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SCSL-04-15-T
(30684 — 31506)

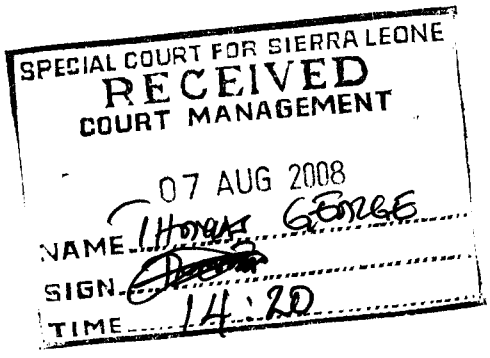
SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

30684

Before: Hon. Justice Pierre Boutet, Presiding
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe



Registrar: Mr. Herman von Hebel

Date filed: 7 August 2008

THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION FINAL TRIAL BRIEF

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I. INTRODUCTION AND HISTORY OF THE RUF

1. The First, Second and Third Accused[1] were participants in a joint criminal enterprise which committed the crimes alleged in the Indictment.[2] They were senior commanders in the Revolutionary United Front ("**RUF**"), which on 23 March 1991, used a corridor through Liberia to attack Sierra Leone at Bomaru and Koindu, Kailahun District. On 3 April 1991 the RUF also entered into Pujehun District, travelling over the Mano River Bridge.[3] This was the beginning of the war in Sierra Leone which caused massive damage to property, the loss of an unknown number of lives, and physical injury and amputations to many. It raged for over 10 years and scarred a country and its people. A former UN Under-Secretary for Humanitarian Affairs, after a visit to Sierra Leone, said that the treatment of civilians by the RUF and AFRC (Armed Forces Revolutionary Council) was unlike anything he had seen in 29 years of humanitarian work. When he made this comment on 15 June 1998, he described the pattern of amputations, lacerations and maiming of civilians, including children, stating "...hands are cut off and ears and noses are amputated ... there are no words to condemn this sort of practice...."[4]

2. The three Accused held some of the very highest assignments in the RUF, a military organization, but the RUF was created, before the three Accused became members, and the RUF's creation is inextricably linked to Charles Taylor and the war fought in Liberia.

3. In August 1990, after the ECOMOG intervention into the Liberian civil war, there was a pronouncement made in the NPFL[5] controlled territories that all citizens from countries that contributed to the formation of ECOMOG should be arrested and detained.[6] Sierra Leoneans were arrested and detained in Harbel.[7] Their release was secured by Foday Sankoh who identified himself as part of the Special Forces in the NPFL and an advisor to Charles Taylor. Sankoh took them to Camp Naama, in Bong County, between Gbarnga and

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[1] Throughout this submission First Accused shall refer to Issa Hassan Sesay, Second Accused shall refer to Morris Kallon and Third Accused shall refer to Augustine Gbao.
[2] Unless stated otherwise, the word Indictment shall refer to *Prosecutor v. Sesay et al,* SCSL-04-15-T-619, "Corrected Amended Consolidated Indictment," ("**Indictment**") 2 August 2006.
[3] Exhibit 38, RUF Training Manual, p. 11069; TF1-036, Transcript 27 July 2005, p. 29.
[4] Exhibit 176, AI Report 1998, pp. 19498-19499.
[5] NPFL refers to the National Patriotic Front of Liberia.
[6] TF1-168, Transcript 31 March 2006, p. 41.
[7] TF1-168, Transcript 31 March 2006, p. 41 (lines 28-29) and p. 42 (lines 1-5).

Voinjama. Camp Naama was a training base for Sierra Leoneans. It was after all recruits had finished training by March 1991 that the war was launched into Sierra Leone.[8]

4. Initially, all the Commanders and the bulk of the fighting forces were Liberians[9] because of the inexperience of Sierra Leonean recruits.[10] Foday Sankoh had little choice in putting Liberians above Sierra Leoneans.[11] There were NPFL fighters trained at Naama and other NPFL Commandos at Lofa and Cape Mount Counties.[12] Rashid Mansaray and Mohamed Tarrawallie were Sankoh's two top men at Naama.[13]

A. Beginnings of the RUF – the Special Forces

5. Early members of the RUF, such as Foday Sankoh, Patrick Lamin, Rashid Mansaray, and Mohamed Tarawalie were Special Forces who trained in Libya in the late 1980's.[14] TF1-168 testified that Mohamed Tarawallie, Rashid Mansaray and Foday Sankoh were the founding fathers of the RUF.[15] Sankoh was a former member of the Sierra Leone Army, others such as Mansaray had been students. They met in Libya along with Charles Taylor and his group, they were trained at the same time, and after the training, all of them, Sankoh's men and Taylor's men, launched the Liberian war in December 1989.[16]

B. Training in Liberia – Vanguards; Training in Sierra Leone – Junior Commandos

6. Most of the Special Forces died in Liberia and Sankoh replaced them with people trained in Liberia, the Vanguards. All three accused are Vanguards. The Vanguards were trained at Camp Naama in Liberia,[17] and those captured and trained in Sierra Leone were called Junior Commandos.[18]

7. The RUF used the training facilities of the NPFL in Liberia. Upon becoming part of the NPFL, General Tarnue was appointed Brigadier General by Charles Taylor and assigned as a training commander. There were training locations at Cuttington University College in

[8] TF1-168, Transcript 31 March 2006, pp. 43-45.
[9] TF1-168, Transcript 31 March 2006, p. 85 (lines 5-7).
[10] TF1-168, Transcript 31 March 2006, p.46 (lines 10-15) and 3 April 2006, p. 61 (lines 13-14).
[11] TF1-168, Transcript 3 April 2006, p. 61 (lines 11-18).
[12] TF1-168, Transcript 31 March 2006, p. 46 (lines 13-14).
[13] TF1-168, Transcript 31 March 2006, p. 91 (lines 7-10).
[14] TF1-168 also testified that Mohamed Tarawallie and Rashid Mansaray were Special Forces that trained with Foday Sankoh in Libya; TF1-168 Transcript 3 April 2006, p. 47 (line 29) and p. 48 (lines 1-3).
[15] TF1-168, Transcript 3 April 2006, p. 47 (line 29) and p. 48 (lines 1-6).
[16] TF1-036, Transcript 27 July 2005, pp. 26-27; TF1-360, Transcript 19 July 2005, p. 97.
[17] TF1-036, Transcript 27 July 2005, pp. 28-29 and TF1-168, Transcript 31 March 2006, p. 67 (lines 17-18).
[18] TF1-036, Transcript 27 July 2005, p. 30.

Gbarnga, at Konola training base in Margibi, at Booker Washington Institute, in Marigi, Kakata, and at Camp Naama an old artillery training base for the AFL (Armed Forces of Liberia).[19] [redacted] said that in 1990 he was taken to a training base not far from Kakata, and later was taken to Cuttington University Campus in Gbarnga, Bong County.[20] After meeting Foday Sankoh, [redacted] was taken to Camp Naama training base, a couple of kilometres from Gbarnga, where Sierra Leoneans were being trained by the RUF. [redacted] of the RUF to the recruits. The NPFL under Charles Taylor was sponsoring the RUF training at Camp Naama.[21] The Second Accused was trained at Camp Naama, after having been recruited by Sankoh in Kakata, Liberia.[22]

8. [redacted] was in Kakata, Liberia in 1990, Sankoh came and said that the Sierra Leoneans there should meet him at school in Kakata. There Sankoh said that he wanted to bring the war to Sierra Leone and the [redacted] base at Camp Naama.[23] Others who trained at Naama were Mohamed Tarawallie, the First, Second and Third Accused and Mike Lamin. After about 3 months at Naama, [redacted] went to Kailahun District with others including a Liberian named Povey, who was one of the Special Forces and their overall leader. They all went to Koindu and the Sierra Leoneans continued on further into Sierra Leone.[24]

9. [redacted] stated that Morris Kallon was also called Morrison Kallon.[25] The witness identified Morris/Morrison Kallon in court,[26] and identified the First and Second Accused.[27]

10. Tarnue recalls training 96 Sierra Leoneans from November 1990 to February 1991, in topics including discipline, tactics, weapons, courtesy and discipline, and cover and concealment.[28] The Special Forces who were acting as trainers told the recruits that when the recruits go to the warfront they should loot.[29] General Tarnue said that from March

[19] General J. Tarnue, Transcript 4 October 2004, p. 61.

[redacted]

[28] General J. Tarnue, Transcript 4 October 2004, pp. 92-94, 96.
[29] General J. Tarnue, Transcript 11 October 2004, p. 172.

1991 up to 1996 "the activity of the RUF were being commanded and controlled by Corporal Sankoh and Charles Taylor."[30] In 1992, after Kono was captured, General Tarnue saw Sankoh, Sam Bockarie, Ibrahim Bah, Augustine Gbao, along with Benjamin Yeaten, bring diamonds and other items that had been looted to Charles Taylor's house at Gbarnga.[31] Tarnue also saw the First and Second Accused in Gbarnga.[32]

11. TF1-366 testified that Vanguards like the First Accused, Bockarie, the Second Accused, Third Accused,[33] and Monica Pearson[34] were trained in Liberia. [redacted] testified that when he was brought to Camp Naama, the First Accused was already there and that Second and Third Accused came after TF1-168.[35] Sankoh took Sierra Leoneans from other parts of the NPFL-controlled areas to Camp Naama for recruitment. After all recruits at Naama finished their training in March 1991, the war was launched.[36] [redacted] also testified that when he was in Kailahun in 1997-1998, positions such as MP Commanders couldn't be given to junior forces, only Vanguards, and that only Vanguards could take up certain positions.[37]

C. March 1991 – the Beginning of the War in Sierra Leone

12. Taylor said that he met Foday Sankoh while they were at the Alma Saba training camp in Libya.[38] On 27 February 1991 Taylor called a meeting, attended by Sankoh, the Third Accused and others, to advise that Sankoh was the head of the RUF.[39] Sankoh introduced Gbao to the others saying that Gbao was his security adviser and that Gbao had been a police officer with the Sierra Leone Police.[40] Taylor said that he met Foday Sankoh while they were at the Alma Saba training camp in Libya.[41] Taylor told Tarnue that he had a military alliance with Sankoh, and that Sankoh was helping him capture Liberia and Taylor, in return, was going to help Sankoh with transportation, ammunitions and

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[30] General J. Tarnue, Transcript 5 October 2004, p. 3.
[31] General J. Tarnue, Transcript 5 October 2004, pp. 14-16.
[32] General J. Tarnue, Transcript 5 October 2004, pp. 18-19, 24-25.
[33] TF1-168, Transcript 3 April 2006, p. 76 (lines 7-12).
[34] TF1-168, Transcript 31 March 2006, p.75 (line 4).
[35] TF1-168, Transcript 31 March 2006, p. 47 (lines 14-16) and 3 April 2006, p 47 (lines 16-18).
[36] TF1-168, Transcript 31 March 2006, p. 45.
[redacted]
[38] General J. Tarnue, Transcript 4 October 2004, pp. 88-89.
[39] General J. Tarnue, Transcript 4 October 2004, pp. 104.
[40] General J. Tarnue, Transcript 4 October 2004, pp. 111-112.
[41] General J. Tarnue, Transcript 4 October 2004, pp. 88-89.

manpower to start a revolution. Taylor gave Sankoh 150 trained NPFL fighters and said that the RUF had to recruit whoever they meet, old, young boys and girls, and if the persons they met refused to join, they were enemies.[42] Taylor told Sankoh that those who cannot fight can be used for other work but if they resist they must be treated as enemies.[43]

13. Taylor introduced Benjamin Yeaten at the meeting, calling Yeaten his right hand man. Yeaten was the commander of Taylor's death squad. At the same meeting, Taylor said that after the RUF entered Kono District any diamonds found should be given to Yeaten or brought to him.[44] Taylor said that the diamonds "would be sold and the proceeds from that diamond will help to create an income base for the NPFL and the RUF, so that they would be able to buy arms and ammunition to continue the war in Sierra Leone."[45]

14. General Tarnue said that during the early years of the war, the RUF operational structure had Taylor at the top with Sankoh as his deputy; Sankoh was at the battlefront implementing the directives of Taylor: "Orders issued by Charles Taylor, it went straight to Corporal Sankoh in the field of operation. And from Corporal Sankoh it goes to Sam Bockarie, Duopo Mekanzon, Benjamin Yeaten .... And it goes down to the unit commander and they implement the implementation aspects from the unit commander and the men. So that's how the operational structure of the RUF was."[46]

15. Charles Taylor provided transportation, arms and ammunition and trained fighters for the attack.[47] The RUF was a guerrilla army[48] and the RUF training manual states that "...in the course of the struggle, many people will shed blood in the form of sacrifice for the few or many that will survive."[49] From 1991, after the RUF entered Sierra Leone, it was their practice to capture civilians. The younger men who were captured by the RUF would be used to carry loads and undergo training in the use of weapons, setting ambushes and the ideology of war.[50]

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[42] General J. Tarnue, Transcript 4 October 2004, pp. 103-107.
[43] General J. Tarnue, Transcript 4 October 2004, pp. 112-113.
[44] General J. Tarnue, Transcript 4 October 2004, pp. 114-115.
[45] General J. Tarnue, Transcript 4 October 2004, p. 116.
[46] General J. Tarnue, Transcript 8 October 2004, pp. 101-102.
[47] General J. Tarnue, Transcript 4 October 2004, pp. 128-130, 125-126.
[48] TF1-036, Transcript 27 July 2005, p. 24.
[49] Exhibit 38, p. 11071.
[50] TF1-036, Transcript 27 July 2005, pp. 21-22.

16. TF1-168 heard that the war started prematurely in Bomaru following an incident involving Liberians and looted goods.[51] He testified that the war was launched on two fronts; towards Kailahun District bordering Lofa County in Liberia and at the Mano River Bridge, i.e. Pujehun District, bordering Grand Cape Mount County.[52] Following the March 1991 invasion, TF1-168 was on the Pujehun axis.[53]

17. In 1991, the combatants in Pujehun District were under the command of Oliver Varney, commander of the 6th Battalion of the NPFL based in Bomi Hills, Liberia.[54] The 6th Battalion of the NPFL had about 2,000 NPFL combatants when it attacked Pujehun District, and established its base in Pujehun District at Zimmi, near the border to Liberia.[55] On the Pujehun District side, they went as far as Zimmi, Potoru and then stopped at Pujehun Town, putting those areas under RUF control.[56]

18. In 1991, Sierra Leoneans were being captured and taken against their will to RUF bases and forced to join the RUF.[57] [redacted] was captured not long after the RUF and NPFL entered Pujehun District. He became a [redacted] member of the RUF, he said he was captured at gunpoint and had no choice but to stay with the RUF. He said the Vanguards accepted the ideology of the RUF but those that were captured in Sierra Leone, it was against their wishes to be part of the RUF.[58] The Liberians who entered Sierra Leone with the RUF in 1991 also looted civilian properties and killed civilians.[59] TF1-360 was captured by the RUF in [redacted] District and taken for combat training to [redacted] in 1991.[60] [redacted] was captured by the RUF on [redacted] 1991, trained as a fighter at Gissywulo, Pujehun District and later became a [redacted], in 2000 the First

[51] TF1-168, Transcript 31 March 2006, p.85 (lines 10-25).
[52] TF1-168, Transcript 31 March 2006, p. 45 (lines 22-26).
[53] TF1-168, Transcript 3 April 2006, p. 80 (lines 13-16).
[54] TF1-371, Transcript 31 July 2006, pp. 33-34.
[55] TF1-371, Transcript 1 August 2006, p. 55.
[56] TF1-168, Transcript 31 March 2006, p. 46 (lines 7-9).
[57] DIS-080, Transcript 5 October 2007, p. 76 (lines 27-29) and p. 77 (line 1).
[redacted]
[59] TF1-371, Transcript 24 July 2006, pp. 68-69.
[60] TF1-360, Transcript 19 July 2005, pp. 92-93. The witness saw two dead bodies and was told that if he was to run, he would be killed.

Accused appointed him a [redacted].[61] TF1-361 was captured in 1991 by the RUF[62] and taken to the [redacted] for military training[63] and later to [redacted]. Zogoda is near Bandawo, Kenema. It was the RUF Headquarter.[64] In addition, the RUF captured women from early on during the war. In cross-examination TF1-036 said that the RUF "captured a lot of these women. Because there was no way for them to leave, they had to stay because they were staying with their partners."[65]

19. The first two years of the war were essentially controlled by the Liberians.[66] The practise of arming children had started, and they were arming children as young as 9.[67] There was also forceful conscription as DIS-080 testified that in 1992 people were going to bases at Manowa and Bunumbu, because Gio children would come and flog them to go.[68] Sankoh had no control over the war.[69] At some stage, after the first two years, Sankoh took control of the fighters who remained in Sierra Leone[70] All the commanders were Liberians because of the inexperience of Sierra Leonean recruits.[71] The Liberian commanders would capture territory and push on ahead, while the Sierra Leonean fighters would come as back up to occupy the captured areas. This was what happened in Zimmi, Potoru and Pujehun, when the front line was at Bandajuma Sowa.[72] The Liberians commanding the troops reported to Taylor.[73]

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[61] TF1-071, Transcript 18 January 2005, pp. 104-106.
[62] TF1-361, Transcript 11 July 2005, pp. 41-42.
[63] TF1-361, Transcript 11 July 2005, p. 43.
[64] TF1-361, Transcript 11 July 2005, pp. 45-46.
[65] TF1-036, Transcript 29 July 2005, pp. 10-11.
[66] TF1-168, Transcript 31 March 2006, p. 84 (lines 28-29) and p. 85 (line 1). DIS-080, Transcript 5 October 2007, p. 71 (lines 6-8) and p. 73 (line 29), p. 74, (line 1); DIS-080 testified that when the war came, a group of Gios with Sierra Leoneans in their midst came to Bombohun.
[67] DIS-080, Transcript 5 October 2007, p. 74 (lines 16-19).
[68] DIS-080, Transcript 5 October 2007, p. 77 (lines 8-15).
[69] TF1-168, Transcript 31 March 2006, p. 86 (lines 6-12) and 3 April 2006, p.61 (lines 10-11). DIS-080 Transcript 8 October 2007, p. 8 (lines 16-17).
[70] TF1-168, Transcript 31 March 2006, p. 89 (lines 7-10). DIS-080, Transcript 5 October 2007, p. 71 (lines 6-8) and p. 73 (line 29), p. 74, (lines 1, 26-29) and p. 75 (lines 1-7).
[71] TF1-168, Transcript 31 March 2006, p. 46 (lines 10-12) and 3 April 2006, p. 61 (lines 13-14).
[72] TF1-168, Transcript 31 March 2006, p. 46 (lines 16-20).
[73] TF1-168, Transcript 31 March 2006, p. 85 (lines 26-28).

20. Liberian Vanguards such as Isaac Mongor, Rambo, Rocky CO, stayed behind with the RUF to prosecute the war and continued on to 1997 and thereafter. Denis Mingo ("Superman") although not a Vanguard also stayed behind. [74]

21. There were other military groups operating in the region, for example ULIMO, which in 1994 split in two. ULIMO-K, Alhaji Kromah's group comprised mainly of persons of Mandingo ethnicity were stationed in Upper Lofa County in 1993 and 1994, and ULIMO-J, Roosevelt Johnson's group comprised mainly of persons of Krahn ethnicity, were stationed in Tubmanburg, Bomi County.[75] When Taylor became President he divided Lofa County into Lower Lofa, called Bomi County, while Upper Lofa remained Lofa County.[76] Taylor was elected President in July 1997 and inaugurated in October 1997.[77] Taylor's residence, White Flower, was located in Kongo Town. Daniel Chea was Taylor's Minister of Defence.[78]

D. Organisation of the RUF

a) Structure – the RUF as a Military Organisation

22. In its structure, organisation and chain of command the RUF closely resembled many national armies, but as stated by TF1-036, the RUF was a guerrilla army:

23. Well, in the RUF, just as I have told you yesterday, it was a guerrilla army. It was not a real professional army. So they created different positions just for the operation to carry on smoothly. ... So we did not go strictly with the professional army rules. Like, the professional army, there were no area commanders but we created that so that the operation could go on smoothly.[79]

24. The Area Commander was responsible for giving reports to the Battle Group Commander, who would send the reports to the Battlefield Commander, but the Area Commander was responsible for operations in his particular area. The Area Commander was higher than the brigade commander and the Area Commander made the link between

[74] TF1-168, Transcript 3 April 2006, p. 61 (lines 17-19) and p. 62 (lines 1-4).
[75] General Tarnue, Transcript 8 October 2004, pp. 80-84.
[76] General Tarnue, Transcript 12 October 2004, pp. 4.
[77] General Tarnue, Transcript 4 October 2004, p. 68.
[78] General Tarnue, Transcript 4 October 2004, pp. 70, 73, 74.
[79] TF1-036, Transcript 28 July 2005, pp. 12-13.

the brigade and the Battle Group Commander.[80] TF1-367 testified that there were Area Commanders, Brigade Commanders and Battalion Commanders.[81]

25. The High Command of the RUF consisted of the Commander-in-Chief, the Battle Field Commander and the Battle Group Commander.[82] TF1-168 testified that the High Command refers to the top-most commander. Foday Sankoh, before his arrest in Nigeria, was the top most Commander. After his arrest, it was General Sam Bockarie (aka "Mosquito").[83] The need for having a clear chain of command in the RUF is apparent from the number of combatants that existed: from 1998 to 1999 there were approximately 15,000 soldiers in the RUF.[84]

26. Another insider witness testified that Bockarie was the highest command:

> ...and beneath him in that chain you had the field commander who deputised Bockarie in the presence of Issa Sesay. Beneath Issa Sesay you had Morris Kallon who, incidentally, occupied the position previously held by Issa Sesay, and that was the battle group. Beneath him in that chain manner, you had the various brigade commanders who, again, in RUF jargon were called area commanders, that were responsible for various RUF battalions [sic]. Horizontally along with the brigade commanders, you had the overall security commander that had the direct responsibility for the internal defence unit.[85]

27. TF1-371 added that battalion commanders were under brigade commanders and that the Overall Security Commander operated horizontally to the brigade commanders. The Overall Security Commander was not under any brigade commander and the Overall Security Commander was directly responsible to Bockarie, the Field Commander and the Battle Group Commander.[86]

28. There were also various units in the RUF, with commanders, such as military police (MP), G5 and others. G1 was responsible for recruiting and for training of commanders and

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[80] TF1-036, Transcript 3 August 2005, pp. 72-75.
[81] TF1-367, Transcript 26 June 2006, pp. 44 and 59-60. See also TF1-366, Transcript 10 November 2005, p. 98, where he refers to a chain of command in 1994 where Kallon reported to Sesay and Sesay was reporting to Bockarie; at that time Bockarie reported to Mohamed Tarawallie, who reported to Sankoh.
[82] TF1-371, Transcript 1 August 2006, p. 133. DAG-048 testified that the High Command was the leader, Battle Field Commander, Battle Group Commander and Area Commanders: DAG-048, Transcript 3 June 2008, pp.24-25.
[83] TF1-168, Transcript 3 April 2006, p. 67 (lines 18-21).
[84] TF1-036, Transcript 28 July 2005, pp. 45-46.
[85] TF1-371, Transcript 20 July 2006, p. 61.
[86] TF1-371, Transcript 20 July 2006, pp. 62-63.

intelligence.[87] G2 for military combat and counter-intelligence. G3 was responsible for general administration and for planning and operations of any military organisation.[88] G4 was responsible for materials and supplies, and G5 for civilian matters.[89] Within the RUF there was the position of G5 sub-commanders that went by S nomenclature for special staff so that under G2 you would have S2 and so on and so forth.[90] The S staffs reported directly to the G staff or they could report to the battle group commander or battle front commander and other commanders.[91] S4 was responsible for food supplies. There was also a medical unit, and the IDU (Internal Defence Unit) was responsible for investigations. These units were part of every battalion.[92] This was a system set up by Sankoh[93] and known to those in the RUF.[94]

29. The G5 was responsible for civilian affairs and one of their roles was that when commanders went on missions and captured people within the town, the G5 would do the screening of those captured to select those physically fit for the training and send them to the training base. Those not fit for training would be sent to zones for civilians where they were assigned to do labour for the organisation like farming and other domestic work. Screening was the instruction given to the G5 and it was a laid down rule that screening must take place.[95]

30. With respect to ranks, the RUF non-commissioned officers went from private, to lance corporal, to corporal, to sergeant, staff-sergeant, sergeant major, then regimental sergeant

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[87] TF1-168, Transcript 31 March 2006, pp. 46, 89-90; Transcript 3 April 2006, p. 50.
[88] General J. Tarnue, Transcript 4 October 2004, pp. 47-48.
[89] TF1-168, Transcript 31 March 2006, p. 46, (line 26-28).
[90] TF1-168, Transcript 3 April 2006, p. 50 (lines 15-20).
[91] TF1-168, Transcript 31 March 2006, p. 90 (lines 8-10) and 3 April 2006, p. 50 (lines 26-29) and p. 51.
[92] TF1-036, Transcript 27 July 2005, pp. 32-33.
[93] TF1-168, Transcript 31 March 2006, p. 90 (lines 12-13).
[94] TF1-168, Transcript 31 March 2006, p. 90 (lines 14-15).
[95] TF1-036, Transcript 27 July 2005, pp. 41-42, 57-58. DAG-080 demonstrated the completeness of the chain of command and the reporting structure of the RUF. He stated that the IDU field agents have their company commander; then they have the battalion IDU commander; then the district IDU commander. Agents on the front line send their reports to the company IDU commander; who sends them to the battalion IDU commander; who sends them to the District IDU commander; who sends them to the overall IDU commander, the Third Accused. DAG-080 explained that when the IDU agent within the company sent his report to the IDU company commander, he copies the company commander. The company IDU commander sent the report to the battalion IDU commander; he copies the battalion commander. The battalion IDU commander sent his report to the district IDU commander; he copies the area commander. Then the district IDU commander now sends his final report to the overall IDU commander. The reporting channel has to go by stages; you, as IDU field agent on the field, you have no right to directly send your report to the overall IDU commander Augustine Gbao; that is bypassing channel (DAG-080, Transcript 6 June 2008, pp.44-50).

major. While the commissioned officers went from second lieutenant, to lieutenant, captain, major, lieutenant colonel, colonel, brigadier, major general, lieutenant general, general.[96]

31. TF1-036 testified that respect was important, the RUF wanted everybody to work by instruction, and the RUF had training about ranks.[97] In addition to the use of ranks, the RUF also had a chain of command: "He [Bockarie] was monitoring all the areas because it is a chain. The other battalion commanders – they received these reports from the battlefield commanders and he also reports to Mohamed Tarawallie and Mohamed Tarawallie would then report to Foday Sankoh."[98] This chain of command was important to the RUF as it is to national armies. During the time that Bockarie was the Battle Group Commander, the Area Commander in Kailahun District was the First Accused.[99]

32. From 1991 to 1994, the RUF 1st Battalion was based in Pujehun District (also called "Libya") and the 2nd Battalion was located in Kailahun District (code named "Burkina"). At times there would be more than 900 persons in the battalion.[100] There were four companies in a battalion, each company had four platoons, and the platoons were divided into squads. Some of the numbers exceeded the required number for a company or a battalion because it was a guerrilla army.[101]

33. There was a clear command structure in the RUF, and even where there is evidence that insubordination may have occurred that does not detract from the command structure and the chain of command in the RUF. One witness observed:

> Even in a conventional army, you know, you must have indisciplined soldiers, not, in fact, looking at a guerrilla outfit, but throughout the history of the RUF, you have incident like this where subordinate were – where some are indisciplined to their authority. ... it happened throughout. It doesn't mean that you are not in command. ... That doesn't mean that the commander don't have control of the majority of the men. ... Yes. Generally, I'm saying that it was common occurrence within the RUF, especially where you have brigade commanders

[96] TF1-036, Transcript 27 July 2005, pp. 38-40; Exhibit 38, p. 11077-11078; see also TF1-361, Transcript 18 July 2005, pp.81-83.
[97] TF1-036, Transcript 27 July 2005, p. 40.
[98] TF1-036, Transcript 29 July 2005, p. 24.
[99] TF1-036, Transcript 28 July 20, pp. 23-24.
[100] TF1-036, Transcript 27 July 2005, pp. 23-25; also see 29 July 2005, p. 12.
[101] TF1-036, Transcript 27 July 2005, p. 32.

> controlling their detachment. You have this problem of insubordination to command.[102]

34. Commanders such as the G5 commander would prepare reports, copy them to the Battle Group and Battle Field commanders and send them to the overall commander "these senior officers would be aware that is what has happened."[103] Bockarie "would instruct Issa and Issa would instruct the person who was subordinate to him. It was a chain work."[104]

35. The RUF operated a well functioning Signal Unit responsible for radio communications. For example, during the period after the intervention, when the First Accused was at Pendembu he and Bockarie would talk on the radio "on routine matters, but on more important issues, Sesay drove to Buedu which is about one hour thirty minute drive from Pendembu."[105] There were radio communications between Sam Bockarie and the First Accused in Buedu and the RUF in Kono.[106] In Buedu there were radios for monitoring and for talking or transmission. The radio was at Mosquito's house and the First Accused's house was opposite.[107] [redacted] told the court that from the time of the ECOMOG intervention until the time the witness went north to join SAJ Musa, the First Accused was frequently monitoring the radio messages, not every day but most of the time. Monitoring was not his main function but as a commander, it was through the radio that they could gather all the information and coordinate all operations.[108] Wherever there was a front-line there was a radio set.[109]

36. [redacted] testified that the G5 commanders in the different areas used to link to those who were the overall RUF commanders, and took orders from them.[110] Prince Taylor was the overall commander of the G5 unit in 1998, there were also IDU, IO (Intelligence Officers) and MP (Military Police) units that were the joint securities.[111] TF1-367 testified

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[102] TF1-371, Transcript 28 July 2006, pp. 92-93.
[103] TF1-036, Transcript 1 August 2005, p. 58. See also the evidence of Sesay Defence witness DIS-149 as further evidence of the comprehensive and thorough reporting and command structure of the RUF (Transcript 6 November 2007, pp.3-4, 17-18, 28-30, 39-42; Transcript 5 November 2007, pp.79-81, 84-85).
[104] TF1-036, Transcript 1 August 2005, p. 60.
[105] TF1-371, Transcript 28 July 2006, p. 107.
[redacted]

that the Joint Security Board was made up of the MP, IDU, and IO.[112] The Third Accused was the head of the Joint Security Board.[113]

37. Assignments within the structure were often determined by whether the combatant was a Vanguard. TF1-168 testified that when he was in [redacted] in 1997-1998 positions such as MP Commanders could not be given to junior forces, but could only be given to Vanguards.[114]

38. Small Boys Unit (SBU's) and Small Girls Unit (SGU's) were part of the structure of the RUF. Count 12 of the Indictment alleges a violation of Art. 4.c of the Statute, and the evidence will be fully discussed there. The use of systematic conscription or enlistment of children under 15 years into armed forces or groups, or using them to participate in hostilities is one of the most insidious aspects of the military conflict in Sierra Leone. Taylor created SBU's in Liberia and said that these boys were assassins.[115] They would do what adult commanders ordered, without having the capacity or understanding to question the propriety of the orders.

39. SBU's were aged from 8 to 15 years old and underwent military training,[116] and "They engaged in activities that ranged from providing personal security to senior commanders to combat missions mostly."[117] From the beginning of the war to disarmament in 2002 there were many SBU's, and all senior commanders had them; Bockarie, the First Accused, the Second Accused and the Third Accused.[118] Exhibit 25 (report from the Training Commandant at the Camp Lion Training Base – Bunumbu, dated 21 May 1998), listed the recruits: 480 "Gallant Men" (physically fit men), 79 "WACs" (the wives unit), and 53 SBU's.[119]

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[112] TF1-367, Transcript 26 June 2006, pp. 63-64.
[113] TF1-041, Transcript 17 July 2006, p. 65.
[114] TF1-168, Transcript 3 April, 2006, p.75.
[115] General Tarnue, Transcript 4 October 2004, p. 120.
[116] TF1-371, Transcript 21 July 2006, pp. 63-64; TF1-036, Transcript 28 July 2005, pp. 15-18.
[117] TF1-371, Transcript 21 July 2006, p. 63; TF1-141, Transcript 11 April 2005, pp. 90-92; TF1-141, Transcript 12 April 2005, pp.27-28, 35-40. See also the evidence of TF1-168, Transcript 31 March 2006, pp. 75-76.
[118] TF1-036, Transcript 28 July 2005, pp. 16-18; TF1-371, Transcript 21 July 2006, pp. 63-64. TF1-334 testified that he saw child soldiers with the RUF before the ECOMOG intervention in February 1998: Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 16 June 2005, p. 93.
[119] Exhibit 25. The same report goes on to indicate the completeness and sophistication of the Camp Lion Training Base; also listed are 13 Instructors, 3 from the S-4 Unit, 7 combat medics, 1 carpenter, 2 signal operators, and 20 base securities.

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40. The sophistication of the RUF as a military organisation is reflected in its developed training program. The first version of the RUF training manual was put together in 1995 by [redacted] and the last version was compiled in 1998.[120] In 1998 the training base was at Bunumbu, Kailahun District.[121] Recruits were taught about combat, weapons, tactics in guerrilla warfare,[122] and about military structure, hierarchy and command and control.[123] Training was given to new recruits and to persons who had been members of the RUF for some time, but had not undergone training earlier.

41. Exhibit 38, the Training Manual itself makes clear one of the purposes of the joint criminal enterprise: the manual listed "minerals" as one of the "Pillars of the RUF Movement."[124] The reason why they were a "Pillar" is clear, diamonds provided the means to acquire arms and ammunition that fuelled the RUF and permitted it to engage in the joint criminal enterprise.

b) Distinction Between Rank and Assignment

42. The witnesses made clear that rank is different from assignment. TF1-334, a former member of the SLA, testified that "in the army, appointments supersede rank,"[125] while TF1-371 testified that "In military parlance the assignment was more important than the rank."[126] This is obviously the case. Corporal Foday Sankoh retained the rank of Corporal but he was the leader of the RUF. A witness said that Sankoh "used to tell us that assignments supersedes rank and everybody was aware of this."[127]

43. In April 1998 Kallon and Sesay were promoted to Brigadiers by JP Koroma.[128] These promotions, although significant, are distinct from the assignments held by Sesay and Kallon, namely Battle Field Commander and Battle Group Commander, and answerable only to Bockarie and Sankoh, at the time the latter was in detention in Nigeria. Similarly,

[redacted]

[124] Exhibit 38, RUF Training Manual, p. 11076.
[125] TF1-334, Transcript 6 July 2006, p. 87.
[126] TF1-371, Transcript 20 July 2006, p. 60; Transcript 31 July 2006, p. 29.
[127] TF1-036, Transcript 29 July 2005, p. 62.
[128] TF1-371, Transcript 1 August 2006, p. 152.

Gbao's rank was significant, as, ultimately a Colonel, his assignment as the Overall Security Commander who reported to Kallon and Sesay determined the importance of his command role. Assignment or appointment determined command and control, and showed who was the leader.[129] TF1-361 confirmed that generally, a colonel in the RUF would have been in a position to issue commands to someone with a higher rank, for instance a brigadier or a brigadier general. He said: "Yes, because the chairman, who was Foday Sankoh, was a corporal. While Brigadier Mosquito was there he gave them command, Brigadier Issa Sesay was there, he gave them command."[130]

44. The distinction between assignment and rank was known throughout the RUF. It was clear to an RUF child soldier, TF1-141, who said in cross-examination: "I want us to forget about the rank. The assignment is more than the rank. You could be a corporal and were made a brigadier – you could be made a brigade commander. So assignment is more than rank."[131]

c) Role of Bodyguards, Securities

45. A "security" was a bodyguard for an RUF commander. The First, Second and Third Accused, Bockarie and others had bodyguards.[132] Most commanders had them, and:

> ...when the RUF took mission, I mean combat missions, the bodyguards, especially of the High Command I mentioned earlier [Bockarie, Sesay, Kallon], were present at those mission, they would perform the role of being an eye for the particular commander in question and they had the responsibility to pass on intelligence information relating to the conduct of the operations of their respective senior commanders.[133]

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[129] TF1-361 Transcript 13 July 2005, pp. 58-64.
[130] TF1-361, Transcript 19 July 2005, p. 64. See also the evidence of TF1-334, Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 20 June 2005, p. 25. "Well, in the army, the appointment supercede rank."
[131] TF1-141, Transcript 18 April 2005, pp. 39-40; the witness was 18 when he testified.
[132] TF1-041, Transcript 10 July 2006, p. 29.
[133] TF1-371, Transcript 20 July 2006, p. 75. See also TF1-367 who said that bodyguards brought information to the commander such as information about others who planned negative things about the commander: TF1-367, Transcript 21 June 2006, pp. 56-57. TF1-041 testified that bodyguards were giving information to their commander about what was happening at various frontline areas, if arms or ammunition were captured, or if things were looted or if there was harassment going on at the frontline areas, the bodyguard should report this to their commander: TF1-041, Transcript 10 July 2006, p. 28.

So it's true that the bodyguards of the High Command, which comprise Kallon, Issa and Sam Bockarie, their bodyguards reported to them on what had happened to the front line.[134]

One of the First Accused's bodyguards was Amara Salia aka Peleto.[135] TF1-367 made clear that once a person was a bodyguard for a senior officer then regardless of later assignments, he remained a bodyguard for the senior officer:

I want to tell you that just like I'm sitting here and you talking there, if you were my bodyguard initially, even if you became a commander somewhere else, still you would have that name. If you did something wrong, they will say that's that man's bodyguard. That's what it looked like. That's how it was. That is how we were doing things. Your name would never be taken away from me.

Q. Is it right that in '93, from what you're saying, Peleto was no longer Mr. Sesay's bodyguard?

He was his bodyguard. I am telling you that here that I'm sitting, Peleto was assigned to where I was. He was the one who gave him all information.

....

Q. When did it stop, Mr. Witness. You did a moment ago say – let me remind you –

Okay, let me tell you the starting and the ending. From 1992, 1993, when we were in the jungle, I said he was his bodyguard. We were together in the jungle with Peleto. He was giving information to Issa. Whatever we did on our own ground, Issa will know. It came to a time they came and raised me with rice and the food that we were eating. It was Peleto who caused it. He was the one who had given that information to Issa. They came, he and Kallon, and they took away all the food. At the end of 1994, when we came from the bush and we advanced into another jungle, the command – we went together to Kono. Peleto was not with Issa, he was in Kono, but he still carried that name that he was his bodyguard. Whatever he did, they would say he was Issa's bodyguard. That's what it was. Even though he was not with him, he still carried his name that he was Issa's bodyguard. If he did something wrong or something good, they would say he was Issa's bodyguard. He still carried his name.

Presiding Judge: If I gather anything from what he's saying, once a bodyguard, always a bodyguard.

Mr. Jordash: This is what I understood it to be.[136]

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[134] TF1-371, Transcript 1 August 2006, p. 40.
[135] TF1-371, Transcript 20 July 2006, pp. 75-76.
[136] TF1-367, Transcript 22 June 2006, pp. 95-97. See also the evidence of TF1-041 who testified that Peleto was one of Sesay's bodyguards from the time they were in Kailahun, through the time Peleto was a mining commander, until the war ended: TF1-041, Transcript 10 July 2006, pp. 92-93.

46. In 1996, Peleto was a lieutenant, and when the RUF was in the jungle in Kono, Peleto was the operation commander.[137] TF1-367 testified that during the Junta period Peleto was a Major and he heard that Peleto was the commander in Benguema, while Rambo was assigned to Lunghi and Lokomassama.[138] The First Accused told TF1-041 that Peleto was a frontline commander and his bodyguard, and the reason the First Accused appointed Peleto as the mining commander was because his bodyguard must report to Sesay.[139] The same witness added that in 1998 Sesay's bodyguards would communicate with the First Accused by radio, if they wanted to send information they would go to a radio set.[140]

47. The RUF leadership had a special category of bodyguards known as the Black Guards who were the RUF leader's personal bodyguards; they reported to the leader[141] and existed right from the early years of the RUF in Sierra Leone.[142] The Black Guards were deployed all over RUF controlled territory[143] and although they reported to the leader, if they were assigned to an area, then they would report and be under the battalion commanders, brigade commanders and area commanders where they were assigned.[144] It was one of the jobs of the Black Guards to monitor the activities of commanders and report.[145] After the intervention, Back Guards were present in RUF areas including Kono, Buedu and Kailahun.[146] All RUF commanders used their bodyguards for a similar purpose as the leader used the Black Guards.

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[137] TF1-367, Transcript 22 June 2006, p. 97. George Johnson testified that at the time he met Peleto, Peleto was a Major and one of the RUF mid-level commanders; he was a task force commander at the time when the fighters in Freetown pulled out from Freetown in February 1998: George Johnson, Transcript 18 October 2004, pp. 29-30.

[138] TF1-367, Transcript 22 June 2006, pp. 97-98. See also TF1-041 who testified that Peleto was a bodyguard of the First Accused and that at one point Sesay appointed Peleto as mining commander and at other times Peleto served as a frontline commander: TF1-041, Transcript 10 July 2006, p. 27.

[139] TF1-041, Transcript 10 July 2006, p. 93. TF1-371 said that one Sesay's security, called Amara Peleto, was [redacted] at Tongo Field and made frequent visits to Kono District: TF1-317, Transcript 21 July 2006, p. 72.

[140] TF1-041, Transcript 11 July 2006, pp. 4-5. Further corroboration was provided by TF1-371, who testified that Peleto was a representative of Issa Sesay and personal securities to commanders, especially to the High Command, were placed at strategic locations to ensure that instructions from the commanders were enforced, and Sesay was in constant communication with his senior bodyguard Peleto: TF1-371, Transcript 31 July 2006, pp. 42-45.

[141] TF1-366, Transcript 17 November 2005, pp.35-36; Accused Issa Sesay, Transcript 31 May 2007, pp.15-16.

[142] DIS-281, Transcript 6 November 2007, pp.77-79.

[143] TF1-041, Transcript 17 July 2006, 47-48.

[144] TF1-367, Transcript 26 June 2006, pp.42-44; DIS-163, Transcript 11 January 2008, pp.44-46.

[145] DIS-069, Transcript 22 October 2007, p.111; Accused Issa Sesay, Transcript 17 May 2007, pp.12-13;

[146] Accused Issa Sesay, Transcript 17 May 2007, pp.13; DIS-281, Transcript 9 November 2007, pp.48-50.

II. CONSIDERATIONS WHEN ASSESSING THE LAW AND THE EVIDENCE

A. Introduction

48. Article 17(3) of the Statute, which reflects fundamental international standards, provides that the Accused shall be presumed innocent until proven guilty. The Prosecution bears the burden of establishing the guilt of the Accused, and, in accordance with Rule 87(A) of the Rules, must do so beyond reasonable doubt.

49. Rule 89(A) of the Rules provides that proceedings before the Special Court are governed by the rules contained in Rules 89-98, and that the Chambers are not bound by national rules of evidence. In addition, Rule 89(C) provides that "[a] Chamber may admit any relevant evidence." This provision ensures that the administration of justice will not be brought into disrepute by artificial or technical rules of evidence.[147]

50. In cases not otherwise provided for by the Rules, the Trial Chamber has discretion in the evaluation of the evidence, and can take the approach it considers most appropriate for the assessment of evidence, and determine the credibility of witnesses and the weight to be afforded to the evidence proffered by the parties based on all of the relevant evidence admitted at trial.[148] However, like any judicial discretion, this discretion must be exercised judiciously and a body of case law has developed in international criminal courts dealing with the principles applicable.

B. Contradictions Within a Witness's Evidence, or Between the Evidence of Different Witnesses

51. The Trial Chamber has discretion to accept a witness's evidence notwithstanding inconsistencies with the witness's prior statements or the evidence of other witnesses.[149] In

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[147] *Prosecutor v. Fofana,* SCSL-04-14-T-371, 'Appeal against Decision refusing Bail', ("***Fofana* Appeal Decision on Bail**"), Appeals Chamber, 11 March 2005.

[148] *Prosecutor v. Kupreškić et al.*, IT-95-16-A, "Appeal Judgement", ("***Kupreškić* Appeal Judgement**"), App. Ch., 23 October 2001, para. 334; *Prosecutor v. Rutaganda,* ICTR-96-3-A, "Judgement," ("***Rutaganda* Appeal Judgement**") Appeals Chamber, 26 May 2003, para. 207 ; *Prosecutor v. Sesay et al.,* SCSL-04-15-T, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker", ("***Sesay* Ruling to Exclude Evidence**") Trial Chamber, 23 May 2005, para. 4; *Fofana* Appeal Decision on Bail, paras 22-24.

[149] *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", ("***Čelebići* Appeal Judgement**") Appeals Chamber, 20 February 2001, para. 497; *Kupreškić* Appeal Judgement, paras 31 and 156; *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, "Judgement," ("***Kajelijeli* Appeal Judgement**") Appeals Chamber, 23 May 2005, paras. 96-97; *Prosecutor v. Semanza*, ICTR-97-20-A, "Judgement", ("***Semanza* Appeal Judgement**") Appeals Chamber, 20 May 2005, para. 224; *Prosecutor v. Limaj et al.*, IT-03-66-T, "Judgement", ("***Limaj* Trial Judgement**") Trial Chamber, 30 November 2005, paras 12, 543.

assessing the evidence, the Trial Chamber may accept some parts of a witness's evidence and reject other parts.[150]

52. In particular, where the evidence of a witness relates to events that occurred years before the trial, the Trial Chamber should *not* treat "minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail."[151] Lack of detailed memory on the part of a witness in relation to peripheral matters should not in general be regarded as necessarily discrediting the evidence.[152]

53. Thus, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that "[f]actors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence."[153]

54. The case law acknowledges in particular that:

a. "... where the witness is testifying in relation to repetitive, continuous or traumatic events, it is not always reasonable to expect witnesses to recall with precision the details, such as exact date or time, and/or sequence of the events to which they testify,"[154] and that such circumstances may impair the ability of such witnesses to express themselves clearly or present a full account of their experiences in a judicial context;[155]

b. "...it lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews

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[150] *Prosecutor v. Strugar,* IT-01-42-T, "Judgement", ("***Strugar* Trial Judgement**") Trial Chamber, 31 January 2005, para. 7; *Kupreškić* Appeal Judgement, paras 332-333; *Prosecutor v. Kunarac et al.*, IT-96-23, IT-96-23/1-A, "Appeal Judgement", ("***Kunarac* Appeal Judgement**") Appeal Chamber, 12 June 2002, para. 228.

[151] *Blagojević and Jokić* Trial Judgement, para. 23, *Prosecutor v. Krnojelac*, IT-97-25-T, "Judgement", ("***Krnojelac* Trial Judgement**") Trial Chamber, 15 March 2002, para. 69 (emphasis added).

[152] Ibid.

[153] *Kupreškić* Appeal Judgement, *para. 31.*

[154] *Prosecutor v. Simić et al.*, IT-95-9-T, "Judgement", ("***Simić* Trial Judgement**") Trial Chamber, 17 October 2003, para. 22.

[155] *Čelebići* Trial Judgement, para. 595.

and that he may remember additional details when specifically asked in court;"[156]

c. "...[a] witness may also forget some matter or become confused;"[157] and

d. where a witness is testifying about extremely traumatic events, any observation they made at the time may have been affected by stress and fear."[158]

55. These factors are taken into account when assessing the credibility of witnesses.[159] In cases of *repeated* contradictions within a witness' testimony, the evidence can still be relied on if it has been sufficiently corroborated.[160]

C. Corroboration is Not Required

56. The Trial Chamber may rely on the testimony of a single witness as proof of a material fact;[161] corroboration is not required although it may go to weight,[162] and absence of corroboration may be particularly significant in the case of identification evidence.[163] The uncorroborated testimony of a single witness may be sufficient to establish the presence of the Accused at the scene of a crime,[164] and indeed, the Appeals Chamber of the ICTY has confirmed that an Accused may be *convicted* on the basis of the evidence of a single witness, although such evidence must be assessed with the appropriate caution.[165]

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[156] *Prosecutor v. Naletilić and Martinović,* IT-98-34-T, "Judgement", ("***Naletilić* Trial Judgement**") Trial Chamber, 31 March 2003, para 10; *Prosecutor v. Vasiljević,* IT-98-32-T, "Judgement", ("***Vasiljević* Trial Judgement**") Trial Chamber, 29 November 2002, para. 21; *Strugar* Trial Judgement, para. 8.

[157] *Strugar* Trial Judgement, para. 8.

[158] *Limaj* Trial Judgement, para. 15.

[159] *Simić* Trial Judgement, para. 22; *Strugar* Trial Judgement, para. 8; *Limaj* Trial Judgement paras 12, 543.

[160] *Prosecutor v. Halilović* , IT-01-48-T, "Judgement", ("***Halilović* Trial Judgement**") Trial Chamber, 16 November 2005, para. 17.

[161] Other, perhaps, than in the case of the testimony of a child witness not given under solemn declaration: *Kupreškić* Appeal Judgement, para. 33.

[162] *Prosecutor v. Tadić*, IT-94-1-A, "Judgement", ("***Tadić* Appeal Judgement**") Appeals Chamber, 15 July 1999, para. 65; *Čelebići* Appeal Judgement, para. 507; *Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", ("***Aleksovski* Appeal Judgement**") Appeals Chamber, 24 March 2000, paras 62-63; *Kunarac* Appeal Judgement, paras. 268 (and paras. 264-271 generally); *Kupreškić* Appeal Judgement, para. 33; *Kajelijeli* Appeal Judgement, para. 170 (citing cases); *Prosecutor v. Rutaganda,* ICTR-96-3-T, Trial Chamber I. 6, "Trial Judgement and Sentence", ("***Rutaganda* Trial Judgement**") Trial Chamber, December 1999, para. 18; *Čelebići* Trial Judgement, para. 594; *Prosecutor v. Akayesu,* ICTR-96-4-T, "Judgement," ("**Akayesu Trial Judgement**") Trial Chamber, 2 September 1998, paras. 132-136; *Kayishema and Ruzindana* Trial Judgement, para. 80; *Simić* Trial Judgement, para. 25; *Strugar* Trial Judgement, para. 9.

[163] *Kupreškić* Appeal Judgement, paras 34, 220.

[164] *Kajelijeli* Appeal Judgement, paras. 96-97.

[165] *Kordic and Prosecutor v. Kordić and Čerkez,* IT-95-14/2-A, "Judgement", ("*Kordić and Čerkez*") Appeals Chamber, 17 December 2004, para. 274 (emphasis added). *Halilović* Trial Judgement, para. 18.

D. Assessing the Credibility and Reliability of Witnesses

57. In assessing the credibility and reliability of witnesses, the Trial Chamber may have regard to the fact that witnesses who do not have a high level of education may have difficulties in identifying and testifying to exhibits such as maps, and may have difficulties in testifying to dates, times, distances, colours and motor vehicles.[166]

58. The inability of witnesses to identify correctly types of weapons or the nature of injuries inflicted on a victim may be due to the witness's lack of knowledge of weapons or physiology, rather than any unreliability as a witness.[167]

59. Human memory degenerates over time[168] and peripheral details may be forgotten over time, even if memories of core details remain vivid. Similarly witnesses may have difficulties in testifying through an interpreter, or discrepancies in a witness statement given via an interpreter may be due to problems of interpretation.[169] George Johnson testified that his statements were not read back to him after the interviews for him to check their accuracy.[170] Investigator Hatt testified that she did not read back to witnesses the statement she took, "It was not the practice how we took statements."[171] Bility testified that when interviewed he answered the questions that were put to him by the interviewer.[172]

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[166] *Rutaganda* Trial Judgement, para. 23.
[167] Ibid, paras. 334-335.
[168] *Akayesu* Trial Judgement, paras 140, and 454-455.
[169] *Rutaganda* Trial Judgement, paras 23, and 334-335; *Akayesu* Trial Judgement, paras 145-154.
[170] George Johnson, Transcript 19 October 2004, pp. 20-21.
[171] Ann-Catherine Hatt, Transcript 28 April 2005, p. 16.
[172] Hassan Bility, Transcript 29 October 2004, p. 69. Several witnesses made this point, for example General Tarnue gave the following responses when cross-examined by the First Accused (Transcript 11 October 2004, pp. 60-61): Q. Yes. What I'm suggesting is that, if it was true that Sesay came before Sam Bockarie left, you would have said so in all of these interviews, and you didn't, did you?

A. I would have said that in all of interview?
Q. You'd have said so. You'd have said Issa -- [Overlapping microphones]
A. But I wasn't asked in the interview; I wasn't asked.
Q. Well, you were asked --
A. If -- if Dr White was interested in knowing specifically which commander came after '95, '96, '97, '99, up to 2000, I was going to be very specific about answering that particular questions.
Q. So is your answer, or part of your answer, 'I didn't say Sesay came in 1997 because I wasn't asked if Sesay came in 1997'? Is that your answer -- part of your answer?
A. But if I went in an examination room and they give me a test, and that I have to answer specific questions, and that if they didn't ask me to give names -- they only ask me, "How many persons did you see in the hall?" I say "Ten," and I say, "Okay, I saw ten persons, but I saw John Brown, I saw Peter," I'm going against the -- I mean, I'm going against the examination rules. If I'm asked a specific question, I should be able to direct myself to answering the specific question, sir.

60. Some of the investigators who interviewed witnesses were from countries outside of Africa. Investigator Hatt for example was from Switzerland and worked as an investigator for the Office of the Prosecutor for six months.[173] Investigator Hatt testified that she was involved in investigating evidence relating to child soldiers and the procedure for interviewing such witnesses was to meet the witness, and if they agreed to be interviewed, to carry out an interview. In some cases the interview could be done in English but this was not often the case and most interviews required translators, in addition, if the interview had to be done while on a mission in the provinces:

> ... we had only probably one chance to talk to them and they had a huge amount of story to tell. So we had to reduce and just try to find out what this witness could tell us. ... you see it now in the cross-examinations, if you ask questions if you want detailed questions, there is a lot to tell, especially if a war has gone a couple of years and the witness has experienced a lot of things. So I had to reduce the information on the important points I was focussing on. I could not go into all the details. So I would summarize it to the point that I had to see if the witness has information that is useful for our purpose....[174]

61. Interviews of children had to be done in a short time because younger witnesses are not able to concentrate for long periods,[175] and the use of interpreters:

> ...always causes problem – I know that from my work at home – because you can't communicate directly with the witness. I could a bit understand if the interpreter would interpret the right way but not always. And there were situations where a witness maybe was answering for 10 minutes and the interpreter would give me only a short answer. So I wasn't sure what the witness exactly said."[176]

62. Investigator Hatt testified about the interview of TF1-199. The allegation of abduction of the UN peacekeepers was not the main focus of her investigation, the question about abducting UN peacekeepers was at the end of the statement "So I was just mentioning it to him and see if he knows something about it. But it wasn't the focus for me in this interview

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Q. When you went into this April interview, what did you think you were going to be asked to do?
A. I didn't know, I didn't know.
Q. You didn't know at all?
A. I didn't know what I was going to be asked to be -- no way, I didn't know. I didn't know.

[173] Ann-Catherine Hatt, Transcript 28 April 2005, p. 4.
[174] Ann-Catherine Hatt, Transcript 28 April 2005, pp. 6-7.
[175] Ann-Catherine Hatt, Transcript 28 April 2005, p. 7.
[176] Ann-Catherine Hatt, Transcript 28 April 2005, p. 7.

and that's why I did not go into details as far as this is concerned. So I cannot say for sure if I would have written it down."[177]

63. TF1-367 testified that when he was first approached by the OTP the "Court was fearful..." to him "What I mean, this kind of Court was – has never been in this country, so when it was brought it was very fearful so we saw that they are arresting people so we just thought that they were going to arrest all of us, those of us who were in the RUF; children, adults, everybody, so we were all worried. So when they called you you would be frightened."[178] With respect to his early interviews with the OTP, TF1-367 said "That fear that I had, all the questions that she [the investigator] was asking me, I was just answering it just so that I would finish and she would leave me, release me to go where I want to go, or so that she would go where she was going, so all the answers I was giving were not very good answers."[179]

64. There is no reason why a person suffering from Post-Traumatic Stress Disorder (PTSD) cannot be a perfectly reliable witness;[180] survivors of such traumatic experiences cannot however be expected to recall the precise minutiae of events such as exact dates and times, and their inability to do so may in certain circumstances indicate truthfulness and lack of interference with the witness.[181]

65. Discrepancies between a witness's testimony and the witness's prior statement(s) may be due to a variety of factors, and do not necessarily indicate that the witness is not credible or reliable, such other factors include failings on the part of the Prosecution investigator, translation problems, and the fact that witness statements are not made under solemn declaration before a judicial officer; thus, the Trial Chamber may attach greater probative value to the witness's oral testimony in court which has been subject to the test of cross-examination.[182]

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[177] Ann-Catherine Hatt, Transcript 28 April 2005, pp. 19-20, 25.
[178] TF1-367, Transcript 22 June 2006, pp. 75-76.
[179] TF1-367, Transcript 22 June 2006, pp. 76-77.
[180] *Kupreškić* Appeal Judgement, para. 171; *Prosecutor v. Furundžija*, ICTY IT-95-17/1-T, "Judgement," ("***Furundžija* Trial Judgement**"), 10 December 1998, para. 109.
[181] *Furundžija* Trial Judgement, para. 113 (and see paras. 110 to 116 generally); *Akayesu* Trial Judgement, paras 142-144, 299.
[182] *Kayishema* Trial Judgement, paras 76-80; *Akayesu* Trial Judgement, para. 137; *Rutaganda* Trial Judgement, para. 19.

66. Cultural factors of loyalty and honour may also have affected the witnesses' evidence as to the events.[183]

E. Hearsay Evidence and Circumstantial Evidence

67. Rule 89(C) gives the Chamber a broad discretion to admit relevant hearsay evidence.[184] This applies even when the evidence cannot be examined at its source or when it is not corroborated by direct evidence.[185]

68. Circumstantial evidence is admissible where it is in the interests of justice to admit it,[186] and is often used to establish the *mens rea* of an accused. If there is more than one conclusion which is reasonably open from the evidence, these conclusions must all be consistent with the guilt of an accused.[187]

F. Insider Witnesses

69. In trials where an 'insider' provides evidence it is for the Tribunal of fact to assess what, if any, impact the conditions surrounding the witness have affecting the reliability and credibility of the testimony. For instance, the witness TF1-371 was a [redacted] member of the RUF; consequently, upon him making the decision to testify if it was appropriate, upon an objective assessment of his security position that he be provided with protection. In the difficult task of evaluating the evidence, due regard can be had to this "context of fear."[188]

70. Insider witnesses play a crucial role in the trials in international criminal courts and are recognised as a pivotal source of evidence. In *Prosecutor v. Hassan Ngeze and Barayagwiza,* the ICTR Trial Chamber considered that the testimony of an insider was in the "the interests of justice."[189] Thus, the fact that such insiders have commonly been

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[183] *Limaj* Trial Judgement, para. 15.
[184] *Aleksovski* Appeal Decision on Evidence, para. 15; *Prosecutor v. Blaškić*, IT-95-14-T, "Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability," ("***Blaškić* Decision on Admission of Hearsay**") Trial Chamber, 21 January 1998, para. 10; *Prosecutor v. Tadić*, IT-94-1-T "Decision on Defence Motion on Hearsay" (***Tadić* Decision on Hearsay**"), 5 August 1996, paras. 7, 17; *Kordić and Čerkez* Appeal Judgement, paras 281, 282.
[185] *Simić* Trial Judgement, para. 23.
[186] *Simić* Trial Judgement, para. 27.
[187] *Halilović* Trial Judgement, para. 15; *Kordić and Čerkez* Appeal Judgement, para. 289; *Delalić* Appeal Judgement, para. 458; *Simić* Trial Judgement, para. 27.
[188] *Limaj* Trial Judgement, para. 15.
[189] *Prosecutor v. Hassan Ngeze and Barayagwiza*, ICTR-99-52-I "Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition," Trial Chamber, 10 April 2003, para. 7.

granted guarantees of non-Prosecution or mitigation is not considered as undermining the credibility of their testimonies.

G. Expert Witnesses

71. Neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact.[190] In relation to experts, it is for the Court to determine whether the factual basis for an expert opinion is truthful and that determination is made in the light of all the evidence given.[191] Furthermore, the weight to be attributed to expert evidence is to be determined by the Trial Chamber in light of all the evidence adduced.[192] According to the jurisprudence, the factors to consider when assessing the probative value of an expert's oral and written evidence are the professional competence of the expert, the methodologies used and the credibility of the findings made in light of these factors and other evidence accepted by the Trial Chamber.[193]

H. Documentary Evidence

72. The weight to be attached to documents admitted into evidence is assessed when considering the entire evidence at the end of the trial. If the original of a document is unavailable then copies may be relied upon.[194]

I. Relevance of the Evidence of One Accused in Relation to Other Accused

73. As a general principle, the Trial Chamber should consider all of the evidence in a case in relation to all of the Accused in the case, so far as it is relevant. It is quite common in a joint trial for the evidence of one accused to be prejudicial to another accused. This does not mean that the evidence of each Accused cannot be taken into account in relation to each of the other accused. The ability of the Trial Chamber in such cases to consider the evidence as a whole in relation to all of the Accused enables it to get to the truth of the

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[190] *Aleksovski* Appeal Judgement, para. 62.
[191] *Prosecutor* v. *Galić*, IT-98-29-T, "Decision on the Expert Witness Statements Submitted by the Defence", ("***Galić* Decision on Expert Witness**") Trial Chamber, 27 January 2003, p. 4; *Čelebići* Appeal Judgement, para. 594.
[192] *Galić* Decision on Expert Witness, p. 4; *Prosecutor* v. *Brđanin,* IT-99-36-T "Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown," Trial Chamber, 3 June 2003, p. 4.
[193] *Blagojević* Trial Judgement, para. 27 endorsing *Vasiljević* Trial Chamber's view.
[194] *Fofana* Appeal Decision on Bail, para. 24.

matter in relation to all of the accused.[195] Thus, a witness presented by one Accused can give evidence against a co-Accused.[196] Similarly, evidence brought to light in the cross-examination of a witness by one Accused can be taken into account to the prejudice of another Accused.[197]

J. Relevance of Evidence of Acts Occurring Outside the Temporal or Geographic Scope of the Indictment

74. Cases before international criminal courts commonly involve numerous crimes committed on a large scale over a significant period of time and over a large geographical area. Thus, in this case, the Indictment specifies the crimes charged by reference to geographical locations and periods of time. In countries where illiteracy is prevalent, time and distance may be understood in relation to seasons or walking distance. Several witnesses gave evidence by referring to rainy season or dry season. This is a matter of which the Trial Chamber may take judicial notice, but TF1-360, for example, testified that the rainy season in Kono District is early, from late April, May and June.[198] Other witnesses referred to locations by saying it was less than hour, or longer, walk from a certain location.

75. An accused can, of course, only be convicted of crimes with which he has been charged in the Indictment, even if at trial evidence emerges of other crimes for which he may bear responsibility. However, this does not mean that evidence of crimes or other conduct that occurred outside the geographical or temporal scope of the Indictment is irrelevant.[199]

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[195] See, for instance, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Request for Severance of Three Accused", ("**Bagosora Decision**") Trial Chamber, 27 March 2006, para. 5, referring to earlier relevant case law of the ICTY and ICTR.

[196] See *Prosecutor v. Kvočka et al.*, IT-98-30-PT, "Decision on the 'Request to the Trial Chamber to Issue a Decision on Use of Rule 90 H'", Trial Chamber, 11 January 2001, p. 3, in which the Trial Chamber rejected a defence motion seeking to limit Prosecution cross-examination of Defence witnesses to questions relating to the accused who called that witness. The Trial Chamber considered "that a witness presented by an accused may give evidence against one of his co-accused, so that the co-accused has a right to cross-examine that witness, and further that to prohibit all cross-examination by a co-accused as requested in the Motion could exclude relevant evidence".

[197] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Decision on the Defence Motion for the Re-Examination of Witness DE", Trial Chamber, 19 August 1998, para. 15.

[198] TF1-360, Transcript 20 July 2005, p. 46.

[199] *Prosecutor v. Strugar, Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence*, Case No. IT-01-42-T, Trial Chamber. II, 22 January 2004, p. 3; *Prosecutor v. Kupreškić et al, Appeal Judgement,* Case No. IT-95-16-A, Appeals Chamber., 23 October 2001, paras. 321, 323.

76. First, such evidence may nonetheless be relevant in determining whether the crimes charged have been proved beyond a reasonable doubt. For example, if an accused is charged with having murdered someone by shooting them on a specific date, this does not mean that evidence of the accused's conduct, such as his preparatory acts or prior threats on other dates is inadmissible. These events occurring before and after the date of the alleged crime would not be pleaded in the indictment.

77. Evidence of crimes committed outside the geographic or temporal scope of the Indictment may be probative of the question whether the crimes charged in the Indictment were part of a widespread or systematic attack against a civilian population. Similarly, evidence that an accused exercised superior authority (for purposes of Article 6(3) of the Statute) shortly before the timeframe in the indictment, or shortly after the timeframe of the indictment, may clearly be probative of the question whether the accused exercised superior authority *during* the Indictment period. While the Trial Chamber is only called upon to decide what is charged in the indictment, in so doing, it must look at all of the evidence in the case considered as a whole, including evidence of matters falling outside the timeframe in the indictment.

78. The evidence in this case has been admitted by the Trial Chamber on the grounds that it is relevant. Where the Defence has had objections to the admission of evidence on grounds of relevance, it has had the opportunity to raise these objections during the trial. At this stage, the Trial Chamber must evaluate all of the evidence in the case as a whole. Evidence cannot be disregarded, merely because it deals with matters outside the geographical or temporal scope of the Indictment.

79. It furthermore needs to be emphasized that in order for an accused to be convicted of a crime charged in the indictment, it is not necessary for the Prosecution to prove beyond a reasonable doubt that the crime was in fact committed within the timeframe specified in the Indictment. It *cannot* be argued, for instance, that if witnesses are contradictory or uncertain as to the precise time at which a crime was committed, there must be a reasonable doubt as to whether the crime was within the temporal timeframe of the Indictment, and that the Accused must therefore be acquitted. The time of the commission of a crime is not a material element of the crime, and the guilt of an accused does not depend on it being proved.

80. The reason for specifying dates in an indictment is not because they are material to criminal liability but is to give notice to the Defence, so that it is able to prepare its case. However, it is clear that it is not always possible to be precise about exact dates when dealing with events on the scale that are under consideration, given especially the climate of upheaval in which they occurred. For this reason, the dates and timeframes given in the Indictment are often prefaced with qualifying words such as "between about" two given dates.

81. The common law rule concerning dates in an indictment, which was said in *Dossi* to be a rule that has existed "since time immemorial,"[200] is expressed in *Archbold* as follows:

> ... a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment...
>
> The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in Dossi if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation....[201]

82. The rule in *Dossi* was applied by the Appeals Chamber of the ICTR in the *Rutaganda* case.[202] The *Dossi* principle has also been recognised by the Appeals Chamber of the ICTY

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[200] *R .v.Dossi*, 13 CR.App.R. 158 (CCA., at pp. 159-160 ("***Dossi***"): "From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence....Thus, though the date of the offence should be alleged in the indictment it has never been necessary that it should be laid according to truth unless time is of the essence of the offence."

[201] *Archbold Criminal Pleading, Evidence and Practice*, 2002 Edition, paras. 1-127 to 128 (emphasis added).

[202] *Prosecutor v. Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003, paras 296-306, especially para. 306: "It is the opinion of the Appeals Chamber that the alleged variance between the evidence presented at trial and the Indictment in relation to the date of the commission of the offence cannot lead to invalidation of the Trial Chamber's findings unless the said date is actually an essential part of the Appellant's alleged offence. However, such is not the case in this instance. The Appeals Chamber notes, moreover, that according to the evidence presented at trial, the weapons distributions occurred during a period that was reasonably close to the date referred to in the Indictment and that, therefore, the Appellant was not misled as to the charges brought against him. For these reasons, the Appeals Chamber dismisses this sub-ground of appeal and finds that the Trial Chamber did not commit the alleged error of law in this instance." The Appeals Chamber in this Judgement affirmed the Judgement of the Trial Chamber in this respect: see *Prosecutor v. Rutaganda*, ICTR-96-3-T, "Judgement", Trial Chamber, 6 December 1999, para 201: "The Chamber notes that the dates of the three incidents - 8 April, 15 April, and 24 April - vary from the date on or about 6 April, which is set forth in paragraph 10 of the Indictment. The phrase 'on or about' indicates an approximate time frame, and the testimonies of the witnesses date the events within the month of April. The Chamber does not consider these variances to be material or to have prejudiced the Accused. The Accused had ample opportunity to cross-examine the witnesses. In reviewing the allegation set forth in this paragraph of the Indictment, the Chamber finds that the date is not of the essence. The essence of the allegation is that the Accused distributed weapons in this general time period." (Footnote omitted.)

in the *Kunarac* case.[203] *Dossi* was further cited with approval by the ICTY Trial Chamber in the *Tadić* case, which affirmed that the date of the crime is not of the essence.[204] The ICTR Trial Chamber in the *Kayishema and Ruzindana* case expressly approved this passage in the *Tadić* case and the authorities cited therein (including *Dossi*), and similarly affirmed that the Prosecution need not prove an exact date of an offence where the date or time is not also a material element of the offence.[205] In that case the Trial Chamber stated:

83. It is unnecessary, however, for the Prosecution to prove an exact date of an offence where the date or time is not also a material element of the offence. Whilst it would be preferable to allege and prove an exact date of each offence, this can clearly not be demanded as a prerequisite for conviction where the time is not an essential element of that offence. Furthermore, even where the date of the offence is an essential element, it is necessary to consider with what precision the timing of the offence must be detailed. It is not always possible to be precise as to exact events; this is especially true in light of the events that occurred in Rwanda in 1994 and in light of the evidence we have heard from witnesses. Consequently, the Chamber recognises that it has balanced the necessary practical considerations to enable the Prosecution to present its case, with the need to ensure sufficient specificity of location and matter of offence in order to allow a comprehensive defence to be raised.[206]

84. The principle is applied in the national courts of a variety of jurisdictions, including for instance England and Wales,[207] Australia,[208] Canada,[209] Trinidad and Tobago[210] and Papua New Guinea.[211]

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[203] *Kunarac* Appeal Judgement, para. 217: "in the view of the Appeals Chamber, minor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in Indictment IT-96-23 did not occur."
[204] *Prosecutor v. Tadić*, IT-94-1-T, "Opinion and Judgement", 7 May 1997, para. 534.
[205] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Judgement and Sentence", 21 May 1999, paras. 81-86.
[206] Ibid, para. 85.
[207] *R. v. JW* [1999] EWCA Crim 1088 (21 April 1999) (CCA.; *R. v. Lowe* [1998] EWCA Crim 1204 (CCA.
[208] *R. v. Kenny Matter*, No. CCA 60111/97 (29 August 1997) (NSW CCA., where the indictment alleged offences in 1986 and the court convicted on evidence indicating that the offence happened in the last week of 1985; *R. v. Liddy* [2002] SASC 19 (31 January 2002) (SA CCA., esp. paras. 256ff; *R. v. Frederick* [2004] SASC 404 (7 December 2004) (SA CCA., esp. paras. 38-41.
[209] *R. v. B(G)* (1990), 56 CCC (3d) 200; *A.B. and C.S. v. R.*, [1990] 2 SCR 30 (SCC) both found at (http://www.canlii.ca/ca/cas/scc/1990/1990scc59.html).
[210] *Bowen v. State*, Cr. App. No. 26 of 2004, Trinidad and Tobago Court of Appeal, 12 January 2005.

85. In cases where the evidence indicates that the event in question happened outside the timeframe of the indictment, the question is thus whether the accused "has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation." The Prosecution submits that if some witnesses put the events within the relevant timeframe and others put it without or are uncertain as to time, it is difficult to see how the Defence could have been misled as to the allegation that the Accused has to answer. Even if all the evidence puts an event outside the timeframe of the Indictment, it is still difficult to see how the Defence would have been misled or prejudiced, given the inclusion in the Indictment of words such as "between about," unless on the evidence it appears that the event was clearly so far outside the timeframe that the Indictment could not even be considered to be the same event as that to which the Indictment refers. Furthermore, the Defence would have had the opportunity to cross-examine the Prosecution witnesses on this aspect of their evidence.

K. Kallon Alibi Evidence

86. The Second Accused waited until 28 March 2007, almost 3 years after the trial began to give notice that he would rely on an alibi. Previously, on 20 March 2007 the Second Accused said that he would not rely on an alibi.[212] The Trial Chamber held that the Second Accused failed to comply with Rule 67(A)(ii) and ordered that notice of the alibi, and related information, be disclosed.[213] The Second Accused filed a Notification of Alibi, listing 20 witnesses who would give alibi evidence with respect to various counts in the indictment.[214] Of those witnesses listed in the Notice of Alibi, only DMK-047, DMK-072, DMK-132 and DMK-116 gave evidence, and only DMK-072 and DMK-047 gave evidence in relation to the alibi proffered by the Second Accused.

87. The purported alibi evidence should be disregarded by the Trial Chamber for the following reasons. First, the Second Accused failed to comply with Rule 67(A)(ii). The

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[211] *State v. Fineko* [1978] PNGLR 262 (25th July, 1978). The rule is not applicable where the defence has provided an alibi defence or where the age of the complainant is an essential element of the offence. See *R. v. Radcliffe* [1990] Crim LR 524 (CA).

[212] Pre-Defence Conference, Transcript 20 March 2007, p. 84.

[213] *Prosecutor v. Sesay et al,* SCSL-04-15-T-770, "Decision on the Prosecution Motion that the Second Accused Comply with Rule 67," 1 May 2007, p. 7.

[214] *Prosecutor v. Sesay et al,* SCSL-04-15-T-785, "Defence for Morris Kallon's Notification of Alibi," 8 May 2007, pp. 2-4: DMK-001, DMK-014, DMK-016. DMK-071, DMK-076, DMK-137, DMK-138, DMK-014, DMK-030, DMK-103, DMK-116, DMK-035, DMK-089, DMK-072,DMK-125, DMK-132, DMK-093 DMK-047, DMK-100 and DMK-133

Trial Chamber noted that the Second Accused violated Rule 67(A)(ii) by failing to give notice of the alibi "as early as reasonable, practical or in any event prior to the commencement of the trial."[215] Second, the Trial Chamber also held that where the Defence indicates an intent to put forward a defence of alibi, but does not provide the particulars as required by Rule 67, it constitutes a breach of the Rule. Based upon this holding the Trial Chamber found the Second Accused to be in breach of Rule 67(A)(ii).[216] Third, with the exception of DMK-072 and DMK-047, all otestimony going towards the Second Accused's alibi defence came from witnesses for which no notice at all was given.

88. The failure to comply with Rule 67(A)(ii) entitles the Trial Chamber to take that failure into account when weighing the credibility of the alibi evidence.[217] The Trial Chamber can also exclude alibi evidence where there has been a failure to comply with Rule 67(A)(ii).[218] Given the failure of the Second Accused to comply with Rule 67(A)(ii), the late notice which was given approximately nine months after the close of the Prosecution case, and the tendering of alibi evidence for which no notice at all was given, the Second Accused's purported alibi evidence is entirely without merit and should be excluded, or in the alternative, given no weight whatsoever.

89. The Indictment charges the Accused in Count 10 with violence to life, health and physical or mental well-being of persons, in particular mutilation as a violation of Article 3 Common to the Geneva Conventions and of the Additional Protocol II punishable under Article 3(a) of the Statute, and in Count 11 in addition, or in the alternative, with other inhumane acts, as a Crime against Humanity, punishable under Article 2(i) of the Statute. In the Indictment the Prosecution submits that "[w]idespread physical violence, including mutilations, was committed against civilians."[219]

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[215] *Prosecutor v. Sesay et al,* SCSL-04-15-T-770, "Decision on the Prosecution Motion that the Second Accused Comply with Rule 67," ("*Sesay et al* Decision on Rule 67 Copliance"), 1 May 2007, pp. 5-6.
[216] *Sesay et al* Decision on Rule 67 Copliance, p. 6.
[217] See *Prosecutor v. Brima et al,* SCSL-04-16-T-521, "Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67," 26 July, para. 18: "...failure by the defence to observe its obligations under Rule 67(A.(ii)(a) will entitle the Trial Chamber to take such failure into account when weighing the credibility of the defence of alibi."
[218] *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic, Papci and Santic,* IT-95-16, "Decision", 11 January 1999, Order (v).
[219] Indictment, para. 61.

III. FORM OF THE INDICTMENT

A. History of the RUF Indictment

90. Over three years into the trial the Second Accused filed a motion challenging the form of the Indictment.[220] The motion was dismissed but the Trial Chamber observed that "it may be appropriate for the Trial Chamber to address objections to the form of the Indictment at the end of the case rather that during the course of the trial...."[221] Although it is not certain a challenge to the Indictment will be made by the Accused in their final arguments, or the nature of those challenges, the Prosecution feels obliged to include argument on this issue.

91. All Accused were initially charged by separate indictments. The indictments were later consolidated[222] and then amended and corrected.[223] Only the Sesay Defence filed a motion pursuant to Rule 72(B)(ii) challenging the First Accused's indictment.[224] The indictment was upheld save for a particular defect relating to the use of the phrase, "not limited to those events", in the formulation, "By his acts or omissions in relation, but not limited to those events ... Issa Hassa Sesay ... is individually criminally responsible ...;"[225] that was remedied.

92. A second motion relevant to the Indictment was filed by the Second Accused in March 2008; it sought an order that evidence be excluded on the basis that the evidence was outside the scope of the Indictment.[226] The Trial Chamber declined to deal with challenges to the form of the indictment at that time,[227] and held that the Second Accused had failed to

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[220] *Prosecutor v. Sesay et al*, SCSL-2004-15-T-970, "Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions," 7 February 2008. See also the request by the Third Accused for leave to raise objections to the form of the indictment, which was dismissed by the Trial Chamber: *Prosecutor v. Sesay et al*, SCSL-2004-15-T-813, "Gbao Request for Leave to Raise Objections to the Form of Indictment," 23 August 2007. The Third Accused acknowledged that he never filed a motion objecting to the form of the Indictment, para. 8.

[221] *Prosecutor v. Sesay et al*, SCSL-2004-15-T-1033, "Decision on Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions," 6 March 2008.

[222] *Prosecutor v. Sesay et al*, SCSL-2004-15-T-005, "Indictment," 5 February 2004.

[223] Indictment.

[224] *Prosecutor v. Sesay*, SCSL-2003-05-PT-055, "Preliminary Motion for Defects in the Form of the Indictment," 23 June 2003 ("***Sesay et al* Indictment Defect Motion**").

[225] *Prosecutor v. Sesay*, SCSL-2003-05-PT-080, "Decision and Order on Defence Motion for Defects in the Form of the Indictment," 13 October 2003, ("***Sesay* Indictment Defect Decision**"), paras 31-33.

[226] *Prosecutor v. Issa Sesay et al*, SCSL-2004-15-T-1057, "Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A," 14 March 2008.

[227] *Prosecutor v. Issa Sesay et al*, SCSL-2004-15-PT-1186, "Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment," 26 June 2008, ("**Kallon Exclusion of Evidence Motion**"), para.18.

make out a *prima facie* case that the Second Accused did not have adequate notice of the allegations against him.[228]

B. Applicable Pleading Principles

93. Article 17(4)(a) of the Statute provides that an accused is entitled to be "informed promptly and in detail [...] of the nature of the charge against him or her." Rule 47(C) states that an "indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence." Under Rule 47(C) of the Rules, the indictment should comprise only a list of counts, with each count followed by brief particulars. The RUF indictment read as a whole clearly goes beyond this and and meets the requirements of the law.

94. In its "Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment," the Trial Chamber correctly identified the principles for pleading indictments.[229]

95. With regard to the nature of material facts to be pleaded in a case under Article 6(1) or 6(3), this Trial Chamber previously held that it may be sufficient to plead the legal prerequisites embodied in the statutory provisions.[230] Further, the Chamber found that the indictment sufficiently pleads the relationship between the Accused and the perpetrators in question as "subordinate members of the RUF and AFRC/RUF forces," it being sufficient in certain cases under Article 6(3) to identify the persons who committed the alleged crimes by means of the category or group to which they belong.[231]

96. With regard to specificity in pleadings, the Appeals Chamber said that the question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case[232] and that in considering the extent to which there is compliance with the specificity requirement in an indictment, the term specificity should not be understood to have any special meaning; it is to be understood in its ordinary

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[228] Kallon Exclusion of Evidence Motion, para. 27.
[229] *Prosecutor v. Issa Sesay*, SCSL-2003-05-PT-080, "Decision and Order on Defence Motion for Defects in the Form of the Indictment," ("***Sesay* Indictment Defect Decision**"),13 October 2003, para. 7.
[230] *Sesay* Indictment Defect Decision, para. 13-14.
[231] *Sesay* Indictment Defect Decision, para. 16-17.
[232] *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A-675, "Judgement" ("***Brima et al* Appeal Judgement**"), 22 February 2008, para.37; citing *Kupreskic* Appeal Judgement, Para. 89.

meaning as being specific in regard to an object or subject matter; an object or subject matter that is particularly named or defined cannot be said to lack specificity.[233]

C. No Preliminary Challenge to Indictment from the Second and the Third Accused

97. The purpose of Rule 72 is to ensure that any issues relating to sufficiency of the indictment are determined before the trial begins. In the *Fofana et al* Trial Judgement, it was stated that: "The Chamber is of the view that preliminary motions pursuant to Rule 72(b)(ii) are the principal means by which objections to the form of the Indictment should be raised, and that the Defence should be limited in raising challenges to alleged defects in the Indictment at a later stage for tactical reasons."[234] The "Chamber is of the opinion, therefore, that Counsel for Fofana should have raised these arguments by way of a preliminary motion, or by raising objections during the course of the trial."[235] The Chamber further stated that:

> However, mindful of its obligations under Rule 26*bis* to ensure the integrity of the proceedings and to safeguard the rights of the Accused, the Chamber will nonetheless consider the objections raised by the Counsel for Fofana at this stage in the proceedings. It notes however, that given that Defence has provided no explanation for its failure to raise the objections at trial, the burden has shifted to the Defence to demonstrate that the Accused's ability to defend himself has been materially impaired by the alleged defects.[236]

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[233] *Brima et al* Appeal Judgement, para. 40.

[234] *Prosecutor v. Fofana, Kondewa,* SCSL-04-14-T-785, "Judgement," (Trial Chamber) ("***Fofana et al* Trial Judgement**"), 2 August 2007, para. 28, citing *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-AR73.3, "Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal", Appeals Chamber, 11 March 2005, para. 10. The Trial Chamber further stated that: "The Fofana Defence submits that in the Sesay Oral Rule 98 Decision, this Chamber held that the appropriate time to raise objections to the form of the Indictment was during final submissions (para. 24, referring to *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Oral Decision on RUF Motions for Judgement of Acquittal Pursuant to Rule 98 (TC), 25 October 2006, Transcript, 25 October 2006, p. 22 ("***Sesay et al* Decision on Motion for Acquittal**"). The Chamber notes that in this Decision, the Chamber made it clear that the primary instrument for challenging the form of the Indictment was by way of a preliminary motion pursuant to Rule 72(b)(ii). It held, however, that this was without prejudice for the Defence to raise such issues in its final closing arguments. The Chamber notes that unlike Fofana, Sesay had already raised its objections to the form of the Indictment by way of a preliminary motion [*Prosecutor v. Sesay*, SCSL-03-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 13 October 2003]. The Chamber is of the view that, while it has the discretion to consider objections to the form of the Indictment at the end of the trial, the burden will shift to the Defence to demonstrate that it has been materially prejudiced if it has not raised any prior objections at trial."

[235] *Fofana et al* Trial Judgement, para. 28.

[236] *Fofana et al* Trial Judgement, para. 29.

98. The Second Accused and the Third Accused did not challenge their initial indictments at the pre-trial stage,[237] while Sesay's motion pursuant to Rule 72(B)(ii) was dismissed save for a particular defect that was remedied.[238]

99. In the *Norman et al* indictment, the Prosecution repeated the language of the Statute in pleading liability under Article 6(1). Counsel for Fofana argued that Fofana's name is not mentioned in the factual descriptions preceding each count, creating the impression that he had only been charged as a superior and that the Prosecution should have pleaded the different heads of liability under Article 6 (1) separately.[239] The Trial Chamber rejected these arguments[240] citing the *Sesay* Decision[241] and the *Kondewa* Decision[242] where the Chamber held *inter alia*, that the accused in those cases had not been prejudiced by the Prosecution's failure to plead the different modes of Article 6 (1) liability separately.

100. The Indictment (paragraph 38 citing Article 6.1 liability, committing, repeated in all counts, read together with paragraphs 41 and 44) clearly charges each of the Accused Issa Sesay, Morris Kallon and Augustine Gbao with committing, involving all crimes charged in the indictment.[243] The Indictment also charges each Accused with planning, instigating, ordering and aiding and abetting.[244] The Indictment (paras. 35-37) further alleges that the crimes in the Indictment were within a joint criminal enterprise and charges each Accused on that basis.[245]

101. Additionally, each Accused had sufficient notice of the evidence by which the Prosecution was to prove these charges against each of them, through the Pre-Trial Brief, Supplemental Pre-Trail Brief, Opening Statement, witness statements and additional information disclosed. For example, the Second Accused's personal involvement in the killing of the Paramount Chief in Gerihun, Bo District is charged on the basis of the Indictment paragraphs 38, 44, 46 and the paragraph immediately following paragraph 53;

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[237] Which in the case of Kallon the Trial Chamber noted in *Prosecutor v. Sesay et al,* SCSL-04-15-T-83, "Kallon – Decision on Motion for Quashing of consolidated Indictment," 21 April 2004, para.20.
[238] *Sesay* Indictment Defect Decision, para. 31-33.
[239] *Fofana et al* Trial Judgement, para.30.
[240] *Fofana et al* Trial Judgement, para.35-37.
[241] *Sesay* Indictment Defect Decision.
[242] *Prosecutor v Kondewa,* SCSL-2003-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 27 November 2003 .
[243] Indictment, para. 38, 41 and 44.
[244] Indictment, para. 38, 41 and 44.
[245] Indictment, para. 35-37.

the evidence by which the Prosecution sought to prove this charge is disclosed in the Pre-Trial Brief, Supplemental Pre-Trial Brief, and other disclosures of evidence including statements/additional statements of TF1-054 (26.11.02; 2.11.03; 24.11.04; 25.8.05) and AFRC transcripts of 19 and 20 April 2005. The Second Accused's personal involvement in killings in Kono District is charged on the basis of the Indictment paragraphs 38, 45, 48 and the paragraph immediately following paragraph 53; the evidence by which the Prosecution sought to prove this charge is disclosed in the Pre-Trial Brief, Supplemental Pre-Trial Brief, and other disclosures of evidence including statements/additional statements of witnesses who were added to the Prosecution list of witnesses by leave of the Trial Chamber and whose evidence was described in the motions for leave to add witnesses to the Prosecution witness list: TF1-366 (30.8.04; 5.2.04; 8, 9, 11, 12, 15, 16.8.05; 5.2.04; 30.8.04; 18.2.05; 16.8.05; 21.10.05; 29.10.05), TF1-360 (12.6.04; 25.6.04; 21,25,31.1.05; 16.6.05), TF1-371 (4.11.05 56 ; 29.11.05; 10.12.05; 12.12.06; 24.1.06; 24.1.06; 25.1.06; 31.1.06 -1.2.06; 17-19.2.06; 19.2.06; 19.2.06), TF1-263 (21, 22.9.03; 26.1.04; 22, 23.9.04, 5, 8, 20, 23, 28.10.04; 14.1.05)

102. By further example, the Second Accused's personal involvement in killings at Cyborg Pit in Kenema District is charged on the basis of the Indictment paragraphs 38, 41, 42, 44, 45, 47 and the paragraph immediately following paragraph 53; the evidence by which the Prosecution sought to prove this charge is disclosed in the Pre-Trial Brief, Supplemental Pre-Trial Brief, and other disclosures of evidence including statements/additional statements of TF1-035 (16.11.02; 16.1.04; 26.11.04; 15.1.04; 16.1.04; 17.2.05; 18.2.05; 22.2.05; 24.2.05). The Second Accused's personal involvement in sexual slavery and forced marriages is charged on the basis of the Indictment paragraphs 38, 54-60 and the paragraph immediately following paragraph 60; the evidence by which the Prosecution sought to prove this charge is disclosed in the Pre-Trial Brief, Supplemental Pre-Trial Brief, and other disclosures of evidence including statements/additional statements of TF1-366 (30.8.04; 5.2.04; 8, 9, 11, 12, 15, 16.8.05; 5.2.04; 30.8.04; 18.2.05; 16.8.05; 21.10.05; 29.10.05), TF1-371 (4.11.05 56 ; 29.11.05; 10.12.05; 12.12.06; 24.1.06; 24.1.06; 25.1.06; 31.1.06 -1.2.06; 17-19.2.06; 19.2.06; 19.2.06), TF1-174 (14.8.03; 11.2.04; 24.1.06; 1.3.06; 7.3.06)

103. The Second Accused's personal involvement in the use of child soldiers is charged on the basis of the Indictment paragraphs 38, 41, 43, 68 and the paragraph immediately following paragraph 68. The evidence by which the Prosecution sought to prove this charge is disclosed in the Pre-Trial Brief, Supplemental Pre-Trial Brief, and other disclosures of evidence including statements/additional statements of TF1-371 (already cited), TF1-366 (already cited), TF1-035 (already cited) TF1-117 (17.1.03; 28.2.04; 28.2.04; 28.10.05; 28.2.06), TF1-015 (15.11.02; 27.1.04; 18.10.04), TF1-036 (12.10.02; 12,14.10.02; 14.8.03; 11.11.03; 28.1.04; 14.2.05; 26,27.3.05; 26.3.05; 27.3.05; 29.5.05; 31.3.04; 14.12.04), TF1-114 (26.3.03; 4.2.04; 13.4.05), TF1-045 (5.3.03; 31.1.03; 26.2.03; 1.3.03; 7.5.05; 13.5.05; 23.6.05; 19.7.05; 20.7.05; 21.7.05; 22.7.05; 25.10.05), TF1-141 (6.4.03; 31.1.03; 23.2.03; 24.2.03; 4.4.04; 9.10.04; 19,20.10.04; 10.1.05).

D. There Has Been no Prejudice to the Accused Caused by the Form of the Indictment

a) Any Defects in the Indictment were Cured

104. In *Ntabakuze* the ICTR Appeals Chamber stated that: "... the Prosecution is obliged to state the material facts underpinning the charges in the indictment, but not the evidence by which material facts are to be proven."[246] And later noted that "... if the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber *must* consider whether the accused was nevertheless accorded a fair trial."[247] And it is not imperative that every material fact be pleaded in the indictment.[248] In the context of this particular trial it is important to note that throughout the Prosecution case evidence was heard for 6 to 8 weeks followed by a break of 6 to 8 weeks. There was ample time to prepare. Second, the Defence case started eight months after the Prosecution closed its case. Both of these factors are significantly different from what took place in the trial of *Brima et al*, which proceeded with very few interruptions, scheduled or otherwise.

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[246] *Prosecutor v. Bagosera et al.*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutoy Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I "Decision on Motion for Exclusion of Evidence," 18 September 2006, para.17.

[247] *Prosecutor v. Bagosera et al.*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutoy Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I "Decision on Motion for Exclusion of Evidence," 18 September 2006, para. 26.

[248] *Prosecutor v. Bagosera et al.*, ICTR-98-41-T, "Decision on Ntabakuze Motion for Exclusion of Evidence," 29 June 2006, para. 4.

105. The Accused were put on notice of all the material facts underpinning the allegations, through the Indictment,[249] Pre-Trial Brief,[250] Supplemental Pre-Trail Brief,[251] Opening Statement,[252] witness statements, additional information and other disclosures of evidence, all of which gave the Accused better details of the charges against each of them thereby helping to cure any defects in the indictment and ensuring that each of the accused was accorded a fair trial. At no point in the Prosecution case did the Second Accused seek an adjournment to prepare to question a witness.

106. During the trial the Accused on numerous occasions exercised their rights to object to evidence brought by the Prosecution on ground of lack of notice and the Trial Chamber addressed such objections. The Trial Chamber also considered and disposed of Defence applications for exclusion of evidence on the basis that it contained new allegations of which the Accused allegedly did not have notice.[253] Each of the Accused had the opportunity to prepare for and to extensively cross-examine the Prosecution witnesses on all matters. During the Defence phase, each Accused had the opportunity and called evidence to counter material allegations all of which they had had notice of, long before the

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[249] Indictment.

[250] *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-PT-39, "Prosecution's Pre-Trial Brief Pursuant to Order For filing Pre-Trial Briefs (Under Rules 54 and 73*bis*) of 13 February 2004 ", 1 March 2004.

[251] *Prosecutor v. Issa Sesay,Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-PT-82, "Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time For Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004".

[252] Transcript 5 July 2004.

[253] *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-PT-1186, "Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment," 26 June 2008, para.14. Citing examples of TF1-108 Ruling; TF1-316 and TF1-122 Decision; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004 ("**TF1-199 Ruling**"); Gbao – Koker Ruling; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004 ("**TF1-060 Ruling**"); *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Oral Application for Respect of Disclosure Obligations, 9 July 2004 ("**Sesay Ruling on Disclosure Obligations**"); *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Disclosure Regarding Witness TF1-195, 4 February 2005; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117, 27 February 2006 ("**TF1-117 Decision**"); *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision for the Defence Motion for the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1041 and TF1-288, 27 February 2006 ("**TF1-113, TF1-108, TF1-330, TF1-041 & TF1-288 Decision**"); *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 19th of October and 20th of October, 2004, and 10th of January, 2005", 3 February 2005; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Prosecution Motion Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371 (AC), 13 December 2007 ("**TF1-371 Appeals Chamber Decision**").

evidence was called by the Prosecution. The ability of each of the Accused to prepare their defence was never impaired.

b) Motions for Additional Witnesses Provided Notice to the Accused

107. Prosecution Witnesses including TF1-314, TF1-360, TF1-361, TF1-362, TF1-366, TF1-367, TF1-369 and TF1-371 were called following Prosecution motions to call additional witnesses.[254] The motions stated the material facts on which the witnesses would testify and provided notice to the Accused long before the witnesses testified.[255] In *Ntabakuze*[256] the ICTR Trial Chamber considered that the Prosecution motion to add a witness, followed by the Chamber's ruling, was sufficient to clearly inform the accused that the testimony of the witness would be part of the case against him; and, that the period during which the motion was pending, and between the date of the decision and the witness's appearance, constituted a *de facto* adjournment which gave the Defence sufficient time to investigate and challenge the witness's testimony, in accordance with the rights of a fair trial.

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[254] TF1-314, TF1-360, TF1-361 and TF1-362 were called following the "Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Statement", SCSL-2004-15-T-191, 12 July 2004; and the "Decision on Prosecution Request for Leave to Call Additional Witness", SCSL-2004-15-T-221, 29 July 2004. TF1-366 and TF1-367 were called following the "Prosecution Request to Call Additional Witnesses and Disclose Additional Witness Statements, Pursuant to Rules 66(A.(ii) and 73*bis*(E)", SCSL-2004-15-T-283, filed on 23 November 2005; and the "Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose additional Witness Statements", SCSL-2004-15-T-320, 11 February 2005. TF1-369 was called pursuant to the SCSL-04-15-T-399, "Decision on Prosecution Request for Leave to Call an Additional Expert Witness," 10 June 2005. TF1-371 was called following the "Confidential, With Ex Parte Under Seal Annex Prosecution Request for Leave to Call Additional Witness and For Order For Protective Measures Pursuant to Rules 69 and 73*bis*(E)", SCSL-2004-15-T-513, filed on 10 march 2006; and the "Decision on the Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures", SCSL-2004-15-T-537, 6 April 2006; see also, "Written Reasons for the decision on Prosecution Request for Leave to call Additional Witness TF1-371 and for Orders for Protective Measures", SCSL-2004-15-T-579, 15 June 2006.

[255] The Decision to add TF1-360 and TF1-361 was issued on 29 July 2004 and TF1-360 testified from 19/07/05-26/07/05 while TF1-361 testified from 11/07/05-19/07/05; The Decision to add TF1-366 and TF1-367 was issued on 11 February 2005 and TF1-366 testified from 07.11.05-18.11.05, while TF1-367 testified from 21.06.06- 26.06.06; The Decision to add TF1-371 was issued on 6 April 2006 and he testified from 20.07.06 -24.07.06 & 28.07.06 –02.08.06.

[256] *Prosecutor v. Bagosera et al.*, ICTR-98-41, "Decision on Ntabakuze Motion for Exclusion of Evidence", 29 June 2006, paras. 10 and 44.

c) There was no Objection to the Evidence in Court on Grounds of Lack of Notice of Material Facts Underpinning the Charges in the Indictment

108. The Second Accused's motion[257] was the first application for exclusion of testimonial evidence on the ground of lack of notice of material facts underpinning the charges in the Indictment. The Trial Chamber observed that:

> In this regard, the overriding principle that has consistently applied by this Chamber is that the Defence shall establish a *prima facie* case that the impugned evidence contained new allegations in respect of which the Accused had not previously been put on notice, either in the Indictment, in the Prosecution Pre-Trial Brief, Supplemental Pre-Trial Brief, or in other disclosure materials. In the Chamber's view, a bare allegation by an Accused that the Indictment itself is defective will not suffice. A *prima facie* case must first be made out by the Defence and then it will become incumbent upon the Prosecution to respond to the allegation and demonstrate conclusively that the Accused did receive adequate notice of the allegations against him.[258]

109. The Trial Chamber concluded that the Kallon Defence had failed to make out a *prima facie* case that the Second Accused did not have adequate notice of the allegations against him.[259]

110. In *Ntabakuze* the Appeals Chamber said:

> In summary, objections based on lack of notice should be specific and timely. The Appeals Chamber agrees with the Prosecution that blanket objections that "the entire indictment is defective" are insufficiently specific. [91] As to timelines, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced. However, an objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial."[260]

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[257] *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-T-1057, "Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A," 14 March 2008.
[258] *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-T-1186, "Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment," 26 June 2008, para. 14.
[259] *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-T-1186, "Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment," 26 June 2008, para. 27.
[260] *Prosecutor v. Bagosera et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutoy Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Motion for Exclusion of Evidence,'" 18 September 2006, para.46; see also paras. 42 and 45.

111. In the present case, the Accused did not raise any objection to the evidence at the time it was tendered in court on grounds of lack of notice of material facts underpinning the charges in the Indictment. Further, each of the Accused cross-examined witnesses and did not seek any adjournment. The burden of proof shifts to the Defence to demonstrate whether the Accused's ability to defend himself has been materially impaired.[261]

d) Locations Not Specifically Pleaded in the Indictment

112. The Indictment states that at all times relevant to the Indictment, a state of armed conflict existed within Sierra Leone, that organized armed factions involved in the armed conflict included the RUF and the AFRC[262] and that a nexus existed between the armed conflict and charges in the Indictment.[263] The Indictment also informs the Accused that all offences alleged in the Indictment were committed within the territory of Sierra Leone.[264] It was always clear to the Accused that the armed conflict area was within Sierra Leone and the crimes charged in the Indictment were committed within Sierra Leone. Judicial notice was taken of the fact that conflict occurred in Sierra Leone[265] involving RUF and AFRC[266] and that the city of Freetown, the Western Area and the Districts of Port Loko, Bombali, Koinadugu, Kono, Kailahun, Kenema and Bo are located in the country of Sierra Leone.[267]

113. It is pleaded in the Indictment that particular acts took place in named locations in named Districts of the conflict area Sierra Leone. In naming the locations of the Districts where the acts took place, the Indictment uses the phrases, "locations in ... District including" or "locations including". Districts are discreet, narrow locations, and by the use of these phrases, it was made clear to the Accused, that the named locations where the acts took place in a particular District were not exhaustive. For example the Indictment in paragraph 48 alleges that: "Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono

[261] *Prosecutor v. Bagosera et al.*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutoy Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I "Decision on Motion for Exclusion of Evidence," 18 September 2006, para.45.
[262] Indictment, para. 5.
[263] Indictment, para. 6.
[264] Indictment, para. 16.
[265] *Prosecutor v. Issa Sesay*, SCSL-2003-05-T-392, "Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 May 2005, ("**Judicial Consequential Notice Order**"), Annex I, para. A.
[266] Judicial Consequential Notice Order, Annex I, para. H.
[267] Judicial Consequential Notice Order, Annex I, para. B.

District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Baiya". The phrase, "locations in Kono District, including", makes clear to the Accused that the named locations in Kono District were not exhaustive and included other locations within Kono District. The Accused knew that other locations of named Districts were included in the pleading in the Indictment.

114. In the *Brima et al* Trial Judgement, Trial Chamber II declined to make any findings on crimes perpetrated in locations not specifically pleaded in the indictment[268] and that decision was upheld by the Appeals Chamber.[269] This Trial Chamber has previously held as follows:

> Under category (iii) challenges, the Defence takes objection to the general formulation of the counts in certain particular respects. The main submission is that general formulations like *"such as"* or *"various locations"* or *"various areas....including"* do not specify or limit the reading of the counts but expand the Indictment without concretely identifying precise allegations against the Accused. The pith of the Defence submission is that these phrases are imprecise and non-restrictive. The Chamber's response to these submissions is that it is inaccurate to suggest that the phrases *"various locations"* and *"various areas....including"* in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example *"within the Southern or Eastern Province"* or *"within Sierra Leone."* This is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases *"such as"* and *'including but not limited to"* would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is, therefore, the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of the said phrases in the context herein. In the ultimate analysis, having regard to the cardinal principle of the criminal law that the Prosecution must prove the case against an accused beyond reasonable doubt, the onus is on the Prosecution to adduce evidence at the trial to support the charges, however formulated. The Chamber finds that even though, as a general rule, phrases of the kind should be avoided in framing indictments, yet in the specific context of paragraphs 23 and 24 they

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[268] *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-T-613, "Judgement," (***Brima et al* Trial Judgement**"), 20 June 2007, paras.37-38.

[269] *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A-675, "Judgement," Appeals Chamber ("***Brima et al* Appeal Judgement**), 22 February 2008, para.64.

> do not unfairly prejudice the Accused or burden the preparation of his defence. The defence protestation, is therefore, untenable.[270]

115. The Prosecution was entitled to proceed at trial on the basis that the Indictment was not defective or that the Accused were not unfairly prejudiced in pleading the locations of crimes in terms of "locations in ... District including" or "locations including," and that any Defence issue in this respect had been settled by pre-trail Decision of the Trial Chamber. This is particularly true in the case of certain locations which are only a short distance from a named location, for example, Wendedu is only about two miles from Koidu and is not named on maps.[271]

116. The Prosecution led evidence of crimes occurring in such locations not specifically named in the Indictment but found in Districts which are pleaded and are therefore covered by the use of these phrases. For example, Nimikoro, Wendedu and Koidu Town are all locations in Kono District. The Prosecution led evidence of crimes in Nimikoro, a location which is not specifically named.[272] The Prosecution also led evidence of unlawful killings in Wendedu which is not specifically pleaded for unlawful killings.[273] The Prosecution further led evidence of looting and physical violence in Koidu Town which is not specifically pleaded for looting[274] and physical violence.[275]

117. Based on the use of the phrases, "locations in ... District including" or "locations including" in the Indictment, the Trial Chamber's Decision[276] and the advance disclosures of evidence to the Defence in the form of witness summaries, witness statements and other disclosures, there can be no complaint that the Defence never had prior notice that Prosecution witnesses' evidence in court concerning particular Districts, would include evidence of acts or omissions in locations not specifically pleaded in the Indictment but covered by the use of the phrases "locations in ... District including" or "locations including". Any vagueness or ambiguity in this respect was therefore cured by the

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[270] *Sesay* Indictment Defect Decision, para. 23.
[271] TF1-217, Transcript 22 July 2004, p. 11.
[272] TF1-360, Transcript 20 July 2005, pp. 55-58; TF1-360, Transcript 26 July 2005, p. 74.
[273] TF1-071, Transcript 21 January 2005, pp. 50-62.
[274] TF1-360, Transcript 20 July 2005, p. 24; Dennis Koker, Transcript 28 April 2005, p. 46; TF1-141, Transcript 11 April 2005, pp. 95-96; TF1-366, Transcript 8 November 2005, p. 31.
[275] TF1-015, 27 Januray 2005, p. 129 lines 15-22.
[276] *Sesay* Defect of Indictment Decision.

provision of timely, clear and consistent information to the Defence. In *Ntabakuze* the ICTR Appeals Chamber emphasised that:

> The location of the crimes alleged to have been committed should be specified in the indictment. However, the degree of specificity required will depend on the nature of the Prosecution's case. As stated in the *Ntakirutimana* Appeal judgement, "[t]here may well be situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations." [277]
>
> ....
>
> Any vagueness or ambiguity in the above respects may be cured in certain cases by the provision of timely, clear and consistent information to the Defence.[278]

118. The Defence were at liberty to apply for appropriate relief where they formed the view that evidence was presented of crimes committed in locations not specifically pleaded in the Indictment. The measures that the Defence could seek, would include an adjournment, or exclusion of the evidence in question.[279] In this case, when evidence was led in court about crimes in locations not specifically pleaded in the Indictment, no objections were raised by the Accused and no adjournments were sought on the grounds that the Prosecution was leading evidence of crimes in locations not pleaded in the indictment. The Accused cross-examined witnesses on all matters including the evidence about crimes in locations not specifically named in the Indictment. To counter Prosecution evidence, the Defence teams on their own part led evidence in locations like Pendembu and Giema in Kailahun District, Makali, Makari and Makeni in Bombali District, which are not specifically pleaded in the Indictment.

119. During the Rule 98 stage, the Accused never complained about the Prosecution having led evidence of crimes in locations not specifically pleaded in the indictment[280]

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[277] *Prosecutor v. Bagosera et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutoy Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence," 18 September 2006, para.27(2).

[278] *Prosecutor v. Bagosera et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutoy Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence," 18 September 2006, para.27(3).

[279] *Prosecutor v. Ntakirutimana,* ICTR-96-10-A, "Judgement" , Appeals Chamber, 13 December 2004, para. 25; see also *Prosecutor v. Naletilic and Martinovic*, IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006, para. 25.

[280] See *Prosecutor v. Issa Sesay,Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-T-645, "Skeleton Argument in Support of Oral Motion for Judgement of Acquittal Pursuant to Rule 98", 25

apart from Kallon whose only complaint was that the burning of Koidu (Count 14) was not pleaded in the indictment.[281] An accused's submissions at trial, for example, a motion for acquittal, may assist in assessing to what extent the Accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[282]

120. The Trial Chamber is not precluded from considering for findings of guilt or otherwise, evidence of acts or omissions in locations not specifically pleaded with regard to particular counts. This should be considered on a case by case basis taking into account all relevant factors in each case. In *Brima et al,* Trial Chamber II in the exercise of its discretion, accepted the pleadings and considered evidence on the sexual slavery, child soldier and enslavement, Counts 9, 12 and 13, for findings of guilt or otherwise, in the absence of specificity with respect to locations. This decision was based on the ground that the Defence had not specifically objected to the said counts for lack of specificity with respect to locations.[283] The Appeals Chamber did not interfere with this decision.[284]

121. The Prosecution requests the Trial Chamber to consider and to make findings of guilt or otherwise, with regard to locations not specifically named in the Indictment, but covered by the use of the phrases, "locations in ... District including" or "locations including." Alternatively, but without prejudice to the above submissions, the Prosecution, relies on the evidence regarding locations not pleaded in the Indictment, as evidence of consistent pattern of conduct, and widespread or systematic attacks against a civilian population. Rule 93(A) of the Rules provides that "Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the statute may be admissible in the interests of justice." Thus, evidence of crimes outside the scope of the Indictment are admissible in establishing a consistent pattern of conduct.[285] The *Brima et al* Trial Judgement held that evidence of crimes which occurred in locations not charged

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September 2006; *Prosecutor v. Issa Sesay,Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-T-648, "Revised Skeleton Motion for Judgement of Acquittal of the Second Accused Morris Kallon," 27 September 2006; *Prosecutor v. Issa Sesay,Morris Kallon and Augustine Gbao*, Case No. SCSL-2004-15-T-644, "Skeletal Argument for Oral Submission Under Rule 98," 25 September 2006; Trancript 16 October 2006.

[281] Trancript 16 October 2006, p. 49-50.

[282] *Prosecutor v. Bagosera et al.,* ICTR-98-41-T, "Decision on Ntabakuze Motion for Exclusion of Evidence," 29 June 2006, para.6.

[283] *Brima et al* Trial Judgement, para.41.

[284] *Brima et al* Appeal Judgement, para.49.

[285] Richard May and Marieke Wierda (2002), International Criminal Evidence, Transnational Publishers, Inc., Ardsley, New York, 2002, pg 106, para. 4.32.

in the indictment may support proof of the existence of a widespread or systematic attack on a civilian population.[286]

[286] *Brima et al* Trial Judgement, para. 37.

IV. CONTEXTUAL ELEMENTS OF ARTICLES 2, 3 AND 4 OF THE STATUTE

122. The legal aspects of the contextual elements of Articles 2, 3 and 4 of the Statute were established in the preceding cases, mainly in the AFRC and in the CDF trial and appeal judgements.[287]

A. Article 2 of the Statute: Crimes Against Humanity

123. The Accused are charged with seven counts of crimes against humanity pursuant to Article 2 of the Statute: extermination (Count 3), murder (Count 4 and 16), unlawful killings (Count 16), rape (Count 6), sexual slavery (Count 7), enslavement (Count 13) and other inhumane acts (Count 8 and 11).

124. Article 2 of the Statute is entitled 'Crimes against humanity' and provides as follows:

> The Special Court shall have power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population. ...

125. Contrary to its ICTY and ICTR counterpart Article 2 of the Statute does not require such crimes to have been committed "during armed conflict"[288] or "on national, political, ethnic, racial or religious grounds"[289], nor is it necessary that the perpetrator had "knowledge of the attack", as required in the ICC Statute.[290]

a) Context Elements

126. In relation to any crime against humanity the Prosecution must prove the following elements: (i) there must be an attack; (ii) it must be widespread or systematic; (iii) and directed against any civilian population; (iv) the acts of the accused must be part of the attack; (v) and the accused must have knowledge that his acts constitute part of a widespread or systematic attack directed against a civilian population.[291]

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[287] *Brima et al* Trial Judgement, paras 210-258.
[288] ICTY Statute, Article 5.
[289] ICTR Statute, Article 3.
[290] ICC Statute, Article 7.
[291] *Brima et al* Trial Judgement, paras 213-222; *Fofana et al* Trial Judgement, para. 110, and paras 111-121; see also *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-469, "Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98", 31 March 2006, ("***Brima et al* Decision on Motion for Acquittal**") para. 42; Oral Decision on the RUF motions for judgment of acquittal, rendered on 25 October 2006, Transcript 25 October 2006, ("***Sesay et al* Decision on Motion for Acquittal**") p. 14, referring to

127. In both the AFRC and CDF trial judgements the Trial Chambers held that an 'attack' is defined as a "campaign, operation or course of conduct directed against a civilian population and encompasses any mistreatment of the civilian population".[292] Both judgements also found that the concepts of 'attack' and 'armed conflict' are distinct, although an attack in the sense of Article 2 may be part of an armed conflict.[293] However, an attack is not limited to the use of armed force, but encompasses any mistreatment of the civilian population.[294]

128. It is settled that "widespread" refers to the scale of the attack and the number of victims, while the "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence[295] and that these requirements are disjunctive.[296] It is the attack itself and not the individual acts of the accused that must be widespread or systematic.[297] When establishing that there was an attack against a particular civilian population, it is irrelevant whether the other side in a conflict also committed crimes against a civilian population.[298]

129. The *mens rea* element is satisfied if the accused had knowledge of the general context in which his acts occurred and of the nexus between his acts and that context,[299] in addition to the requisite *mens rea* for the underlying offence or offences with which he is charged.[300]

Prosecutor v. Norman, Kondewa, Fofana, SCSL-04-14-T-473, Decision on Motions for Judgement of Acquittal pursuant to Rule 98", 21 October 2005, ("***Norman et al* Decision on Motion for Acquittal**"), paras 56-59.

[292] *Brima et al* Trial Judgement, para. 214. Similarly: *Fofana et al* Judgement, para. 111. Both referring to *Kunarac* Appeal Judgement, paras 82-89; *Akayesu* Trial Judgement, para. 581; *Limaj* Trial Judgement, para. 182; *Naletilić and Martinović* Trial Judgement, para. 233.

[293] *Brima et al* Trial Judgement, para. 214. Similar: *Fofana et al* Trial Judgement, para. 111; referring to *Vasiljević* Trial Judgement, para. 30; *Kunarac* Appeal Judgement, para. 86.

[294] *Limaj* Trial Judgment, para. 182.

[295] *Brima et al* Judgement, para. 215; *Fofana et al* Judgement, para. 112; *Blaškić* Appeal Judgment, para. 101; *Tadić* Trial Judgement para. 646.

[296] *Kunarac* Appeal Judgment, para. 95; *Kordić and Čerkez* Appeal Judgment para. 93.

[297] *Blaškić* Appeal Judgment, para. 101.

[298] *Kunarac* Appeal Judgment, paras 87-88.

[299] *Kunarac* Appeal Judgment, para. 102.

[300] *Kunarac* Appeal Judgment, para. 102.

b) Evidentiary Basis

130. The evidence adduced proves a pattern of *attacks and campaigns* led by the RUF alone or in conjunction with the AFRC, throughout Sierra Leone, in particular in strategically important areas. The campaigns were massive, frequent, large-scale actions and they were "carried out collectively with considerable seriousness and directed at multiple victims."[301] During the Indictment period civilians were systematically killed, mutilated, or otherwise injured in order to terrorize and subdue the civilian population.[302] Adults and children were massively and systematically enlisted into the RUF and used in hostilities or for other military purposes in order maintain and enforce the manpower of the RUF and AFRC forces.[303] Civilians were captured and used for forced labour to carry loads of ammunition, looted goods, food and other material, to farm, to mine diamonds, and other labour. Due to lack of manpower the RUF and AFRC were completely reliant on these forms of forced labour. Although it is not a legal requirement that the crimes were supported by a policy or plan, it can be relevant to establish the widespread or systematic nature of the attack and that it was directed against a civilian population.[304] In the CDF case the Appeals Chamber found that, as a matter of law, a military attack can coexist with an attack directed against a civilian population.[305]

131. In order to evaluate whether such attacks were *'widespread' or 'systematic'* the targeted population as well as "the means, methods, resources and result of the attack upon the population" need to be identified.[306] The evidence shows that the campaigns and attack lead by the RUF and AFRC, were well organised at the highest level, followed a regular

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[301] *Akayesu* Trial Judgement, para. 580; *Kayishema and Ruzindana* Trial Judgement, para. 123; *Kunarac* Appeals Judgement, para.94; *Tadić* Trial Judgement, para. 648.
[302] Exhibit 163, UNOMSIL - Human Rights Situation Report and Preliminary Technical Assistance Needs Assessment, 19 July 1998 (19185-19188), pp. 19186-19187. ("**UNOMSIL Human Rights Report 1998**").
[303] Exhibit 155, Fourth Secretary General Report, 1998, para. 28., Exhibit 158, Humanitarian Situation Report, 1999, p. 4 (19112), Exhibit 162, Sixth Report of the Secretary-General on the United Nations Observation Mission in Sierra Leone, 4 June 1999 (S/1999/645) [paras 19-20 and 28-33 (19171-19173)], ("**Exhibit 162, Sixth UNOMSIL Report 1999**"), para 32., Exhibit 175, Human Rights Watch Report "Sowing Terror, Atrocities against Civilians in Sierra Leone", Vol. 10, No. 3(A), July 1998, [p. 4 (19437) and Section entitled: Killings, Mutilations, Sexual Abuse, and Enslavement by the AFRC/RUF in Human Rights Abuses Committed by Members of the AFRC/RUF, pp. 15-23 (19448-19456)], ("**Exhibit 175, HRW Report 1998**"), pp. 21-23 (19454-19456); Exhibit 177, Amnesty International, "Sierra Leone: Childhood - A Casualty of Conflict", A1 Index: AFR 51/69/00, 31 August 2000 ("**AI Report 2000**"), pp. 3-7, 16-18 (19542-19546, 19555-19557).
[304] *Limaj* Trial Judgement, para. 184; *Blaškić* Appeal Judgement, paras 100, 120; *Kunarac* Appeal Judgement, para. 98.
[305] *Fofana et al* Appeal Judgement, para. 252.
[306] *Kunarac* Appeal Judgement, para. 95.

pattern[307] and were carried out pursuant to a pre-conceived plan and policy,[308] and were not isolated or random acts.[309] International human rights organisation as well as the UN repeatedly defined the attacks by RUF and AFRC forces as "systematic and widespread perpetration of multiple forms of human rights abuse against the civilian population..." Numerous human rights reports gave accounts of the systematic manner in which human rights abuses by RUF occurred,[310] especially in the years 1997[311] 1998[312] and 1999[313]. During the AFRC/RUF Junta period, from May 1997 to February 1998, the violence against civilians came close to what could be considered as a "state-sponsored" campaign against opponents.[314] After the ECOMOG intervention in February 1998, when the AFRC and RUF forces retreated from and re-attacked different strategic locations, including the capital in January 1999, the violence became more cruel and aimed at punishing "disloyal" civilians or deterring them from supporting the government. The violence in Sierra Leone lead the Security Council to determine in its Resolution 1132, dated 8 October 1997 that the "situation in Sierra Leone constitutes a threat to international peace and security in the region."[315]

132. The evidence leaves no doubt that the *civilian population was the primary object* of these campaigns, as reflected in the testimonies that follow and in numerous human rights and situation reports.[316] Mutilations, killings, burning, and other forms of destruction of

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[307] Exhibit 161, Third Progress Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, *16 December 1998,* (S/1998/1176)[PARAGRAPH 18 (19150), 32 AND 36-37 (19153-19154)] ("**Third UNOMSIL Report 1998**"), para. 36; Exhibit 163, UNOMSIL - Human Rights Situation Report and Preliminary Technical Assistance Needs Assessment, 19 July 1998 (19185-19188), pp. 19186-19187. ("**UNOMSIL Human Rights Report 1998**"), (19187); *Kunarac* Trial Judgement, para. 429; *Kunarac* Appeal Judgement, para. 94.

[308] *Akayesu* Trial Judgement, para. 580; *Kayishema and Ruzindana* Trial Judgement, para. 123; *Kunarac* Appeals Judgement, para.94; *Tadić* Trial Judgement, para. 648.

[309] *Tadić* Trial Judgement, para. 649.

[310] Exhibit 174, HRW Report 1999, pp. 10-11, (19378-19379); Exhibit 176, AI Report 1998, pp. 15-16 (19493-19494) and 19-22 (19497-19500); pp. 19-22; Exhibit 178, US State Department Report 1998, p. 3 (19583).

[311] E.g. Exhibit 178, US State Department Report 1998, pp. 3-9 (19583-19589).

[312] Exhibit 159, First UNOMSIL Report 1998, para. 36 (19122); Exhibit 161, Third UNOMSIL Report 1998, para. 36 (19154). See also: Exhibit 163, UNOMSIL Human Rights Report 1998, p. 19188.

[313] Exhibit 162, Sixth UNOMSIL Report 1999, para. 32.

[314] Exhibit 178, US State Department Report 1998, pp. 1-3 (19581-19583); Exhibit 181, Report of the NGO No Peace Without Justice, Conflict Mapping in Sierra Leone, 10 MARCH 2004 ("**NPWJ Conflict Mapping**"), p. 24245.

[315] Exhibit 153, Security Council Resolution 1132, p. 2. (19078)

[316] Exhibit 147, UNOMSIL Human Rights Assessment 1999, pp. 4-6 (19044-19046); Exhibit 160, Second UNOMSIL Report, 1998, para. 22 (19136); Exhibit 162, Fourth UNOMSIL Report, 1998, para. 31 (19172); Exhibit 174, HRW Report 1999, pp. 10-11, (19378-19379); Exhibit 174, HRW Report 1999, pp. 29, 33-34,

property and abductions, rape and other forms of sexual violence aimed at terrorizing, punishing and deterring civilians from supporting the democratically elected government of President Kabbah and to ultimately control the captured areas and suppress its population. During attacks, especially when civilians were mutilated they were told that this was a punishment for voting for the government and that they should go to President Kabbah to get new hands,[317] as described in detail in the evidence section of Counts 10 and 11, below. The vast majority of the evidence shows that the victims were civilians[318] and only a hand-full of the witnesses mention that combatants were targeted as well.[319] Even if there were non-civilians amongst the targeted population, this does not change the civilian character of that population.[320] Further, the means and methods used in the course of the attack, for instance, disguising RUF combatants as ECOMOG soldiers or misinforming civilians that ECOMOG was back in control in specific areas in order to lure civilians from their hidings in the bush to their villages,[321] the status and number of the victims, and the nature of the crimes committed in course of the attack, clearly indicate the civilian nature of the targeted

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(19397, 19401-19402); Exhibit 175, HRW Report 1998, pp. 17-19 (19450-19452); Exhibit 176, AI Report 1998, pp. 19-22 (19497-19500); Exhibit 178, US State Department Report 1998, 3 (19583): "Since 1991 the RUF waged an armed rebellion marked by violent attacks against civilians." Further, in the AFRC Trial Judgement the Trial Chamber found that "it is established beyond reasonable doubt that a widespread or systematic attack by AFRC/RUF forces was directed against the civilian population of Sierra Leone at all times relevant to the Indictment.", para. 224.

[317] TF1-179, Transcript 27 July 2005, pp. 38-41; Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, pp. 83-84; TF1-213, 2 March 2006, pp. 16-17. TF1-197, Transcript 22 October 2004, p. 16; TF1-172, Transcript 17 May 2005 p. 24- 25; TF1-172, Transcript 17 May 2005, p. 13-14. [redacted]

[318] Exemplary: TF1-015, Transcript 27 January 2005, p. 95 (lines 17-25): "A. Everybody was panicking and they were all civilians. I didn't see anything with them. Q. Did you observe any weapons on any of the civilians running away? A. I didn't see any weapon. Q. To the best of your knowledge were any of the civilians you saw running away participants in the shooting? A. To my own knowledge I didn't see anybody with weapon and I didn't see anybody shooting among the civilians."

[319] [redacted] and Exhibit 59a, TF1-023, Transcript from AFRC Trial, Transcript 09 March 2005, p. 36.

[320] *Tadić* Appeal Judgement, para. 644.

[321] E.g. TF1-217, Transcript 22 July 2004, pp. 9-15 and 32; Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 12-13 and [redacted]

population.[322] The more detailed comments in the section on Counts 15 to 18, in particular paragraphs 1119 to 1123 and 1136 make clear that this was also the case for the UN peacekeepers and military observers who were attacked and taken hostage by the RUF in May 2000.

133. The fact that certain areas of Sierra Leone were more affected than others by the attacks of the RUF and AFRC, and that in certain areas, such as Kailahun, the RUF stronghold, civilians were less exposed to violence than those in other areas, does not rule out an attack against the civilian population. The attacks need not be directed against the "entire population of the geographical entity in which the attack took place", since it is enough to show "that a sufficient number of individuals were targeted" 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".[323] The evidence shows that civilians were especially targeted for two major reasons: if they lived in areas controlled by the opposing party as a way to punish and deter, as shown clearly in the following sections on Count 1 to 11, or because they were needed as workforce in forced labour, as sex slaves or for military reinforcement, as set out in the sections on Count 9 and 12 to 13.

134. The evidence further shows that the *necessary nexus between the act of the accused and the attack* existed, since the acts of the accused need only form part of the attack, viewed objectively,[324] by their nature or consequences.[325] The three Accused were amongst the most senior commanders of the RUF and, during the Junta period, of the AFRC and RUF Junta. The evidence adduced shows that the three Accused in their respective functions as RUF commanders, by their acts and omissions, were part of the widespread and systematic attack on the civilian population and that their acts were not isolated or random.[326] They were in positions of command where the alleged crimes occurred, they were involved in the planning and carrying out of some of the alleged crimes and they

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[322] *Brima et al* Trial Judgement, paras 218-219; referring to *Galić* Appeal Judgement, footnote 437; *Blaškić* Appeal Judgement, fn. 220.
[323] *Brima et al* Trial Judgement, para. 217; *Kunarac* Appeal Judgment, para. 90; *Limaj* Trial Judgment, para. 187.
[324] *Limaj* Trial Judgment, para. 188.
[325] *Brđanin* Trial Judgment, para. 132.
[326] *Ibid.*

formed part of a joint criminal enterprise that had the ultimate goal to gain control over Sierra Leone. There is no need to show that they committed the acts "in the midst of the attack".[327] Viewed objectively, by their nature or consequences, their acts clearly formed part of the RUF campaign.[328] *In casu*, reliable indicia of a nexus existed, especially "the nature of the events and circumstances surrounding the perpetrator's acts; the temporal and geographic proximity of the perpetrator's acts with the attack; and the nature and extent of the perpetrator's knowledge of the attack when he commits the acts."[329]

135. As to the *mens rea* requirements, all three Accused, due to their senior position within the RUF and the Junta hierarchy, had not only understood the "greater dimension of criminal conduct"[330], they were aware that a widespread or systematic attack on the civilian population was taking place and that their action was part of this attack.[331] Even more, they shared the purpose or goal behind the attack.[332] The accused's motives are irrelevant and they need only know that his or her acts are parts thereof.[333] In the CDF case the Appeals Chamber underlined that the purpose for which a party is fighting is not decisive for the determination of the general requirements for crimes against humanity.[334] Further, crimes against humanity may be committed for purely personal reasons[335] and it does not matter whether the accused intended his acts to be directed against the targeted population or merely against his victim.[336] Thus, the alleged acts enslavement committed by the Accused in relation with "private mining"[337] or "private farming"[338] or of forced marriage and sexual slavery,[339] qualify as crimes against humanity.

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[327] *Ibid.*
[328] *Limaj* Trial Judgment, para. 188.
[329] *Brima et al* Trial Judgement, para. 220; referring to *Tadić* Appeal Judgement, paras 632.
[330] *Prosecutor v. Bagilishema,* ICTR-95-1A-T, "Judgement", ("Trial Judgment") Trial Chamber, 7 June 2001, para. 94; *Limaj* Trial Judgment, para. 190.
[331] *Brima et al* Trial Judgement, para. 221, referring to *Kunarac* Appeal Judgement, para. 121; *Tadić* Appeal Judgement, para. 255.
[332] *Brima et al* Trial Judgement, para. 222; *Kordić and Čerkez,* Appeal Judgment, para. 99; *Kunarac* Appeal Judgment, para. 103; *Blaškić* Appeal Judgment, para. 124.
[333] *Limaj* Trial Judgement, para. 190; *Tadić* Appeal Judgment, paras 248-272; *Kunarac* Appeal Judgment, para. 103.
[334] *Fofana et al* Appeal Judgement, para. 249.
[335] *Kordić & Čerkez,* Appeal Judgment, para. 99; *Kunarac* Appeal Judgment, para. 103 (footnotes omitted); *Blaškić* Appeal Judgment, para. 124.
[336] *Kunarac* Appeal Judgment, para. 103.
[337] TF1-367, Transcript 22 June 2006, Closed Session, pp. 49-52. Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 17 May 2005, pp. 40-44, 53-57.

c) Conclusion

136. The evidence establishes the widespread and systematic nature of the attack against the civilian population for the entire period of the Indictment, taking into consideration the frequency of the attacks, the prolonged period of the campaigns, and the vast territorial areas and the high number of civilian victims affected and the regular pattern of crimes, which clearly reflected a plan and purpose. It is also beyond reasonable doubt that the Accused knew that their conduct formed part of this widespread or systematic attack.

B. Article 3 of the Statute: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

137. The Accused are charged with six counts of violations of Article 3 Common to the Geneva Conventions ("**Common Article 3**") and of Additional Protocol II, pursuant to Article 3 of the Statute: acts of terrorism (Count 1), collective punishments (Count 2), violence to life, health and physical or mental well-being of persons, in particular murder (Count 5 and Count 17), outrages upon personal dignity (Count 9), violence to life, health and physical or mental well-being of persons, in particular mutilation (Count 10), pillage (Count 14), and the taking of hostages (Count 18).

a) Context Elements

138. The contextual elements of Article 3 of the Statute have been established by this Court as the following: 1) an armed conflict existed at the time of the alleged violation of Common Article 3 or Additional Protocol II; 2) a nexus existed between the alleged violation and the armed conflict; and 3). the victim was a person taking no direct part in the hostilities at the time of the alleged violation.[340]

139. The alleged acts of the Accused must be committed in the course of an armed conflict, and that "it is immaterial whether the conflict is internal or international in

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[338] DIS-178 Transcript 19 October 2007, pp. 5-7 and DIS-117 Transcript 5 October 2007, p. 18; TF1-108, Transcript 7 March 2006, pp. 104-105. TF1-330, Transcript 14 March 2006, pp. 24-25, 27, 28, 30-31; DIS-302, Transcript 27 June 2007, pp. 7-9.

[339] TF1-366, Transcript 8 November 2005, Closed Session, pp. 72-76; TF1-141, Transcript 11 April 2005, pp. 90-95; [redacted]; TF1-108, Transcript 9 March 2006, pp. 4-6.

[340] *Brima et al* Trial Judgement, paras 243-254; *Fofana et al* Trial Judgement, para. 122; *Sesay et al* Decision on Motion for Acquittal, p. 15 (lines 3- 7).

nature."[341] Further, under Common Article 3, "an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state"[342] and international humanitarian law applies from the initiation of such armed conflicts until a general conclusion of peace is reached or a peaceful settlement is achieved.[343] Protocol II to the Geneva Conventions applies if an armed conflict took place in a state "between its armed forces and dissident armed forces or other organized armed groups; and [t]he dissident armed forces or other organized groups: (ii) Were under responsible command; (iii) Were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and (iv) Were able to implement Additional Protocol II."[344]

140. In addition, for an offence to fall within the scope of Article 3 of the Statute, a sufficient link must exist between the alleged violation and the armed conflict. The nexus is satisfied where the perpetrator acted in furtherance of, or under the guise of, the armed conflict.[345] This is, for example, the case if the perpetrator was a combatant, if the act can be said to have served a military campaign, and if the crime was committed as part of, or in the context of, the perpetrator's official duties.[346] Further, "[b]oth Common Article 3 and Additional Protocol II protect only those persons who take no active or direct part in the hostilities, and those who have ceased to take part therein and are therefore placed *hors de combat* by sickness, wounds, detention or any other cause. To fulfil this requirement, the Prosecution must prove the relevant facts of each victim with a view to ascertain whether that person was actively involved in the hostilities at the relevant time."[347]

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[341] *Sesay et al* Decision on Motion for Acquittal, p. 15, referring to *Norman et al* Decision on Motion for Acquittal, para. 68, citing, *inter alia, Kunarac* Appeal Judgement, paras 57-58.
[342] *Brima et al* Trial Judgement, para. 243; *Fofana et al* Trial Judgement, para. 124 and para. 128; *Tadic* Appeal Decision on Jurisdiction, para. 70.
[343] *Brima et al* Trial Judgement, para. 245; *Kunarac* Appeal Judgement, para. 57.
[344] *Fofana et al* Trial Judgement, para. 126, referring to *Akayesu* Trial Judgement, para. 623; *Rutaganda* Trial Judgement, para. 95; *Musema* Trial Judgement, para. 254.
[345] *Brima et al* Trial Judgement, para. 246; *Fofana et al* Trial Judgement, para. 129; *Kunarac* Appeal Judgement, para. 58; *Tadić* Appeals Chamber Jurisdiction Decision, para. 70; *Rutaganda* Appeal Judgement, para. 570.
[346] *Brima et al* Trial Judgement, para. 247 (footnotes omitted), referring *inter alia* to *Kunarac* Appeal Judgement, paras 58-59.
[347] *Brima et al* Trial Judgement, para. 248, referring to *Tadić* Trial Judgement, para. 615; *Semanza* Trial Judgement, para. 365; *Halilović* Trial Judgement, para. 32. See also: *Fofana et al* Trial Judgement, paras 131-135.

b) Evidentiary Basis

141. The existence of an armed conflict during the Indictment period is not in question, since judicial notice had been taken of the fact that a state of war existed in Sierra Leone between 1991 and 2002 involving the RUF, AFRC and CDF.[348] The AFRC Trial Chamber found that the conflict was of a non-international character.[349] The same Trial Chamber found that the "armed conflict continued along the same lines after the ECOMOG intervention which saw the Kabbah government reinstated."[350] It further held that the "May 1999 Ceasefire Agreement and the July 1999 Lomé Peace Treaty both provided for the cessation of the armed conflict, which did not eventuate."[351] Documentary evidence shows that attacks by AFRC and RUF forces continued throughout 1999.[352]

142. The evidence shows that the crimes were closely related to this conflict. The crimes alleged in Counts 1, 2, 5, 9, 10, 14 and 18 were committed in furtherance of or under the guise of the armed conflict.[353] The evidence also proves that the acts of terrorism, the collective punishments and the extreme violence to life, health and physical or mental well-being of persons, in particular mutilations and murder as well as the systematic sexual violence, the pillage and the taking of hostages of UN peacekeepers and military observers were part of the RUF war efforts. The armed conflict played a substantial part in the perpetrators' ability to commit these offences even if they did not necessarily occur when fighting was actually going on or at the scene of combat.[354]

143. It has been shown above, that the vast majority of the victims of these offences were civilians. It was part of the war strategy of the RUF and the AFRC to target

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[348] Judicial Consequential Notice Order, Annex A, p. 11991; endorsed in *Brima et al* Trial Judgement, para. 249.
[349] *Brima et al* Trial Judgement, para. 251, referring to the test applied in *Tadić*, Appeal Judgement, para. 84.
[350] *Brima et al* Trial Judgement, para. 252; see also: Exhibit 181, NPWJ Conflict Mapping, pp. 24247-24251.
[351] *Brima et al* Trial Judgement, para. 253 (footnotes omitted).
[352] See: Exhibit 162, Fourth UNOMSIL Report 1999, paras 19-20; Exhibit 181, NPWJ Conflict Mapping, pp. 24252-24254.
[353] *Brima et al* Trial Judgement, para. 246; *Sesay et al* Decision on Motion for Acquittal, p. 14-15; *Kunarac* Appeal Judgement, para. 58; *Rutaganda* Appeal Judgement, para. 570.
[354] *Brima et al* Trial Judgement, para. 243; *Sesay et al* Decision on Motion for Acquittal, p. 14; *Kunarac* Appeal Judgement, para. 58; *Rutaganda* Appeal Judgement, para. 570.

specifically civilians who lived in captured areas in order to deter, punish and control the civilian population and to demoralize the other party.[355]

c) Conclusion

144. The evidence establishes the existence of an armed conflict at the time of the alleged violations of Common Article 3 or Additional Protocol II as well as the existence of a link between the alleged violation and the armed conflict. It is further established that the victims of these crimes were in their vast majority persons taking no direct part in the hostilities at the time of the alleged violation.

C. Article 4 of the Statute: Other Serious Violations of International Humanitarian Law

145. The Accused are charged with two counts of 'other serious violations of international humanitarian law' pursuant to Article 4(b) and (c) of the Statute, namely conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Count 12) and intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission (Count 15).

146. Article 4 of the Statute possesses the same chapeau requirements as Article 3 of the Statute,[356] in particular the existence of an armed conflict at the time of the alleged violation and of a nexus between the alleged violation and the armed conflict.[357]

147. The Prosecution therefore refers to the evidentiary findings and conclusion set out above.

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[355] TF1-179, T. 27 July 2005, pp. 40-42; Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, pp. 83-84; TF1-213, 2 March 2006, pp. 16. TF1-197, Transcript 22 October 2004, p. 16; TF1-172, Transcript 17 May 2005 p. 24- 25; TF1-172, Transcript 17 May 2005, p. 13-14. [redacted]

[356] *Brima et al* Trial Judgement, para. 257.

[357] *Fofana et al* Trial Judgement, paras 138-139; *Sesay et al* Decision on Motion for Acquittal, p. 16.

V. MODES OF LIABILITY

148. The evidence establishes the responsibility of the three Accused under Articles 6(1) and 6(3) of the Statute for the eighteen counts in the Indictment. The recognition in the Statute that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law.[358] The Statute does not make any legal distinction between the different modes of participation and the consequences of engaging in any of the mentioned forms of participation entails equal criminal liability.[359]

A. Planning, Instigating, Ordering, Committing and Aiding and Abetting: Article 6(1) of the Statute

a) Planning

149. To secure a conviction for planning a crime, the Prosecution must show that: (1) the accused, either alone or in concert with others, designed or organized the commission of the *actus reus* of a crime which was subsequently perpetrated.[360] The criminal conduct designed constitutes one or more statutory crimes that are later perpetrated[361] by another person[362] and can be an acts or omissions;[363] (2) the planning was a factor substantially contributing to the criminal conduct;[364] and (3) the accused acted with direct intent, or was aware of the substantial likelihood that a crime would be committed in the execution of the plan.[365]

150. It needs to be established that the Accused, directly or indirectly, intended the crime in question to be committed.[366] The required *mens rea* is that of intent or recklessness.[367] The accused may be held criminally responsible for "planning" crimes that are committed

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[358] *Prosecutor v. Delalic et al. (Celebici)*, IT-96-21-A, 'Judgement', Trial Chamber, 16 November 1998, para. 321.
[359] Antonio Cassese, "International Criminal Law", Oxford University Press, 2003, at p. 180. The ICTY and ICTR adopt a purposive approach, wherein they sought to establish the object and purpose of the provisions of the Statute as opposed to narrow construction. See e.g. *Tadic* Appeal Chamber Judgement, para. 189.
[360] *Brima* Decision on Motion for Acquittal, para. 284; *Akayesu* Trial Judgement, para. 480.
[361] *Kordić and Čerkez* Appeals Judgement, para. 26 ; *Kordić and Čerkez* Trial Judgement, para. 386; *Limaj* Trial Judgement, para. 513; *Akayesu* Trial Judgement, para. 473.
[362] *Bagilishema* Trial Judgement, para. 30.
[363] *Kordić and Čerkez* Appeal Judgement, para. 31.
[364] Ibid., para. 26; *Bagilishema* Trial Judgement, para. 30; *Stakić Rule* 98*bis Decision*, paras. 103-104.
[365] *Brima* Decision on Motion for Acquittal, para. 284; *Kordić and Čerkez* Appeal Judgement, paras. 29, 31.
[366] *Brđanin* Trial Judgement, para. 268.
[367] *Blaškić* Trial Judgement, para. 267.

in the execution of his plan, even if those crimes were not part of the plan, provided that he was aware of the substantial likelihood of their being committed.[368]

151. There may be different levels of culpability for "planning", depending on levels of command.[369] A superior commander, for example, may determine the overall strategy whereas the field commander may have substantial discretion in determining his or her tactical plan in accordance with the superior commander's operational requirements. An accused may be held liable on the basis of planning alone, but may additionally be liable under other modes of liability where the evidence supports such a finding. In these circumstances, the accused's involvement in planning the crime at least constitutes an aggravating factor.[370]

b) Instigating

152. In order to secure a conviction for instigating a crime, the Prosecution must show that: (1) the *actus reus* of a crime was performed by a person other than the accused; (2) the accused prompted the person to commit an offence punishable under the Statute,[371] in the sense that the conduct of the accused was a factor substantially contributing to the conduct of the other person;[372] and (3) the accused acted with direct intent, or was aware of the substantial likelihood that a crime would be committed in response to his prompting.[373]

153. There must be a causal connection between the instigation and the execution of the crime, but this connection need not amount to a *conditio sine qua non*.[374] Instigation can be express or implied, and can also occur by omission rather than by a positive act, provided

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[368] *Kordić and Čerkez* Appeal Judgement, para. 30; *Tadić* Trial Judgement para. 692.
[369] *Kupreškić* Trial Judgement, para. 862, where a commander that has been held criminally liable for passing orders from his superiors to his subordinates is also considered to have "assisted in the strategic planning of the whole attack."
[370] *Brđanin* Trial Judgement, para. 268.
[371] *Orić* Trial Judgement, para. 270.
[372] *Akayesku* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Brđanin* Trial Judgement, para. 269; *Rutaganda* Trial Judgement, para. 38 ; *Prosecutor v. Strugar*, IT-01-42-T, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 bis", Trial Chamber, 21 June 2004, para. 86; *Kvočka et al.* Trial Judgement, para. 252; *Naletilić and Martinović* Trial Judgement, para. 60; *Brđanin* Trial Judgement, para. 269; *Kordić and Čerkez* Appeal Judgement, para. 27.
[373] *Brima* Decision on Motion for Acquittal, para. 293; *Kordić and Čerkez* Appeal Judgement, paras. 32;.
[374] *Blaškić* Trial Judgement, para. 280; *Tadić* Trial Judgement, para. 688; *Kvočka* Trial Chamber Judgement, para. 252; *Čelebići* Trial Judgement, para. 327; *Kordić and Čerkez* Trial Judgement, para. 387; Also see Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, page 190; *Galić* Trial Judgement, para. 168; *Akayesu* Trial Judgement, para. 482

that the accused intended to cause the direct perpetrator to act in a particular way and, in fact, had that effect.[375] A superior's persistent failure to prevent or punish crimes by his subordinates can also constitute instigation.[376]

154. For the *mens rea* to be fulfilled, it is necessary that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts or omissions.[377] Consequently, as in the case of "planning", the accused may be held criminally responsible for "instigating" crimes that are committed in the course of executing the instigated crime, even if the accused did not intend to instigate such crimes, so long as he was aware of the substantial likelihood of their being committed.[378] Accordingly, the required *mens rea* is that of intent or recklessness.[379]

c) Ordering

155. In order to secure a conviction for ordering a crime, the Prosecution must demonstrate that: (1) the *actus reus* of the crime was performed by a person or persons other than the accused, with or without the participation of the accused; (2) the perpetrator(s) acted in execution of an express or implied order given by the accused to a subordinate or other person over whom the accused was in a position of authority; and (3) the accused issued the order with direct intent, or was aware of the substantial likelihood that a crime would be committed in the execution of the order.[380]

156. An accused may be held liable for orders given within regular military formations as well as irregular bodies, such as paramilitary forces, in which there is no *de jure* superior-subordinate relationship, provided the accused is vested with an authority that

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[375] *Blaškić* Trial Judgement, para 280; *Brđanin* Trial Judgement, para. 269.
[376] *Blaškić* Trial Judgement, para. 337.
[377] *Brđanin* Trial Judgement, para. 269; *Kordić and Čerkez* Appeal Judgement, paras 32, 112.
[378] *Limaj et al.* Trial Judgement para. 514; *Tadić* Appeal Judgement, para. 220: "What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called dolus eventualis is required..." ; *Tadić* Trial Judgement, para. 692.
[379] *Blaškić* Trial Judgement, para. 267.
[380] *Strugar* Trial Judgement, paras. 331-333; See also *Brima et al* Decision on Motion for Acquittal, para. 296.

enables him or her to give orders to the other members of the group.[381] The necessary authority may be informal or of a purely temporary nature.[382] Nor is there a requirement that the order be in writing or in any particular form.[383] It may be express or implied.[384] An order "does not need to be given by the superior directly to the person who performs the *actus reus* of the offence."[385] The existence of an order may be proven circumstantially and there is no requirement to adduce direct evidence that the order was given.[386] In order to determine whether a superior in fact must have had the requisite knowledge the following indicia may be considered: the number and scope of illegal acts; the number, identity and type of troops involved; the effective command and control exerted over these troops; the logistics involved, if any; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; the location of the superior at the time; and the superior's knowledge of crimes committed by his subordinates.[387] An accused may also be liable for receiving a criminal order and using his powers to instruct his subordinates to perform it. According to the *Kupreškić* Trial Chamber, this amounts to the "reissuing of orders that were illegal in the circumstances."[388]

157. A causal link between the act of ordering and the perpetration of a crime is a required component of the *actus reus* of ordering.[389] Such link need not be such that the offence would not have been committed in the absence of the order.[390]

158. With regard to the *mens rea*, it must be established that the accused in issuing the order intended to bring about the commission of the crime, or was aware of the substantial likelihood that it would be committed in execution of the order.[391] However, if the order is

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[381] *Strugar* Trial Judgement, para. 331; *Kordić and Čerkez* Appeal Judgement, para. 28; *Kordić and Čerkez* Trial Judgement, para. 388; *Brđanin* Trial Judgement, para. 270.
[382] *Semanza* Appeal Judgement, para. 363; *Kordić and Čerkez* Trial Judgement, para. 388;
[383] *Strugar* Trial Judgement, para. 331; *Blaškić* Trial Judgement, para. 281.
[384] *Blaškić* Trial Judgement, para. 281.
[385] Ibid., para. 282.
[386] *Strugar* Trial Judgement, para. 331; *Kordić and Čerkez* Trial Judgement, para. 388; *Blaškić* Trial Judgement, para. 281.
[387] *Galić* Trial Judgement, para. 171; *Blaškić* Trial Judgement, para. 307; *Celebici* Judgement, para. 386.
[388] *Kupreškić* Trial Judgement, para. 862.
[389] *Strugar* Trial Judgement, para. 332.
[390] Ibid.
[391] *Blaškić* Appeal Judgement, para. 42 "... a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.";; *Kordić* Appeal Judgement, para. 30; *Strugar* Trial Judgement, para. 333.

generic (e.g. an order to abuse prisoners of war), the mental element of recklessness or gross negligence is sufficient.[392] It is the *mens rea* of the person who gave the order that is important and not that of the actual perpetrator.[393] A conviction for "ordering" a particular crime will not be entered where the accused has committed the same crime.[394]

d) Committing

159. An accused may be found liable for directly committing alone a crime if the Prosecution has demonstrated that: (1) the accused performed all elements of the *actus reus* of the crime in question. This means the participation of the accused physically or otherwise directly, in the material elements of a crime under the Court's Statute[395] or failing to act when such a duty exists;[396] and (2) the accused acted or failed to act with the required *mens rea* for the crime in question.[397] The accused must either possess the *mens rea* of the relevant crime, or be aware of the substantial likelihood that a crime would occur as a consequence of his or her act or omission.[398]

e) Aiding and Abetting

160. The elements of aiding and abetting are: (1) the accused carries out an act or omission[399] specifically directed to assist, encourage or lend moral support to the perpetration of a crime physically committed by a person other than the accused; (2) the accused's conduct has a substantial effect upon the perpetration of the crime; and (3) the accused acted with knowledge that his conduct would assist in the commission of the crime.[400]

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[392] Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 194, footnote 13; *Blaškić* Trial Judgement, para. 267.
[393] *Blaškić* Trial Judgement, para. 282.
[394] *Stakić* Rule 98 bis Decision, para. 109.
[395] *Kvočka* Trial Judgement, para. 251.
[396] *Simić* Trial Judgement, para. 137; *Stakić* Trial Judgement, para. 439;*Vasiljević* Trial Judgement, para. 62; *Krstić* Trial Judgement, para. 601.
[397] *Kordić and Čerkez* Trial Judgement, para. 376; *Kvočka* Trial Judgement, para. 251.
[398] *Kvočka* Trial Judgement, para. 251.
[399] *Brdanin*, Trial Judgement, para. 271; *Kvocka,*Trial Judgement, para. 256; *Aleksovski* Trial Judgement, para. 62; *Blaškić* Trial Judgement, para. 284. Examples are given in *Tadic* Trial Judgement, para. 686; *Celebici* Trial Judgement, para. 842; *Akayesu* Trial Judgement, para. 705
[400] *Blaškić Appeal Judgement*, para. 45 (citing *Vasiljevi} Appeal Judgement*, para. 102); *Strugar Trial Judgement*, para. 349; *Brdanin*, Trial Judgement, para. 271; *Blaškić* Trial Judgement, para. 284

161. While having a role in a system without influence would not be enough to attract criminal responsibility,[401] there is no requirement that the conduct of the aider and abettor be a *conditio sine qua non* of the actions of the perpetrator.[402] The fact that similar assistance could have been obtained from someone else does not remove the accused's responsibility.[403]

162. Aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals.[404] Presence during the commission of the crime can constitute "abetting" if it has an encouraging effect on the perpetrators, or gives them moral support or psychological support, or has a significant legitimizing or encouraging effect on the principals, even if the accused takes no active part in the crime.[405] It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime.[406] The presence of a superior can be perceived as an important *indicium* of encouragement or support.[407]

163. The *actus reus* of aiding and abetting can take place before, during or after the crime has been committed, and this form of participation may take place geographically and temporally removed from the crime's location and timing.[408] It is not necessary for the person aiding or abetting to be present during the commission of the crime. [409] Presence, particularly when coupled with a position of authority, is a probative, but not determinative, indication that an accused encouraged or supported the perpetrators of the crime.[410] The Prosecution submits that a persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting.[411] Aiding and abetting does

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[401] *Furundžija* Trial Judgement, para. 233.
[402] *Strugar* Trial Judgement, para. 349 (citing *Blaškić* Appeal Judgement, para. 48); *Furundžija* Trial Judgement, paras. 233-235.
[403] *Furundžija* Trial Judgement, paras 224, 233.
[404] *Furundžija* Trial Judgement, para. 199.
[405] *Tadić* Trial Judgement, paras 689-692 (see also paras 678-687); *Akayesu* Trial Judgement, paras 546-548; *Čelebići* Trial Judgement, paras 327-328; *Furundžija* Trial Judgement, paras 205-209, 232-235.
[406] *Aleksovski* Appeal Judgement, para. 164.
[407] *Brđanin* Trial Judgement, para. 271; *Akayesu* Trial Judgement, paras 693, 704-705.
[408] *Blaškić* Appeal Judgement, para. 48; *Simić* Trial Judgement, para. 162; *Naletilić and Martinović* Trial Judgement, para. 163; *Vasiljević* Trial Judgement para. 70; *Kvočka* Trial Judgement, para. 256; *Blaškić* Trial Judgement, para. 285; *Krnojelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Aleksovski* Trial Judgement, paras 62, 129.
[409] *Akayesu* Trial Judgement, para. 484.
[410] *Kvočka* Trial Judgement, para. 257; *Kunarac* Trial Judgement, para. 393; see *Tadić* Trial Judgement, para. 689; *Aleksovski* Trial Judgement, paras 64-65; *Akayesu* Trial Judgement, para. 693.
[411] *Blaškić* Trial Judgement, para. 337.

not require a pre-existing plan or arrangement to engage in the criminal conduct in question and the principal may not even know about the accomplice's contribution.[412]

164. The *mens rea* requirement for aiding and abetting is satisfied if the accused knows – in the sense of awareness – that his actions or omissions will assist the perpetrator in the commission of a crime.[413] The aider and abettor must at least have accepted that the commission of a crime would be a possible and foreseeable consequence of his conduct.[414] Such awareness may be inferred from all relevant circumstances and need not be explicitly expressed.[415] The aider and abettor needs to have, as a minimum, accepted that his or her assistance would be a possible and foreseeable consequence of his or her conduct.[416] While the aider and abettor need not share the *mens rea* of the principal, he or she must be aware of the essential elements of the crime ultimately committed by the principal.[417] 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.[418]

165. Conduct held to constitute aiding and abetting has included supplying the weapon or other instruments used in the commission of the crime;[419] failing to prevent others from perpetrating crimes in circumstances where the accused is under a legal obligation to protect a victim;[420] failing to maintain law and order by a person in a position of

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[412] *Kordić and Čerkez* Trial Judgement, para. 399; *Tadić* Trial Judgement, para. 677; *Čelebići* Trial Judgement, paras 327-328.

[413] *Strugar* Trial Judgement, para. 350 (citing *Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 162; *Blaškić* Appeal Judgement, para. 49); *Furundžija* Trial Judgement, para. 245; *Čelebići* Trial Judgement, paras 327-328; *Kunarac* Trial Judgement, para. 392. The principal need not know that he has been assisted by the aider and abettor. *Tadić* Appeal Judgement, para. 229 (ii); *Brđanin* Trial Judgement, para. 272.

[414] *Kvočka* Trial Judgement, para. 255.

[415] *Strugar* Trial Judgement, para. 350; *Tadić* Trial Judgement, paras 675-676; *Čelebići* Trial Judgement, paras 327-328.

[416] *Blaškić* Trial Judgement, para. 286: "in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."

[417] *Strugar* Trial Judgement, para. 350 (citing *Aleksovski* Appeal Judgement, para. 162).

[418] *Strugar* Trial Judgement, para. 350 (citing *Blaškić* Appeal Judgement, para. 50); *Brđanin* Trial Judgement, para. 272.

[419] *Tadić* Trial Judgement, paras 680, 684 (referring with apparent approval to the *Zyklon B* and *Mulka* cases).

[420] *Tadić* Trial Judgement, para. 686 (referring with apparent approval to the *Borkum Island Case*); *Akayesu* Trial Judgement, paras 704-705 (failure of *bourgmestre* to maintain law and order in a commune, and failure to oppose killings and serious bodily or mental harm, found to constitute a form of tacit encouragement, which was compounded by being present at such criminal acts); *Aleksovski* Trial Judgement, para. 88.

authority;[421] and the presence of the accused coupled with a position of authority during the perpetration of a crime.[422] Either aiding or abetting alone is sufficient to render the perpetrator criminally liable.[423]

B. Superior Responsibility: Article 6(3) of the Statute

166. A superior will be held criminally responsible for the crimes of his subordinates where: (1) an offence was committed; (2) a superior-subordinate relationship between the accused and the perpetrator of the offence existed; (3) the accused knew or had reason to know that the perpetrator (subordinate) was about to commit the offence or had done so; and (4) the accused failed to take the necessary and reasonable measures to prevent the offence or to punish the perpetrator.[424]

a) The Effective Control Test

167. The *actus reus* consists of the existence of a superior-subordinate relationship, i.e. a hierarchical relationship between the accused and the perpetrator, in which the former has 'effective control' over the latter.[425] The test of 'effective control' concerns the material ability of the accused to prevent offences or to punish the offenders.[426] The hierarchical relationship need not be formalized, as it may be derived from the accused's *de facto* or *de jure* position of superiority.[427] As stated by the ICTY Appeals Chamber in *Aleksovski*, "it does not matter whether [the accused] was a civilian or a military superior, if it can be proved that [...] he had the powers to prevent or to punish [...]."[428] Article 6(3) of the

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[421] *Akayesu* Trial Judgement, paras 704-705.
[422] *Rutaganira* Trial Judgement, paras 76-77.
[423] *Akayesu* Trial Judgement, para. 484; while "aiding" is defined by the ICTR as "giving assistance to someone", abetting is defined as "facilitating the commission of an act by being sympathetic thereto."
[424] *Čelebići* Appeal Judgement, paras 189-198, 225-226, 238-239, 256, 263; *Strugar* Trial Judgement, para. 357; It is settled that Article 7(3) applies to both international and internal armed conflicts. *Kordić and Čerkez* Trial Judgement, para. 401.
[425] *Čelebići* Appeal Judgement, paras 197 and 255-6 and 303; *Čelebići* Trial Judgement, para. 378; *Kajelijeli* Appeal Judgement, para. 87.
[426] *Čelebići* Appeal Judgement, para. 196; *Strugar* Trial Judgement, para. 362-363; *Kayishema* Appeal Judgement, para. 302; *Kunarac* Trial Judgement, para. 396; *Bagilishema* Appeal Judgement, para. 50.
[427] *Čelebići* Appeal Judgement, paras 192-194; *Kordić and Čerkez* Trial Judgement, paras 405-406, 416; *Krnojelac* Trial Judgement, para. 93; *Kunarac* Trial Judgement, para. 396; *Galić* Trial Judgement, para. 173; *Stakić* Trial Judgement, para. 459.
[428] *Aleksovski* Appeal Judgement, para. 76.

Statute applies equally to temporary or *ad hoc* military units if, at the time of the alleged acts, the offenders were under the effective control of the accused.[429]

168. "Effective control" need not take the form of military-style command.[430] Responsibility may be incurred by civilians who are not part of a military structure, such as political leaders, if they *de facto* constitute part of the chain of command.[431] The ICTY Appeal Judgement in the Orić case stated that "*de jure* authority is not synonymous with effective control" and that a "*prima facie* evidence of effective control" is not sufficient[432], as it had been suggested in earlier ICTY jurisprudence as for instance in the *Čelebići* Appeal Judgement.[433] However, the Appeals Chamber underlined that "the possession of *the jure* powers may certainly suggest a material ability to prevent or punish criminal acts of subordinates".

169. A de facto superior who lacks formal letters of appointment but who has, in reality, effective control over the perpetrators of offences equally incurs criminal responsibility.[434] In the same vein, the mere ad hoc or temporary nature of a military unit or an armed group does not per se exclude a relationship of subordination between the member of the unit or group and its commander or leader.[435] There is no requirement that the relationship between the superior and the subordinate be permanent in nature.[436]

170. A superior may also be responsible for crimes committed by a subordinate more than one level down the chain of command.[437] In the *Halilović* case, the Trial Chamber referred to the judgment in the case against the Japanese Admiral Soemu Toyoda tried in the aftermath of World War II:

> The military tribunal in that case highlighted that subordination does not have to be direct and stated that (*Toyoda* case, p. 5006): "[i]n the

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[429] *Strugar* Trial Judgement, para. 362; *Kunarac* Trial Judgement, paras 399, 628.
[430] *Baglishema* Appeal Judgement, para. 55; *Kajelijeli* Appeal Judgement, para. 87.
[431] *Aleksovski* Appeal Judgement, para. 76; *Čelebići* Appeal Judgement, paras 195-197, reaffirming the conclusion of the Trial Chamber in *Čelebići* Trial Judgement, paras 356-363.
[432] *Prosecutor v. Orić,* IT-03-68-A, "Judgement", Appeals Chamber, 3 July 2008, http://www.un.org/icty/oric/appeal/judgement/oric_jud080703.pdf ("***Orić* Appeal Judgement**"), para. 92.
[433] *Čelebići* Appeal Judgement, para. 197; also: *Hadžihasanović et al* Appeal Judgement, para. 83.
[434] *Brđanin* Trial Judgement, para. 276.
[435] *Kunarac* Trial Judgement, para. 399; *Strugar* Trial Judgement, para. 362; *Halilovic* Trial Judgement, para. 61.
[436] *Limaj* Trial Judgement, para. 522.
[437] *Strugar* Trial Judgement, paras. 363-366; see also ICRC Commentary to the Additional Protocols, p. 1013, para. 3544 (on-line commentary).

> simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, *immediate or otherwise*, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.[438]

171. There is no requirement that the superior-subordinate relationship be direct or immediate in nature.[439] For example, the relationship between a commander of one unit and troops belonging to other units that are temporarily under his command, constitutes the hierarchic relationship of superior-subordinate.[440] Effective control can exist, whether that subordinate is immediately answerable to that superior or more remotely under his command,[441]

172. The Appeals Chamber in Blaskić held that "the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate."[442]

173. The jurisprudence provides for certain criteria that may be indicative of the existence of authority in terms of effective control.[443] They include the formality of the procedure used for appointment of a superior,[444] the official position held by the accused,[445] the position of the accused within the military or political structure,446 the actual tasks that he performed,[447] the power of the superior to issue orders whether de jure or de facto 448

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[438] *Halilović* Trial Judgement, para. 63.
[439] *Strugar* Trial Judgement, para. 363; *Stakić* Trial Judgement, 31 July 2003, para. 459.
[440] This essentially was the view expressed in the post-World War II trial of the Japanese General Tomoyuki Yamashita, by the U.S. Military Commission (subsequently affirmed by the U.S. Supreme Court). *Trial of General Tomoyuki Yamashita Before U.S. Military Commission* (Oct. 7–Dec. 7, 1945), summarized in 4 U.N. War Crimes Commission, Law Reports of Trials of War Criminals 1, 33-35 (1948). Affirmed in the appeal before the U.S. Supreme Court in *In re Yamashita*, 327 U.S. 1 (1946).
[441] *Halilović* Trial Judgement, para. 63.
[442] *Blaškić* Appeal Judgement, para. 69 (emphasis added); *Akayesu* Trial Judgement, para. 491; *Strugar* Trial Judgement, para. 366; *Halilović* Trial Judgement, para. 63;
[443] *Orić* Trial Judgement, paras 307 et seq.
[444] *Halilović* Trial Judgement, para. 58.
[445] *Kordić and Čerkez* Trial Judgement, paras 418-424.
[446] *Kordić and Čerkez* Trial Judgement, para. 423.
[447] *Kordić and Čerkez* Trial Judgement, para. 424.

or take disciplinary action,[449] the power to appoint leaders of local groups, and charged specific persons with a specific task,[450] the fact that subordinates show in the superior's presence greater discipline than when he is absent,[451] the fact that the subordinates where informing the accused of measures taken,[452] the capacity to transmit reports to competent authorities for the taking of proper measures,[453] the capacity to sign orders,[454] provided that the signature on a document is not purely formal or merely aimed at implementing a decision made by others,[455] but that the indicated power is supported by the substance of the document[456] or that it is obviously complied with,[457] an accused's high public profile, manifested through public appearances and statements[458] or by participation in high-profile international negotiations,[459] the fact that witnesses had described his sphere of command, the respect he enjoyed and his widely acknowledge leadership,[460] the fact that an accused had been promoted as commander.[461]

174. The effective control test can be satisfied even when the superior is not competent to order and/or implement sanctions himself. It has been held that the superior has to order or execute appropriate sanctions[462] or, if not yet able to do so, he or she must at least conduct an investigation[463] and establish the facts[464] in order to ensure that offenders under his or her effective control are brought to justice.[465] The superior need not conduct the

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[448] *Aleksovski* Trial Judgement, paras 101, 104; *Blaškić* Trial Judgement, para. 302; *Kordić and Čerkez* Trial Judgement, para. 421; *Kajelijeli* Trial Judgement, paras 403-404.
[449] *Blaškić* Trial Judgement, para. 302; *Hadžihasanović* Trial Judgement, paras 83 et seq.
[450] *Orić* Trial Judgement, para. 700.
[451] *Čelebići* Appeal Judgement, para. 206, endorsing the findings of *Čelebići* Trial Judgement, para. 743.
[452] *Čelebići* Appeal Judgement, para. 209.
[453] *Aleksovski* Trial Judgement, para. 78; *Blaškić* Trial Judgement, para. 302.
[454] *Čelebići* Trial Judgement, para. 672; *Kordić and Čerkez* Trial Judgement, para. 421; *Naletilić and Martinović* Trial Judgement, para. 67.
[455] *Kordić and Čerkez* Trial Judgement, para. 421.
[456] Ibid.
[457] *Naletilić and Martinović* Trial Judgement, para. 67.
[458] *Kordić and Čerkez* Trial Judgement, para. 424.
[459] *Alekovsk*i Trial Judgement, para. 101; *Kordić and Čerkez* Trial Judgement, para. 424; *Strugar* Trial Judgement, para. 398.
[460] *Čelebići* Appeal Judgement, paras 206, 209, endorsing the findings of *Čelebići* Trial Judgement, paras 746-750.
[461] *Čelebići* Appeal Judgement, para. 206.
[462] As for instance, by suspending a subordinate: *Ntagerura* Trial Judgement, para. 650.
[463] *Kordić and Čerkez* Trial Judgement, para. 446; *Brđanin* Trial Judgement, para. 279; *Halilović* Trial Judgement, paras 74, 97, 100.
[464] *Halilović* Trial Judgement, paras 97, 100.
[465] *Strugar* Trial Judgement, para. 378; *Halilović* Trial Judgement, para. 98.

investigation or dispense the punishment in person,[466] but he or she must at least ensure that the matter is investigated[467] and transmit a report to the competent authorities for further investigation or sanction.[468] As in the case of preventing crimes, the superior's own lack of legal competence does not relieve him from the duty of taking action within his material ability.[469]

175. The proof of the existence of a superior-subordinate relationship does not require the identification of the principal perpetrators, particularly not by name, nor that the superior had knowledge of the number or identity of possible intermediaries, provided that it is at least established that the individuals who are responsible for the commission of the crimes were within a unit or a group under the control of the superior.[470]

b) The Superior Knew or Had Reason to Know

176. 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 crimes of his or her subordinates.[471]

177. Actual knowledge may be established by way of circumstantial evidence.[472] The superior's position is not to be understood as a conclusive criterion[473] but may be a significant indication from which knowledge of a subordinate's criminal conduct can be

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[466] *Halilović* Trial Judgement, paras 99-100.
[467] Ibid., paras 97, 100.
[468] *Blaškić* Appeal Judgement, para. 632; *Blaškić* Trial Judgement, paras 302, 335, 464; *Kordić and Čerkez* Trial Judgement, para. 446; *Kvočka* Trial Judgement, para. 316; *Stakić* Trial Judgement, para. 461; *Brđanin* Trial Judgement, para. 279; *Halilović* Trial Judgement, paras 97, 100.
[469] *Aleksovski* Trial Judgement, para. 78; *Blaškić* Trial Judgement, paras 302, 335, 464; *Halilović* Trial Judgement, para. 100.
[470] *Blaškić* Appeal Judgement, para. 217. See also *Hadžihasanović* Trial Judgement, para. 90.
[471] Ibid., para. 317.
[472] *Čelebići* Trial Judgement, paras 383, 386; *Kordić and Čerkez* Trial Judgement, para. 427; *Krnojelac* Trial Judgement, para. 94; *Naletilic* Trial Judgement, para. 71; *Galić* Trial Judgement, para. 174; *Brđanin* Trial Judgement, para. 278; *Strugar* Trial Judgement, para. 368; *Halilović* Trial Judgement, para. 66; *Limaj* Trial Judgement, para. 524; *Hadžihasanović* Trial Judgement, para. 94; *Bagilishema* Trial Judgement, para. 46; *Kajelijeli* Trial Judgement, para. 778; *Aleksovski* Trial Judgement, para. 80; *Blaškić* Trial Judgement, para. 307; these Judgements indicate that the position of authority of the superior over the subordinate is a significant indication in itself that the superior knew of crimes committed by his subordinates.
[473] *Blaškić* Appeal Judgement, para. 57; *Bagilishema* Trial Judgement, para. 45; *Semanza* Trial Judgement, para. 404; *Kajelijeli* Trial Judgement, para. 776.

inferred.[474] 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.[475] Additionally, the fact that a military commander "will most probably" be part of an organized structure with reporting and monitoring systems has been cited as a factor facilitating the showing of actual knowledge.[476]

178. A superior can be held responsible on the basis of having had reason to know, had he made use of information which, by virtue of his superior position and in compliance with his duties, was available to him, that subordinates were about to commit or had already committed crimes.[477]

179. It is sufficient that the superior be in possession of sufficient information in written or oral form,[478] or even general in nature, to be on notice of the likelihood of illegal acts by his subordinates, so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed.[479] Such information must suggest the need for further inquiry into the likely or possible unlawful acts of subordinates and need not be explicit or specific.[480] With regard to the duty to prevent, the superior need be on notice only of the "risk" or possibility of crimes being committed by his subordinates, not that crimes will be committed.[481] The ICTY Appeals Chamber *Strugar* recently ruled that "the Trial Chamber erroneously read into the mens rea element of Article 7(3) the requirement that the superior be on notice of a strong risk that his subordinates would commit offences." The Appeals Chamber recalled "that under the correct legal standard,

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[474] *Aleksovski* Trial Judgement, para. 80; *Blaškić* Trial Judgement, para. 308.
[475] 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.
[476] *Naletilić and Martinović* Trial Judgement, para. 73.
[477] *Čelebići* Trial Judgement, paras 387-389, 393; *Blaškić* Trial Judgement, para. 332; *Bagilishema* Trial Judgement, para. 46; *Čelebići* Appeal Judgement, para. 238; *Galić* Trial Judgement, para. 175.
[478] *Čelebići* Appeal Judgement, para. 238; *Kvočka* Trial Judgement, para. 318; *Galić* Trial Judgement, para. 175.
[479] *Čelebići* Trial Judgement, para. 393; *Kordić and Čerkez* Trial Judgement, para. 437; *Strugar* Trial Judgement, paras 369-370; *Čelebići* Appeal Judgement, para. 241; *Blaškić* Appeal Judgement, para. 62; *Kvočka* Trial Judgement, para. 318; *Krnojelac* Trial Judgement, para. 94; *Naletilić and Martinović* Trial Judgement, para. 74; *Galić* Trial Judgement, para. 175; *Brđanin* Trial Judgement, para. 278; *Blagojević* Trial Judgement, para. 792; *Halilović* Trial Judgement, para. 68; *Kayishema* Trial Judgement, para. 228; *Semanza* Trial Judgement, para. 405; *Kajelijeli* Trial Judgement, para. 778; *Kamuhanda* Trial Judgement, para. 609.
[480] *Bagilishema* Appeal Judgement, para. 28; *Čelebići* Appeal Judgement, paras 236, 238; *Strugar* Trial Judgement, para. 369; *Kvočka* Trial Judgement, paras 317-318; *Kordić and Čerkez* Trial Judgement, para. 437.
[481] *Krnojelac* Appeal Judgement, paras 155, 166, 169, 170, and 173-180.

sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute."[482] Moreover, where a superior possesses such information, he has an affirmative duty to take reasonable measures to prevent criminal conduct, that go beyond his duty to investigate the situation.[483]

180. In *Celebići*, the ICTY Appeals Chamber held that "knowledge may be presumed ... if [the superior] had the *means* to obtain the knowledge but deliberately refrained from doing so."[484] The superior need not have possessed knowledge of the specific details of the crime.[485]

181. This determination does not require the superior to have actually acquainted himself with the information in his possession,[486] nor that the information would, if read, compel the conclusion of the existence of such crimes.[487] It rather suffices that the information was available to the superior and that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by subordinates.[488] As soon as the superior has been put on notice of the risk of illegal acts by subordinates,[489] he is expected to stay vigilant and to inquire about additional information, rather than doing nothing[490] or remaining willfully blind.[491]

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[482] *Prosecutor v. Strugar*, IT-01-42-A, "Judgement", Appeals Chamber, 17 July 2008 ("Strugar Appeal Judgement), para. 304, referring to paras 297- 301 of the same judgement. Also: *Čelebići* Appeal Judgement, para. 241; *Hadžihasanović* Appeal Judgement, para. 27.

[483] *Kvočka* Trial Judgement, paras 317-318; *Čelebići* Appeal Judgement, para. 238 (notice of the violent or unstable character of subordinates may trigger duty to intervene); *Strugar* Trial Judgement, para. 373.

[484] *Čelebići* Appeal Judgement, para. 226; *Stakić* Trial Judgement, paras 460-461; in the *Halilović* case, the Trial Chamber held that knowledge cannot be presumed if a person fails in his duty to obtain the relevant information, but it may be presumed where a superior had the means to obtain the relevant information and deliberately refrained from doing so, see *Halilović* Trial Judgement, para. 69.

[485] *Čelebići* Appeal Judgement, para. 238: "[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'... This information does not need to provide specific information about unlawful acts committed or about to be committed. 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." This view was also repeated by the ICTY Trial Chamber in *Galić* Trial Judgement, 5 Dec. 2003, para. 175; *Krnojelac* Appeal Judgement, para. 155.

[486] *Čelebići* Appeal Judgement, para. 239; *Galić* Trial Judgement, para. 175.

[487] *Čelebići* Trial Judgement, para. 393; *Naletilić and Martinović* Trial Judgement, para. 74; *Halilović* Trial Judgement, para. 68; *Hadžihasanović* Trial Judgement, para. 97.

[488] *Čelebići* Trial Judgement, para. 393.

[489] Instead of the "risk" of crimes by subordinates, as used in describing the standard of possible awareness in the case law of this Tribunal (*Krnojelac* Appeal Judgement, para. 155; *Čelebići* Trial Judgement, para. 383;

182. Examples of information which have been found to place a superior on notice of the risk of criminal conduct by a subordinate, and show that the superior possessed the requisite knowledge, include that of a subordinate having a notoriously violent or unstable character and that of a subordinate drinking prior to being sent on a mission.[492] Similarly, a commander's knowledge of, for example, the criminal reputation of his subordinates may be sufficient to meet the mens rea standard if it amounted to information which would put him on notice of the present and real risk of offences within the jurisdiction of the Special Court.[493]

c) Necessary and Reasonable Measures

183. A superior must take reasonable and necessary measures within his material abilities to prevent the offence or punish the offender.[494] There is no rigid definition as to what constitutes reasonable measures;[495] it should be decided on a case-by-case basis in light of the superior's material abilities.[496] Such 'available' measures have been held to include measures which are beyond the legal authority of the superior, if their undertaking is materially possible.[497] Examples of information which have been found to place a superior on notice of the risk of criminal conduct by a subordinate, and show that the superior possessed the requisite knowledge, include that of a subordinate having a notoriously violent or unstable character and that of a subordinate drinking prior to being sent on a mission.[498] Similarly, a commander's knowledge of, for example, the criminal reputation of his subordinates may be sufficient to meet the mens rea standard if it

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Strugar Trial Judgement, para. 416), some Judgements speak of "likelihood" (*Kordić and Čerkez* Trial Judgement, para. 437; *Limaj* Trial Judgement, para. 525) or even of "substantial" and "clear likelihood" (*Strugar* Trial Judgement, paras 420, 422). Yet this language, rather than requiring a higher standard, seems merely to express that with such a degree of likelihood the risk test is definitely satisfied. See also *Hadžihasanović* Trial Judgement, paras 98, 102 et seq.

[490] *Strugar* Trial Judgement, para. 416.

[491] *Čelebići* Trial Judgement, para. 387; *Halilović* Trial Judgement, para. 69.

[492] *Čelebići* Appeal Judgement, para. 238; *Krnojelac* Appeal Judgement, para. 154; *Hadžihasanović* Trial Judgement, para. 100.

[493] *Brđanin* Trial Judgement, para. 278, referring to *Čelebići* Appeal Judgement, paras 223 and 241; *Halilović* Trial Judgement para. 68.

[494] *Strugar* Trial Judgement, para. 372; *Aleksovksi* Appeal Judgement, para. 76; *Blaškić* Trial Judgement, para. 335; *Čelebići* Trial Judgement, paras. 377, 395.

[495] *Aleksovski* Trial Judgement, para. 81; *Čelebići* Trial Judgement, para. 394.

[496] *Strugar* Trial Judgement, para. 372, 374, 378.

[497] *Čelebići* Trial Judgement, para. 395. *Stakić* Trial Judgement, para. 461.

[498] *Čelebići* Appeal Judgement, para. 238; *Krnojelac* Appeal Judgement, para. 154; *Hadžihasanović* Trial Judgement, para. 100.

amounted to information which would put him on notice of the present and real risk of offences within the jurisdiction of the Special Court.[499] Examples of information which have been found to place a superior on notice of the risk of criminal conduct by a subordinate, and show that the superior possessed the requisite knowledge, include that of a subordinate having a notoriously violent or unstable character and that of a subordinate drinking prior to being sent on a mission.[500] Similarly, a commander's knowledge of, for example, the criminal reputation of his subordinates may be sufficient to meet the mens rea standard if it amounted to information which would put him on notice of the present and real risk of offences within the jurisdiction of the Special Court.[501]

184. A superior may be held liable despite lacking the formal legal competence to take particular measures to prevent or repress offences committed by subordinates.[502] Such a superior ordinarily can, for example, alert others concerning crimes committed or about to be committed by subordinates.[503] At the same time, however, mere punishment by the superior of a subordinate after the crimes had been committed cannot remedy the superior's failure to take 'necessary and reasonable measures' in advance aimed at preventing the crime.[504]

185. A superior's duty to prevent crimes by subordinates was addressed in the *Strugar* case, where the ICTY Trial Chamber stated that "if a superior has knowledge or has reason to know that a crime is being or is about to be committed, he has a duty to prevent the crime from happening and is not entitled to wait and punish afterwards."[505] The Trial

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[499] *Brđanin* Trial Judgement, para. 278, referring to *Čelebići* Appeal Judgement, paras 223 and 241; *Halilović* Trial Judgement para. 68.
[500] *Čelebići* Appeal Judgement, para. 238; *Krnojelac* Appeal Judgement, para. 154; *Hadžihasanović* Trial Judgement, para. 100.
[501] *Brđanin* Trial Judgement, para. 278, referring to *Čelebići* Appeal Judgement, paras 223 and 241; *Halilović* Trial Judgement para. 68.
[502] *Strugar* Trial Judgement, para. 372; *Čelebići* Trial Judgement, para. 395; *Kordić and Čerkez* Trial Judgement, para. 443.
[503] *Aleksovksi* Trial Judgement, para. 78; *Blaškić* Trial Judgement, para. 302. See also Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff, Geneva 1987, para 3562; *Blaškić* Trial Judgement, para. 335. *Stakić* Trial Judgement, para. 461.
[504] *Blaškić* Trial Judgement, para. 336. *Stakić* Trial Judgement, para. 461.
[505] *Strugar* Trial Judgement, para. 373; See also *Blaškić* Trial Judgement, para. 336. Customary international law allows for conviction on the sole basis that the superior failed to prevent the crimes of his subordinates even if the perpetrators were punished after crimes had been committed. *US v. von Leeb and others* (High Command Case), US Military Tribunal sitting at Nuremberg, Judgement of 28 October 1948, in TWC, XI, p.

Chamber listed several factors considered by the post-World War II tribunals in establishing a superior's responsibility for failure to prevent crimes by his subordinates, including the failure to issue orders aimed at bringing practices into accord with the rules of war, failure to secure reports that military actions had been carried out in accordance with international law, failure to protest against or criticize criminal acts, failure to take disciplinary measures to prevent criminal acts by subordinates, and the failure to insist before a superior authority that immediate action be taken against perpetrators of crimes.[506]

186. The Trial Chamber in *Strugar* also held that "a superior's duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities."[507]

d) Plurality of Superiors

187. More than one superior may be held responsible for their failure to prevent or punish the same crime committed by a subordinate.[508] The fact that an accused may himself have had superiors does not impact on his own responsibility as a superior. Command responsibility applies to every commander at every level.[509]

188. Finally, an accused who is found guilty under Article 6(1) of the Statute should not also be convicted of the same crime pursuant to Article 6(3); instead, his superior position will be considered an aggravating factor in sentencing.[510]

a) General Evidence of Superior Responsibility

189. The RUF was a structured military organization. From as early as 1993 to 1994 the RUF battalions came together at Zogoda and the command structure in place was enforced. Sankoh as the leader, Rashid Mansaray the battlefield commander, Mohamed Tarawallie aka Zeno the battle group commander, and under them were other senior commanders such

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568, also in *Annual Digest* 1948 ; *US v. List and others* (Hostages Case), US Military Tribunal sitting at Nuremberg, Judgement of 19 February 1948, TWC , XI, p. 1298-99, also in *Annual Digest* 1948.

[506] *Strugar* Trial Judgement, para. 374.

[507] *Strugar* Trial Judgement, para. 376.

[508] *Blaškić* Trial Judgement, para. 303; *Krnojelac* Trial Judgement, para. 93.

[509] *Halilović* Trial Judgement, para. 62. *Blaškić* Trial Judgement, paras 296, 302, 303; *Krnojelac* Trial Judgement, para. 93; *Naletilić and Martinović* Trial Judgement, para. 69.

[510] *Kordić and Čerkez* Appeal Judgement, para. 34 (quoting *Blaškić* Appeal Judgement, para. 91).

as Bockarie, the First Accused, the Second Accused and others.[511] In that same time period of 1993 to 1994, Rashid Mansaray and dozens of Vanguards were executed by the First Accused and others,[512] thereafter Mohamed Tarawallie became the Battle Field Commander while Bockarie became the Battle Group Commander.[513] Transitions in the leadership of the RUF continued throughout the war.

190. The Prosecution evidence varies between witnesses as to the particular assignments held by the three Accused. This is much less the case for the Third Accused, whom almost all insider witnesses, and several Defence witnesses stated was the RUF Overall Security Commander.[514]

191. These differences between Prosecution witnesses in fact demonstrate credibility. The RUF was a guerrilla force, uniforms with insignias were not a matter of course. These are also events which happened 8 to 15 years ago. Given that several witnesses are illiterate, the fact that information would be passed by word of mouth at muster parades or meetings, and the passage of time, it should be expected that there would be some variation in testimonies.

192. All three accused are Vanguards. The Vanguards were trained at Camp Naama in Liberia,[515] and those captured and trained in Sierra Leone were called Junior Commandos.[516] Certain positions in the RUF could not be given to junior forces; only Vanguards could take up certain positions;[517] for example, Prince Taylor who at some point served as overall G5 commander was a Vanguard.[518] TF1-360 testified that Vanguards were the senior officers; the Junior Commandos were under the Vanguards.[519] Mingo was

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[511] TF1-036, Transcript 27 July 2005, p. 25.
[512] TF1-371, Transcript 24 July 2006, pp. 69-70, 73.
[513] TF1-036, Transcript 28 July 2005, p. 23; Transcript 29 July 2005, pp. 27-28. Exhibit 36, the Salute Report signed by Issa Sesay, states that after the Kamajor and SLA attack on Zogoda, Bockarie was appointed Battle Group Commander of the RUF (p. 2345).
[514] E.g. TF1-041, Transcript 17 July 2006, pp. 64-65; TF1-371, Transcript 20 July 2006, pp. 29-30; TF1-036, Transcript 3 August 2005, p. 92; DIS-149 Transcript 5 November 2007, pp. 79-81; DAG-048, Transcript 3 June 2008, pp. 29-30; DAG-080, Transcript 6 June 2008, pp. 18-19.
[515] TF1-036, Transcript 27 July 2005, pp. 28-29 and TF1-168, Transcript 31 March 2006, p. 67, lines 17-18.
[516] TF1-036, Transcript 27 July 2005, p. 30.
[517] TF1-168, Transcript 3 April 2006, p. 75.
[518] TF1-371, Transcript 1 August 2006, pp. 137-138.
[519] TF1-360, Transcript 19 July 2005, pp. 98-99.

not a Vanguard.[520] TF1-361 stated that: "Any Vanguard that is in the community must have that honour and he must be respected by force and they were our superiors."[521] TF1-361 described the Second Accused in Kono in 1998 as not having an area of responsibility but at the same time said the Second Accused was a commander and a Vanguard.[522] DIS-188 stated that: "Well, we had the Vanguards within the RUF. These are senior military advisers. Whether you are having your rank, you are not having the rank, you are having assignment, you are not having an assignment. In any area where there is a vanguard he is being recognised as a senior officer. That he advises - - he is an adviser to all unit commanders and even the brigade."[523]

193. The evidence is clear that each of the Accused held superior positions within the RUF, positions close to or at the top of the RUF command structure. They held *de facto* and *de jure* authority over many subordinates. Each had effective control to prevent offences or punish offenders.[524] Routinely they ignored the legal obligations imposed on them, and frequently participated in crimes[525] under the Statute or gave orders to do so.[526] They had knowledge of the atrocities and did not react.[527] TF1-360, for instance, testified that RUF commanders knew about atrocities, "They give orders to kill, to amputate, to burn. But after the mission they wouldn't tell you to put it in a message form and send it to them."[528] Each of the Accused held official titles within the RUF, and in such cases it is presumed that he had effective control over his subordinates, unless proof of the contrary is produced.[529] The evidence shows that the Accused did have power over their subordinates. Effective control is a matter of evidence, which may involve assessing whether the Accused had the power to prevent, punish, or initiate measures leading to proceedings

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[520] TF1-168, Transcript 3 April 2006, p.62. The Second Accused agreed that Superman was not a Vanguard, but that he was claiming to be one: Accused Morris Kallon, Transcript 18 April 2008, pp.70-71.
[521] TF1-361, Transcript 12 July 2005, p.12 (lines 5-7).
[522] TF1-361, Transcript 19 July 2005, p.29 (lines 5-10)
[523] DIS-188, Transcript 29 October 2007, p.27, (lines 7-12)
[524] TF1-366, Transcript 11 November 2005, pp. 6-7.
[525] *Brima et al* Trial Judgement, para. 762, citing *Tadić* Appeal Judgement, para. 188; *Krnojelac* Trial Judgement, para. 73.
[526] TF1-360, Transcript 20 July 2005, p. 57 (lines 2-7).
[527] TF1-360, Transcript 20 July 2005, pp. 46, 55-56.
[528] TF1-360, Transcript 26 July 2005, pp. 45-46.
[529] *Hadžihasanović* Trial Judgement, para. 83. TF1-360 testified that within the RUF only a few promotions were documented, "...promotion at times can come through radio messages, at times through information. If a commander can say, 'This man today is a sergeant,' there is no document with regards that" TF1-36, Transcript 25 July 2005, pp. 106-107.

against the alleged perpetrators where appropriate.[530] Responding to a suggestion from Counsel for the Third Accused that Gbao had no influence over military activities, the Second Accused stated: "He get right to stop any junior commander under him. Let me just explain something, My Lord. An RUF was in this setting. We have Vanguard. We have the junior forces. Gbao fell in the Vanguard position. Why the junior forces who were - - some were Colonel, Lieutenant-colonel, they fell in the junior forces, what we call position, and Gbao was having right to command any of those forces. And if the junior forces failed to take command from me he was having right to take any military action. Like any other Vanguard."[531]

194. Although the Prosecution will argue below that the Accused had actual knowledge of crimes, such proof is not a requirement of Article 6(3) liability. The evidence below is of extensive and widespread crimes committed frequently or notoriously by subordinates, such as to demonstrate that the Accused had knowledge of the crimes.[532] Circumstantial evidence of the number, type and scope of the illegal acts, the time during which they occurred, and other factors all lead to the conclusion that the Accused knew or had reason to know of the crimes being committed.[533]

b) First Accused

195. The First Accused was a Vanguard.[534] In 1994 the First Accused was the commander of Kailahun District.[535] In 1996, when the Abidjan peace talks were taking

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[530] *Blaškić* Appeal Judgement, para. 69 (emphasis added); *Akayesu* Trial Judgement, para. 491; *Strugar* Trial Judgement, para. 366; *Halilović* Trial Judgement, para. 63; *Orić*, Trial Judgement, paras 307 et seq. (emphasis added).

[531] Accused Morris Kallon, Transcript 17 April 2008, p.18 (lines 27-29) – p.19 (lines 1-7), cross-examination by Counsel for the Third Accused. The Second Accused agreed that although at some point he and Peleto were at the same rank, Kallon being a Vanguard had command over Peleto: Accused Morris Kallon, Transcript 18 April 2008, pp.60-61.

[532] 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.

[533] *Čelebići* Trial Judgement, para. 386; *Blaškić* Trial Judgement, para. 307; *Kordić* Trial Judgement, para. 427; *Galić* Trial Judgement, para. 174; *Brđanin* Trial Judgement, para. 276; *Strugar* Trial Judgement, para. 368; *Limaj* Trial Judgement, para. 524; *Bagilishema* Trial Judgement, para. 968; *Orić* Trial Judgement, para. 319

[redacted]

place in November,[536] and Camp Zogoda was overrun,[537] Sankoh made Bockarie Field Commander, and the First Accused took over as Battle Group Commander.[538] According to TF1-371 the First Accused became the Battle Field Commander before the Junta began.[539] As to his *de facto* position in the RUF as second in command after Bockarie, TF1-371 said: "with the arrest of Sankoh in Nigeria and at the same time the disappearance of Zino, they already saw the pattern. So just a matter of feeling [filling] the vacant of the pattern, you know, Sam Bockarie became a brigadier, became the CIC, the High Command, playing the part of Sankoh and he therefore decided to appoint Issa as the field commander. I mean, this was the structure."[540]

196. TF1-371 said that the First Accused was a full colonel during the AFRC Junta.[541] Bockarie was the First Accused's immediate boss and the First Accused "had considerable influence over Bockarie."[542]

197. The First Accused had the right to pass information to any commander he wanted, and the right not to talk to commander and talk directly to soldiers.[543] The authority to promote is an essential exercise of control in any organization and with respect to the RUF, [redacted] testified that during the time Bockarie and the First Accused were the two most senior commanders in the RUF they determined promotions:

> ...he [Bockarie] consulted his deputy, who was Issa, on promotions. They had direct control and contact with the combatant. Beside some of the senior commanders I knew, I didn't have any knowledge of the rear operation at the front line. I was never a frontline commander, so Issa Sesay, who was in day-to-day contact and Morris Kallon, recommended the other combatants to Sam Bockarie for promotion.[544]

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[536] See *Prosecutor v. Sesay et al*, SCSL-04-15-T-392, "Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 may 2005, which states at Annex I, para. M., that the Sankoh and the President of Sierra Leone signed a peace agreement at Abidjan on 30 November 1996.
[537] TF1-036, Transcript 28 July 2005, p.24; TF1-360, Transcript 20 July 2005, pp.3-4.
[538] TF1-036, Transcript 28 July 2005, pp. 24-25. Exhibit 36, the Salute Report signed by Sesay, states at p. 2345, that while at Abidjan in late 1996 to early 1997, Sankoh appointed Bockarie to Battle Field Commander and Sesay to Battle Group Commander.
[539] TF1-371, Transcript 31 June 2006, p. 24-26
[540] TF1-371, Transcript 31 June 2006 , pp. 23-24.
[541] TF1-371, Transcript 24 July 2006, pp. 93-94.
[542] TF1-371, Transcript 28 July 2006, p. 106.
[543] TF1-360, Transcript 25 July 2005, pp. 11-12.
[redacted]

198. TF1-045 testified about command during the AFRC/RUF Junta, and discussed a meeting he attended in [redacted] where he saw a chart displaying the command structure of the AFRC government. Among the names on the chart was the First Accused and under his name was the assignment Army Chief of Staff. TF1-045 testified that "he [First Accused] was to deputize the Army Chief of Staff."[545] The First Accused was a member of the Supreme Council during the AFRC/RUF Junta.[546] TF1-362 said she knew that in Freetown the First Accused was the second-in-command of the RUF because all instructions came from him.[547] Similarly, TF1-041 stated that during the Junta the First Accused was the Battle Field Commander of the RUF, he was next to Bockarie in command.[548]

> RUF had its own hierarchy which was quite distinct from AFRC. Despite the two group working together, we still maintained loyalty to that hierarchy. ... Once Sankoh was here, before he arrest in Nigeria, in fact, Bockarie was not the field commander, it was Zino and Sankoh was the CIC, the High Command. Now, we - - with the arrest of Sankoh in Nigeria and at the same time the disappearance of Zino, they already saw the pattern. So just a matter of feeling the vacant of the pattern, you know, Sam Bockarie became a brigadier, became the CIC, the High Command, playing the part of Sankoh and he therefore decided to appoint Issa as the field commander. I mean, this was the structure.[549]

199. TF1-041 stated that during the Junta the First Accused was in charge of Freetown when Bockarie was not there.[550] George Johnson testified that the First Accused used the weapons that arrived by ship during the Junta to fight at the front line and that the First Accused "had command and control over all the RUF fighters who were thousands."[551] A child soldier abducted near Koidu by the RUF immediately after the ECOMOG intervention, said that in early 1998[552] the First Accused was the commander of PC ground[553] and also overall commander of PC Ground, Banya Ground and Kissi Town.[554]

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[545] TF1-045, Transcript 18 November 2005, p. 83; see also TF1-045, Transcript 24 November 2005, p. 5.
[546] TF1-045, Transcript 18 November 2005, p. 81.
[547] TF1-362, Transcript 25 April 2005, pp. 52-57.
[548] TF1-071, Transcipt 19 January 2005, pp. 22-24.
[549] TF1-371, Transcript 31 June 2006, Closed Session, pp. 23-24.
[550] TF1-041, Transcript 10 July 2006, p. 27.
[551] George Johnson, Transcript 19 October 2004, p. 15.
[552] TF1-263, Transcript 6 April 2005, p.7, lines 1-6.
[553] TF1-263, Transcript 6 April 2005, p. 12.
[554] TF1-263, Transcript 6 April 2005, p.15, lines 7-23.

After TF1-263's arrival in Kissi Town, they pronounced that the First Accused was a General and introduced him as overall boss.[555] At the time Superman was in Koidu the First Accused was superior to him.[556]

200. TF1-036 testified that in February 1998 Johnny Paul Koroma appointed Bockarie as Chief of Defence Staff (CDS) and a brigadier, and the First Accused was made the Battle Field Commander.[557] TF1-361, testified that the First Accused and Bockarie did not allow Superman to operate as Battle Group Commander.[558]

201. Similarly, TF1-071 testified that in 1998 Bockarie was at the top of the RUF military structure, and just below him was the First Accused as the Battle Field Commander.[559] TF1-071 reiterated that the Battle Field Commander was in charge of Battle Group Commander, then the Battle Group Commander commands brigades, the brigade commanders command the battalions, the battalions command the companies, platoons, and squads.[560]

202. After the ECOMOG intervention the First Accused allegedly lost diamonds in Liberia. TF1-367 said the First Accused was transferred to Pendembu, only a very short distance from Buedu, but this was not a punishment:

> It's like they take you from Bo and they say go to Kenema; that was what happened. But he was not punished. The same power that you had, you retained. They did not take it away from you. It is not a punishment. That was punishment if they demoted you, but if they say from Bo to Kenema and all that you used to have in Bo you were getting in Kenema. That's not punishment.[561] Pendembu was not a front line, and

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[555] TF1-263, Transcript 7 April 2005, pp.104-106.
[556] TF1-361, Transcipt 11 July 2005, pp. 85-86.
[557] TF1-036, Transcript 28 July 2005, p. 25. Exhibit 35, the Salute Report of Bockarie, states that when Johnny Paul Koroma arrived at Kailahun "he appointed me [Bockarie] to take over command for both the RUF and the SLA as Chief of Defence Staff with the rank of Brigadier General ... I took it upon myself to appoint Brig. Issa as Battlefield Commander and Colonel Mingo as Battle Group Commander" (p. 2363). See also Exhibit 36, the Salute Report signed by Issa Sesay, at p. 2350, which confirms that JPK appointed Bockarie Chief of Defence Staff over both the RUF and SLA, and gave Sesay the assignment of Battle Field Commander.
[558] TF1-361 Transcript 14 July 2005, Closed Session, pp.73-74.
[559] TF1-071, Transcript 26 January 2005, pp. 14-15; Transcript 27 January 2005, pp. 75-78.
[560] TF1-071 Transcript 21 January 2005, pp.22-26. See also TF1-361 Transcript 11 July 2005, pp.67-69: Mosquito was the leader of the RUF and Issa Sesay was his Deputy.
[561] TF1-367, Transcript 23 June 2006, p. 31.

civilians were at Pendembu; and Sesay was Bockarie's deputy and was responsible for co-ordinating combatants to fight.[562]

203. Following the alleged loss of diamonds TF1-036, [redacted] stated that he never understood that Sesay went to the front-lines as a punishment, rather the First Accused went there as a battlefield man to observe the battle front, and he would come and go from Buedu.[563] Defence witnesses said that Sesay was in Pendembu. DIS-174 the [redacted], explained that the First Accused was senior to him and that he had to report to the First Accused. The First Accused decided what to do; DIS-174 said "That is the chain."[564] TF1-371 said that the First Accused remained as the Field Commander when he went to Pendembu and performed his functions without duress from Bockarie.[565]

204. General Tarnue testified that when Bockarie left Sierra Leone for Liberia, in keeping with the chain of command, the First Accused, the Second Accused, and the other junior commanders were directly in charge of the RUF.[566] At that time the First Accused was getting instructions from Taylor, and the First Accused was dealing directly with Taylor. General Tarnue said that Taylor gave military instructions to the First Accused, although Tarnue did not know the content of the instructions.[567] TF1-174 testifies that Issa was seen as a powerful man leading the RUF and that he was in a position to order the cessation of crimes, but this power was not exercised all the time.[568]

205. TF1-314 was told by her commander [redacted] in Buedu in 1998 that General Issa was the overall commander.[569] When Bockarie fled the RUF in 1999 the First Accused became the field commander controlling the entire forces of the RUF.[570] TF1-036 testified that after the Lomé Agreement was signed in the end of 1999, Bockarie fled to Liberia and the First Accused took Bockarie's position while the Second Accused took the First Accused's position as Battle Field Commander.[571]

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[562] TF1-367, Transcript 23 June 2006, pp. 32.
[563] TF1-036, Transcript 29 July 2005, pp. 98-102.
[564] DIS-174, Transcript 21 January 2008, pp. 99-100.
[565] TF1-371, Transcript 21 July 2006, p. 71.
[566] General Tarnue, Transcript 11 October 2004, p. 54.
[567] General Tarnue, Transcript 11 October 2004, pp. 63-64.
[redacted]
[569] TF1-314, Transcript 2 November 2005, p. 55.
[570] TF1-360, Transcript 21 July 2005, pp.50-51.
[571] TF1-036, Transcript 28 July 2005, pp. 25-26.

206. As to the ranks within the RUF, TF1-371 said that the "RUF had its own hierarchy which was quite distinct from AFRC. Despite the two group working together, we still maintained loyalty to that hierarchy."[572] Expert witness Johan Hederstedt said that the RUF had to follow the command structure of the AFRC during the Junta which was different from the RUF one. He also said that contrary to what is usually the case in an organised army, the ranking and assignment system of the RUF prior to the Junta did not necessarily correspond.[573] Nevertheless, Johnny Paul Koroma promoted him to the rank of a brigadier in 1998, according to TF1-371.[574]

207. Regarding particular military commands in specific operations and locations, and the effective control over commanders there is evidence that the First Accused was the commander of the attack on Bo in February 1998 in the rank of a Brigadier and with AF Kamara as Major.[575] Further, he was the overall commander for the mission to attack Koidu in December 1998; senior officers at the meeting to plan the mission included the First, Second and Third Accused, Mike Lamin and Johnny Paul Koroma.[576] TF1-141, a former child soldier, said: "Povey [aka the First Accused] was instructing us to loot in Koidu Town but when we came to Makeni, because that was his birthplace, so we shouldn't loot there."[577] TF1-263 said that in early 1998[578] when Superman was in Koidu the First Accused was superior to him.[579] The First Accused was the commander of PC ground[580] and also overall commander of PC Ground, Banya Ground and Kissi Town.[581]

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[572] This information was corroborated by expert witness Johan Hederstedt, who underlined that "Of course it was not so easy to emerge two organisations, the SLA and the RUF. They had different experiences from the war. They .... were different organised. They had different .... ranking system, and in spite of -- they -- well, you tried to put new -- deploy new units with a commander from -- from SLA and a deputy from RUF or vice versa. It was a lot of difficulties here to merge the culture from ... two organisations...", Transcript 23 June 2008, p. 112.
[573] Johan Hederstedt, Transcript 24 June 2008, p. 5 and Exhibit 398 Hederstedt Report, para. 4.3.
[574] TF1-371, Transcript 31 July 2006, pp. 103, 110.
[575] George Johnson, Transcript 19 October 2004, pp. 18-21.
[576] TF1-036, Transcript 28 July 2005, pp. 61-62.
[577] TF1-141, Transcript 15 April 2005, p. 38. This was corroborated by TF1-366; the First Accused said that Makeni should not be burnt because it was "his home town, that was where Pa Sankoh was born, and that we should not loot there like we have done to other places. That was where he himself was based there." The First Accused added that Makeni was the RUF headquarters and it should not be destroyed like the RUF destroyed other places: TF1-366, Transcript 10 November 2005, pp. 84-86.
[578] TF1-263, Transcript 6 April 2005, p. 7, referring to the period "when mangoes ripen".
[579] TF1-361, Transcipt 11 July 2005, pp. 85-86.
[580] TF1-263, Transcript 6 April 2005, p. 12.
[581] TF1-263, Transcript 6 April 2005, p. 15.

208. The First Accused told the Second Accused to deploy Savage to Tombodu; giving such orders is evidence of command responsibility.[582] And when the RUF attacked Makeni in late December 1998, the overall commander of the attack was the First Accused.[583]

c) Second Accused

209. The Second Accused was a Vanguard, trained at Camp Naama.[584] In 1996, when the Abidjan peace talks were taking place in November,[585] Zogoda was overrun,[586] and the Second Accused was an Area Commander at Koribundu Jungle-Bo Highway.[587] The assignment of Area Commander was an assignment created by the RUF to facilitate operations, the Area Commander was below the Battle Group Commander and above the Brigade Commander.[588]

210. Later when the Koribundu Jungle-Bo Highway collapsed the Second Accused went to the Northern Jungle (Kangari Hills).[589] TF1-361 said that Sankoh sent the Second Accused to the Northern Jungle to take responsibility there.[590] TF1-371 testified that Johnny Paul Koroma promoted the Second Accused to Brigadier in 1998.[591]

211. The witnesses did not agree on the precise assignments of the Second Accused, however, it is clear that he was one of the most senior commanders in the RUF throughout the Indictment period. Witnesses referred to him as an Area Commander, Battlefield Inspector, later as the Battle Group Commander, and ultimately the Battle Field Commander of the RUF.

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[582] TF1-366, Transcript 15 November 2005, pp. 109-110.
[583] TF1-361, Transcript 12 July 2005, pp. 101-105.
[584] TF1-036, Transcript 27 July 2005, pp. 27-30.
[585] See *Prosecutor v. Sesay et al*, SCSL-04-15-T-392, "Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 May 2005, which states at Annex I, para. M., that the Sankoh and the President of Sierra Leone signed a peace agreement at Abidjan on 30 November 1996.
[586] TF1-036, Transcript 28 July 2005, p.24; TF1-360, Transcript 20 July 2005, pp.3-4.
[587] TF1-036, Transcript 28 July 2005, p. 24-25; TF1-360, Transcript 19 July 2005, p.107.
[588] TF1-036, Transcript 28 July 2005, pp. 10-14; Transcript 3 August 2005, pp. 72-75. In the event the Area Commander or the Battle Group Commander give the instruction to the battalion commander to go to the front line, then they go: TF1-036, Transcript 3 August 2005, pp. 46-48."
[589] TF1-371, Transcript 31 July 2006, pp. 107-108.
[590] TF1-361, Transcript 18 July 2005, pp. 8-9.
[591] TF1-371, Transcript 31 July 2006, Closed Session, pp. 103, 110.

212. TF1-371 testified that when the First Accused became RUF Battle Field Commander the Second Accused was appointed Battle Group Commander.[592] These promotions happened before the junta began.[593] The Battle Group Commander commands all RUF operational areas where there is battle; he supervises all the front lines and sometimes goes there.[594] TF1-071 recalled that at the time the First Accused was appointed as the Battle Field Commander in 1998, he appointed Kallon the Battle Field Inspector.[595] The Battle Field Inspector was responsible for reporting on all battle activities directly to the Battle Field Commander.[596]

213. During the AFRC/RUF Junta the Second Accused was a member of the Supreme Council.[597] [redacted] testified that during the AFRC/RUF Junta, Mosquito held a meeting at the secretariat in Tongo and introduced the Second Accused as his deputy, and that when Mosquito was not around, the Second Accused would be in charge.[598]

214. TF1-366 said that the Second Accused was the Battle Group Commander when the First Accused left Koidu in March 1998, and Superman was the field inspector; he said the Second Accused was the senior man in Kono District.[599] The Second Accused appointed [redacted] at Koidu, and the witness took orders from Kallon.[600] Similarly, TF1-334 stated that when the Second Accused came back to Kono from Buedu in early 1998, before ECOMOG started moving toward Koidu, the Second Accused was the most senior RUF commander in Kono and Superman was immediately subordinate to him; in turn the Second Accused's superior was the First Accused.[601] TF1-334 testified that Bazzy was the commander of the SLA's in Kono until mid-May 1998 when Gullit arrived in Koidu and became the SLA commander there. When Gullit came to

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[592] TF1-371, Transcript 31 July 2006, Closed Session, p. 24.
[593] TF1-371, Transcript 31 July 2006, Closed Session, pp. 25-26.
[594] TF1-036, Transcript 29 July 2005, pp. 105-107.
[595] TF1-071, Transcript 26 January 2005, pp. 14-15; Transcript 27 January 2005, pp. 75-78.
[596] TF1-071, Transcript 27 January 2005, pp. 75-78.
[597] TF1-045, Transcript 18 November 2005, Closed Session, p. 81.
[redacted]
[599] TF1-366, Transcript 14 November 2005, pp. 45-47, 58-59; TF1-045, Transcript 22 November 2005, p. 59, the First Accused assigned the Second Accused to be in charge in Kono.
[600] TF1-366, Transcript 15 November 2005, p. 120.
[601] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 19 May 2005, p. 7. TF1-366 testified that the Second Accused was the most senior commander in Kono as he was the Battle Group Commander: TF1-366, Transcript, 8 November 2005, pp. 37-38; 14 November 2005, pp.58-59.

Koidu he was subordinate to the Second Accused.[602] The Second Accused had effective command over combatants in Koidu.[603] The Second Accused assigned Savage to Tombodu after being told to do so by the First Accused.[604] There was a cordial relationship between the RUF and SLA in Kono, they went on patrol in each other's areas and "If there was any operation there was usually joint cooperation and it was clearly visible that we knew the command structure."[605]

215. Another witness testified that after the Junta, and at the time Johnny Paul Koroma was taken to Kailahun District, Superman and the Second Accused remained as the commanders of Koidu, and according to a witness, the Second Accused deputized Superman.[606] At Koidu the Second Accused had a radio set although it was not fully operational.[607]

216. TF1-041 stated that when Superman went to Koinadugu District after the Fiti Fata mission,[608] the Second Accused was the overall commander in Kono and Rambo, the brigade commander, was the Second Accused's subordinate.[609] A child soldier abducted by the RUF immediately after the ECOMOG intervention said that in early 1998,[610] Kallon was in charge of Banya Town[611] near Koidu.[612] After TF1-263's arrival in Kissi Town in early 1998 the Second Accused was called Colonel at that time.[613] TF1-141 stated that the Second Accused was in charge of the group at Guinea Highway.[614]

217. TF1-036 testified that in February 1998 the Second Accused was appointed as the Battle Group Commander,[615] but later amended that evidence to say that Kallon was the

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[602] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 19 May 2005, pp. 7-8.
[603] However, TF1-361 said in March to May 1998 the Second Accused was Superman's deputy and he carried out Superman's instructions. The Second Accused had effective command over combatants in Koidu. TF1-361 Transcript 19 July 2005, pp.2-3, 15-18.
[604] TF1-366, Transcript 15 November 2005, pp. 109-110.
[605] Exhibit 119, TF-334, AFRC Transcript 19 May 2005, pp. 29-30, 34-36.
[606] TF1-361, Transcript 11 July 2005, pp. 84-86.
[607] TF1-361, Transcript 11 July 2005, pp. 104-105.
[608] TF1-041, Transcript 10 July 2006, p. 50.
[609] TF1-041, Transcript 10 July 2006, p. 50.
[610] TF1-263, Transcript 6 April 2005, p.7, lines 1-6.
[611] TF1-263, Transcript 6 April 2005, p.13; Transcript 8 April 2005, pp.101-102.
[612] TF1-263, Transcript 6 April 2005, pp.14, 15, 17; Transcript 8 April 2005, p. 5.
[613] TF1-263, Transcript 8 April 2005, p.102.
[614] TF1-141, Transcript 11 April 2005, pp. 91-95.
[615] TF1-036, T. 28.7.05, p. 25. Exhibit 35, the Salute Report of Bockarie, states that when Johnny Paul Koroma arrived at Kailahun "he appointed me [Bockarie] to take over command for both the RUF and the SLA as Chief of Defence Staff with the rank of Brigadier General ... I took it upon myself to appoint Brig.

Area Commander in Kono.[616] TF1-371 was certain that the Second Accused had been operating as the Battle Group Commander in 1998, and added that Mingo (aka Superman) thought he should be the Battle Group Commander and at some point in late 1998 Mingo had said this to TF-371. TF1-361, testified that the First Accused and Bockarie did not allow Superman to operate as Battle Group Commander.[617]

218. TF1-361's evidence was that from March to May 1998 the Second Accused was Superman's deputy in Kono and Kallon had effective command over all the fighters under the control of Superman; whenever Superman left the Second Accused was in command.[618] Between March and May 1998 the the witness understood that the Second Accused was a Colonel. He said that the Second Accused was a very active field commander in Kono, he went to the battlefront many times.[619] The Second Accused was responsible for calling formations in Kono District; some AFRC refused to attend so the Second Accused shot and killed an AFRC.[620] TF1-071 said that the Second Accused became the Battle Group Commander in 1999,[621] while TF1-036 stated that when Bockarie left Sierra Leone for Liberia in December 1999, the Second Accused took the Battle Field Commander assignment vacated by the First Accused.[622]

219. The Second Accused was the deputy commander for the mission to attack Koidu in December 1998[623]; senior officers at the meeting to plan the mission included the First, Second and Third Accused, Mike Lamin and Johnny Paul Koroma.[624] In April and May 2000, the Second Accused was higher ranking in the RUF than the Third Accused.[625]

Issa as Battlefield Commander and Colonel Mingo as Battle Group Commander" (p. 2363). See also Exhibit 36, the Salute Report signed by Issa Sesay, at p. 2350, which confirms that JPK appointed Bockarie Chief of Defence Staff over both the RUF and SLA, and gave Sesay the assignment of Battle Field Commander.

[616] TF1-036, Transcript 29 July 2005, Closed Session, p. 124.

[617] TF1-361 Transcript 14 July 2005, Closed Session, pp.73-74.

[618] TF1-361, Transcript 19 July 2005, pp. 2-10, 17; TF1-367, Transcript 21 June 2006, pp. 46-47.

[619] TF1-361, Transcript 18 July 2005, pp. 81-82.

[620] TF1-360, Transcript 20 July 2005, pp. 22-23.

[621] TF1-071 Transcript 21 January 2005, pp.22-26. See also TF1-361 Transcript 11 July 2005, pp.67-69: Mosquito was the leader of the RUF and Issa Sesay was his Deputy.

[622] TF1-036, Transcript 28 July 2005, pp. 23-26.

[623] Accused Issa Sesay, Transcript 26 June 2007, p. 28; Accused Morris Kallon, Transcript 18 April 2008, pp. 92-93.

[redacted]

[625] TF1-360, Transcript 26 July 2005, pp. 85-87.

d) Third Accused

220. The Third Accused was also a Vanguard, trained at Camp Naama.[626]

221. He was the RUF Overall Security Commander and reported to the High Command.[627] A Defence witness said that the Third Accused became the Overall Security Commander because he was the most senior man amongst the overall unit commanders, he was a Vanguard, educated, and he had accepted the RUF ideology.[628]

222. TF1-036 described the Third Accused as the Overall IDU commander, and that he reported to Battle Group Commander and the Battle Field Commander.[629] TF1-071 said the Third Accused was the Chief of Security in 1998, a position that falls directly under the Battle Field Commander.[630] It was the job of the Chief of Security to enforce the RUF rules.[631]

223. When TF1-371 [redacted], Gbao was already the Overall Security Commander and he held that position until 2002.[632] In March 1998 Gbao was a Colonel based in Kailahun District.[633] The Overall Security Commander:

> ... had a responsibility to co-ordinate the activities of the Internal Defence Unit, called IDU, which comprised of intelligence officers and also interfaced between IDU operations and the High Command of the RUF relating to intelligence that had to do with the RUF fighters. The movement of civilians within the territorial confines of the RUF. As well as to make known any subversive activity that may be hosted by any senior commander of RUF to the High Command. He also liaised with the military police as well as the G5 responsible for civilian affairs.[634]

224. The Overall Security Commander was "supervising the movement of civilians at a particular point in time, when they were used as carriers of goods, materials, specifically food stuff, logistical materials, arms and ammunition to strategic locations within the RUF,

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[626] TF1-036, Transcript 27 July 2005, p. 36.
[627] DAG-080, Transcript 6 June 2008, p.21.
[628] DAG-080, Transcript 6 June 2008, pp.79-80.
[629] TF1-036, Transcript 27 July 2005, p. 27. The witness said the Overall IDU commander reported to the Battle Group and Battle Field Commanders and IDU level commanders reported to the Overall IDU commander: TF1-036, Transcript 3 August 2005, p. 79.
[630] TF1-071, Transcript 21 January 2005, pp. 8, 13-14.
[631] TF1-361, Transcript 19 July 2005, p. 43.
[632] TF1-371, Transcript 20 July 2006, p. 30.
[633] TF1-371, Transcript 1 August 2006, Closed Session, pp. 117-118.
[634] TF1-371, Transcript 20 July 2006, p. 29.

in that function, he, the overall security commander, supervised their movement."[635] As the Overall Security Commander the Third Accused reported to the Battle Group Commander and the Battlefield commander,[636] "...it was chain work. He did report to them and they too took it up."[637] Gbao was in charge of security, his unit investigated if a person committed a crime, from the time the RUF entered Sierra Leone till May 2000. The IDU was the umbrella department for the Intelligence officers who worked within the IDU; the Intelligence Officers had the primary responsibility to gather intelligence information within the territorial confines of the RUF and they worked within the IDU department.[638]

225. The G5, IDU, IO, a part of the IDU, and the MP units, were all under the Third Accused, "All of us reported to him."[639] The IDU, G5 and MP's worked along side each other and they were part of the Joint Security Unit.[640] The IO sent reports to the Overall Security Commander and to the First Accused.[641] TF1-361 testified that the Third Accused was in charge of the MP and IDU, he also oversaw the G5 but he concentrated on the MP and IO's.[642]

226. DAG-048 testified that the Third Accused was to oversee the security offices (IDU, MP, IO, G5).[643] DAG-101 observed that the role of the IDU was to defend civilians from combatants because combatants tried to take advantage of civilians, and there was a tendency among combatants to commit crime against civilians throughout 1996 to 2000.[644]

227. Subsequent to the RUF attack and capture of Makeni in late December 1998 early January 1999, the Third Accused came to Makeni. At that time: "Augustine Gbao, he was

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[635] TF1-371, Transcript 20 July 2006, p. 30.
[636] TF1-036, Transcript 3 August 2005, p. 92.
[637] TF1-036, Transcript 27 July 2005, p. 36; Transcript 28 July 2005, p. 27.
[638] TF1-371, Transcript 24 July 2006, pp. 35-36.
[639] TF1-041, Transcript 10 July 2006, p. 64.
[640] TF1-041, Transcript 10 July 2006, p. 80, cross-examination of Sesay.
[641] TF1-041, Transcript 10 July 2006, p. 81. DAG-048 testified that IDU agents submitted their reports to their overall IDU commander, the Third Accused (DAG-048, Transcript 3 June 2008, pp.125-126).
[642] TF1-361, Transcript 19 July 2005, pp. 61-62.
[643] DAG-048, Transcript 3 June 2008, pp.49-51.
[644] DAG-101, Transcript 9 June 2008, pp.160-161. Credibility is in issue with most defence witnesses and with regard to DAG-048 (Transcript 3 June 2008, pp.133-140) and DAG-080 (Transcript 9 June 2008, pp.28-34), although they claimed that throughout the indictment period, the MP and IDU would not submit reports to Augustine Gbao as Overall Security Commander, Exhibit 378 is an example of a report from the MP, and Exhibit 379 is an example of a report from the IO, to the Overall Security Commander.

third in command for RUF/SL, third in command since then. From Issa, Morris Kallon and Augustine Gbao. They were not paying much attention to Superman and others."[645]

228. TF1-371 also testified that when he arrived in Buedu after the ECOMOG intervention, Gbao was the Overall Security Commander, and had other duties, which included oversight and supervision of the civilians that carried RUF logistics going across the Moa River to Kono, screening combatants.[646] TF1-371 said:

> ...when I talk about screening of the combatant movement across the Moa River, that was part of the security duty of his office so that combatants cannot leave the front line, and come to the rear in Kailahun District, which was a common occurrence among combatants that defected from the front line and it was the responsibility of his office to ensure that combatants don't leave and come across the Moa River, behind the rear, as well as those that are not supposed to go across the river into the front line area.[647]

229. The Third Accused was also the head of the Joint Security Board of Investigation, which met on an ad hoc basis, and the structure was created so that Gbao would meet with all of the security commanders of the MP, the IO and the IDU, "So that made him the overall security commander of joint security."[648] Gbao "was abreast with whatever decisions were taken, depending on the magnitude of the allegation at a particular battalion."[649] Witnesses said of the Third Accused that he was the chief investigator for the RUF and the Overall Security Commander, and that whosoever did wrong was handed over to him to investigate, if the Third Accused said release him they will release you:[650] "Augustine Gbao's branch was number one. He was the chief investigator," and it was the Third Accused who decided on punishment. "Whatever thing he comes up with, then we take it to Issa."[651] The Third Accused "investigated us when we do something wrong. Whoever does something wrong, if he says you're going to die today, you would die. If he says he was going to release you, he will release you. He would do the investigation."[652]

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[645] TF1-366, Transcript 18 November 2005, pp.28-29. TF1-045 stated that
[646] TF1-371, Transcript 21 July 2006, pp. 58-59.
[647] TF1-371, Transcript 21 July 2006, p. 59.
[648] TF1-371, Transcript 1 August 2006, p. 145-147.
[649] TF1-371, Transcript 1 August 2006, p. 149.
[650] TF1-366, Transcript 7 November 2005, p. 70.
[651] TF1-366, Transcript 11 November 2005, pp. 6-7; Transcript 8 November 2005, pp. 51-52.
[652] TF1-366, Transcript 8 November 2005, p.53; TF1-366, Transcript 17 November 2005, pp. 33-35. "When somebody has been investigated, when they finish investigating the person, what Augustine Gbao would tell Issa Sesay, that would be the last order," TF1-366, Transcript 17 November 2005, p. 34.

230. Exhibit 380 is a Death Warrant signed by the Third Accused.[653]

231. [redacted], a G5 commander, testified that he and others used to report to the Third Accused,[654] who was the chief security commander of the RUF.[655] TF1-041 said the Third Accused had a lot of IO's, IDU's and securities.[656] In 1998 when she was at Makeni, TF1-314 came to know the Third Accused was a top commander. TF1-314 used to hear that Gbao was the MP Commander.[657] TF1-168 and TF1-361 also confirmed that the Third Accused, in his role of Overall Security Commander, controlled the MP unit.[658]

232. The Third Accused was one of senior officers at the meeting to plan the mission to attack Koidu in December 1998, including the First and Second Accused, Mike Lamin and Johnny Paul Koroma.[659]

233. DIS-149 testified that the First and Third Accused were well aware that the IDU's had difficulties investigating crimes committed by RUF combatants at the frontlines.[660] Nothing was done about this, and this willingness to ignore their command responsibilities, on the part of the First and Third Accused, will be the subject of further submissions. Another witness DAG-018 described an incident in Makeni, where the Third Accused "disciplined" RUF fighters who had captured a civilian and forced him to take off his slippers and carry rice, by making the soldiers hold their ears and jump up and down.[661]

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[653] Exhibit 380, Death Warrant for Alusine Kamara signed by Col. Augustine Gbao, Overall Security Commander RUF/SL.

[redacted]

[655] TF1-041, Transcript 17 July 2006, p. 66.

[656] TF1-041, Transcript 18 July 2006, p. 24.

[657] TF1-314, Transcript 7 November 2005, pp. 5-9.

[658] TF1-168 said the Third Accused was the overall MP commander in 1998, Transcript 3 April 2006, Closed Session, p. 75; TF1-361 was cross-examined on this point by counsel for the Third Accused (see Transcript 19 July 2005, Closed Session, pp.60-62):

> Q. So would you agree with me that that covers the period 1997, '98, until early '99 when he was invited to come to Makeni? Am I right on the dates?
> A. Yes, sir.
> Q. During that period he was in charge of - am I right - both the military police and the IDU, the Internal Defence Unit?
> A. Yes, sir.
> Q. But not the G5?
> A. He oversee over them but he concentrated mostly on the MPs, the IOs, then the other security agencies.

[659] TF1-036, Transcript 28 July 2005, pp. 61-62.

[660] DIS-149, Transcript 6 November 2007, pp. 17-18, 39-42.

[661] DAG-018, Transcript 16 June 2008, pp. 9-15, 42.

This evidence of the Third Accused's authority over combatants, at the same time is also evidence of his unwillingness to lawfully execute that authority.

234. The Third Accused "had the right to pass military orders. In the absence of the commander who was above him he had the right to pass direct order."[662]

C. The Joint Criminal Enterprise Mode of Liability

a) Introduction

235. The joint criminal enterprise time period is between 25 May 1997 and January 2000.[663] Throughout the time period of the joint criminal enterprise its members committed the crimes alleged in Counts 1 to 14 in all of the geographical areas pleaded in the Indictment, including the attack on Freetown in January 1999 and the crimes in Freetown, the Western Area and Port Loko after that attack. This section of the brief is intended to be both introductory and substantive. Joint criminal enterprise, in the Prosecution's submission, is the mode of liability that most appropriately applies to the scale of the crimes inflicted on civilians by the three Accused and their co-perpetrators of the joint criminal enterprise. In this section submissions are made on the law of joint criminal enterprise. In addition, the Prosecution has sought to use a selection of evidence to demonstrate why the joint criminal enterprise mode of liability is appropriate, and proven on the facts. The evidence is more fully detailed towards the end of this brief in evidence sections under the various Counts of the Indictment.

236. The *Brima et al* Appeal Judgement[664] commenced its discussion of the law of joint criminal enterprise[665] by citing the important statement of principle and law authored by the ICTY Appeals Chamber Judgement in *Tadić*:

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[662] TF1-360, Transcript 26 July 2005, pp. 111-112.
[663] This was the time period found by the Appeals Chamber in *Brima et al* Appeal Judgement, para. 85.
[664] *Brima et al* Appeal Judgement, para. 74. See also *Fofana et al* Trial Judgement, paras. 206-208.
[665] Joint criminal enterprise is recognized in international criminal law as a form of "commission" pursuant to Article 6(1) of the Statute: see *Prosecutor v. Tadić*, IT-94-1-A "Judgement," Appeals Chamber, 15 July 1999, (**"*Tadić* Appeal Judgement"),** paras. 188-190; *Prosecutor v. Vasiljević*, IT-98-32-A, "Judgement" Appeals Chamber, 25 February 2004 (***Vasiljević* Appeal Judgement**) , para. 95; *Prosecutor v. Miltinović, Nikola Sainovic, Dragoljub Ojdanic.*, IT-99-37-AR72, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise", Appeals Chamber, 21 May 2003, (***Ojdanić* JCE Appeal Decision**) para. 20; *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-469, Decision on Defence Motions For Judgement of Acquittal Pursuant to Rule 98, 31 March 2006,(**"*Brima et al* Decision on Motion for Acquital**"), para. 308; *Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T,* "Judgement" Trial Chamber,

190. Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility ....

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.[666]

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21 May 1999 (***Kayishema Trial Judgement***), para. 203; *Prosecutor v Delalić* et al., IT-96-21-T, "Judgement", Trial Chamber, 16 November 1998, (***Čelebići* Trial Judgement**) para. 328.

[666] *Tadić* Appeal Judgement, paras. 190-193.

237. The Appeals Chamber also settled the application of the law of joint criminal enterprise as it was pleaded in the Indictment. This is so because the pleading of the joint criminal enterprise in the *Brima et al* indictment is identical to the pleading in this trial.[667] In coming to this conclusion the Appeals Chamber first observed that the *actus reus:*

> ...for all forms of joint criminal enterprise[668] liability consists of the following three elements:
>
> (i) a plurality of persons;
>
> (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;
>
> (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[669]

238. The issue before the Appeals Chamber pertained "to the requisite nature of the common plan, design or purpose,"[670] and the Appeals Chamber concluded "that the

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[667] Para. 81 of the *Brima et al* Appeal Judgement reproduces paragraphs 33 to 35 of the AFRC indictment, which are identical to paragraphs 36 to 38 of the RUF Indictment, save for the words AFRC and RUF being interchanged and the names of the accused being interchanged.

[668] The forms of joint criminal enterprise are now settled in international criminal law:
(1) for the basic form it is necessary to prove that the Accused intended to commit one or more of the crimes listed in the statute and intended to participate in a common plan whose object was the commission of a crime *Tadić* Appeal Judgement, para. 228; *Prosecutor v. Brđanin*, IT-99-36-A, "Judgement", Appeals Chamber , 3 April 2007, (**"*Brđanin* Appeal Judgement"**) para. 365; *Prosecutor v. Vasiljević,* IT-98-32-A, "Judgement" Appeals Chamber (**"*Vasiljević* Appeal Judgement"**), paras. 97, 101; *Prosecutor v. Kvočka* et al., IT-98-30/1-A, "Judgement" Appeals Chamber, 28 February 2005, **(*Kvočka* Appeal Judgement),** para. 82. And the participants of the Joint Criminal enterprise must share the same criminal intent i.e. to commit the said crimes or crime. see *Tadić* Appeal Judgement, para. 228 .
(2) the second category is also the basic form but refers to an organized system to achieve the criminal purpose, such as a concentration camp. It applies where the accused has personal knowledge of a concerted system of ill-treatment. The Accused must have personal knowledge of the system and the intent to further this concerted system of ill-treatment. see: *Prosecutor v. Krnojelac,* IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003 **("*Krnojelac* Appeal Judgement"),** para. 32; *Tadić* Appeal Judgement, paras. 203. However, it is not necessary to prove the existence of a formal or informal agreement between the members; see *Krnojelac* Appeal Judgement, para. 96, *Prosecutor v. Simić et al.*, IT-95-9-T, "Judgement", Trial Chamber, 17 October 2003, (*Simić* Trial Judgement) para. 158.
(3) the extended form exists where participants share the intention to carry out a common design and where the physical perpetrator commits a crime which falls outside the scope of the original design but which is nevertheless a natural and foreseeable consequence of that design. It is necessary to prove that: (a) crimes that were not intended as part of the implementation of the common purpose occurred; (b) these crimes were a natural and foreseeable consequence of effecting the common purpose and (c) the participant in the joint criminal enterprise was aware that the crimes were a possible consequence of the execution of the common purpose, and in that awareness, he nevertheless acted in furtherance of the common purpose. see: *Tadic* Appeal Judgement, para. 206, 220, and 228; *Prosecutor v. Kordic and Cerkez*, "Judgement" Trial Judgement , 26 February 2001 ("*Kordić* Trial Judgement"), para. 398; *Prosecutor v Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, (*Brđanin and Talić* Further Form of Indictment Decision), para. 30; *Prosecutor v Krstić*, IT-98-33-T, "Judgement", 2 August 2001, **("*Krstić* Trial Judgement"),** para. 613; *Kvočka* Appeal Judgement, para. 86, *Vasiljević* Appeals Judgment, para. 99).

[669] *Brima et al* Appeal Judgement, para. 75.

requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective."[671] [underlining added]

239. The following principles of law, and their application to the joint criminal enterprise pleading, were then stated by the Appeals Chamber:

> 84. The Appeals Chamber holds that the common purpose of the joint criminal enterprise was not defectively pleaded. Although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 [identical to para. 36 of the RUF Indictment] and reading that paragraph in isolation. Furthermore, the Trial Chamber erred in its consideration of "evidence" adduced at trial to determine whether the Indictment was properly pleaded. The error arose because determination of whether the Prosecution properly pleaded a crime must be determined on the basis of whether the Prosecution pleaded all the material facts in the Indictment, not whether it had adduced evidence to support the allegations.
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> 85. Several other issues arose in the context of JCE for which the Appeals Chamber wishes to express itself. The Trial Chamber erred in concluding that the Prosecution could not plead the basic and extended forms of joint criminal enterprise liability in the alternative on the grounds that the two forms, as pleaded, logically exclude each other. Pleading the basic and extended forms of JCE in the alternative is now a well-established practice in the international criminal tribunals. The Trial Chamber erred in finding that the Indictment failed to specify the period covered by the JCE. That period is that covered by all of the alleged crimes, which in this case is between 25 May 1997 and January 2000.[672]

240. Paragraph 36 of the Indictment read with paragraphs 37 and 38 set out the common purpose. They further plead that the objective, set out in paragraph 36, namely to "take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas,"[673] was to be achieved "by conduct constituting crimes within the Statute."[674]

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[670] *Brima et al* Appeal Judgement, para. 76.
[671] *Brima et al* Appeal Judgement, para. 80.
[672] *Brima et al* Appeal Judgement, paras. 84-85 (footnotes in the text omitted).
[673] Indictment, para. 36.
[674] *Brima et al* Appeal Judgement, para. 82.

241. Paragraph 37 of the Indictment also pleads the basic[675] and extended forms of joint criminal enterprise liability in the alternative, and the Appeals Chamber acknowledged that pleading as alternatives the basic and extended forms, is "a well-established practice in the international criminal tribunals."[676]

242. The crimes charged in Counts 1 through 14 of the Indictment were within the joint criminal enterprise, that is the basic form of joint criminal enterprise. The three Accused and others agreed upon and participated in a joint criminal enterprise to carry out a campaign of terror and collective punishments in order to pillage the resources of Sierra Leone, particularly diamonds, and to control forcibly the population and territory of Sierra Leone. Alternatively, the crimes alleged in the Indictment were the foreseeable consequences of the crimes agreed upon in the joint criminal enterprise. Regardless of the role played by each participant in the commission of the crime, all participants in the joint criminal enterprise are guilty of the same crime.[677]

243. Although the basic form of joint criminal enterprise requires the existence of a common purpose that amounts to, or involves the commission of one or more crimes stated in the Statute, the common *purpose need not be previously arranged and may materialize extemporaneously.*[678] Nor is it required under the basic form that the principal perpetrators of the crimes that are part of the common purpose be members of the joint criminal enterprise, but to impute liability to an accused for a crime committed by another, the crime must form part of the common criminal purpose.[679]

244. An accused is held responsible under the extended form of joint criminal enterprise for a crime outside the common purpose if, under the circumstances it was foreseeable that

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[675] The first and second categories of JCE do not need to be referred to specifically, since both are encompassed within a pleading of a "basic" form of joint criminal enterprise liability: *Vasiljević* Appeal Judgement, para. 98, *Krnojelac* Appeal Judgement, para. 89.
[676] *Brima, et al* Appeal Judgement, para. 85.
[677] *Vasiljevic* Trial Judgement, para. 67, affirmed on appeal, *Vasiljević* Appeals Judgment, para. 111; *Prosecutor v. Blagojević and Jokić,* IT-02-60-T, "Judgment" Trial Judgement, **(*Blagojević and Jokić* Trial Judgment)**, 17 January 2005, para. 702. (The sentence imposed on each member of the joint criminal enterprise may reflect the gravity of the offence and criminal conduct of that accused in relation to the commission of that offence; *Aleksovski* Appeal Judgement, para. 182 and *Čelebići* Appeal Judgement, para. 731; *Jelisić* Appeal Judgement, para. 101, quoting with approval *Kupreškić* Trial Judgement, para. 852.)
[678] *Prosecutor v. Brđanin* , IT-99-36-A, "Judgement," Appeals Chamber, 3 April 2007 **("*Brđanin* Appeal Judgement")**, para. 418.
[679] *Fofana et al* Trial Judgement, para. 216; *Brđanin* Appeal Judgement, paras. 410, 418.

such a crime *might be perpetrated* by one or more members of the group or persons used by a member to carry out the crime, and the accused willingly took that risk.[680]

245. Under both the basic and extended forms of joint criminal enterprise, participation is satisfied so long as the accused assisted or contributed to the execution of the common purpose. The accused need not perform any part of the *actus reus* of the crime.[681] Nor is it required that the accused's participation be necessary or substantial.[682]

b) Geographical Area and Scope of the Joint Criminal Enterprise

246. The Indictment alleges crimes in seven Districts of Sierra Leone and Freetown and Western Area, and for some crimes, throughout the Republic of Sierra Leone. This reflects the scope of the war fought in Sierra Leone and the widespread and systematic nature of the crimes alleged in the Indictment. In *Krajišnik*, the Defence argued that joint criminal enterprise was not the appropriate mode of liability in that trial due to the size of the case, its scope, and the fact that the accused was structurally remote from the commission of the crimes charged in the indictment.[683] The Trial Chamber rejected the suggestion:

> Far from being inappropriate, JCE is well suited to cases such as the present one, in which numerous persons are all said to be concerned with the commission of a large number of crimes.
>
> 877. On the facts of this case, as discussed later in this section, the Chambers finds JCE to be the most appropriate mode of liability. Therefore, the other forms of liability charged in the indictment will not be further considered in this judgement.[684]

247. The crimes alleged in the Indictment, the nature of those crimes, the geographical area where they were committed, the number of victims, and the number of persons involved in the joint criminal enterprise, are all factors which render joint criminal enterprise the most appropriate mode of liability in this case.

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[680] *Brđanin* Appeal Judgement, para. 365, 411, 431.
[681] *Kvočka* Appeal Judgement, para. 99; and *Prosecutor v. Stakić* , IT-97-24-A, "Judgement", Appeals Chamber, 22 March 2006, ("***Stakić* Appeal Judgement**"), para 64.
[682] *Brđanin* Appeal Judgement, para. 430; *Kvočka* Appeal Judgement, para. 98.
[683] *Prosecutor v. Krajišnik and Plavsić* , IT-00-39-T, "Judgement," Trial Chamber, 27 September 2006 (**"*Krajišnik* and *Plavsić* Trial Judgement"**), para. 876. This finding relies on two Appeals Chambers decisions: *Brđanin* Appeal Judgement, para. 423, and *Prosecutor v. Rwamakuba,* ICTR-98-44-AR72.4, "Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide," 22 October 2004, **(*Rwamakuba* JCE Interlocutory Appeal Decision),** para. 25.
[684] *Krajišnik and Plavsić* Trial Judgement, paras. 876-877.

248. However, as will be apparent in later sections, the Prosecution also alleges liability pursuant to the remaining modes of liability under Art. 6(1) and pursuant to Art. 6(3) of the Statute.

c) Plurality of Persons

249. Paragraph 36 of the Indictment states that the RUF, including the First, Second and Third Accused, and the AFRC, including Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu shared a common plan. The common plan was one shared by two armed groups, RUF and AFRC, and some members of those groups died, were injured and rendered *hors de combat,* or ceased to be affiliated with the groups. In the case of a large scale joint criminal enterprise, the participants may change over a period of time, with new members joining, and some persons ceasing to be members; membership in the enterprise may vary (it is hard to conceive how this could not be so during a war as combatants die and must be replaced) but so long as the common aim remains constant the joint criminal enterprise continues.[685]

250. A common plan existed throughout the Indictment period and the three Accused were part of the plurality of persons who shared that common plan. Evidence exists of the participation of Bockarie, Akim Touray, Alex Tamba Brima, K.S. Banya, Mingo, Charles Taylor and others. On the evidence it is impossible to specify fully the membership of the joint criminal enterprise, and it is not necessary to do so.[686] However, the pre-Indictment period evidence is relevant to demonstrating the context in which the joint criminal enterprise arose.

251. The RUF attacked Sierra Leone in 1991 to overthrow the APC government.[687] From early on the RUF abducted civilians and forced them to be combatants, or to labour for the RUF. The evidence referred to under Count 13 of this submission is relied on. In particular TF1-330's evidence, illustrates forced labour or enslavement as an integral aspect of the RUF strategy and policy to gain control over natural resource of Sierra Leone. Forced

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[685] *Brđanin* Trial Judgement" para. 261; *Tadić* Trial Judgement para. 227; *Blagojević and Jokić* Trial Judgment, paras 700-701.
[686] *Krajišnik* Trial Chamber Judgement, para. 1086.
[687] Exhibit 38, RUF Training Manual p. 11069; General Tarnue, Transcript 4 October 2004, pp. 128-131; TF1-036, Transcript 27 July 2005, p. 29; Accused Issa Sesay, Transcript 22 June 2007, p.10; Accused Morris Kallon, Transcript 18 April 2008, pp.2-5.

labour and forced military service occurred in different forms. The evidence of forced mining and forced farming demonstrates the use of civilians within the larger common plan of the joint criminal enterprise.

252. For instance, forced farming for the RUF was common from 1996 up to 2000. Civilians were forced to farm both on so called "RUF farms" or "government farms" and on private farms[688] of the three Accused and of other commanders. The civilians working on such farms were treated like slaves.[689]

253. Johan Hederstedt's evidence referred to the characteristics of guerrilla groups and advised that:

> The main aim of this "fight for the rural districts" in developing countries will be to gain control of the farming population, which constitutes the majority of the population and is where the direct influence of the ruling regime in question is normally weak.[690]
>
> ....
>
> 17. Most guerrilla movements need and get the support of the population.
>
> ....
>
> This may involve using civilians by force to achieve the goals and in order to survive.... The support can consist of labour, directly or indirectly as farming, building roads, organizing workshops, maintenance, hosptialisation of injured soldiers or housing staff, leaders, etc.[691]
>
> ....
>
> 10. In new conflicts the question of control over local resources is often the triggering factor. In some cases these resources may be traded internationally (for example minerals).[692] [underlining added]

254. The evidence described in Count 13 establishes precisely this: the RUF planned to take control of the civilian population by force, capturing and enslaving them, in order to support the military objectives of the RUF. This included forcing civilians to mine diamonds for the RUF.

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[688] TF1-371, Transcript 21 July 2006, Closed Session, pp. 60-62. Also: TF1-367, Transcript 23 June 2006, Closed Session, p. 34, on Sam Bockarie's Chief of Defence Staff – farm; TF1-367, Transcript 22 June 2006, pp. 49-51.Corroborated by Dennis Koker, Transcript 29 April 2005, pp. 38-39.
[689] TF1-330, Transcript 14 March 2006, pp. 24-25, 27-28, 30-31.
[690] Exhibit 389, Report of Johan Hederstedt, p. 26758.
[691] Exhibit 389, Report of Johan Hederstedt, p. 26760.
[692] Exhibit 389, Report of Johan Hederstedt, p. 26757.

255. Similarly, the evidence in Count 12 shows that during the pre-Indictment period the RUF systematically captured, conscripted or enlisted children under 15 years, or used them to participate actively in hostilities. Witness TF1-314, was only 10 years of age in 1994 when she was captured by the RUF[693] and given military training.[694] TF1-117 was 10 years old in 1992 when he was captured.[695] His group of child soldiers were trained to cock and fire and use arms such as G3, AK 47 and LAR.[696] DIS-188 confirmed the use of SBU's during the pre-Indictment period, attributing the SBU's to the NPFL contingent that was part of the RUF at the time.[697] Other Defence witnesses testified of children as bodyguards,[698] and Gios using 11 and 12 year old children to participate in fighting.[699]

256. The above evidence and the evidence referred to in Counts 1 to 14 below, show that from the outset the RUF comprised of a plurality of persons who acted in a concerted and planned way to commit crimes in furtherance of its goal. A reference to the RUF training manual makes clear that:

> ...the RUF entered Sierra Leone as a redeemer on the 23rd March 1991, with arms because the corrupted A.P.C. escaped many coup d'etats. So the A.P.C. grew strong in Sierra Leone and it was only rooted out by invasion in the form of arm struggle.[700]

257. The existence of the joint criminal enterprise is demonstrated by the acts of the RUF in the pre-Indictment period. The concerted actions of the collectivity, the members of the joint criminal enterprise, prove the existence of the common plan, design or purpose. Following 25 May 1997 the RUF was invited to join the AFRC *coupists*. The criminal acts committed by the RUF prior to the coup continued after the coup. And the common plan of the RUF prior to the coup, to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, continued as the common plan when the plurality of persons comprised of the RUF, including the three Accused, and members of the AFRC.

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[693] TF1-314, Transcript 2 November 2005, pp. 24-26.
[694] TF1-314, Transcript 2 November 2005, pp. 27-30.
[695] TF1-117, Transcript 29 June 2006, pp. 86-88.
[696] TF1-117, Transcript 29 June 2006, p. 91.
[697] DIS-188, Transcript 25 October 2007, p. 91.
[698] DIS-163, Transcript 14 January 2008, p. 77.
[699] DIS-252, Transcript 18 January 2008, p. 42.
[700] Exhibit 38, RUF Training Manual, p. 11072.

i) Plurality of Persons After 25 May 1997

258. Sankoh accepted the *coupists* offer to join the Armed Forces Revolutionary Council (AFRC).[701] His acceptance was broadcast over the Sierra Leone Broadcasting Service (SLBS) on 28 May 1997,[702] and Sankoh told the RUF that the RUF should take command from Johnny Paul Koroma and that from that time on the RUF would be called the People's Army, and that the RUF and SLA were brothers and should be together.[703]

> Judicial notice was taken of the following facts:
>
> R. Shortly after the AFRC seized power, at the invitation of Johnny Paul Koroma, and upon the order of Foday Saybana Sankoh, leader of the RUF, the RUF formed an alliance with the AFRC.
>
> S. The AFRC/RUF Junta forces (Junta) were also commonly referred to as "Junta", "rebels", and "People's Army" by the population of Sierra Leone.
>
> T. After the 25 May 1997 coup d'état, a governing body was created within the Junta that was the sole executive and legislative authority within Sierra Leone during the Junta.
>
> U. The governing body included leaders of both the AFRC and the RUF.[704]

259. No evidence has been led to suggest that the three Accused were not members of the RUF, and the evidence further proves that the three Accused were senior commanders of the RUF. They were part of a plurality of persons.

ii) The Supreme Council

260. Government Notice Number 215 of the Sierra Leone Gazette, dated 18 September 1997 lists those persons who "constitute the Armed Forces Revolutionary Council with effect from the 25th day of May 1997."[705] Thirty-four names are listed, including Major Johnny Paul Koroma (Chairman), Corporal Foday S. Sankoh (Deputy Chairman), Staff Sergeant Abu Sankoh, Staff Sergeant Alex T. Brima, Staff Sergeant Brima B. Kamara,

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[701] The leaders of the coup were Johnny Paul Koroma, Chairman of the AFRC government, Zagalo, Alex Tamba Brima, Ibrahim Bazzy Kamara, Samuel Kargbo, Biyoh Sesay, Momoh aka Dotti, Tamba Gborie, Abdul Sesay, Woyoh, Sullay Falaba, George Adams, Lager, Leather Boot, Hassan Papa Bangura aka Bomb Blast, Santigie Kanu aka Five-Five: George Johnson, Transcript 14 October 2004, pp. 24-26.
[702] Exhibit 16, C.D OF Radio Broadcast Dated 28 May 1997. This exhibit is an audio recording of the broadcast and Exhibit 17, Transcript of C.D OF Radio Broadcast dated 28 May 1997 is a transcript of that recording.
[703] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 16 May 2005, pp. 44-45.
[704] Judicial Notice Consequential Order, Annex 1, paras. R, S, T and U.
[705] Exhibit 6, Copy of Sierra Leone Gazette dated Thursday 18 September 1997.

Colonel Sam Bockarie, Major Morris Kallon, Colonel Issa H. Sesay, Colonel Gibril Massaquoi, and Colonel Michael Lamin.[706]

261. During the time of the Junta the Third Accused remained in Kailahun District but he was a Vanguard and the Overall Security Commander of the RUF. Vanguards had a specific position within the RUF as they had been trained in Liberia in the early days of the RUF[707] Important positions within the RUF hierarchy, such as MP Commanders were only given to Vanguards, even in 1997 and 1998.[708]

262. The Supreme Council, of which the First and Second Accused were members, "was the highest decision-making body of the Junta, which co-ordinated both the affairs of the government, of the Junta, as well as defence of the Junta, that is the security of the Junta at that point in time."[709]

iii) Plurality of Persons after February 1998

263. Judicial notice was taken of the following facts:

> V. The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998.
>
> W. After the Junta was removed from power, the AFRC/RUF alliance continued.[710]

264. This ongoing alliance is conclusive proof of the plurality of persons, and there is ample evidence to demonstrate this continuation of a plurality of persons, of which the three Accused were part. The pull-out from Freetown included all senior commanders of the AFRC government and the other ranks; a mixed group of RUF and SLA soldiers were fighting against ECOMOG troops.[711] Johnson testified that he saw the Second Accused "on the 12th February at the residence of Johnny Paul Koroma when it was made to all commanders that we should pull out of Freetown.".[712] TF1-334 testified that when he reached Newton he saw the First Accused there; Sesay went to Newton to receive some of

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[706] Exhibit 6, Copy of Sierra Leone Gazette Dated Thursday 18 September 1997.
[707] TF1-036, Transcript 27 July 2005, pp. 28-29; TF1-168, Transcript 31 March 2006, p. 67.
[708] TF1-168, Transcript 03 April 2006, p. 75.
[709] TF1-371, Transcript 20 July 2006, p. 31.
[710] Judicial Notice Consequential Order, Annex 1, paras. V, W, p. 11991.
[711] George Johnson, Transcript 14 October 2004, p. 45.
[712] George Johnson, Transcript 19 October 2004, pp. 108-109.

his men and then went back to Masiaka.[713] The First Accused even instructed [redacted] to put some men together to go and receive Johnny Paul Koroma as Koroma was pulling out of Freetown.[714]

265. TF1-334 discussed a meeting shortly after the withdrawal from Freetown of SLA and RUF held in Kabala that was chaired by SAJ Musa who said that Kono should be captured.[715] At Masiaka there was a meeting between the RUF and the AFRC where the 16 Honourables responsible for the coup plus RUF top commanders promoted themselves to brigadier general.[716] [redacted] said there was a meeting at Masiaka of senior members of the AFRC and the RUF, which he attended, the purpose of which was to assess the situation and develop a strategy following the intervention.[717] At Makeni, in mid to late February 1998 there was another meeting attended by Johnny Paul Koroma, Bazzy, Five-Five, the First and Second Accused and others at a nightclub. After the meeting the Second Accused told the troops to move to Kono and that the First Accused had said that this is 'Operation Pay Yourself', each individual should try to get food and vehicles to take into the bush. The looting was done by RUF and AFRC.[718]

266. The RUF and AFRC continued to Kono District and a meeting was held in Koidu attended by the First Accused, Johnny Paul Koroma and others.[719] Around this time SAJ Musa went to Koinadugu District,[720] however, his presence (or that of any other individual who had been part of the plurality of persons) in another location is irrelevant to the existence of a plurality of persons. The law simply does not require that the plurality of persons remain the same throughout the joint criminal enterprise, nor is there a requirement that the plurality of persons be organized in a military, political or administrative structure.[721] The *Tadić* Appeals Judgement makes clear that not all members of the group must contribute to the commission of crimes: "Whoever contributes to the commission of

[713] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 17 May 2005, p. 68.
[redacted]
[715] TF1-334, Transcript 6 July 2006, pp. 109-111.
[716] George Johnson, Transcript 20 October 2004, pp. 2-4.
[redacted]
[718] TF1-360, Transcript 20 July 2005, pp.9-11.
[719] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 18 May 2005, pp. 3-4.
[720] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 18 May 2005, pp. 5, 20; TF1-334, AFRC Transcript 17 May 2005, pp.105, 112-113.
[721] *Fofana et al* Trial Judgement, paras, 213 and 227; *Brđanin* Trial Judgement,para. 261;. *Tadić* Appeal Judgement, para. 227;. *Vasiljević,* Appeal Judgment, para. 100;. *Stakic*, Appeal Judgment , para 64; *Tadic* Appeal Judgement, para. 227.

crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable ...."[722] [underlining added].

267. It is possible for co-perpetrators pursuant to a joint criminal enterprise to be removed from the *actus reus* of a crime. Senior leaders necessarily divide tasks up amongst each other and use the means at their disposal, such as armies or police forces, to execute the common plan. A commander may use the forces under his control, while another participant makes inflammatory speeches and yet another provides political support. In *Stakić* the Appeals Chamber found that a "group including the leaders of political bodies, the army, and the police who held power in the Municipality of Prijedor" was a plurality of persons, meeting the first element of joint criminal enterprise.[723]

268. Throughout 1998 and to disarmament, members of the AFRC remained with the RUF in Kono and Kailahun Districts. For example, TF1-071 described the role of Akim Turay in the RUF, "he was one of the senior fighters of the RUF, but he was an SLA."[724]

269. Some of the Honourables, the persons responsible for the AFRC Coup, such as Honourables Adams, Lagawo, Sammy and Eddie Kanneh resided in Buedu and took orders from Bockarie, and Bockarie had a good relationship with the AFRC in Buedu.[725] TF1-036 testified that Bockarie was carrying out the military operation but he did it in consultation with Johnny Paul Koroma.[726] Diamonds were taken from Johnny Paul Koroma but after that:

> Mosquito met him and apologised to the diamonds they had taken away from him and they came together and started working hand in hand. Later Mosquito met him and apologised to the diamonds they had taken away from him and they came together and started working hand in hand. But Mosquito told him to stay in Kangama because he doesn't want him to be taking part in military commands and he does not want him to be talking in radio so that the enemies will hear and mount pressures on where they were. So he was just sitting down whilst Mosquito was taking decisions, and when once he will make a decision, he will go and report to him and return. That

[722] *Tadić* Appeal Judgement, para. 190.
[723] *Stakić*, Appeal Judgment, paras. 68-69.
[724] TF1-071, Transcript 21 January 2005, p. 82.
[725] TF1-168, Transcript 3 April 2006, pp. 14-15.
[726] TF1-036, Transcript 28 July 2005, pp. 43-44.

is exactly what was happening. That's why I said he was the most high command.[727]

270. Members of the RUF, such as [redacted] Col. Alfred Brown and Captain Stagger, went to Koinadugu and Bombali Districts to where members of the former AFRC were located.[728] Throughout the conflict members of the AFRC and RUF formed a plurality of persons. This was also perceived to be the case by victims.[729]

271. Exhibit 40, a letter from Bockarie to Charles Taylor dated 24 June 1998, is a request for ammunition.[730] By this time ECOMOG had driven the RUF and AFRC out of Freetown, and the RUF and AFRC were planning further attacks on the people Sierra Leone.

d) Common Purpose or Design

272. The second element of the *actus reus* of joint criminal enterprise is the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts."[731] In addition, "Within a joint criminal enterprise there may be other subsidiary criminal enterprises."[732]

273. The RUF described itself as taking up an armed struggle against the APC government.[733] It entered into Sierra Leone in 1991 and from then on fought against

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[727] TF1-036, Transcript 29 July 2005, p. 73.

[redacted]

[729] See for example, TF1-101 who, during the 1999 Freetown invasion, witnessed an argument between an "SLA and a rebel", about the purpose of entering Freetown. The SLA said they did not want to overthrow and they just brought the rebels there. The rebel said "since they had come to the city, they were all together, so what their leader told them to do was they should do it. The SLA said they would not fight again until they were paid." Finally a certain Captain Blood arrived and said "Don't fight. You are all together. Don't make any argument again." TF1-101, Transcript 28 November 2005, pp. 40-41

[730] Exhibit 40, Unsigned Copy of Letter from Bockarie to President Charles G. Taylor, 24 June 1998.

[731] *Kvočka* Appeals Judgement, para. 96. The understanding or arrangement may be an unspoken one. It is only necessary that the person have a tacit common state of mind with other members of the joint criminal enterprise, which may be inferred from all the circumstances. The existence of such a common plan, design or purpose may be established by circumstantial evidence, and may be inferred from all the evidence: *Simić* Trial Judgement, para. 158;. *Vasiljević* Trial Judgement,,para. 66; *Krnojelać*, Trial Judgement, para. 80; *Prosecutor v. Furundžija,* IT-95-17/1-A, "Judgement", Appeals Chamber, ("*Furundžija* Appeal Judgement"), 21 July 2000, para. 119; *Krnojelac* Appeal Judgement, para. 96, *Tadić Appeal Judgement*, para. 227; *Stakić Appeal Judgement*, para. 64.

[732] *Kvočka et al* Trial Judgement, para. 307.

[733] Exhibit 38, RUF Training Manual, p. 11069.

government forces. Later the AFRC *coupists* overthrew the elected government in May 1997, and the RUF joined the AFRC, while the elected government was forced into temporary exile. For just over eight months AFRC/RUF Junta forces controlled a large territorial area of Sierra Leone, including Freetown. ECOMOG forces remained in Sierra Leone during this time and active hostilities continued. The AFRC/RUF Junta forces during the Junta continued to use any actions necessary, including committing crimes within the Statute, to gain and exercise political power and control of Sierra Leone, in particular the diamond mining areas and this continued after the ECOMOG intervention in February 1998. Several witnesses underlined the importance Bockarie placed on the recapture of Kono, after the entry of ECOMOG in 1998, to consolidate the position of the RUF and AFRC and to enable the Junta to sustain its military operations.[734]

274. There are two questions which should be considered when assessing the evidence:

1. Did the joint criminal enterprise include the crimes in the Statute?
2. If not, were the crimes a natural and foreseeable consequence of the implementation of the common purpose of the joint criminal enterprise or did they fall outside the joint criminal enterprise?

275. Whether crimes are "original" to the common objective or were added later is a question of evidence, but the common objective should be conceptualized "as fluid in its criminal means."[735] The *Krajišnik* Trial Chamber commented that:

> An expansion of the criminal means of the objective is proven when leading members of the JCE are informed of new types of crime committed pursuant to the implementation of the common objective, take no effective measures to prevent recurrence of such crimes, and persist in the implementation of the common objective of the JCE. Where this holds, JCE members are shown to have accepted the expansion of means, since implementation of the common objective can no longer be understood to be limited to commission of the original crimes. With acceptance of the actual commission of new types of crime and continued contribution to the objective, comes intent, meaning that subsequent commission of such crimes by the JCE will give rise to liability under JCE form 1.[736]

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[734] TF1-371, Transcript 20 July 2006, pp. 14-15, 8; TF1-071 Transcript 19 January 2005, Closed Session, pp. 50, 55 and Transcript 21 January 2005, Closed Session, pp. 86-87.
[735] *Krajišnik* Trial Chamber Judgement, para. 1098.
[736] *Krajišnik* Trial Chamber Judgement, para. 1098.

i) Count 13, Enslavement

276. The capture of civilians and forced labour, the crime of enslavement, were hallmarks of the joint criminal enterprise. Earlier in this submission, note was taken of the evidence of the witness Hederstedt who said that most guerrilla movements need civilians support and this may "involve using civilians by force...."[737] It was part of the joint criminal enterprise from the outset to enslave civilians, force them to labour on farms, mine diamonds, carry loads, do domestic work and other activities. The practice to capture civilians in RUF controlled areas, to detain them and use them in forced labour for different tasks, such as carrying looted goods, weaponry and ammunition was clearly part of a common war effort and a key element of the RUF strategy to achieve its goal to gain control over Sierra Leone.

277. The example of forced farming and the so called "subscription" system that the RUF imposed on civilians in particular in Kailahun District, as described in detail in the evidence section of Count 13, renders a good example of the elaborate system of enslavement and forced labour the RUF imposed on civilians in Kailahun District since the beginning of the war.[738] Several witnesses testified that civilians were forced to work on so called "government farms" or "state farms" for the RUF,[739] under harsh conditions and under gunpoint.[740] The Third Accused was a senior commander in Kailahun District from 1996 to 2000. He organised, planned and supervised an elaborate system of forced labour in Kailahun[741] through a system of G5 officers[742] and "town chiefs" installed by the RUF, who gathered and organised the civilians.[743] During that period alone in Giema up to 400 civilians were used in forced farming; in addition they were forced to carry the farmed goods for the RUF.[744] Civilians were captured by force by the RUF to do this labour.[745] In addition to forcing people to farm on "government farms" the RUF had established a

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[737] Exhibit 389, Report of Johan Hederstedt, p. 26760.
[738] TF1-367, Transcript 22 June 2006, Closed Session, pp. 25-26.
[739] TF1-371, Transcript 21 July 2006, Closed Session, p. 60; TF1-367, Transcript 22 June 2006, p. 26.
[740] TF1-113, Transcript 2 March 2006, pp. 71-72; TF1-108, Transcript 7 March 2006, pp. 104-106 and Transcript 13 March 2006, pp. 36-37.
[741] TF1-108, Transcript 7 March 2006, pp. 104-105.
[742] TF1-113, Transcript 7 March 2006, pp. 28-29; and Transcript 2 March 2006, pp. 71-72. Corroborated by DIS-074 Transcript 4 October 2007, p. 64.
[743] DIS-302, Transcript 27 June 2007, pp. 35-38; DIS-117 Transcript 5 October 2007, pp.16-17 ;
[744] TF1-108, Transcript 7 March 2006, pp. 107-111, Transcript 8 March 2006, pp. 23, 29; Transcript 9 March 2006, p. 63.
[745] TF1-108, Transcript 8 March 2006, p. 46; TF1-366, Transcript 15 November 2005, pp. 59-60.

system that witnesses referred to as "subscription" in which farmers, in particular in Kailahun, were forced to hand in some kind of a levy to the RUF, consisting mostly in coffee, cacao and palm oil, meat and fish. This system existed from 1996 to 2001 and it was the Third Accused who collected the products through his G5 commanders[746], who made civilians carry the goods.[747] Civilians were not compensated they had to gather food besides the forced labour for the RUF.[748] Witnesses considered this system as forced labour[749] and slavery.[750] The products were sent to the frontlines.[751] The use of forced labour on RUF farms was necessary to feed the troops[752]

278. Diamond mining was a pillar of the RUF movement and a main source of income during the armed conflict. Bockarie considered the Tongo area and Kono District, both diamondiferous areas as strategically important regions, and said they should remain under RUF or Junta control at all means.[753] Unified RUF and AFRC forces collectively attacked Tongo in August 1997, which was under the control of the Kamajors.[754] The attack was lead by Bockarie. He entered Tongo with over 300 combatants and gathered around 1,000 civilians at the NDMC football field in Tongo to tell them that they now had to do "AFRC government mining".[755] TF1-334 testified that the SLA and RUF were mining in Tongo during the Junta, which was controlled by the AFRC secretariat under the command of the Secretary of State East, Captain Eddie Kanneh, who worked closely together with Sam

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[746] TF1-330, Transcript 16 March 2006, p. 76.

[747] [redacted] See also: Exhibit 84, Note dated 15 February 1999 from the G5 Office 4th Battalion Headquarters, Kailahun (confidential) and TF1-330, Transcript 16 March 2006, p. 91. Corroborated by TF1-367, Transcript 23 June 2006, Closed Session, p. 40, who said that in 1998 civilians took the products of their private farming, to the riverside markets at the border and sold them there, while the earnings had to be handed over to the RUF. Even Defence witnesses admitted that civilians could "not refuse" to carry out these tasks: DIS-117 Transcript 5 October 2007, pp. 16-17. This information was corroborated by DIS-074, Transcript 4 October 2007, pp. 63-64.

[748] TF1-330, Transcript 14 March 2006, 46-48

[749] TF1-330, Transcript 16 March 2006, pp. 79-80.

[750] TF1-330, Transcript 14 March 2006, p. 92; TF1-113, Transcript 2 March 2006, p. 71; TF1-108, Transcript 10 March 2006, p. 43 and Transcript 13 March 2006, p. 99.

[751] DIS-117 Transcript 4 October 2007, p.103 and Transcript 5 October 2007, pp. 13-15. In cross-examination DIS-117 admitted, that the first Accused had given him food once in Pendembu and that was the reason why he came to testify for the first Accused. Transcript 5 October 2007, p. 25.

[752] TF1-108, Transcript 7 March 2006, p. 91.

[753] TF1-036, Transcript 28 July 2005, p. 44.

[754] TF1-035, Transcript, 5 July 2005, p. 78; DIS-293, Transcript 13 November 2007, pp. 62.

[755] TF1-035, Transcript, 5 July 2005, pp. 79-81; DIS-293, Transcript 13 November 2007, p. 63.

Bockarie.[756] Kanneh had political and administrative functions similar to a resident minister of the Eastern Region and the AFRC secretariat performed administrative functions specifically relating to mining. Brigade commander of Kenema was Fallah Sewa.[757]

279. Further proof of the importance mining played in the RUF and AFRC strategy and plan was the weight, revenue generation was given in meetings of the Supreme Council. Since the Junta found it very difficult to raise revenue through taxes but nevertheless had to pay for salaries to members of the Supreme Council, the government, the combatants and for military logistics they had to generate income. "The only alternative, at that point in time, was a resort to alluvial mining in order to support the Junta"[758] to pay for petroleum to allow troops and commanders to move, for the supply of arms and ammunition and rations.[759] Johnny Paul Koroma appointed senior members of the Supreme Council to supervise the mining of alluvial diamonds in Kono and Kenema, and periodically those members updated the Supreme Council on the diamonds that were mined.[760] A controlling and recording system was in place by 1998 and 1999 and diamonds would be brought – mostly through Buedu[761] – to Liberia in exchange for weapons, medicine and food.[762] Secretary of State Eddie Kanneh, Sam Bockarie, the First and the Second Accused took diamonds to Liberia. Eddie Kanneh would come from Monrovia with white people; he was the go-between between the RUF and Charles Taylor. They brought back arms, AK47, RPG, HMG, mines, and rice, medicines, dollars.[763]

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[756] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 17 May 2005, pp. 54, 57.
[757] TF1-371, Transcript 20 July 2006, Closed Session, pp. 26-27.
[758] TF1-371, Transcript 20 July 2006, p. 35.
[759] TF1-371, Transcript 20 July 2006, p. 36.
[760] TF1-371, Transcript 20 July 2006, pp. 36-37, 53.

[redacted]

[763] TF1-366, Transcript 10 November 2005, pp. 29-34.

280. The RUF did diamond mining as early as 1996.[764] During the Junta, diamond mining took place in different areas of Kono District, mainly, at Tongo Fields in Kenema District,[765] and at Yenga, Morfindo, Jojoima and Jabama, Golahun in Kailahun District.[766] Sam Bockarie controlled the mining in Tongo.[767] The actual mining was predominantly done by the RUF and the diamonds found there went to the RUF high command, including the First and Second Accused.[768]

281. The mining was done by civilians who had been captured in different locations, throughout AFRC and RUF occupied areas of Sierra Leone, civilians were forcibly transported into Kono to work in the mines.[769] They were forced to work under the supervision of AFRC and RUF soldiers,[770] at gunpoint,[771] mostly in very harsh and inhuman conditions,[772] which many did not survive.[773] Civilians were kept in camps and prevented from fleeing.[774] Mining was carried out both for the Junta "Government" as well as for individual commanders.[775]

282. Civilians were also used for other forms of forced labour, in particular to carry goods for the RUF or for so called "food finding missions,"[776]

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[764] TF1-367, Transcript 23 June 2006, Closed Session, pp. 42-43.
[765] TF1-371, Transcript 20 July 2006, Closed Session, p. 52; TF1-371, T. 31.6.06, pp. 55-57.
[766] TF1-366, Transcript 10 November 2005, pp. 7-8. ; However, mining in Giema, Kailahun District was stopped, since the returns were poor. TF1-367, Transcript 23 June 2006, pp. 52-53.
[767] TF1-060, Transcript 29 April 2005, pp. 68, 69; TF1-035, Transcript, 5 July 2005, p. 79-81.
[768] TF1-371, Transcript 20 July 2006, pp. 52-54.
[769] TF1-366, Transcript 15 November 2005, pp.53-54; Exhibit 181, NPWJ Conflict Mapping , p. 38.
[redacted]
[771] TF1-367, Transcript 22 June 2006, p. 48-50; TF1-371, Transcript 21 July 2006, pp. 69-70; TF1-366, Transcript 10 November 2005, pp.12-13, 29-34. TF1-035, Transcript, 5 July 2005, pp. 82-83.
[772] TF1-371, Transcript 20 July 2006, pp. 52-53, 57. TF1-041 saw 100 to 200 civilians digging diamonds in December 1997, and confirmed that the civilians were treated badly, Transcript 10 July 2006, pp. 19-20.
[773] Exhibit 181, NPWJ Conflict Mapping , p. 32.
[774] TF1-071 Transcript 21 January 2005, pp. 39-42.
[775] TF1-367, Transcript 22 June 2006, pp. 49-51; TF1-366 testified that Bockarie, Johnny Paul Koroma and other Junta commanders, including the First and Second Accused, had diamonds mined by civilians under their bodyguards, Transcript 7 November 2005, pp. 91, 92
[776] Exhibit 181, NPWJ Conflict Mapping , p. 32: "In some places, more sophisticated methods of extracting support from civilians were put into place by the RUF/AFRC, including local tax administrations and systems allowing the regime to communicate demands to civilians less violently. Nevertheless, "food finding missions" ballooned, including such plainly-titled looting sprees as "Operation From your Hand to My Hand, from Your Pocket to my Pocket."

283. The above evidence and that cited below under the heading Count 13 demonstrate that the crime of enslavement was part of the joint criminal enterprise from its inception. The practice to capture civilians in RUF and AFRC controlled areas, to detain them and to use them in forced labour for different tasks, in particular mining, farming, transporting looted goods, weaponry and ammunition was clearly part of a common war effort and a key element of the RUF and AFRC strategy to achieve its goal to gain control over Sierra Leone.

284. There is no need to go on to the second question: whether the crimes a natural and foreseeable consequence of the implementation of the common purpose of the joint criminal enterprise. Nonetheless, if the crime of enslavement was not part of the joint criminal enterprise, it was a natural and foreseeable consequence of the common purpose of the joint criminal enterprise.

ii) Count 12, Conscripting, Enlisting or Use of Children Under 15 to Participate Actively in Hostilities

285. The training and use of child soldiers was an important component of the war effort. Children have been used in the RUF since 1991; they were used because they implemented orders easily.[777] The First Accused himself clearly indicated in his testimony that it was the policy of the RUF that children received military training, as he testified that Foday Sankoh said the children were to be trained so that they could defend themselves in case of any attack from enemies, that children were the future leaders and that they were supposed to be part of the RUF.[778] Defence witnesses confirmed that the use of children was a practice which started in the early years of the RUF and which went on from 1996 up to 2000.[779] The RUF created an organized system to provide support and fill in its ranks effectively, in which children, both male and female, were especially targeted. The ultimate aim of the process was to foster the child's dependency on the armed group, thereby preventing escape.[780] The recruitment and use of child soldiers was also common under the Junta

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[777] TF1-366, Transcript 8 November 2005, p. 69.
[778] Accused Issa Sesay, Transcript 3 May 2007, p. 81.
[779] DIS-163, Transcript 10 January 2008, pp. 39-41; DIS-174, Transcript 21 January 2008, pp. 119-119; DAG-101, Transcript 10 June 2008, pp. 8-10.
[780] Accused Issa Sesay, Transcript 3 May 2007, p. 81.

regime.[781] Children were trained together with forcibly recruited adults in special training camps such as Matru Jong, Bunumbu, Koidu and Yengema[782] under harsh conditions. They were organised in so called Small Boys Units (SBU) or Small Girls Units (SGU) and used for different purposes, such as carrying loads, domestic chores, carrying weapons, fighting in combat,[783] spying enemy positions and transmitting information.[784] Child soldiers were also used to guard civilians who forcibly worked in diamond mining[785] or farming. Several witnesses testified that it was common for RUF commanders to use child soldiers as bodyguards.[786] The RUF used child soldiers, both boys and girls, throughout the conflict from 1991 up to 2002 and some of them were as young as 8, 9 or 10 years old.[787] Child soldiers committed atrocities such as rape, amputations[788] killings, often on the order of senior commanders.[789] Some testimonies suggested that the enlistment and use of child soldiers increased after the ECOMOG intervention in 1998.[790]

286. The conscription, enlistment, or use of children under 15 years into the RUF and AFRC forces, was widespread and planned. The use of SBU's and SGU's was known throughout the RUF, and to the three Accused who used SBU's. The crime alleged in Count 12, as demonstrated by the evidence summarized here and the evidence relied on under Count 12 below, was a part of the joint criminal enterprise from the outset. In the event the crime alleged in Count 12 was not part of the common purpose of the joint criminal enterprise, the crime was a natural and foreseeable consequence of the common purpose.

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[781] TF1-122, Transcript, 7 July 2005, pp. 58-60, 97-98; 8 July 2005, pp. 2, 3

[redacted]

[785] TF1-060, Transcript 29 April 2005, pp. 70-74, TF1-035, Transcript, 5 July 2005, pp. 81-84, referring to the mining sites in Tongo.

[786] TF1-045, Transcript 21 November, pp. 38-39; TF1-366, Transcript 8 November 2005, pp. 69-70.

[redacted]

[788] TF1-343, Transcript 17 March 2006, pp. 67-68.

[789] TF1-060, Transcript 29 April 2005, Closed Session, pp. 70-74. Referring to incidents in Tongo in September, October 1997; and TF1-035, referring to an incident in Tongo, when the Second Accused was present, Transcript, 5 July 2005, pp. 90-92.

[790] TF1-071, Transcript 19 January 2005, pp. 34-35; George Johnson testified that many civilians were abducted on the trip to Rosos. George Johnson, Transcript 14 October 2004, p. 86.

iii) Count 14, Pillage

287. The systematic looting of civilian property was part of the common criminal design, as RUF and AFRC troops, not receiving wages for their involvement and engagement in hostilities, had to find the means to survive during the war and were told to do so by their commanders. The common criminal purpose included looting. TF1-360 said: "in the guerrilla you are not paid. You live on what you capture. In the national army you are paid".[791] "Operation Pay Yourself", launched during the retreat from Freetown to Kono after the ECOMOG intervention in Freetown in February 1998, confirms that the taking of property was ordered at the highest level in order to provide for and maintain the RUF and AFRC as a fighting force, and in order to trade for arms and ammunition. Although Defence witnesses euphemistically referred to the looted goods as "government property,"[792] it is clear that the massive looting of property by the RUF and AFRC was illegal pillage as set out in detail under Count 14 below. So called "food finding missions" [793] were recurrent and involved the systematic taking of food supplies from civilians. Other property such as vehicles, machinery, generators, tapes or refrigerators[794] was commonly looted throughout the conflict. It increased with the launch of Operation Pay Yourself after the overthrow of the Junta, during the retreat in early 1998,[795] in particular in Makeni[796] and on the way from Makeni to Kono[797] and in Koidu.[798] By ordering "Operation Pay

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[791] TF1-360, Transcript 22 July 2005, p. 24 (lines 15-16).
[792] DIS-188, Transcript 2 November 2007, Closed Session, pp. 99-100. This witness explained the RUF ideology as regards looting: The taking of property from a place that had been captured from the enemy was not looting because the property in that place, declared an RUF zone, became RUF property as soon as the place was captured. According to the RUF ideology everything found in a captured location automatically became RUF property, including civilians present in that location.
[793] TF1-141, Transcript 11 April 2005, pp.90-91; DIS-188, Transcript 2 November 2007, Closed Session, pp. 101-103.
[794] DIS-188, Transcript 2 November 2007, Closed Session, pp. 99-100. This witness explained the RUF ideology as regards looting: The taking of property from a place that had been captured from the enemy was not looting because the property in that place, declared an RUF zone, became RUF property as soon as the place was captured. According to the RUF ideology everything found in a captured location automatically became RUF property, including civilians present in that location.
[795] DIS-188, Transcript 26 October 2007, pp. 80-81.
[796] TF1-117, Transcript 29 June 2006, pp. 101-105; DMK-032, Transcript 6 May 2008, pp. 15-16.
[797] DMK-032, Transcript 6 May 2008, pp. 13-14; DMK-082, Transcript 13 May 2008, pp. 27-31. DMK-082 said, that there was looting in towns like Masingbi, Makoni Junction, Makali, Matotoka, and Magburaka Transcript 13 May 2008, pp. 31-32.
[798] TF1-141, Transcript 11 April 2005, pp. 108-109; DIS-188, Transcript 26 October 2007, pp. 106-107; DMK-082, Transcript 13 May 2008, p. 90.

Yourself" explicit commands to pillage were given[799] and commanders were looting themselves.[800]

288. In particular the pillage of diamonds was systematic and planned looting that was essential to the common purpose of the joint criminal enterprise, as shown in detail under Count 13, at paragraphs 876-886 and 923-924 and in Count 14, at paragraphs 996-1002. These were plundered resources from the civilians of Sierra Leone that were used by the RUF and AFRC to acquire arms and ammunition. It was a matter specifically addressed by the Supreme Council at its meetings since the Junta could not raise revenue through taxes.[801] Thousands of diamonds were looted by the RUF and the AFRC during the Indictment period.[802] As set out above, farmers were forced to turn over their produce to the RUF before and during the Indictment period in a so called "subscription" system which existed throughout the RUF regime, mainly in Kailahun District from 1996 to 2001.[803] As regards, the massive pillage committed in Freetown, during the coup[804] and during the Freetown Invasion[805] it was integral to the ongoing existence of the RUF, a self-reliant entity, whose members looted to survive. Exhibit 225, minutes of a December 1998 RUF forum, utters the prophetic advice: "No looting until the mission is accomplished."[806] It was understood by all members of the RUF that looting was accepted and encouraged once a mission was accomplished.

289. The RUF relied on looting to sustain itself, it was not a force with a payment system, and fighters were expected and encouraged to loot. This was done for food, and other items which could be used, or traded. Looting was widespread and systematic within the RUF, including the pillage of diamonds which was essential to maintain RUF and AFRC, and forcing civilians to turn over their produce to the RUF. From its inception the

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[799] TF1-117, Transcript 29 June 2006, pp. 101-105;
[800] TF1-141, Transcript 11 April 2005, pp. 109-112.
[801] TF1-371, Transcript 20 July 2006, p. 35.
[802] Exhibits 41 and 42 Diamond Mining Records.
[803] TF1-330, Transcript 14 March 2006, pp. 41-45; TF1-108, Transcript 8 March 2006, pp. 23-24; Transcript 7 March 2006, p. 96. TF1-108 described the "subscription" system as follows: "...whatever the RUFs needed to pursue the war, they would tell us, the civilians, then we too would tell our people and then we would subscribe what they needed to pursue the war" TF1-108, Transcript 7 March 2006, p. 91.
[804] Exhibit 176, AI Report. 1998, pp.15-16 (19493-19494); Exhibit 178, US State Department Report, 1998, pp. 5-6 (19585-19586).
[805] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, pp. 101, 103; Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 8-9 (19048-19049).
[806] Exhibit 225, Forum Minute, 11 December 1998, RUF/SL, Chairman Colonel Issa H. Sesay, p. 3.

RUF engaged in looting and the summary of evidence above, along with the more complete review of evidence below under Count 14 proves that pillage was part of the common purpose throughout the Indictment period. In the alternative, pillage was a natural and foreseeable consequence of the common purpose.

iv) Count 6, Rape; Count 7, Sexual Slavery; Count 8, Other Inhumane Act; Count 9, Outrages Upon Personal Dignity

290. These Counts are dealt with together throughout this brief because of the similarity of the evidence that is relevant to these Counts. The abduction and sexual assault of women was common within the RUF prior to the Indictment period, and continued throughout the Indictment period. It was a widespread crime within the RUF and AFRC and part of the common purpose. Massive sexual violence was not only used to sow terror amongst the civilian population, it further served military and supply purposes: rape and sexual slavery helped to maintain the moral of the fighting forces in a long lasting and gruelling guerrilla war. Forced marriage further helped the RUF to keep combatants and commanders committed to the movement since they could satisfy their sexual and emotional needs and in addition take care of the every day chores. DIS-174, [redacted], explained that where a combatant lived with a woman at the frontline, there was no "need for the soldier to retreat again, when you have your own wife at the full front with you, so you would not be thinking of becoming an AWOL soldier."[807] DAG-101 testified that some members of the IDU WACs (Women Auxiliary Corps) "were assigned to these combatants. They were living with these combatants as partners, wives and so on. They were living with them at the front lines as well as the rear, as were calling them."[808] The widespread and systematic use of sexual violence, including rape, sexual slavery and forced marriage therefore served the ultimate objective "to gain and exercise political power and control over the territory of Sierra Leone,..."[809] The Accused, together with the leaders of the AFRC, shared a common plan and design to achieve the objective by conduct constituting crimes within the Statute.

[807] DIS-174, Transcript 21 January 2008, Closed Session, p. 120 (lines 9-12). (AWOL means Absent Without Official Leave, desert).
[808] DAG-101, Transcript 9 June 2008, pp. 91 (lines 27-29) – 92 (lines 1-3)
[809] Indictment, para. 36.

291. The witness Hederstedt said that "It may be more correct to see the use of terror as just one of many weapons used by an insurgent movement as part of its work towards safeguarding its political and its military progress."[810] The witness testified that the sexual assault of women would fall within this use of terror, as would the amputation of limbs.[811] Further the extent of the systematic and widespread sexual violence inflicted by members of the RUF and AFRC on women and girls[812] especially in 1998[813] and 1999[814] in particular in Kono District[815], the north-eastern part of the country[816] and in Freetown and the surrounding areas during and following the January 1999 invasion,[817] and the manner in which women were sexually abused[818], clearly shows that sexual violence was not random. It was not committed by single undisciplined combatants but rather, it was part of the common purpose and used as a war strategy. An NGO estimated that between February and June 1998, thousands of women and girls had been raped by members of the AFRC/RUF.[819] The report of TF1-369 states that during the war in Sierra Leone, women and girls were targeted, abducted, gang raped, and used as sex slaves or made bush wives, captured and forced to be the wives of rebels.[820] Rape was specifically targeted at civilians who lived in areas that were captured by AFRC and RUF and clearly aimed at punishing the civilians. The pattern in which sexual violence was inflicted upon the victims, for instance the fact that rapes were often coupled with other gruesome atrocities, mostly

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[810] Exhibit 389, Report of Johan Hederstedt, page 8.
[811] J. Hederstedt, Transcript 24 June 2008, pp. 109-110.
[812] Exhibit 159, First UNOMSIL Report, 1998, para. 36., Exhibit 162, Fourth UNOMSIL Report 1998, para 32., Exhibit 173, Fourth Secretary-General Report on UNAMSIL, para. 45.
[813] Exhibit 163, UNOMSIL - Human Rights Situation Report and Preliminary Technical Assistance Needs Assessment, 19 July 1998 (19185-19188), ("UNOMSIL Human Rights Report 1998"), p. 19188 ("First UNOMSIL Report 1998") para. 36 reads: "The rebels are estimated to hold several thousand civilian captives, including women and children. They are used as porters, human shields and for forced sexual activity.";
[814] Exhibit 162, Sixth Report of the Secretary-General on the United Nations Observation Mission in Sierra Leone, 4 June 1999 (S/1999/645) [[para. 32 (19172)] : "A large number of civilians are believed to have been abducted by RUF/AFRC over the past three months. The abductions have reportedly followed a consistent pattern where RUF/AFRC retreating from a town or village have forced men, women and children to go with them to serve as porters, potential recruits or sex slaves. Most of these abductees are still being held by RUF/AFRC."
[815] Exhibit 175, HRW Report, 1998, pp. 17-19, 21 (19450-19452, 19454).
[816] Exhibit 161, Third UNOMSIL Report 1998, para. 36.
[817] Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 6 (19046), Exhibit 174, HRW Report, 1999, p.34 (19402).
[818] See also Exhibit 146, HRW Report "We'll Kill You If You Cry. Sexual Violence in the Sierra Leone Conflict", January 2002, Vol. 15, No. 1 (A., ("HRW Report on Sexual Violence"), pp. 28 and 35-36.
[819] Exhibit 175, HRW Report 1998, p. 4 (19437).
[820] Exhibit 138, Expert Report Forced Marriage, p. 12089.

killings[821], mutilations[822] or ill-treatment[823], and the accounts of brutal gang rapes,[824] rapes of children[825], and rapes in front of the family members and other civilians,[826] clearly show that sexual violence was particularly used to terrorize, punish and subdue civilians.

292. TF1-217's account of what happened to him and his family [redacted][827] when Junta forces under the command of [redacted] attacked his village, gives an impression of the extent of violence civilians were exposed to, and how sexual violence was used to terrorize them. After separating women and men, combatants were ordered to pick women and rape them; some were raped in public, in front of the other captured persons. The witness and his children[828] were forced at gunpoint to watch how eight combatants raped his wife and how she was killed after the gang rape. [redacted] told him that since he did not know how to do it, he shall look at what [redacted] boys do.[829] After that the [redacted] started to amputate the hands of nine civilians.

293. The fact, that rape was used as a war technique and was not randomly committed by individual combatants only to satisfy their sexual needs is further reflected in the fact that

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[821] TF1-217, Transcript 22 July 2004, pp. 18-19. This witness testified that his wife was killed after having been gang raped by 8 combatants, p. 19.

[822] TF1-192, Transcript 1 February 2005, p. 65. This witness testified that a small boy was forced to have sexual intercourse with a woman and when he was not able to do so, the rebels "started slashing this fellow's private" and "slitting the lady's privates, so that this lady would not meet with any other individual in her life."(lines 2-9).

[823] TF1-192, Transcript 1 February 2005, p. 65 (lines 2-9): "... there was a small boy that was my friend. The lady that was given to him -- the lady reported that the fellow was a eunuch. So these bad people took a knife and started slashing this fellow's private. So that they did so, they took a knife and starting slitting the lady's privates, so that this lady would not meet with any other individual in her life."

[824] TF1-305, Transcript 27 July 2004, pp. 54-56; 61.

[825] TF1-305, Transcript 27 July 2004, pp. 54-56; 61: When asked how old she was when she was gang raped, this witness said she had just come from the initiation bush, p. 56. "Our own people -- they don't take it by years, they only look at your growth. When your breast are full and they say, "This is big enough. Let's put her into the society." (lines 21-22). TF1-212, told about the rape of a 12 year old girl. Transcript 8 July 2005, pp. 103-105; TF1-016, said, her 11 year old daughter was raped, Transcript 21 October 2004, p. 19; TF1-031 said, her 10 year old daughter Transcript 17 March 2006, pp. 89-90; [redacted]

[826] TF1-217, Transcript 22 July 2004, pp. 18-20 and 23; TF1-197, Transcript 21 October 2004, pp. 86-87. See also: HRW has written in its 1998 report, that "[t]he crimes of sexual violence committed by the AFRC/RUF against women and girls are often accompanied by other forms of violence." And "Often, the rapes occur in front of family members and others..., and in some cases relatives are forced to rape their sisters, mothers or daughters." Exhibit 175, HRW Report 1998, p. 19450.

[827] TF1-217, Transcript 22 July 2004, p. 15.

[828] TF1-217, Transcript 22 July 2004, pp. 18-20 and 23.

[829] TF1-217, Transcript 22 July 2004, pp. 17-19 and 24, especially p. 17 (lines 26-29). HRW confirmed in its report on violence in the Sierra Leonean conflict, that "[m]any rapes were committed in full view of other rebels and civilians." And: "[c]hild combatants also raped women who could have been their mothers or in some instances even their grandmothers." Exhibit 146, HRW Report on Sexual Violence, pp. 35-36.

child soldiers, as young as 14 years old[830], were forced to rape[831], captured civilians were forced to have sexual intercourse with other civilians, often in public,[832] and family members were forced to have sexual intercourse with their relatives.[833] Rape was clearly used as punishment.[834] Breastfeeding or pregnant women were raped or otherwise sexually abused, although sexual intercourse with women in this state is taboo in the Sierra Leonean society.[835] Some women who were raped where subsequently forced into marriages or sexual slavery, where they continued to be raped.[836] Rape was used as an instrument of terror, a means of punishment and a methodical way to demoralize and humiliate the enemy, including the civilian population targeted.[837] Besides the personal motivations of the combatants to have their sexual desires fulfilled, it was a military strategy used to achieve the common purpose of the joint criminal enterprise.

294. Forced marriage was widespread and systematic during the conflict in Sierra Leone, as set out in The "Expert Report on the phenomenon of 'forced marriage' in the context of the conflict in Sierra Leone" ("**Report**") and the accompanying expert testimony of witness TF1-369, both discussed extensively under Count 6-9, below. Women and girls were abducted and used as sex slaves or made bush wives by RUF and AFRC combatants and commanders.[838] TF1-045 described this practice as follows: "When you capture a woman, there are no formalities in terms of marriage. You take her. It is not for anything but to use her as a woman, your wife. That is what I mean by bush wife."[839] Expert witness TF1-369, in her report put it as follows: "Forced marriage became a means of survival for most girls in the bush, as bush wives were spared gang rapes, were ensured regular meals and were

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[831] TF1-199, Transcript 20 July 2004, p. 30 (lines23- 26). HRW wrote in its report on sexual violence during the Sierra Leonean conflict: "Child combatants also raped women who could have been their mothers or in some instances even their grandmothers." Exhibit 146, HRW Report on Sexual Violence, p. 35.
[832] TF1-064, Transcript 19 July 2004, pp. 48-49. See also Exhibit 146, HRW Report on Sexual Violence, p. 35.
[833] TF1-218, Transcript 1 February 2005, p. 84. See also: Exhibit 175, HRW Report 1998, p. 19450. "... in some cases relatives are forced to rape their sisters, mothers or daughters."
[834] Exhibit 178, US State Department Report, 1998, pp. 19582-19583 and 19586.
[835] TF1-064, Transcript 19 July 2004, pp. 48-49. See also Exhibit 146, HRW Report on Sexual Violence, p. 35, where HRW stressed that "[i]n Sierra Leone, postmenopausal and breastfeeding women are presumed not to be sexually active, but rebels violated this cultural norm by raping old women and breastfeeding mothers."
[836] TF1-064, who was first forced to have sexual intercourse with another abductee, TF1-064, Transcript 19 July 2004, p49, was later forced to "chose a husband" amongst the rebels, Transcript 19 July 2004, pp.66-67.
[837] Exhibit 178, US State Department Report, 1998, pp. 19582-19583 and 19586.
[838] Exhibit 138,Expert Report Forced Marriage, p. 12089.
[839] TF1-366, Transcript 21 November 2005, pp. 37-38

protected by their husbands."[840] This evidence was corroborated by a number of insider[841], victim[842] and other witnesses.[843]

295. The evidence is extensive of acts that were crimes under Counts 6 to 9 by the RUF and AFRC during the Indictment period. It is beyond credulity to think that it was not known by the three Accused, as there is evidence that they themselves were involved in sexual crimes[844] and had bush wives.[845] Further, it was accepted conduct within the RUF; in fact, commanders sought to exercise their power[846] by being able to choose women before subordinates could and sexual crimes did usually go unpunished.[847] DAG-080 claimed that forced marriage was considered an offence within the RUF but was not aware of any Joint Security Board of Investigations ever being set up for such cases during the indictment period.[848] Rapes were regularly committed by high ranking commanders of the RUF.[849] The large number of witnesses who testified that women and girls were systematically raped when a group of civilians was captured[850] indicates that sexual violence was part of a pattern used by the RUF when capturing civilians. These crimes were within the common purpose from the outset. Alternatively, they became part of the common purpose during the retreat from Freetown in February 1998. In the further alternative, Counts 6 to 9 were a natural and foreseeable consequence of the common purpose.

v) Count 10, Violence to Life; Count 11, Other Inhumane Acts

296. The widespread and systematic use of mutilations reflects in particular the aim of the joint criminal enterprise to gain and exercise "control over the population of Sierra

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[840] Exhibit 138, Expert Report Forced Marriage, p. 12095.
[841] TF1-371, Transcript 21 July 2006, p. 66-67;TF1-071, Transcript 19 January 2005, pp. 38-40.
[842] TF1-314, Transcript 2 November 2005, pp. 37-40 and Exhibit 47; TF1-064, Transcript 19 July 2004, pp. 59, 66-67;TF1-016, Transcript 21 October 2004, pp. 13-15.
[843] TF1-015, Transcript 28 January 2005, pp. 9-10.
[844] TF1-117 testified about a rape committed by the Third Accused in Makeni when the AFRC and RUF troops retreated from FreetownTranscript 29 June 2006, p.105 and p. 107 (lines 5-16). At least one witness testified that Johnny Paul Koroma's wife had told him directly that she had been raped by the First Accused after a meeting held in Buedu in February or March 1998: TF1-045, Transcript 21 November 2005, p 56.
[845] TF1-366, Transcript 8 November 2005, pp. 74-76, and p. 107.
[846] TF1-015, Transcript 28 January 2005, p. 9 (line 26) and p. 10.
[847] TF1-015, Transcript 31 January 2005, p. 99.
[848] DAG-080, Transcript 9 June 2008, pp.36-37.
[849] TF1-362, Transcript 26 April 2005, pp.87-89; TF1-071, Transcript 19 January 2005, pp. 38-39
[850] TF1-217, Transcript 22 July 2004, pp. 8-11 and 19 see also Exhibit 175, HRW Report 1998, p. 4 and 17-18, Exhibit 146, HRW Report on Sexual Violence, pp. 28 and 35-36.

Leone in order to prevent or minimize resistance to their geographic control, ..."[851] The massive and widespread, symbolic chopping of limbs, as a form of the retaliation because people were voting for the Kabbah Government, the targeted attacks on civilians, the locking of whole families in houses which were then set on fire, all these acts aimed at gaining control over the population by putting the civilians in a constant state of terror which would stop them from supporting the government.

297. The witness Hederstedt testified that insurgencies used terror as means to political and military control, and that amputations were an example of such terror.[852] Such amputations took place in several Districts. A stark of example of this crime was told by a 60 year old grandmother whose arm was amputated shortly before 4 May 1998 [redacted] The attackers had wanted to amputate the arm of her grandson, but the grandmother pleaded with them to amputate her arm instead. The attackers did so.[853]

298. TF1-214 who told the Court that her family, terrified by the fact that more and more people with amputations appeared in her village [redacted] in February 1998[854] panicked and ran to the bush where they were hiding for three months.[855] Upon return to their village in May 1998 the witness and her small girl were captured. The witness was stripped naked and slapped and was then assembled with other villagers.[856] The rebel commander said "Since you say you love a civil government, we are going to chop off your hands." And "If you are ready to cut off their hands, begin with the child so that they should know that they are not going to be spared." They first chopped off her six year old child's hand and then amputated the hand of the witness. [857] They then continued to amputate other civilians and one rebel told the witness "You're beautiful now, eh."[858] The witness told the court that after she and her little child were operated on at hospital her

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[851] Indictment, paras 36 and 37.
[852] J. Hederstedt, Transcript 24 June 2008, pp. 109-110.
[redacted]
[854] TF1-214, Transcript 14 July 2004, pp.3L 29-36 and Transcript 15 July 2004, p. 3.
[855] TF1-214, Transcript 14 July 2004, p. 4-5.
[856] TF1-214, Transcript 14 July 2004, pp25-27.
[857] TF1-214, Transcript 14 July 2004, pp. 29-31. The testimony of the amputation of the witness and her child was corroborated by TF1-215, Transcript 2 August 2005, p. 95-96.
[858] TF1-214, Transcript 14 July 2004, p. 31L27

child asked her: "Mama, when would my hand grow again?"[859] Other witnesses corroborated the information about children who were amputated[860], even chopped in pieces.[861] This was far from an isolated incident.[862] The practice to mutilate civilians was widespread and common.[863] [redacted] This information was confirmed by some insider and numerous victim witnesses whose evidence is summarized in the section on Counts 10 and 11. This evidence shows that the aim of this practice was to terrorize, punish, deter and control the civilian population, especially in areas captured from the opposing party. A former RUF combatant, TF1-360, who went on a mission where civilians were amputated on the direct order of the Second Accused in an operation in the early rainy season of 1998, in Nimikoro Chiefdom, put it this way: "Anybody that we saw, we cut their hands. Because it was said that cutting people's hands was fearful."[866] This practice was clearly part of the war strategy of the RUF and the AFRC to subdue civilians and to demoralize the "enemy". Most witnesses who suffered an amputation were told to take their hand to President Tejan Kabbah or to ECOMOG since they voted for

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[859] TF1-214 Transcript 14 July 2004, p 35L 20-24. The Chamber asked "to observe for the records that this witness in her narration of the incidents of amputation up to about the tail end of her evidence was virtually testifying sobbing and was under a lot of stress." Transcript 14 July 2004, p. 38.

[redacted]

[861] TF1-015 witnessed in April 1998 in Koidu [redacted] by Major Rocky giving the order to chop both arms and both legs of a boy and saw how his torso was then thrown away, Transcript 27 January 2005, pp. 129-132., TF1-331, witnessed during the 1999 Freetown Invasion, how rebels cut a little child apart and said it was a sacrifice for peace, Transcript 22 July 2004, pp. 47.

[862] Exhibit 163, UNOMSIL, Human Rights Report, 1998 p 19186.

[863] Exhibit 159, First UNOMSIL Report, 1998, para. 34., Exhibit 160, Second UNOMSIL, Report 1998, para. 21., Exhibit 161, Third UNOMSIL Report 1998, para. 36-37., Exhibit 162, Fourth UNOMSIL Report 1998, para 29, 31., Exhibit 163, UNOMSIL, Human Rights Report, 1998.p19186, Exhibit 174, HRW Report, 1999, p.29, 33 (19397, 19401)., Exhibit 176, AI Report. 1998, pp.15-16, 19-24 (19493-19494, 19497-19502), Exhibit 178, US State Department Report, 1998, pp. 5-6 (19585-19586)

[redacted] Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 5-6 (19045-19046)

[redacted]

[866] TF1-360, Transcript 20 July 2005, pp. 55- 56 (lines 6-7).

Kabbah.[867] In order to increase the terror within the civilian population mutilations were often followed or accompanied by killings.[868]

299. Other forms of mutilation and ill-treatment were recurrent as well. For instance, TF1-074 and other witnesses[869] testified how the letters "AFRC" or "RUF" were carved on their bodies.[870] Further, witnesses told about serious ill-treatment,[871] often while they were kept in camps for forced labour[872] or if they refused to work in forced labour, for example in the diamond mines they were killed.[873]

300. In areas such as Kenema District civilians alleged to support the Kamajors were subjected to serious ill-treatment to a point where the victims almost died.[874] Detailed accounts of those acts may be found in the evidence of TF1-129[875] and TF1-125 in the evidence section of Count 10 and 11.

301. The crimes alleged in Counts 10 and 11 were included in the joint criminal enterprise from the outset. In the alternative, if they were not, they soon became known to the three Accused as crimes within the joint criminal enterprise. In the further alternative,

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[867] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, p.41L1-12; Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, pp. 83-84; TF1-213, Transcript 2 March 2006, pp. 16-17; TF1-197, Transcript 22 October 2004, p. 16; TF1-172, Transcript 17 May 2005 p. 24-25.

[redacted]

[868] TF1-015, Transcript 27 January 2005, pp.129-132; TF1-0221, Transcript 29 November 2005, pp.3438; TF1-343, Transcript 17 March 2006, pp.67-69; TF1-179, Transcript from AFRC trial, Transcript 27 July 2005, pp.40-41.

[869] TF1-016, Transcript 21 October 2004, p. 9; TF1-212, Transcript 8 July 2005, pp. 107-108.

[870] TF1-074, Transcript 12 July 2004, pp. 13, 31.

[871] TF1-015, Transcript 31 January 2005, pp. 4-5, 8; TF1-125, Transcript 12 May 2005, p. 109; TF1-075, Transcript 1 February 2005, pp. 20-21; TF1-129, Transcript 10 May 2005, Closed Session, pp. 66-68, 71, TF1-035, Transcript, 5 July 2005, pp. 88; TF1-212, Transcript 8 July 2005, pp. 107; TF1-331, Transcript 22 July 2004, pp. 48.

[872] TF1-071 Transcript 21 January 2005, pp. 120-121; TF1-077, Transcript 20 July 2004, p. 80; TF1-366, Transcript 8 November 2005, p. 66; See also: Exhibit 178, US State Department Report, 1998, p. 6 (19586)

[873] TF1-035, Transcript, 5 July 2005, pp. 87-88.

[874] TF1-125, Transcript 12 May 2005, p. 109; TF1-129, Transcript 10 May 2005, Closed Session, pp. 66-68, 71.See also: Exhibit 178, US State Department Report, 1998, p. 3 (19583)

[875] For instance where TF1-129 talks about the ill-treatment of BS Massaquoi, who was mercilessly beaten by six rebels with a strip of rubber for about an hour Transcript 10 May 2005, pp. 71, 74-75.

the crimes alleged in Counts 10 and 11 were the natural and foreseeable consequence of the implementation of the common purpose of the joint criminal enterprise.

vi) Count 3, Extermination; Count 4, Murder; Count 5, Violence to Life, in particular Murder

302. These crimes were included within the joint criminal enterprise from the outset. From early in the Junta period murders were committed by the RUF and AFRC Junta. Killings of civilians were systematic and widespread.[876] Targeting civilians was common throughout the country,[877] in particular in Kailahun, Kono, Koinadugu and Bombali Districts,[878] and during the January 1999 attack on Freetown.[879]

303. Civilians were targeted specifically[880], for instance because they were suspected to support the Kamajors[881] or ECOMOG. Others were shot randomly,[882] while Paramount chiefs,[883] government officials and police officers were especially targeted.[884]

304. Killings often occurred in the context of forced labour, in particular forced mining, for instance when civilians were mining at night or outside the stated period of time[885], when they were unwilling to work or when they were suspected of having stolen diamonds.

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[876] Exhibit 163, UNOMSIL, Human Rights Report, 1998.
[877] Exhibit 159, First UNOMSIL Report, 1998, para. 13, 33, 35., Exhibit 160, Second UNOMSIL, Report 1998, para. 21., Exhibit 161, Third UNOMSIL Report 1998, para. 36., Exhibit 162, Fourth UNOMSIL Report 1998, para 30., Exhibit 163, UNOMSIL, Human Rights Report, 1998.
[878] Exhibit 178, US State Department Report, 1998, pp. 2-5 (19582-19585).
[879] Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 4-5 (19044-19045), Exhibit 174, HRW Report, 1999, p.11 (19379).
[880] TF1-060, Transcript 29 April 2005, pp. 93-94.
[redacted]
[882] TF1-004, Transcript 7 December 2005, pp. 71-77; 8 December 2005, pp. 2-8, 11-13, 36-38, testifying about a shooting at or near Tikonko in June 1997. TF1-060, talked about the shooting of civilians in Bumpe, Transcript 29 April 2005, p. 67. In May 1998, TF1-334 saw Rambo kill about 15 civilians at Koidu Buma by chopping them down with a cutlass. Exhibit 119, TF1-334, Transcript from AFRC Trial, Tanscript 20 May 2005, pp. 22-23, TF1-015, Transcript 27 June 2007, pp. 111-116, 124, 127-133, 135-136, with an account of the killing of around 100 civilians in Koidu, by Major Rocky who was also under the command of Rambo in April 1998.
[883] TF1-054, Transcript 30 November 2005, pp. 32-35. TF1-054 testified about the killing of the Paramount Chief in Gerihun in June 1997.
[884] TF1-060, Transcript 29 April 2005, p. 66. This testimony told about the targeted killing of a retired police officer on 8 September 1997.
[885] TF1-045, Transcript 18 November 2005, p. 74, also Transcript 23 November 2005, p. 38.

Killings were often committed during or after attacks coupled with other atrocities, for example mutilations[886], with the clear aim to terrorize the civilian population. [887]

305. The crimes alleged in Counts 3 through 5 were included in the joint criminal enterprise from the outset. In the alternative, if they were not, they soon became known to the three Accused as crimes within the joint criminal enterprise. In the further alternative, the crimes alleged in Counts 3 through 5 were the natural and foreseeable consequence of the implementation of the common purpose of the joint criminal enterprise.

vii) Count 1, Terrorism; Count 2, Collective Punishments

306. Counts 1 and 2 are pleaded to include the criminal acts that form the evidentiary basis for Counts 3 through 14 of the Indictment. Terrorism and collective punishments were included with the joint criminal enterprise from the outset. In the alternative, the crimes alleged in Counts 3 through 5 were the natural and foreseeable consequence of the implementation of the common purpose of the joint criminal enterprise.

e) Participation of the Accused in the Common Design Involving the Perpetration of one of the Crimes Provided for in the Statute

307. Participation in a joint criminal enterprise need not involve the commission of a specific crime but may take the form of assistance in, or contribution to, the execution of the common purpose.[888]

308. In the remainder of this section a selection of evidence will be presented to show the participation of the Accused in the joint criminal enterprise, and to show the scope of the joint criminal enterprise and some of the acts committed by the Accused and others to further the common purpose of the joint criminal enterprise. These acts may not be evidence of the commission of a specific crime, but they assisted or contributed to the execution of the common purpose. At the outset, the assignments of the three Accused are significant and relevant. During the majority, if not all, of the Indictment period the First Accused was the Battle Field Commander, the Second Accused was the Battle Group Commander and the Third Accused was the Overall Security Commander. The joint

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[886] TF1-031, Transcript 17 March 2006, p. 85; TF1-196, Transcript 13 July 2004, pp. 24-25 and 28; TF1-214, Transcript 14 July 2004, pp. 25-28.
[887] TF1-035, Transcript, 5 July 2005, pp. 87-88.
[888] *Stakić* Appeal Judgment, para. 64, *Tadić* Appeal Judgement, para. 227.

criminal enterprise could hardly have been pursued without persons holding those assignments assisting or contributing to the execution of the common purpose. The evidence is overwhelming that the three Accused assisted or contributed to the execution of the common purpose.

i) Diamond Mining

309. Diamond mining was important to the joint criminal enterprise because it helped to fund the acquisition of arms, ammunition[889], and other commodities needed to sustain the common purpose of "gaining and exercising political power and control over the territory of Sierra Leone." It also served as a motive for two of the significant crimes in Sierra Leone: forced labour (enslavement, Count 13) and looting (pillage, Count 14).

310. RUF did *diamond mining* as early as 1996.[890] It was one of the major sources of income of the RUF and of the AFRC/RUF Junta. The RUF Training Manual listed "Minerals" as one of the "Pillars of the RUF Movement"[891] and during the Junta time, revenue generation for the sustainability of the AFRC/RUF "government" was one of the major issues discussed at meetings of the Supreme Council.[892] Diamonds provided revenue that could be used to support combat activities.[893] The proceeds were used for military supply, such as petroleum to allow troops to move, arms and ammunition and rations.[894] The RUF and AFRC Junta knew that without diamonds their access to arms and ammunition would be severely restricted. Several witnesses testified that Bockarie told the commanders, that both Kono and Tongo Field should be retained as "defensive points", since they are diamondiferous mining areas and "because you cannot fight a war without

[889] TF1-371, Transcript 20 July 2006, Closed Session, p. 36.
[890] TF1-367, Transcript 23 June 2006, Closed Session, pp. 42 (line 28)-43.
[891] Exhibit 38, RUF Training Manual, p. 11076.

[893] TF1-371, Transcript 20 July 2006, Closed Session, p. 79.
[894] TF1-371, Transcript 20 July 2006, Closed Session, p. 36, see also: TF1-071 Transcript 21 January 2005, pp.113 (line 6) and refers to 1998 at p 116

economy."[895] Both regions were considered as strategically important areas that should remain under RUF or Junta control[896]

311. Bockarie stated "that he did receive instruction from Mr. Taylor to ensure that Kono be maintained", which meant to "recapture Kono and to consolidate the position of the RUF, in Kono, in order to enable the RUF to mine diamonds and to pay for logistic material."[897] The information about diamond trade to Liberia in exchange for military support was corroborated by [redacted] who gave evidence about a meeting that took place after Bockarie returned from a trip to Liberia. It was called by Bockarie and was attended by the three Accused, Peter Vandi, Mike Lamin, Johnny Paul Koroma and other AFRC representatives, either in December 1998 or January 1999. They planned the capture of Kono under the First Accused's command and the ammunition was shared among the commanders.[898] In 1998 and 1999 diamonds from Tongo and Kono were brought to Buedu where they were recorded[899], and then given to Sam Bockarie who would take them to Liberia in exchange with weapons, medicine and food.[900] [redacted] recalls Bockarie bringing ammunition from Liberia three times.[901] [redacted] Bockarie then travelled for some weeks to Burkina Faso with S.Y.B. Rogers, Eddie Kanneh and General Ibrahim Bah, a military advisor introduced by Foday Sankoh. The day after their return to Liberia they departed for Buedu with two trucks loaded with ammunition, drugs and food.[902] Further Eddie Kanneh, the First and the Second Accused took diamonds to Liberia. Eddie Kanneh would come from Monrovia with white people; he was the go-between between the RUF and Charles Taylor. [redacted]

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[895] TF1-071, Transcript 19 January 2005, p. 50.

[redacted]

[897] TF1-371, Transcript 20 July 2006, Closed Session, p. 79.

[898] [redacted]

[redacted] The first time was in 1998, after diamonds were taken from Johnny Paul Koroma; Bockarie returned with a truck that brought ammunition. Bockarie went on the second trip to Monrovia with his bodyguards and they returned with ammunition and food.

[redacted]

[redacted] with the First Accused to Monrovia. Charles Taylor's bodyguard, Momo Jibbah, would provide accommodation and the First Accused went to Charles Taylor's place in Congo Town. They brought back arms, AK47, RPG, HMG, mines, and rice, medicines, and dollars.[903] On one occasion, the First Accused, accompanied by Col. Jungle, claimed to have lost diamonds near a tea shop in Monrovia.[904] The Salute Report signed by the First Accused goes on to state that following the loss of the diamonds, he was ordered to "fall-out" for over one week and was then instructed to coordinate all front-line locations from Pendembu.[905]

[redacted]

313. The mining done in the Junta period was mainly alluvial diamond mining because the commercial mining companies did not operate any longer and the machines needed for industrial mining were not functioning. Alluvial diamond mining, which utilised manpower, was the only alternative to mechanised mining.[908]

314. Diamond mining took place in different areas of Kono District, at Tongo Fields in Kenema District,[909] and at Yenga, Morfindo, Jojoima and Jabama, Golahun in Kailahun District.[910] In all Districts the mining was done by civilians,[911] in forced labour,[912] working at gunpoint[913] under the supervision of AFRC and RUF soldiers[914], as described in detail in the evidence section of Count 13, below. An unknown number of civilians were abducted

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[903] TF1-366, Transcript 10 November 2005, pp. 29-34.
[904] Exhibit 35, p. 2364, Exhibit 36, pp. 2350-2351.
[905] Exhibit 36, p. 2351. TF1-036 testified that the First Accused made visits to the front line, but he remained based in Buedu: TF1-036, Transcript 29 July 2005, pp. 89-90.
[redacted]
[908] TF1-371, Transcript 20 July 2006, Closed Session, pp. 35-36.
[909] TF1-371, Transcript 20 July 2006, Closed Session, p. 52.
[910] TF1-366, Transcript 10 November 2005, pp. 7-8; However, mining in Giema, Kailahun District was stopped, since the returns were poor. TF1-367, Transcript 23 June 2006, pp. 52-53.
[911] TF1-367, Transcript 22 June 2006, pp. 29-30.
[912] TF1-367, Transcript 22 June 2006, p. 29.
[913] TF1-367, Transcript 22 June 2006, p. 48; TF1-366, Transcript 10 November 2005, pp.12-14 and pp. 29-34; TF1-060, Transcript 29 April 2005, Closed Session, p. 69.
[914] TF1-367, Transcript 21 June 2006, Closed Session, p. 58; This witness said they were captured "just like you would capture a chicken,", ibid. p. 50.

throughout RUF and AFRC, areas or areas attacked by them where civilians were captured, and were brought to the mining areas, many of them dying[915] as a result of the living conditions,[916] sometimes in special labour camps.[917]

315. The so called "Government mining" – which was carried out for the "movement", not for individuals[918]- was organised and supervised by an overall mining commander and sub-mining commanders for certain areas. [redacted] reported directly to the First Accused, then battlefield commander, who reported to Bockarie, the Chief of Defence staff. Kennedy was succeeded by [redacted] All diamond proceeds came to his office. He supplied the materials for mining, deployed people in all the mining areas to do mining and he reported to the First Accused who was under Bockarie.[920] All mining commanders reported to the First Accused.[921] There was also private mining on the account of individual commanders.[922] The First and Second Accused also had people mining for them, they used civilians who were captured and forced to mine.[923]

[redacted] would sign each others logbooks and the First Accused would take

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[915] Exhibit 181, NPWJ Conflict Mapping, pp. 32 and 34.
[916] TF1-371 said, that in 1997 and 1998, diamonds mined in Kono were reported to the First Accused.Transcript 21 July 2006, pp. 69-70.
[917] TF1-071 said: "We used to keep these civilians so that they cannot go and contact to enemies, so that they cannot reveal our secret or information .... Civilians were not free to leave, if they were caught trying to leave they would be punished, beaten or given extra work.", Transcript 21 January 2005, pp. 40-42. TF1-071 said, over 500 civilians were held at the Wendedu camp and a similar number at Meiyor, Transcript 21 January 2005, p 43 and that forced labour existed from 1998 to 2000 at mining camps like Tuiyor, Bombodu, Tombodu and other sites, TF1-071, Transcript 21 January 2005, pp. 96-100, 103-108, 116-119, 120-123.
[918] Exhibit 119, TF-334, AFRC Transcript 20 May 2005, pp. 41, 43-44.
[919] TF1-071 Transcript 21 January 2005, Closed Session, pp. 101-103; TF1-366, Transcript 10 November 2005, p. 9-10; TF1-367,
[920] [redacted]
[921] TF1-071 Transcript 21 January 2005, pp.109-113.
[redacted]

the diamonds. The latter was sometimes replaced by Pa Alhaji. The diamonds were recorded by zones, which were mining areas, e.g. Kaisambo, Bumpe. Several persons would be present during the recording procedure, CO Lion, Staff Alhaji,[925] [redacted]

317. The evidence shows that during Junta the mining was supervised by AFRC and RUF,[927] both in Tongo[928] and in Kono[929] and that the First and Second Accused had their bodyguards in the mining areas, who were also involved in capturing civilians[930]. Alex Brima aka Gullit was in Koidu for part of the Junta period overseeing the mining there[931] as representative of the Junta.[932] There was an AFRC secretariat in Kono and diamond mining during the Junta was predominantly organised by the AFRC, although the Second Accused was present there,[933] active in mining.[934] Whereas at Tongo Fields the mining was carried out predominantly by the RUF.[935]

318. After the 1998 ECOMOG intervention from March to mid-May 1998 the mining in Kono District was organized by Superman and the Second Accused who had their own men mining.[936] In Kono mining was under RUF control[937], and the First Accused appointed [redacted] as mining commander about around the time when Koidu was captured,[938] and the First Accused went to Makeni to get civilians for the mining in Kono, to provide the TF1-

[925] Pa Alhaji, was a village elder assigned by Pa Sankoh to advise the First Accused, TF1-366, Transcript 10 November 2005, p. 30.
[926] TF1-366, Transcript 10 November 2005, pp.17-19 and pp.28-30.
[927] TF1-041, Transcript 10 July 2006, pp. 19-20.
[928] TF1-367, Transcript 21 June 2006, pp. 58-59, Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 17 May 2005, pp. 52-54, 57.
[929] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 17 May 2005, pp. 52-54, 57.
[930] TF1-367, Transcript 21 June 2006, pp. 59-60; TF1-041, Transcript 10 July 2006, pp. 19-20.
[931] TF1-371, Transcript 20 July 2006, pp. 55-56.
[932] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 17 May 2005, pp. 52-54, 57.
[933] TF1-371, Transcript 20 July 2006, p. 55.
[934] TF1-371, Transcript 1 August 2006, p. 37.
[935] TF1-371, Transcript 20 July 2006, p. 52; TF1-371, Transcript 21.6.06, pp. 55-58.
[936] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, pp. 40-43. [redacted]
[938] TF1-367, Transcript 23 June 2006, pp. 48-49.

367 with more manpower.[939] [redacted]. [940] The First Accused also ordered that checkpoints be installed around Koidu up to Makeni from 1999 to 2000 in order to avoid that diamonds were taken outside Kono.[941]

ii) Forced Farming and Other Forms of Enslavement

319. Forced farming was a form of forced labour which was mainly used in Kailahun District. TF1-371 described forced farming on so called "government farms" as follows:

> ... when I talk about government job, it means jobs for the RUF movement which the combatant cannot do because of their engagement in combat activities. Specifically, they, the state farm and individual farms that were run by commanders in Kailahun did use the civilian manpower for such activities. Secondly, the civilians in Kailahun were used to carry logistical materials, including ammunition, rice across the Moa, to the front line areas in the Kono District. In addition, to that, the building of bridges and an air strike that was being constructed in Buedu township. Civilians were used extensively for such activities.[942]

320. Such forced labour was a crime under Count 13, enslavement. The evidence adduced under this count will establish the elements of the crime of enslavement. Civilians were forced to work on RUF farms[943] and they were not compensated,[944]and all of the product of their labour was for the benefit of the RUF.[945] The evidence proves that forced farming was organised under the command and control of the Third Accused[946], through his G5 commanders,[947] from 1996 through 1999.[948] In Buedu camp, where about 500 civilians were forced to work on farms, the fate of the captives was determined by the First

[redacted]

[940] TF1-367, Transcript 23 June 2006, p. 80, Transcript 22 June 2006, pp. 29-30.
[941] TF1-071, Transcript 25 January 2005, pp. 69, 75-76.
[942] TF1-371, Transcript 21 July 2006, pp. 59-60.
[943] TF1-113, Transcript 6 March 2006, p. 37.
[944] TF1-113, Transcript 2 March 2006, pp. 71-72; TF1-330, Transcript 16 March 2006, p. 30; Dennis Koker, Transcript 28 April 05, p. 61.
[945] TF1-330, Transcript 17 March 2006, pp. 7-8.
[946] TF1-108, Transcript 7 March 2006, pp. 104-105.
[947] TF1-113, Transcript 2 March 2006, pp. 71-72.
[948] TF1-108, Transcript 7 March 2006, pp. 93-95.

Accused, Mike Lamin and Mosquito. Koker further testified that Mosquito never decided anything without the First Accused.[949]

321. TF1-108 estimated that the number of civilians who worked on such farms in Kailahun District doubled from 1996 to 1997 and 1998.[950] Several witnesses said that people were working at gunpoint and were beaten, if they did not work.[951] RUF senior commanders had there own farms that used civilian forced labour[952] to cultivate them, including each of the three Accused and Mosquito, as early as in 1995.[953]. Civilians were working under similarly bad conditions on the private farms.[954] [redacted] Other forms of forced labour and enslavement were recurrent during the indictment period. Civilians were forced to carry logistical materials, arms, food, looted goods for the RUF. The civilians were forced to do so and were not compensated.[956] Some witnesses told the Court that they were forced to do other chores, for example medical work,[957] brushing the roads,[958] carrying farmed goods,[959] fishing and hunting.[960]

322. The evidence demonstrates that the understanding in the RUF was that if they captured territory, all that was on it, including the civilians living there and their private property belonged to the RUF.[961] In 1991, TF1-330 witnessed Sankoh, Bockarie, the First and Second Accused telling civilians in Kailahun District that whatever anybody had, including themselves as people belonged to the RUF. The witness said, "when you were

[949] Dennis Koker, Transcript 28 April 05, pp. 80-81, 86.

[redacted]

[951] TF1-141, Transcript 12 April 2005, pp.16-20; TF1-108, Transcript 13 March 2006, p. 37.
[952] TF1-371, Transcript 1 August 2006, p. 158; TF1-366, Transcript 14 November 2005, pp. 93-96.
[953] TF1-108, Transcript 7 March 2006, pp. 109-111, TF1-371, Transcript 21 July 2006, pp. 60-62.
[954] TF1-330, Transcript 14 March 2006, pp. 24-25, 27, 28, 30-31. This type of farming in Kailahun District happened in 1997, 1998, 1999, 2000; TF1-366, Transcript 10 November 2005, pp. 4-7.
[955] TF1-366, Transcript 14 November 2005, pp. 93-96.
[956] TF1-371, Transcript 21 July 2006, p. 62.
[957] TF1-113, Transcript 6 March 2006, p. 37.
[958] TF1-330, Transcript 15 March 2006, pp. 36-38.
[959] TF1-108, Transcript 7 March 2006, p. 98.
[960] TF1-330, Transcript 16 March 2006, p. 59.
[961] DIS-188 agreed that according to the RUF understanding and ideology, everything found in a captured location automatically became RUF property, including civilians present in that location. The witness then conceded that it was a rule within the RUF from 1991 up to the disarmament and that it had been applied in Kono District during the Junta period, as well as in Kenema, Bombali and Kailahun Districts, DIS-188, Transcript 2 November 2007, Closed Session, pp. 99-100.

captured you were like a slave".[962] Other witnesses also mentioned that the civilians were treated like slaves.[963]

323. Several witnesses described a so called "subscription" system established by the RUF. Villagers were forced to turn over to the RUF a certain amount of their agricultural products. It was a protection racket like those used by gangsters. In Kailahun District the produce that had to be turned over to the RUF was mostly coffee, cacao and palm oil, meat and fish. The system existed throughout the RUF regime from 1996 to 2001. The Third Accused collected the products through his G5 commanders. The civilians were also forced to carry these products wherever they were ordered to.[964] TF1-108 described the "subscription" system as follows: "...whatever the RUFs needed to pursue the war, they would tell us, the civilians, then we too would tell our people and then we would subscribe what they needed to pursue the war."[965]

iii) Arms Shipments

324. Arms and ammunition were essential to carrying out the common purpose of the joint criminal enterprise. Acquiring and distributing arms and ammunition to members of the joint criminal enterprise was a significant means of assistance to, or contribution to, the joint criminal enterprise. The evidence shows of how the Junta got arms and ammunition shipments from abroad, partly with the support of Charles Taylor, and that this shipments were, at least partly, paid with diamond revenues.[966]

325. [redacted], he said "because of the failed Abidjan discussion there was frantic efforts, in terms of boosting up the Defence of AFRC in preparation for the imminent attack ... from the ECOMOG forces." Therefore an emergency meeting was called at the State House in order to establish a "contingency plan upon receiving an intelligence report that Freetown was going to be invaded. And during that meeting key issues that emerged were the conspicuous lack of arms and ammunition, and the need to raise more products; that is alluvial mining

[962] TF1-330, Transcript 14 March 2006, p. 20 (lines 29); TF1-330 also mentioned that people were beaten, if they did not work. Transcript 14 March 2006, pp. 29- 30, 92;
[963] TF1-113, Transcript 2 March 2006, pp.70-71.
[964] TF1-330, Transcript 14 March 2006, pp. 41-44; TF1-108, Transcript 8 March 2006, pp. 23-24; Transcript 7 March 2006, p. 96 and pp. 109-111.
[965] TF1-108, Transcript 7 March 2006, p. 91.
[redacted]

diamonds to ensure that procurement of arms and ammunition take place, as well as specific instruction from the chairman to one senior member of the RUF at that point in time, Colonel Isaac, to bring in RUF manpower into the western area ...".[967] One of the decisions that were taken was:

> ...to pay for a shipment of arms and ammunition that was supposed to come in to Sierra Leone at Magburaka where an airstrip was renovated and there was a mention of 90 carat of diamonds, in payment of those shipments, and USD90,000 to be taken from the Bank of Sierra Leone, in payment of the flight that was to bring in the shipment.[968]

326. The witness then testified that the First and the Second Accused, and some of the security that were along with them, went to Magburaka to collect the shipment with arms and ammunition. The witness understood that there was supposed to be a "second trip which was aborted because of the assault on the air strike by a Nigeria Alpha Jet whom may have received an intelligence about the movement of the shipment. However, the first shipment was brought in to Freetown for storage. The shipment came from Burkina Faso and was organised by General Ibrahim Bah. Parts of it were put at the ammunition dump at Sierra Leone Army military headquarters at Cockerill and some of the consignment was stored at the residence of Johnny Paul Koroma. Later those arms and ammunition were distributed among the AFRC and the RUF.[969] [redacted][970]

327. [redacted]

[967] [redacted]

[971] TF1-360, Transcript 22 July 2005, p. 35.

[redacted]. He gave Mike Lamin weapons to take to Bockarie.[973] Others at Magburaka were Five-Five (Santigie Borbor Kanu), Gullit (Alex Tamba Brima), Kailondo, Mike Lamin, the Second Accused, Akim, and a number of other fighters.[974]

328. George Johnson remembered the delivery of arms and ammunition on board a Ukrainian ship that anchored at Queen Elizabeth Quay during the Junta period. Troops went to unload the arms and ammunition and transport them to the residence of Johnny Paul Koroma. The consignment included AK rounds, 7.6 mm rounds, RPG bombs, commando mortars, six anti-aircraft guns and two BMG guns. The arms were distributed by Johnny Paul Koroma's chief of staff, S.O. Williams, to some RUF commanders such as Dennis Mingo (Superman), the First and Second Accused, Gibril Massaquoi and Rambo of the RUF.[975] The First Accused used the weapons when he went to the front to fight against ECOMOG and Sesay "had command and control over all the RUF fighters who were thousands."[976]

329. Fighting took place at Orugu bridge in Benguema during the Junta between the RUF and AFRC on one side, against ECOMOG. The First Accused took bullets, guns and food to the RUF and AFRC troops based at Orugu bridge.[977] [redacted] The ammunition was used by the RUF, the soldiers and the STF (Special Task Force) to fight.[978]

330. [redacted] further testified that around the middle of 1998, General Ibrahim Bah made a series of trips with arms by road from Monrovia to Buedu. The escorting of the weapon deliveries was at times done by Taylor's Anti-Terrorist Unit, Eddie Kanneh, Commander Jungle, the liaison between the RUF and the Liberian Security Forces, and

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[redacted]

[973] TF1-366, Transcript 11 November 2005, pp. 24-25.
[974] TF1-366, Transcript 11 November 2005, p. 28.
[975] George Johnson, Transcript 14 October 2004, pp. 38-40. The witness said, he did not remember the date of this shipment. (p. 38). Johnson testified that there was a person known as RUF Rambo and another person known as SLA Rambo who was from the Sierra Leone Army (Transcript 14 October 2004, p. 40).
[976] George Johnson, Transcript 19 October 2004, p. 15.
[redacted]
[978] TF1-366, Transcript 7 November 2005, pp. 64-65.

Zigzag Mazar, a member of Anti-Terrorist Unit. General Bah negotiated the deal through the assistance of Musa Cisse, Taylor's chief of protocol. Bah used diamonds to obtain the arms.[979] Taylor was paid with diamonds to have him send arms and ammunitions.[980]

[redacted]Other witnesses confirmed the information that arms shipments were paid for with diamonds. [redacted]. The first trip took place after Bockarie took diamonds from Johnny Paul Koroma just after the ECOMOG intervention, the last trip was around the end of 1998[redacted] In addition, General Tarnue travelled by helicopter to deliver arms to the RUF: once during the Junta; then around May 1998; and finally in 1999 or 2000. The third trip took place after Bockarie had left Sierra Leone.[982] Exhibit 40 is a letter from Bockarie to Charles Taylor dated 24 June 1998, containing a request for ammunition[redacted]

332. [redacted] They went in a convoy including Akim Turay an SLA soldier, Mike Lamin, the Second Accused, Five-Five and Gullit. The guns and cartridges were loaded on to vehicles, brought to Freetown, and distributed to Mosquito in Kenema, and front lines in Bo and Freetown. The First Accused distributed them.[984]

iv) Child Soldiers

333. Child soldiers were widely used throughout the Indictment period and the Accused conscripted or enlisted them, or used them in hostilities. The evidence is only briefly referred to here, and the Prosecution relies on the evidence stated below in the evidence

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[redacted]

[981] TF1-036, Transcript 28 July 2005, pp. 58-61.
[982] General Tarnue, Transcript 5 October 2004, pp. 75-84; the witness said Bockarie left Sierra Leone in November of December 1999.
[983] [redacted]
[984] TF1-366, Transcript 7 November 2005, pp. 74-77.

section of Count 12. The use of child combatants in Sierra Leone's armed conflict was documented in numerous NGO and UN reports.[985] During the period from 1997 to 1999, most senior commanders had SBU's, including Bockarie, the First and Second Accused, and others.[986] SBU's engaged in activities that ranged from providing personal security to commanders to combat missions. Most senior commanders had SBU's attached to their personal security outfit including the First and Second Accused.[987] [redacted] She further testified that she saw the Third Accused with SBU's from 1996 to 1997 when he was in Kailahun.[988]

334. TF1-129 was physically beaten during the AFRC Junta and thrown into the boot of a vehicle by six rebels on the instructions of the First Accused. Sesay brought a small boy about the age of seven, gave him an AK-47 and told him to watch TF1-129. The boy was instructed by the First Accused to shoot the Witness dead if he moved. The boy who could hardly handle the rifle sat down and put it on his leg pointing it towards TF1-129's head.[989]

335. TF1-141, who was captured at about the age of 11 in 1998 by the RUF in Koidu Town[990] gave a detailed account how he was sent on food finding missions from Guinea Highway as a subordinate of the Second Accused. He testified that there were many SBUs and almost all commanders had some. The Second Accused had several SBUs under his command.[991] When TF1-141 travelled to Kailahun with Johnny Paul Koroma and the Second Accused[992] they met the Third Accused in Kailahun Town.[993] The witness was then forced to go to the training base at Bunumbu, called Camp Lion[994], where he met many

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[985] Exhibit 127, Expert Report on Children with the fighting forces; Exhibit 175, HRW Report 1998, pp. 19455-19456; Exhibit 177, AI Report 2000, pp. 3-7, 16-18 (19542-19546, 19555-19557); Exhibit 161, Third UNOMSIL Report 1998, para. 32; Exhibit 173, Fourth Secretary-General Report on UNAMSI, para. 49-50; Exhibit 173, Fourth Secretary-General Report on UNAMSIL, para. 49-50; Exhibit 176, AI Report 1998, pp.25-27 (19503-19505); Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 6-7 (19046-19047).
[986] TF1-036, Transcript 28 July 2005, pp.17-18.
[987] TF1-371, Transcript 21 July 2006, p. 63.
[988] TF1-113, Transcript 2 March 2006, pp. 64-66.
[989] TF1-129, Transcript 10 May 2005, Closed Session, pp. 64-65.
[990] TF1-141, Transcript 11 April 2005, pp. 78-80. Witness said he was 14 at the time of disarmament in 2000, so that he was 11 or 12 when he was abducted in 1998.
[991] TF1-141, Transcript 11 April 2005, pp. 91-92.
[992] TF1-141, Transcript 12 April 2005, p. 6.
[993] TF1-141, Transcript 12 April 2005, pp. 14 and 19-21.
[994] TF1-141, Transcript 12 April 2005, pp. 22-23

other boys and underwent a combat training and got so-called combat medics and substances.[995] The First Accused held a speech for recruits at Camp Lion, gave them jamba and other drugs and said that after going through the training, they should apply whatever they would be told in the front line, otherwise they would be executed.[996] After his training, the witness was actively involved in attacks of villages, Manowa and Segbwema in Kailahun District,[997] and in RUF combat operations, including Operation Born Naked.[998]

v) Events During the Junta

[redacted]Following the AFRC Coup in May 1997, the Supreme Council was formed. The Supreme Council included leaders of the AFRC and the RUF.[999] It "was the highest decision-making body of the Junta, which co-ordinated both the affairs of the government, of the Junta, as well as defence of the Junta, that is the security of the Junta at that point in time."[1000] At the Supreme Council decisions were made as to the operation of the AFRC government.[1001] The First and Second Accused were members of the Supreme Council, and the "Minutes of An Emergency Council Meeting," held on 11 August 1997, a meeting attended by the First and Second Accused, state "that as Members of the Highest Council of the land, Members must conduct themselves with respect and honesty."[1002] Johnny Paul Koroma was named Chairman of the Supreme Council and his deputy was Sankoh.[1003] At the time Sankoh was under detention in Nigeria, Bockarie took Sankoh's place and appointed the First Accused to act in his absence;[1004] for instance when Bockarie left Freetown for Kenema around August 1997, he instructed the First Accused to remain in

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[995] TF1-141, Transcript 12 April 2005, pp. 27-28 and 32-33.
[996] TF1-141, Transcript 12 April 2005, pp. 30-32.
[997] TF1-141, Transcript 12 April 2005, pp. 46-50.
[998] TF1-141, Transcript 12 April 2005, pp. 57-63.
[999] Judicial Consequential Notice Order, Annex 1, paras T and U, p. 11991.
[redacted]
[1001] George Johnson, Transcript 18 October 2004, p. 113.
[1002] Exhibit 224, Document dated 16th August 1997, titled Minutes of an Emergency Council Meeting of the AFRC held at the State House on Monday 11th August 1997" ("**Exhibit 224, Minutes Emergency Council Meeting**"), para. 14, p. 00009774; Exhibit 6, Copy of the Sierra Leone Gazette, dated Thursday 18th September 1997, ("**Exhibit 6, Sierra Leone Gazette**"), p. 00009699, nr. 9 and nr. 11; George Johnson, Transcript 18 October 2004, pp. 118-119; TF1-036, Transcript 1 August 2005, Closed Session, p. 19.
[1003] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 16 May 2005, p. 92.
[1004] George Johnson, Transcript 14 October 2004, p. 26.

Freetown as the most senior RUF person.[1005] [redacted]

> The Supreme Council was comprised of senior leaders of the junta, beginning with the chairman of the junta, Johnny Paul Koroma, SAJ Musa, who was a deputy, and the 17 members who staged the coup, by that time called honourables, and senior members among them were the principal liaison officers, PLO 1, PLO 2, and PLO 3. They were also comprised of High Command of the Sierra Leone Armed Forces, beginning with the chief of defence staff, by the name of SFY Koroma; the army chief of staff, who was by then called SO Williams; the chief of staff, the naval commander of Sierra Leone Armed Forces; the air wing commander, who was called Victor King; as well as brigade commanders, including seven members of the RUF led by the High Command of the RUF. These were the key components of the Supreme Council.[1007]

[redacted]

338. TF1-334 said that the Supreme Council "were responsible for carrying out the day to day activities of the government,"[1009] and that they met weekly and also had emergency meetings.[1010] The major issues discussed at meetings of the Supreme Council were about the "security of the junta, revenue generation for the sustainability of the junta, as well as resolutions of conflicts between the AFRC and the RUF, called People's Army and, frequently, issues relating to the misbehaviours of the so-called honourables, regards looting and harassment of civilians."[1011] The security of the Junta was the paramount issue because at that point the Junta was besieged, under an embargo, and there was constant harassment by the ECOMOG forces at Jui and from the civil militias upcountry. This included discussions about "how to maintain the security, how to ensure that the troops,

[1005] TF1-036, Transcript 28 July 2005, Closed Session, p. 37.

[redacted]

Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 17 May 2005, pp. 7-8.

[1009] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 16 May 2005, p. 57.

[redacted]

especially troops that were not homogeneous, were disciplined and how to maintain logistical supply for such troops in terms of arms and ammunitions."[1012]

339. The evidence shows that the Junta "government" maintained frequent contact with Charles Taylor. While he was in Freetown during the Junta, TF1-367 saw Jungle, a Liberian soldier who was Taylor's bodyguard; he knew Jungle from the time in Liberia in 1993 and he knew Jungle was Mosquito's friend.[1013] Later the witness heard that Jungle returned to Liberia.[1014] TF1-366 also saw Jungle at the First Accused's house during the Junta. Jungle was sent by Taylor to assess relations between the RUF and the AFRC. Jungle went to Kenema to Bockarie and Bockarie sent him to the First Accused at OAU village in Freetown. The Third Accused was with Bockarie at Kenema when Jungle stopped there.[1015] [redacted], which was "basically seeking the support of Mr. Taylor to work and re cognise the junta regime as part of the endeavour of the junta regime to gain recognition from ECOWAS member state, which was already undergoing."[1017] [redacted] In June 1997 Charles Taylor instructed his Minister of Defence, Daniel Chea, to fly to Freetown to meet with Johnny Paul Koroma to try to convince him of building a military alliance, and to tell him any other support he needs, we are prepared to help him. If there is any outside intervention and it requires that we give him artillery pieces, we are standing by to supply him.[1019] Chea went to Freetown and returned the same day. Upon return he contacted Benjamin Yeaten, and they went to Taylor's residence White Flower. Chea told Taylor that Johnny Paul Koroma agreed and had said he would contact Taylor if there was an outside intervention against the AFRC.[1020]

[1012] TF1-371, Transcript 20 July 2006, Closed Session, p. 34.
[1013] TF1-367, Transcript 21 June 2006, Closed Session, pp. 53.
[1014] TF1-367, Transcript 21 June 2006, Closed Session, p. 55.
[1015] TF1-366, Transcript 7 November 2005, Closed Session, pp. 65-67 and 70-71; TF1-366, Transcript 17 November 2005, Closed Session, pp. 24-25 and 28-29.
[1016] [redacted]
[1017] [redacted]
[1018] [redacted]
[1019] General Tarnue, Transcript 5 October 2004, pp.40-41.
[1020] General Tarnue, Transcript 5 October 2004, pp. 47-51.

Chea returned to Freetown in about July 1997,[1021] with Charles Taylor's instruction: "Go ahead and, after the military alliance, any other logistical support he would need – fuel, gas, and other thing – we will be able to provide that for him, and I will support him politically."[1022] RUF representatives went to White Flower in Monrovia several times between 1997 and 1999 to see Charles Taylor. Sometimes they took diamonds to Charles Taylor.[1023] Ibrahim Bah was the liaison between Charles Taylor and Bockarie. He would meet Benjamin Yeaten to complete any transaction.[1024]

340. TF1-045 testified that the AFRC/RUF was structured in such a way that when there was an AFRC commander his deputy would be RUF and vice versa.[1025]

341. There were joint RUF and AFRC operations during the Junta.[1026] The RUF were called to come to Freetown and "They worked hand in hand with the soldiers in Freetown under the AFRC government. So on all operations they do it jointly."[1027] During the Junta, the RUF obtained arms and ammunition from the military ordinance at Murray Town which was shared by both the RUF and the SLA.[1028] During the Junta Johnny Paul Koroma had to go through the RUF High Command and did not give orders directly to RUF commanders. He "didn't directly deal with individual commanders within the RUF. There was a channel he went through."[1029] If he "had anything for the RUF, he'd go through the structure. He contacted the RUF High Command in Freetown by then, which was Issa Sesay."[1030] At the end of the Junta Johnny Paul Koroma instructed all of the fighters in Kono that they shall be under the RUF and that they are to recognise themselves as

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[1021] General Tarnue, Transcript 5 October 2004, pp. 51.
[1022] General Tarnue, Transcript 5 October 2004, pp. 54.
[1023] General Tarnue, Transcript 5 October 2004, pp. 97-98.
[1024] General Tarnue, Transcript 5 October 2004, pp. 99-100.
[1025] [redacted] arrived in Tongo it was an AFRC commander Captain Yamao Kati who was the overall commander. Though he was AFRC, Captain Yamao Kati reported to Mosquito. Kati's deputy was Captain Eagle of the RUF, [redacted] See also Exhibit 39, a letter to Johnny Paul Koroma seeking to allocate responsibilities. The First Accused signed because Bockarie was in Kenema; TF1-036, Transcript 28 July 2005, Closed Session, pp. 33-35.
[1026] DIS-080, Transcript 05 October 2007, p. 102 (lines 1-10).
[1027] George Johnson, Transcript 14 October 2004, p. 35.
[1028] George Johnson, Transcript 14 October 2004, pp. 35-36, the witness advised that there was a joint RUF and SLA operation to attack the Nigerians at their headquarters but it was unsuccessful and another joint operation to attack the Mammy Yoko hotel on 2 June. [redacted]
[1029] TF1-371, Transcript 24 July 2006, Closed Session, pp. 96-97.
[1030] TF1-371, Transcript 24 July 2006, Closed Session, p. 99.

RUF.[1031] TF1-371 testified that prior to the AFRC and RUF being forced out of Freetown in mid-February 1998 "... beside a very minor misunderstanding, there was a cordial relationship between the RUF and the AFRC."[1032]

342. The above evidence demonstrates the plurality of persons and the efforts to pursue the common purpose, and to some extent crimes committed during the Junta. The Prosecution refers to Counts 1 to 14 for further evidence of crimes committed during the Junta which were part of the joint criminal enterprise, or alternatively, were the natural and foreseeable consequences of the joint criminal enterprise.

vi) February 1998 Retreat from Freetown

343. When the Junta forces were forced from power on behalf of the ousted government of President Kabbah about 14 February 1998,[1033] ("**ECOMOG Intervention**") Taylor instructed them by radio to fight back, consolidate and regain their positions[1034] and to create a corridor for Johnny Paul Koroma to escape to Liberia.[1035] The pull-out from Freetown included all senior commanders of the Junta government and the other ranks. A mixed group of RUF and SLA soldiers were fighting against ECOMOG troops.[1036] The Junta troops pulled out of Freetown by the peninsula to York, Tombu, Phogbo, Newton, then Masiaka.[1037] Johnson said there was command and control during the pull-out, "because if there had been no command and control, we should not have retreated the same route we took together.... [and] if no command and control from Freetown, some commanders will go in a different way, because the meeting was held that we should all pull out to Tombo and that was done."[1038] [redacted]

[1031] George Johnson, Transcript 14 October 2004, p. 36.
[1032] TF1-371, Transcript 20 July 2006, Closed Session, p. 57.
[1033] Judicial Consequential Notice Order, Annex 1, para. V, p. 11991.
[1034] General Tarnue, Transcript 8 October 2004, pp. 197-198.
[1035] General Tarnue, Transcript 11 October 2004, pp. 7-9.
[1036] George Johnson, Transcript 14 October 2004, p. 45.
[1037] George Johnson, Transcript 14 October 2004, p. 50.
[1038] George Johnson, Transcript 19 October 2004, p. 12.

Then all of them went to Masiaka, including Johnny Paul Koroma and the First Accused.[1039]

344. During the retreat looting took place in Freetown, Lumley and Juba, also between Masiaka and Makeni. Vehicles for transport were taken and shops looted.[1040] Members of the RUF said they were engaged in a self-reliant struggle. They were not paid and had to find other means to sustain themselves. This was the essence of Operation Pay Yourself.[1041] In addition to the looting and burning of houses, civilians were captured and taken to Masiaka. RUF, SLA, STF, all of them committed these crimes.[1042]

345. The Second Accused came to Masiaka with his convoy from Bo. Then the First Accused, the Second Accused, and ex-SLA Akim Touray told the troops to disarm the ECOMOG Guineans.[1043] [redacted] The First Accused was promoted to brigadier when the fighters pulled out from Freetown. From Masiaka an operation was sent to attack Bo under Major A.F. Kamara and the First Accused. Sesay went on the mission because it was a joint operation of the SLA and RUF, and the First Accused represented the RUF High Command at Masiaka. Johnson testified that the First Accused "was the commander of the attack, because Major AF Kamara was a major, whilst Issa Sesay was carrying the rank of a brigadier. So he is the commander, the highest authority commander of any attack." Sesay was the commander of all troop members on the mission to Bo, SLAs and RUF, and all troop members took instructions from him.[1045] TF1-360 stated that the First Accused "was the high command in Makeni during that period. So, whosoever delivered a message to us that that was what Issa Sesay said, we believed because we worked according to commands, and commands stem from the top unto the bottom."[1046]

[1039] TF1-366, Transcript 7 November 2005, Closed Session, pp. 98-99.
[1040] George Johnson, Transcript 14 October 2004, pp. 54-56.
[1041] See the evidence of DIS-188, Transcript 2 November 2007, Closed Session, pp. 101-103.
[1042] TF1-366, Transcript 7 November 2005, Closed Session, pp. 100.
[1043] TF1-366, Transcript 7 November 2005, Closed Session, pp. 101-102.
[1044] TF1-366, Transcript 7 November 2005, Closed Session, pp. 102-103.
[1045] George Johnson, Transcript 19 October 2004, pp. 18-19 and 23.
[1046] TF1-360, Transcript 22 July 2005, Closed Session, p. 55; [redacted]

346. When the mission returned from Bo a meeting was called. Those present included Solomon Anthony Julius Musa (S.A.J. Musa), Bazzy Kamara, Santigie Kanu, Dennis Mingo, the First and Second Accused, and Mike Lamin. S.A.J. Musa was in command of the SLA at Masiaka and the First Accused was in command of the RUF [redacted] They said if the troops go to Kono they would be able to defeat the government. Diamonds were there so if they captured Kono they would be able to defeat the government.[1050] Johnny Paul Koroma stated that Kono should be made a Junta stronghold.[1051] The First Accused, the Second Accused and Superman gave the order for Operation Pay Yourself,[1052] and the retreat to Kono was decided.[1053] Both SLA and RUF looted in Makeni. Vehicles were used to transport the looted items and civilians were captured to carry things along.[1054] The First Accused was the "immediate senior commander" of this mission.[1055]

347. TF1-360 got the order for Operation Pay Yourself in Makeni through the Second Accused from the First Accused.[1056] He further stated, that raping was taking place and that school children were abducted at Makeni by RUF and AFRC.[1057] TF1-334 saw young girls and young men captured and abducted.[1058] The pillage started in Masiaka but continued through Makeni to Kono. "[W]e were taking properties, whatever we saw we would take."[1059]

[1047] George Johnson, Transcript 14 October 2004, pp. 51-52.
[1048] George Johnson, Transcript 20 October 2004, p. 2, corroborated by TF1-371, Transcript 20 July 2006, Closed Session, pp. 58-61.
[1049] [redacted]
[1056] TF1-360, Transcript 22 July 2005, Closed Session, p. 57-58.
[1057] TF1-360, Transcript 20 July 2005, Closed Session, p. 12.
[1058] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 17 May 2005, pp. 91-92.
[1059] TF1-366, Transcript 7 November 2005, Closed Session, p. 110.

348. [redacted] The fighters retreated to Bumpe after an ambush. "Issa was annoyed because he saw that everybody was trying to withdraw." The First Accused shot a soldier in the foot and said "If you do not stop people from retreating, everybody will go back."[1060] Superman led the advance team. The First and the Second Accused, Johnny Paul Koroma and other authorities were in the middle group. TF1-360 was in the last group advancing to Kono. Properties were destroyed at Magburaka, Matatoka, Makali, Masingbi. Villages on the highway to Kono and wares were burnt down. Bockarie was in Buedu and sent orders through radio message to the First Accused.[1061] During the retreat the AFRC and RUF were abducting civilians from Makeni, Magburaka, Matotoka, Masingbi and Kono.[1062] TF1-071 saw villages burned, Coal Town, Sewafe, Bumpe, Ngaya, Mortema, Simbakoro[1063], and a lot of corpses in Tonkoli and Kono Districts in March to April 1998. Most of the corpses were seen in burnt villages alongside the road. RUF fighters went into nearby villages, looted and captured civilians who were forced to go to Kono. Many children were taken. Some of them became child soldiers, some were less than 10 years old.[1064]

349. [redacted] About three weeks after their arrival in Koidu Town, the Second Accused and the STF broke into a bank situated at the back of the Opera, at Konomanyi Park. The Second Accused and Major Kennedy took the money from the bank break-in and diamonds to the First Accused in Kailahun.[1067]

[1060] TF1-334, Transcript 7 July 2006, p. 7.
[1061] TF1-360, Transcript 20 July 2005, Closed Session, pp. 13-14. [redacted]
[1062] TF1-360, Transcript 22 July 2005, Closed Session, p. 64.
[redacted]

350. Following the ECOMOG Intervention in February 1998, Taylor told Bockarie to report to him at White Flower along with Benjamin Yeaten. The First and Second Accused went with Bockarie to Monrovia. At the meeting Taylor said that the RUF had to hold Kono District because the diamonds allowed the RUF to get arms and ammunition. Yeaten accompanied Bockarie, the First and Second Accused, and others to the arms storage site to give them arms and ammunition.[1068]

vii) Operations in Kono District

351. The evidence of conduct and crimes in Kono District during the Indictment period are stated in the evidence part of Counts 1 to 14, and will not be restated here. They are incorporated by reference.

352. [redacted] civilians were abducted at Koidu and the area around Koidu, strong men and young women, and children between 8 to 12 years, and those who tried to escape were executed.[1070] This was confirmed by TF1-071 who said that villagers were abducted by force, including many children, some of whom became child soldiers, and that rice, palm oil and items such as tape recorders were looted.[1071] The strong civilians who were captured were used to carry food for the fighters and some of them were trained as fighters,[1072] while women were taken as bush wifes.[1073] [redacted] By then Koidu, Yengema, Bumpe, Jagbwema Fiama, Tombodu, and Yomadu was completely burned down. The Second Accused was present during the burnings in Kono.[1074] Superman continued to

[1068] General Tarnue, Transcript 5 October 2004, pp. 62-68.
[1069] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript20 May 2005, p. 3; Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 16 June 2005, p. 56.
[1070] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, pp. 4-5.
[1071] TF1-071, Transcript 19 January 2005, pp. 33-36.
[1072] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, p. 6. The children "who were captured, they started giving them training, and myself up and my companions called them SBUs." TF1-334 testified that the children were used to amputate people in Kono District, at places such as Tombodu.
[1073] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, pp. 5-6. "the women, especially the beautiful ones, they were under the full control of the commanders and, indeed, they became their wives. They were cooking our food for us and the other soldiers who were in Kono. [And] since they were unmarried and they were captives, they used them sexually."
[1074] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, pp. 8-11.

remain operation commander for both the RUF and the SLA because the SLA commander was not there.[1075]

353. After the capture of Koidu, when TF1-334 and Superman had returned from their trip to Kabala, where they asked SAJ Musa for reinforcement of the troops in Koidu and picked up Johnny Paul Koroma and his family in his village and went all together to Kono,[1076] Johnny Paul Koroma, as superior commander of the Junta[1077], called a meeting in a village close to Woama on Gandorhun Highway, where he was based.[1078] It was attended by the First Accused, Superman and others. Johnny Paul Koroma said that Kono should be defended because it would draw the attention of the international community and "we would be able to get diamonds from Kono so as to be able to support the movement."[1079] He told the others that he was going to Kailahun and would then meet Taylor and purchase arms in Liberia and Burkina Faso. The First Accused said "that civilians had betrayed them, we should not tolerate them, we should not allow them to come near us and that we should burn the houses in Kono and this would make them not to come closer to our area."[1080]

354. After the meeting Johnny Paul Koroma together with the First Accused, Mike Lamin, Akim Turay and SLA Rambo (aka CSO Rambo), with families and other fighters went to Kailahun[1081] to meet Bockarie in Kailahun. The G5 Unit was told to provide civilians to the commanders to carry the commanders' loads and the MP's forced the G5 to capture the civilians and the civilians were not treated well. They were captured by armed men.[1082]

355. During the retreat, Bockarie went from Kenema to Buedu. From there he gave orders by radio messages to the First Accused, telling him to prepare the command structure for Kono, and that Johnny Paul Koroma and other important individuals should

[redacted]

not stay at Kono.[1083] [redacted] the first communication occurred when Mosquito said he was sending ammunition to the RUF and SLA in Kono, and that the RUF and SLA should clear Koidu Geiya so that the arms and ammunition could be received. Mosquito also said that the money that had already been looted from the bank in Kono should be taken to Koidu Geiya.[1085] The First Accused, who was in Kailahun, also spoke in the first communication and Sesay said that soon things would be received in Kono to make the whole troop happy, and the Second Accused spoke to Bazzy over the radio to say that the Second Accused was on his way to Koidu. The Second Accused arrived before ECOMOG started moving toward Koidu.[1086] The second radio communication happened when Bockarie learned that ECOMOG forces were heading toward Koidu and Bockarie said to "ensure that the commanders, both the RUF and SLA, should put down the Sewafe bridge."[1087] This second communication took place around May 1998.[1088]

356. [redacted] that when the Second Accused came back to Kono before ECOMOG started moving toward Koidu, the Second Accused was the most senior RUF commander in Kono and Superman was immediately subordinate to him; in turn the Second Accused's superior was the First Accused.[1089] [redacted] that Bazzy was the commander of the SLA's in Kono until mid-May 1998 when Gullit arrived in Koidu and became the SLA commander there. When Gullit came to Koidu he was subordinate to the Second Accused.[1090] The Second Accused had effective command over combatants in Koidu.[1091] Superman became director of operations for both the SLA and RUF in Kono, and the RUF commander Rambo became the acting operations commander for the RUF.

[redacted]

Col. Isaac Mongor of the RUF was the artillery commander in Kono. There was a cordial relationship between the RUF and SLA in Kono, they went on patrol in each other's areas and "If there was any operation there was usually joint cooperation and it was clearly visible that we knew the command structure."[1092]

357. TF1-041 was in Koidu for about one month before he heard about ECOMOG advancing. Around 15 April ECOMOG troops entered Kono.[1093] AFRC, RUF and STF were burning down houses and "they said Morris Kallon said when you take part in burning, you will we [*sic*] promoted."[1094] [redacted] said that the First Accused:

> ... told Kallon that if at all they were to pull out from Kono, Kallon should ensure that nobody should come and stay in Kono. He said Kallon should ensure that Kono should be burnt down. So this was the first assignment given to Kallon which I knew of. During that period he was a field commander, so Kallon passed this order to the soldiers. In fact, from this, Kallon appointed soldiers and he said 12 – 10 soldiers, and he said who was going to be responsible for burning Kono. He said that whosoever accepted, he was going to give a promotion to that person.[1095]

358. The evidence shows, that physical violence to civilians was part of the RUF intent to terrorize, in which the Accused participated. Prior to the Fitti Fatta mission in June 1998, [redacted] was sent on a mission to the area between Bumpe and Tongo highway in Kono District. The Second Accused sent [redacted] on the mission, and Kallon told CO Rocky that "whosoever see us shall never see a rebel again" or people's hands should be amputated in that mission. According to the Second Accused's instructions, anyone they saw, they were to cut that person's hand, whether the person was old or a child. It was said that cutting people's hands was fearful. Kallon said that because ECOMOG were approaching, they should burn down all the villages and every civilian they meet they should cut off his hand.

[1092] [redacted]

[1093] TF1-041, Transcript 10 July 2006, Closed Session, pp. 43-45.

[1094] TF1-041, Transcript 10 July 2006, Closed Session, pp. 45-46; TF1-041, Transcript 17 July 2006, Closed Session, pp. 35-36, "April 15th, ECOMOG captured Kono. Then, it was in the same April when burning was begun in Kono before they came, because they said we should burn down Kono since the ECOMOG were advancing so they wouldn't have area to settle."

[redacted]

More than 20 people had their hands amputated, for some both hands were amputated. AFRC and RUF fighters carried out this order to amputate the hands of civilians.[1096]

viii) Movement of Some RUF to Koinadugu District

359. The First Accused summoned Superman to Buedu for briefings and to receive ammunition[1097] in order to prepare for the Fiti Fata, which was an unsuccessful attempt to retake Koidu.[1098] After this attack the First Accused ordered Superman to go to meet SAJ Musa. Superman said the First Accused and Mosquito had sent ammunition for this operation.[1099] He left for the Northern Jungle, in Koinadugu.[1100]

360. According to TF1-366, SAJ Musa sent a message to Mosquito and the Second Accused that he had received Superman and that Bockarie should not be discouraged, but be patient, that he himself and Superman fought at Mongor, where they captured arms and ammunition, and that SAJ Musa wanted reinforcement. Bockarie told the Second Accused to send reinforcement. Senegalese then came to Superman Ground with 70 men and they went to SAJ Musa in Kurubonla.[1101]

361. [redacted], went with SAJ Musa and AFRC and RUF commanders when they retreated from Freetown to Masiaka, Makeni, Kabala, Mongo, and Kurubonla.[1102] SAJ Musa headed for Kabala when JPK went to Kono and Kailahun where the RUF was based.[1103] Later RUF, STF, and SLA were in Kabala Town and SAJ Musa was the commander of the SLA, Bropleh of the STF, and Superman of the RUF. They moved from Kabala to Mongo when they had information that ECOMOG was approaching Kabala and from there to Kurubonla when news came that ECOMOG was coming to Mongo.[1104] George Johnson and other AFRC members went to join SAJ Musa in Kurubonla from Kono District in April or May 1998 and made a camp at

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[redacted]

[1097] TF1-361, Transcript 12 July 2005, Closed Session, p. 24.
[1098] TF1-366, Transcript 8 November 2005, Closed Session, pp. 78-81. TF1-041said that the Fiti Fata attack on Koidu took place prior to the rainy season in 1998, Transcript 10 July 2006, Closed Session, p. 53.
[1099] TF1-361, Transcript 12 July 2005, Closed Session, pp.40-42; Transcript 15 July 2005, Closed Session, pp. 111-113.
[1100] TF1-041, Transcript 10 July 2006, Closed Session, pp. 50-54.
[1101] TF1-366, Transcript 8 November 2005, Closed Session, pp. 85-88.
[1102] TF1-184, Transcript 5 December 2005, pp. 3-8.
[1103] [redacted]

Mansofinia.[1105] They retook Mongo, mainly with AFRC soldiers. The RUF commander on the ground was Komba Gbundema, who had a lot of women, as well as boys who were carrying loads.[1106] He was sent by Superman as an advance team after the Fiti Fata Operation and [redacted] SAJ Musa was the overall commander there. [redacted] With Superman's arrival SAJ Musa started taking orders from Mosquito. Superman was under the First Accused and Mosquito,[1109] and he brought supplies sent by Mosquito.[1110] At Kurubonla a messenger came from Johnny Paul Koroma saying that all SLA should be answerable to the RUF.[1111]

362. From Kurubonla combined RUF and AFRC under the command of SAJ Musa and Superman attacked Kabala. The attack was planned by Superman, SAJ Musa and General Bropleh and a report of the attack was made to Buedu. [redacted] witnessed looting and capturing of civilians, who were forced to do household chores. The fighters captured the civilians and handed them over to the G5 who screened them. Superman and SAJ Musa sought advice from Bockarie as to whether they should train people captured in Koinadugu. The combined troop could not hold Kabala and retreated to Koinadugu.[1112] TF1-184 saw the RUF capture civilians and make them carry bags and ammunition.[1113] Mosquito and the First Accused communicated with Superman, and told him that ECOMOG troops at Makeni planned to attack them in Kabala, that they should send people to make an ambush between Kabala and Makeni, and "should operate with unity with SAJ Musa."[1114]

[1105] George Johnson, Transcript 14 October 2004, pp. 76-78.
[1106] TF1-184, Transcript 5 December 2005, pp. 17-18. At Kabala there were more than 50 STF, more than 100 SLA and more than 50 RUF, TF1-184, Transcript 6 December 2005, Closed Session, pp. 8-9.
[1107] TF1-361 Transcript 12 July 2005, Closed Session, pp.39-40; corroborated by TF1-184, Transcript 6 December 2005, Closed Session, pp. 6, 8-10.
[1108] TF1-361 Transcript 12 July 2005, Closed Session, pp. 47-49.
[1109] TF1-361 Transcript 18 July 2005, Closed Session, pp. 25-26.
[1110] TF1-184, Transcript 5 December 2005, p. 22.
[1111] TF1-184, Transcript 5 December 2005, p. 93.
[redacted]
[1113] TF1-184, Transcript 5 December 2005, pp. 18-19.
[1114] TF1-361 Transcript 12 July 2005, Closed Session, pp. 51-54, Transcript 18 July 2005, pp. 27-32; TF1-184, Transcript 5 December 2005, pp. 16-21.

363. While [redacted] was at Koinadugu they used to have communication with Alex Tamba Brima who had gone ahead to Bombali District. Gullit asked SAJ Musa for manpower. [redacted] had to pass on the information to First Accused and Mosquito. The latter sent men commanded by Jin Gbandeh from Kailahun; some were sent by the Second Accused from Kono.[1115] The witness, who spent three months in Koinadugu, with Superman, the STF and many SLA combatants witnessed that many civilians were captured in Kabala and the surroundings of Koinadugu and a training base was set up in Koinadugu to train the civilians.[1116]

364. TF1-184 testified that there were contacts between the RUF in Kailahun and AFRC in Kurubonla. Mosquito ordered Superman to send all weapons and ammunition captured from ECOMOG during the Kabala attack to Kailahun. The AFRC under SAJ Musa split from the RUF and STF in Koinadugu and SAJ Musa moved with his men from Koinadugu to Tumania.[1117] Superman's group went to a village near Fulawa in Koinadugu District, established a camp there. Later radio contact was made between Superman and Bockarie and the First Accused, and Superman was ordered to go to Makeni to attack Teko Barracks and was told that the First Accused was going from Kailahun to join Rambo at Kono in order to attack Koidu and then Makeni township.[1118]

365. Superman unsuccessfully attacked Teko Barracks on 23 December 1998. They were told by radio, that the First Accused, Rambo, Short Bai Bureh and others had captured Magburaka and were heading for Makeni. Shortly after they captured Makeni.[1119]

ix) Movement of RUF and AFRC to Camp Rosos and Freetown

366. As mentioned above, a group of AFRC led by Gullit, including George Johnson left Koinadugu to establish Camp Rosos in Bombali District around July or August 1998.[1120] During their movement through Yarya, Karina, Matehun, Batkanu to Rosos, civilians were abducted wherever the combatants could lay their hands on civilians. They were used to

[redacted]

[1117] TF1-184, Transcript 5 December 2005, pp.21-24.

[redacted]

[1120] George Johnson, Transcript 19 October 2004, p. 43.

show them the route, to carry loads; and children were abducted and trained to fight as SBUs. The total number trained at Camp Rosos, including children, was 526.[1121] Johnson testified that some RUF fighters went with them to Rosos and that an RUF named Arthur was part of the command structure as a captain controlling the third battalion.[1122] Before his group passed through Karina, Gullit said that Karina is the home town of President Tejan Kabbah and should be burned down, people should be amputated and killed. Johnson testified that more than 100 civilians, including small children, babies and women were killed; some children were killed by dropping them from buildings. Other civilians were burned and if they ran from the fire they would be shot. Half of the town of Karina was burned town. Other villages on the way to Rosos were burned, and if a civilian resisted abduction they would be killed.[1123] Atrocities were also committed while at Camp Rosos, also by an RUF commander, Lt. Arthur who beheaded the chief of Mateboi because he refused to join the fighters.[1124] Arthur was capturing civilians in Karina and cut off their hands.[1125] More than 100 girls who had been captured on the way from Mansofinia to Camp Rosos were forcefully given to husbands at Camp Rosos.[1126] TF1-334 talked about the radio communication between Gullit and the First Accused in which Gullit said Sesay should have confidence in him and that they needed to co-operate.[1127] In a later radio communication with Bockarie, Gullit explained why he had not been communicating and briefed Bockarie on various attacks, while Bockarie said "he was very happy and that the two sides, both the RUF and the SLA, were brothers."[1128]

367. Johnson was at Rosos for about 2 ½ months, and then he and the others at Rosos went to Major Eddie Town.[1129] The move happened because ECOMOG jets bombed Camp

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[1121] George Johnson, Transcript 14 October 2004, pp. 85-88, the witness said, about 30 to 35 were children between 8 to 14 years.
[1122] George Johnson, Transcript 19 October 2004, p. 47; corroborated by TF1-184, Transcript 5 December 2005, pp. 24-27.
[1123] George Johnson, Transcript 14 October 2004, pp. 88-91.
[1124] George Johnson, Transcript 14 October 2004, pp. 91-92; George Johnson, Transcript 19 October 2004, pp. 93.
[1125] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, pp. 70-71.
[1126] George Johnson, Transcript 14 October 2004, pp. 92-94 and 97-99. See also the corroborating evidence of TF1-334: Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 24 May 2005, pp. 59-67.
[1127] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 24 May 2005, pp. 31-36.
[1128] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 24 May 2005, pp. 55-56.
[1129] George Johnson, Transcript 14 October 2004, pp. 100-101. TF1-334 testified that he was at Rosos for about three months after arriving there at the beginning of the rainy season in 1998 and that they left Rosos in September 1998: Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, p. 103.

Rosos.[1130] Approximately 900 to 1,000 people were at Major Eddie Town, including families.[1131]

368. [redacted] Gullit and Five-Five, to SAJ Musa so that SAJ Musa could reinforce the RUF/AFRC fighting force at Rosos. TF1-360 went around August 1998 in a group from Superman Ground to Koinadugu, escorted by a group of Junta to Koindadugu.[1132] At Koinadugu they met SAJ Musa and other AFRC and RUF fighters. SAJ Musa, with the other authorities, provided manpower to escort [redacted] group to Rosos. They left Koinadugu on 1 September 1998. Commander 05 led the group of around 250 people, which increased to 300 as they met more fighters. Most of them were AFRC, but there was one platoon of 64 RUF fighters, and some STF.[1133] At Rosos, Commander 05 talked to Superman over the radio and told him that SAJ Musa had decided to go to Freetown.[1134]

369. At the time Commander 05 and the reinforcements arrived at Rosos, TF1-334 heard an announcement over the BBC by Eldred Collins that the RUF had declared Operation Spare No Soul.[1135].

370. Some time about September 1998 a split occurred between SAJ Musa and Superman in Koinadugu. From that point until SAJ Musa's death in late December 1998, there was limited communication between the RUF and persons in Rosos and Eddie Ground. TF1-184 testified that SAJ Musa was in Rosos for about one week when they left

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[1130] George Johnson, Transcript 14 October 2004, p. 101.
[1131] George Johnson, Transcript 14 October 2004, p. 105. TF1-334 said that Major Eddie Town was located between the Tonko Limba Chiefdom and the Sanda Magbonlontor Chiefdom. The whole troop moved in September 1998 from Camp Rosos to what was called Major Eddie Town: Exhibit 119, TF1-334 Transcript from AFRC Trial 24 May 2005, pp. 73-74 and 80-81.
[1132] TF1-360, Transcript 21 July 2005, Closed Session, pp.7-9.
[1133] [redacted]
[1134] TF1-184, Transcript 5 December 2005, pp. 29-30.
[1135] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 24 May 2005, pp. 105-106. It said "soldiers should destroy any village that they captured and that they should spare no person."

for Freetown. In Lunsar an argument arose between SAJ Musa and Gullit because Gullit was talking through the radio set to Mosquito. From Lunsar they went to Masiaka where they attacked the Guinean ECOMOG troops. Mosquito said on BBC that his men had attacked ECOMOG. RUF Alfred Brown had relayed this information to Mosquito and was slapped and warned by SAJ Musa who told him not to inform the RUF anymore.[1136] Once SAJ Musa died, Gullit immediately resumed contact with the RUF. S.A.J. Musa instructed the troops to target police, Nigerian soldiers, Nigerian civilians, and all collaborators of the SLPP government, and kill them.[1137]

371. Johnson said that on the way from Major Eddie Town to Lunsar, all the shops at Mange were burned down in order to give direction through the jungle for the troops behind. When Lunsar was attacked all the pharmacies at Lunsar were looted.[1138] The troop bypassed Masiaka and attacked RDF, the Rapid Deployment Force, a unit of the Sierra Leone army that was located on the highway between Mile 38, also known as Magbuntoso, and Masiaka. The attack on Mile 38/Magbuntoso took place on S.A.J. Musa's birthday, which was 17 November.[1139] At Newton there was a meeting to restructure the fighters and the responsibilities for the six different battalions during the attack on Freetown.[1140] Alfred Brown, the RUF signal commander, was appointed as one of the standby officers who would take the place of an injured commander.[1141] At Newton the fighting force was up to 3,000 armed men and up to 2,000 civilians who had been abducted on the trip from Mansofinia to Camp Rosos and were forced to carry food and ammunitions.[1142] From Newton they went to Benguema, where SAJ Musa died.[1143]

x) November and December 1998 RUF Furthering the JCE

372. After the break up between Superman and SAJ Musa in Koinadugu, described in the previous section, a "strategic meeting" took place in Buedu in the first or second week in December 1998, attended by senior members of the AFRC and RUF such as the three

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[1136] TF1-184, Transcript 5 December 2005, pp. 30-34.
[1137] George Johnson, Transcript 14 October 2004, p. 110.
[1138] George Johnson, Transcript 14 October 2004, pp. 110-112.
[1139] George Johnson, Transcript 14 October 2004, pp. 113-115.
[1140] George Johnson, Transcript 14 October 2004, pp. 116-118.
[1141] George Johnson, Transcript 14 October 2004, pp. 119; and see Exhibit 10, Chart of Newton Command Structure.
[1142] George Johnson, Transcript 14 October 2004, pp. 121-122.
[1143] TF1-184, Transcript 5 December 2005, p. 34.

Accused, Superman, Isaac Mongor, Peter Vandi, Akim Turay, Eddie Kanneh,.[1144] They were briefed in Bockarie's compound, with a map of Sierra Leone on a blackboard, where Bockarie discussed the planned attack to recapture Freetown and Kono District. A selected number of commanders were informed about Bockarie's trip to Liberia and Burkina Faso.[1145] Bockarie's plan was to attack Freetown on two flanks. One led by the First Accused, recapturing Kono, Makeni and Masiaka, the other was to capture Segbwema, Kenema and Bo, and then to meet up with the First Accused. Bockarie called the plan Operation No Living Thing. Bockarie said that Operation No Living Thing meant that no prisoner of war was to be tolerated and no living thing would act as resistance to the fighting forces: any person who may be a threat or resistance to the movement should be exterminated.[1146] [redacted] stated that on 15 December 1998 a mass meeting was called by Rambo at Superman Ground in the presence of the First and the Second Accused, Rocky, and Akim Turay.[1147] This meeting is confirmed in Exhibit 225 and Exhibit 226.[1148] The commanders agreed there should be an attack on Koidu on 16 December, and advance teams should proceed to Makeni and wait for further instructions. Tekeke and Junior Conteh, a former SLA, commanded the attack on the area of Tombodu by Yardu road.[1149] TF1-371 testified that:

> ...the intention was to have work with the AFRC to recapture Freetown. What I said earlier, because of the particular interest of the AFRC, who, at that point in time, proved recalcitrant to the RUF, or we the RUF, High Command, the invasion of Freetown was not co-ordinated smoothly between the two groups. One of the groups took the lead once the RUF was making head way, gaining grounds rapidly towards Masiaka. The AFRC group took the lead to enter Freetown.[1150]

[redacted]

[1148] Exhibit 225, Forum Minute of RUF 2 Brigade Headquarters, Kono Axis, Chaired by Colonel Issa H. Sesay on 11 December, 1998; Exhibit 226, RUF S/L Comprehensive Report Dated 24 January 1999 From Issa H. Sesay.

[1149] TF1-071 Transcript 21 January 2005, Closed Session, pp.83-86. The Salute Report authored by the First Accused states that the enemy lost tanks, armoured cars, artillery pieces, rifles and ammunition, "They also suffered heavy casualties the likes of which they have never experienced in the history of ECOMOG. They were forced to retreat on foot with not even a bicycle being able to pass our defenses", Exhibit 36, p. 2352.

[1150] TF1-371, Transcript 21 July 2006, Closed Session, p. 48.

[redacted]From Koidu the RUF captured Makeni and the next day they had a meeting.[1151] Bockarie called from Buedu and talked to the First and the Second Accused and Superman. They said they should now advance to where SAJ Musa was. They advanced to Lunsar. By the time the RUF were at Makeni, SAJ Musa had reached Waterloo. [redacted]

xi) Communications for the Freetown Attack

374. [redacted]

Over 200 RUF gunmen were at Eddie Ground.[1154]

375. While at Major Eddie Town, Gullit communicated by radio with Bockarie who told him about Johnny Paul Koroma's safety and that Bockarie was very happy that Gullit and his men had not surrendered. Gullit also communicated by radio with the First and the Second Accused.[1155] SAJ Musa intended to arrest the RUF members at Major Eddie Town but did not, since the whole troop spoke on behalf of the RUF.[1156] The Second Accused contacted SAJ Musa while advancing to Masiaka and asked him to wait since the Second Accused had a heavy force and together with the First Accused and SAJ Musa they would have taken Freetown,[1157] but then SAJ Musa died at the ammunition dump at Benguema.[1158] The troops moved to Coba Water (also Koba Wata[1159]) where Gullit called a

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[1151] With regard to Makeni, the First Accused said that Makeni should not be burnt because it was "his home town, that was where Pa Sankoh was born, and that we should not loot there like we have done to other places. That was where he himself was based there." the First Accused said Makeni was RUF headquarters and the RUF should not destroy it like they destroyed other places: TF1-366, Transcript 10 November 2005, pp. 84-88.

[1152] TF1-366, Transcript 9 November 2005, pp. 23-25.

[redacted]

[1155] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, pp. 31-34.

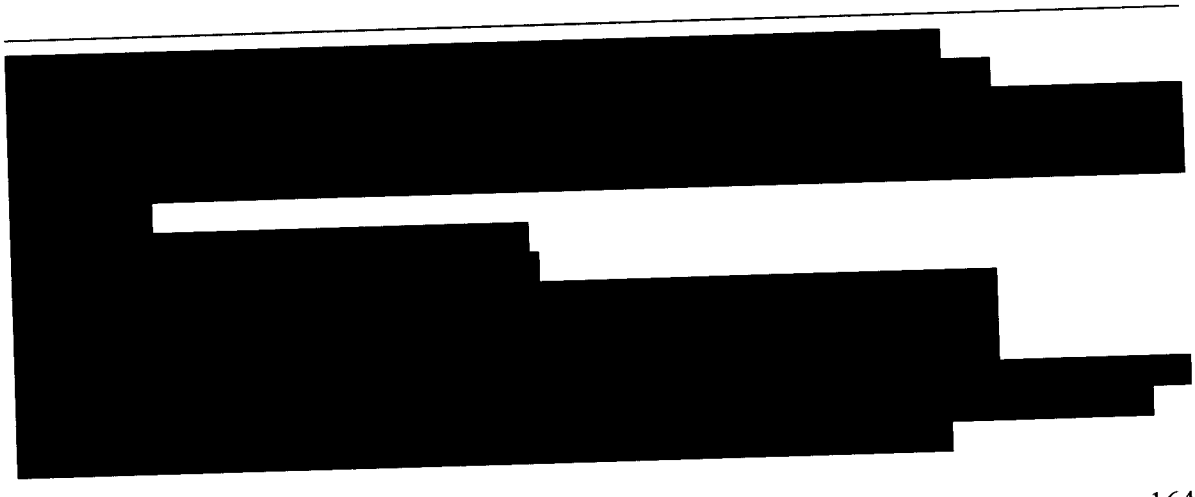
[1156] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, pp. 37-38.

[1157] TF1-366, Transcript 15 November 2005, p.6.

[1158] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, pp. 53-55. At the time of Musa's death the main group of the RUF were very close to Makeni preparing to take over Makeni town. Johnson testified that prior to the death of SAJ Musa the objective of going to Freetown was to restore the army. After Musa's death Gullit changed the plan to attack Freetown: George Johnson, Transcript 18 October 2004, pp. 32, 33, 37, 49, 59, 61.

meeting of the military supervisors around 21 or 22 December 1998 and announced he would take SAJ Musa's position.[1160] He stated that they needed reinforcement from their brothers, the RUF, and that he had spoken to Mosquito who said that reinforcements would be sent, led by Akim aka Tank.[1161] Mosquito said not to enter Freetown and to make a base and wait for the troop that had passed Makeni, which was Superman coming from Koinadugu and the First and Second Accused coming from Kono.[1162] They waited for some time at Benguema for reinforcements but the Kamajors attacked the troop at Benguema, and that was why they decided not to wait any longer and to go to Freetown.[1163]

376. About 1,500 combatants proceeded towards York. The attack on York failed and the troops went to attack Hastings, and then attacked Waterloo.[1164] After the failed attack on York Gullit called Mosquito, informing him that they were heading for Freetown but lacked logistics, arms and ammunition, and that Gullit needed reinforcements. Mosquito said he is sending reinforcement to join Gullit to enter into Freetown.[1165] When the troops attacked Waterloo for the second time there was heavy looting of food, and the troops that went to Waterloo returned to the temporary base at Hastings jungle. Gullit called the First Accused who said that they had captured Kono and were heading towards Makeni to reinforce Gullit as he went to Freetown. Gullit contacted Superman as well who said his troops were moving towards Makeni but were attacked by a jet, he would however reinforce Gullit's position to enable them to enter Freetown."[1166] Gullit then ordered an attack on Hastings, which was successful; arms and ammunitions were captured, a helicopter was set on fire and Hastings was set on fire. On 4 January 1999 the whole troop moved to Hastings.[1167] The troops then moved to Allen Town on 5 January 1999.[1168]



377. [redacted] said the majority of men with Gullit opted to move to Freetown because waiting in the jungle would lead to further attacks on their position. When they reached State House, Gullit sent a message to Mosquito saying he was talking from State House.[1169] Mosquito said he advised not to enter but then the conversation was cut off. The next day Gullit called Mosquito again, who told him to capture some important areas as a base. Gullit said he had had set on fire the oil terminal. The troops were at Ferry Junction when Mosquito told them to dispatch a "receiving team to come and receive people at Kossoh Town."[1170] TF1-334 testified that after Gullit and Mosquito talked over the radio, Gullit ordered the Director of Operations to go in search of fuel and petrol, which was distributed to the commanders. Then Gullit said the big market should be set on fire.[1171] When Gullit asked Bockarie for help, telling him that his group had been encircled by ECOMOG, Bockarie instructed Superman to try to open the way for Gullit so that Gullit and his group could get out of Freetown.[1172] Johnson testified that Bockarie said that if ECOMOG push the troops out, Bockarie "will give orders for the burning down of the whole central part of Freetown and all important buildings."[1173] The First Accused sent an instruction that Rambo was coming and they will attack Waterloo.[1174] [redacted] TF1-263 testified that in Makeni, 55 radioed Superman that he needed reinforcement to Freetown causing the First Accused to dispatch armed rebels to Freetown.[1176]

378. [redacted] Gibril Massaquoi, Alfred Brown and some combatants to receive the men coming from Hastings. They told the group in Hastings to jointly clear the

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[redacted]

[1173] George Johnson, Transcript 18 October 2004, p. 55.

[redacted]

[1176] TF1-263, Transcript 07 April 2005, pp. 30-33.

road of ECOMOG troops. [redacted]. The plan was to attack Kossoh Town so that the troops in Hastings could join the group in Freetown.[1177] They had expected the RUF to attack Kossoh Town, but they did not attack. [redacted] understood that Bockarie had ordered the RUF to assist by attacking and coming to meet the AFRC in Freetown. [redacted] The Second Accused, Superman and RUF Rambo were at Waterloo, on standby to receive the group from Freetown. The next day, the troops from Freetown entered the bush and found their way to Waterloo.[1178]

379. [redacted]. The Guineans were guarding the airfield and the RUF stopped at Devil Hole and contacted Five-Five, Gullit, Bazzy, Mamie Tina, Red Goat, 05, Rambo, and Wako Wako, who were in Freetown fighting. Bockarie, the First and Second Accused and Rambo communicated with them. The RUF attacked Hastings and Jui where ECOMOG was, and Kossoh Town. The First and Second Accused came to Waterloo and told Five-Five and others they should fight together to clear Hastings and enter Freetown.[1180]

380. Johnson testified of several communications between Gullit and the RUF prior to Gullit entering Freetown and during the time Gullit, Alfred Brown, [redacted] and others were in Freetonw. From Orugu Village Gullit radioed Bockarie that Gullit was coming to Freetown; from State House Gullit radioed Bockarie that Gullit was in control of Freetown; and when Gullit started pulling out of Freetown. This communication prompted the dispatch of Junior Marvin to Foamex to meet RUF combatants. Then from Shankaras building, near Ferry Junction, Gullit radioed Bockarie that he was pulling out and that

[redacted]

President Kabbah had offered a ceasefire. Bockarie said the ceasefire should be rejected. Gullit agreed to keep on fighting. When Gullit contacted Bockarie again from the Kissy Mental Hospital, during the withdrawal from Freetown, he was ordered to hand over all of the high politicians released from Pademba Road prison to the First Accused once Gullit arrived at Waterloo. Then during the pull out when Gullit reached Orugu Village, Gullit radioed Bockarie to say that Freetown had been lost and "the response of Mosquito is that we should pull out at least for us not to be trapped in Freetown, to join the RUF at Waterloo."[1181] The politicians released from Pademba Road prison were handed over to the First Accused at Waterloo.[1182]

381. [redacted], and that when the retreat intensified Gullit's signal operator "sent message to Sam Bockarie pleading with Bockarie to come to their rescue to open a back corridor, because the ECOMOG forces was trying, at that point in time, to cut them off at the rear. In that effort to cut them off, they came in contact with the hastily retreating AFRC forces. That was the time that they requested Sam Bockarie to help them open the corridor for them to go out."[1183] After the request came, the troop headed by Rambo, "managed to link up with them and the corridor was opening."[1184] The Salute Report signed by Bockarie states that

> ...the troops that entered Freetown had been cut off from the rear and were being encircled leaving them no way out. I was able to coordinate their operations over set and got them to combine their forces and bulldoze from the side accessing them to the mountains through which they took a bye-pass to join our troops at Benguema and Waterloo as JOI [*sic* Jui] was occupied by ECOMOG. This is how the troops that entered Freetown were able to retreat.[1185]

382. The Salute Report signed by the First Accused similarly states that: "At this time our forces [in] Freetown were under enemy cut-off from the rear and were in danger of being boxed in and either captured alive or killed."[1186]

[1181] George Johnson, Transcript 18 October 2004, pp. 58-61, 78.
[1182] George Johnson, Transcript 18 October 2004, p. 62.
[redacted]
[1185] Exhibit 35, Salute Report Bockarie 1999, pp. 2365, 2366.
[1186] Exhibit 36, Salute Report First Accused 1999, p. 2353.

383. [redacted] STF Rambo was the one they called Red Goat. Later STF Rambo crossed the Orogu Bridge with a squad and joined up with Five-Five and others and Gullit. The RUF went to the bridge but the Second Accused said the RUF should not cross the bridge if ECOMOG were not dislodged.[1188] STF Rambo and others proceeded and joined Five-Five and Gullit in Freetown. [redacted] Civilians in Waterloo were killed and property was looted, houses set on fire by RUF, AFRC, STF. The loot was brought to the First Accused in Waterloo, who said that Bockarie had given an order that whatever was looted in Freetown and Waterloo was government property.[1190]

xii) Attack on Freetown

384. The attack on Freetown was on 6 January 1999.[1191] While at Colonel Eddie Town Gullit and Bazzy had developed their own plan for an attack on Freetown. [redacted] described it as being separate from anything contemplated by SAJ Musa, "but it was in relation with the plan that came from Buedu."[1192] The RUF combatants who moved with them to Freetown from Colonel Eddie Town were under the command of Gullit.[1193] On 4 January 1999 mixed RUF and SLA attacked Hastings.[1194] [redacted] Johnson said that it was a mixed group of RUF and SLA fighters that took part in the attack

[1187] TF1-366, Transcript 9 November 2005, p.29.
[1188] TF1-366, Transcript 9 November 2005, pp.30-31.
[1189] TF1-366, Transcript 9 November 2005, p.32.
[1190] TF1-366, Transcript 9 November 2005, pp. 33-35.
[1191] TF1-184, Transcript 5 December 2005, p.37.
[redacted]

on Freetown.[1196] TF1-184 said it was a joint force of AFRC and RUF who came to Freetown.[1197]

385. Before entering Freetown, Gullit called a meeting at Allen Town where he said that all police stations should be burnt down, that Freetown should be burnt down, that anyone who was captured who was a collaborator should be executed and that Pademba Road prison should be opened.[1198] Gullit also said that whatever the fighters were able to get from civilians would be theirs, but diamonds and dollars were government property that should be reported to the brigade.[1199]

386. At around 1 a.m. on 6 January, the fighters started moving from Allen Town toward Calaba Town, then captured Wellington and went to Berewe (Brewery).[1200] TF1-334 testified that he and other fighters continued on to the Shell Old Road to the Saroulla Cinema, to Fisher Lane, then to Upgun. The AA gun (Anti-aircraft) moved toward Ross Road and Fourah Bay Road, while others moved along the Kissy Road to Mountain Cut Junction toward the Eastern Police station which they captured at around 5 a.m. Two police men were executed and the police station was completely burnt down.[1201]

387. From the Eastern Police station TF1-334 used Goderich Street while others used Sani Abacha Street to go to State House, which was captured around 5:45 a.m.[1202] Gullit came to State House and said that the CID should be burned down, it was set on fire and while it was burning, TF1-334 and others moved to the Pademba Road prison.[1203] After going to the Pademba Road prison, TF1-334 and others went to the national stadium where they opened the gates and the soldiers inside the stadium came out to join them and they went to the Youyi building, then to the Congo Cross bridge.[1204] TF1-334 testified that

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[1196] George Johnson, Transcript 19 October 2004, pp. 131-132. He said there were less than 40 RUF fighters with them.
[1197] TF1-184, Transcript 6 December 2005, pp. 87-88.
[1198] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, pp. 100-101.
[1199] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, p. 103.
[1200] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, pp. 105-108. Gullit said some fighters should use the Berewe route towards the tobacco company and use the new road while other fighters should use the old road.
[1201] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, pp. 110-118. For further evidence of these events see George Johnson, Transcript 18 October 2004, pp. 42-53.
[1202] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 13 June 2005, pp. 118-119.
[1203] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 4-6.
[1204] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 12-14.

heavy fighting was taking place at the Congo Cross bridge so he and others returned to State House.[1205]

388. At State House, TF1-184 saw Gibril Massaquoi and Steve Bio of the RUF.[1206] The witness saw Bazzy, Gullit, 55, Gibril Massaquoi, Steve Bio, Alfred Brown and others at State House in a meeting where a decision was taken to burn Freetown. Petrol was distributed and the burning started.[1207] Later in the afternoon ECOMOG repelled them from State House and when they were at Kissy Road, Gullit asked Mosquito for reinforcement.[1208] Of the reinforcement, which was a joint operation of the SLA and RUF, the witness said that only the 17 men led by Rambo Red Goat reported to Gullit in Freetown.[1209]

389. The evidence of atrocities committed during the invasion is abundant. TF1-093, who was abducted and trained by the RUF when she was 15, was already in Freetown before 6 January. [1210] She commanded a group of 50 combatants during the invasion. She said, she was ordered to kill and to order her group to commit atrocities, for instance burning 20 houses with people inside.[1211] At State House, Gullit shot two captured Nigerian ECOMOG soldiers after questioning them and ordered the execution of twelve others.[1212] Fighters were raping women at State House on 6 January 1999.[1213] During the first week the fighters were in Freetown fighting took place in Kingtom. Civilians were killed for supporting ECOMOG, houses looted and burned.[1214] At Fourah Bay Road civilians were shot and killed following the killing of a combatant there.[1215]

[1205] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, p. 14-15. George Johnson corroborated this information and added that upon returning to State House, Gullit sent a radio message to Bockarie, Transcript 18 October 2004, pp. 54-55.
[1206] TF1-184, Transcript 5 December 2005, pp. 46-47.
[1207] TF1-184, Transcript 5 December 2005, pp. 51-52; Transcript 6 December 2005, p. 58.
[1208] TF1-184, Transcript 5 December 2005, pp. 52-53.
[1209] TF1-184, Transcript 6 December 2005, pp. 47-48 and 54-56.
[redacted]
[1212] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 22-24, 27. See also George Johnson, Transcript 18 October 2004, pp. 53-55.
[1213] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, p. 25-26.
[1214] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 40-45.
[1215] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 66-67.

390. ECOMOG pushed the combatants out of State House and the combatants retreated to Eastern Police station. In the third week of the invasion, RUF Rambo radioed Gullit that he was at Waterloo and he was sending reinforcement.[1216] A team of about 50 men with Rambo Red Goat entered Freetown.[1217] After pulling back to the Eastern Police station the troops that entered Freetown went to PWD where Gullit said that civilians should be abducted. When the troops lost Upgun the abductions started and civilians, especially young girls and young children were taken to the headquarter at PWD. While the fighters were at Upgun, Five-Five ordered his troops to start with amputations. He demonstrated an amputation on two civilians, telling them that since they voted for Kabbah they should go to Kabbah to get hands.[1218] This evidence was confirmed by TF1-184, who testified that after they lost State House the fighters went to Kissy Road, then moved to Upgun, and meeting with Gullit, Gibril Massaquoi, Bazzy, 55 and other AFRC was held and the order was given to ransack and burn Ross Road and that civilians should be chopped.[1219] Houses were burned at Kissy Road. TF1-184 saw people who had been killed and some were hacked, and he saw people whose hands had been chopped off. He was in Freetown for about 18 to 19 days before ECOMOG came to push them out, then went up into the hills and to Benguema. There he saw the Second Accused, Superman, Gibril Massaquoi and others at Benguema Barracks, while most of the RUF were at Waterloo.[1220]

391. While retreating from PWD to the Kissy mental home, and as the troops were capturing civilians and burning, TF1-334 saw about six civilians who had both arms amputated at Shell Old Road.[1221] The troops stayed one night at Kissy mental home and the next day Gullit ordered the oil refinery to be burned down and that if the troops reach the mosque near the Shell Old Road with people in it the people should be shot and killed. TF1-334 testified that people were shot at the mosque and died. From the Kissy mental home the troops went toward Wellington, then to Calaba Town and Allen Town.[1222]

[1216] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 54-58.
[1217] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 58-59.
[1218] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 60-64 and 68-71. He said they could do short sleeve or long sleeve amputations. Then ten civilians were brought and they were amputated from the elbow, a short sleeve.
[1219] TF1-184, Transcript 5 December 2005, pp. 57-58.
[1220] TF1-184, Transcript 5 December 2005, p. 60, 63-65.
[1221] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 79-82.
[1222] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 87-89, 98-100.

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392. The troops then retreated to the Grafton jungle and set up a temporary base close to Benguema.[1223] At Calaba Town, Johnson saw seven dead bodies outside the mosque and more dead bodies inside the mosque; the commander of the area was Red Goat.[1224] It took Johnson a day to get to Orugu village and on arrival there Gullit sent a radio message to Bockarie who told him to pull out faster in order not to be blocked in Freetown.[1225] Some of the troop stayed at Benguema Village while the others went into the peninsula and went to Benguema; it took four days to go to Benguema. Gullit and the bulk of the troops stayed at Benguema while Bazzy Kamara, George Johnson and some mid-level commanders went to Waterloo to meet the RUF.[1226]

393. Other evidence supports these accounts [redacted] Exhibit 227 describes RUF participation in the attack on Freetown, including being at Waterloo Refugee camp on 6 January 1999, attacking the Peninsular Secondary School at Waterloo on 7 and 8 January, deploying to Hastings on 9 January, an agreement on 15 January "that the men in Freetown and the men at our point were to do joint operation on Jui and Kosso town. The Freetown men schedule to attack Jui and we to attack Kosso town, that night we attacked Kosso town clear the enemies but the Freetown men never turn up..."[1228] Exhibit 227 was shown to [redacted] who testified that he recognized on the document the signature of Raymond Kartewu, a Black Guard the witness knew.[1229]

394. While they were at Benguema, Five-Five, RUF Rambo and others planned an ambush of Guinean ECOMOG soldiers and captured a trailer of arms and ammunition which were taken to a refugee camp between Waterloo and the Newton Highway where it

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[1223] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 103-104.
[1224] George Johnson, Transcript 18 October 2004, pp. 76-77.
[1225] George Johnson, Transcript 18 October 2004, pp. 77-78.
[1226] George Johnson, Transcript 18 October 2004, pp. 78-79.
[1227] TF1-296, Transcript 13 July 2006, p. 64. See also the evidence of TF1-212 a female civilian from Koinadugu who was captured in 1998, shot and injured, and in October 1998 taken to hospital in Freetown. She saw children who had been abducted in Koinadugu when she was in Freetown on 6 January 1999. After 6 January 1999 they were taken from the rebels: TF1-212, Transcript 8 July 2005, pp. 113-116.
[1228] Exhibit 227, "Report from Overall Intelligent Officer Commander and Black Guard Adjutant to BFC (Brigadier I.H. Sesay)," 21 January 1999, p. 2.
[redacted]

was guarded by Junior Sheriff and RUF Rambo. The First and Second Accused, and Superman came to Benguema to a meeting with Gullit, Bazzy, Five-Five, Junior Lion and others; Gullit told the First Accused that he was happy that they had come to join force with the SLA and that he wanted the troops to plan an operation to go back to Freetown.[1230] The First Accused agreed and the Tombo axis was attacked. The First and Second Accused came with ammunition and RUF Rambo had an anti-aircraft gun. The Second Accused and Five-Five were part of the advance team while Col. 05, Superman and others used the bypass. The attack on Tombo failed and the troops retreated to Benguema.[1231] [redacted] The RUF took everything away from the soldiers and handed them to the First Accused and that the purpose of the Tombo attack was to get ammunition so that they could fight their way to Freetown.[1232] TF1-334 said that the co-operation between the RUF and the SLA was very cordial during this joint operation that aimed at re-attacking Freetown.[1233] The First Accused was to be the overall commander of the joint AFRC and RUF mission at Tombo and at Allen Town, which lasted for about a week.[1234]

395. At Waterloo Superman summoned another meeting and it was decided to attack the Guineans who were at Newton, and were about to pass on their way to Masiaka. Bazzy, Gullit, Superman and Senegalese of the RUF attacked the Guineans and RUF Rambo collected all of the weapons and sent them to Makeni.[1235]

396. [redacted] Superman went to Lunsar, the First and Second Accused went to Magburaka or Makeni.[1236] Johnson confirmed this and said, Superman went to Lunsar, Gullit and 55 to Makeni, Bazzy Kamara, Johnson and others to Four Mile Highway,

[1230] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 106-108. [redacted]

[1232] TF1-366, Transcript 9 November 2005, pp. 36-37.
[1233] TF1-334, Transcript 6 July 2006, pp. 72-73; 7 July 2006, pp. 51 and 83-84.
[1234] George Johnson, Transcript 20 October 2004, pp. 62-63.
[1235] TF1-184, Transcript 5 December 2005, pp. 66-67.
[1236] TF1-360, Transcript 21 July 2005, pp.45-46.

between Lumpa and Newton. Johnson and the others, stayed there for about one week and then attacks from ECOMOG forced them to pull back to the RDF camp that is very close to Mamamah.[1237]

[redacted] Bazzy Kamara instructed the combatants to make the terrain more fearful around Mamamah for the ECOMOG troops to slow down their movement. Corpses of civilians killed with machetes were displayed on the main highway, about five of them. Other civilians were placed in two grass houses, about seven civilians in each, and the houses were set on fire with the civilians inside. When the fire started blazing, two small children tried to run out from the house. Ibrahim Bazzy Kamara fired two shots into the ground close to the children, to chase them back into the house.[1238] Civilians were abducted in very large numbers during the retreat and used to carry the loads of the commanders, as bush wives or child soldiers.[1239] [redacted]

xiii) Crimes After the January 1999 Withdrawal from Freetown

[redacted] This mixed group moved with about 50 abductees from Wellington through Calaba Town to Benguema taking by force the civilians whom they had captured. On the way this group of RUF and SLA killed civilians, looted and burned houses. Women were raped and were forced to become wives of the fighters [redacted]

[1237] George Johnson, Transcript 18 October 2004, pp. 80-82.
[1238] George Johnson, Transcript 18 October 2004, p. 82.
[1239] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 119-122.
[1240] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 9-13.
[1241] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 13-15.
[1242] TF1-029, Transcript 28 November 2005, pp. 10-14.

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[redacted]At RDF (Rapid Deployment Force) or Mamamah, Bazzy ordered a security called Kankanda to "go and decorate Mammah Town", with the bodies of killed civilians. TF1-334 saw around 15 chopped bodies at Mamamah later on [redacted]

400. [redacted] Later Bazzy ordered that Port Loko should be attacked and that any village they pass through should be burned down and the civilians killed. Port Loko was attacked and Malian ECOMOG soldiers were captured and taken back to Gberi Bana. Bazzy told Mosquito over the radio that he had attacked Port Loko and captured two Malians. Mosquito said that he would tell the Malian embassy that if Mali did not move out of Sierra Leone Mosquito would execute the Malian soldiers.[1248] Bazzy ordered an attack on Makolo village and three ECOMOG soldiers were captured and killed and three women were chopped with an axe and killed.[1249]

401. [redacted] The First Accused also spoke to Bazzy prior to Sankoh's radio communication praising Bazzy and said that Bazzy was a brother to the First Accused. Prior to the ceasefire Mosquito spoke to Bazzy over the radio

[1243] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 20-21.
[1244] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 20-25.
[1245] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, p. 23.
[1246] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 6 July 2006, p. 75.
[1247] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 7 July 2006, p. 90.
[1248] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 35-37.
[1249] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 38-39.
[1250] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 41-43.

and said that Bazzy's troops should not go to the ceasefire.[1251] The day the ceasefire was announced Bazzy organized an operation to attack Mansumana.[1252]

xiv) The Joint Criminal Enterprise

402. The above evidence demonstrates the ongoing assistance and contribution of each of the three Accused to the joint criminal enterprise. The evidence detailed below under the sections for Counts 1 to 14, reviews in further detail, the acts of crimes of the Accused and their acts of ongoing assistance and contribution to the joint criminal enterprise. The elements of the joint criminal enterprise: the plurality of persons, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute, and the participation of the Accused in the common purpose involving the perpetration of one of the crimes provided for in the Statute, are proven. This is so throughout the time period alleged in the Indictment.

403. The Accused were already members of a joint criminal enterprise before the AFRC Coup. During the Junta the RUF joined the AFRC *coupists* and the common purpose of the joint criminal enterprise, of which the Accused and other RUF and AFRC were members, was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone. During the Junta crimes under the Statute were committed by the Accused or by other members of the joint criminal enterprise in pursuit of the common purpose: forcing civilians to labour on farms, in mining, or in transporting loads in Kailahun, Kono and Kenema Districts; killing civilians in Bo and Kenema Districts; enlisting, conscripting or using children under 15 in hostilities; sexual crimes; and a campaign to terrorize the population. At the end of the Junta the RUF and AFRC continued their joint criminal enterprise, the common purpose remained the same, although some members of the joint criminal enterprise changed. Each of the Accused continued to remain members of the joint criminal enterprise, even though there was overwhelming information known to them of the nature and scope of the horrific crimes being committed by the members of the joint criminal enterprise. In February 1998, the Third Accused told Bockarie that over 65 prisoners in cells in Kailahun Town should not be living with the RUF. He arrested them and gave information to Bockarie knowing their fate. They were

[1251] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 43-44.
[1252] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 15 June 2005, pp. 44-49.

executed in his presence and the Third Accused continued on as a member of the joint criminal enterprise. The First Accused knew of this killing, asked Bockarie about it, and must have been content with Bockarie's answer that Bockarie could not stay with enemies.[1253] The First Accused also continued on as a member of the joint criminal enterprise. The Second Accused killed civilians in Kenema District during the Junta and continued on killing civilians in Kono District.

404. The evidence of their participation in the joint criminal enterprise is overwhelming, as is their knowledge of the crimes that were part of the means of achieving the common purpose of the joint criminal enterprise.

405. [redacted] Each of the Accused participated in the ongoing joint criminal enterprise and the crimes that were committed in Koinadugu, Bombali, Freetown and Western Area, and Port Loko, given the heinous crimes which they all knew of taking place in Kono and Kailahun Districts, were part of the common purpose, or alternatively, were a natural and foreseeable consequence of the joint criminal enterprise.

406. [redacted] A split occurred between SAJ Musa and Superman in about September 1998. From that point until SAJ Musa's death in late December 1998, there was limited communication between the RUF and persons in Rosos and Eddie Ground. However, the RUF were already in Eddie Ground, and as stated by TF1-184, it was a joint force of AFRC and RUF who came to Freetown.[1254] Once SAJ Musa died, Gullit immediately resumed contact with the RUF and the RUF took various steps to assist the AFRC and RUF troops in Freetown, including making it possible for them to withdraw to the hills behind Freetown. Bockarie stated in his Salute Report:

[1253] Accused Issa Hassan Sesay, Transcript 8 May 2007, pp. 73-75.
[1254] TF1-184, Transcript 6 December 2005, pp. 87-88.

> Meanwhile the troops that entered Freetown had been cut off from the rear and were being encircled leaving them no way out. I was able to coordinate their operations over set and got them to combine their forces and bulldoze from the side accessing them to the mountains through which they too a bye-pass to join our troops at Benguema and Waterloo as JOI [*sic*, possibly Jui] was occupied by ECOMOG. This is how the troops that entered Freetown were able to retreat.[1255]

407. The crimes committed by the joint force in Freetown, Western Area, and as they withdrew to Port Loko District, were within the joint criminal enterprise. The common purpose need not be previously arranged and may materialize extemporaneously.[1256] The shared intent to commit crimes in furtherance of the common plan may be inferred from the evidence. Shared intent may, and often will, be inferred from knowledge of the plan and participation in its advancement.[1257] There can be no dispute that the three Accused sought to take part in an attempt to seize political and territorial control of Sierra Leone and its population. They were all active participants in crimes throughout the Indictment period. The common purpose of the joint criminal enterprise also "contemplate[d] crimes within the Statute as the means of achieving its objective."[1258] The evidence described below in Counts 1 to 14 is further proof of the Accused's participation in the joint criminal enterprise.

408. In the *Fofana et al* Trial Judgement, the *mens rea* of joint criminal enterprise was reviewed:

> 218. In the first category of joint criminal enterprise the Accused must intend to commit the crime and intend to participate in a common plan whose object was the commission of the crime. The intent to commit the crime must be shared by all participants in the joint criminal enterprise.
>
> 219. The *mens rea* for the third category of joint criminal enterprise is two-fold: in the first place, the Accused must have had the intention to take part in and contribute to the common purpose. In the second place, responsibility under the third category of joint criminal enterprise for a crime that was committed beyond the common purpose of the joint criminal enterprise, but which was "a natural and foreseeable consequence thereof," arises only if the Prosecution proves that the Accused had sufficient knowledge that the additional crime was a natural and foreseeable consequence to him in

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[1255] Exhibit 35, "Salute Report," 26 September 1999, from Major General Sam Bockarie to the Leader of the Revolution, RUF S/L, ("**Exhibit 35, Bockarie Salute Report 1999**"), pp. 2365-2366.
[1256] *Brdanin* Appeal Judgement, para. 418.
[1257] *Kvočka* Trial Judgment, para. 271.
[1258] *Brima et al* Appeal Judgement, para. 80.

particular. The Accused must also know that the crime which was not part of the common purpose, but which was nevertheless a natural and foreseeable consequence of it, *might* be perpetrated by a member of the group (or by a person used by the Accused or another member of the group). The Accused must willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.[1259]

409. The settled law of international criminal tribunals is that, "Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable...."[1260]

410. The law is not blind to the nature of the crimes that are committed in wartime situations, where the "...crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design."[1261] The perpetrator of the crime is of course liable, but so too are those persons who facilitated the offence. Those persons who are removed from the scene of the crime, as a function of their rank and superiority, are more morally culpable than the perpetrator. They facilitate the common purpose, the massive, widespread and systematic campaign of terror on civilians. Without their assistance and contribution to the common purpose the campaign of terror could not sustain itself. The obtaining of arms is essential, as is conscripting civilians to fight, as is allowing and encouraging pillaging by combatants. The campaign of terror conducted by the joint criminal enterprise spanned years and most of the Districts of Sierra Leone. Each of the three Accused intended to commit the crimes that were part of the common purpose, in particular, the evidence of their role in the enslavement crimes, Counts 7, 9, 12 and 13 is overwhelming. Nor is there any evidence to bring into question the intention of the Accused to commit murder and extermination. The Third Accused, charged with the duty of investigating and punishing crimes, was a party to the killing of over 65 civilians in Kailahun Town. The First Accused knew of these killings and those in Kono District and did nothing to withdraw from the joint criminal enterprise, he remained the Battle Field Commander. The Second Accused, one of the most senior commanders in the RUF, committed murders in Kenema District and Kono District.

[1259] *Fofana et al* Trial Judgement, paras. 218-219.
[1260] *Tadic* Appeal Judgement, para. 190.
[1261] *Tadic* Appeal Judgement, para. 191.

411. The crimes alleged in the Indictment, Counts 1 to 14, are all part of the joint criminal enterprise of which the three Accused were senior members. The January 1999 invasion, and ensuing, crimes were part of the joint criminal enterprise. There was ongoing communication between the RUF outside of Freetown and the troops (including RUF members) who had invaded Freetown, and the RUF, including the First and Second Accused, took all steps possible to assist the fighters who had attacked Freetown. Without that assistance the fighters in Freetown may not have been able to withdraw. Not all military attacks involve successful campaigns, retreats are necessary, and those who make tactical retreats possible are clearly assisting and contributing to the joint criminal enterprise.

412. The scale of the crimes that were committed in Sierra Leone was enormous. It is also true that the brutality of some of those crimes must shock the sensibility of any person. The individual who chops off arms is a criminal. But those persons who assist and contribute to a joint criminal enterprise that facilitates such crimes are also guilty pursuant to the joint criminal enterprise mode of liability. It is the mode of liability that captures both the scale and the brutality of the crimes, and it most fully and accurately encompasses the criminality of the three Accused.

VI. COUNT 3-5: UNLAWFUL KILLINGS

413. The Accused are charged under Article 6(1) and, or alternatively, under Article (6) of the Statute with extermination, a crime against humanity, Count 3; murder, a crime against humanity, Count 4; and violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Common Article 3 common to the Geneva Conventions and of Additional Protocol II.[1262]

A. Applicable Law and Elements of Crime

Count 3: Extermination as Crime Against Humanity

414. In addition to the common elements for crimes against humanity, extermination is proved where there has been a mass killing or destruction of part of a population. The Trial Chamber stated that the specific elements of extermination are: 1) the accused killed one or more persons by means including the infliction of conditions of life calculated to bring about the destruction of part of a population;[1263] and 2) the conduct constituted or took place as part of a mass killing of members of a civilian population.[1264]

415. The element of massiveness required for a finding of extermination may result from an aggregate of all killing incidents charged in an indictment. It is not required that the mass murder occur in a concentrated manner and over a short period.[1265] A perpetrator may be guilty of the crime of extermination if he kills or destroys one individual as long as that

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[1262] Punishable under Article 3(a) of the Statute: Indictment, p. 12.

[1263] *Prosecutor v. Sesay, Kallon, Gbao,* "Decision on Defence Motion for Acquittal Pursuant to Rule 98," ("***Sesay et al,* Decision on Motion for Acquittal**"), Transcript 25 October 2006, pp.16-17; see also *Stakic* Trial Judgement, para. 640: "This Trial Chamber does not find that the case-law provides support for the Defence submission that the killings must occur on a vast scale in a concentrated place over a short period. Such a claim does not follow from the requirement that the killings must be massive. Nor does the Trial Chamber believe that a specific minimum number of victims is required." See also *Blagojevic and Jokic* Trial Judgement, para. 573: "any ...attempt to set a minimum number of victims in the abstract will ultimately prove unhelpful; the element of massive scale must be assessed on a case -by-case basis in light of the proven criminal conduct and all relevant factors"; see also generally *Blaškić* Trial Judgement, para. 207 *in fine*.

[1264] *Sesay et al,* Decision on Motion for Acquittal, p. 17.

[1265] *Brima et al* Trial Judgement, para. 686; citing *Brđanin* Trial Judgement, para. 391; *Stakić* Trial Judgement, para. 640; but see *Krajišnik* Trial Judgement, para. 716, according to which "[t]he killings constituting the extermination must form part of the same incident, taking into account such factors as the time and place of the killings, the selection of the victims and the manner in which they are targeted." Applying this rationale, the *Krajišnik* Trial Chamber, para. 720, found that "the element of mass scale is fulfilled, considering the number of deaths in each incident and the circumstances surrounding the deaths [...]" in respect of specific locations, including a village where 17 people were killed.

killing is part of a mass killing event.[1266] Knowledge of a "vast scheme of collective murder" is not an element required for extermination.[1267] Unlike the crime of genocide, the crime of extermination does not require a discriminatory intent.[1268] The *mens rea* is satisfied if the accused intended to either kill or to cause serious bodily harm in the reasonable knowledge it would likely result in death[1269] or in reckless disregard for human life, as in the case of murder.[1270]

Count 4: Murder as Crime Against Humanity

416. In addition to the common elements as a crime against humanity, the Trial Chamber has identified the elements of murder as: 1) the death of one or more persons; 2) the death of the person was caused by an act or omission of the accused; and 3) the accused intended to either kill or cause serious bodily harm in the reasonable knowledge that it would likely result in death.[1271]

417. Regarding the first element, "proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. The fact of a victim's death can be inferred circumstantially from all of the evidence presented."[1272] The death of the victim may be demonstrated through circumstantial evidence, provided it is the only inference that may reasonably be drawn from the acts or omissions of the perpetrator.[1273] Such may include the general climate of lawlessness, length of time which has elapsed since the person disappeared and the fact that the alleged victim has not been in contact with others whom he would have been expected to contact.[1274]

[1266] *Brima et al* Trial Judgement, para. 683; citing *Kayishema* Trial Judgement, para. 147.
[1267] *Brima et al* Trial Judgement, para. 683; citing *Stakić* Appeal Judgement, para. 259; *Stakić* Trial Judgement, para. 640.
[1268] *Brima et al* Trial Judgement, para. 683; citing *Krstić* Trial Judgement, para. 500.
[1269] *Sesay et al,* Decision on Motion for Acquittal, p.17.
[1270] *Stakić* Trial Judgement, para.641.
[1271] *Sesay et al,* Decision on Motion for Acquittal, p.17.
[1272] *Krnojelac*, Trial Judgement, para. 326.
[1273] *Brima et al* Trial Judgement, para. 689, citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR77, Judgement on Allegation of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 91; *Čelebići* Appeal Judgement, para. 458; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement"), para. 327; *Vasiljević* Appeal Judgement, para. 120.
[1274] *Brima et al* Trial Judgement, para. 689, citing *Krnojelac* Trial Judgement, para. 327, fn. 857, providing an extensive list of case-law from the European Court of Human Rights, the Inter-American Court of Human Rights and domestic legal systems.

418. The *mens rea* is satisfied if the perpetrator intends to kill or cause serious bodily harm in the reasonable knowledge that death would result or in reckless disregard for human life.[1275] Premeditation is not a *mens rea* requirement.[1276] "[T]he *mens rea* is not confined to cases where the accused has a direct intent to kill or to cause serious bodily harm, but also extends to cases where the accused has what is often referred to as an indirect intent."[1277] Therefore, "[t]he necessary mental state exists when the accused knows that it is probable that his act or omission will cause death."[1278]

Count 5: Violence to Life, Health and Physical or Mental Well-Being of a Person as Violation of Common Article 3 and Protocol II

419. The definition of the *actus reus* of murder, as a crime against humanity is legally no different from that of murder as a violation of Common Article 3 to the Geneva Conventions. However, as regards the *mens rea,* the Trial Chamber in the Celebići case found that the mental element of murder under Common Article 3 to the Geneva Conventions is broader, since it includes recklessness.[1279]

> 439. .... the Trial Chamber is in no doubt that the necessary intent, meaning *mens rea*, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life. It is in this light that the evidence relating to each of the alleged acts of killing is assessed and the appropriate legal conclusion reached in Section IV below.[1280]

420. Furthermore, this Trial Chamber has recalled in the *Fofana et al* Judgement that : "The status of the victim as a person not taking direct part in the hostilities is an element of the offence. This implies that the Prosecution must show that the mens rea of the Accused

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[1275] *Blaškić* Trial Judgement, para. 152, 181; *Celebici* Trial Judgement, para. 439; *Ndindabahizi* Trial Judgement, para. 487
[1276] *Brima et al* Trial Judgement, para. 690, citing *Akayesu* Trial Judgement, para. 588; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 ("*Kayishema* Appeal Judgement"), para. 151; Brđanin Trial Judgement, para. 386; Oric Trial Judgement, para. 348.
[1277] *Strugar* Trial Judgement, para. 235.
[1278] *Strugar* Trial Judgement, para. 236.
[1279] Christopher K. Hall, "Murder", in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Oxford, 2008, pp. 183-190, N. 20, p. 188.
[1280] *Čelebići* Trial Judgement, para. 439.

encompassed the fact that the victim was a person not taking direct part in the hostilities."[1281]

B. Evidence

421. Many witnesses testified of the intentional killing of civilians or persons *hors de combat*. The evidence of killings satisfies the legal requirements for both murder as a crime against humanity and murder as a violation of Common Article 3 of the Geneva Conventions.[1282] Although the crime of extermination does not require the death of a specific number of persons, the evidence shows that the RUF killed a large number of people throughout Sierra Leone. It was widespread, systematic and massive killing, and the evidence satisfies the legal requirements for extermination as a crime against humanity. The circumstances of the killings demonstrate that the perpetrators intended to kill their victims and, in fact, a part of the population. The only reasonable inference from the evidence is that the perpetrators intended to kill the civilian victims or acted in the reasonable knowledge that their acts would result in the deaths of the victims.

a) Bo District

[redacted]On 15 June 1997, groups of armed soldiers came toward Tikonko. The witness recognized one of the soldiers as an RUF soldier. They came with a vehicle mounted with an AA gun. They used that AA gun to shoot persons the witness said were Kamajors and civilians at Tikonko junction. Ten persons were killed there, most of them were civilians. The soldiers then proceeded to Tikonko and the witness heard shooting coming from the town and saw smoke.[1283] [redacted]

[1281] *Fofana et al* Trial Judgement, para. 147 citing *Naletilic and Martinovic* Appeal Judgement, para. 116 and *Halilovic* Trial Judgement, para. 36.

[1282] In a human rights situation report dated in 1998, UNOMSIL spoke of the systematic and widespread commission of atrocities and human rights abuses, including killings by the rebels: see Exhibit 163, UNOMSIL, Human Rights Report, 1998. This information was confirmed in numerous other reports, which state that the practice was widespread and common: see Exhibit 159, First UNOMSIL Report, 1998, para. 13, 33, 35; Exhibit 160, Second UNOMSIL, Report 1998, para. 21; Exhibit 161, Third UNOMSIL Report 1998, para. 36., Exhibit 162, Fourth UNOMSIL Report 1998, para 30; Exhibit 163, UNOMSIL, Human Rights Report, 1998. Various reports also spoke of killings that took place by the rebels in Freetown during the coup (see Exhibit 178, US State Department Report, 1998, pp. 2-5 [19582-19585]) and the Freetown Invasion (see Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 4-5 [19044-19045], Exhibit 174, HRW Report, 1999, p.11 [19379]).

[redacted]

[redacted]

425. DMK-160 testified that Chief Demby was killed on 26 June 1997.[1291] DMK-160 corroborated TF1-054 that the men who met Demby and addressed a meeting of the town's people included Dr. Tommy.[1292] [redacted]

[1284] TF1-004, Transcript 8 December 2005, pp. 3-8. The witness and other community members buried many dead bodies: TF1-004, Transcript 8 December 2005, pp. 11-13.
[1285] TF1-008, Transcript 8 December 2005, pp. 33-34.
[1286] TF1-008, Transcript 8 December 2005, pp. 36-38.
[redacted]
[1291] DMK-160, Transcript 21 April 2008, p.56.
[1292] DMK-160, Transcript 22 April 2008, pp.69-71.
[1293] DMK-160, Transcript 22 April 2008, pp.65 & 68.

[redacted] The Second Accused accepted that there were unlawful killings of civilians in Bo, including the killing of Paramount Chief Demby.[1295]

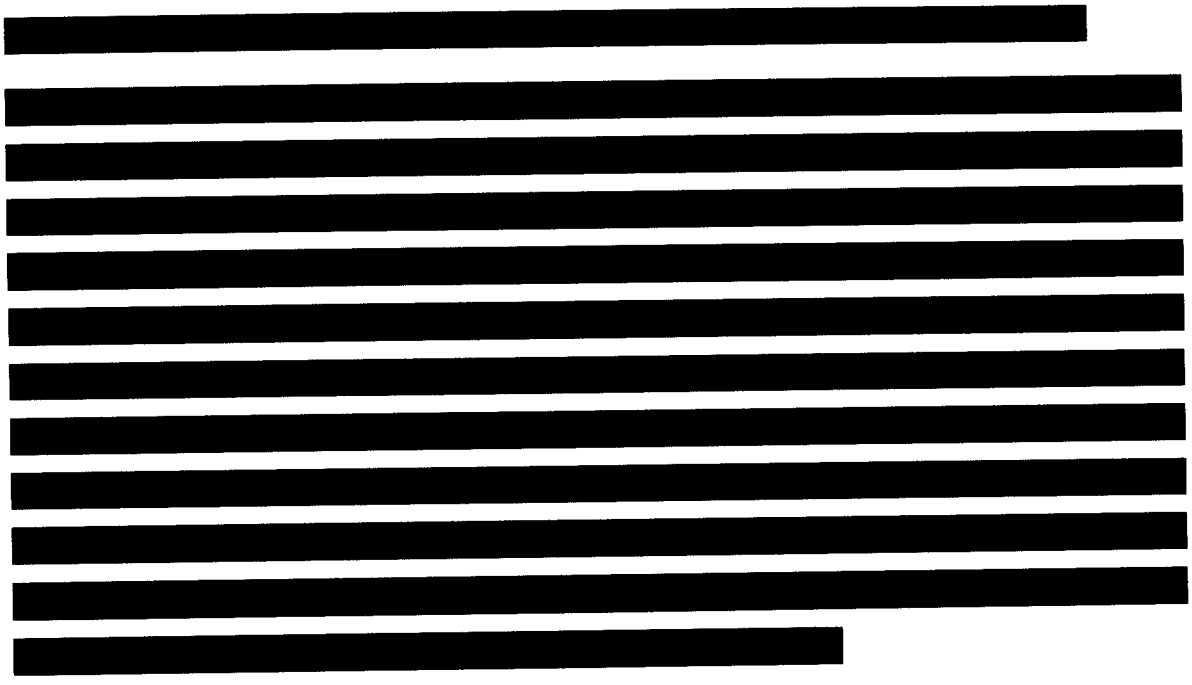
b) Kenema District

[redacted] The matter was transferred to the police who investigated and recommended their release. Mosquito was furious when he learned they had been bailed and BS Massaquoi was rearrested. On 6 February 1998, soldiers and RUF collected BS Massaquoi and the others from the police.[1297] [redacted]

427. TF1-125 corroborated TF1-122 in all material particulars.[1299] [redacted] Amnesty International reported about these events.[1304]

[1294] DMK-160, Transcript 22 April 2008, pp.76-78.
[1295] Accused Morris Kallon, Transcript 18 April 2008, pp.40-43.
[1296] TF1-122, Transcript 7 July 2005, pp. 84-86.
[1297] TF1-122, Transcript 7 July 2005, pp. 86-90.
[1298] TF1-122, Transcript 7 July 2005, pp. 90-93.
[1299] TF1-125, Transcript 12 May 2005, pp. 104-109, 134-136.
[1300] TF1-071, Transcript 19 January 2005, pp.6-8, 11. Bockarie sent his securities to arrest BS Massaquoi and Dr. Momodu Kpaka. This was somewhere around October to November.
[1301] TF1-036, Transcript 28 July 2005, pp. 37-39.
[1302] TF1-071 Transcript 19 January 2005, pp.14-21.
[1303] TF1-129, Transcript 10 May 2005, pp. 74-77.
[1304] Exhibit 176, AI Report 1998, p. 19494: Amnesty International reported that on 13 and 14 January 1998 several Kenema citizens were arrested including B.S. Massaquoi, Dr. P.B. Momoh, Paramaount Chief Moinama Karmor and Ibrahim Kpaka, and held at the AFRC Secretariat though some were later moved to the police station and army brigade headquarters. That these men were stripped, beaten repeatedly with sticks,

428. About three days after the AFRC coup, Bunny Wailer, Sydney Cole, and a Bangura were arrested and taken to the Kenema Police Station by soldiers and RUF fighters on allegations that they wore military fatigues and were taking people's property. At the station they were shot dead at close range by an RUF.[1305] [redacted]



430. At Weama, 9 miles from Tongo, people were mining and the RUF went there and shot and killed three people because the RUF said that no one was allowed to mine for themselves, all had to mine for the AFRC government.[1313] In October 1997 civilians were mining around a church at Pendembu; child soldiers were sent there and they shot and killed three people, while also in October at Sandeyeima Swamp two people were shot and killed by child soldiers while they were washing gravels.[1314]

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electric cable and strips of tires and that B.S. Massaquoi was killed by members of the RUF on 8 February 1998. [redacted]

[1307] TF1-060, Transcript 29 April 2005, pp. 66, 92-93.
[1308] TF1-060, Transcript 29 April 2005, p. 66.
[1309] TF1-060, Transcript 29 April 2005, pp. 93-94.
[1310] TF1-060, Transcript 29 April 2005, p. 67.
[1311] TF1-060, Transcript 29 April 2005, pp. 67-68.
[1312] TF1-122, Transcript 7 July 2005, pp. 77-81.
[1313] TF1-060, Transcript 29 April 2005, p. 68.
[1314] TF1-060, Transcript 29 April pp. 72-74.

431. [redacted]. This was a well-planned attack coordinated by the RUF and AFRCs; Mosquito was there, Akim was there. "They always operate together, both the AFRC and RUF. They carried out that attack."[1315] RUF and AFRC killed these 3 people.[1316]

432. [redacted]. In one incident at Cyborg pit, three civilians were shot and killed by RUF and AFRC for mining outside the stated period.[1317] At night it was usual for the AFRC/RUF to go from house to house looting and raping. On one such raid at Lamin Street the civilians challenged the raiding by AFRC/RUF. The soldiers opened fire on the civilians killing a man.[1318]

433. Similar evidence was given by TF1-035 who testified that in August 1997 the RUF/AFRC forced civilians to mine for them at Cyborg pit in Tongo.[1319] At a meeting in Tongo, Mosquito said that in his absence the Second Accused would take over from him.[1320] While civilians were mining an SBU told the civilians to get out of the pit; they argued and the SBU said he was going to report to Morris Kallon.[1321] A man who Mustapha (an RUF junior commander) said was Colonel Morris Kallon told the civilians to get out of the pit. The people were still mining. The commanders stood with the SBUs. The witness saw the SBUs firing into the pit. They killed 25 people in the pit including the witness's nephew. The incident was during the rainy season when the RUF/AFRC were there.[1322]

434. DIS-281 accepted that RUF/ex-SLAs committed crimes against civilians in Kenema and that he heard that BS Massaquoi was killed.[1323] DIS-124 stated that while he was in

[1315] TF1-122, Transcript, 7 July 2005, pp. 73-74.
[1316] TF1-122, Transcript, 7 July 2005, p. 74.
[1317] TF1-045, Transcript 18 November 2005, pp. 74-75, 79; Transcript 23 November 2005 pp.38-39.
[1318] TF1-045, Transcript 18 November 2005 pp. 75-76.
[1319] TF1-035, Transcript 5 July 2005, pp. 78, 80-83.
[1320] TF1-035, Transcript 5 July 2005, pp.89-90.
[1321] TF1-035, Transcript 5 July 2005, pp.91-92.
[1322] TF1-035, Transcript 5 July 2005, pp. 92-93.
[1323] DIS-281, Transcript 12 November 2007, p.60.

Tongo during the junta, he heard that the Second Accused was in Tongo[1324] and also that while he was in Tongo, the Second Accused's securities were in Tongo and they were armed.[1325] The First Accused said he went to Kenema three times; twice in September and once in October 1997.[1326]

435. The First Accused stated that while traveling to Kailahun after the intervention, he heard that Mosquito killed B.S. Massaquoi, a popular and prominent man in Kenema.[1327] Around November to December 1997, the Second Accused heard that Bockarie and Eddie Kanneh ordered B.S. Massaquoi killed. The Second Accused stated that B.S. Massaquoi, a prominent person, was killed for no reason and that to Kallon, the claim that B.S. Massaquoi supported Kamajors was not reason enough to just kill a prominent person like that.[1328]

c) Kono District

436. Many civilians were killed in Kono District during the Indictment period. A massive killing of [redacted] civilians [redacted] Koidu, was recounted in detail by TF1-015. RUF Major Rocky led the RUF fighters who carried out this killing in April 1998.[1329] "Small, small" rebels cut off the heads of all of the [redacted] people killed by Major Rocky.[1330] The rebels also cut off both hands and feet of a 15 year old boy and then threw the boy into a latrine pit.[1331] The boy was a civilian.[1332] This killing [redacted] was corroborated by TF1-071.[1333]

437. Major Rocky reported the killings to Colonel Rambo.[1334] RUF members told about the killing included the Second Accused and a vote was taken at a mosque on whether TF1-

[1324] DIS-124, Transcript 22 November 2007, pp.162-166.
[1325] DIS-124, Transcript 23 November 2007, p.31.
[1326] Accused Issa Sesay, Transcript 4 May 2007, p.84; Transcript 8 May 2007, pp.22-23, 42-44.
[1327] Accused Issa Sesay, Transcript 8 May 2007, pp.70-71.
[1328] Accused Morris Kallon, Transcript 14 April 2008, pp.105-107
[1329] TF1-015, Transcript 27 January 2005, pp. 104-137.
[1330] TF1-015, Transcript 27 January 2005, pp. 135-136.
[1331] TF1-015, Transcript 27 January 2005, pp. 129-133.
[1332] TF1-015, Transcript 31 January 2005, pp. 100-101.
[1333] TF1-071, Transcript 21 January 2005, pp. 47-53.
[1334] TF1-015, Transcript 27 January 2005, pp. 128-129.

015 should be killed. The Second Accused voted for his death, but [redacted] came and voted that he be saved.[1335]

438. In early 1998, after the intervention, TF1-141 was captured at Opera Roundabout in Koidu together with other civilians by rebels who executed everybody except the young ones. The witness saw corpses in the street; some were combatants; some Kamajors and civilians. Patrol teams would capture civilians from the bush and bring them to town and sometimes kill them.[1336] The First and Second Accused were present at the Opera in Koidu.[1337] TF1-141 went to Tombodu with the Second Accused and they met civilians and killed a lot of them.[1338] As they were entering the town, the Second Accused gave a command on how to enter. The stomach of a pregnant woman was cut open in the presence of the Second Accused to determine the sex of the child.[1339] Similar evidence was given of RUF and Junta killing civilians after the intervention at Tombodu[1340] and at Koidu, Wendedu (only about 2 miles from Koidu[1341]) and Penduma. [1342]

439. TF1-141 left for Kailahun with RUF combatants and civilians carrying loads. Women who got tired and could not carry loads were executed at Gandorhun Gbane and in the hills towards Sandaru.[1343]

440. TF1-304 testified that in March 1998 in Tombodu, he saw armed people said to be the Junta shooting all over the place and heard the Junta Soldiers say: "if you see any civilian, that civilian will be killed".[1344] Near Tombodu at Bendu II, TF1-304 saw Savage Pit that contained a large number of human heads and many skeletons.[1345]

441. [redacted] "Morris Kallon and Akim were our bosses

[1335] TF1-015, Transcript 27 January 2005, 137-141, 144-149.
[1336] TF1-141, Transcript 11 April 2005, pp. 80-83.
[1337] TF1-141, Transcript 11 April 2005, pp.88-90.
[1338] TF1-141, Transcript 13 April 2005, pp.17-18, 21-24.
[1339] TF1-141, Transcript 13 April 2005, pp.26-31; 19 April 2005, pp. 11-12. These events occurred at the time of the December 1998 Koidu attack: TF1-141, Transcript 13 April 2005, pp.13-18, 21-23.
[1340] TF1-197, Transcript 21October 2004, p. 56-61, 89-90; Transcript 22.october 2004, p. 13.
[1341] TF1-217, Transcript 22 July 2004, p. 11.
[1342] TF1-217, Transcript 22 July 2004, pp. 8-15, 18-23, 30
[1343] TF1-141, Transcript 11 April 2005, pp.103-108
[1344] TF1-304, Transcript 12 January 2005, p. 21-22.
[1345] TF1-304, Transcript 12 January 2005, pp. 35-36.
[1346] TF1-366, Transcript 8 November 2005, pp. 5-8.

as commanders, and Peter Vandi."[1347] When taking Johnny Paul Koroma to the Moa River, the First and Second Accused were present and the RUF and AFRC killed villagers and burned houses. [redacted] The Second Accused gave orders that they should burn all houses in Koidu, they should not encourage any civilian in their midst, and the RUF should be united with the SLA and STF.[1348]

442. About three weeks after arriving in Koidu after the intervention, reports came that people were killed and houses burned in surrounding villages and peoples' hands were cut off; TF1-071 saw corpses in Koidu when he arrived. At a meeting, reports were made that in nearby villages, especially Tombodu, Savage was cutting people's hands off and burning villages.[1349] The First and Second Accused, Superman, and other AFRC commanders were at the meeting.[1350] TF1-071 said that Savage reported to Superman, and that TF1-071 was assigned to Tombodu from around August 1998 up to 2000.[1351] TF1-071 saw Savage violently kill two civilians when TF1-071 arrived there; most people killed in Tombodu were dumped in Savage Pit.[1352] TF1-360 stated that the RUF High Command removed Savage from Tombodu.[1353]

443. [redacted] around May 1998, and saw RUF Rambo kill about 15 civilians at Koidu Buma by chopping them down with a cutlass.[1354] At Jagbwema Fiama a young civilian male was captured, and as he was being taken to Koidu, Isaac Mongor had a fighter shoot the civilian in the head and then Mongor ordered the driver of a vehicle with a twin-barrel gun to drive over the civilian.[1355]

444. TF1-263 testified that in the mango season of 1998, on the way from Kissi Town to PC ground, he saw the First Accused armed, with his bodyguards and 5 men tied up.[1356] He

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[1347] TF1-366, Transcript 8 November 2005, pp. 22-23.
[1348] TF1-366, Transcript 8 November 2005, pp. 23-27.
[1349] TF1-071, Transcript 19 January 2005, pp. 45-48. The witness said in March 1998.
[1350] TF1-071, Transcript 19 January 2005, p. 47.
[1351] TF1-071, Transcript 21 January 2005, p. 95.
[1352] TF1-071, Transcript 21 January 2005, pp. 96-100. When TF1-263 went with Superman's group to Tombodu he saw Savage Pit and was told it was where Savage and his men killed people. He saw four corpses in Savage Pit: TF1-263, Transcript 6 April 2005, pp. 43-44.
[1353] TF1-360, Transcript 26 July 2005, p. 43.
[redacted]
[1356] TF1-263, Transcript 6 April 2005, pp. 19-20.

later heard gunshots and later saw five corpses at the same location.[1357] TF1-304 confirmed that the mango season in Kono District is in April to May.[1358]

[redacted] Second Accused killed 3 civilians at Five-Five, a club very near Koidu. They were civilians who had shakers and shovels when the Second Accused saw them; the Second Accused said they were Kamajors and spies and shot the 3 civilians. [redacted]

446. After the shooting at Five-Five club there were complaints by civilians about Savage and Rocky CO looting and killing civilians, which were made known to the Second Accused and Superman.[1362] After the shooting at Five-Five and before the RUF were pushed out of Koidu by ECOMOG,[1363] [redacted] Peter Vandi brought civilians and the Second Accused asked the civilians where they came from, and alleged they were Kamajors. The Second Accused ordered that the captured civilians be put in a room, and he told his bodyguard Sankoh Trouble to bring a mattress made of grass, it was placed at the door and set on fire using petrol. The people in the room screamed until they died. The Second Accused was there and was the most senior person. Fifteen young men died there.[1364] [redacted] a report to the First Accused and Sam Bockarie,

[1357] TF1-263, Transcript 6 April 2005, p. 20-21. TF1-263 also heard one of Wallace's bodyguards say that too many people were being killed in Kissi town: TF1-263, Transcript 6 April 2005, p. 17.
[1358] TF1-304, Transcript 13 January 2005, p. 50.

[redacted]

they spoke on the radio and "Issa did say if Morris Kallon can defend Kono, he should do all he can to defend Kono."[1365]

[redacted]

448. TF1-371 said that these crimes of the Second Accused, Rocky CO and Savage all took place in Tombodu,[1367] and the First Accused and Third Second Accused were aware of these crimes having been committed.[1368] The Second Accused was the most senior commander in Kono District at the time of these killings.[1369]

[redacted]The Second Accused reported to Buedu following the killings, it was just after Sani Abacha's death, which occurred on 8 June 1998.[1370] [redacted]

[redacted]

[redacted]

451. TF1-071 testified that in June 1998 when he was going to Wendedu (about 2 miles from Koidu[1377]) a girl told him that 8 of her relatives had been killed by KS Banya; Banya said that Superman had told him that anybody found in the bush is RUF enemy. KS Banya was a former SLA loyal to Johnny Paul Koroma but taking orders from Superman at that time[redacted]

[redacted]

[1377] TF1-217, Transcript 22 July 2004, p. 11.
[1378] TF1-071, Transcript 21 January 2005, pp. 54-57.
[1379] TF1-071 Transcript 21 January 2005, pp. 57-71.

452. TF1-064 testified that when she and her family heard that rebels were approaching Foendor, a short distance from Tombodu, they ran to the bush, before they were captured. One of the rebels that captured them was Tamba Joe.[1380] Tamba Joe was an RUF G5 officer at Bukuma in Kono District.[1381] Tamba Joe was giving orders.[1382] TF1-064 and other civilians were put in a house and their children placed under a tree. TF1-064 could hear the children crying outside and then it stopped. The rebels opened the door and she could see the corpses of the children. The rebels then killed the adults who were in the house.[1383]

453. During the early rainy season of 1998, TF1-192 was captured in Bomboafuidu, Kono District with about 20 other residents by more than 50 armed men, all in combat uniform, except for 2 in Kamajor dress. The commander was in combat.[1384] The attackers spoke of having killed a Limba man. TF1-192 witnessed the attackers slit the throat of a Limba woman and saying they were offering a sacrifice.[1385] Two of the captured civilians died following the amputations of their limbs.[1386]

455. The First Accused testified that in late June 1998, he heard from Mike Lamin that Mosquito had called Rocky CO to report in Buedu, concerning the killing a civilian lady

[1380] TF1-064, Transcript 19 July 2004, pp. 47-48.
[1381] TF1-071, Transcript 21 January 2005, p. 18.
[1382] TF1-064, Transcript 19 July 2004, p.87 (line 5, 6).
[1383] TF1-064, Transcript 19 July 2004, pp. 50-56, 88. TF1-064, Transcript 19 July 2004, p. 56, line 25-28: "The corpses I saw was the the town chief's corpse and my father-in-law and my mother-in-law and my father-in-law's nephew and a man called Kongoney, the father of the leader of the troop that came, and my father-in-law's little sister's three grandchildren. There was also another adopted child belonging to one Temne woman. Those are the ones I remember seing." The killings took place between the dry and the rainy season: TF1-064, Transcript 19 July 2004, pp. 74-77.
[1384] TF1-192, Transcript 1 February 2005, pp.57-61,
[1385] TF1-192, Transcript 1 February 2005, p.63,
[1386] TF1-192, Transcript 1 February 2005, pp.75-76,
[1387] TF1-362, Transcript 26 April 2005, pp. 5-8. The Indictment alleges killings in Kono during the time period of 14 February 1998 to 30 June 1998.
[1388] TF1-362, Transcript 22 April 2005, pp. 21-23.

who was a Nigerian;[1389] that Bockarie asked Rocky and he denied killing the woman and Bockarie sent him back to Kono.[1390]

[redacted] said that he was with the First Accused in Pendembu testified that while in Pendembu in 1998, [redacted] received information about Rocky CO killing civilians and reported the matter to Bockarie who summoned Superman, the Second Accused and Rocky CO to report to Buedu[redacted] was getting information from the retreating soldiers or civilians coming to Kailahun, and other unit commanders like the IO. That G5 in Kono was also sending reports to the commander in Kailahun, so [redacted] and other commanders were able to know what was happening. The signal unit also provided information about Kono.[1392] DAG-080 testified that IO agents were deployed at the frontlines to report crimes committed by RUF combatants and that he was in contact with the IO agents almost everyday through radio communication.[1393] DIS-080 was not telling the truth when he said that in 1998 he was not receiving reports from Kono;[1394] [redacted]

457. DIS-281 testified that he went to Kono during the Fiti Fata mission and received reports about killings by Savage.[1396] DIS-281 made the reports to Bockarie.[1397] DIS-281 also received reports regarding killings of civilians by Banya[1398] and also got reports regarding the killing of a Nigerian woman in Kono and was told that Rocky CO was involved.[1399] DIS-163 said neither Rocky nor the Second Accused was ever punished for any crime relating to killings in Kono.[1400] DMK-072 testified that he was assigned to Tombodu and saw Savage kill 9 people. He filed the report with Superman,[1401] and between February to June 1998 he filed 3 reports concerning Savage and the SLAs.[1402]

[1389] Accused Issa Sesay, Transcrpt 17 May 2007, p.11-12.
[1390] Accused Issa Sesay, Transcrpt 17 May 2007, pp.14-15.
[redacted]
[1396] DIS-281, Transcript 12 November 2007, p.21.
[1397] DIS-281, Transcript 12 November 2007, pp.21-23.
[1398] DIS-281, Transcript 12 November 2007, p.23.
[1399] DIS-281, Transcript 12 November 2007, p.24.
[1400] DIS-163, Transcript 15 January 2008, p.4.
[1401] DMK-072, Transcript 1 May 2008, pp.104-108, 110.
[1402] DMK-072, Transcript 2 May 2008, pp. 9-11.

458. The Second Accused testified of his presence at a muster parade at Tankoro Police Station where it was discussed that a commander in Tombodu called Savage was killing and amputating people.[1403] Kallon accepts that during February - June 1998 the RUF/AFRC committed some crimes in Kono including killings.[1404] [redacted] This claim, coming only during Kallon's testimony was never put to any other Prosecution witness and is a fabrication.

e) Kailahun District

i) Mass Execution at Kailahun Town

459. Several witnesses testified of the killing in Kailahun Town of approximately 65 civilians.[1406] They were taken out of a jail and executed.[1407] [redacted] Fatoma said an order had come from Mosquito in Buedu to screen these people for Kamajors. The investigation was to be done by the Third Accused. Sixty-seven people were set aside as Kamajors and placed in a cell.[1409] Two weeks later, the witness heard shooting and went to the roundabout where she saw two corpses and witnessed Mosquito shoot 8 others in the head. The First and Third Accused were present. Mosquito ordered that the remaining 57 people in the cells be killed. After Mosquito left for Buedu, the witness saw the remaining prisoners brought out of the cells, shot and killed by four MP personnel.[1410]

[1403] Accused Morris Kallon, Transcript 14 April 2008, p.122.
[1404] Accused Morris Kallon, Transcript 18 April 2008, pp.85-87.
[1405] Accused Morris Kallon, Transcrpt 14 April 2008, pp. 61-62; Transcript 18 April 2008, p.88.
[1406] All Prosecution witnesses said they were civilians, although the RUF, in particular the Third Accused, suspected they were Kamajors.
[1407] TF1-113, Transcript 2 March 2006, pp. 56-53.
[1408] TF1-113, Transcript 2 March 2006, pp. 47-49.
[1409] TF1-113, Transcript 2 March 2006, p. 50.
[1410] TF1-113, Transcript 2 March 2006, pp. 56-63.

460. [redacted] Mosquito asked the Third Accused about the civilians and the Third Accused said that the people were all Kamajors; Gbao said "...so they should not live amongst us. So Mosquito passed an order for them to all be killed."[1412] The civilians were taken out of their cells five at-a-time and killed.[1413] Gbao was present when the order was made and when it was executed. After the killings started, Mosquito left and the Third Accused was the most senior commander present whilst the rest of the civilians were being executed.[1414]

[redacted] The First Accused arrived and Gbao briefed him that the people in the cells were not saying the truth that they were Kamajors.[1417] The First Accused gave the order to Gbao that he should kill these people. The order was given by Sesay and Bockarie, the "two of them were in command. Wherever Issa was, Sam Bockarie was. Wherever Sam Bockarie was, Issa was."[1418] Bockarie sent Issa, Issa passed the order; Issa gave that order to Augustine Gbao.[1419] [redacted] The Third Accused was there and said they would not bury them until Sesay returned. The corpses were at the back of the MP, the police station.[1420] The people who were killed were civilians.[1421] [redacted]

[redacted]

[redacted]

investigation.[1426] On 19 February 1998, a group of MP's led by the District MP Commander, John Duawo came to the Police Station and said that Bockarie had come with his senior officers and he had told Gbao to bring 10 of the suspects to him at the roundabout.[1427] The Third Accused resided in Kailahun as the overall MP Commander.[1428] Duawo said that Gbao had passed the message to him.[1429] The instruction passed from Sam Bockarie, through the overall MP Commander Colonel Augustine Gbao, to the district commander Major John Duawo and then to the MP's.[1430] The Third Accused as part of the command chain knew that executions were going to be carried out.[1431] The 10 prisoners were taken to the roundabout and sporadic gunshots were heard.[1432] The MP's told TF1-168 that while the Kamajor suspects were being killed, all the Vanguards that had come with Bockarie from Buedu were at the intersection with Gbao. After the gunshots, the MP's came back and said that those ten people had been executed and that the Third Accused had passed orders down the line for the executions to take place. [redacted]

[redacted]

[redacted] DAG-048 testified that the 65 people who were alleged to be Kamajors and killed, were investigated by a panel chaired by the Third Accused. After the investigation these people were placed on parole because the investigation was not concluded.[1434] That one group was released after investigations on approval by Bockarie.[1435] But DIS-157 claims that the first group was released without Bockarie's involvement, which prompted the order to kill the rest.[1436] The evidence of DAG-048 clearly shows that the people, who were accused of being Kamajors, were killed without any evidence that they were Kamajors.[1437] [redacted]

ii) Other Killings

464. TF1-141 testified that soon after the Bank robbery in Koidu,[1439] he was trained and deployed on the frontlines.[1440] They attacked Daru; this attack took place before the attack to capture Segbwema[1441] and before the Koidu attack of December 1998.[1442] [redacted] When they were in Daru barracks, they were killing civilians stealthily.[1443]

465. [redacted]. During this trip the witness was informed that his brother had been shot and killed because he was tired. He was shot by one of the commandos that were escorting the group.[1444] This incident

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[1434] DAG-048, Transcript 3 June 2008, pp.80-83.
[1435] DAG-048, Transcript 5 June 2008, pp.19-20.
[1436] DIS-157, Transcript 24 January 2008, pp.83-86.
[1437] DAG-048, Transcript 3 June 2008, pp.80-83; DAG-048, Transcript 5 June 2008, p. 21.
[1438] DIS-157, Transcript 28 January 2008, pp.46-48.
[1439] The Bank robbery in Koidu took place in March 1998 about 3 weeks after the AFRC/RUF came into Koidu following the intervention: see TF1-366, Transcript, 8 November 2005, pp.31-32; TF1-360 Transcript, 20 July 2005, p.24.
[1440] TF1-141, Transcript 11 April 2005, pp.95-112; TF1-141, 12 April 2005, pp.10-40.
[1441] TF1-141, Transcript 12 April 2005, pp.46-49, 66-67.
[1442] TF1-141, Transcrip 13 April 2005, pp.13-14.
[1443] TF1-141, Transcript 12 April 2005, pp.40-45.
[1444] TF1-108, Transcript 8 March 2006, pp. 29-30.

happened in 1998.[1445] TF1-108 further testified that civilians were not allowed to move without passes from the MPs and G5s. That four people tried to cross into Guinea and they were captured by RUF, taken to Kailahun and killed.[1446] Augustine Gbao was present when the 4 people were killed.[1447] According to the witness, this happened "beginning from 1998 to 1999."[1448]

466. After TF1-093's abduction by the RUF in 1996 from Njala village and her arrival in Kailahun in 1997, the rebels fought with the Kamajors to enter Kailahun and killed civilians.[1449] TF1-093 went on 20 attacks with the RUF in Kailahun during which civilians were killed. During each attack about 50 civilians were killed. The ages of the victims ranged from the very young to the very old. The throats of civilians would be cut; their heads were placed on a stick which would be taken all over town. The rebels would kill whomever they came across and only the lucky were spared. TF1-093 participated in the killings.[1450] TF1-093 testified that in Kailahun, a captured traditional priest/Moray Man told Superman that if seven pregnant women were buried alive, the rebels would not be overpowered by Kamajors. Superman ordered TF1-093 and others to capture 7 pregnant women and they were buried alive. As the RUF continued to be overpowered by the Kamajors, Superman ordered Junior to kill the traditional priest.[1451] These events took place prior to the junta period.[1452]

467. [redacted] They said they killed him because he stole medicine. Shortly after killing the doctor Superman went to Krubola to SAJ Musa. That was the time the RUF attacked Kono during the Fiti Fata mission,[1454]

[1445] TF1-108, Transcript 13 March 2006, pp. 63-65.
[1446] TF1-108, Transcript 8 March 2006, pp. 48-49.
[1447] TF1-108, Transcript 13 March 2006, pp. 77-79.
[1448] TF1-108, Transcript 8 March 2006, p. 49.
[1449] TF1-093, Transcript 29 November 2005, p. 85.
[1450] TF1-093 Transcript 29 November 2005, pp. 93-95.
[1451] TF1-093, Transcript 29 November 2005, pp. 89-93.
[1452] TF1-093, Transcript 29 November 2005, pp.97-101.
[1453] TF1-371, Transcript 2 August 2006, pp. 42-43.
[1454] TF1-366, Transcript 10 November 2005, pp. 49-53.

which on the evidence was in June 1998.[1455] TF1-141 testified that a doctor charged for embezzling drugs was executed at the muster parade by the First Accused.[1456] The First Accused also executed Fonti Kanu[1457] and Foday Kallon.[1458]

[redacted]

f) Koinadugu District

469. In February 1998 the People's Army came through Kondembaia, Dian Chiefdom.[1462] While abducted by the rebels, TF1-214 saw many dead people under a cotton tree in her village. TF1-214 witnessed the execution of her sister's husband by the rebels who shot him in his head and he died. TF1-214 also saw the killing of a man called Alhaji by the rebels. TF1-214 met many dead bodies of people who had been killed in Kondemibaia Town.[1463]

470. TF1-263 testified that when Superman's group and Savage's group were advancing from Tombodu to Krubola, Savage's was the advance group and was killing civilians in their path and went around killing.[1464] TF1-263 then went to SAJ Musa in Krubola. They took five weeks on the way and arrived in the rainy season.[1465] On the evidence, Superman went to Krubola some time after Fiti-Fata.[1466]

[1455] Fiti-Fata took place soon after Sani Abacha's death: TF1-366, Transcript 8 November 2005, pp.76-79. Abacha died on 8 June 1998: see Exhibit 54.
[1456] TF1-141, Transcript 12 April 2005, p.71.
[1457] TF1-371, Transcript 21 July 2006, pp. 53-54; TF1-371, Transcript 31 June 2006, pp. 85-87, 80-81; TF1-141, Transcript 12 April 2005, pp.67-71; TF1-141, Transcript 15 April 2005, p.80.
[1458] TF1-036, Transcript 28 July 2005, p. 66; TF1-168, Transcript 31 March 2006, pp. 79-80; 3 April 2006, pp. 35-36; TF1-366, Transcript 10 November 2005, pp.46-49.
[1459] TF1-168, Transcript 31March 2006, p. 81; TF1-168, Transcript 3 April 2006, p. 28.
[1460] TF1-168, Transcript 3 April 2006, p. 72.
[1461] TF1-168, Transcript 31March 2006, p. 81.
[1462] TF1-214, Transcript 14 July 2004, pp. 3-4.
[1463] TF1-214, Transcript 14 July 2004, pp. 27-29, 34-35.
[1464] TF1-263, Transcript 6 April 2005, pp. 45-47.
[1465] TF1-263, Transcript 6 April 2005, p.47.
[1466] Fiti-Fata took place soon after Sani Abacha's death: TF1-366, Transcript 8 November 2005, pp.76-79. Abacha died on 8 June 1998: see Exhibit 54.

471. TF1-172 and five others were captured by 12 rebels half a mile from Seraduya in the planting season of 1998.[1467] Before the rebels chopped off their hands, TF1-172 suggested to them to allow the civilians to follow the rebels instead; the rebels refused saying, "if they see civilians, ...they will kill you." In Seraduya Town TF1-172 saw rebels kill a young man who had been captured by stabbing him in the neck.[1468]

472. When RUF attacked Kondembaia in April 1998,[1469] TF1-215 saw the corpses of John Bai who was a Sierra Leone police man and Mohamed who had been a baker. A third man was shot twice, in the head and the chest by the boss man. TF1-215 also saw the corpses of Marka, a gardener, and that of an ECOMOG soldier. They also killed a girl, Aminata Koroma, who had given birth three months earlier. These events happened on 19 May 1998.[1470]

473. TF1-329 testified that rebels attacked Fadugu on 22 May 1998.[1471] On coming out of hiding, she saw three corpses of Kaloko, Kaloko's brother Johnny and Mammy Satta.[1472] The rebels attacked Fadugu again in September 1998 and she was told by the town speaker that the Paramount Chief, Alimamy Fanneh II was killed by burning down his house and placing a burning mattress on him. A woman from Kabala who was visiting Fadugu was also burned to death in a house with her child by the rebels.[1473]

474. TF1-212 testified that after SAJ Musa left Koinadugu village for Serekolia, Superman said they should kill all the civilians, "So, in the evening, they started setting the houses on fire, kill people, shot at people."[1474] TF1-212 said, "during that time they had gathered some people and locked them in the house. They started setting fire to the house. They took machete and started hacking them." About 48 of the civilians were killed; Superman was the commander of the rebels who did this in October 1998.[1475]

[1467] TF1-172, Transcript 17 May 2005 pp. 8-9.
[1468] TF1-172, Transcript 17 May 2005 pp. 13-14.
[1469] TF1-215, Transcrpt 2 August 2005, pp. 68, 71, 108.
[1470] TF1-215, Transcript 2 August 2005, pp. 92, 95, 100-102.
[1471] TF1-329, Transcript 2 August 2005, pp. 4-5.
[1472] TF1-329, Transcript 2 August 2005, p. 25.
[1473] TF1-329, Transcript 2 August 2005, pp. 33, 37-39.
[1474] TF1-212, Transcript 8 July 2005, pp. 108-110.
[1475] TF1-212, Transcript 8 July 2005, pp. 111-112.

g) Bombali District

475. George Johnson testified that they arrived in Mansofinia in early May 1998 and then went through Karina.[1476] An order was passed by Alex Tamba Brima, to all commanders that Karina is the home town of President Tejan Kabbah, so Karina must be burned, and there should be amputations and killings there. More than a hundred people were killed in Karina. Children aged six months up to three years were killed by dropping them from a high building. Up to 10 or 20 children at a time would be killed in this way. Edward Williams burnt people in a house wrapped in a carpet. At Camp Rosos, an abducted trainee who attempted to escape was killed. Also at Rosos, Gullit sent a team to Mateboi to invite the civilians to join the rebels and when they refused, a second team was sent, commanded by Lieutenant Arthur of RUF; they came with the head of the chief of Mateboi, saying he had prevented his people from joining; and a lot of killing was done there.[1477]

476. [redacted]. RUF under Superman, AFRC under SAJ Musa and STF under General Bropleh were in Koinadugu. SAJ Musa provided manpower that escorted the witness's group to Gullit's location at Rosos. They left Koinadugu on 1 September 1998 led by 05 with about 300 people, mostly AFRC with one platoon of RUF (64 people) and others were STF. Along the way, they entered villages and killed villagers. 05 ordered the killings. Old men, old women, children, women, pregnant women were killed. In a small village before Pendembu in Bombali District, more than 20 people were killed. Kabila split open the stomach of a pregnant woman and removed the child from her belly and cut it into pieces. 05 said nobody should live and tell the story. In Pendembu, the commander shot a civilian because two fighters were fighting over her.[1478] At Kantia, Major 05 executed 15 civilians they had brought along from Kamalo, saying he would not enter Eddie Town with them.[1479] They arrived near Rosos on 21 September

[1476] George Johnson, Transcript 14 October 2004, pp. 78-85.
[1477] George Johnson, Tracript 14 October 2004, pp. 88-95.
[1478] TF1-360 Transcript, 21 July 2005, pp. 6-15.
[1479] Exhibit 119, TF1-334, AFRC Trial, Transcript 25 May 2005, p.4.

1998, at a place called CO Eddie Ground[1480] with RUF's like Major Alfred Brown and Captain Stagger.[1481] The RUF stayed with the AFRC until Freetown.[1482]

477. George Johnson testified that at Major Eddie town, some women among the abductees were accused of being witches; up to 13 women aged between 18 and 30 years old, were then arrested, impaled, beaten, cut into peaces and their bodies thrown into the Little Scarcies River.[1483]

478. TF1-196 testified that sometime before the Freetown invasion on 6 January 1999, she and her husband, together with other civilians were captured in the bush near Batmis, close to Karina in Bombali District by 5 rebels. Some rebels wore uniforms; some wore mixed combat and civilian clothing. TF1-196 saw her husband being killed and chopped up with a cutlass by the rebels on orders of Mosquito, who said he was AFRC. TF1-196 also saw the rebels killing other civilians by shooting them and cutting them with a cutlass. TF1-196 does not remember how many people were killed; she was in pain after being amputated.[1484]

479. TF1-199 testified about events of June 1998.[1485] He and his three brothers were abducted by the rebels near Madina Loko village, near Makeni, in Bombali District and brought to Madina Loko. In Madina Loko TF1-199 saw his uncle dead on the floor; the rebels had killed him.[1486]

480. TF1-263 participated in the attack of Binkolo late 1998. Savage was with the advance team. Along the way many civilians were killed. Blood received a message on the radio from the First Accused to Superman that he was at Magburaka heading for Makeni; so the witness and the group moved to Makeni. TF1-263 testified that both ECOMOG and civilians were targeted in the Binkolo attack and that many civilians were killed.[1487]

481. TF1-031 testified that during the rainy season, she was captured in Karina by rebels who said they were Foday Sankoh's people. They killed some civilians. At Karina "there

[redacted]

[1483] George Johnson, Trancript 14 October 2004, pp.105-106.
[1484] TF1-196, Transcript 13 July 2004, pp. 19-25.
[1485] TF1-199, Transcript 20 July 2004, pp.51-52.
[1486] TF1-199, Transcript 20 July 2004, pp. 18-22.
[1487] TF1-263, Transcript 7 April 2005, pp 19-24.

were corpses like chicken all over the place".[1488] At Mayayi TF1-031 witnessed two civilians being killed by "Foday Sankoh's people." One was hit on the head and the other had her throat slit.[1489] TF1-031 saw Baimba Kamara being tied up and taken away by the rebels; "he too was killed" by the rebels.[1490] George Johnson testified that they arrived in Mansofinia in early May 1998 and then went to find a camp in Bombali District passing through Karina.[1491]

482. TF1-343 testified that while at Mateboi, Bombali District in April, several years after the start of the war, the village was attacked by rebels.[1492] The rebels killed some people two of whom the witness identified as his relations.[1493] The rebels settled at Rosos.[1494] While in hiding, TF1-343 heard that the rebels were killing many people in the village. They killed about twenty civilians at Mateboi. TF1-343 and two others were later captured by the rebels who cut off their hands and one of them later died.[1495]

483. TF1-156 was in Bornoya town when it was attacked in the month of Yougbenteh, seven years before he testified.[1496] TF1-031 testified that "Jombente" is an Islamic praying day that fell within the rainy season in 1998.[1497] TF1-156 was told that people of Bornoya were being mutilated and killed. TF1-156 hid in the graveyard; when he got out he found dead and wounded people. TF1-156 named ten men, women and children killed that morning during the attack; two children were put in mattresses and burned; others were hacked to death with machetes. In Madogbo TF1-156's sister was killed. A woman, Fanta Touray was killed in Dariya. Three men were killed in Mayombo. TF1-156's brother, Mamadu Mansaray, was captured and killed in Karina.[1498]

[1488] TF1-031, Transcript 17 March 2006, pp .78-82.
[1489] TF1-031, Transcript 17 March 2006, p.85.
[1490] TF1-031, Transcript 17 March 2006 p. 89.
[1491] George Johnson, Transcript 14 October 2004, pp. 78, 83, 85.
[1492] TF1-343, Transcript 17 March 2006, p. 61.
[1493] TF1-343, Transcript 17 March 2006, pp. 58-59.
[1494] TF1-343, Transcript 17 March 2006, pp. 63-64.
[1495] TF1-343, Transcript 17 March 2006, pp. 62-63, 68-70.
[1496] Exhibit 103, TF1-156, Transcript from AFRC Trial, Transcript, p. 17860; the witness testified on 26 September 2005, and seven years earlier was 1998.
[1497] TF1-031, Transcript 17 March 2006, p. 79. Jombente and Yougenteh are spelling differences.
[1498] Exhibit 103, TF1-156, Transcript from AFRC Trial, Transcript, pp. 17853-17856, 17858, 17863-17864.

484. TF1-028 testified that she was in Karina in February 1998. At that time, soldiers went to Karina three times[1499] and the fourth time was 6 April 1998[1500] when, near the mosque, TF1-028 saw her uncle chopped and lay dead. Another uncle chopped on his shoulder was struggling to die. TF1-028's two brothers struck on their heads[1501] died from the injuries. The soldiers brought TF1-028 to a field where she saw two men she knew, being hacked by men dressed in combat and civilian clothes. [1502]

485. TF1-159 testified that he was captured by seven persons calling themselves soldiers, in Mafabu, Bombali District, in May but could not remember the year. He was taken to Mafabu Town where he saw an unknown number of civilians who had been hacked to death and shot. In Mafabu, he witnessed daily mass killings of civilians by the soldiers. The civilians were either hacked to death or shot.[1503] TF1-159 was taken to Malama and saw that the soldiers continued killing civilians. TF1-159 testified that during the three months at Rosos, civilians were being killed by the soldiers. [1504]

[redacted]

487. TF1-179 testified that in 1998, the Junta entered Batkanu, "The group who were just mixed up; the rebels, the juntas, they were together."[1506] A woman called Nma Seidiubah was killed and TF1-179 saw her corpse. TF1-179 and his family went to Makeni on 10th May 1998. There, they were halted by 7 armed men, dressed in combat uniforms, who were Junta and rebels. One of the armed men chopped his father's hand, hacked him and mutilated him. The armed man also chopped his uncle's hand who later died from the injuries and killed TF1-179's mother. In Mabudungka, TF1-179 was told that his children had been killed by their captors; he was told this by a man who escaped from captors. TF1-

[1499] TF1-028,Transcript 17 March 2006, pp. 108-109.
[1500] TF1-028,Transcript 17 March 2006, pp. 110-111.
[1501] TF1-028, Transcript 17 March 2006, pp. 119-122.
[1502] TF1-028, Transcript 20 March 2006, pp. 5, 7-9.
[1503] TF1-159, Transcript 5 April 2006, pp. 4-11.
[1504] TF1-159, Transcript 5 April 2006, pp. 11-13.
[1505] TF1-041, Transcript 10 July 2006, pp. 84-86.
[1506] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 32-35.

179 learned from his brother that one of seven armed men, who attacked them, killed his grandmother.[1507]

488. [redacted] AFRC.[1508] When RUF and AFRC were pushed out of Makeni in March 1998 by ECOMOG, they attacked the Makeni-Kabala, the Makeni-Lunsar and the Kono Highways, Ngowahun Chiefdom, Biriwa, Lunsar, Foredugu, Gbendembu, Fadugu and Malal. During this phase, civilians were killed in Gbendembu.[1509] In December 1998, during the attack on Makeni, a boy was shot because "he had fled and they recognised him."[1510]

h) Freetown and the Western Area

489. TF1-021 witnessed the killings by random firing, of 36 civilians who were hiding in the Masjeed Douheed Rogbalana Mosque in Kissy, Freetown on 6 January 1999. After the killing in the mosque, he went to the Islamic school attached to the mosque and met another 7 dead people. He came by the gate and found more dead people. In total he counted 71 dead bodies.[1511] The perpetrators said "we are junta, we are people's army (...), we'll leave no soul around in that mosque."[1512]

490. On 6 January, 1999 when the rebels attacked, TF1-331 and others were asked by the rebels to line up in Loko Town, where the rebels cut one child into two and said it was a sacrifice for the peace.[1513] TF1-331 was amputated by the rebels and she saw them shoot her husband in the head. Neighbours told TF1-331 that her sister who was seven months pregnant was killed by the rebels.[1514]

491. TF1-235 testified that out of his 7 children, all except one were killed, as well as his 2 year-old grandchild, during the January attack on Freetown.[1515] As he was fleeing from

[1507] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 34-38, 40-44. [redacted]

[1511] TF1-021, Transcript 15 July 2004, pp. 34-36.
[1512] TF1-021, Transcript 15 July 2004, pp.36-37.
[1513] TF1-331, Transcript 22 July 2004, pp. 45-47, 53.
[1514] TF1-331, Transcript 22 July 2004, pp. 49-51.
[1515] TF1-235, Transcript 29 July 2004, pp. 46-50.

his home in Wellington with his family and other civilians they saw people with combat camouflage rain gear, with rifles, and some with rocket propelled grenade tubes. TF1-235 with his family entered a car that was stuck between two trucks. A soldier who detected them was told by the others, "why are you wasting your time with these civilians? These are the very people who rejected our rule. Now they are running away from us. They are the ECOMOG and Tejan Kabbah supporters. They should be taught a lesson. I think we ought to just shoot them down."[1516] One fighter opened fire injuring him and his wife and killing TF1-235's son, and 3 daughters[1517]

492. On 22 January 1999 TF1-029 and 50 other civilians were abducted by a mixed group of RUF and SLA in Wellington. The witness was captured by Major Arif who was SLA and taken to Calaba Town. The SLA and RUF retreating from Freetown burnt houses and killed people on the way. TF1-029 witnessed the beheading of an ECOMOG soldier and saw a nun killed and two others shot in their hands. The group killed babies on the way to Benguema to prevent them from causing noise.[1518]

493. TF1-022 testified that on 6 January 1999, he was at his house in Kissy when the RUF entered the town. In hiding, he could hear RUF fighters threatening that they would shoot and kill if not given money. TF1-022's brother-in-law was shot in the back. TF1-022 and others were taking him to hospital when they were abducted by RUF and ordered to abandon the patient and he later died. On the way, he saw a lot of corpses in Rogbalan Mosque Kissy. A young man was shot and killed by one of the rebels.[1519]

494. TF1-093 testified that she lived in Freetown with her brother who was shot and killed on 6 January 1999. She participated in the Freetown invasion on January 6 1999 and was in command of a group of RUF fighters which burnt 20 houses with people inside. Her group also killed about 20 civilians along Kissy, Upgun, Fourah Bay Road, Eastern Police. TF1-093 said she was ordered to kill.[1520]

495. TF1-104 testified that between 6 and 14 January 1999 RUF/AFRC brought corpses in a van to Kissy cemetery and he participated in burying them. They were mainly bodies

[1516] TF1-235, Transcript 29 July 2004, pp. 48-53.
[1517] TF1-235, Transcript 29 July 2004, pp. 53-54.
[1518] TF1-029, Transcript, 28 November 2005, pp. 7-11, 14.
[1519] TF1- 022, Transcript 29 November 2005, pp. 22-27, 30, 37, 43.
[1520] TF1-093, Transcript 29 November 2005, pp. 100-107.

of civilians and most had wounds and blood all over them. TF1-104 recalls 15 January 1999 that the "junta and RUF guys ... were very bloody" and that they brought more corpses than usual. The corpses had gunshot wounds. [redacted] A Nigerian businessman (Ike) who was being treated at the hospital was shot and left there; the witness does not know what happened to him.[1521] The witness and others were marched to the commanders who were at one Pa Zubay's house; they were lined up and randomly fired at, whereupon a total of fifteen civilians were killed.[1522]

496. Five or six days after 6 January 1999, TF1-101 and other civilians in Kissy went to Mabella market. On their return, at PWD by Ferry Junction, they encountered a checkpoint with fighters who said they were rebels. A rebel commanded the sacrifice of two people and two men were picked from among the civilians; one was stabbed until he fell. His blood was put in a bowl. The other man was shot and killed. TF1-101 and the other civilians were allowed to leave.[1523] Days later, five rebels came to TF1-101's house, two of whom were SLA's; one was called Issa Conteh. They told TF1-101 that President Kabbah had refused a ceasefire and had sent ECOMOG to fight them and that because of this all civilians were going to die together. An elderly man standing at the veranda was shot by a rebel. TF1-101 heard gunshots and saw two persons fall down and die. On 19 January 1999, seven rebels came to Abass' house where TF1-101 and other civilians were hiding. One of the rebels called Commando had a pistol. The other four were also armed. One of the rebels said that all of the young men should be brought to the junction and twenty-four young men were brought. Commando ordered that everybody put his hand out to be cut off. The civilian at the front pleaded for his hand not be cut and Commando shot him in the face, killing him. The next in line, also pleaded and was shot and killed by Commando. The third man also pleaded and Commando then killed six of those civilians. Then on

[1521] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, pp. 17-24.
[1522] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, pp.25-28.
[1523] TF1-101, Transcript 28 November 2005, pp. 37-39.

Commando's orders the rebel with the axe and the other with the cutlass split open their heads.[1524]

497. TF1-097 testified that when the RUF attacked Tombo on 23 December 1998, he fled into the bush. The RUF who attacked him in his village was Captain Blood. When he returned to Tombo, he saw 7 civilian corpses.[1525]

498. George Johnson testified that the combatants arrived at State House on 6 January 1999. At the front of State House he saw more than 30 dead bodies of Nigerian soldiers, Nigerian civilians and policemen killed by gunshots. They were targeted people. During the withdrawal they stopped at the Sierra Leone Road Authorities (SLRA) building.[1526] A government minister was killed and his body deposited at the building. At the SLRA were about 15 bodies. Eight catholic nuns were abducted and three of them killed outside Kissy mental home by Foday Bah Marah, aka Bulldoze. At a mosque there were a lot of dead bodies outside and inside.[1527]

499. [redacted] Captain Blood executed seven civilians; he shot 3 and used a machete on the others. At a mosque in Kissy, they killed many people. TF1-334 took part in the shooting.[1529]

[1524] TF1-101, Transcript 28 November 2005, pp. 42-52, 54.
[1525] TF1-097, Transcript 28 November 2005, pp. 77-79; see pp. 87, 97-98 for attack and killings in Freetown.
[1526] George Johnson, Transcript 18 October 2004, pp. 48, 53-54, 65-66.
[1527] George Johnson, Transcript 18 October 2004, pp. 70-77.
[redacted]

500. The First Accused testified that Rambo told him that in Freetown they burnt houses, killed people and cut off people's hands. That Rambo got the information from King Perry.[1530]

i) Port Loko District

501. Johnson testified that at Mamamah, Ibrahim Bazzy Kamara ordered that the terrain be made fearful for ECOMOG troops. About 5 civilians, killed by machete, were displayed on the highway. More than 7 civilians were placed in each house in two grass houses and set on fire. Making the area fearful meant killing people and putting them on the highway.[1531] Bazzy ordered that Gberibana village be made a civilian free area; that civilians should be executed. Later TF1-334 saw 15 bodies there. This was 2 to 1 ½ months before the ceasefire in 1999.[1532]

502. In April 1999, TF1-253 was in Manarma[1533] when "soldiers and Gbethis" came to the village. One Friday in April 1999, four people came to her village from Taron village, crying because of massacre of people at Taron by the rebels. Later, at Makambisa, TF1-253 met rebels who said their leader was Superman.[1534] TF1-253 saw the rebels shoot her two brothers and saw her stepmother captured with TF1-253's 2 children; one rebel chopped one of the children on the head, and then the child was shot and killed. The stepmother was killed. One Saffa was shot and killed. The rebels struck dead a child that the sister of TF1-253 was holding, with a club. The rebels shot dead TF1-253's sister and a child she was carrying. In town, TF1-253 saw a lot of dead corpses.[1535] TF1-253 saw 6 people locked in a house and burnt there and later counted 73 corpses. TF1-253 saw his colleague being shot by the rebels. Also, in the corner of a house, one person was slaughtered to death. TF1-253 later found the corpses of his brothers and sisters and his stepmother, and he buried them and also other people from Makambisa village; they could not bury everyone because so many were massacred.[1536]

[1530] Accused Issa Sesay, Transcript 18 May 2007, pp. 88-89.
[1531] George Johnson, Transcript 18 October 2004, pp. 81-83.
[redacted]
[1533] TF1-253, Transcript 28 July 2004, p. 6 line 18: the writing of the witness hometown is Manarma, as opposed to Muharma on p. 4, line 23.
[1534] TF1-253, Transcript 28 July 2004, pp. 6-12
[1535] TF1-253, Transcript 28 July 2004, pp. 14-23.
[1536] TF1-253, Transcript 28 July 2004, pp. 23-30.

503. TF1-345 testified that her group of 40 residents of Nonkoba were captured in the bushes near Nonkoba and Chendekom by rebels, around 6 January 1999. TF1-345 fled and hid in a thicket; she was there alone and heard children shouting. All the civilians were taken into the bush and killed, including TF1-345's own children. She heard them being clubbed to death, and had previously seen machetes and axes. The children of her co-wife were also killed in the same way. TF1-345's aunt and her husband, her brother-in-law, her housemate and housemate's children were all killed.[1537]

504. TF1-256 testified that in April 1999 he was in Masimera village when soldiers in military uniform attacked the village, killing people.[1538] TF1-256 was told by one Lamin that the soldiers were SLA. The witness and his wife and children were in a garden as part of about 55 civilians captured by the soldiers.[1539] Forty-seven of the people were led away towards the town including the witness's own children, brothers and sisters; plus his brother's wife, children and mother-in-law, Idirissa's 4 children and wife, Alamie's children, and, Yaiye and her 3 children. When the witness went to the bush, he found 7 people among those captured killed in the bush, among them, his son.[1540] The witness has never seen the other 40 people again.[1541]

505. TF1-255 testified that after the 29 May, 1999 attack of the village of Chendekom,[1542] he saw a person who had been killed in the outskirts of town, and 4 others who had been killed in a farm hut. He recognized one person killed. TF1-255 saw bodies of murdered people along the road. TF1-255 also saw the corpse of his wife and their three month old child, which had its throat slit and whose body had been placed beside its mother's. TF1-255 also saw the bodies of three of his other children. In all, there were 47 people killed from TF1-255's village during the attack. While still in custody of the soldiers, TF1-255 saw his other wife from a distance; she gestured to him that their suckling child had been killed; this was the only contact that they had. While still a prisoner, TF1-255 was in Lunsar, and saw two people playing football. He was told that the

[1537] TF1-345, Transcript 19 July 2006, pp. 26-44.
[1538] Exhibit 136, TF1-256, Transcript from AFRC Trial, Transcript 14 April 2005, pp.46-47.
[1539] Exhibit 136, TF1-256, Transcript from AFRC Trial, Transcript 14 April 2005, pp.68-69.
[1540] Exhibit 136, TF1-256, Transcript from AFRC Trial, Transcript 14 April 2005, pp.70-79.
[1541] Exhibit 136, TF1-256, Transcript from AFRC Trial, Transcript 14 April 2005, pp.81-83.
[1542] TF1-255, Transcript 18 July 2006, p. 68-70.

players were Superman and Sesay. This was in June 1999,[1543] during which time the village Head Man's child was killed and other village elders suffered atrocities.[1544]

C. Liability of the Accused

a) Joint Criminal Enterprise

506. Murder and extermination were crimes within the joint criminal enterprise from the outset. The RUF took part in killing civilians before the Junta. During the Junta the Second and Third Accused were in Bo District when killings took place; the Second Accused was present in Kenema District and killings took place; [redacted] The Third Accused instigated the killing of over 65 civilians in Kailahun Town by condemning them as Kamajors. The Second Accused killed at least 18 civilians in Kono District, something that was reported to the First Accused. In the alternative, crimes of murder and extermination were the natural and foreseeable consequence of the implementation of the joint criminal enterprise.

507. There is no particular number of killings required to prove extermination, nor does the mass murder need to occur in a concentrated manner and over a short period.[1546] The killings at Kailahun Town and at Kamchende Street were massive, and meet the elements of extermination, in the alternative, the killings carried out pursuant to the common purpose of the joint criminal enterprise of which the Accused were members, renders each of the Accused guilty of extermination.

b) Liability under Article 6(1) of the Statute

ii) First Accused

508. The First Accused participated in a plan and orders to make Kono a defensive ground and Koidu a no go area for civilians. Johnny Paul Koroma said that civilians should not live in Kono and to execute those not ready to join the movement.[1547] Sesay supported

[1543] TF1-255. Transcript 18 July 2006, pp. 79-96, 111-112.
[1544] TF1-255. Transcript 19 July 2006, p. 4.
[1545] TF1-129, Transcript 10 May 2005, Closed Session, pp. 63-65.
[1546] *Brima et al* Trial Judgement, para. 686.
[redacted]

Johnny Paul Koroma[1548] and said that civilians were traitors who had betrayed them and should not be tolerated and they should burn houses in Kono.[1549] In his testimony, the First Accused spoke about attending a meeting of AFRC and RUF commanders convened, chaired and addressed by Jonny Paul Koroma before leaving for Kailahun.[1550] The civilians had allegedly betrayed the AFRC/RUF by inviting the Kamajors into Kono and the Kamajors had fought the AFRC/RUF during their entry into Kono after the intervention.[1551] The plan and the orders to make Koidu a no go area for civilians intended the killings of civilians; alternatively, the plan and the orders were made in the reasonable knowledge that killings of civilians would be committed in the execution of the plan and the orders; alternatively the plan and the orders were made in reckless disregard of civilian lives. Many civilians were killed in Koidu and other locations in Kono District, [1552] in circumstances indicating that civilians were not to be tolerated.

509. When taking Johnny Paul Koroma to the Moa River, the First and Second Accused were present and the RUF and AFRC killed villagers and burned houses in Koindu Gieya, Sandaru and Koindu Bwema.[1553] The First Accused was thereby involved in planning, ordering, instigating, or aiding and abetting the killings.

510. The First Accused participated in orders for the killing of over 60 civilians in Kailahun town on allegations that they were Kamajors; alternatively, he aided and abetted those crimes.[1554]

ii) Second Accused

511. Civilians were killed at Cyborg Pit in Kenema District on the orders and in the presence of the Second Accused. Alternatively, he aided and abetted the killings as they

[redacted]

[1550] Accused Issa Sesay, Transcript 9 May 2007, pp.44-45.

[redacted]

[1552] TF1-015, Transcript 27 January 2005, pp.104-136; TF1-015, Transcript 31 January 2005, pp.100-101; TF1-071, Transcript 19 January 2005, pp.45-48; TF1-071, Transcript 21 January 2005, pp.47-57, 57-71; TF1-141, Transcript 11 April 2005, pp.80-83, 88-90; TF1-366, Transcript 8 November 2005, pp.32-34; [redacted]

[1553] TF1-366, Transcript 8 November 2005, pp. 23-24.
[1554] TF1-366, Transcript 8 November 2005, pp.58-60.

were committed in his presence by RUF combatants who were under him.[1555] The Second Accused was also present in Bo District when civilians were killed.

512. The Second Accused participated in a plan and orders to make Kono a defensive ground for the junta forces and to make Koidu no go area for civilians.[1556] Johnny Paul Koroma said that civilians not ready to join the movement should be executed.[1557] The Second Accused testified about attending a meeting of AFRC and RUF commanders convened and chaired by Jonny Paul Koroma before leaving for Kailahun.[1558] The civilians had allegedly betrayed the AFRC/RUF by inviting the Kamajors into Kono and the Kamajors had fought the AFRC/RUF during their entry into Kono after the intervention.[1559] The Second Accused subsequently issued orders that civilians were not to be encouraged in their midst. At the Opera in Koidu where Kallon and Superman were in command,[1560] a meeting was held where the Second Accused gave an order not to encourage civilians in their midst.[1561] Many civilians were killed in Koidu and other locations in Kono District.[1562] While in Kono, when the Second Accused ordered an operation to Nimikoro-Bumpe,[1563] his orders were that, "we should drive away whosoever we met in the place, whether civilians or any gun person"[1564] and that, "whosoever see us shall never see a rebel again."[1565] By these orders, the Second Accused intended killings of civilians or issued the orders in the reasonable knowledge that the orders would result in killings of civilians by the combatants or made the orders in reckless disregard for civilian lives.

[redacted]

[1558] Accused Morris Kallon, Transcript 14 April 2008, pp.14-15.

[redacted]

[1560] TF1-366, Transcript 8 November 2005, pp.25-26.
[1561] TF1-366, Transcript 8 November 2005, p.25-27.
[1562] TF1-015, Transcript 27 January 2005, pp.104-136; TF1-015, Transcript 31 January 2005, pp.100-101; TF1-071, Transcript 19 January 2005, pp.45-48; TF1-071, Transcript 21 January 2005, pp.47-57, 57-71; TF1-141, Transcript 11 April 2005, pp.80-83, 88-90; TF1-366, Transcript 8 November 2005, pp.32-34; [redacted] TF1-064, Transcrpt 19 July 2004, pp.50-56, 88.
[1563] Mission to Nimikoro-Bumpe took place following Superman's return from Buedu, but before Fiti-Fata and before Superman's departure to join SAJ Musa: [redacted]
[1564] TF1-360, Transcript 20 July 2005, p.55 (lines 20-21).
[1565] TF1-360, Transcript 20 July 2005, p.56 (line 6).

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513. The Second Accused killed 3 civilians at Five-Five Club in Koidu.[1566] Civilians in Tombodu in Kono District were killed at the court barri on the orders and in the presence of the Second Accused.[1567] A civilian woman was killed in Wendedu on the orders or instigation of the Second Accused, or by his aiding and abetting.[1568]

514. The Second Accused was involved in planning, inciting, ordering or otherwise aiding and abetting the killing of [redacted] civilians [redacted] in Koidu. The [redacted] people killed by Rocky [redacted] were part of a large group of about 250 civilians who had been abducted by the RUF and included TF1-015.[1569] This large group of civilians was first taken to Sunna Mosque; at this time, they were about 249 civilians as one of them had already been killed.[1570] From Sunna Mosque, on the instructions of Colonel Rambo, the civilians were taken to [redacted] where the killing took place.[1571] On the way from Sunna Mosque to [redacted], TF1-015 saw about 50 dead bodies of people.[1572] The killing was done by Major Rocky who came to [redacted] after the civilians had already arrived there.[1573] After the killing, Rocky reported to Rambo that he (Rocky) had killed [redacted] people.[1574] After the killings, Major Rocky took TF1-015 back to Sunna Mosque where there were about 30 RUF commanders.[1575] The Second Accused was one of those commanders and they carried out a vote to determine whether or not TF1-015 should be killed.[1576] What transpired when Major Rocky returned to Sunna Mosque after the killings clearly shows that the Second Accused and the other RUF commanders who were present knew that that Rocky had just killed a large number of civilians. It also shows that the commanders had knowledge of the intended killings before the killings happened. The civilians had been taken through Sunna Mosque where Colonel Rambo issued orders for them to be taken to [redacted] where they were killed.[1577] Upon returning from the Killings, 30 RUF commanders were assembled at Sunna Mosque

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[redacted]

[1568] TF1-071 Transcript 21 January 2005, pp. 58-73.
[1569] TF1-015, Transcript 27 January 2005, pp. 104-109.
[1570] TF1-015, Transcript 27 January 2005, pp. 109-113.
[1571] TF1-015, Transcript 27 January 2005, pp. 114-117, 120-128.
[1572] TF1-015, Transcript 27 January 2005, pp. 115-116.
[1573] TF1-015, Transcript 27 January 2005, pp. 123-128.
[1574] TF1-015, Transcript 27 January 2005, pp. 128-129.
[1575] TF1-015, Transcript 27 January 2005, pp. 137.
[1576] TF1-015, Transcript 27 January 2005, pp. 140-148.
[1577] TF1-015, Transcript 27 January 2005, pp. 109-117, 120-128.

including the Second Accused.[1578] Referring to TF1-015, Major Rocky said to the RUF commanders who included the Second Accused, "I'm not satisfied this man is still alive"[1579] before putting the matter to a vote.[1580] The Second Accused voted that TF1-015 be killed.[1581] Sunna Mosque is close [redacted], the scene of the killings, both are located at Hill Station in Koidu.[1582]

515. After capturing Koidu, the Second Accused sent troops to the villages to search for Kamajors.[1583] TF1-366 participated in fighting at Gandorhun Gbane (a village near Koidu) where they killed Kamajors and many civilians. "Morris Kallon and Akim were our bosses as commanders, and Peter Vandi."[1584] When taking Johnny Paul Koroma to the Moa River, the First and Second Accused were present and the RUF and AFRC killed villagers and burned houses in Koindu Gieya, Sandaru and Koindu Bwema.[1585] The Second Accused planned, instigated or aided and abetted those killings.

iii) Third Accused

516. The third Accused was party to orders for, and the the killing of, over 60 civilians in Kailahun town on allegations that they were Kamajors; alternatively, the Third Accused instigated the crimes by telling Bockarie that the persons were Kamajors and "they should not live amongst us...."[1586] The victims of these killings were either civilians or *persons hors de combat*, as they were being detained in jail cells. By his assertion to Bockarie that these people were Kamajors, the Third Accused knew that they would be killed and intended that they be killed or acted in reckless disregard of their lives. The Third Accused was also present in Bo during the Junta when civilians were killed. His presence there as a senior commander of the RUF proves aiding and abetting.

[1578] TF1-015, Transcript 27 January 2005, pp. 137-148.
[1579] TF1-015, Transcript 27 January 2005, p. 137 (lines 27-29).
[1580] TF1-015, Transcript 27 January 2005, pp. 137-138.
[1581] TF1-015, Transcript 27 January 2005, pp. 138-148.
[1582] TF1-015, Transcript 27 January 2005, pp. 113, 115, 120.
[1583] TF1-366, Transcript 8 November 2005, pp. 5-8.
[1584] TF1-366, Transcript 8 November 2005, pp. 22-23.
[1585] TF1-366, Transcript 8 November 2005, pp. 23-24.
[1586] TF1-045, Transcript 21 November 2005, pp. 41-42. They were killed in February: TF1-045, Transcript 21 November 2005, p. 46.

c) Liability under Article 6(3) of the Statute

i) First Accused

517. During the Junta, the First Accused and the Second Accused were present in Kenema town and also had their bodyguards or representatives based in Tongo[1587] and each of them being a superior, knew or had reason to know about unlawful killings by AFRC/RUF in these locations but failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators. TF1-122 saw the First Accused in Kenema Town several times during the junta.[1588] TF1-125 testified that in 1997 and early 1998 he was living along Hangha Road in Kenema. General Mosquito was in one apartment and General Issa was in the next one and was in charge of at least 20 RUF combatants who used to go to Tongo and back.[1589] Soon after the intervention, the First Accused was at the Opera Roundabout in Koidu town when the RUF were killing civilians but failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators.[1590]

518. The First Accused knew or had reason to know about unlawful killings by AFRC/RUF in the areas where crimes under Counts 3 to 5 were committed and failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators. In particular, the First Accused received reports of killings by his subordinates in Kono District and failed to take any action.[1591] Further, as shown else where in this brief, the RUF had an organized structure with well established reporting and monitoring systems which facilitated the First Accused's knowledge of the crimes under Counts 3 to 5. For example, as Battled Field Commander, in 1998, the First Accused frequently monitored all

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[1587] TF1-045, Transcript 18 November 2005, pp.77-78, 93; TF1-367, Transcript 21 June 2006, pp.58-59; TF1-041, Transcript 10 July 2006, pp.19-21; DIS-124, Transcript 22 November 2007, pp.162-166; DIS-124, Transcript 23 November 2007, p.31 (lines 10-29).
[1588] TF1-122, Transcript 7 July 2005, pp.56-60.
[1589] TF1-125, Transcript 16 May 2005, p. 16; TF1-125, Transcript 12 May 2005, pp. 137-138
[1590] TF1-141, Transcript 11 April 2005, pp.80-90.
[1591] TF1-366, Transcript 8 November 2005, pp.35-37, 42; TF1-371, Transcript 21 July 2006, p.6; TF1-371, Transcrpt 24 July 2006, pp.17-19.

the frontlines through radio communication.[1592] There were radio communications between Bockarie and the First Accused in Buedu and the RUF in Kono.[1593]

ii) Second Accused

519. The Second Accused was based in Tongo when civilians were killed at the Cyborg Pit in Tongo on his orders and in his presence.[1594]

520. The Second Accused was based in Kono in 1998 and he knew or had reason to know about unlawful killings by AFRC/RUF in Kono District, but failed to take necessary and reasonable measures to prevent the crimes or to punish the perpetrators. The Second Accused was the most senior man in Kono.[1595] Soon after the intervention, the Second Accused was at the Opera Roundabout in Koidu town when the RUF were killing civilians but failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators.[1596]

521. The tasks performed by the Second Accused while in Kono in 1998 show that he had authority in terms of effective control; the Second Accused was involved in deploying troops,[1597] he was a very active field commander who went to the frontlines,[1598] he would send supplies to the frontlines,[1599] he commanded the laying of ambushes against ECOMOG,[1600] he ordered and supervised the burning of Koidu,[1601] he often held muster

[redacted]

[1593] TF1-361 Transcript 11 July 2005, pp.97-102; 12 July 2005, pp.2-7, 21-26, 40-42.
[1594] TF1-035, Transcript 5 July 2005, pp.89-93.
[1595] TF1-371, Transcript, 31 June 2006, p. 135; see also TF1-366, Transcript 8 November 2005, pp.37-38; TF1-366, Transcript 14 November 2005, pp.45-47; TF1-366, Transcript 14 November 2005, pp.58-59; TF1-366, Transcript 14 November 2005, pp.61-62; TF1-366, Transcript 16 November 2005, pp.14-16; Exhibit 119, pp. 14694 – 16288 (Exhibit 119, TF-334, Transcript from AFRC Trial, Transcript 19 May 2005, pp. 4-5); Exhibit 119, pp. 14694 – 16288 (TF-334, Transcript from AFRC Trial, Transcript 19 May 2005, p. 7); TF1-141, Transcript 11 April 2005, pp.80-90; TF1-360, Transcript 22 July 2005, p.28; TF1-041, Transcript 17 July 2006, p. 33; TF1-041, Transcript 17 July 2006, pp. 33-34; TF1-360, Transcript 20 July 2005, p.18; TF1-360, Transcript 20 July 2005, pp.18-19; Transcript 12 July 2005, p.14; Transcript 12 July 2005, p.21-23; TF1-361 Transcript 11 July 2005, pp.97-98; 12 July 2005, pp.2-7, 21-26, 40-42; TF1-361 Transcript 15 July 2005, pp.35-36; TF1-361 Transcript 19 July 2005, pp.2-3; TF1-361 Transcript 19 July 2005, p.10; TF1-361 Transcript 19 July 2005, p.17.
[1596] TF1-141, Transcript 11 April 2005, pp.80-90.
[1597] TF1-366, Transcript November 2005, pp.25-26.
[1598] TF1-361, Transcript 19 July 2005, pp.17-18.
[1599] TF1-361, Transcript 8 November 2005, pp.35.
[1600] TF1-361, Transcript 18 July 2005, pp.101-104.
[1601] TF1-361, Transcript 18 July 2005, p.105; TF1-360, Transcript 20 July 2005, p.15, 59.

parades to address troops and to issue orders,[1602] he ordered operations and received reports from such operations,[1603] and he was the one who ordered radio operators from Kono to join the AFRC/RUF in Koinadugu.[1604] In terms of the Second Accused's powers to issue orders in Kono in 1998, TF1-041 stated that: "Like Morris Kallon we called him Bilah Karim. If he said this definitely he would do it. If you refuse he will fire you off. All the soldiers were afraid of him. All of us were afraid of him. Nobody would challenge his orders by then."[1605] The Second Accused had the power to take disciplinary action and he lied in claiming that he was stopped in his attempts to discipline combatants in Kono.[1606] Kallon had powers to discipline combatants and commanders.[1607]

522. The Second Accused received reports of killings of civilians in Tombodu but failed to take necessary and reasonable measures to prevent further crimes or to punish the perpetrators.[1608] The Second Accused accepted that Rocky and Banya were not punished for crimes.[1609] Further, the RUF had an organized structure with well established reporting and monitoring systems which facilitated the Second Accused's knowledge of the crimes under Counts 3 to 5.[1610] While in Kono, as a superior, the Second Accused was in a position where he had the knowledge or the means of obtaining the knowledge of crimes committed by his subordinates. During muster parades, for which it was a requirement for all combatants to attend, there would be discussions regarding combatants who had

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[1602] TF1-360, Transcript 20 July 2005, pp.22; TF1-141, Transcript 11 April 2005, pp.90-92, 95-96; DIS-163, Transcript 11 January 2008, pp.65-67;
[1603] TF1-360, Transcript 20 July 2005, pp.55-58; TF1-360, Transcript 26 July 2005, pp.74-76; TF1-366, Transcript 8 November 2005, pp.61-64.
[1604] TF1-360, Transcript 20 July 2005, p.58.
[redacted]
[1606] Accused Morris Kallon, Transcript 18 April 2008, pp.126-128. Morris Kallon shot 2 AFRC soldiers for not attending a muster parade but not for burning houses as claimed by Kallon. The claim was never put to Prosecution witnesses: TF1-360, Transcript 20 July 2005, p.22; TF1-360, Transcript 26 July 2005, p.66.
[1607] Accused Morris Kallon, Transcript 18 April 2008, pp-126-128, especially pp. 127 (lines 3-29) – 128 (lines 1-2).
[1608] TF1-366, Transcript 8 November 2006, p.38; TF1-366, Transcript 8 November 2005, pp. 42-43; Accused Morris Kallon, Transcript 14 April 2008, p.122; DIS-163, Transcript 15 January 2008, pp. 3-4.
[1609] Accused Morris Kallon, Transcript 18 April 2008, pp. 89-90.
[1610] For example, the orders and reporting system complied with the chain of command and the Second Accused had access to the use of radio communication: Accused Morris Kallon, Transcript 18 April 2008, pp. 14-15, 65. TF1-361 said that as a commander and a Vanguard, Morris Kallon could use any radio set he wanted: TF1-361, Transcript 12 July 2005, p. 29 (lines 5-10).

committed crimes during missions.[1611] Further, while in Kono, Kallon's body guards attended some missions and reported back to him.[1612]

523. The Second Accused is guilty under Article 6(1) for the killing of [redacted] civilians at [redacted] in Koidu. Alternatively, the Second Accused knew or had reason to know about the killings and failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators. The civilians had been taken through Sunna Mosque before going to [redacted] where they were killed.[1613] On the way from Sunna Mosque to [redacted], TF1-015 saw about 50 dead bodies of people.[1614] Immediately after the killings, the Second Accused was present at Sunna Mosque with other RUF commanders.[1615] What transpired when Major Rocky returned to Sunna Mosque after the killings shows that the Second Accused knew that Rocky had just killed a large number of civilians.[1616] The presence of a large number of dead bodies[1617] within close proximity of the Second Accused's location (Sunna Mosque) [1618] at the material time must have alerted him to unlawful killings by his subordinates.

iii) Third Accused

524. The Third Accused knew or had reason to know about unlawful killings by the RUF[1619] but did not initiate any measures leading to punishment of the perpetrators, or to investigate the crimes. The Third Accused was in charge of security and his unit investigated crime,[1620] and he was the head of the Joint Security Board of Investigation, made up of MP, IO and IDU, "So that made him the overall security commander of joint

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[1611] Accused Morris Kallom, Transcript 18 April 2008, pp.53-54.
[1612] Accused Morris Kallon, Transcrpt 18 April 2008, pp.65-66. Bodyguards acted as commanders' eyes and gave them reports: TF1-371, Transcript 20 July 2006, p.75; TF1-367, Transcript 21 June 2006, pp.56-57; TF1-041, Transcript 10 July 2006, p.28.
[1613] TF1-015, Transcript 27 January 2005, pp.109-113; TF1-015, Transcript 27 January 2005, pp.114-117, 120-128.
[1614] TF1-015, Transcript 27 January 2005, pp.115-116.
[1615] TF1-015, Transcript 27 January 2005, pp.137.
[1616] TF1-015, Transcript 27 January 2005, pp.137 (lines 27-29) - 138.
[1617] TF1-015, Transcript 27 January 2005, pp.115-116.
[1618] TF1-015, Transcript 27 January 2005, pp.137-148.
[1619] TF1-371, Transcript 21July 2006, p. 6.
[redacted]

security."[1621] IDU agents were at every deployment area[1622] and Augustine Gbao received their reports on a weekly and monthly basis.[1623] As Overall Security Commander, Augustine Gbao had the ability to maintain law and order in the RUF. DAG-080 said that in Makeni in 1999, Gbao exercised his authority and ensured law and order by ensuring that the security units performed their duties. [1624] The Second Accused stated that he was senior to Augustine Gbao in rank but that Augustine Gbao was Overall Security Commander and had authority, to make any investigation.[1625]

[redacted]

[1622] DAG-048 Transcript 3 June 2008, pp.30-31.
[1623] DAG-048 Transcript 3 June 2008, pp.40-41. It was Gbao' job to ensure that IDU, MP, IO, G5, performed their duties: DAG-048 Transcript 3 June 2008, pp.49-51; DAG-080, Transcript 6 June 2008, pp.44-51, pp64-65; DAG-080, Transcript 9 June 2008, pp.38-39; DAG-101, Transcript 9 June 2008, pp.98-100, pp.106-110. Exhibit 378 from the MP, and exhibit 379 from the IO, are examples of reports to the Overall Security Commander, Augustine Gbao.
[1624] DAG-080, Transcript 9 June 2008, pp.44-51, p.28, cross-examination by the Prosecution
[1625] Accused Morris Kallon, Transcript 17 April 2008, pp.12-14.

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VII. COUNT 6-9: SEXUAL VIOLENCE

A. Applicable Law and Elements of Crime

525. The Accused are charged under Count 6 for rape, as a crime against humanity, punishable under Article 2(g) of the Statute, under Count 7 for sexual slavery as a crime against humanity, punishable under Article 2(g) of the Statute and under Count 8 for other inhumane acts as a crime against humanity, punishable under Article 2(i) of the Statute and in addition, or in the alternative, under Count 9 for outrages upon personal dignity, as a violation of Article 3 Common to the Geneva Conventions and of the Additional Protocol II, punishable under Article 3(e) of the Statute. It is alleged that the three Accused, pursuant to Article 6 para. 1 and, or alternatively, Article 6 para. 3 of the Statute, are individually criminally responsible for these crimes.[1626]

526. There are certain specific contextual elements for crimes against humanity, in addition to the ones elaborated in the general section on the chapeau elements above, in section IV A on the context elements of crimes against humanities, which are common to Count 6 to 8 and will be discussed briefly. The massive campaign led by the RUF, and subsequently, the AFRC/RUF Junta, which included massive sexual violence inflicted upon thousands of women and girls, must be considered as an attack and therefore qualifies as a constitutive element of crimes against humanity. An 'attack' is not limited to the use of armed force, but also refers to a campaign, operation or course of conduct directed against a civilian population, encompassing any mistreatment of civilians.[1627] As to the requirement that the attack must be *either* widespread *or* systematic, it must be noted, especially in relation to the crime of rape, that even a single act perpetrated in the context of a widespread or systematic attack upon civilian population can be sufficient to confer individual criminal liability upon the perpetrator.[1628]

527. The evidence shows that sexual violence was systematically used by the RUF and by the Junta forces as a tactic to sow terror, to control occupied areas[1629] and to increase the

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[1626] Indictment, pp. 13-15.
[1627] *Norman et al* Decision on Motion for Acquittal, para. 56; *Brima et al* Decision on Motion for Acquittal, para. 42; *Limaj* Trial Judgement, para. 182, *Kunarac* Appeal Judgement, para. 86.
[1628] *Brima et al*, Decision on Defence Motion for Acquittal, para. 42; *Tadić* Trial Judgment, para. 649.
[1629] Exhibit 175, HRW Report 1998 "Sowing Terror, Atrocities against Civilians in Sierra Leone", Vol. 10, No. 3(A., July 1998, [p. 4 (19437) and Section entitled: Killings, Mutilations, Sexual Abuse, and Enslavement by the AFRC/RUF in Human Rights Abuses Committed by Members of the AFRC/RUF, pp.

"combat morale" of their fighters. Sexual slavery or forced marriage served the RUF to gain manpower and to boost the moral of the combatants. The evidence clearly reveals identifiable patterns of crimes.[1630] Further, crimes of sexual violence were often accompanied by other forms of violence, such as murder or mutilation, abduction, forced labour or forced marriage.[1631] It was also "used as an immediate punishment for refusing to follow instructions or in retaliation for the acts of others held in captivity."[1632]

528. Sexual violence was not only systematic; it was also widespread throughout the conflict in Sierra Leone, and especially during the indictment period. According to human rights organisations sexual violence was used "as a weapon to terrorize, humiliate and punish, and to force the civilian population into submission."[1633] The fact, that certain acts establishing crimes against humanity may have been committed for purely personal reasons is irrelevant. The evidence demonstrates that the RUF used rape and other forms of sexual violence as a tactic of war, as is common in armed conflicts[1634] and as is often used as a means to achieve the goal of an armed group in guerilla warfare.[1635] The targeted

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15-23 (19448-19456)], ("**Exhibit 175, HRW Report 1998**"), p. 4; The expert witness DAG-112, Johan Hederstedt, confirmed that sexual assault of women could be used by insurgent movements to terrorise the civilian population. Johan Hederstedt, Transcript 24 June 2008, p. 109.

[1630] "The AFRC/RUF's rape and enslavement of women and girls for sex is not only a vicious expression of power over the individual, but also a means of expressing dominance over the community. Throughout the world, sexual violence is routinely directed against women and girls during situations of armed conflict as a weapon to terrorize a community and to achieve a political end. The humiliation, terror and pain inflicted by the rapist is meant to harm not only the individual victim but also to strip the humanity from the larger group of which she is a part. The rape of one person can be translated into an assault upon the community through the emphasis placed in every culture on women's sexual virtue; the shame of the rape humiliates the family and all those associated with the survivor.", Exhibit 175, HRW Report 1998, p. 18. (19451)

[1631] TF1-213, Transcript 2 March 2006, pp. 11-16; TF1-064, Transcript 19 July 2004, pp. 48-49; TF1-192, Transcript 1 February 2005, p. 65.

[1632] Exhibit 175, HRW Report 1998, p. 17 (19450).

[1633] TF1-218, Transcript 1 February 2005, pp. 84-85; See also Exhibit 146, HRW Report on Sexual Violence, pp. 28 and 35-36, "The rebels sought complete domination by doing whatever they wanted with women, including sexual acts that, by having the additional element of assailing cultural norms, violated not only the victim but also her family or the wider society. The rebels have forced civilians to commit incest, one of the biggest taboos in any society. ... Fathers were forced to rape their daughters. Fathers were forced to dance naked in front of their daughters and vice versa. ... Victims were also raped in mosques, churches, and sacred places of initiation."

[1634] In a recent resolution, Resolution 1820 (2008), the Security Council explicitly held "that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security," S/RES/1820 (2008), "Women and peace and security", 19 June 2008, paras. Available at: http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1820%20(2008)&Lang=E&Area=UNDOC

[1635] Johan Hederstedt, Transcript 24 June 2008, pp. 109.

population was clearly civilian. Women and girls in villages captured or controlled by the RUF were actively targeted for sexual violence.[1636]

Count 6: Rape as a Crime Against Humanity

529. In the AFRC Trial the Trial Chamber found that:

> 692. The prohibition of the crime of rape in armed conflict is firmly enshrined in customary international law. Rape was proscribed as a crime against humanity in the Allied Control Council Law No. 10 and prosecuted as 'inhuman acts' before the Tokyo Tribunal. Rape as a crime against humanity is found in the statutes of the ICTY, the ICTR and the ICC and has been defined largely through the jurisprudence of the ICTY and the ICTR.[1637]

530. As to the *actus reus* of the crime against humanity of rape, this Chamber held in the Decision on Motion for Acquittal, that the constitutive elements of rape are as follows:

> 1. That the accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim of the accused with a sexual organ, or of the anal or genital opening of a victim with any object or any other part of the body;
>
> 2. That the invasion was committed by force or by threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person, or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;[1638]

531. The Chamber adopted the ICC Elements of Crime for Article 7 (1) (g)-1[1639], of the Rome Statute of the International Criminal Court regarding the crime against humanity of rape, which may be considered as the codification of prior international case law.[1640] This was consistent with the findings of the Trial Chamber in the AFRC Trial[1641] which defined

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[1636] Exhibit 175, HRW Report 1998, p. 18.
[1637] *Brima et al* Trial Judgement, para. 692 (footnotes omitted).
[1638] *Sesay et al* Decision on Motion for Acquittal, p. 21 (lines 27-29).
[1639] ICC Elements of Crimes, p. 119.
[1640] ICC Elements of Crimes, p. 119 (footnote omitted) Footnote 15 clarifies that "It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."
[1641] *Brima et al* Trial Judgement, para. 693: "...the Trial Chamber adopts the following elements of the crime of rape: 1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and 2. The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim And further in para. 694. "Consent of the victim must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape and there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the

the objective elements of rape in accordance with settled international case law.[1642] In *Prosecutor v. Muhimana* the ICTR Trial Chamber found that a broad definition of rape is in accordance with settled international case law.[1643]

532. The general *mens rea* elements to be fulfilled for a crime against humanity are described above in the section on the contextual elements. The evidence adduced will show that the three Accused had the necessary knowledge, or reason to know that RUF combatants under their command systematically raped women and girls.

533. In addition to these general requirements, the requisite *mens rea* for the underlying offence must be established. The perpetrators intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur and that the victim did not consent,[1644] and that they acted knowing that the act formed part of a widespread or systematic attack against a civilian population.[1645] The abundant evidence establishes the legal requirements of the *mens rea* of the direct perpetrators for the crime of rape.

Count 7: Sexual Slavery as a Crime Against Humanity

534. The Prosecution filed a "Public Notice re count 7 of the Indictment" on 29 April 2008, in which it gave notice that "consistent with paragraphs 108(iii) and 109 of the Appeals Chamber Judgement, the Prosecution elects to proceed on the basis that Count 7 of the RUF Indictment should be read to allege the crime of sexual slavery, a crime against humanity, punishable under Article 2.g of the Statute, and that the charge of "any other form of sexual violence" in Count 7 should, with the permission of the Trial Chamber, not

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victim. This is necessarily a contextual assessment. However, in situations of armed conflict or detention, coercion is almost universal. 'Continuous resistance' by the victim, and physical force, or even threat of force by the perpetrator are not required to establish coercion. Children below the age of 14 cannot give valid consent." (footnotes omitted).

[1642] *Kunarac* Appeal Judgement, para. 127; *Furundžija* Trial Judgement, para. 183; *Musema* Trial Judgement, paras. 229, 907, 933, 936; *Niyitegeka* Trial Judgement, para. 456; *Delalić* Trial Judgement, paras. 478-479.

[1643] *Muhimana* Trial Judgement, para. 550: "The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a "physical invasion of a sexual nature", *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape." (footnotes omitted).

[1644] *Sesay et al* Decision on Motion for Acquittal, pp. 21-22.

[1645] *Muhimana* Trial Judgement, para. 530; *Gacumbitsi* Trial Judgement, para. 302; *Semanza* Trial Judgement, para. 332; *Ntagerura* Trial Judgement, para. 698.

be considered."[1646] Count 7 therefore charges the Three Accused only with sexual slavery, a crime against humanity.

i) Actus Reus

535. The prohibition against slavery is a customary norm of international law and the establishment of enslavement as a crime against humanity is firmly established. Sexual slavery is a specific form of slavery.[1647] Thus, slavery for the purpose of sexual abuse is a *jus cogens* prohibition in the same manner as slavery for the purpose of physical labour.[1648] As opposed to other forms of sexual violence, it is the status or condition of being enslaved which gives rise to sexual slavery.[1649] Therefore, the definition of slavery under international criminal law provides useful guidance to characterize the crime of sexual slavery, a particular form of slavery involving acts of a sexual nature.[1650]

536. Trial Chamber II in the AFRC Judgement held that while sexual slavery is not specifically contained in the statutes of the ICTY or the ICTR, the underlying crimes of enslavement and rape are included in both statutes and have been developed through a significant body of jurisprudence, which is reflected in the Rome Statute of the International Criminal Court.[1651] Trial Chamber II consequently adopted the following elements of the crime of sexual slavery, in accordance to the Rome Statute Elements of Crimes:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

[1646] *Prosecutor v. Sesay et al,* SCSL-04-15-T-1105, "Public Notice re count 7 of the Indictment", 29 April 2008, para. 7.
[1647] *Brima et al* Trial Judgement, para. 705 citing the Special Rapporteur on Contemporary forms of Slavery, *Final report on Contemporary forms of Slavery: Systemic rape, sexual slavery and slavery-like practices during armed conflict*, E/CN.4/Sub.2/1998/13, 22 June 1998, at para. 29.
[1648] *Brima et al* Trial Judgement, para. 705 citing the Special Rapporteur on Contemporary Forms of Slavery, *Update to the final report on Systematic rape, sexual slavery and slavery-like practices during armed conflict* E/CN.4/Sub.2/2000/21, 6 June 2000, at para 51.
[1649] Special Rapporteur on rape, sexual slavery and slavery like practices during armed conflict, Update to final report UN Doc E/CN.4/Sub.2/2000/21 6 June 2000, para 50.
[1650] See 1996 ILC Draft Code, *Article 18*, para. 10; 1998 UN Slavery Rapporteur Report, para. 30.
[1651] *Brima et al* Trial Judgement, paras 706-707.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. [1652]

537. This second element would be met when a perpetrator exercised the power of control over sexual access involving rape or any other forms of sexual violence.[1653] The existence of multiple perpetrators is most likely to be the case in this crime.[1654]

538. Notably, Trial Chamber II also held in paragraph 709 of its Judgement that:

> The powers of ownership listed in the first element of sexual slavery are non-exhaustive. There is no requirement for any payment or exchange in order to establish the exercise of ownership. Deprivation of liberty may include extracting forced labour or otherwise reducing a person to servile status. Further, ownership, as indicated by possession, does not require confinement to a particular place but may include situations in which those who are captured remain in the control of their captors because they have no where else to go and fear for their lives. The consent or free will of the victim is absent under conditions of enslavement.

539. The ICTY analyzed the elements of "enslavement" in great detail in the *Kunarac* case and considered different factors as potential *indicia* of enslavement endorsed by the Appeals Chamber[1655], which confirmed that "the *quality* of the relationship between the accused and the victim" was to be taken in account, together with a number of factors to determine that quality. It held further that it is not necessary that the enslavement or deprivation of liberty lasted indefinitely or for a prolonged period of time. The duration of

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[1652] *Brima et al* Trial Judgement, para. 708 (emphasis added) citing Rome Statute Elements of Crimes, Article 7(1)(g)-2. (underlining added)

[1653] The Women's Caucus for Gender Justice had indeed proposed that the Elements require such exercise of power of control over sexual access, Women's Caucus for Gender Justice, Revised proposal for elements under article 8 para. 2 (b) (xxii), 1 (4 August 1999).

[1654] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Cambridge University Press*, 2002, p.329. See also ICC Elements of Crimes, footnote 53.

[1655] *Kunarac* Trial Judgement, paras 542-543: [...] Indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. [...]. Factors [...] to be taken into consideration in determining whether enslavement ... are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. See also *Kunarac* Appeals Judgement, para. 119.

the relationship is one more factor to be taken into account but should be assessed depending "on the particular circumstances of the case".[1656]

540. The Appeals Chamber added that the lack of resistance or consent did not need to be proven as an element of the crime of enslavement, but that it may be "relevant from an evidential point of view" with regard to the question of whether the accused exercised a power attaching to the right of ownership. Circumstances which render it impossible to express consent would be sufficient to presume the absence of consent.[1657].

ii) Mens Rea

541. The *mens rea* is established when the perpetrator committed such conduct intending to engage in the act of sexual slavery, and also when the perpetrator acted in the reasonable knowledge that this was likely to occur.[1658] The Appeals Chamber in *Kunarac* held that, "[i]t is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts".[1659]

Count 8: Other Inhumane Acts as Crime Against Humanity

542. Trial Chamber II adopted the following elements of the crime of other inhumane acts:

> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
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> 2. The act was of a gravity similar to the acts referred to in Article 2(a) to (h) of the Statute; and
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> 3. The perpetrator was aware of the factual circumstances that established the character of the gravity of the act.[1660]

543. In paragraph 699, it held further that:

[1656] *Kunarac* Appeal Judgement, para. 121. See also The 1998 UN Slavery Rapporteur Report, para. 29: "[t]he mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery. In all cases, a subjective, gender-conscious analysis must also be applied in interpreting an enslaved person's reasonable fear of harm or perception of coercion. This is particularly true when the victim is in a combat zone during an armed conflict ... and has been identified as a member of the opposing group or faction"

[1657] *Kunarac* Appeals Judgement , para. 120.

[1658] *Prosecutor v Sesay, Kallon, Gbao*, Oral Decision on Defence Motion for Acquittal Pursuant to Rule 98, Transcript, 25 October 2006, p. 22; *Brima et al* Trial Judgement, para. 708 citing Rome Statute Elements of Crimes, Article 7(1)(g)-2.

[1659] *Kunarac* Appeal Judgement, para. 122.

[1660] *Brima et al* Trial Judgement, para. 698 citing Rome Statute, Elements of Crimes, Article 7(1)(k).

> The seriousness of a particular act or omission and the sufficiency of its gravity must be examined on a case-by-case basis, taking into consideration the personal circumstances of the victim including age, sex and health as well as the physical and mental consequences of the conduct.[1661] The act or omission must have a direct and seriously damaging, though not necessarily long-term, effect on the victim.[1662]

544. As regards the *mens rea*, the Trial Chamber found that it is satisfied where the intent of the perpetrator to inflict serious physical suffering, or serious injury to body or to mental or physical health, or to conduct a serious attack on human dignity, are proved. This includes situations where the perpetrator knew that his acts or omissions would likely cause serious physical suffering, or serious injury to body or to mental or physical health, or constituted a serious attack on human dignity and nevertheless accepted that risk.[1663]

545. In the Indictment, forced marriage, as an 'other inhumane act' is classified under sexual violence. The Appeals Chamber emphasised that it did not "see [any] reason why the so-called 'exhaustive' listing of sexual crimes under Article 2.g of the Statute should foreclose the possibility of charging as 'Other Inhumane Acts' crimes which may among others have a sexual or gender component."[1664]

546. The question as to whether forced marriage amounted to an "Other Inhumane Act" was settled by the Appeals Chamber, which found that "Other Inhumane Act" as embodied in Article 2 (i) of the Statute was part of customary international law.[1665] The Appeals Chamber analysed the requirements of the notion of "Other Inhumane Act", particularly the mental and physical suffering caused by forced marriages:

> The Appeals Chamber finds that the evidence before the Trial Chamber established that victims of forced marriage endured physical injury by being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty. Many were psychologically traumatised by being forced to watch the killing or mutilation of close family members, before becoming "wives" to those who committed these atrocities and from being labelled rebel "wives" which resulted in them being ostracised from their communities. In cases where they became

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[1661] *Kayishema* Trial Judgement, para. 148-151; *Čelebići* Trial Judgement, para. 536; *Kunarac* Trial Judgement, para. 504.
[1662] *Kunarac* Trial Judgement, para. 501; *Krnojelac* Trial Judgement, para. 144.
[1663] *Brima et al* Trial Judgement, para. 700 citing *Vasiljević* Trial Judgement, para. 236; *Aleksovski* Trial Judgement, para. 56; *Kayishema* Trial Judgement, para. 153.
[1664] *Brima et al* Appeal Judgement, para. 186.
[1665] *Brima et al* Appeal Judgement, para. 197 citing *Stakić* Appeal Judgment, para. 315; *Blagojević* Trial Judgment, para. 624.

> pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation.[1666]

547. After having carefully assessed the gravity of forced marriage in the Sierra Leone conflict, the Appeals Chamber concluded that it was "firmly of the view that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence."[1667]

548. The Appeals Chamber also settled the law with respect to the crime of forced marriage itself.[1668] It considered it be a crime distinct from the crime against humanity of sexual slavery and accepted that forced marriage consists of "words or other conduct intended to confer a status of marriage by force or threat of force . . . with the intention of conferring the status of marriage."[1669] Contrary to the crime of sexual slavery, the relationship of the perpetrators to their "wives" is not limited to one of ownership. Furthermore, while acts of forced marriage may in certain circumstances amount to sexual slavery, in practice they do not always involve the victim being subjected to non-consensual sex or even forced domestic labour. It is settled law that forced marriage is not predominantly a sexual crime, as recognized by the Appeals Chamber.[1670]

549. Forced marriage actually differs from sexual crimes, particularly sexual slavery, because of the imposition of a "forced conjugal association by the perpetrator over the victim"[1671], a distinctive element which was endorsed by the Appeals Chamber in its analysis of the Trial Chamber's findings relating to forced marriage. The Appeals Chamber considered that the trial record showed that the intention of the perpetrators was the imposition of a forced conjugal association rather than the exercise of mere ownership over

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[1666] *Brima et al* Appeal Judgement, para. 199. The Appeals Chamber also referred to the Partly Dissenting Opinion of Justice Doherty, para. 53 in which she considered that forced marriage qualified as an "Other Inhumane Acts" causing mental and moral suffering, which in the context of the Sierra Leone conflict, is of comparable seriousness to the other crimes against humanity listed in the Statute. See also paras 48 and 51 stating that "[s]erious psychological and moral injury follows forced marriage. Women and girls are forced to associate with and in some cases live together with men whom they may fear or despise. Further, the label 'wife' may stigmatise the victims and lead to their rejection by their families and community, negatively impacting their ability to reintegrate into society and thereby prolonging their mental trauma."
[1667] *Brima et al* Appeal Judgement, para. 200. See generally paras 197-201.
[1668] *Brima et al* Appeal Judgement, para. 195-196.
[1669] *Brima et al* Prosecution Appeal Brief, para. 612.
[1670] *Brima et al* Appeal Judgement, para. 190.
[1671] See also *Brima et al* Prosecution Appeal Brief, para. 614.

civilian women and girls.[1672] It then addressed the distinctions between the crime of forced marriage and that of sexual slavery:

> Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery.[1673]
>
> Accordingly, the Appeals Chamber adopted a definition of forced marriage as 'an other inhumane act' which reads as follows:
>
> In light of the distinctions between forced marriage and sexual slavery, the Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.[1674]

550. Finally, the Appeals Chamber referred to the Concurring and Partly dissenting Opinions of respectively Justices Sebutinde and Doherty, in which "a clear and convincing distinction [was made] between forced marriages in a war context and the peacetime practice of 'arranged marriages' among certain traditional communities." They both concluded that arranged marriages were "not to be equated to or confused with forced marriage during armed conflict".[1675] The Appeals Chamber agreed with Justice Sebutinde in that forced marriages, as opposed to arranged marriages in violation of human rights

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[1672] *Brima et al* Appeal Judgement, para. 192.
[1673] *Brima et al* Appeal Judgement, para. 195 (emphasis added).
[1674] *Brima et al* Appeal Judgement, para. 196
[1675] *Brima et al* Appeal Judgement, para. 194, citing Sebutinde Separate Concurring Opinion, paras 10 and 12. Doherty Partly Dissenting Opinion, para. 36.

standards, were criminal in nature, since they involved the abduction and detention of women and girls and their use for sexual and other purposes.[1676]

Count 9: Outrages upon Personal Dignity as Violation of Common Article 3 and Protocol II

551. The Trial Chamber in the AFRC case found that the "crime of outrages upon personal dignity must be interpreted in light of the purpose behind Common Article 3",which is "to uphold the inherent human dignity of the individual" and concluded that the offences subsumed under outrages against personal dignity constitutes a "non-exhaustive list of conduct" including, but not limited to, humiliating and degrading treatment, rape, enforced prostitution and indecent assaults of any kind.[1677]

i) Chapeau Elements

552. The circumstantial elements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II had been discussed above in section IV (C), above. In relation to the crimes of sexual violence some specifications are however necessary. As for the nexus requirement, the evidence shows that the perpetrators in their majority were *combatants*. They often identified themselves as RUF or AFRC combatants or were clearly identifiable as such, since they were wearing uniforms and arms.[1678] Rapes and other forms of sexual violence often occurred following or within military attacks and the pattern of sexual crimes used throughout the conflict in Sierra Leone indicated that sexual violence was part of the military campaign led by the RUF against civilians.[1679] Further, the victims of the sexual violence were civilians. The RUF targeted women and

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[1676] *Brima et al* Appeal Judgement, para. 194; Sebutinde Separate Concurring Opinion, para. 12. Indeed, many international treaties and conventions, such as the International Covenant of Civil and Political Rights, declare that forcing a person to marry another against his or her will is a violation of human rights. See Universal Declaration of Human Rights, Article 16(2); International Covenant on Civil and Political Rights, Article 23(2); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Articles 5.1, 6(a) and 7; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Article 1(1).

[1677] *Brima et al* Trial Judgement, para. 716 (footnotes omitted), referring to *Aleksovski* Appeal Judgement, para. 56 and the ICRC Commentary, on Common Article 3.

[1678] TF1-192, Transcript 1 February 2005, pp. 60-61; TF1-195, Transcript 1 February 2005, pp. 24-26; TF1-196, Transcript 13 July 2004, p. 21; Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 5, 7, 15-16.

[1679] [redacted]; TF1-192, Transcript 1 February 2005, pp. 62-64; TF1-192, Transcript 1 February 2005, pp. 60-61.; TF1-214, Transcript 14 July 2004, pp. 21-24; TF1-199, Transcript 20 July 2004, pp. 29-30; TF1-196, Transcript 13 July 2004, p. 21; TF1-031, Transcript 17 March 2006, p. 80; TF1-093, Transcript 29 November 2005, Closed Session, p. 93.

girls who took no active or direct part in the hostilities, and were thus protected persons under Article 3 Common to the Geneva Conventions and of Additional Protocol II.[1680]

ii) Actus Reus

553. In addition to the chapeau requirements discussed in section xx above, the Trial Chamber adopted the following elements of the war crime of outrages upon personal dignity in accordance with the ICC Elements of Crime[1681] for article 8(2)(c)(ii) of the Rome Statute of the International Criminal Court, as follows:

1. That the accused humiliated, degraded or otherwise violated the dignity of one or more persons;
2. That the severity of the humiliation, degradation or other violation was of such a degree as to be generally recognised as an outrage upon personal dignity;
3. The accused intended to humiliate, degrade or otherwise violate the dignity of the person or acted in the reasonable knowledge that this was likely to occur.[1682]

ii) Mens Rea

554. As regards the *mens rea* element, the Trial Chamber in the AFRC case held that "[t]he perpetrator intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity"; and that "[t]he perpetrator knew that the act or omission could have such an effect.[1683]

B. Evidence

555. Widespread sexual violence committed against civilian women and girls included brutal rapes, often by multiple rapists, and forced "marriages".[1684] Women and girls were

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[1680] Common Article 3; Article 4(1) of Additional Protocol II; *Tadić* Trial Judgement, para. 616.
[1681] ICC Elements of Crimes, p. 146. Although the wording of the ICC Elements of Crime in para. 3 is different, but in accordance with the wording of Common Article 3, and reads as follows: "Such person or persons were either *hors de combat,* or were civilians, medical personnel or religious personnel taking no active part in the hostilities." Further, para. 4 reads consequently: "4. The perpetrator was aware of the factual circumstances that established this status." And para 5 and 6 additionally read as follows: "5. The conduct took place in the context of and was associated with an armed conflict not of an international character.; 6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."
[1682] *Sesay et al* Decision on Motion for Acquittal, p. 23.
[1683] *Brima et al* Trial Judgement, para. 715.
[1684] Indictment, para. 54.

the primary targets of widespread rape, sexual slavery, and other forms of sexual violence. The oral evidence confirms several reports by different human rights organisations which repeatedly stated that "... sexual violence has been widespread, against thousands of women and girls. Furthermore, no comprehensive medical statistics have been compiled on rape-related injuries or on pregnancies as a result of rape. Those who have witnessed, or endured and survived these and other atrocities are suffering enormous psychological trauma."[1685]

a) Evidence Applicable to All Crime Bases

i) Evidence on Sexual Violence in General

556. It has been well documented throughout the course of the war that the rebels engaged in rape and other forms of sexual violence against the civilian population of Sierra Leone.[1686] Several reports documented the sexual violence committed by the rebels in various parts of Sierra Leone, including Kono[1687] and in Freetown and the surrounding areas during the January invasion.[1688] The NGO Human Rights Watch ("HRW") estimated that between February and June 1998 only, thousands of women and girls had been raped by members of the AFRC/RUF.[1689] They were the primary targets of widespread rape, sexual slavery, and other forms of sexual violence.[1690]

557. [redacted] The report produced at the end of the project indicates that the medical team treated 1168 rebel abductees between March and December 1999, 77% of whom were females. 58.5% of the victims treated had been sexually abused or raped and 52% had

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[1685] Exhibit 175, HRW Report 1998, p. 17.
[1686] Exhibit 159, First UNOMSIL Report, 1998, para. 36., Exhibit 162, Fourth UNOMSIL Report 1998, para 32., Exhibit 173, Fourth Secretary-General Report on UNAMSIL, para. 45.
[1687] Exhibit 175, HRW Report, 1998, pp. 17-19, 21 (19450-19452, 19454).
[1688] Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 6 (19046), Exhibit 174, HRW Report, 1999, p.34 (19402).
[1689] Exhibit 175, HRW Report 1998, p. 17 (19450). "Women and girls are frequently abducted individually or collectively and kept as so-called "wives" for members of the AFRC/RUF. Some suffer rape or gang rape multiple times as they escape one AFRC/RUF group, only to be caught by another. Rape is also used as an immediate punishment for refusing to follow instructions or in retaliation for the acts of others held in captivity."
[1690] Exhibit 175, HRW Report 1998, pp. 17-18 (19450-19451).
[1691] Exhibit 104a, TF1-081, Transcript from AFRC Trial, Transcript 4 July 2005, pp. 5-6.

sexually transmitted diseases.[1692] The report also states that 99% of the patients were abducted.[1693] There were 200 sexual victims who were pregnant and more than 80% of them were teenagers aged 14 to 18 years old.[1694] [redacted] surgeries were performed on two victims who had been gang raped. One such victim was gang raped by as many as 30 men before passing out, while the second was able to count 15 men before losing consciousness.[1696] Some of the girls said that they were married in the bush.[1697]

[redacted]

559. TF1-174 testified that [redacted], the youngest age of a rape victim that he encountered, was 9 or 10.[1700] Some of the children [redacted], involved with the RUF, reported that they had raped when participating in attacks with the RUF.[1701]

[redacted]

and above had received military training, fought along with their commanders and committed rapes.[1705]

[redacted]

561. [redacted] The number of female children would range from 45 to 100.[1711] During counselling sessions, children would sometimes be divided on the basis of gender, because girls were generally ashamed to talk about their experiences in the presence of boys.[1712] A lot of girls said that they had been raped.[1713] [redacted] the girls who were pregnant and the ones who were breastfeeding mothers were part of the same group, tagged girl mothers, and were receiving separate counselling. A few children aged 5 and below were also brought to the centre along with "girl mothers", who had been impregnated by their commanders during their stay with them. These "girl mothers" specifically told [redacted] that they had not consented to a relationship with their commanders and that they had no option when they were captured.[1714] [redacted]r that these girls were not married before their capture and were "married" to the commanders who had captured them. Some "husband commanders" would

[1705] TF1-174, Transcript 21 March 2006, p.48.
[1706] TF1-174, Transcript 21 March 2006, pp. 48-49.
[1707] TF1-174, Transcript 21 March 2006, p. 49 (lines 25-29) and p. 50 (lines 1-2).
[1708] TF1-174, Transcript 21 March 2006, p. 71 and Transcript 27 March 2006, pp. 66-67.
[1709] TF1-174, Transcript 21 March 2006, p. 30.
[1710] TF1-174, Transcript 21 March 2006, p. 32.
[1711] TF1-174, Transcript 21 March 2006, pp. 33-34.
[1712] TF1-174, Transcript 21 March 2006, p. 31; TF1-174, Transcript 27 March 2006, p. 58.
[1713] TF1-174, Transcript 21 March 2006, pp. 34-35.
[1714] TF1-174, Transcript 21 March 2006, pp. 33-35.

frequently come to [redacted] very often to try to take back their wives.[1715] The girl mothers were aged between 13 and 18 years, but the majority of them were actually between 15 and 16 years old.[1716] While some of the girls were actual trained fighters who participated in attacks, the majority of the girls were housewives who performed the duties of wives towards their husband commanders.[1717] A medical screening was performed by [redacted] and the most frequent diseases detected among children [redacted] were STD's.[1718] [redacted] the youngest to have participated in a rape was a 14 year old child who served in the RUF ranks for 5 years. This young RUF recruit told the witness that he committed rape as the RUF attacked communities moving from one village to the other.[1720]

562. [redacted] At one point, there were over 100 girls, from both categories, namely girl mothers and girls captured by the forces. Their age ranged from infants to 18 year old, although the age group between 13 and 15 years was in the majority.[1722] [redacted], the youngest girl he encountered who had been raped was a 10 year old girl who had stayed with the RUF for 2 years.[1723]

ii) Specific Evidence on Forced Marriage

563. The "Expert Report on the phenomenon of 'forced marriage' in the context of the conflict in Sierra Leone" ("**Report**") and the accompanying expert testimony of expert witness [redacted] provide evidence on the phenomenon of forced marriage, and evidence as to its extent during the conflict and its consequences. The Report states that during the war

[1715] TF1-174, Transcript 21 March 2006, p. 35.
[1716] TF1-174, Transcript 21 March 2006, p. 35 (lines 18-22).
[1717] TF1-174, Transcript 21 March 2006, p. 36.
[1718] TF1-174, Transcript 21 March 2006, p. 36 (lines 1-7).
[1719] TF1-174, Transcript 21 March 2006, p. 36 (line 15-24).
[1720] TF1-174, Transcript 21 March 2006, p. 39.
[1721] TF1-174, Transcript 20 March 2006, p. 88; TF1-174, Transcript 21 March 2006, p. 67.
[1722] TF1-174, Transcript 21 March 2006, pp. 67-68.
[1723] TF1-174, Transcript 21 March 2006, pp. 69-70.

in Sierra Leone, women and girls were targeted, abducted, gang raped, and used as sex slaves or made bush wives, captured and forced to be the wives of rebels.[1724]

564. The Report describes the practice of early or arranged marriages in Sierra Leone in times of peace, as well as its legal, social and religious framework. It then stresses the significant difference between such practice and forced marriages as they occurred during the war.[1725] Notably, one of the main features of early/arranged marriages is that "during the whole process [...], the consent and participation of both families is paramount. Several witnesses are also required for religious or traditional ceremonies."[1726] This is to be contrasted with forced marriages during the war where, "family members were not involved in the arrangement of the latter so-called marriage, no official ceremony of any form took place and the consent of the parents was not sought. Instead, girls were forcefully abducted [...] and taken to the bush where they were informed that they had become 'wives'.[1727] Forced marriage inflicted upon girls and women by members of the RUF during the armed conflict was not comparable to traditional arranged marriages.

565. The Report emphasised that the mere statement "You na me wife", meaning "You are my wife" marked the beginning of the relationship and identified the woman as the rebel's wife.[1728] The term 'wife' could have such meaning and impact during the conflict, only because it conveyed the image of marriage. This was confirmed by the perception of the women themselves, who referred to themselves with the terms "bush wife", "jungle wife" or "rebel wife" to describe their own position.[1729]

566. The Report emphasizes further that the rejection by the community faced by many "bush wives" is one of the worst experiences that an individual can face in Sierra Leone,

[redacted] See also Exhibit 180, Women Waging Peace and the Policy Commission "From Combat to Community: Women and Girls of Sierra Leone", Dyan Mazurana and Kristopher Karlson [p. 12-14 (19782-19784)], ("**Women Waging Peace Report**"), p. 19782. According to their study, 60 % of the women and girls in the RUF and the AFRC forces were "wives".

[redacted]

[1728] Exhibit 139 A, TF1-369, Transcript from AFRC Trial, 3 October 2005, p. 52; TF1-369, Transcript 26 July 2006, p. 98 (lines 14-20).

[redacted]

because the "value of the extended family system which provides social safety networks, protection and the sense of belonging to a family or community is a critical factor in Sierra Leone." Besides the breakdown of family ties, the Report also demonstrates the severe physical, psychological and sexual abuse endured by bush wives, causing them serious long-term trauma.[1730] The perception of the communities and the family entails systematic stigmatisation and rejection upon the wives' return into their communities.[1731] Communities believed that any person who lived with a rebel longer than a day becomes tainted and acquires "rebel behaviour". Victims were therefore ashamed to disclose their status.[1732] Due to this stigmatization, most bush wives encountered problems with successfully reintegrating back into their communities and families.[1733] The Report finally addressed the reason for which a lot of 'bush wives' had decided to stay with their 'rebel husband' after the war and explained that they stayed for economic concerns rather than as a matter of choice. Those with children feared that no other man would marry them and accept their 'rebel children'.[1734]

567. TF1-366, testified that they would capture women and bring them back to the base. He said that women were forcefully married, explaining that combatants would turn women into wives and would have sex with them. Women would not dare to say no. Both the First and the Second Accused married women who had been captured. The Second Accused had up to two or three such wives. [redacted] The witness would implement these orders by ordering his boys to go and capture women, so that he

[redacted]

could then take them to the Second Accused.[1735] The witness also saw the First Accused with many such wives from 1991, 1992, 1996 up to 2002. He had two steady ones which he moved around with and which were forced to have sex with him whether they liked it or not.[1736] The Third Accused, Superman, and even Foday Sankoh had captured women. The Third Accused had wives in Makeni, Mendebuema, Kailahun, Makali and Masingbi. the witness testified that every commander in the RUF had wives in forced marriages.[1737] He also described how these "wives" had sometimes been used for military purposes.[1738]

568. TF1-045, described the term "bush wife" as follows: "When you capture a woman, there are no formalities in terms of marriage. You take her. It is not for anything but to use her as a woman, your wife. That is what I mean by bush wife."[1739]

b) Kono District

i) Insider Witnesses

569. TF1-141, a former child soldier, testified that he stayed at Opera for about 14 - 15 days, where he saw the First and Second Accused , Colonel Banya, Superman and Rambo.[1740] He said that while in Koidu Town, RUF patrol teams would capture civilians from the bush and bring them to town, including women who were used as wives and cooks, mostly by commanders.[1741] Later, while he was at Guinea Highway, he was sent on food finding missions by the Second Accused who was in charge of the ground where his group was. Some combatants would rape women, capture them and bring them to town. Sometimes fighters also took these women as their wives. When the witness went on food finding missions, he and his group would bring many women. He said that the Second Accused took a young girl as his wife and that other commanders were doing the same.[1742]

[1735] TF1-366, Transcript 8 November 2005, Closed Session, pp. 72-74.
[1736] TF1-366, Transcript 8 November 2005, Closed Session, p. 74.
[1737] TF1-366, Transcript 17 November 2005, Closed Session, p. 107.
[1738] "The women, Morris Kallon took them to the front line and placed them at the checkpoint, forcefully. He was the first person we saw that took women to the front line, where many of them died. That was their own job. We called them "wives". Many of them were promoted from within the ranks of captain to major." TF1-366, Transcript 8 November 2005, Closed Session, p. 71 (lines 6-11).
[1739] TF1-045, Transcript 21 November 2005, p. 37 (lines 28- 29) and p. 38 (line 1).
[1740] TF1-141, Transcript 11 April 2005, pp. 88-89.
[1741] TF1-141, Transcript 11 April 2005, p. 83.
[1742] TF1-141, Transcript 11 April 2005, pp. 90-95.

570. TF1-362 testified that there were different platoons in [redacted], including a wives platoon which had women aged from 18 to 37 years old.[1743] The [redacted] The witness reported to the First Accused.[1745] Captured wives were sent [redacted] for training. [redacted] commanders who sent women [redacted] for training to send them back to them after their training. Notably, she said that she did not think that anything would happen to the women when they were sent back to the commanders, since "they took them as their wives".[1746] [redacted] it was the same situation for women when the training base was in Bunumbu, Kailahun District: they would be taken back to the commanders as their wives.[1747] [redacted] that SGU's were trained to serve commanders at home.[1748] Captured women who were approached by armed RUF soldiers could not refuse them.[1749] She explained that the victims of rape had no power and did not have the courage to report those offences, especially given that sometimes rapes were being committed by high ranking commanders.[1750] "When you are a civilian and an armed man approaches you saying that he want you, you cannot deny, you just have to agree."[1751]

571. TF1-071, who arrived in Koidu Town in March 1998[1752], testified that the taking of women was most effective in Kono district, particularly from Sewafe up to Koidu. Women were abducted and taken away from their husbands, parents and home villages. The witness described abductions as "a forced arrangement" since women had to go along, whether they wanted or not. The witness saw such abductions happening in 1998 in Kono, where women were taken in villages occupied by the rebels or visited by them on food-finding missions. Some women were used for cooking, while some were used for forced marriages

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[1743] TF1-362, Transcript 22 April 2005, pp. 19-20.
1744 TF1-362, Transcript 22 April 2005, pp. 12-13.
[1745] TF1-362, Transcript 22 April 2005, pp. 4-5.
[1746] TF1-362, Transcript 22 April 2005, pp. 26-28.
[redacted]
[1748] TF1-362, Transcript 22 April 2005, p. 27 (line 29).
[1749] TF1-362, Transcript 22 April 2005, pp. 41-42.
[1750] TF1-362, Transcript 26 April 2005, pp.87-89.
[1751] TF1-362, Transcript 22 April 2005, Closed Session, p. 41 (lines 17-18).
[1752] TF1-071, Transcript 19 January 2005, p. 40.

and others were raped.[1753] DIS-089 testified that he had heard that as the RUF retreated back to Kono, a good number of civilians were abducted and many women were raped.[1754]

ii) Victim Witnesses

572. TF1-217, testified that in February 1998, Junta forces entered Koidu Town. He saw the Junta fighters going from house to house, knocking at doors and committing atrocities, including raping young women, girls and children. The witness knew that rape occurred on a regular basis since he went to the hospital, where he met young women who had been raped. The Junta commanders present in Koidu Town at that time were Lieutenant Tee, Captain Bai Bureh, Komba Gbundema, the area Mining Commander and Bockarie. When a rebel group led by Akim drove the Kamajors out of Koidu, the witness and his family had to run away to Wendedu with many other civilians.[1755] In Wendedu, the Junta forces abducted his 16 year old sister and she was given as a wife to Captain Bai Bureh[1756] The witness met his sister again only after the disarmament.[1757] In Wendedu he saw Captain Bai Bureh, accompanied by lots of rebels and juntas in five Land Rover trucks carrying girls, which he estimated to be between 13 and 16 years old; one of whom was weeping.[1758]

573. TF1-217 also remembered events from April 1998 in Penduma.[1759] The AFRC forces[1760] under Colonel Staff Alhaji, surrounded the village, firing at people, and captured his wife and other civilians. Staff Alhaji separated them in three groups: the pregnant and breastfeeding mothers, the other women and the men.[1761] Combatants under Staff Alhaji's orders started to pick women and rape them, either right outside in front of other civilians

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[1753] TF1-071, Transcript 19 January 2005, pp. 37-39.
[1754] DIS-089, Transcript 29 February 2008, p. 93.
[1755] TF1-217, Transcript 22 July 2004, pp. 8-11.
[1756] TF1-217, Transcript 22 July 2004, p. 12 (lines 3-10): "...the junta boys, they captured my younger sister. They said, "This is Captain Bai Bureh's wife." They took her to Bai Bureh, then they said "Yes, this is a beautiful lady." I went to beg so that my sister could be released; they didn't agree. Then they asked me, "Your life, your sister, which of the two do you want?" Then I said "My life." Then my sister said, "Brother go." Then I left there."
[1757] TF1-217, Transcript 22 July 2004, p. 13.
[1758] TF1-217, Transcript 22 July 2004, pp. 11-13.
[1759] TF1-217, Transcript 22 July 2004, p. 15.
[1760] TF1-217, Transcript 22 July 2004, pp. 29-30. In Cross-examination, the Witness said that Staff Alhaji was a soldier and agreed that the combatants responsible for what happened to his wife were juntas acting separately from the rebels.
[1761] TF1-217, Transcript 22 July 2004, p. 16.

or inside the houses. His own wife was raped by eight combatants while he was forced to watch at gunpoint. He describes how he witnessed the rape:

> But Staff Alhaji told ... me that he does not know how to do this thing no -- "Now come and look how my boys can do." There are eight of his boys that raped my wife in my presence where I -- in my presence, where I stood.[1762]
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> ... they only told me that I don't know how to do it, they knew how to do it, they were laughing, they shouted.
>
> Some of them, they bow her down, some of them laid her down and take the feet up. This is how they raped my wife.[1763]

574. The witness was forced to count the men raping his wife. His three children, aged 19, 5 and 9 were forced to watch as well. After the gang rape, she was killed in the presence of the witness and her three children. Other women, who had been raped, were killed as well. Staff Alhaji was sitting on the root of a big tree and gave the orders for all that happened. The witness knew two of perpetrators, [redacted].[1764]

575. TF1-064, a farmer from Foendor, fled with her family between the dry and the rainy season and hid in the bush, since the rebels were coming. She gave birth to her child in the bush. One week later, the witness was caught by rebels near Foendor together with her family and other civilians. [redacted] one of the captors, Tamba Joe, who was from Foendor and knew her husband. The rebels asked her husband's sister who was with them to take down her pants and put a knife into her genitals. She begged but a rebel tried to push the knife deeper. One woman who had a little child holding onto her skirt was told to enter one of the houses so that they could have sex with her. Tamba Joe told the girl not to take the little child. The witness did not see this woman again.[1765] The rebel came back and told the witness to have sex with one of the abductees. She refused because she was a young nursing mother. They took a whip and started flogging the man and the witness and forced

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[1762] TF1-217, Transcript 22 July 2004, pp. 17-19 and 24, especially p. 17 (lines 26-29). HRW confirmed in its report on violence in the Sierra Leonean conflict, that "[m]any rapes were committed in full view of other rebels and civilians." And: "[c]hild combatants also raped women who could have been their mothers or in some instances even their grandmothers." Exhibit 146, HRW Report on Sexual Violence, pp. 35-36.
[1763] TF1-217, Transcript 22 July 2004, p. 19 (lines 9 -10) and (lines 16- 17).
[1764] TF1-217, Transcript 22 July 2004, pp. 18-20 and 23. HRW has written in its 1998 report, that "[t]he crimes of sexual violence committed by the AFRC/RUF against women and girls are often accompanied by other forms of violence." And "Often, the rapes occur in front of family members and others, and in some cases relatives are forced to rape their sisters, mothers or daughters." Exhibit 175, HRW Report 1998, p. 19450.
[1765] TF1-064, Transcript 19 July 2004, pp. 46-48.

her to have sex with him.[1766]. "They cut me and they spread my legs away and parted my legs and they asked the man to start making love to - sex with me." Her little child witnessed all that and was flogged when crying.[1767]

576. The group of civilians was then forced to walk to Foendor, where her two boys were taken away from the witness. All civilians were forced to undress and locked in a house.[1768] When they were released the witness saw that her children were killed. All the other civilians were killed as well, except the witness and a Temne boy, who was killed later, after they were both forced to walk to Tombodu. There, the witness saw the heads of her two little boys.[1769] An argument arose between [redacted] who wanted to kill the [redacted], and a Kissy man to whom the witness ran for protection. They finally did not kill her, but asked her to identify a husband amongst the rebels. The witness said:

> I tried to identify some and they said they don't want me, so they themselves identified a husband for me. In fact, at that time I was just a new nursing mother, my condition was terrible, and I was very unsightly.
>
> They brought an old man and they said he is my husband and I am his wife. ... the old man asked me to go with him to his house. ... When we were in his house at night he asked me to have sex with him so I told the old man, "Oh, old man, won't you sympathise with my condition," and I did not agree. ..., he said he was going to bring my complaints to their boss man, and I knew if the complaint went to the boss man that would be the end of my life, so in the morning I gathered all his belongings that were to be washed and I washed them so that he did not complain me to the boss man any more.[1770]

577. TF1-064 finally managed to escape, met her family in Koakoyima, where she received medical treatment. She also met her first husband, who had another wife. She followed them to Bo, where he left her. The witness then went back to her aunt.[1771]

578. TF1-305, a young girl who had just come from the initiation bush[1772], fled to the bush with her parents from her home village in Kono District, two weeks after the New

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[1766] TF1-064, Transcript 19 July 2004, pp. 48-49. See also Exhibit 146, HRW Report on Sexual Violence, p. 35, where HRW stressed that "[i]n Sierra Leone, postmenopausal and breastfeeding women are presumed not to be sexually active, but rebels violated this cultural norm by raping old women and breastfeeding mothers."
[1767] TF1-064, Transcript 9 July 2004, p. 49 (lines 17-23).
[1768] TF1-064, Transcript 19 July 2004, pp. 49- 51.
[1769] TF1-064, Transcript 19 July 2004, pp. 51-53 and 55- 58.
[1770] TF1-064, Transcript 19 July 2004, pp. 59, 66-67 (lines 22-36).
[1771] TF1-064, 19 July 2004, pp. 67-68.

Year's celebration when they heard shootings. Two weeks later, they were caught by rebels.[1773] Eight rebels took her behind a hut and gang raped her:

> Each one of them took turns in raping me. I could just lay there and I saw one of them come and take his clothes off and make sex to me. After all of these guys had made sex to me, I just was lying there as if I was in the hands of death itself, and I was bleeding profusely.[1774]

579. The witness heard the rebels calling each other various names, such as Killer, Copul, RUF and Liberia Boy. She was seriously injured pursuant to the gang rape[1775] and finally was provided treatment in an IDP camp in Kenema. She expressed her feelings: "At that time I was very, very much ashamed. I was unable to appear in public or even speak about what happened to me in public to anybody."[1776] She had to undergo surgery three times, once in Kenema, then in Bo and finally the last one in Freetown. She said that she was still not quite well when appearing before Court.[1777]

580. TF1-016 testified that she was living in Koidu but had to flee to Guinea because rebels were arriving from Freetown.[1778] Upon her return, she and her family, including her 11-year old daughter were captured by ten rebels who identified themselves as members of the RUF.[1779] The civilians were forced to go to Kissi Town, where the rebels distributed the female captives among themselves saying "this is my own wife". The witness explained that both she and her daughter were "given to a man as wives". She was given to [redacted] She never consented to being his wife, although she had to

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[1772] TF1-305, Transcript 27 July 2004, pp. 56-57. She could not say, how old she was exactly but stated: Our own people -- they don't take it by years, they only look at your growth. When your breast are full and they say, "This is big enough. Let's put her into the society."", p. 56.
[1773] TF1-305, Transcript 27 July 2004, 53-56. They explicitly said: "We are rebels at this moment, we are in charge of the government", p. 54 (lines 21-24).
[1774] TF1-305, Transcript 27 July 2004, p. 55 (lines 19-20) and p. 56 (lines 14-15).
[1775] TF1-305, Transcript 27 July 2004, pp. 57 (lines 22-27): "... they took all our property with them. When they went, my mother went and picked me up. I couldn't stand. My mother took me and placed me down and put the pot over the fire to boil some water. When the water was hot, she placed it down to cool down a bit and she put some quantity of salt in it and placed me in it. So even though I sat in there, still, I was bleeding. I bled for three days. When I stopped bleeding, at that time I no longer felt like I wanted to urinate; I urinated without even noticing it."
[1776] TF1-305, Transcript 27 July 2004, pp. 59-60, especially p. 59
[1777] TF1-305, Transcript 27 July 2004, p. 78.
[1778] TF1-016, Transcript 21 October 2004, p. 8.
[1779] TF1-016, Transcript 21 October 2004, pp. 5-7.

live with him in the same house.[1780] The witness stated that "he had sex with [her] to his satisfaction, [...] even when I was in my menstrual period" and "he will do it regular, everyday". She also made it clear that she complained about it.[1781] She also had to perform all the domestic chores for him, namely cook for him and other people, do the laundry, clean and do everything in the house, prepare palm fruits and pound the rice. She said: "I used to do all this work up to an extent my hands were all blistered".[1782] The witness expressed how she felt having been given forcibly to a man as a wife and said: "I didn't feel good, because somebody who is not your legal husband. I was not happy at all".[1783] The head of the rebels, [redacted], was also living in the house and was always armed. She was afraid to attempt to go anywhere because she feared repercussions.[1784]

581. After spending a month in Kissi Town, she left for Njagbema, where she still had to stay with her [redacted] and work for him the same way she did when they were staying in Kissi Town. She reported that he was still having regular sexual intercourse with her.[1785] [redacted] joined her in Njagbema and the witness learnt from her that Alpha had raped her. The witness told her daughter to be patient and explained to her that "this is the war and we don't have nothing to do".[1786] [redacted] altogether she was held captive and had to live with [redacted] for a period of one year and three months. She added that she never attempted to escape because there were so many rebels around and because she was afraid to get caught and held by another group. Consequently, she said "So, I decided to stay with him". The witness remembered that following the attempt of captives to run away from Kissi Town, she was summoned, accused to have talked with them and threatened to be killed.[1787]

[1780] TF1-016, Transcript 21 October 2004, pp. 13-15. The witness agreed with the Defence's proposition that [redacted] was a civilian, but she then added that he was working for the RUF and behaved like them. TF1-016, Transcript 21 October 2004, pp. 23-24.
[1781] TF1-016, Transcript 21 October 2004, p. 16 (line 28) and p. 17 (line 1).
[1782] TF1-016, Transcript 21 October 2004, p. 16. Based on direct interviews conducted by the expert witness, the Report detailed the various functions that a bush wife was expected to perform, namely all the functions of a wife and even more. Those encompass, among others, carrying the husband's possessions, cooking, gratifying his sexual wishes and following him across the countryside (See Exhibit 138, Expert Report Forced Marriage, p. 12097).
[1783] TF1-016, Transcript 21 October 2004, p. 17 (lines 2-5).
[1784] TF1-016, Transcript 21 October 2004, p. 17
[1785] TF1-016, Transcript 21 October 2004, p. 18.
[1786] TF1-016, Transcript 21 October 2004, p. 19.
[1787] TF1-016, Transcript 21 October 2004, p. 20.

582. TF1-197 testified that, after the announcement that ECOMOG had reached Koidu Town, when captured around Tombodu, he saw Staff Alhaji raping a woman in front of him and other captives. He pointed a gun at the ear of a woman carrying a child, touched her private part, ordered her to undress and to lie down and then had sex with her in front of everyone present.[1788]

583. TF1-192 testified that his village, Bomboafuidu was attacked at the beginning of the 1998 rainy season.[1789] The witness came back from the bush when the ECOMOG troops arrived and the village was attacked shortly thereafter by about 50 armed men, most in combat uniform.[1790] He and 20 other civilians from the village were captured and ordered to undress. Male and female captives were then paired up and ordered to have sex with each other.[1791] The sexual violence was combined with sexual mutilations,[1792] and one of the female captives had a pistol thrust into her vagina by the attackers, which was there until the morning, as the witness saw it himself the next morning.[1793]

584. TF1-195, left Tongo, where she lived with her husband and four children,[1794] for Kainako, near Gandorhun, with her husband and his younger brother. She was on her way to Koidu, when she heard that Kamajors had come to Koidu.[1795] The witness then ran to hide in the bush, together with a lot of other civilians.[1796] After about three weeks in the bush, she saw vehicles passing by and heard that it was Johnny Paul Koroma going towards Guinea end.[1797] The witness was caught by two rebels, one wearing a soldier's uniform, armed with a gun, and the other dressed in civilian clothes holding a stick to which a red piece of cloth was attached.[1798] She had to follow them to the hills, where she met a group of rebels and a lot of civilians who had been captured.[1799] She was given loads to carry and

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[1788] TF1-197, Transcript 21 October 2004, pp. 86-87.
[1789] TF1-192, Transcript 1 February 2005, pp. 57-59.
[1790] TF1-192, Transcript 1 February 2005, pp. 60-61.
[1791] TF1-192, Transcript 1 February 2005, pp. 62-64.
[1792] TF1-192, Transcript 1 February 2005, p. 65 (lines 2-9): "... there was a small boy that was my friend. The lady that was given to him -- the lady reported that the fellow was a eunuch. So these bad people took a knife and started slashing this fellow's private. So that they did so, they took a knife and starting slitting the lady's privates, so that this lady would not meet with any other individual in her life."
[1793] TF1-192, Transcript 1 February 2005, p. 68.
[1794] TF1-195, Transcript 1 February 2005, pp. 2-3.
[1795] TF1-195, Transcript 1 February 2005, pp. 4-5.
[1796] TF1-195, Transcript 1 February 2005, pp. 6-8.
[1797] TF1-195, Transcript 1 February 2005, p. 9.
[1798] TF1-195, Transcript 1 February 2005, pp. 10-11.
[1799] TF1-195, Transcript 1 February 2005, p. 15.

marched with the rebels to Sawoa, where Lieutenant T declared "Operation No Living Thing", because he had heard that ECOMOG had captured Kono and Kailahun.[1800] The virgins were taken away and the witness stayed behind with five older women.[1801] She and the five other women were taken away along the route leading to Benguema Fiama by a group of rebels armed with guns and sticks. They were asked to undress and lie down. The witness was raped by two different rebels and the second rebel who raped her inserted a stick into her vagina. She said that because of that incident she was physically in pain for five years and said she never consented to having sex with any of them.[1802] The witness is now divorced, as her husband claimed that the rebels had battered her. Three days after the rape, she was brought to Connaught Hospital in Freetown by ECOMOG troops and received medical treatment there.[1803] She recalled that all those events happened during the intervention period, more precisely "the time the People's Army were removed from here [Freetown] and went up to Kono".[1804]

585. TF1-015 testified that he was captured from Tongoro bush, about seven miles from Koidu, during the third week of March 1998.[1805] He was taken to Wundidu (Wendedu) camp by Major Rocky, an RUF commander.[1806] There were also women in the camp and he used to hear them scream at night: "Leave me, Leave me, Leave me alone. You did not bring me for this. I'm not your wife." Some women told him that they had been "used" at night by some men.[1807] There were many commanders present in Wundidu Camp, including Major Rocky, Co Pepe, who was an SBU commander, and Rebel Father.[1808] The commanders claimed that captured women were their wives and explained further: "There is no wedlock from the family. Just because of gun, you've taken her to be your wife, using

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[1800] TF1-195, Transcript 1 February 2005, pp. 18-19.
[1801] TF1-195, Transcript 1 February 2005, p. 23. The habit of so called "virgination" was common, as reported by HRW: "The rebel forces subjected women and girls of all ages, ethnic groups, and socio economic classes to individual and gang rape. Although the rebel forces raped indiscriminately irrespective of age, the rebels favored girls and young women whom they believed to be virgins." Exhibit 146i, HRW Report on Sexual Violence, p. 28. See also: TF1-213, Transcript 2 March 2006, pp. 11-12 and TF1-196, Transcript 13 July 2004, p. 26, TF1-031, Transcript 17 March 2006, p. 89, who used the words: "My daughter, 10 years old, she was deflowered.",
[1802] TF1-195, Transcript 1 February 2005, pp. 24-26.
[1803] TF1-195, Transcript 1 February 2005, pp. 27-28.
[1804] TF1-195, Transcript 1 February 2005, p. 28 (14-28).
[1805] TF1-015, Transcript 27 January 2005, pp. 104-107.
[1806] TF1-015, Transcript 27 January 2005, p. 149 and TF1-015, Transcript 28 January 2005, pp. 2-5.
[1807] TF1-015, Transcript 28 January 2005, p. 6 (lines 25-26) and p. 8.
[1808] TF1-015, Transcript 28 January 2005, pp. 8-9.

her as your wife."[1809] The witness stated that commanders were having sex with women without their consent.[1810] He added that if there were any rules and regulations in the camps against rape and other crimes, those were clearly violated.[1811]

586. TF1-218 was living in Fenduma with her family during the war. When the rebels had been driven out of Freetown, she and her family ran to the bush, where they hid for two days and then fled to Bumpeh. There, a man in combat uniform carrying a gun and a knife came to the house where the witness was staying. The witness ran to the bush, but returned when she heard her child crying. The man kicked her and she fell on the ground. Another man in combat uniform came, ordered her to go into the next house and pushed her into a room where many other captured civilians were locked up. The rebels told them to laugh and said that their lives were ended. They undressed them and lined them up naked. One of them ordered a couple to have sexual intercourse in front of all the others, otherwise he would kill them.[1812]

587. The rebels then forced a young girl to wash the penis of her father. Then they asked the witness where her husband was. When she said that he had been killed, the rebel that had the gun said, "since your husband is not here, I am going to have sexual intercourse with you." He pushed her on the floor, put the gun on one side and the knife on the other, lifted her feet, opened her legs and started forcing her to have sex with him. He said if she refused, he was going to kill her. The witness said, he staid on her for a very long time. After he had left, the witness was raped again by another rebel.[1813] She described her condition after the two rapes: "I was trembling, so I got up. I stood there for some time trembling." She managed to run away, although the rebels shot her in her hand. She said "I was naked. Everywhere blood was oozing out of me, … from my vagina, and also from my

[1809] TF1-015, Transcript 28 January 2005, p. 9 (lines 19-22).
[1810] TF1-015, Transcript 28 January 2005, p. 9 (line 26) and p. 10.
[1811] TF1-015, Transcript 31 January 2005, p. 99.
[1812] TF1-218, Transcript 1 February 2005, pp. 79-84 and 91. "He asked one lady called Bambeh "where is your husband"? And then she said "this is my husband." And then he said they should have intercourse with this husband. "Let us see how you are doing this thing together with your husband." … The man was ashamed because there are so many people in the room, so he didn't want to have sexual intercourse with the wife. But because of the gun, he was forced to have sexual intercourse in the presence of other people. … They hit the butt of the gun on his wrist and pointed the gun at him, that if he does not have sexual intercourse with the wife, they are surely going to kill him." p. 84 (lines 6-10, 12-15 and 17-19).
[1813] TF1-218, Transcript 1 February 2005, p. 85 (lines 14-15) and p. 86.

hand."[1814] After hiding for some time the witness went back to the house where she was raped and saw that the civilians who had been there with her were dead. She found her children who had survived and went towards Mortema where she was taken care of by her uncle. There were ECOMOG troops in Mortema and the witness was finally taken to Connaught Hospital in Freetown where she was hospitalized for two months.[1815]

c) Koinadugu District

588. TF1-212 testified that, she was hiding in the bush with her husband in August 1998, when they heard that the rebels had returned to her village, Koinadugu.[1816] Shortly after, she was caught by rebels, who raped a 12 year old girl in front of her. She was then taken to Koinadugu village with other civilians and placed in a guardroom for one night.[1817] The rebels would come for girls who were locked in the guardroom: "They would come, when they see young girls who were beautiful, the rebel would go and sign for the civilian, meaning that she belonged to him. If anyone is missing, that is unsigned for, many men would in fact rape her. But when you signed for her, she would be under your care."[1818] The next day, she was taken to the barri, where SAJ Musa held a speech, also attended by Superman and Brigadier Mani.[1819]

589. TF1-213 testified that on 18 March 1998, soldiers dressed in full combat fatigue, carrying guns and wearing red headbands, arrived in Lengekoro.[1820] Twenty five girls of her village of her age group were captured.[1821] The witness was captured by an armed soldier, who raped her.[1822] She was then forced to follow them to town and was able to recognize Yellow Man, who she thought was their commander.[1823] TF1-214 testified that she was living with her husband in Kondembaia in February 1998[1824], when rebels attacked the village.[1825] A rebel stripped her clothes off and asked for money. She was naked and the

[1814] TF1-218, Transcript 1 February 2005, p. 86 (lines 27–29) and p. 88 (lines 3-4 and 7).
[1815] TF1-218, Transcript 1 February 2005, pp. 89-92.
[1816] TF1-212, Transcript 8 July 2005, p. 102.
[1817] TF1-212, Transcript 8 July 2005, pp. 103-105.
[1818] TF1-212, Transcript 8 July 2005, p. 105 (lines 16-21).
[1819] TF1-212, Transcript 8 July 2005, pp. 105-106.
[1820] TF1-213, Transcript 2 March 2006, pp. 7-8.
[1821] TF1-213, Transcript 2 March 2006, pp. 9-10.
[1822] TF1-213, Transcript 2 March 2006, pp. 10-12.
[1823] TF1-213, Transcript 2 March 2006, p. 6 and pp. 14-15.
[1824] TF1-214, Transcript 14 July 2004, p. 3.
[1825] TF1-214, Transcript 14 July 2004, pp. 21-24.

rebel slapped her with some shoes. Later in the day, she witnessed a rebel forcing a girl from the village to lie down and have sex with him. He refrained to do so since she had her menstrual period.[1826]

d) Bombali District

590. TF1-199, abducted at the age of 12 near Madina Loko[1827], testified that, together with 18 other boys of his village, he was part of the SBU, specifically assigned to Lieutenant Marrah.[1828] He testified further that there were many young girls in his group.[1829] He said that commanders would forcefully take them along and consider them as their wives. The witness heard one commander saying to a girl: "You're going to be my wife". He explained that to his understanding "a rebel wife [was] a forceful way of using a woman as his own wife". These girls were forced to sleep with commanders and the witness saw it himself whilst in the bush.[1830] During attacks in which he participated, girls were raped publicly. He recalled that his commander commended a girl to lie down on the ground, take off her clothes and then had sex with her in front of him.[1831] During an attack, the witness himself was forced by his commander to rape a young girl and this happened again during another attack.[1832]

591. TF1-117 testified that, as the RUF retreated from Freetown to Makeni, they committed atrocities on the way. He and other RUF combatants captured a Lebanese woman in one of the shops they were looting in Makeni and, pursuant to the Third Accused's orders, took her to the Task Force Office. The Third Accused said that she was his wife. They took her upstairs, left her there and the Third Accused went upstairs holding onto his pistol. Later, the witness heard the woman crying and she reported to him that the Third Accused forcibly had sex with her.[1833] The First Accused arrived at the Task Force Office and was told about the incident. The witness described the First Accused's reaction

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[1826] TF1-214, Transcript 14 July 2004, pp. 26-27.
[1827] TF1-199, Transcript 20 July 2004, pp. 18-19 and p. 21 (line5).
[1828] TF1-199, Transcript 20 July 2004, p. 23 (line 25) and p. 24 (lines 1-4).
[1829] TF1-199, Transcript 20 July 2004, p. 24.
[1830] TF1-199, Transcript 20 July 2004, p. 25.
[1831] TF1-199, Transcript 20 July 2004, p. 29 (lines 35-37) and p. 30 (lines 1-8).
[1832] TF1-199, Transcript 20 July 2004, p. 30 (lines 23- 26). HRW wrote in its report on sexual violence during the Sierra Leonean conflict: "Child combatants also raped women who could have been their mothers or in some instances even their grandmothers." Exhibit 146, HRW Report on Sexual Violence, p. 35.
[1833] TF1-117, Transcript 29 June 2006, p.105 and p. 107 (lines 5-16).

towards the Third Accused: "He got annoyed. [...] He dug his ten toes". The witness then explained "It's a threat to shoot. When somebody has done wrong, you don't want to kill that person, you shoot underneath his feet."[1834]

592. TF1-360 testified that when Operation Pay Yourself resumed in Makeni, there were numerous reports of rape occurring in the city. The witness was not able to give the exact numbers of rapes, but said it happened all over Makeni.[1835] Defence witnesses have also largely admitted that the commission of rape by RUF forces in Makeni was a common occurrence. DIS-015, DIS-009 and DAG-018 mentioned that they had heard that the RUF was raping women in Makeni.[1836]

593. TF1-031 testified that while living in Karina, she was attacked by a group of rebels who told her that they were Foday Sankoh's people. They were armed and some were dressed in country clothes, while others were in combat.[1837] After burning her house, they stripped her naked, brought her outside and tied her with a rope around her waist.[1838] She said it happened during the rainy season, eight years before her testimony in 2006.[1839] She explained that she was not the only person captured, as many other civilians from other villages, including women who were also naked and tied, were around her.[1840] She testified further that her ten year old daughter told her that she was raped by a rebel in Mandaha. At night, the rebels used to forcibly take young girls into the bush and the witness would hear them scream. The witness knew the name of three of the rebels in her group: Abu Bockarie, Woyoh and Five-Five.[1841]

594. TF1-028 testified that she was in Karina during the time of the intervention, in February 1998.[1842] The group of armed people which entered Karina on 6 April 1998[1843] under the command of SAJ Musa, included Jabbi, Alabama, George Johnson, Alimany

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[1834] TF1-117, Transcript 29 June 2006, p. 106 and Transcript 3 July 2006, pp. 51-53 and 55.
[1835] TF1-360, Transcript 20 July 2005, pp. 11-12.
[1836] DIS-015, Transcript 15 February 2008, p. 44; DAG-018, Transcript 16 June 2008, p. 46; DIS-009, Transcript 22 February 2008, p. 98 and 101.
[1837] TF1-031, Transcript 17 March 2006, p. 80 (lines 25-29).
[1838] TF1-031, Transcript 17 March 2006, pp. 78-79.
[1839] TF1-031, Transcript 17 March 2006, p. 79 (lines 12-18). The year would have been 1998.
[1840] TF1-031, Transcript 17 March 2006, p. 81.
[1841] TF1-031, Transcript 17 March 2006, pp. 89-90.
[1842] TF1-028,Transcript 17 March 2006, p. 108.
[1843] TF1-028,Transcript 17 March 2006, p. 110 (line 27).

Bobson Sesay, Captain Blood and Adama Cut Hand.[1844] The witness was captured by a man in combat who put her at gunpoint[1845] and tore her dress using his knife, so that she was naked. He tied her hands and was made to follow him and the other combatants back to Karina.[1846] They also captured her elder brother's wife, named Fanta Kallon, who was stripped naked and tied together with the witness. They did the same to a breastfeeding woman who was in the next house. The three naked women were tied together and forced to walk to the mosque, guarded by two rebels.[1847] When they reached the school, she saw her sister and her aunt, who were also naked.[1848] After the attack on Karina, the captives, some of them naked like the witness, were made to march from the village of Makabie to Makith.[1849] On the way out of Karina, the witness was then brought to a field where she was made to lie down at gunpoint and was threatened to be killed. She was spared because a man called [redacted][1850] saved her, as she was a Limba Madingo.[1851] She then became his wife: "I was in his hands as his wife". She explained that there was no ceremony but that she was forced to have sex with him and became his wife as a result.[1852] She said she did not love him but stayed with him because he was able to provide her with protection: "He was always by me to encourage me and to safeguard me".[1853] He was protecting her from other men and she had to accept him as a husband to enjoy that protection, the alternative probably being death.[1854] She also testified that her sisters were

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[1844] TF1-028, Transcript 20 March 2006, pp. 48-49.
[1845] TF1-028, Transcript 17 March 2006, pp. 111-113.
[1846] TF1-028, Transcript 17 March 2006, pp. 114-117.
[1847] TF1-028, Transcript 17 March 2006, pp. 118-120.
[1848] TF1-028, Transcript 20 March 2006, p. 6.
[1849] TF1-028, Transcript 20 March 2006, pp. 9-12 and p. 19.
[1850] Ibrahim Kamara was not an AFRC soldier but that he had told her that he was based in Freetown before his government was removed, which was the reason for his coming to Karina (TF1-028, Transcript 20 March 2006, pp. 44-45).
[1851] TF1-028, Transcript 20 March 2006, pp. 7-8 17 (line 24) and p. 38 lines (8-11).
[1852] TF1-028, Transcript 20 March 2006, pp. 38-39. The expert witness made it clear that there was no free will involved in the decision of women to get married with their rebel husband and that, conversely, women were under duress, threatened by a gun and had no other alternative. There was no consent asked to or given by the woman (See Exhibit 139A, TF1-369, Transcript from AFRC Trial 3 October 2005, p. 52 (lines 14-19) and pp. 133-134).
[1853] TF1-028, Transcript 20 March 2006, p. 38 (lines 24-25).
[1854]TF1-028, Transcript 20 March 2006, p. 55. She gave the instance when she was resting in the forest and his presence kept some men away from her, whereas they were about to hurt her (TF1-028, Transcript 20 March 2006, p. 38). She gave another example when she and her brother were taken away by two men in uniforms who threatened to kill them. Ibrahim Kamara came back and saved them. (TF1-028, Transcript 20 March 2006, pp. 16-18). The expert report explains that "being a 'bush wife' meant that the girl belonged to one person and was not required to have sex with different rebels. Forced marriage became a means of survival for most girls in the bush, as bush wives were spared gang rapes, were ensured regular meals and

in a similar situation, since they also had such "husbands" protecting them.[1855] While the witness and her sister were both resting in the forest, a man wearing a soldier's uniform and holding a gun came to kill her sister because she was accused of being a member of the Tejan Kabbah family. Her life was spared because a man called Jabbi claimed that she was his wife.[1856] After this event, "they were as husband and wife", even if there was no marriage between them: "he just took her and started using her as a wife".[1857]

595. [redacted] On 28 December 1998, when by RUF troops were "gradually heading to Freetown"[1860] a similar incident occurred: a young girl, about 15 years old, came and said she had been raped.[1861]

596. [redacted] Husbands and wives lodged marital complaints with him. 55 would call the Mammy Queen, appointed by Gullit, to deal with women's affairs.[1862] Women found guilty could be beaten and or locked inside the Mammy Queen's rice box.[1863] A discipline order was used for various forms of indiscipline women committed; e.g. "misbehaving on the husband" or being caught with somebody's husband.[1864] The witness saw Junior report to 55 that he suspected his wife to be involved with a commander. 55 investigated and found

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were protected by their husbands." 'Bush wives' explained that they were saved from being subjected to some of the worst atrocities that happened to other women not in marriages and that "husbands" were considered as protectors. Even if bush wives were benefiting such protection, the report stressed that they "could be used, and then disposed of as and when her 'husband' wanted"[1854]. Besides, they were led to believe that their 'husbands' had the right to kill them without fear of any repercussions." (See Exhibit 138, Expert Report Forced Marriage, pp. 12094-12095 and Exhibit 139A, TF1-369, Transcript from AFRC Trial, Transcript 3 October 2005, p. 57).

[1855] TF1-028, Transcript 20 March 2006, p. 55 (lines 17-19).

[1856] TF1-028, Transcript 20 March 2006, pp. 12-15.

[1857] TF1-028, Transcript 20 March 2006, pp. 15-16.

[1858] TF1-174, Transcript 20 March 2006, pp. 101-102.

[1859] TF1-174, Transcript 20 March 2006, p. 104.

[1860] TF1-174, Transcript 21 March 2006, p. 19 (line 9).

[1861] On 3 January 1999 a meeting was organised by the RUF chief spokesman NP Jalloh. He said that the RUF would stay and he warned everybody "that they have no policeman to man any prison, any court. Whoever goes against their laws will receive the consequence immediately." TF1-174, Transcript 21 March 2006, pp. 19- 22; p. 21 (lines 13- 16).

[redacted]

the woman guilty, sent her to the Mammy Queen.[1865] The witness was present with the operation commander and military supervisors when 55 made, read, signed the order, and gave one to the witness' commander. 55, the Mammy Queen, the Brigade Commander, all had a copy each of the order.[1866] 55 sent the order to the Mammy Queen that the woman should be given 12 lashes and then locked in a box. The witness escorted the woman to the Mammy Queen and gave the order to the Mammy Queen. The Mammy Queen gave her 12 lashes and locked her in the box.[1867]

597. TF1-196 testified that sometime before the 6 January Freetown invasion, the rebels passed through Malama on their way to Freetown and attacked villages in the area, while she was hiding in the bush near Malama.[1868] The witness, her husband and other civilians were captured by 5 rebels and then taken to Batmis. She heard the rebels saying that they were going to rape women and virginate the young girls. She also heard them talk about a woman who was raped by 10 rebels.[1869] When she was captured in the bush, she was publicly raped by one of the five rebels who captured her.[1870] Some of the rape victims from Batmis, including the witness, were treated in the Makeni Government Hospital by Mr Dumbuya.[1871]

e) Kailahun District

598. [redacted] A lot of them had therefore decided to stay in Kailahun District.[1872] [redacted]

[redacted]

[1868] TF1-196, Transcript 13 July 2004, p. 20.
[1869] TF1-196, Transcript 13 July 2004, p. 26.
[1870] TF1-196, Transcript 13 July 2004, pp. 27-28.
[1871] TF1-196, Transcript 13 July 2004, pp. 26-27.
[1872] All the villages in Kailahun District have ex-combatants living there and in some villages there are more ex-combatants there than people from the community. A lot of the chiefs in Kailahun were appointed by the RUF during the war. The RUF had installed their own chiefs and created their own structures. [redacted]

from Koinadugu, Tonkolili, Pujehun, Kono, Bonthe, Bo, Freetown and Kenema. The expert witness explained [redacted] there were women who were not married and did not call themselves "bush wives", because they were not assigned to anybody.[1873] "They were often raped, abducted and they stayed and travelled along with the fighters".[1874] The information provided by the expert witness has been corroborated with numerous testimonies of crime base and insider witnesses.

599. TF1-371, [redacted], gave an example of how RUF commander captured young girls and took them as wives:

> A commander who hasn't a wife, somebody to take care of him domestically, take care of his domestic needs, go to a particular town on combat mission, and he is the head of that mission. He happens to conquer that particular territory, and abduct young girls that found it extremely difficult to escape with the opposing troop, and that commander sees a young lady that he is interested in, and he is a senior commander there. The combatants, the other combatant are subjected to him. It is up to him, I mean at his discretion, to tell lady ..., you are supposed to be with the ... commander officer. The young lady has no .... option, in terms of negotiating whether in fact [s]he want or not. So that lady automatically become the wife of that commander.[1875]

600. TF1-371 said that thousands of women were abducted this way.[1876] They would provide domestic services for commanders, become their wives and sex partners, and have children with them.[1877] He recalled that the Second Accused had a wife who had been abducted in an operation in Bo District.[1878] The witness testified that most of the women in Kailahun District found themselves behind the RUF line against their will[1879] and "some of these abducted girls found themselves to be the wives of some of the commanders."[1880]

601. Dennis Koker testified that when a village was captured, women were taken from their husbands and commanders would take the women as wives in unlawful marriages. He further said that ".Some will have five, some will have six wives. Some they send them to

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[redacted]

[1875] TF1-371, Transcript 21 July 2006, p. 66 (lines 20-29) and p. 67 (lines 1-4).
[1876] TF1-371, Transcript 21 July 2006, p. 68 (lines 13-17).
[1877] TF1-371, Transcript 21 July 2006, p. 67 (lines 8-9).
[1878] TF1-371, Transcript 21 July 2006, pp. 68-69.
[1879] TF1-371, Transcript 21 July 2006, pp. 65-66.
[1880] TF1-371, Transcript 21 July 2006, p. 66 (lines 17-18).

the training ground to train."[1881] The witness also testified that his direct superior, MP commander Tom Sandy, was well-known in Kailahun District, for having sex with little children.[1882] Tom Sandy was subordinate to the Third Accused.[1883]

602. At the age of 15, TF1-093, a girl from Rutile, Moyamba District, was raped in Njala, Moyamba District, by two [redacted] bodyguards, [redacted], in the rainy season of 1996. While they were fighting over her, one stabbed her foot and her "private". After the rape, [redacted] came and asked her whether she would marry him, if he would treat her wounds. She had to accept, since she did not want to die.[1884] As [redacted] wife, the witness had to have sex with him, cook and launder for him, as well as carry loads on her head for the RUF. While moving towards Kailahun with the RUF, she witnessed that women were abducted and forced to become RUF commanders' wives.[1885] On the way TF1-093 was given different drugs, "series of tablets", "cannabis sativa and even gunpowder ... that would make you to become very zealous to do your work."[1886] TF1-093 and many other captured civilians were brought to Kailahun Town where the RUF was fighting the Kamajors. The RUF commanders fighting there were Tactical's group with CO Papay and Superman's group. After the fighting in Kailahun, many people were killed and raped.[1887] A camp was created, and more than 300 RUF combatants and civilians were based there and the RUF commanders were Colonel Superman, Tactical and CO Papay.

[1881] Dennis Koker, Transcript 28 April 2005, p. 63 (in particular lines 26-28).

[1882] Dennis Koker, Transcript 28 April 2005, pp. 64-65. Several witnesses testified that Tom Sandy was subordinate to the Third Accused. TF1-366, Transcript 8 November 2005, p. 52. TF1-108, Transcript 7 March 2006, pp. 49-50. TF1-168 said that Tom Sandy was the deputy MP commander to Kaisamba aka Kaisuku in Buedu at the beginning of 1998 and that they both responded to the Third Accused as overall MP commander; TF1-168, Transcript 4 April 2006, pp. 19-21.

[1883] Several witnesses corroborated the fact that Tom Sandy was subordinate to the Third Accused. TF1-366, Transcript 8 November 2005, p. 52; TF1-168, Transcript 4 April 2006, pp. 19-21: TF1-168 said that Tom Sandy was the deputy MP commander to Kaisamba aka Kaisuku in Buedu at the beginning of 1998 and that they both responded to the Third Accused as overall MP commander;.

[1884] TF1-093, Transcript 29 November 2005, Closed Session, pp. 72-76.

[1885] TF1-093, Transcript 29 November 2005, pp. 76-82; TF1-093, Transcript 29 November 2005, Closed Session, p. 81 (lines 1-11): "Because the rebels, some of them, did not have wives. So they would capture women and make them to become their wives. Some, they would meet their wife and the husband and they would bring them outside and they would ask, "Who is this to you?" And they would ask, "What are you used to doing at night?" Then they would take them outside and say, "Okay, do what you have been doing at night," and they would sex. And when the man who is the husband to the wife had sex they would say, "Okay, laugh." Then they would give them loads to carry. And they would take the wife and give her to some other rebel and ask the rebels to have sex with her in the presence of the husband."

[1886] TF1-093, Transcript 29 November 2005, Closed Session, p. 82 (lines 28- 29) and p. 83 (line 1).

[1887] TF1-093, Transcript 29 November 2005, Closed Session, pp. 83-86.

The camp was used as a military training camp.[1888] The witness herself, together with many other civilians, amongst them children as young as eight, underwent military training there. The witness was in the group [redacted] one of the bodyguards who had raped her.[1889] She said that atrocities were committed during the attacks in which she participated in Kailahun District, including the rape of children.[1890] She could recall the rape of an 8 year old girl.[1891]

603. TF1-314, who was abducted at the age of 10 in Masingbi, Tonkolili District, in 1994 by [redacted] and other RUF combatants, testified how, prior to her abduction, she was raped by three RUF combatants. She was then taken to Buedu together with other civilians. In Buedu the First Accused, as overall commander there, passed the order for civilians to be trained [redacted].[1892] Other commanders present in Buedu at that time included the Second and Third Accused and [redacted]. She stayed in Buedu from 1994 to 1998 and was part of a Small Girl Unit ("SGU"). She testified that all the RUF commanders used SGU's to launder, cook and do other domestic chores. She testified that the three Accused also had such SGU's.[1893] Shortly after her arrival in Buedu, the witness was raped by one of [redacted] and became pregnant as a result of that rape, but the baby died.[1894] Within the year, she was raped a second time by another RUF combatant who was under the command of the First Accused. Both times she had been taken to a room and was forced to have sex with them. Aged 11 then, she became pregnant again after this second rape and the baby survived this time. The RUF combatant who raped her the second time took her as his own wife. She was living in his house, cooking and laundering for him. She was also forced to have sex with him at night. She explained that she was not the only abducted civilian who became a wife to a rebel in Buedu, as other girls between 10 and 15 years old were also taken as such "wives". RUF combatants would capture girls while on mission and take them away to their house, saying "This is my wife". Those girls would then have to cook, launder and, at night, have sex with the rebels who

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[1888] TF1-093, Transcript 29 November 2005, Closed Session, pp. 86-87
[1889] TF1-093, Transcript 29 November 2005, Closed Session, pp. 88-89.
[1890] TF1-093, Transcript 29 November 2005, Closed Session, p. 94.
[1891] TF1-093, Transcript 29 November 2005, Closed Session, p. 94 (lines 14-18).
[1892] TF1-314, Transcript 2 November 2005, pp. 24-29 and Exhibit 45.
[1893] TF1-314, Transcript 2 November 2005, pp. 32-36.
[1894] TF1-314, Transcript 2 November 2005, pp. 36- 39 and Exhibit 46.

took them as "wives".[1895] The witness further said that all three Accused and [redacted] knew that those girls were aged 10 to 15. Escape from Buedu was impossible, because the escapee would have been killed by rebels if caught or by Kamajors if they learnt that the person was from a rebel zone.[1896]

604. [redacted]. That was the day diamonds were taken from Johnny Paul Koroma.[1897] The First Accused raped Johnny Paul Koroma's wife after the meeting. He drove away with her on a road leading to Kailahun. [redacted] TF1-045 also testified that during the pull out of the Junta troops from Kenema towards Daru in February 1998, many civilians went with troops, some were captured and abducted. In Daru he met his niece, who was still a school girl, around 12 to 13 years old, and she told him that she had been raped and abducted by an RUF soldier [redacted]. The witness did not punish [redacted] or report him to a superior but told him: "If you need her you will meet me and I will talk it."[1899]

605. TF1-108, testified that his wife was raped in 1998 by eight RUF "boys". She died in the same week. He reported the incident to the Third Accused and to [redacted] in Giema. The Third Accused told the witness that if he was not bothered about those who were dying in the war front, why would he then about the rape of that woman. No action was taken.[1900] The six year old niece of the witness had been captured between [redacted] She escaped from there and

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[1895] TF1-314, Transcript 2 November 2005, pp. 39-40 and Exhibit 47. DIS-302, who was a birth attendant for the RUF, testified that she helped deliver the babies of very young women who had had become pregnant from RUF fighters (DIS-302, Transcript 27 June 2007, pp. 34-35).
[1896] TF1-314, Transcript 2 November 2005, pp. 42-43.
[1897] Several witnesses mention this incident and locate it shortly after the Freetown retreat in February 1998: TF1-036, Transcript, 29 July 2005, Closed Session, pp. 70, 73; TF1-361, Transcript 12 July 2005, Closed Session, p. 29.
[1898] TF1-045, Transcript 21 November 2005, pp. 52 and 55-56 and Transcript 24 November 2005, pp. 48-52. This information was corroborated by TF1-361, Transcript 12 July 2005, Closed Session, pp. 29-30, where the witness suggested that the First Accused and Sam Bockarie "forced his woman, they put their hands in the woman's slip" although it is not clear from the testimony whether they did that only to remove "all the money that was there" or for other purposes. (p. 30, lines 1-6).
[1899] TF1-045, Transcript 21 November 2005, pp. 12-15; p. 13 (lines 22-23).
[1900] TF1-108, Transcript 8 March 2006, pp. 50-51; Transcript 9 March 2006, Closed Session, pp. 67-68.

complained to the witness that the commanders "used her so much".[1901] The witness also testified that while in Kailahun, captured women would be taken to the training base and others would be taken as wives by the RUF commanders. In [redacted] the witness met two girls from Kono who had been captured and who told him that they were the wives of the Third Accused. They told the witness that they were doing work for him and that they were sleeping in the same house. The witness also saw two other Kono girls in Dodo Kotuma who told him that they were the wives of the First Accused. They were captured and had to fish, launder for him and sleep in the same house as him. The girls clearly expressed they were not happy with this situation.[1902]

606. TF1-366 testified that the Third Accused had wives in forced marriages from 1992 to 1996 when he was in Kailahun and then between 2000 and 2002. He had one in the house but also many "peripheral ones", who were not treated nicely.[1903] The witness recalled for example that the Third Accused captured a school girl in Makeni, named Kadi, and made her his wife. It happened during the time the RUF captured Makeni. She disagreed but the Third Accused said "whether you agree or not I am going to marry you"[1904] The witness further said that the Third Accused also had a wife named Bessie in Buedu and many others in Kailahun.[1905]

607. The testimony of Prosecution witnesses was partly corroborated by Defence witnesses. DIS-174, [redacted], testified that, when RUF combatants wanted a woman in the Pendembu region, where he was based, they could go to the G5 commander and arrange it. If the woman accepted, one would go to the "zoo bush commanders" and discuss the issue. The combatant had then to take care of the women. He said it was not really a marriage. These women were from enemy areas captured by the RUF and they were there, did not know where to go or how to survive – and they had no other way out. If a soldier wanted such a woman he would "arrange the matter" with the G5 and the chief or the zoo bush commander. By 1998, almost everybody was married in the Pendembu region.[1906] The witness also said that women were at the front with the RUF

[1901] TF1-108, Transcript 8 March 2006, pp. 46-47.
[1902] TF1-108, Transcript 9 March 2006, pp. 4-6.
[1903] TF1-366, Transcript 8 November 2005, pp. 75-76.
[1904] TF1-366, Transcript 8 November 2005, pp. 75-76 and Transcript 17 November 2005, pp. 99-100.
[1905] TF1-366, Transcript 17 November 2005, pp. 99-107.
[1906] DIS-174, Transcript 21 January 2008, Closed Session, pp. 105-106.

and he described their tasks, such as cooking, taking care of materials, looking for food etc. He explained: "No need for the soldier to retreat again, when you have your own wife at the full front with you, so you would not be thinking of becoming an AWOL soldier."[1907] DIS-164 explained in detail his involvement in relationships between men and women. He testified that if someone wanted to marry captured civilian women from the front line, he needed to be advised. A document would then be prepared showing that the woman is with the man during the war period, but stating the woman is not "yours" because someone may be looking for her. [1908] He also said that every woman was expected to be with a man, because they needed to be protected from being raped by RUF combatants.[1909]

608. DIS-080 admitted that from 1993 to 1997 marriages without marriage ceremonies took place in Giema[1910] since some RUF combatants got married to some of the women they had captured and brought back to Giema.[1911] DIS-149, an RUF insider witness who was based in [redacted] from 1996 to 2000,[1912] testified that while he was in [redacted] between 1997 and 1998, an RUF fighter had beaten up his civilian wife and the matter was dealt with by escorting the woman back to her people.[1913] He replied further that another case involved [redacted] commander Denis Lansana and his wife, but that the matter was reported by neither of them and that he did not ask any questions, as he was afraid of [redacted] commander.[1914] DIS-128, a farmer [redacted] from Giema,[1915], agreed that there was a stigma attached to raped women and that because it was considered disgraceful, a woman who was raped would not go around telling people what happened to her.[1916]

[1907] DIS-174, Transcript 21 January 2008, Closed Session, p. 120 (lines 9-12). (AWOL means Absent Without Official Leave, desert).
[1908] DIS-164, Transcript 28 January 2008,pp. 88-90. The witness made it clear that women should not be without a man. Women should be attached to someone to take care of them and to have sex with them.
[1909] DIS-164, Transcript 31 January 2008, p. 9-10.
[1910] DIS-080, Transcript 5 October 2007, p. 92.
[1911] DIS-080, Transcript 8 October 2007, pp. 10-11.
[1912] DIS-149, Transcript 5 Novembre 2007, Closed Session, pp. 15-17.
[1913] DIS-149, Transcript 5 Novembre 2007, pp. 30-32 and Transcript 6 Novembre 2007, p. 31.
[1914] DIS-149, Transcript 5 Novembre 2007, pp. 67-68.
[1915] DIS-128, Transcript 27 November 2007, Closed Session, p. 19-21.
[1916] DIS-128, Transcript 27 November 2007, Closed Session, pp. 20-21.

f) Freetown and the Western Area

609. During the Indictment period the crimes alleged were committed in Freetown and the Western Area, including "wives" being forced to perform a number of conjugal duties under coercion by their "husbands".[1917]

610. TF1-104, [redacted], testified that between the 6 and 14 January 1999, two RUF/Junta soldiers tried to rape one of his colleagues. Two RUF men came to the hospital at about 3 p.m. One of the men was in combat uniform; the other in plain cloths. They went into a room where the nurse was working and closed the door. They attempted to rape her and she was shouting. The witness had been upstairs but was called down by the sister in charge. The men were finally stopped by a Captain Shepard who gave an order and opened the door. The witness's colleague later told him and the other staff that nothing had happened to her, but that the men were attempting to rape her when Captain Shepard came in.[1918] Captain Shepard did not punish the men for the attempted rape. He introduced himself to the nurses as an SLA, but the witness was not sure whether the RUF/Junta men belonged to his group.[1919] The witness said, when the Junta forces entered Freetown on the 6 January 1999 he could distinguish SLA soldiers from RUF fighters: "The SLA they were fully dressed with full military uniform. [...] But the RUF, I mean, they were just haphazardly dressed and were having this piece of cloth round their head."[1920]

[1917] Indictment, p. 59. See Exhibit 174, Human Rights Watch Report June 1999, "Getting Away With Murder Mutilation Rape", Vol. 11, No. 3(A., highlighted portions at pp. 7-9 (19375-19377), Section entitled "Systematic Targeting of Civilians" at pp. 10-11 (19378-19379)] ("Exhibit 174, HRW Report 1999"), pp. 33-34 (19401-19402): Throughout the January offensive RUF forces perpetrated systematic, organized, and widespread sexual violence against girls and women including individual and gang-rape, sexual assault with objects such as sticks and firewood, and sexual slavery. These sexual crimes were most often characterized by extraordinary brutality and frequently preceded or followed by violent acts against other family members. ... And, while it is impossible to determine the precise number of victims, doctors and counsellors report having treated several hundred girls and women for the physical and psychological effects of sexual abuse perpetrated by the rebels during this time. Once captive the victims were frequently shared and divided among the combatants who would rape them on a daily basis for anywhere from one day to several weeks. Of the victims interviewed by Human Rights Watch, over half reported being raped by more than one combatant. Several girls and women abducted during January described pairing up and attaching themselves to one rebel so as to avoid gang-rape, be given a degree of protection, and be subjected to less hardship. [redacted]

611. TF1-029, who was living in Wellington in January 1999, testified that when the RUF and AFRC troops entered Wellington, around 50 persons fled to her compound. On 22 January 1999 all the civilians in the compound were abducted by a [redacted] The other abducted women were also raped by RUF and AFRC soldiers.[1922] [redacted] The other girls were also raped by RUF and AFRC soldiers in Benguema. [redacted] 1999, the witness and 31 other civilians were released and sent back to Freetown.[1923]

612. TF1-023, who was abducted at the age of 16 during the retreat of the Junta forces from Freetown, testified that she was captured during the attack on Calaba Town at Consider Lane on 22 January 1999 by a boy in combat uniform.[1924] She was given to Colonel Rambo, aka Red Goat, aka Idris Kamara who took her as his wife without her consent. She had no option but to accept to be his wife and there was no marriage ceremony. She said that she and other women were forced into a marriage that was not legal. At night she was shown the place where she would sleep and Rambo entered the room shouting: "can't you undress? Can't you take off your clothes? ... What do you feel about yourself?" He threatened her and had sex with her; she was a virgin. After that first night, she continued to be forced to sleep with the commander.[1925] She and the other abductees had to walk to Waterloo, Benguema and then Four Mile, where her "rebel husband" joined up again with her and kept on having sex with her. They were together for about three weeks, and then he left for Makeni and left her with somebody else. The

[1921] TF1-029, Transcript 28 November 2005, pp. 7-10.
[1922] TF1-029, Transcript 28 November 2005, p. 12.
[1923] TF1-029, Transcript 28 November 2005, p. 15-18. See also Exhibit 174, HRW Report 1999, p. 33 (19401)on atrocities committed during the Freetown invasion: "While some of the victims interviewed were raped within their homes, most report having been rounded together up with other girls at gunpoint and taken to houses and buildings which, during the occupation, served as rebel bases and command centers. The girls and women were rounded up from their homes, as they were fleeing, and from centers of refuge such as mosques, churches, and camps for displaced people. Once with the rebels in these bases, nearly all victims described witnessing the sexual abuse of other girls and young women also being held there."
[redacted]

witness said he never asked her consent before he had sex with her because he said she was his wife.[1926] She could not escape, because there were more than 400 armed combatants around and she saw that people who tried to escape from Four Mile were caught and beaten badly. Her "husband" had armed men around him, and one would follow her wherever she was going to prevent her from escaping.[1927] There were other women at Four Mile who had been given to rebels as wives. She knew ten of them personally and talked with them about their experiences. They were also captured and given to soldiers with lower ranks, lieutenants or just ordinary soldiers. The other women treated her with respect because she was the "wife" of a commander. They would call her "de mammy".[1928] When Colonel Rambo left for Makeni he left the witness under the auspice of a Captain Yellow Man . The witness said that while she was "married" to Colonel Rambo she was not forced to do anything apart from having sex with him.[1929] She finally managed to escape from Magbeni to Freetown in August 1999.[1930]

613. TF1-022 testified that he was captured by seven RUF combatants on 22 January 1999 and taken to an RUF commando in Winter Street, near the Rogbalan Mosque in Kissy, together with other civilians. In his group there were two little 10-year-old girls. One of the combatants who had arrested them said: "Commando, these two ladies, we'll give you one for you to marry. The other one will go and kill that of your friend again." The witness said they were to be forcefully married to the commando.[1931]

[redacted]

[1926] Exhibit 59a, TF1-023 Transcript from AFRC Trial, Transcript 9 March 2005, pp. 48-51.
[1927] Exhibit 59a, TF1-023 Transcript from AFRC Trial, Transcript 9 March 2005, pp. 51-53.
[1928] Exhibit 59a, TF1-023 Transcript from AFRC Trial, Transcript 9 March 2005, pp. 53-58.
[1929] Exhibit 59a, TF1-023 Transcript from AFRC Trial, Transcript 9 March 2005, p. 57; Exhibit 59c, TF1-023 Transcript from AFRC Trial, Transcript 7 November 2005, p. 13. Although she had stated in her earlier testimony that her "rebel husband" had asked her to cook for him and she had told him she did not know how to cook. (Exhibit 59a, TF1-023 Transcript from AFRC Trial, Transcript 9 March 2005, p. 51). Name under seal in Exhibit 59f.
[1930] Exhibit 59b, TF1-023 Transcript from AFRC Trial, Transcript 10 March 2005, pp. 38-41.
[1931] TF1-022, Transcript 29 November 2005, pp. 24 and 31-34.
[1932] Exhibit 104a, TF1-081, Transcript from AFRC Trial, Transcript 4 July 2005, pp. 10-11.
[1933] TF1-081, Transcript 6 April 2006, p. 19.

615. [redacted] testified that he saw abductions and rape on the 6 January 1999 in Freetown. The soldiers forcefully brought women to the State House and used them for sexual intercourse. The women did not do it voluntarily.[1934] He saw many soldiers taking women and girls on 6 January 1999 in the building. The soldiers would take care of them and the women would cook for them.[1935] When the Junta troops retreated after loosing the Eastern Police and Upgun and moved their headquarters to PWD, more young girls were abducted and brought to PWD. Most of the young girls became the wives of the various commanders.[1936]

616. TF1-097, a fisherman from Tombo who had fled to Kissy (Freetown) when the RUF attacked his village on the 23 December 1998, explained what happened during the January 1999 invasion in Freetown.[1937] The witness and his family members stayed in a house in Kissy, when on 21 January 1999, somebody came running and shouting that the ECOMOG were coming.[1938] The witness and his family members fled inside the house where he remained with his brother-in-law's younger brother, while two boys managed to escape. Captain Blood and another RUF man came and wanted 400'000 Leones from the witness. Since he did not have this amount of money, Captain Blood struck him with a machete and chopped of his left hand. The witness was then hiding in the toilet and saw how the combatants chopped off the two hands of his brother-in-law's younger brother and how they set fire on the house. He then saw, while still hiding in the toilet of his house that the rebels captured some women and that one of the rebels raped all of them. Later, TF1-097 moved around in the night and met friends, some of whom were also amputated. One of them told him that his sister had been raped.[1939]

[redacted]

also Exhibit 174, HRW Report 1999, pp. 33 (19401): rebels frequently told the victims they would be taken to the bush and made into a rebel wife and indeed young girls and women made up the majority of the hundreds of civilians witnessed to have been later abducted as the rebels retreated out of Freetown."

[1937] TF1-097, Transcript 28 November 2005, pp. 77-80.

[1938] TF1-097, Transcript 28 November 2005, pp. 80-89.

[1939] TF1-097, Transcript 28 November 2005, pp. 96-98.

[redacted]

618. TF1-360 testified that when he met the RUF authorities in Waterloo during the retreat from Freetown, *inter alia* the First and the Second Accused, they were told by Gullit that there were still thousands of soldiers in Freetown with Rambo Red Goat. They heard about rape and other atrocities. In a meeting, AFRC and RUF superior commanders, including the First and the Second Accused, decided to re-launch an attack on Freetown.[1942] Several witnesses confirmed the information, that it was the First Accused who was the commander in charge of the Junta troops.[1943]

g) Port Loko

619. TF1-345, testified that she was captured by rebels around 6 January 1999, as part of a group of about 40 Nonkoba residents who were hiding in the bushes near Nonkoba and Chendekom.[1944] They were detained there for several days and were forced to work for the rebels. The witness said that while pounding rice the rebels would come and get some of her companions to rape them. She added: "It was not their wish. After having sex with them, at times when one returned, she would weep, she wept bitterly, she wept bitterly and we have to talk to the person."[1945] One rebel took the witness with him into the bush, but she managed to stay with another woman and was ultimately released, before he could rape her. However, the man came again another morning, told her to lie down and started to beat her with a guava stick, saying that she "was overlooking him and … trying him".[1946] The witness finally managed to escape to Lunsar and learned that the commander of the rebels was Superman.[1947]

[1940] Exhibit 61, TF1-169, Transcript from AFRC Trial, Transcript 6 July 2005, Closed Session, p. 12.
[1941] Exhibit 61, TF1-169, Transcript from AFRC Trial, Transcript 6 July 2005, Closed Session, p. 60.
[1942] TF1-360, Transcript 21 July 2005, Closed Session, p. 45.
[1943] George Johnson, Transcript 20 October 2004, p. 79 and Transcript 20 October 2004, pp. 54 and 62; TF1-366, Transcript 9 November 2005, pp. 35-36; TF1-360, Transcript 21 July 2005, pp. 45-46.
[1944] TF1-345, Transcript 19 July 2006, pp. 26-27, 30 and 43.
[1945] TF1-345, Transcript 19 July 2006, pp. 32-33, p. 33 (lines 27-29).
[1946] TF1-345, Transcript 19 July 2006, pp. 35-36, p. 36 (lines 25-26)
[1947] TF1-345, Transcript 19 July 2006, pp. 38-42.

620. TF1-255, a farmer from Chendekom, testified that he was captured by the rebels on 29 May 1999 together with members of his family.[1948] Two of his daughters, aged 12 and 14 years old, were taken away by the rebels. One month later, the witness found them in Makeni and they told him that they became the "wives" of two rebels and were forced to have sex with them and to cook for them. Two other girls from the village, named Rugei and Kadi, were also captured and taken away.[1949]

621. TF1-256, testified that he was captured together with about 100 other civilians in April 1999 when he was living in the village of Masimera. They were forced to work in Rochendekom, under a certain Captain Ritchie. The commander of the soldiers was called Abu Kanu. The witness was later told that the soldiers were SLAs.[1950] One day, Abu Kanu led 47 people away and three women stayed behind. One of them, the witness' niece, named Yebu, told the witness later that she was raped over and over again by the soldier who had captured her, a certain Yellow Man. She fell ill and her vagina was swollen. Another woman, Abie, told the witness that a man raped her. The third woman, Rugie, told him that she had been repeatedly raped by her captor since the time they were captured. Kadija, a young girl, told the witness also, that she had been raped when she was captured. The soldier used to send the women in different areas and they cooked for the soldiers.[1951]

C. Liability of the Accused

a) Joint Criminal Enterprise

622. On the evidence presented above in the joint criminal enterprise section and given the overwhelming evidence relating to sexual violence and forced marriage, the three Accused are liable for the crimes charged under Counts 6 to 9 pursuant to the theory of joint criminal enterprise.

623. In the AFRC case, the Appeals Chamber concluded that it was sufficient that the crimes committed as the means of achieving its objective reflect the common plan, design or purpose of a joint criminal enterprise, which is inherently criminal. Given the finding of

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[1948] TF1-255, Transcript 18 July 2006, p. 68-72.
[1949] TF1-255, Transcript 18 July 2006, pp. 92-94. The commander of the rebels was called Captain Rittin.TF1-255, Transcript 18 July 2006, p. 82.
[1950] Exhibit 136, TF1-256, Transcript from AFRC Trial, Transcript 14 April 2005, pp. 46-49, 59-64 and 69.
[1951] Exhibit 136, TF1-256, Transcript from AFRC Trial, Transcript 14 April 2005, pp. 89 and 97-98.

the Appeals Chamber in the AFRC case that not only the objective, but also the means to achieve the objective constitute the common criminal purpose underlying the joint criminal enterprise[1952], the crimes charged in Counts 6 to 9 clearly constituted an essential means of the RUF criminal design, in which each of the Accused participated. Massive sexual violence was used to reach the ultimate objective alleged in the Indictment "... to gain and exercise political power and control over the territory of Sierra Leone...".[1953]

624. Further, the *mens rea* requirement is fulfilled, as the three Accused, who intended to take part and contribute to the common plan, also intended to commit the crimes charged under Count 6 to 9. Alternatively, those crimes were undoubtedly a reasonably foreseeable consequence of the execution of the common criminal plan. Given the common occurrence of rape and other forms of sexual violence and the general environment of coercion surrounding women, the three Accused were fully aware that such acts were a highly probable consequence of the pursuit of their common goal and accepted that possibility.

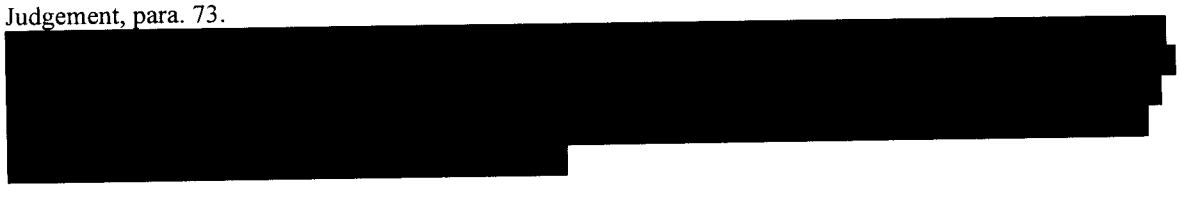
b) Liability under Article 6(1) of the Statute

i) Rape as Crime Against Humanity

625. Evidence exists for the direct commission of acts of rape by the First and the Third Accused in the sense of "the physical perpetration of a crime" committed "by the offender himself."[1954] At least one witness testified that Johnny Paul Koroma's wife had told him directly that she had been raped by the First Accused after a meeting held in Buedu in February or March 1998.[1955]

626. As regards the commission of one rape by the Third Accused, one witness testified, that he captured together with other RUF combatants a Lebanese woman in one of the shops along Rogbaneh Road in Makeni when the RUF retreated from Freetown to Makeni

[1952] *Brima et al* Appeal Judgement, paras 80 and 76.
[1953] Indictment, para. 36.
[1954] *Brima et al* Trial Judgement, para. 762, citing *Tadić* Appeal Judgement, para. 188; *Krnojelac* Trial Judgement, para. 73.



in 1998.[1956] Pursuant to the Third Accused's orders she was taken to the Task Force Office. The woman later told the witness that the Third Accused had raped her.[1957]

627. The evidence shows that all three Accused aided and abetted the commission of rapes by their troops. According to the Trial Chamber in the AFRC trial, it is sufficient that the accused gave practical assistance, encouragement, or moral support and that this had a substantial effect on the perpetration of the crime[1958], whereas the contribution can be provided through an intermediary [1959] and irrespective of whether the participant was present or removed both in time and place from the actual commission of the crime.[1960] The Trial Chamber in the AFRC held that a "persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting."[1961] It also stated that "while such failure entails a superior's responsibility under Article 6(3) of the Statute, it may also be a basis for his liability for aiding and abetting, subject to the *mens rea* and *actus reus* requirements being fulfilled."[1962]

628. The *mens rea* requirement for aiding and abetting is the knowledge of the aider and abettor that his acts or omissions would assist the commission of the crime by the perpetrator or that he was at least aware of the substantial likelihood that his acts would assist the principal perpetrator in the commission of the crime, whereby no knowledge of the precise act to be committed is necessary. It suffices that the aider and abettor was aware that one of a number of crimes would probably be committed, including the one actually committed.[1963]

629. The evidence shows that sexual violence, including, and in particular the crime of rape, was widespread throughout the conflict. The large number of witnesses who testified that women and girls were systematically raped when a group of civilians was captured[1964] indicates that rape was part of a pattern used by the RUF when capturing civilians. Rapes

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[1956] TF1-117, Transcript 29 June 2006, p. 104.
[1957] TF1-117, Transcript 29 June 2006, p.105 and p. 107 (lines 5-16).
[1958] AFRC Trial Judgement, para. 775, referring to *Blaškić* Appeal Judgement, para. 46.
[1959] *Brima et al* Trial Judgement, para. 775, referring to *Limaj* Trial Judgement, para. 516.
[1960] *Brima et al* Trial Judgement, para. 775, referring to *Blaškić* Appeal Judgement, para. 48.
[1961] *Brima et al* Trial Judgement, para. 777, citing the *Brima et al* Prosecution Final Brief, para. 431.
[1962] *Brima et al* Trial Judgement, para. 777.
[1963] *Brima et al* Trial Judgement, para. 777, referring to *Blaškić* Appeal Judgement, para. 50.
[1964] TF1-217, Transcript 22 July 2004, pp. 8-11 and 19 see also Exhibit 175, HRW Report 1998, p. 4 and 17-18, Exhibit 146, HRW Report on Sexual Violence, pp. 28 and 35-36.

were regularly committed by high ranking commanders of the RUF.[1965] Children were forced by their commanders to rape other children or women who could have been their mothers.[1966] Men were forced to have sexual intercourse with their wives,[1967] women and girls were publicly raped, gang raped – sometimes to death.[1968] This scale of sexual violence is not accidental or random but rather reflects a premeditated plan: rape and other forms of sexual violence were part of the war technique of the RUF and the Accused, by their acts and omissions clearly encouraged and furthered rape and other acts of sexual violence amongst their troops knowingly and intentionally. For instance, several witnesses testified that forced sexual intercourse was very often part of a forced marriage. All three Accused had bush wives and by doing so clearly sent out the message that rape is accepted.

630. Some witnesses testified that the First Accused punished combatants who were suspected of rape[1969] and that laws existed prohibiting rape. However, there is no evidence of any systematic prosecution and punishment of rape within the RUF. On the contrary: impunity was the rule and evidence shows that the Accused themselves raped women. Further, the "punishment" the First Accused inflicted on the Third Accused – when he heard about the latter's rape ended in a simple "He got annoyed. [...] He dug his ten toes".[1970] Besides, rape and other forms of sexual violence within a forced marriage were clearly accepted and all three Accused had bush wives themselves.[1971] In addition, there is clear evidence that the three Accused in their respective functions as commanders accepted instances of rape committed by their troops as shown below.

631. Consequently, given the First and Third Accused bear individual criminal responsibility under Article 6(1) for the direct commission of rape. Furthermore, the First , Second and Third Accused are to be held responsible pursuant to Article 6 (1) by way of

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[1965] TF1-362, Transcript 26 April 2005, pp.87-89; TF1-071, Transcript 19 January 2005, pp. 38-39
[1966] TF1-174, Transcript 21 March 2006, pp. 36 and 39; Exhibit 146, HRW Report on Sexual Violence, pp. 35-36.
[1967] TF1-192, Transcript 1 February 2005, pp. 62-64; [redacted]
[1968] TF1-305, Transcript 27 July 2004, pp. 55-56; TF1-217, Transcript 22 July 2004, pp. 18-20 and 23; Exhibit 175, HRW Report 1998, p. 19450; FAWE Report, p. 12112; Exhibit 104a, TF1-081, Transcript from AFRC Trial, Transcript 4 July 2005, p. 9; Exhibit 174, HRW Report 1999, p. 34 (19402).
[1969] TF1-314, Transcript 2 November 2005, p. 47.
[1970] TF1-117, Transcript 29 June 2006, p. 106 and Transcript 3 July 2006, pp. 51-53 and 55.
[1971] TF1-174, Transcript 21 March 2006, p. 71 and Transcript 27 March 2006, pp. 66-67; TF1-366, Transcript 8 November 2005, Closed Session, pp. 72-74; TF1-108, Transcript 9 March 2006, pp. 4-6.

ordering, planning and/or instigating, as well as aiding and abetting in the planning, preparation or execution of acts of rape.

ii) Sexual Slavery as Crime Against Humanity

632. The evidentiary basis and the factual allegations for the crime of sexual slavery and the crime of forced marriage are related, although not identical. Some of the evidence going to the proof of sexual slavery is also (contextual or direct) evidence of forced marriage. Nonetheless, sexual slavery and forced marriage consist of two *distinct offences*, with *distinct elements*, as recognized by the Appeals Chamber:

> While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors.[1972]

633. Convictions may be entered for both outrages upon personal dignity and forced marriage, as these two crimes have distinct elements:

> The Appeals Chamber is also aware that the Trial Chamber relied upon the evidence led in support of sexual slavery and forced marriage to enter convictions against the Appellants for "Outrages upon Personal Dignity" under Count 9 of the Indictment. Since "Outrages upon Personal Dignity" and "Other Inhumane Acts" have materially distinct elements (in the least, the former is a war crime, and the latter a crime against humanity) there is no bar to entering cumulative convictions for both offences on the basis of the same facts.[1973]

634. The question that was not resolved by the Appeals Chamber was whether convictions can be entered for sexual slavery and forced marriage ("other inhumane act"). This is because Count 7 of the Indictment in the AFRC case was duplicitous and the Count was dismissed.[1974] As a result, sexual slavery was dealt with under Count 9.[1975]

635. The Prosecution submits that the Accused can be convicted for both sexual slavery and forced marriage, for the *same* underlying conduct because the crimes have different

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[1972] *Brima et al* Appeal Judgement, para. 195. The distinguishing factors identified by the Appeals Chamber are : "First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences for breach of this exclusive arrangement."
[1973] *Brima et al* Appeal Judgement, para. 202.
[1974] *Brima et al* Trial Judgement, paras. 92-95.
[1975] *Brima et al* Trial Judgement, para. 713.

elements: "multiple convictions for the same conduct are permissible if each statutory provision has a materially distinct element not contained in the other. Elements are materially distinct from one another if each requires proof of a fact not required by the other."[1976]

636. With respect to forced marriage, the Appeals Chamber held that "the intention of the perpetrators was the imposition of a forced conjugal association rather than the exercise of mere ownership over civilian women and girls".[1977] The existence of a forced conjugal association differs from the requirement of 'mere' ownership that is an element of sexual slavery. Factual elements that must be proven to establish the crime of sexual slavery, such as abduction, enslavement or rape, may also serve to prove the crime of forced marriage. But because the elements are different, the same facts may be relied on to prove those elements, and where the different elements of distinct crimes are proven, multiple convictions should be entered.

637. The expert report made a distinction between bush wives and sex slaves, referred to as non-bush wives, indicating that there is a different status attached to each term. Some women, who were sex slaves were not called bush wives because they were not subject to a conjugal association.[1978] However, in spite of this distinction in the terminology, the evidence adduced above shows clearly that some women were victims of both sexual slavery and forced marriage, since some women, although considered wives, were also used as sex slaves by their husbands.

638. As to the requirement relating to powers of ownership, the Appeals Chamber held that it did not require confinement to a particular place, but included situations in which those who were captured remained in the control of their captors because they had no where else to go and feared for their lives.[1979] According to the evidence, women were abducted *en masse* and subsequently felt themselves under imminent threat of physical

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[1976] CDF Appeals Judgement, para. 220 citing CDF Trial Judgment, para. 974, *quoting Čelebići* Appeal Judgement, para. 412.
[1977] *Brima et al* Appeal Judgement, para. 192.
[1978] Exhibit 138, Expert Report Forced Marriage, p. 12097. The report also underlined that non-bush wives were consequently assigned to different tasks. They were used to carry loads and food supplies as the group was moving, forced into hard labour in the camp, regularly sexually abused by any rebel in the camp, not provided with food which they had to find for themselves and sometimes sent as spies on reconnaissance or to the war front.
[1979] *Brima et al* Trial Judgement, para. 709.

harm. Their autonomy and freedom of movement were clearly restricted and those who tried to escape were punished. Those factors prove a deprivation of liberty. Furthermore, the perception of the women attributed to combatants as wives was described by the expert as follows: "You are with him and you are part of his property, I might say, because he takes care of you, he protects you, he feeds you. So you are part and parcel of him".[1980] This statement clearly conveys that women felt they were being owned by their captors who served as husbands.

639. Captured women were systematically used to provide sexual gratification to RUF combatants, as shown above in Count 6. The evidence shows a pattern according to which abducted women were subjected to acts of a sexual nature. RUF combatants, whether so called husbands or other fighters, engaged in such acts with women deprived of their liberty. Women were even the victims of multiple perpetrators sometimes. It is clear that RUF combatants had total control over the women and their sexual access. The testimony of TF1-314 is self-explanatory in that matter, as it illustrates how women and girls' fate and sexuality in Buedu was in the hands and at the complete discretion of the RUF, the First Accused being the overall commander there.[1981] Training camps were based in Buedu and girls between 10 and 15 years old (SGU's), as well as women, were used for forced labour and for sexual purposes. TF1-314 herself was part of the SGU's and stated that escape from Buedu was impossible. She was raped by 2 different combatants and only the second one decided to take her as her wife.[1982] TF1-212 testified that she was locked in a guardroom with other girls and that combatants would come to pick which girls they wanted. The ones not picked were simply left for anyone to rape.[1983] TF1-345 also explained that, after her capture, she was detained and used for forced labour, during which combatants would come, pick women and rape them.[1984]

640. Furthermore, as will be shown in the next section, the evidence proves that the three Accused forced women into becoming their wives, whose freedom of movement was clearly restricted and who were compelled to engage in acts of a sexual nature. This also qualifies as sexual slavery.

[1980] TF1-369, Transcript 3 October 2005, p.52.
[1981] TF1-314, Transcript 2 November 2005, p. 27.
[1982] See para. 603 above and TF1-314, Transcript 2 November 2005, pp. 32- 42.
[1983] See para 588 above and TF1-212, Transcript 8 July 2005, pp. 103-105.
[1984] See para 619 above and TF1-345, Transcript 19 July 2006, pp. 32-33.

641. The *mens rea* requirement is fully established, as it is clear from the evidence that the perpetrators intended to engage in acts of sexual slavery. In any case, given the women's position of vulnerability and the environment of constant violence against them, the three Accused acted in the reasonable knowledge that acts of sexual slavery were more than likely to occur.

642. The evidence shows that members of the RUF engaged in sexual slavery by exercising ownership over women and girls, battering them, depriving them of liberty and forcing them to take part in sexual acts either by use of force, threat of force, coercion or by taking advantage of a coercive environment or the victim's incapacity to give genuine consent in the circumstances. The evidence has established beyond reasonable doubt the legal requirements for the crime against humanity of sexual slavery and that the First, Second and Third Accused are individually criminally responsible pursuant to Article 6(1) for committing, ordering, planning and/or instigating, or otherwise aiding and abetting in the planning, preparation or execution of acts of sexual slavery. The submissions made in respect of the liability of the Accused for aiding and abetting under paragraphs 627 to 630 above are also relied upon for the crime of sexual slavery.

iii) Other Inhumane Acts Crime as Against Humanity

643. The crime against humanity of forced marriage as an "Other Inhumane Act" is distinct from the practice of early/arranged marriages, still practised in many societies, including Sierra Leone. The jurisprudence of this Court also makes this distinction.[1985] The *modus operandi*, the actors, the context and the consequences of forced marriage as compared to early/arranged marriage, are entirely distinct. While an arranged union conforms to traditional rules and rites, forced marriages, as pled in the Indictment, are committed outside of any family control or consent and are, as such, a negation of the traditional values and rites of the Sierra Leonean society. TF1-093 confirmed the difference between an arranged marriage and the bush marriage she was forced into, when she stressed that [redacted] who forced her to become his wife, did not know her parents or her

[1985] See *Brima et al* Appeal Judgement, para. 194.

family.[1986] The expert witness also gave much emphasis on this fundamental difference, as described above in paragraphs 563 to 564.

644. Overwhelming evidence demonstrates that captured women and girls were coerced into living with RUF rebel combatants as wives throughout the life of the war and that such forced marriages became a common and regular practice within the RUF. The *forced conjugal association* that is an element of the crime of forced marriage, is proven on the evidence.[1987] The statement "you're my wife", combined with the use of force, threat of force or other means of coercion imposed on the women, is evidence of an enforced marital union. The trial record contains abundant evidence that women were systematically and forcibly abducted by the RUF forces and compelled to serve as wives to rebel combatants, by being forced to perform various conjugal duties which encompassed cleaning, cooking, laundering, other forms of forced labour and sexual intercourse. Furthermore, not only women had to stay with combatants as their wives, but they also had to bear and bring up their children. The husbands were in return expected to take care of them and protect them from other combatants.

645. The expert witness and several insider witnesses, such as TF1-045, TF1-362, TF1-071, TF1-366, TF1-371, TF1-334, TF1-199 and TF1-141, have testified to the widespread phenomenon of forced marriages and to its extensive commission by RUF combatants. For instance, TF1-362 testified to the existence of a specific unit for wives who needed to be trained, called 'the wives platoon', in [redacted] training bases.[1988] DIS-174 said that in the Pendembu region, Kailahun District, it was possible for RUF combatants to arrange with the G5 commander to have women and that by 1998, all the combatants were married.[1989] Direct victims of forced marriages, such as TF1-016, TF1-028, TF1-093, TF1-314 and TF1-023, explained their traumatising experiences in great detail. The conjugal obligations consisted of the performance of domestic chores and constant sexual availability, whereas the husband was to provide protection from other

[1986] TF1-093, Transcript 29 November 2005, Closed Session, p. 76 (lines 16-19): "[...] that was bush marriage, because he did not know my father, he did not know my mother, he did not know my family. He just captured me and he said he wanted me to be his wife."
[1987] *Brima et al* Appeal Judgement, paras 195-196.
[1988] TF1-362, Transcript 22 April 2005, pp. 7 and 19-20.
[1989] DIS-174, Transcript 21 January 2008, Closed Session, pp. 105-106.

fighters and food. The existence of such obligations is not necessarily part of a "master to slave relationship", but is evidence of the existence of a conjugal association.

646. The evidence presented proves that the perpetrators used threat or physical violence to impose this conjugal association. Evidence has showed that most forced marriages lacked the consent of the woman or the girl. Many witnesses, whether direct victims of forced marriage, insiders or others, have stressed the fact that women were abducted and did not consent to being married to rebel combatants who decided to make them their wives, but that it was under duress. Notably, the expert witness explained in that regard: "A place is attacked, you become a victim and you are forced to stay and you adjust your life to it".[1990] The evidence shows that women and girls had no capacity to give genuine consent. The husband had total control over the woman because of the coercion he was able to exercise and, notably, because of the image of marriage that he created.[1991] It is recalled that such marriages took place without any marriage ceremonies. This evidence was corroborated by DIS-180[1992], TF1-045[1993] and TF1-023.[1994] Unlike sexual slavery, forced marriage implied a relationship of exclusivity between the "husband" and the "wife."[1995] However, bush wives, for example TF1-016, perceived themselves not as "lawfully" married, and being a bush wife was different from that of a traditional, religious, or legal marriage.

647. Direct victims have also expressed the fact that the husband was able to provide them with protection. The evidence has shown indeed that, given the general context and climate of violence, the need for protection was very often a determinative factor for women to stay with their rebel husband.[1996] The expert witness reported that women

[1990] TF1-369, Transcript 25 July 2006, p. 104 (lines 21-29).

[redacted]

[1992] DIS-080, Transcript 8 October 2007, p. 10. See also TF1-023, Exhibit 59a, Transcript from AFRC Trial, Transcript 9 March 2005, p. 45-47.
[1993] TF1-045, Transcript 21 November 2005, p. 37.
[1994] Exhibit 59a, TF1-023, Transcript from AFRC Trial, Transcript 9 March 2005, p. 48-51.
[1995] See *Brima et al* Appeal Judgement, para. 195.
[1996] TF1-028, Transcript 20 March 2006, p. 55. See para. xxx above; TF1-016, Transcript 21 October 2004, p. 20.

preferred to be subjected to a husband, thereby enjoying his protection, rather than to be left on their own, as targets for any combatants. She said that "forced marriage became a means of survival for most girls in the bush".[1997] Women had the choice between being raped and even gang raped repeatedly by various rebels or to being subjected to the condition of a "rebel wife". However, given the environment of violence and coercion in which forced marriage occurred, the benefits received by victims of forced marriage from perpetrators do not signify consent to the forced conjugal association, or vitiate the criminal nature of the perpetrator's conduct.[1998]

648. [redacted] Being labelled rebel "wives" resulted in women being stigmatised, ostracised and even rejected from their communities. While bush wives were provided with certain advantages on a short term, they were left with an indelible stigma and their so-called rebel children suffered long-term social stigmatisation because of that association. The expert report explained in detail the difficulties encountered by bush wives upon their reintegration into their communities.[2000] Direct victims have also expressed the feeling of shame attached to their having been a bush wife, how it has affected the way they are being perceived and how much it has jeopardised their future perspectives[2001], for instance to ever being married again.

649. Witnesses have implicated the three Accused in the commission of the crime. TF1-366 involved them directly by stating that throughout the conflict and in different locations, all three Accused had women whom they had turned into their wives. He even described an incident which involved the Third Accused in forcing a school girl in Makeni to becoming his wife.[2002] Significantly, He also reported having received orders from the Second

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[1997] Expert Report Forced Marriage, p. 12097.
[1998] *Brima et al* Trial Judgement, paras 1081 and 1092; *Brima et al* Appeal Judgement, para. 190.
[1999] *Brima et al* Appeal Judgement, para. 192. The report was also extensively quoted by Justice Sebutinde in her Separate Concurring Opinion (Sebutinde Separate Concurring Opinion, paras 13 and 15).
[2000] See Expert Report Forced Marriage, pp. 12098-12101.
[2001] For example, TF1-093, Transcript 29 November 2005, Closed Session, p. 112, TF1-093 said that she was struggling with the child she had with Superman, raising him on her own.
[2002] TF1-366, Transcript 8 November 2005, pp. 75-76.

Accused to capture women who the witness was to bring to him.[2003] This evidence is corroborated by TF1-141, a child soldier whose group was directly subordinate to the Second Accused. While on food finding missions, he would capture women to bring back and some would be turned into wives for combatants. TF1-141 also testified that he saw the Second Accusing taking a young girl as his wife [redacted] TF1-108 met girls from Kono who were the wives of the First and Third Accused.[2006]

650. The Prosecution further submits that forced marriage, as pled in the Indictment, is of sufficient gravity to constitute an "Inhumane Act" under Article 2(i) of the Statute, as victims of forced marriage were being inflicted great suffering and/or serious injury to their physical, moral, and psychological health by the very conjugal association they were forced into. The commission of forced marriage in this case have involved acts of forced labour, forced pregnancy, rape, sexual violence, sexual slavery, corporal punishment, and deprivation of liberty. The evidence proves that victims of forced marriage did endure physical injury as well as psychological trauma, as a result of those repeated acts. The gravity of the crime of forced marriage is therefore without any doubt similar to the acts referred to in Article 2(a) to (h) of the Statute.

651. As to the fulfilment of the *mens rea* requirement, the Appeals Chamber stated:

> The Appeals Chamber is also satisfied that in each case, the perpetrators intended to force a conjugal partnership upon the victims, and were aware that their conduct would cause serious suffering or physical, mental or psychological injury to the victims. Considering the systematic and forcible abduction of the victims of forced marriage, and the prevailing environment of coercion and intimidation, the Appeals Chamber finds that the perpetrators of these acts could not have been under any illusion that their conduct was not criminal. This conclusion is fortified by the fact that the acts described as forced marriage may have involved the commission of one or more international crimes such as enslavement, imprisonment, rape, sexual slavery, abduction among others.[2007]

[2003] See above para. 567 and TF1-366, Transcript 8 November 2005, Closed Session, pp. 72-74.
[2004] See para. 569 above and TF1-141, Transcript 11 April 2005, pp. 90-95.
[2005] See para. 560 above and TF1-174, Transcript 21 March 2006, p. 71 and Transcript 27 March 2006, pp. 66-67.
[2006] TF1-108, Transcript 9 March 2006, pp. 4-6.
[2007] *Brima et al* Appeal Judgement, para. 201(emphasis added).

652. The evidence has shown that the perpetrators of forced marriages intended to impose a forced conjugal association upon the victims, knowing that it would expose the women to severe physical and mental suffering. Furthermore, given the systematic pattern of the commission of the crime and the coercive environment in which captured women lived in, the three Accused were undoubtedly aware of the factual circumstances surrounding their criminal conduct. The trial record in this case and the evidence presented have established the elements of the crime of forced marriage, independent of the crime of sexual slavery under Article 2(g) of the Statute. Each Accused should therefore be held responsible for committing, ordering, planning, instigating or otherwise aiding and abetting in the planning, preparation or execution of the crime of forced marriage, an "other inhumane act."

iv) Outrages upon Personal Dignity as Violation of Common Article 3 and Protocol II

653. Since the underlying facts are the same for the war crime of Outrages upon Personal Dignity as a Violation of Common Article 3 and Protocol II contained in Count 9 and those in Counts 6 to 8, the Prosecution refers to the discussion in paragraphs 625 to 652, above.

654. The evidence adduced shows that the perpetrators humiliated, degraded or otherwise violated the dignity of one or more persons by inflicting atrocious acts of sexual violence on the victims. Women and girls were frequently gang raped[2008], children as young as nine or ten years old were raped[2009], family members forced to have sexual intercourse with each other[2010], children were forced by their commanders to rape other children or women who could have been their mothers,[2011] rapes were frequently committed publicly and regularly violated cultural taboos[2012], and an unknown number of women and girls were forced into sexual slavery and forced marriage.

[2008] TF1-305, Transcript 27 July 2004, pp. 55-56; TF1-217, Transcript 22 July 2004, pp. 18-20 and 23; Exhibit 175, HRW Report 1998, p. 19450; [redacted]; Exhibit 104a, TF1-081, Transcript from AFRC Trial, Transcript 4 July 2005, p. 9; Exhibit 174, HRW Report 1999, p. 34 (19402). [redacted]

[2010] TF1-192, Transcript 1 February 2005, pp. 62-64 [redacted]

[2011] TF1-174, Transcript 21 March 2006, pp. 36 and 39; Exhibit 146, HRW Report on Sexual Violence, pp. 35-36.

[2012] For example having sexual intercourse with breastfeeding mothers: TF1-064, 19 July 2004, pp. 48-49; Exhibit 146, HRW Report on Sexual Violence, p. 35

655. These acts, which were committed systematically and on a massive scale, are generally recognized as an outrage upon personal dignity. The victims were, in their majority civilians, women and girls captured from villages and towns.

656. Furthermore, the Prosecution submits that acts such as forced undressing and naked marching[2013], sexual mutilation[2014] or forcing a daughter to wash her father's private parts[2015] are also encompassed in the crime of outrage upon personal dignity as charged under Count 9.

657. The perpetrators were aware of the factual circumstances that established the status of the victims as protected persons under international humanitarian law and they were also aware of the factual circumstances that established the existence of an armed conflict.

658. The Prosecution has proven beyond reasonable doubt that in the present case that the First, Second and Third Accused should to be held responsible under Article 6(1) for committing, ordering, planning and/or instigating the crime charged under Count 9. Alternatively, by reference to the discussion above under Count 6, the three Accused are to be considered as aiders and abettors in the planning, preparation or execution of the crime.

c) Liability under Article 6 (3) of the Statute

i) Sexual violence – Counts 6, 7 and 9

659. For the general requirements establishing command responsibility, the Prosecution refers to sections V (B) on superior responsibility and V (C) on joint criminal enterprise, above. Several witnesses testified that rape occurred in situations, where the three Accused were in a position of command and they clearly fulfilled the three-pronged test of Article 6(3) of the Statute for criminal liability to attach, which is the existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime, the knowledge of the accused that the crime was about to be or had been committed; and his failure to take necessary and reasonable measures to prevent the crime or punish the perpetrators thereof.[2016] DIS-214 for instance testified that after the retaking of Makeni,

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[2013] TF1-031, Transcript 17 March 2006, pp. 78-81; TF1-218, Transcript 1 February 2005, p. 84; TF1-028, Transcript 17 March 2006, pp. 118-120 and TF1-028,Transcript 20 March 2006, p. 6.
[2014] TF1-192, Transcript 1 February 2005, p. 65.
[2015] TF1-218, Transcript 1 February 2005, pp. 84-85.
[2016] *Brima et al* Trial Judgement para. 781, referring to *Čelebići* Trial Judgement, para. 346.

looting and raping was rampant under Superman. The First Accused therefore decided to bring in the Third Accused to restore law and order. However, no one was punished for these crimes. DIS-214 alleged that the reason for the First Accused not to punish anyone for the rampant raping and looting was that Superman had a large force and the First Accused was afraid of him.[2017]

660. Several other witnesses testified about instances where the three Accused individually or together failed as commanders to take the necessary actions to prevent or punish rape. The First Accused was the overall commander in Buedu camp[2018] in Kailahun, where rapes were committed, even by some of his direct subordinates.[2019] The Second and Third Accused were also commanders in Buedu.[2020] The First Accused was overall commander in Waterloo during the retreat from Freetown and he was the in charge of the re-launch of the attack on Freetown by RUF and AFRC troops.[2021] The Second Accused was also one of the commanders in charge of this attack. During the retreat from Freetown, rape by RUF and AFRC troops was widespread and systematic and the First and Second Accused had knowledge of it.[2022] In 1998, the Second Accused was the commander in charge at Guinea Highway. He sent combatants to capture civilians, including child soldiers on food finding missions during which rapes were committed by RUF combatants.[2023] A witness testified that one of the Third Accused's direct subordinates during his time as commander in Kailahun District was well known for having sex with little children.[2024]

661. The evidence shows that the three Accused failed to take necessary and reasonable measures[2025] to prevent or punish the crimes of their subordinates, and that they encouraged such behaviour. They did not prevent the execution and completion of a subordinate's

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[2017] DIS-214, Transcript 17 January 2008, p. 111.
[2018] TF1-314, Transcript 2 November 2005, pp. 24-29 and Exhibit 45.
[2019] TF1-314, Transcript 2 November 2005, pp. 32- 37 and Exhibit 46
2020 TF1-314, Transcript 2 November 2005, p. 27.
[2021] George Johnson, Transcript 20 October 2004, p. 79 and Transcript 20 October 2004, pp. 54 and 62; TF1-366, Transcript 9 November 2005, pp. 35-36; TF1-360, Transcript 21 July 2005, pp. 45-46.
[2022] TF1-360, Transcript 21 July 2005, Closed Session, p. 45.
[2023] TF1-141, Transcript 11 April 2005, pp. 90-95.
[2024] Dennis Koker, Transcript 28 April 2005, p. 65. Several witnesses testified that Tom Sandy was subordinate to the Third Accused; TF1-366, Transcript 8 November 2005, [redacted]
[2025] *Brima et al* Trial Judgement, para. 798, referring to *Limaj* Trial Judgement, para. 528.

crimes, nor their earlier planning and preparation. They did not intervene when they became aware of crimes to be committed by their subordinates although they clearly had the effective ability to prevent them from starting or continuing.[2026] No evidence exists that there was a meaningful investigation with a view to establish the facts, order or execute appropriate sanctions, or report the perpetrators to the competent authorities for rapes committed by subordinates of the Accused.[2027]

ii) Other Inhumane Acts Crime as Against Humanity – Forced Marriage

662. Reference is made to Sections V (B) and V (C), where the Prosecution has proved that the general requirements of command responsibility were established. The Prosecution also relies on the submissions relating to the responsibility of the three Accused for Counts 6, 7 and 9.

663. In light of the widespread nature of the commission of the acts of forced marriage and the environment of systematic violence surrounding women generally, the three Accused knew or had reason to know that such acts were about to be or had been committed.

664. The three Accused failed to take the necessary and reasonable measures to prevent or punish the commission of the crime. Forced marriages became a generally accepted rule within the RUF. TF1-366 and TF1-141 both reported that they received orders from the Second Accused to capture women who were subsequently married.[2028] Furthermore, the evidence shows that commanders took advantage of their positions to be the first to select women. TF1-015, TF1-141 and TF1-366, all testified that it was usual for RUF commanders to have bush wives. DIS-174 expressly insisted on the need for combatants to have women with them at the front line.[2029] The First, Second and Third Accused bear individual criminal responsibility for the crime of forced marriage pursuant to Article 6(3).

[2026] *Brima et al* Trial Judgement, para. 798 (footnote omitted), referring to *Halilović* Trial Judgement, para. 79.
[2027] *Brima et al* Trial Judgement, para. 799 (footnote omitted), referring to *Limaj* Trial Judgement, para. 529; *Strugar* Trial Judgement, para. 376.
[2028] TF1-366, Transcript 8 November 2005, Closed Session, pp. 72-74; TF1-141, Transcript 11 April 2005, p. 94.
[2029] DIS-174, Transcript 21 January 2008, Closed Session, p. 120.

VIII. COUNT 10-11: PHYSICAL VIOLENCE

665. The Indictment charges the Accused in Count 10 with violence to life, health and physical or mental well-being of persons, in particular mutilation as a violation of Article 3 Common to the Geneva Conventions and of the Additional Protocol II punishable under Article 3(a) of the Statute, and in Count 11 in addition, or in the alternative, with other inhumane acts, as a Crime against Humanity, punishable under Article 2(i) of the Statute. In the Indictment the Prosecution submits that "[w]idespread physical violence, including mutilations, was committed against civilians."[2030]

A. Applicable Law and Elements of Crime

Count 10: Violence to Life, Health and Physical or Mental Well-Being of a Person as Violation of Common Article 3 and Protocol II

i) Chapeau Elements

666. The circumstantial elements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute are discussed above in Section IV on the contextual elements, above. Some comment is necessary about the crime of mutilation, in particular, regarding the nexus between the crime and the armed conflict.

667. In order to prove the nexus between the armed conflict and the offence it must be shown, at a minimum, that the armed conflict played a "substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed".[2031] The evidence shows that the extreme and massive physical violence inflicted upon the civilian population in Kono, Koinadugu, Bombali and Port Loko District and in the Freetown and the Western Area, mostly in the form of mutilations, were part of the war tactic of the RUF and the AFRC. The nexus requirement is therefore satisfied, since the perpetrators obviously "acted in furtherance of or under the guise of the armed conflict". The perpetrators were normally combatants and the victims were non-combatants, who were typically considered supporters of the "opposing party," or

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[2030] Indictment, para. 61.
[2031] *Kunarac* Appeal Judgement, paras 58-59.

at least not sympathetic to the RUF. Mutilations were meant to serve the "ultimate goal of a military campaign".[2032]

668. The Trial Chamber has stated that Article 3 and the Additional Protocol II protect persons who at the time of the alleged offences were not taking part directly in the hostilities.[2033] The evidence proves that the victims of the mutilations committed by the RUF were predominantly civilians. The RUF specifically targeted civilians who took no active or direct part in the hostilities, and were thus protected persons under Article 3 Common to the Geneva Conventions and of Additional Protocol II.[2034] The abundant evidence shows that it was part of the war strategy of the RUF and of the Junta to target civilians who lived in areas captured by the RUF and to mutilate them to demoralize the "enemy". For instance, several witnesses testified, that following their amputation they were told to ask President Kabbah or ECOMOG to give them back their hands; some were even given letters for Kabbah or ECOMOG.[2035] One witness said the rebels said that they were not interested in civilian support and that they therefore killed civilians.[2036]

ii) Actus Reus and Mens Rea

669. In addition to the chapeau requirements discussed in Section IV on the contextual elements, above, and in this section, in paras , the following elements of the war crime of violence to life, health and physical or mental well-being of persons, in particular mutilation, were established by the Trial Chamber in the Rule 98 Decision. They are

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[2032] *Brima et al* Trial Judgement, para. 246-257; *Sesay et al.* Decision on Motion for Acquittal, p. 14-15; *Kunarac* Appeal Judgement, para. 59; *Tadić* Appeals Chamber Jurisdiction Decision, para. 70; *Rutaganda* Appeal Judgement, para. 570.

[2033] *Brima et al* Trial Judgement, para. 248.

[2034] Common Article 3; Article 4(1) of Additional Protocol II; *Tadić* Trial Judgement, para. 616.

[2035] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 38-41; Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, pp. 83-84; TF1-213, Transcript 2 March 2006, pp. 16-17; TF1-197, Transcript 22 October 2004, p. 16; [redacted]

[2036] TF1-172, Transcript 17 May 2005, pp. 13-14.

similar to the ICC's elements[2037] for the war crime of mutilation as a violation of Common Article 3 as codified in Article 8(2)(c)(i)-2 of the Rome Statute of the International Criminal Court:

1. The accused persons subjected one or more persons to mutilation, in particular, by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;
2. The conduct was neither justified by medical, dental or hospital treatment of the person or persons concerned or carried out on such persons or persons' interest;
3. The accused intended to subject the person or persons to mutilation or acted in the reasonable knowledge that this was likely to occur;
4. The accused knew or had reason to know that the person was not taking a direct part in the hostilities.[2038]

670. In the AFRC Trial Judgement the Trial Chamber clearly stated that the perpetrator's conduct must not cause the death or seriously endanger the physical or mental health of the victim. This element is superfluous.[2039]

671. The evidence shows that the Accused, as members of a joint criminal enterprise, or by their acts and omissions, in particular as superior commanders of the RUF, subjected hundreds of civilians to the cruelest forms of mutilation by chopping off limbs, carving their body, cutting ears and tongues etc. It is also clear that these mutilations were not medically warranted and were not in the victims' interest.

672. Each of the Accused, as members of a joint criminal enterprise, or by their acts and omissions, in particular as senior commanders of the RUF, intended to subject the victims to mutilation or acted in the reasonable knowledge that this was likely to occur. The evidence shows that mutilations were part of a war tactic used by the RUF and AFRC and that the Accused actively participated in the planning and execution of it by direct commission or instigating or by not preventing and punishing as superior commanders.

[2037] ICC Elements of Crimes, p. 146. Also AFRC Judgement, para. 724. However, the wording of the ICC Elements of Crime in para. 3 is different, in accordance with the wording of Common Article 3 and reads as follows: "Such person or persons were either *hors de combat,* or were civilians, medical personnel or religious personnel taking no active part in the hostilities." Further, para. 4 reads: " The perpetrator was aware of the factual circumstances that established this status." Para. 5 and 6 respectively read as follows: " The conduct took place in the context of and was associated with an armed conflict not of an international character; The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

[2038] *Sesay et al* Decision on Motion for Acquittal, p. 26.

[2039] *Brima et al* Trial Judgement, para. 725.

Since the chosen target of the massive physical violence was the civilian population in areas that were occupied by the RUF, or civilians who had been abducted from such areas, the aim of the mutilations was to punish the civilians for their support of the democratically elected government or to ensure that civilians marked with "RUF" could not flee to government controlled areas. There is no doubt the Accused had reason to know that the victims were not taking a direct part in the hostilities.

Count 11: Other Inhumane Acts as Crime Against Humanity

i) Chapeau Elements

673. The Chapeau elements of a crime against humanity have been discussed in Section IV on the contextual elements, above. The mutilations and injuring of and the targeted physical attacks on civilians in areas captured by the RUF and AFRC as a means of collective punishment and deterrence, clearly fit into the larger widespread and systematic attack against the civilian population as described above. Even if specific areas and villages were targeted, it "is sufficient to show that enough individuals were targeted in the course of the attack."[2040] In particular the amputations of limbs and the carving of the letters RUF on the body of victims were executed in a manner that shows a clear pattern. "The organised nature of the acts of violence and the improbability of their random occurrence"[2041] clearly indicate that a policy of terror and deterrence existed. The RUF, and during the Junta period RUF and AFRC combatants used these inhumane acts against civilians. These acts were not random and were not limited to selected individuals. Instead, the inhabitants of entire villages in particular in Kono, Bombali, Freetown and Western Area, and Koinadugu suffered this cruel treatment.

ii) Actus Reus and Mens Rea

674. In addition to the chapeau requirements discussed in Section IV on the contextual elements, above, above, and in paragraph 673 of this section, the elements of the Crime against humanity of other inhumane acts are as follows:

1. The occurrence of an act or omission of similar seriousness to the act or other acts enumerated in Article 2 of the Statute;

[2040] *Kunarac* Appeal Judgement, para. 90; *Tadic* Trial Judgement, para 648.
[2041] *Kunarac* Appeal Judgement, para. 94.

2. The act or omission caused serious mental or physical suffering, or injury, or constituted a serious attack on human dignity;

3. The accused, at the time of the act or omission, had the intention to commit the inhumane act or acted in reasonable knowledge that this was likely to occur.[2042]

675. The *Brima et al* Trial Judgement stated that "With regard to particular acts of physical violence, the seriousness of the act or omission and its degree of gravity must be examined on a case-by-case basis."[2043] Trial Chamber advised that it would consider acts other than mutilations, such as beatings and other forms of ill-treatment solely under Count 11 of the AFRC indictment.[2044] The Trial Chamber further held, it would "assess the seriousness of a particular conduct and its sufficient gravity on a case-by-case basis" giving consideration "to all the factual circumstances, including the nature of the act or omission which forms the factual basis of the charges, the context in which it occurred, including the personal circumstances and the effects on the victim".[2045] In *Brđanin*, the ICTY trial chamber stated that "'physical violence' may comprise treatment that does not amount to torture".[2046]

676. The evidence demonstrates that civilians were regularly exposed to extremely cruel treatment, which was often followed by mutilations or killings, and which in certain instances might have reached the seriousness of torture.[2047] There are accounts in the evidence of civilians being flogged or beaten near to death.[2048] Civilians were often shot at, either on a random or targeted basis, the result being the infliction of serious gunshot wounds. In such cases, victims were often prevented from getting medical treatment, which increased their pain and suffering.[2049] These acts caused great mental or physical suffering, or injury, and constituted a serious attack on human dignity.

[2042] *Sesay et al* Decision on Motion for Acquittal, p. 22-23. These are in accordance with the ICC Elements of Crime for article 7 (1) (k) of the Rome Statute of the International Criminal Court: ICC Elements of Crimes, p. 125.
[2043] *Brima et al* Trial Judgement, para. 726.
[2044] *Prosecutor v. Brima, Kamara and Kanu,* SCSL-2004-16-PT, Indictment, 5 February 2004, p. 15-16.
[2045] AFRC Judgement, para. 726, referring to the *Čelebići* Trial Judgement, para. 536 and the *Kunarac*, Trial Judgement, para. 501.
[2046] *Brđanin* Trial Judgement, para. 1005.
[2047] TF1-129, Transcript 10 May 2005, Closed Session, p. 77.
[2048] TF1-125, Transcript 12 May 2005, p. 109; TF1-075, Transcript 1 February 2005, pp. 20-21; TF1-129, Transcript 10 May 2005, Closed Session, pp. 66-68, 71, TF1-035, Transcript, 5 July 2005, pp. 88; TF1-212, Transcript 8 July 2005, pp. 107; TF1-331, Transcript 22 July 2004, pp. 48.
[2049] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 26-30.

B. Evidence

677. The Indictment alleges that "[w]idespread physical violence, including mutilations, was committed against civilians. Victims were often brought to a central location where mutilations were carried out."[2050] The "AFRC/RUF ... physically mutilated men, women and children, including amputating their hands or feet and carving "RUF" and "AFRC" on their bodies."[2051] Testimonies of victim, insider and expert witnesses and reports prepared by UN agencies and human rights organisations, prove that the use of physical violence, in particular mutilations, was not only systematic and widespread but formed a part of the larger plan to punish, terrorize and control the civilian population in areas captured by the RUF and the AFRC and to demoralize the adversary. The evidence also shows that all three Accused, in their positions as high level commanders within the RUF were part of this common plan; they further actively participated in, ordered or aided and abetted the commission of these crimes or were responsible for them as superiors. In 1998, UNOMSIL reported on the systematic and widespread commission of atrocities and human rights abuses, including mutilations committed by the rebels.[2052] Other reports confirmed that the practice was widespread and common.[2053]

a) Evidence Applicable to All Crime Bases

678. Civilians were mutilated in large numbers, marked with the letters "RUF" and "AFRC", amputated, beaten, stabbed, shot at and treated in the most cruel and inhumane way possible.

[redacted]

[2050] Indictment, para. 61.
[2051] Indictment, para. 43.
[2052] Exhibit 163, UNOMSIL, Human Rights Report, 1998.
[2053] Exhibit 159, First UNOMSIL Report, 1998, para. 34, Exhibit 160, Second UNOMSIL, Report 1998, para. 21, Exhibit 161, Third UNOMSIL Report 1998, para. 36-37, Exhibit 162, Fourth UNOMSIL Report 1998, para 29, 31, Exhibit 163, UNOMSIL, Human Rights Report, 1998, p. Court Management No. 19186, Exhibit 174, HRW Report, 1999, p.29, 33 (Court Management No. 19397, 19401), Exhibit 176, AI Report 1998, pp.15-16, 19-24 (19493-19494, 19497-19502), Exhibit 178, US State Department Report, 1998, pp. 5-6 (19585-19586).

[redacted]

[redacted]

[redacted]

[redacted]

[2056] Exhibit 147, UNOMSIL Human Rights Assessment 1999, p. 5-6 (19045-19046)

[redacted]

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[redacted]

683. [redacted] in particular a 12 year old girl, who was admitted on 7 or 8 May 1998. She told the witness that she and her family had been attacked by RUF rebels who tried to amputate both of her hands, but only cut halfway through. The witness testified that the young girl had:[2067]

> ...a complete blank expression on her face as she was lying on the ground in the emergency room. I recall that when I took her down to the operation theatre to be helped, she had splints under her arms because of the fractures and she walked behind me with her hands stretched out and she kept on repeating, "why me? Why me? Why me?" As she came to the operation theatre, her father was helped first, and she realised she was going to be seen by the doctor and she just cried and said, "Don't cut my hands. Don't cut my hands. Don't cut my hands."[2068]

b) Kono

684. [redacted] the interviews with patients revealed that "between 15 and 25 April [1998] the villages between Njaiama Sewafe and Koidu, ... were attacked by

[redacted]

groups of armed men." There seems to have been a pattern in how the amputations were carried out, which was confirmed by the accounts of the Prosecution witnesses:

> They were then, one by one, in front of the other villagers, taken to the pounding block, asked by their attackers which arm they used to work with, after which the right or left arm would be put on the pounding block and amputated with a cutlass. Sometimes a pre-cut would be made with bayonet, to show where the amputation was to happen. People realising what was happening like one teacher, said that he used his left arm, even though he was right handed. His left arm was amputated.[2069]

685. [redacted] on 4 May 1998 following the amputation. The attackers wanted to amputate the arm of her grandson, but the grandmother pleaded to amputate her arm instead. The attackers did so.[2070]

686. TF1-334 testified that when he arrived in Tombodu about 78 civilians present and Savage was amputating people's hands. TF1-334 saw the amputated hands of about 15 people. Savage told the civilians to tell ECOMOG that Savage was in Tombodu.[2071] TF1-334 heard Superman tell Savage that "This sort of thing which you have done is one of the things that the human rights are against; it is a crime against humanity." However, no action was taken against Savage to punish him for the amputations, "Bazzy and the other supervisors went to visit Tombodu where they went to drink palm wine."[2072]

687. In April 1998 at Number 11 Camp,[2073] TF1-212 saw rebels cut off the hands of three civilians, Mohamed S. Kamara, Muktar Jalloh and Mr. Bah.[2074] In May 1998, TF1-329 was recovering at the Makeni Hospital from the amputation of her left leg due to a gunshot by a rebel. There she saw a woman from Mortema who said that Mortema had

[redacted]

[2072] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2006, p. 17-18, p. 18 (lines 3-4).
[2073] Number 11 and Tombodu are the same place: TF1-366, Transcript 15 November 2005, p. 109.
[2074] TF1-212, Transcript 8 July 2005, pp. 97-98.

been attacked by rebels. One woman from Mortema had been shot in her leg and a man had been shot in his mouth.[2075]

688. The account of TF1-217, who was a miner in Koidu, makes clear the gruesome way in which amputations were carried out by RUF and AFRC combatants. The witness testified that in February 1998 AFRC and RUF forces were present in Koidu Town raping, looting and stabbing people.[2076] The Kamajors pushed the Junta out and stayed for around three weeks in Koidu and were then pushed out themselves by Commander Akim and his troops. The witness fled from Koidu with his family only to return when he heard, that the ECOMOG was in Koidu.[2077] However, this was false information. The rebels were still in Koidu. The rebels told the civilians that they did not like the civilians since they had deceived them. The rebels killed and injured some civilians. Therefore, the witness together with his family and many other civilians fled to Penduma in April 1998.[2078] In Penduma the witness met a man whose hand had been cut off coming from the direction of Tombodu. The man told the witness that a certain commander Staff Allah [sic] had amputated his hand. Shortly thereafter, the rebels surrounded Penduma and were firing at people who tried to escape. Later, on capturing the village, Staff Alhaji gave orders to separate civilians in three groups: the first group was locked in a house where they were shot. The second group was taken behind the Penduma Primary School where they were slaughtered. The witness was in the third group. Staff Alhaji started to amputate one man after the other.[2079] The witness described how his left hand was chopped off:

> I watched the third person and then he called me, he said, "Come." And he commanded his boys to tie me up. … They tied up my feet on the tree. He said, "I'm coming to amputate both feet of yours." He said, "You will never play football here any more." I pleaded with him. But why he untied me eventually was because he saw my wristwatch.
>
> … He said, "until the end of the world … you'll never put a wrist watch on this particular hand." … I pleaded with him, I said, "please" but he didn't adhere to my plea. Then I put the right hand to him, I put it on the ground, but as he raised up the cutlass to chop, then I threw my hand away from it. Then he hit me with the cutlass on my forehead. … Then blood started oozing out. Right there I knew that if I had -- that if I was

[2075] TF1-329, Transcript 2 August 2005, p. 30.
[2076] TF1-217, Transcript 22 July 2004, pp. 7-8.
[2077] TF1-217, Transcript 22 July 2004, pp. 9-14 and 32.
[2078] TF1-217, Transcript 22 July 2004, pp. 14-15.
[2079] TF1-217, Transcript 22 July 2004, pp. 20-21.

> unwilling to do anything he would kill me. Then I took the left hand, I put it on the ground and it was amputated.
>
> Then he told my children, ... "follow your father" because he is a man that knows my children well. And my children used to call him uncle, and his own children used to call me uncle.
>
> Then the children were following me while I was going. When I returned to take back the hand, the amputated one, then he wounded me at my back. He said, "it is this hand that we want." He said, "go to Tejan Kabbah for him to give you a hand because he has brought ten containers load of arms. Now that you say you don't want our military rule, then go to your civilian rule." [2080]

689. TF1-217 said all nine civilians in his line were amputated. While he was amputated, his children were watching the scene[2081]:

> My children were sitting in front of me. Where they were put, they were sitting and they were looking -- seeing me, because they didn't hide them. They were in the open and they were seeing what was happening, ...[2082]

690. Although severely injured, witness TF1-217 and his children finally managed to reach an ECOMOG controlled area, although he fainted several times:

> I didn't go too far then I dropped on the ground because I started loosing blood. I laid there for some time then they fired at my back, then my child said, "Father rise up let us go." I rose up. I went for some distance then I fell again. My child tried to draw me but he couldn't (sic). So for me to rise up, my child told me ... "Look at them, they are coming again, father." He said, "Rise up," then I rose up. Even though I was physically weak, but I fought. So I walked ... till we passed Small Sefadu. ... It was there again that I fell; ...
>
> I couldn't any more (sic). My child did all that he could to coax me but I couldn't. So he ran away and met the ECOMOG soldiers at the checkpoint and explained to them.[2083]

691. Another form of physical violence inflicted upon many civilians by the RUF and AFRC was the carving of the letters "RUF" and/or "AFRC" on parts of their bodies – mostly on their chests. Witness TF1-074, who, with his brother and other civilians were captured by Junta combatants in February 1998 in Baiwandu[2084] explained how RUF and

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[2080] TF1-217, Transcript 22 July 2004, p. 21 (lines 5-8) and p. 22 (lines 17-32).
[2081] TF1-217, Transcript 22 July 2004, p. 23.
[2082] TF1-217, Transcript 22 July 2004, p. 23, lines 32-34.
[2083] TF1-217, Transcript 22 July 2004, p. 24 (lines 5-11 and 26-27).
[2084] TF1-074, Transcript 12 July 2004, pp. 5, 7-8.

AFRC combatants under the command of Bangali and Major Komba Gbundema, an RUF commander, marked 18 captured civilians in Kayima, in the north of Kono District:

> And they told all of us to take off our clothes, and we took all of our clothes and put them under the orange tree. And he sent one of his fellows to go and take a surgical blade, and they started carving AFRC on our bodies. I, in particular, was carved -- was marked by Bangalie. By then, my younger brother was so much afraid. In fact, he came by me and I held his hand, and they marked AFRC on [redacted] bodies...

[redacted][2085]

692. [redacted]

Similarly, TF1-016, a farmer from Tomandu (or Tomendeh) who was abducted by ten RUF combatants about four months after the RUF and AFRC entered Koidu in 1998, testified how RUF combatants marked the captured men with the letters "RUF". The marking was done by a combatant called Soh [or Sow], with a razor blade and without anaesthetic or providing medication afterwards. He told them that the marking was done to prevent them from escaping.[2087]

693. TF1-197, a trader from Koidu, testified about three incidents in which he was captured and severely ill-treated. First, in an RUF/AFRC attack on civilians in the bush near Tombodu in the late dry season of 1998, he and others were beaten with sticks and gun-butts, blindfolded and forced to lie on ants.[2088] His feet were clamped, causing him to fall and he was also stabbed in the head, resulting in scarring to the left side of the head. As a result, he bled from the head, ear and nose and eyes and his head was swollen.[2089] He and others were fired at between the legs.[2090] After news of ECOMOG's arrival in Kono, TF1-197 was again captured by rebels around Tombodu.[2091] There, he and his younger brother were tied to a mango tree with wire and severely beaten with wires. Every part of his body was swollen because of the heavy beating. Staff Alhaji, the commander in charge, watched

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[2085] TF1-074, Transcript 12 July 2004, p. 13 (lines 2-6 and lines 8-9). See also Exhibit 2, filed under seal, which contains a photograph of the witness that shows the markings.
[2086] TF1-074, Transcript 12 July 2004, p. 21.
[2087] TF1-016, Transcript 21 October 2004, pp. 5-11 and p. 21-22.
[2088] TF1-197, Transcript 21 October 2004, p. 73.
[2089] TF1-197, Transcript 21 October 2004, pp. 74-75 and 79.
[2090] TF1-197, Transcript 21 October 2004, p. 74.
[2091] TF1-197, Transcript 21 October 2004, p. 80-82.

the beating from the veranda of the house.[2092] In April 1998, TF1-197 and other civilians, were captured again by rebels who took them to the rebel base in Yardu. There the rebels told their leader that the group of civilians was on the way to Tombodu where Staff Alhaji was. Since Staff Alhaji had apparently killed some of this commander's men the day before, the six other civilians were killed, the witness being the sole survivor. [2093] Before the killings, the seven civilians were asked to sit on the floor and were seriously beaten. Then the rebels told them that they would do some fortune telling:[2094]

> They brought seven stones. ... The seven stones were, according to them, to do some fortune telling. According to them, if they send the stone, whosoever the stone meets means you have long life; and you that the stone misses, it means you are to die.[2095]

694. One of the AFRC/RUF rebels got the order to amputate TF1-197's hand with a cutlass:

> ... when they first struck my hand it was not totally cut off, so the man asked me to go. The hand was still there. It was while I was going, then I was called again, and they said my hand was not completely amputated. So the man who was to cut my hand was asked if he should not cut my hand then he was going to be killed. So it was then they finally cut my hand off.[2096]

695. TF1-197 was told to go to Kabbah to get a new hand and a letter was placed in his pocket for Kabbah. When the witness passed a checkpoint at the junction where the roads from Koidu, Tombodu and Kwakoyima meet, he heard the rebels say that they should kill him because if he goes to the ECOMOG with his amputation, it would be bad for their name. The witness managed to escape to the bush and finally reached Kwakoyima, where he received medical treatment.[2097]

696. TF1-192 testified that after he and around 20 other residents of the village Bomboafuidu were captured by men in combat uniform during an attack in the rainy season 1998,[2098] they were undressed, and men and women of the village were forced to have sex with each other. With a knife they slit the private parts of a young boy and of a woman,

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[2092] TF1-197, Transcript 21 October 2004, pp. 83-85.
[2093] TF1-197, Transcript 22 October 2004, pp. 7-9.
[2094] TF1-197, Transcript 22 October 2004, p. 13.
[2095] TF1-197, Transcript 22 October 2004, p. 13 (line 9 and lines 11-15)
[2096] TF1-197, Transcript 21 October 2004, p. 16 (lines 2- 8).
[2097] TF1-197, Transcript 22 October 2004, pp. 16-17.
[2098] TF1-192, Transcript 1 February 2005, pp. 57-59.

saying that this "lady would not meet with any other individual in her life", because she refused to have sexual intercourse with the boy.[2099] The female captives were then taken to a farm house, locked up and beaten up one by one.[2100] The villagers were then divided into lines and TF1-192 was the first one in his line. He was ordered to lay his hand on the ground: "So I tried to lay my left-hand and he said no, let me put the right one. It is the right one that is useful, the left one is not useful. So I laid the right one so he chopped it off." However, his hand was not completely chopped off but the bone was broken.[2101] After TF1-192 the rebels continued amputating the other civilians. The rebels then told them to go to "Pa Kabbah to give them false hands". TF1-192 stated that on returning to his village the next morning, he saw the amputated hands still there.[2102] TF1-192 also saw some people with their hands and ears cut off including his sister who had one hand cut off and the other mutilated disabling its use. Two persons from the witness' village died on the way as they tried to seek medical attention in Freetown.[2103]

697. TF1-071, who arrived in Koidu around March 1998, when the town was under Junta control, testified that during his first three weeks in Koidu [redacted] about people being killed and houses burned in the surrounding villages. [redacted] [redacted] about amputations, mostly from the area of Tombodu.[2104] [redacted] were also received by Superman and other commanders. At a meeting at the Tankoro Police Station in Koidu in April 1998, attended by the First and Second Accused, Superman and others, the fact that in the area around Tombodu Savage had amputated and mutilated people's hands and privates, and that he has completely burned down Tombodu and the surrounding villages was made known to those present.[2105]

698. TF1-015 testified that he was captured by rebels in Tongoro Bush, 7 miles from Koidu, in the third week of March 1998.[2106] In April 1998 he was taken to Koidu where he witnessed the killing of [redacted] civilians [redacted].by CO Rocky of the

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[2099] TF1-192, Transcript 1 February 2005, pp. 64-65.
[2100] TF1-192, Transcript 1 February 2005, p. 67.
[2101] TF1-192, Transcript 1 February 2005, pp. 69-71.
[2102] TF1-192, Transcript 1 February 2005, pp. 71-73.
[2103] TF1-192, Transcript 1 February 2005, pp. 74-75.
[2104] This information was corroborated by some Defence witnesses: DIS-214, Transcript 17 January 2008, p. 18 and Morris Kallon, Transcript 11 April 2008, p. 93.
[2105] TF1-071 Transcript 19 January 2005, pp. 46-47.
[2106] TF1-015, Transcript 27 January 2005, pp. 104-107.

RUF (this event is described in detail under the evidence related to Counts 3-5, above).[2107] During the same attack he also a child being cut into pieces:

> ...then I saw they brought a child. The child was crying in their hand. I saw them place the little child's hand on a stick and chop it off at the wrist. He began begging them, saying: "Eh, what I have done? Please leave me." Then I saw them place the left hand of the child and cut it also. ...
>
> They surrounded him. The left foot at the ankle of the foot they placed it on the stick. They cut that also. Still he is crying, pleading for them to leave him. ...
>
> They laid a stick again. They came to the right foot now. At the ankle again that also was chopped off. Then he cried. He said: "What have I done? You're punishing me so." ...
>
> After they have amputated all, then two men held him, one with the arm, the other on the feet, then two held him on the feet again. They shake, shake him then they threw him in a latrine pit. Then he began crying. He said, "Eh, my people, do not throw me." ...
>
> I heard him crying and they said, "We should go."[2108]

699. TF1-015 further testified that while he was kept at Wondedu camp, he was arrested and dragged by rebels to Captain Banya,[2109] [redacted]. The witness said: "I suffered. I was in pain. Even up to this hour I'm in pain. I was distressed, because I became old when I'm young. ... All my teeth in my mouth cannot work again except I suck and swallow."[2110]

700. TF1-360 testified that when he returned to Kono from Buedu with Superman in the early rainy season of 1998, the Second Accused assigned Rocky for a mission to Nimikoro Chiefdom. The Second Accused [redacted] on this mission. The Second Accused told Rocky that "whosoever see us shall never see a rebel again" or that people's hands should be amputated on the mission. TF1-360 testified that during the mission they burned the villages down and amputated peoples' hands in accordance with the Second Accused's instructions. The witness said: "Anybody that we

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[2107] TF1-015, Transcript 27 January 2005, pp.114-116 and 120-122 and in Closed Session: pp. 126-129.
[2108] TF1-015, Transcript 27 January 2005, p. 129 (lines 17-22), p. 131 (lines 10-12), 132 (lines 4-7, lines 13-17 and 24).
[2109] TF1-015, Transcript 31 January 2005, pp. 4-5.
[2110] TF1-015, Transcript 31 January 2005, pp. 8-9.

saw, we cut their hands. Because it was said that cutting people's hands was fearful." The events were detailed in a written report that was submitted to the Second Accused.[2111] In Bumpe TF1-360 estimated that they gathered more than 20 people and amputated their hands, sometimes one, sometimes both hands. The capture and amputations were carried out at night as ECOMOG troops were nearby; after the amputations some civilians were ordered to go to ECOMOG troops.[2112]

701. Several insider and victim witnesses talked explicitly about ill-treatment of civilians in the context of forced labour in Kono District. TF1-071, described the inhumane conditions in the forced labour camps in Kono where civilians were kept and forced to work in the diamond mines, in particular in 1998 and 1999 as described in detail in the evidence relating to Count 13. Miners were flogged, if they did not work.[2113] TF1-077, a civilian who was abducted and forced to mine at Tombodu Bridge,[2114] testified that miners died because of the harsh conditions and that sometimes civilians were brought in chains to the mining site.[2115] He described one incident in which the mining commanders, Tactical, Officer Med and Gibbo ordered child soldiers to flog one of the town chiefs, called S.E. Sogbeh, saying that he had not paid the duties that were levied on him. They then forced him to work in the mine but he could not do so, since he was so badly beaten. A child soldier was then ordered by Officer Med to shoot Sogbeh.[2116] TF1-366 testified that civilians who were forced to carry loads for the RUF, as described in detail in the evidence relating to Count 13, were ill-treated. He describes that shortly before Sani Abacha, the President of Nigeria, died (8 June 1998[2117]) they received arms and ammunition from Liberia and the RUF forced civilians to carry it to Kono. They were treated badly because they were not willing to carry the loads.[2118] Witness TF1-141 recalled that women amongst the civilians who had been forced by the RUF to carry loads when leaving Guinea Highway in 1998 for Kailahun, after walking for two days, were unable to walk any longer. Their feet were swollen and some cried in pain. Some of them were executed at Gandorhun

[2111] TF1-360, Transcript 20 July 2005, pp. 46, 55-56.
[2112] TF1-360, Transcript 20 July 2005, pp. 57-58.
[2113] TF1-071 Transcript 21 January 2005, pp. 120-121.
[2114] TF1-077, Transcript 20 July 2004, pp. 76-78, and Transcript 21 July 2004, p.15.
[2115] TF1-077, Transcript 20 July 2004, p. 80-81.
[2116] TF1-077, Transcript 20 July 2004, pp. 80, 82.
[2117] Exhibit 54, The New York Times obituary of former Nigerian President Sani Abacha.
[2118] TF1-366, Transcript 8 November 2005, p. 66.

Gbane and in the hills towards Sandaru.[2119] TF1-015, described that civilians who were sent to "food-finding missions" from Wundidu (Wendedu) camp, were in such a bad shape when they came back that they "could not even walk properly".[2120] Former President Kabbah receiveed reports about civilians being forced to mine for RUF in Kono District, from mid February 1998 and up to January 2000. He was told that RUF had taken over Kono and Tongo Field and were beating up people.[2121]

c) Kenema

702. In Kenema District, which was under Kamajor control prior to the overthrow of 1997, serious ill-treatment amounting to torture was typically inflicted upon civilians and suspected Kamajor supporters.

703. TF1-129 gave a detailed description of how suspected "enemies", even those clearly civilian, were treated by the RUF and how they were subject to physical and mental ill-treatment. On 27 October 1997, the day when the rebels were celebrating their victory over ECOMOG forces, [redacted] The First Accused then ordered that TF1-129, [redacted]s and two other persons be placed in the boot of a vehicle which the First Accused boarded.[2125] On the way to the Junta secretariat they stopped and Captain Lion got out and hit TF1-129 with a bottle and

[2119] TF1-141, Transcript 11 April 2005, pp. 106-107
[2120] TF1-015, Transcript 28 January 2005, pp. 16-17.
[2121] Ahmed Tejan-Kabbah, Transcript 16 May 2008, p. 114.
[2122] TF1-129, Transcript 10 May 2005, Closed Session, p. 57-59. In the transcript the word "molest" is used, explained later by the witness as meaning "to beat you up, to disgrace you and to do everything to humiliate you"; TF1-129, Transcript 11 May 2005, Closed Session, p. 3 (lines 7-12).
[2123] TF1-129, Transcript 10 May 2005, Closed Session, pp. 59 and 93.
[2124] TF1-129, Transcript 10 May 2005, Closed Session, pp. 60-61.
[2125] TF1-129, Transcript 10 May 2005, Closed Session, p. 61 and Transcript 11 May 2005, Closed Session, p. 11.

took 300,000 from his pocket. At the secretariat, they announced that they had brought the "Chief Kamajor" and people came around kicking, spitting and urinating on TF1-129 as he was lying in the boot. The First Accused then ordered a boy, about seven years old, armed with an AK-47, to watch the witness and to shoot him dead if he moved. The boy said something in Mende to the effect of "we are going to put off your engine this night" and pointed the weapon on TF1-129's head.[2126]

[2126] TF1-129, Transcript 10 May 2005, Closed Session, pp. 63-65.
[2127] TF1-129, Transcript 10 May 2005, Closed Session, pp. 65-71.

[2129] TF1-129, Transcript 10 May 2005, Closed Session, p. 72.

[redacted] TF1-071 witnessed the torture of BS Massaquoi by Bockarie and his securities somewhere around in November 1997, since they suspected him to have "single barrel rounds and supporting the pro-Kamajors to attack his positions".[2134]

[redacted]

705. [redacted] testified that on 25 May 1997 he saw many RUF combatants enter Kenema Town to join the AFRC/SLA troops. Secretary of State ("**SOS**") Eddie Kanneh, headed the secretariat for the AFRC at 12 Hangha Road in Kenema and the RUF had their representatives working there as well. The

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[2130] TF1-129, Transcript 10 May 2005, Closed Session, pp. 73-76.
[2131] TF1-129, Transcript 10 May 2005, Closed Session, pp. 76-77.
[2132] TF1-129, Transcript 11 May 2005, Closed Session, pp. 28-31.
[2133] TF1-129, Transcript 12 May 2005, Closed Session, p. 3.
[2134] TF1-071 Transcript 19 January 2005, pp. 14-17:. "...B S Massaquoi's still continued to deny the allegations. This grew Sam Bockarie more annoyed and he intends the torturing either by taking out his pistol -- the nozzle of the pistol was strucked by Sam Bockarie on the head of B S Massaquoi several times" and further: "Still B S Massaquoi denied the allegations." And "So B S Massaquoi was flogged nearly over one hour or 30 minutes in time, and then later Sam Bockarie ordered the securities to put B S Massaquoi and Dr Momodu back to prison." Further: "... I saw him beating B S Massaquoi with a tied rubber and a pistol struck him on his head and then during that I saw blood all over his head and all over his body."
[2135] TF1-129, Transcript 10 May 2005, Closed Session, p. 77.
[2136] TF1-129, Transcript 11 May 2005, Closed Session, pp. 27.

[redacted]

most senior RUF commanders in Kenema were Mosquito and the First Accused.[2139] [redacted] Mosquito the re-arrest Kpaka and Massaquoi on the 2 February 1998.[2142] On 6 February, as rumours circulated that Kamajors and ECOMOG troops were five miles from Kenema, a military police team, headed by Lieutenant AB Turay stormed [redacted] The witness heard that the detainees were killed.[2143]

707. TF1-195, was captured by rebels just after she heard that Kamajors had been pushed out of Koidu by soldiers.[2146] She was captured and raped by rebels, as described in detail in the evidence relating to Count 6-9, and was then forced to carry loads to Sawoa. In

[2139] TF1-125, Transcript 12 May 2005, pp. 97-99.
[redacted]
[2141] Exhibit 28, CID Diary, p. 00008570. The Transcript erroneously mentions the 3 January 1998 instead of the 30 January 1998. TF1-125, Transcript 12 May 2005, p. 131.
[2142] Exhibit 28, CID Diary, p. 00008570, TF1-125, Transcript 12 May 2005, p. 133-134.
[redacted]
[2144] TF1-125, Transcript 12 May 2005, p. 138-139.
[2145] TF1-125, Transcript 12 May 2005, p. 139-140.
[2146] TF1-075, Transcript 1 February 2005, pp. 2-6.

Sawoa the rebels started flogging and beating all the civilians, including TF1-195. Then a small boy, around 14 years old, was told to cut off the right hands of the five male abductees.[2147] The witness and other civilians had to watch and were ordered to "clap for them and laugh" which they did because they were surrounded by armed rebels.[2148] TF1-195 was to be the next person amputated but a man came and stopped the boy. The boy was about to chop her hand off but he chopped the upper part of her arm because she didn't put her hand on the mortar.[2149] The witness was raped again and sexually ill-treated. The rebels put a stick into her vagina.[2150]

708. The Tongo area was a strategically important diamond area and forced mining took place in the Junta period as shown in the evidence of Count 13. TF1-371, testified that he saw hundreds of civilians mining in Tongo Field during the Junta occupation of the area. They were treated inhumanely.[2151] This information was corroborated by TF1-041,[2152] and TF1-045, who testified that in December 1997 forced mining under the AFRC/RUF was still going on and the captured civilians were treated worse than before.[2153] TF1-035, a civilian living in Tongo, testified that the civilians refused to work for the AFRC/RUF after the killing of 20 people in the Cyborg Pit.[2154] Consequently TF1-035 was captured in his house by AFRC/RUF combatants, beaten, dragged to the old security headquarters and accused of instigating the strike. He was locked in a cell with other civilians for three days and then released.[2155] DIS-293, a civilian who worked as a miner in Tongo in 1997, testified that miners were not allowed to work at night and if they did so, they were punished.[2156]

[2147] TF1-075, Transcript 1 February 2005, pp. 20-22.
[2148] TF1-075, Transcript 1 February 2005, pp. 22-23.
[2149] TF1-075, Transcript 1 February 2005, p.23.
[2150] TF1-075, Transcript 01 February 2005, pp. 25-26.
[2151] TF1-371, Transcript 20 July 2006, pp. 52-53 and 56.
[2152] TF1-041, Transcript 10 July 2006, pp. 19-20.
[2153] TF1-045 Transcript 18 November 2005, pp. 94, 97.
[2154] TF1-035, Transcript, 5 July 2005, p. 87.
[2155] TF1-035, Transcript, 5 July 2005, pp. 88-89.
[2156] DIS-293, Transcript 13 November 2007, pp. 92-93.

d) Koinadugu

709. The evidence proves that amputations in Koinadugu District were used systematically after attacks, to punish civilians for supporting the government of President Kabbah and to terrorize, subdue and ultimately control the local population.

710. Witness TF1-074 testified that after he had been captured in February 1998 by RUF combatants, he was forced to carry ammunition for RUF Captain Barry who launched an attack on Efin (Yiffin).[2157] After looting the town, Captain Barry caught seven people. The witness, who was standing nearby heard Barry say, "Now you should go and tell the SLA ... that I Rebel Barry, I am on the way coming." Barry then took the axe and started chopping off these people's hands.[2158]

711. Witness TF1-214 testified that in February 1998 she was living with her husband as a farmer in Kondembaia, when one night vehicles were passing through the town.[2159] TF1-214 saw people in military uniform with red pieces of fabric on their heads who said they were the People's Army.[2160] After some days, TF1-214 saw people who had fled their villages after rebel attacks, their villages having been pillaged and burned. When the witness and her family heard these stories they panicked and ran to the bush where they hid for about three months.[2161] There, they met a number of civilians who had also fled. Some of these civilians had already had limbs amputated by the rebels: both of Pa Issa's arms had been amputated,[2162] and Sundu Koroma, told them how the rebels tried to amputate her leg and how she managed to escape, and showed them the mark on her leg.[2163] One day the witness had to go to town because one of her sister's children went missing and she met a boy, Yunku Sesay, lying down with both his arms amputated.[2164] She also met Issa Bangura, who had both hands chopped off.[2165] When they were told that the rebels in the bush would be bombed, TF1-214 and her family returned to Kondembaia, which the rebels then attacked on a Thursday in May 1998. They came to the witness' house, where she was

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[2157] TF1-074, Transcript 12 July 2004, pp. 5, 21-22.
[2158] TF1-074, Transcript 12 July 2004, p. 29 (lines 9-11) and p. 41.
[2159] TF1-214, Transcript 14 July 2004, p. 3 and Transcript 15 July 2004, p. 1-3.
[2160] TF1-214, Transcript 14 July 2004, p. 4 and Transcript 15 July 2004, p. 4.
[2161] TF1-214, Transcript 14 July 2004, p. 4-5 and Transcript 15 July 2004, pp.5-6.
[2162] TF1-214, Transcript 14 July 2004, p. 4 and Transcript 15 July 2004, p. 4.
[2163] TF1-214, Transcript 14 July 2004, p. 6 and Transcript 15 July 2004, p. 6.
[2164] TF1-214, Transcript 14 July 2004, p. 7 and p. 20.
[2165] TF1-214, Transcript 14 July 2004, p. 21. This information was corroborated by TF1-215, Transcript 2 August 2005, pp. 73-74.

alone with her children and a rebel boy stripped her naked and slapped her face with his shoes in front of her children. Later, the civilians were assembled at the cotton tree where the rebel bosses were seated.[2166] People were killed and the witness saw two men tied, laying on the floor. One of the two men was killed; the other one, Lamin Kamara, had his hand chopped off.[2167] The rebel commander said "Since you say you love a civil government, we are going to chop off your hands" and "If you are ready to cut off their hands, begin with the child so that they should know that they are not going to be spared." The rebels first chopped off the hand of the witness' six year old child and then amputated the hand of the witness. The rebel commander said that this was "Operation No Living Thing" and one of the rebels told the witness: "If you look at me, I will chop off the other hand."[2168] After the amputation as TF1-214 and her child were sitting there, bleeding, they witnessed the rebels piercing a man under the chin and also the amputation of [redacted] who was advanced in pregnancy. They were then told to go to Kabala and tell ECOMOG that they would not overpower the rebels. A rebel threatened to put acid on her. After they had left, another rebel stroked the witness with a big machete, as she was trying to flee with her injured child. She was chased by a rebel who kept on telling her "You're beautiful now, eh."[2169] The witness finally reached the road leading to the farm where her husband would work. When the family saw the witness and her child they started crying. As there was no medicine available, they covered the wound with tobacco leaves, since an old man told them that this was what the people did in Kono, where many were amputated, until they got medical care.[2170] After some days, the witness and her child finally reached a hospital and they were taken by helicopter to a hospital, where they were both operated on. After the operation the child asked the witness: "Mama, when would my hand grow again?" The witness testified that [redacted] were amputated the same day as she was.[2171]

[2166] TF1-214, Transcript 14 July 2004, pp. 21- 23, 25-26 and 27-28.
[2167] TF1-214, Transcript 14 July 2004, pp. 28-29.
[2168] TF1-214, Transcript 14 July 2004, pp. 28-30. The testimony of the amputation of the witness and her child was corroborated by TF1-215, Transcript 2 August 2005, pp. 95-96.
[2169] TF1-214, Transcript 14 July 2004, p. 31.
[2170] TF1-214, Transcript 14 July 2004, pp. 33-34.
[2171] TF1-214 Transcript 14 July 2004, pp. 35- 36. The Chamber asked "to observe for the records that this witness in her narration of the incidents of amputation up to about the tail end of her evidence was virtually testifying sobbing and was under a lot of stress." Transcript 14 July 2004, p. 38.

712. The testimony of TF1-214 was corroborated by TF1-215, also from Kondembaia, who testified that in April 1998, prior to the attack on Kondembaia, he met an amputee from Yifin, Kabba Jalloh, whose two hands had been chopped off.[2172] Another man from Kromanta called Moseray Koroma had to be carried in a hammock to Kondembaia after being hacked repeatedly.[2173] This witness corroborated the information that after the attack on Kondembaia on 19 May 1998[2174] Yanku Sesay's hands were chopped off on a long bench.[2175] The witness and other persons pleaded with their captors not to cut off their hands. The rebels grabbed a small child. Here, the witness corroborates the testimony given by TF1-214, above, the mother of the six year old child whose hand was amputated.[2176] TF1-214 specified: "They took a machete, cut her hand and put her hand in the policeman's mouth. That's the policeman who was dead. They put … her hand in his mouth."[2177] The person who cut off her hand was called Junta 2. TF1-215 and his companion, Nfajie Koroma, were both put on the ground and Junta 2 ordered that Nfajie's right hand to be chopped off.[2178]

713. The witness then described how his own hand was amputated. They needed several strokes to chop of his hand, since the cutlass was blunt: "Not the first chopping. It was not a single time. They chopped it, this side. They chopped the other side."[2179] His attackers said "These hands, these hands that were chopped, these were the hands that you took, you know, to vote for a civilian government. You will never vote for any civilian government again."[2180] From the time they shaved "RUF" into the head of a villager named Magba, the people of Kondembaia knew that their attackers were the RUF. After TF1-215's hand was chopped, they stabbed Sergeant-Major Forewa, an old retired soldier, with bayonet and then chopped off his right hand. After that they told TF1-215 and the others to go to Kabala and tell them that Tejan Kabbah had brought a container of hands.[2181] [redacted] took TF1-215 to Connaught Hospital in Freetown. There TF1-215 learned that around six or seven

[2172] TF1-215, Transcript 2 August 2005, pp. 71-72.
[2173] TF1-215, Transcript 2 August 2005, pp. 72-73.
[2174] TF1-215, Transcript 2 August 2005, pp. 101-102.
[2175] TF1-215, Transcript 2 August 2005, pp. 81-82.
[2176] TF1-215, Transcript 2 August 2005, p. 95-97 and TF1-214, Transcript 14 July 2004, p. 30.
[2177] TF1-215, Transcript 2 August 2005, p. 97 (lines 1-3).
[2178] TF1-215, Transcript 2 August 2005, pp. 97-98.
[2179] TF1-215, Transcript 2 August 2005, p. 98 (lines 8-26).
[2180] TF1-215, Transcript 2 August 2005, p. 99 (lines 24-27).
[2181] TF1-215, Transcript 2 August 2005, pp. 109-100.

injured persons from Lengekoro where taken to Connaught, amongst them Pa Donkeh Marah, Fatmata Marah, Mohamed Marah and Bockarie.[2182]

714. TF1-172 testified that early in the planting season of 1998, he and five other persons were captured by 12 rebels about half a mile from Seraduya.[2183] He was stabbed thrice, but the dagger could not penetrate his chest. He was then tied up with his shoulders pushed to his back. All other captives were also tied up. TF1-172 was hit in the teeth with a gun butt, which caused his tooth to come out.[2184] In Seraduya, TF1-172's own cutlass was used to cut off his hand. When he offered his left hand, the rebels insisted on cutting off the hand he ate with.[2185] When his right hand was cut off and dropped, he was asked to pick it up with his left hand.[2186] His daughter's hand was also amputated followed by the amputation of the hands of two other persons.[2187] TF1-172 stated that they were amputated by a certain "Cutty Hand", although they were surrounded by many other rebels.[2188] They were told to take their hands to ECOMOG and to Tejan Kabbah who had brought hands in two containers.[2189] The amputees were left at the outskirts of Seraduya, but could not continue up to Alikalia as they were too weak.[2190] TF1-172 was finally brought to Connaught Hospital in Freetown. There he saw amputees being brought in daily during 12 days.[2191]

715. After a fighter raped TF1-213 on 18 March 1998 at Lengekoro, other fighters started arguing over her and some said that she should be chopped into bits so that each of them would have their own bit of her.[2192] Commander Yellow Man said the best thing to do was to chop off both TF1-213's hands.[2193] Yellow Man then chopped both of her arms. TF1-213 said "Right, now please kill me because I'm no longer useful." Yellow Man said she would not be killed but instead wrote a letter that TF1-213 was to take to Kabbah. Since TF1-213 did not have any hands to hold the letter Yellow Man put it under her

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[2182] TF1-215, Transcript 2 August 2005, pp. 104-106.
[2183] TF1-172, Transcript 17 May 2005 pp. 8-9.
[2184] TF1-172, Transcript 17 May 2005 p. 9-11.
[2185] TF1-172, Transcript 17 May 2005 pp. 12-13.
[2186] TF1-172, Transcript 17 May 2005 p. 15.
[2187] TF1-172, Transcript 17 May 2005 p. 16-17.
[2188] TF1-172, Transcript 17 May 2005 p. 34.
[2189] TF1-172, Transcript 17 May 2005 p. 24-25.
[2190] TF1-172, Transcript 17 May 2005 p. 27-28.
[2191] TF1-172, Transcript 17 May 2005 p. 30.
[2192] TF1-213, Transcript 2 March 2006, p. 11-13.
[2193] TF1-213, Transcript 2 March 2006, p. 14.

bosom.[2194] TF1-213 started following her assailants and begging them to kill her since, as she stated: "they had disabled me and I wouldn't be able to live like that."[2195] The witness was later told that Superman was the leader of the group that attacked Lengekoro.[2196] Two days after these events, TF1-213 was taken to Kabala Hospital where she met a woman, Manti who was also from Lengekoro, who had both hands chopped. TF1-213 also met Dogeh who said the soldiers chopped off his feet and his left hand,[2197] Pa Dansa who suffered a double hand amputation, and Issa who also had both of his hands cut off at Badala.[2198] She knew two amputees who later died, Sheriff, who had his left hand amputated by the same rebel who had mutilated the witness,[2199] and Sandi, who's "privates" had been cut off by the rebels.[2200] At Connaught Hospital steel was put in TF1-213's arm stumps so that she is able to hold a cup, but she continues to feel pain.[2201]

[redacted]

717. While retreating from Freetown, after the February 1998 ECOMOG intervention, TF1-117 reached Kabala in a mixed RUF and AFRC group. They settled at One Mile, in the outskirts of Kabala. SAJ Musa gave the order to cut hands. They would capture civilians in Bauya One and Bauya Two and bring them to One Mile where they lined the persons up. They used the bottom of a large mortar and put the hand of the person on top. The witness himself, who was 15 at that time, was cutting hands. They would use axes and cutlasses and ask the person whether he or she wanted short sleeve or long sleeve.[2204] The witness explained: "Short sleeve is when your hand got up to the muscle. The long sleeve is

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[2194] TF1-213, Transcript 2 March 2006, p. 16.
[2195] TF1-213, Transcript 2 March 2006, p. 16, p. 18 (lines 4-7).
[2196] TF1-213, Transcript 2 March 2006, p. 29.
[2197] TF1-213, Transcript 2 March 2006, p. 24.
[2198] TF1-213, Transcript 2 March 2006, pp. 25-26.
[2199] TF1-213, Transcript 2 March 2006, p. 19- 20.
[2200] TF1-213, Transcript 2 March 2006, pp. 25-26.
[2201] TF1-213, Transcript 2 March 2006, p. 28.
[redacted]
[2203] TF1-367, Transcript 26 June 2006, p. 73.
[2204] TF1-117, Transcript 29 June 2006, pp. 111-113, and 86, where the witness testified that he was 23 at the time of the testimony in court.

where your hands join down."[2205] TF1-117 also recounts that they also cut off breasts and dropped burning plastic on the backs of civilians.[2206]

718. Civilians were not only subjected to amputations but also to other physical violence. In August 1998,[2207] the [redacted] of TF1-212 who was then 16 years old, was held by the rebels in Koinadugu village. They were beating her up and kicked her because she refused to join the rebels. TF1-212 [redacted] "Instead of you being killed, please agree." The rebels then marked the [redacted] chest with "RUF".[2208] TF1-329 testified that she was shot in the leg by a rebel when the rebels entered Fadugu on 22 May 1998.[2209] She managed to crawl to a house and to hide there. Later she saw how rebels beat the old man who owned the house.[2210] Following the gun shot, the left lower leg of TF1-329 had to be amputated at the Makeni Government Hospital.[2211]

e) Bombali

719. The crimes that occurred during the indictment period, between about 1 May 1998 and 31 November 1998[2212], were mostly committed by a mixed group of RUF and AFRC combatants led by Gullit, which left Koinadugu District to establish Camp Rosos in Bombali District around July or August 1998.[2213] Amongst the RUF fighters that went to Rosos was also RUF Captain Arthur who was part of the command structure and controlling the third battalion.[2214] The group passed through Yarya, Karina, Matehun, Batkanu to Rosos and committed numerous crimes.[2215] Gullit announced that Karina was the home town of President Tejan Kabbah and should therefore be burned down and people

[2205] TF1-117, Transcript 29 June 2006, pp. 113 (lines 13-14).
[2206] TF1-117, Transcript 29 June 2006, p. 114.
[2207] TF1-212, Transcript 8 July 2005, p. 102.
[2208] TF1-212, Transcript 8 July 2005, pp. 107-108.
[2209] TF1-329, Transcript 2 August 2005, pp. 4 and 8-9.
[2210] TF1-329, Transcript 2 August 2005, p. 23.
[2211] TF1-329, Transcript 2 August 2005, p. 28.
[2212] Indictment, para. 65.
[2213] George Johnson, Transcript 19 October 2004, pp. 31-34, 43.
[2214] George Johnson, Transcript 19 October 2004, p. 47; corroborated by TF1-184, Transcript 5 December 2005, pp. 24-27, 6-10; TF1-167, Transcript 19 October 2004, paras. 47-48 and TF1-334, who testified that Captain Arthur was the commander of the C Company and brought a few men from Kono but mostly those who had come from Mongor Bendugu. Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, p. 105.
[2215] George Johnson, Transcript 14 October 2004, pp. 85-88.

should be amputated and killed.[2216] Atrocities were also committed by Captain Arthur who was capturing civilians in Karina and cut off their hands.[2217]

720. [redacted] testified that on the way many people were killed and villages burned. In a village near Pendembu a SLA commander, called Kabila, slit the stomach of a pregnant woman open and removed the child from her belly. A young girl stabbed in the head and in the back, but did not die immediately and an AFRC soldier convinced O-Five not to kill her but to let him take her as a wife.[2221]

721. Around 2 ½ months after Johnson had arrived in Rosos, he and the others moved on to a village they named Major Eddie Town,[2222] because ECOMOG jets bombed Camp Rosos.[2223] Some of these insider witnesses testified about atrocities committed in Camp Rosos and during the move from Rosos to Major Eddie Town. Johnson testified that corporal punishment was used against abductees in Camp Rosos, such as "public flogging, 200 cuts and above" for minor offences like "stealing food, clothes". Those who tried to

[2216] George Johnson, Transcript 14 October 2004, pp. 88-91.

[redacted]

[2220] TF1-360, Transcript 21 July 2005, pp. 7-10.
[2221] TF1-360 Transcript, 21 July 2005, pp. 13-14.
[2222] George Johnson, Transcript 14 October 2004, pp. 100-101. TF1-334 testified that he was at Rosos for about three months after arriving there at the beginning of the rainy season in 1998 and that they left Rosos in September 1998: Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, p. 103.
[2223] George Johnson, Transcript 14 October 2004, p. 101.

run away were executed.[2224] [redacted] George Johnson, upon his arrival at Major Eddie Town, witnessed the arrest of 13 abductees, accused to be witches. They were impaled and beaten and then cut into pieces and thrown into the Little Scarcies.[2226]

722. Witness TF1-196 testified that sometime before the January 1999 Freetown Invasion, she and her husband were captured by rebels under the command of Mosquito, passing through Malama on their way to Freetown. They were captured with other civilians in the bush near Batmis, close to Karina.[2227] After killing her husband, the rebels surrounded the witness, took her right hand and one rebel, Foyoh Fayia, chopped it with a cutlass. He chopped at her right hand four times and four times at her left-hand until both hands were chopped off. The rebels told her that she should go to Kabbah who would give her hands.[2228] Witness TF1-196 got treatment in Makeni Hospital, where she met other amputees, like Adama Munu and Sallieu Sesay, who were also amputated by the rebels.[2229]

723. TF1-031, who was captured in Karina on the Islamic holiday of Jombente, during the rainy season 1998[2230] by "Foday Sankoh's people", testified that the rebels came during night, stripped her and 17 other people who were in the house naked, and brought them outside. They tied her with a rope around her waist.[2231] The captured people were taken to Mayayi where the combatants killed two women and amputated the hands of three men.[2232] They were then brought on to Mambala and further to Mandaha. There, around 100 captured civilians were assembled. The rebels burnt the witness' left leg from the knee to

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[2224] George Johnson, Transcript 14 October 2004, p. 100.
[2225] TF1-360 Transcript, 21 July 2005, pp. 24-25.
[2226] George Johnson, Transcript 14 October 2004, p. 105.
[2227] TF1-196, Transcript 13 July 2004, pp. 19-23. See also: Exhibit 3, Witness Statement of Witness TF1-196 given to investigators of the Office of the Prosecutor on 15 September 2003 (filed under seal).
[2228] TF1-196, Transcript 13 July 2004, pp. 24-25 and 31.
[2229] TF1-196, Transcript 13 July 2004, p. 30.
[2230] TF1-031, Transcript 17 March 2006, pp. 78-79. The witness did not remember the year but said, she was 52 years old at that time and that she was 60 years old at the time of her testimony in court.
[2231] TF1-031, Transcript 17 March 2006, p. 83-84.
[2232] TF1-031, Transcript 17 March 2006, pp. 84-85.

the toes and her left hand from her fingers midway up the arm. Having partly burnt her, the rebels told the witness to go to Tejan Kabba for him to give her a foot.[2233]

724. TF1-343, who lived in Mateboi during the war and remembered that the "war came from the North", testified that the [RUF] rebels[2234] advanced towards his village, destroying property and killing people during three days. A year later the rebels came again from the East. At Ma-Almamikukuna, they chopped both hands of one of the witness' colleagues. The rebels would hide in Rosos and some of the commanders there were called Sergeant Musa, Five-Five and Adama Cut Hand.[2235] The witness and two other civilians, Adama [or Yandama] and Osman, were hiding in the bush when some rebels caught them. The witness was chopped on his shoulder. The rebels told them that instead of killing them, they would give them a letter and started chopping off their hands. All three had both hands amputated. One of them went and struck Pa Osman on his head and he fell. The witness narrated how the hands of each one was cut off and then the rebels directed them "Go to Tejan Kabbah and explain".[2236] The three amputees could not move since the wounds hurt too much, but in the morning some people picked them up and brought them Makeni to the Government Hospital, except Pa Osman who died as a result of the amputation. There, TF1-343 met many people whose hands and legs had been cut off and learnt of the rebels amputating arms and legs of civilians in villages surrounding their base in Rosos.[2237] The other amputees were from different places in the Bombali District including Reima, Ro-Petifu, Ma-Almami Kukuna, Mafabu and Royema.[2238]

725. TF1-179, who tried to flee with his family from Makeni to Batkanu on 10 May 1998,[2239] testified how he was stopped by a group of seven armed AFRC and RUF combatants.[2240] They hit TF1-179 on his back, then on his wrist bone.[2241] One of the armed men chopped his father's hand, hacked him and mutilated him.[2242] He also chopped his

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[2233] TF1-031, Transcript 17 March 2006, pp. 87-88.
[2234] TF1-031, Transcript 17 March 2006, p. 62 (lines 12-14). The witness said they called those who fought in "Foday Sankoh's war" rebels. He could not remember the time when they came.
[2235] TF1-343, Transcript 17 March 2006, pp. 58-64.
[2236] TF1-343, Transcript 17 March 2006, pp. 67-68, 69 (lines 8-9).
[2237] TF1-343, Transcript 17 March 2006, pp. 70-73.
[2238] TF1-343, Transcript 17 March 2006, pp. 71, 73-74.
[2239] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, p. 34-36.
[2240] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 38 and 64-65.
[2241] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 38.
[2242] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 40-41.

uncle's hand. He later died from his injuries.[2243] He amputated TF1-179's right arm and his brother-in-law's hand as well. The rebels told them to go to Tejan Kabbah to get their hands back, and to tell ECOMOG that they [the rebels] were on their way to Makeni.[2244] Some men who were captured by the rebels and managed to escape, told TF1-179 that the commander was called SAJ Musa.[2245]

726. TF1-028, who lived Karina during the time of the intervention, in February 1998, testified that during that period soldiers came to Karina and were looting and beating up civilians.[2246] The witness was captured on 6 April 1998, stripped naked by her captor and stabbed, although she sustained no injury.[2247] The man who stabbed TF1-028 then asked a man to chop her, but he was stopped by other men who were wearing both civilian and combat clothes.[2248] The witness, tied together with two other naked women, was led to Karina, where she saw her uncle who had been chopped in the shoulder.[2249] The abductees were then taken to Makabie, then to Manyaie where TF1-028 passed by two men who were on their way back to Makabie. TF1-028 heard one of them shouting that his foot had been cut off.[2250] The group went on to Kortu, where she witnessed how one of the rebels brought two men from a house.[2251] The two men had had their hands amputated by two men called Fasuluku and Achebe, one up to the wrist and the second up to the elbow. One of the men was then handed a letter addressed to Tejan Kabbah so that he could buy hands for him.[2252]

727. TF1-174 testified that when the RUF AFRC were pushed out of Makeni in March 1998, following the entry of ECOMOG. They went on to attack Makeni-Kabala highway, Makeni-Lunsar Highway, Kono Highway, Gbendembum, Ngowahun Chiefdom, Biriwa, Makeni, Lunsar, Foredugu, Gbendembu, Fadugu and Malal.[2253] During this phase, civilians suffered amputations in Gbendembu and Gotowhun and their environs. Some people had their ears cut. Over 20 civilians from Gbendembu with hand amputations were brought to

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[2243] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 40, 42-43 and 62.
[2244] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 40-41.
[2245] Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 65-66.
[2246] TF1-028, Transcript 17 March 2006, pp. 108-109.
[2247] TF1-028, Transcript 17 March 2006, pp. 110, 113-115.
[2248] TF1-028, Transcript 17 March 2006, pp. 114-115.
[2249] TF1-028, Transcript 17 March 2006, p. 118-120.
[2250] TF1-028, Transcript 20 March 2006, pp. 10-11.
[2251] TF1-028, Transcript 20 March 2006, pp. 20.
[2252] TF1-028, Transcript 20 March 2006, pp. 21-23, 65.
[2253] TF1-174, Transcript 20 March 2006, p. 106.

St Joseph's compound in Makeni.[2254] Further, the RUF introduced a system of corporal punishment to Makeni for offences known as "different intention" and or "overlooking", which could incur the penalty of 70 to 300 lashes. Overlooking was tantamount to not greeting the RUF. Issa Kah Jallow was lashed 300 times because of this.[2255]

728. Some Defence witnesses confirmed that they had heard about mutilations and ill-treatment of civilians. DIS-103 heard but did not see that the RUF was mutilating people during the time the CDF were in Masingbi.[2256]

f) Freetown and the Western Area

729. Between 6 January 1999 and 28 February 1999, members of the AFRC/RUF mutilated an unknown number of civilian men, women and children in various areas of Freetown, and the Western Area, including Kissy, Wellington and Calaba Town. The mutilations included cutting off limbs.[2257] These abducted civilians were used as forced labour. The January 1999 occupation of Freetown by AFRC/RUF forces "was characterized by the systematic and widespread perpetration of ... gross human rights abuses against the civilian population...". Abductions were widespread throughout the offensive.[2258] Several victims describe the amputation they were subjected to.

730. TF1-331, who lived in Wellington, fled to the bush for one week together with her husband and other civilians on 6 January 1999 when armed rebels entered Freetown. When they returned they found their house bunt down and they were asked by the rebels to line up in Loko Town.[2259] After they shot her husband, a rebel amputated her left hand with a cutlass. Since it was not sharp he needed three strokes to sever the hand. When the witness tried to reach a hospital, she was caught again by rebels, beaten and "stoned with a bottle". The rebels were about to kill her, saying that she "was the mother of Tejan Kabbah". Somebody stopped them from killing her. They took her to a house and would not let her

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[2254] TF1-174, Transcript 20 March 2006, pp. 107-108.
[2255] TF1-174, Transcript 27 March 2006, p. 61-62. This evidence is also relevant to Counts 1 and 2 of the Indictment, where the time period of the alleged crimes is broader.
[2256] DIS-103, Transcript 25 February 2008, p. 85.
[2257] Indictment, para. 66.
[2258] Exhibit 174, Human Rights Watch Report June 1999, "Getting Away With Murder Mutilation Rape", Vol. 11, No. 3(A., highlighted portions at pp. 7-9 (19375-19377), Section entitled "Systematic Targeting of Civilians" at pp. 10-11 (19378-19379)] ("**Exhibit 174, HRW Report 1999**").
[2259] TF1-331, Transcript 22 July 2004, pp. 45-47.

go to the hospital. They kicked her, she fell on the gutter. Finally, they told her to go and "tell Tejan Kabbah that they want peace". She then hid in the bush again for three days. Her hand had already putrefied when she finally managed to reach the Eastern Police on the fourth day where she fainted. She was then taken to the Connaught Hospital, still unconscious.[2260] However, there was no food, no medicine, no dress, no clothes and no doctors in the hospital and by then parts of her hand were falling off. At Connaught Hospital the witness saw other people who had been amputated, men, children, girls and boys. She also met her uncle, whose foot had been cut off. The witness testified that she is now dependent on other's help, even for easy chores. She is begging for money since she cannot work.[2261]

731. TF1-022, a civilian from Freetown who was captured by seven RUF combatants on 22 January 1999,[2262] testified that he and other captives were marched naked to the rebel commando.[2263] The commando ordered their hands to be cut off.[2264] The captured civilians were asked one after the order to put their hands on a log and the hand was then chopped off with an axe by one of the fighters. TF1-022 testified that when it was his turn he was struck twice, but his hand did not come off but it was hanging and he was ordered to place it back on the log and the whole hand was then cut off completely. While this was going on a rebel stood by with a gun to ensure nobody ran off and that they positioned their hands for cutting when they were ordered to do so. Another rebel had a polythene bag and he collected the severed hand and put it in his bag.[2265] TF1-022 reached Connaught Hospital several days later and found the hospital full with people whose limbs had been cut off.[2266]

732. TF1-097, a fisherman from Tombo who had fled to Kissy,[2267] was captured at PWD junction, a week after 6 January 1999 by RUF combatants who flogged him and threatened to kill him. He saw RUF fighters with machetes, sticks and axes who said they wanted peace.[2268] On 21 January 1999, he was in his relatives' house in Kissy where he and his two

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[2260] TF1-331, Transcript 22 July 2004, pp. 47-49.
[2261] TF1-331, Transcript 22 July 2004, pp. 50-51.
[2262] TF1-022, Transcript 29 November 2005, pp. 24 and 31-34.
[2263] TF-022, Transcript 29 November 2005, pp. 29 -30.
[2264] TF-022, Transcript 29 November 2005, p. 34.
[2265] TF1-022 Transcript 29 November 2005, pp. 35-36.
[2266] TF1-022 Transcript 29 November 2005, p. 42.
[2267] TF1-097, Transcript 28 November 2005, p. 76-79.
[2268] TF1-097, Transcript 28 November 2005, pp. 80-81, 83-85.

brothers-in-law were hiding when they heard that ECOMOG were coming. Rebels came and threatened to set the house on fire, if the door was not opened. Captain Blood and another combatant entered the house and threatened to cut off TF1-097's hand if he did not produce the money they wanted.[2269] Captain Blood struck the witness on his back with a machete.[2270] TF1-097 fainted and fell and Captain Blood chopped off his right hand. He then told TF1-097 to go see Pa Kabbah as Pa Kabbah had brought a lot of hands for amputees. The rebels then cut off both hands of another person; TF1-097 could hear this person crying.[2271] TF1-097 was hiding in the toilet till at midnight and was finally told by another rebel to go in a specific direction. TF1-097 at one point had to lean against a zinc house, while his hand was bleeding and said it felt as though a bullet were passing through his head. TF1-097 then met other persons whose hands had been amputated and in the morning they all went to a hospital. TF1-097 saw more amputees there.[2272]

733. TF1-101, who lived in Kissy, testified that he saw rebels everywhere on 6 January 1999 and so did not dare to leave the house. Some rebels were in combat uniform, and some in civilian outfit.[2273] He finally needed to go out to get food. At a checkpoint at Kissy Shell Company TF1-101 witnessed an argument between an "SLA and a rebel" about what was the purpose of entering Freetown. The SLA said they did not want to overthrow and they just brought the rebels there. The rebels said "since they had come to the city, they were all together, so what their leader told them to do was they should do it. The SLA said they would not fight again until they were paid." Finally a certain Captain Blood arrived and said "Don't fight. You are all together. Don't make any argument again."[2274] Some days later, when the witness was back in his house, some rebels came and told him that President Kabbah had denied the ceasefire and that all civilians were going to die together and that this was "Operation No Living Thing." They set the house on fire but the witness managed to escape to his neighbour Abass' house where he stayed with other civilians. Abass' house was also burned but they survived in the cellar.[2275] Seven rebels came to Abass' house, armed with guns, an axe and a cutlass. They picked 24 young men, including

[2269] TF1-097, 28 November 2005, pp. 86-89.
[2270] TF1-097, 28 November 2005, p. 91.
[2271] TF1-097, 28 November 2005, pp. 91-96.
[2272] TF1-097, 28 November 2005, pp. 96-100.
[2273] TF1-101, 28 November 2005, pp. 34-37.
[2274] TF1-101, Transcript 28 November 2005, pp. 37, 39-40, 41 (lines 13-16 and 26-27).
[2275] TF1-101, Transcript 28 November 2005, pp. 42-46.

the witness and brought them to the main road.[2276] A big log was brought and a certain commander Commando said that everybody should put his hand so that it could be cut off. Commando killed eight persons who refused to do so.[2277] Commando then ordered a small rebel to cut off the civilians' hands. TF1-101 was the first in the group who was brought forward and untied. He received a heavy blow from a cutlass by the youngest of the seven rebels. Commando then took the axe and cut off his left and his right hands completely.[2278] Commando ordered that another civilian's hand be cut off but halted when Rambo came and gave the order to stop the amputations.[2279]

734. These victim testimonies were corroborated by several insider and eye witnesses. George Johnson testified that during the withdrawal of Junta troops from State House to Ferry Junction and to the Kissy Mental Home amputations and other atrocities were ordered and committed. The order was given by Santigie Kanu that the troops should amputate up to 200 people and send them into Freetown to the ECOMOG controlled area.[2280] [redacted] They got a so called "short sleeves" amputation on both arms, where the arm is cut at the elbow. They were also told to get new hands from Pa Kabbah since they voted for him.[2283] Later, in the evening, when they had occupied the area around the mental hospital, Gullit called a meeting with all the commanders, Supervisor A, Bazzy, Five-Five, the Operation Commander, the Deputy Operation Commander, the military supervisors and the Battalion

[2276] TF1-101, Transcript 28 November 2005, pp. 46-48.
[2277] TF1-101, Transcript 28 November 2005, pp. 48-51.
[2278] TF1-101, Transcript 28 November 2005, pp. 52-53.
[2279] TF1-101, Transcript 28 November 2005, p. 55.
[2280] George Johnson, Transcript 18 October 2004, pp. 53, 67-68 and 72-73.
[redacted]

Commanders and told them that the civilians must be punished, since they cheered the arrival of the ECOMOG troops. He sent Changamulanga, Mines, Colonel Kido towards the low cost area to amputate people.[2284]

735. TF1-093, a girl soldier who was abducted by the RUF at the age of 15 in 1996 and became one [redacted] "bush wives"[2285] testified that during the Freetown Invasion on 6 January 1999, groups of rebels were amputating hands of civilians from Calaba Town to Kissy.[2286] They would amputate at the wrist calling it long sleeve and at the elbow, calling it short sleeve.[2287] The rebels would also cut off four fingers on the same hand and leave the thumb intact, saying that civilians would then be able to show "one love" to Tejan Kabbah.[2288] She saw more than 100 civilians' hands being chopped off on 6 January.[2289]

736. [redacted]

There were about 100 civilians there who had been captured, mainly women. There were people of all ages, elderly and children.[2290] She witnessed that a civilian boy called Samuel, was captured and accused of being a Kamajor. Both his hands were chopped off and his tongue cut out. A rebel forced her to watch the mutilation. The rebels wrote a note, hung a bag on the boy's neck and placed the note in it. Samuel was then told to go and tell the ECOMOG that they [the rebels] would return and he was then released.[2291]

737. TF1-104, [redacted] testified how seriously injured civilians were brought to the [redacted] on 6 January 1999, for example a Nigerian businessman whose ear had been chopped off and with serious gunshot wounds on his wrist[2293], two other patients with gunshot injuries, one of them said he was the only one out of 7 people to survive an attack by the RUF and

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[2284] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 83-84.
[2285] See evidence to Counts 6-9, above.
[2286] TF1-093, Transcript 29 November 2005, p. 110.
[2287] TF1-093, Transcript 29 November 2005, p. 108-109.
[2288] TF1-093, Transcript 29 November 2005, p. 109.
[2289] TF1-093, Transcript 29 November 2005, p. 111.
[2290] Exhibit 59a, TF1-023, Transcript from AFRC Trial, Transcript 09 March 2005, pp. 26, 30-34.
[2291] Exhibit 59a, TF1-023, Transcript from AFRC Trial, Transcript 09 March 2005, p. 36-37.
[2292] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 5, 8 and 59.
[2293] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 9 and 12.

AFRC. A colleague [redacted] was shot in her house by RUF and AFRC men and had a deep wound on the buttock.[2294] Between 6 and 14 January 1999, 1 to 3 cases of civilians with gunshot wounds were admitted every day. RUF combatants were [redacted] brought to the [redacted] Clinic with gunshot wounds. On 15 January 1999, TF1-104 witnessed how Junta members shot a man in a cemetery near the hospital. He was brought to the hospital with gunshot wounds in the abdomen, bleeding profusely and his intestines protruding and later died.[2295] On 18 January 1999, a group of AFRC and RUF combatants came to the hospital [redacted] and accused [redacted] hospital staff of treating ECOMOG soldiers and Kamajors. They asked everyone to go outside the hospital; patients, staff, nurses, relatives and even passers-by and made them sit outside in front of the fence with their legs spread out. They started beating their legs and heads with Cobokos - sticks with a large round head. They said the civilians were being beaten for keeping ECOMOG and Kamajors in the hospital. The civilians were then taken to the commando, installed in a seized civilian house near the hospital, [redacted] near Parliament.[2296] The witness saw commanders on the veranda on an upper floor. There were around 200 civilians assembled in front of the gate they were made to stand against a wall and the combatants started to shoot until an order to stop was given.[2297] The witness was shot in the right elbow, the knee, and the right hip and was brought to the Good Shepard hospital with the other injured persons. There he got medical treatment but later, at night the juntas came back and said that if they found anyone in the hospital that night they would kill everyone and burn the hospital down. The witness left the hospital, although seriously wounded, and fled to the hills with his family. They were hiding there for about two days and then went back to get food and other provisions. Three combatants, one in uniform, two in plain cloths, attacked the witness, looted him, then locked him and his family inside their house at 5 Congress Road and set it on fire.[2298] They managed to escape

[2294] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 10-11 and 41.
[2295] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 19, 43-44 and 72-75.
[2296] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 22-23.
[2297] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 25-27.
[2298] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 27-31.

the burning house and the witness finally went to the medical offices at National Stadium for treatment.[2299]

g) Port Loko

738. TF1-345 testified that she was captured by rebels around the 6 January 1999, as part of a group of about 40 civilians near Nonkoba and Chendekom (or Tendakum).[2300] They were detained for several days and ill-treated. Rebels would hit their heads,[2301] TF1-345 herself was pushed by one rebel, ordered to lie down and was then beaten up with guava stick. He said she was "overlooking" him and "trying" him. He was beating her in front of the other abductees.[2302]

739. TF1-255, a farmer from Chendekom, was abducted on 29 May 1999 with his family, when Chendekom was attacked by rebels coming from the direction of Masiaka.[2303] He testified that the captured civilians were forced to work,[2304] and also seriously ill-treated.[2305] A soldier flogged him badly because the witness could not give him any rice, made him lie down and face the sun and whenever he winked the soldier would hit TF1-255 with a stick. He wounded TF1-255's right foot with the muzzle of his gun.[2306] TF1-255 witnessed the assault of 3 other men. One was struck on the head and injured with a gun. The other was hacked on the shoulder with a cutlass and fell down. He was put in a box they called a guard room. They removed him from the box several times to stab his wound before placing him back in the box. He spent three days in the box before he was killed. The third man was tied with a rope and pulled to the farm.[2307]

[2299] Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, Closed Session, pp. 32 and 50.
[2300] TF1-345, Transcript 19 July 2006, pp. 26-27, 30 and 43.
[2301] TF1-345, Transcript 19 July 2006, p. 32-33.
[2302] TF1-345, Transcript 19 July 2006, pp. 36-37.
[2303] TF1-255, Transcript 18 July 2006, p. 68-73.
[2304] TF1-255, Transcript 18 July 2006, p. 82-84.
[2305] TF1-255, Transcript 18 July 2006, pp. 86-91.
[2306] TF1-255. Transcript 18 July 2006, pp. 86-87.
[2307] TF1-255. Transcript 18 July 2006, pp. 89-91.

C. Liability of the Accused

a) Joint Criminal Enterprise

740. On the evidence presented above, the Accused are guilty of Counts 10 and 11, as members of a joint criminal enterprise. The crimes charged in Counts 10 and 11 constituted an essential means of the RUF and AFRC criminal design, in which each of the Accused participated. Massive physical violence was used to reach the ultimate objective alleged in the Indictment, "which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone,..." The widespread and systematic use of mutilations reflects in particular the aim of the joint criminal enterprise to gain and exercise "control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, ..."[2308] The symbolic chopping of limbs, some kind of perverted *ius talionis,* where hands were hacked off because people had voted for the Kabbah Government, the targeted attacks on civilians, the locking of whole families in houses which were then set on fire, all these acts were aimed at gaining complete control over the occupied areas and ultimately Sierra Leone as a whole.

741. The Accused, together with members of the AFRC, shared a common plan and design to achieve the objective by conduct constituting crimes within the Statute. The Prosecution submits further that the *mens rea* requirement is fulfilled, as the three Accused, who intended to take part and contribute to the common purpose, also intended to commit the crimes charged under Counts 10 and 11. In the alternative, the crimes were a natural and foreseeable consequence of the common purpose.

b) Liability under Article 6(1) of the Statute

i) First Accused

742. Evidence shows that the First Accused directly committed acts of physical violence. As the most senior RUF commander after Mosquito during the Junta period[2309], the First Accused ill-treated suspected Kamajor or Kamajor collaborators in Kenema himself as

[2308] Indictment, paras 36 and 37.
[2309] TF1-125, Transcript 12 May 2005, pp. 97-99.

direct perpetrator[2310] There is for instance evidence that the First Accused was beating up detainees.[2311] The ill-treatment was not only physical but also included serious mental ill-treatment in the form of repeated death threats[2312] and threats to seriously harm close family members of the victim,[2313] as well as detention in a place filled with explosives.[2314] Ill-treatment occurred in his presence or according to his direct orders.[2315]

ii) Second Accused

743. The evidence shows that the Second Accused directly ordered the amputation of limbs in the early rainy season of 1998 in Kono District. He and Superman sent their bodyguards with other combatants to Nimikoro and ordered that people's hands should be amputated in that mission.[2316] The Second Accused said, because ECOMOG were approaching every civilian that they met there should be amputated.[2317] His orders were executed and reported in written form to the Second Accused.[2318] Amputations were considered as acts that were particularly terrorizing the civilian population and the "enemy". Therefore amputees were ordered to go to the ECOMOG troops.[2319] The Second Accused by his actually prompting of other persons to commit an offence, clearly went further than merely "facilitating the commission of the principal offence, which may suffice for aiding and abetting."[2320] The Second Accused ordered or alternatively instigated the crimes.

iii) First, Second and Third Accused

744. The systematic manner in which civilians were mutilated and injured in a clearly targeted manner in direct attacks and systematically ill-treated by RUF combatants during the period when the Three Accused were senior commanders of the RUF or held key functions in the RUF command structure proves that they, at least, aided and abetted the

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[2310] TF1-125, Transcript 12 May 2005, pp. 138-139; as defined in *Brima et al* Trial Judgement, para. 762, citing *Tadić* Appeal Judgement, para. 188; *Krnojelac* Trial Judgement, para. 73.
[2311] TF1-125, Transcript 12 May 2005, pp. 139-140.
[2312] TF1-129, Transcript 10 May 2005, Closed Session, pp. 60 and 64-65.
[2313] TF1-129, Transcript 10 May 2005, Closed Session, p. 77.
[2314] TF1-129, Transcript 10 May 2005, Closed Session, p. 68.
[2315] TF1-129, Transcript 10 May 2005, Closed Session, pp. 60-64.
[2316] TF1-360, Transcript 20 July 2005, pp. 46, 55-56.
[2317] TF1-360, Transcript 20 July 2005, p. 57 (lines 2-7).
[2318] TF1-360, Transcript 20 July 2005, p. 56.
[2319] TF1-360, Transcript 20 July 2005, pp. 57-58.
[2320] *Brima et al* Trial Judgement, para. 769, referring to *Kordić* Appeal Judgement, para. 27.

commission of acts of physical violence by their troops. The clear targeting of civilians in direct attacks and the systematic manner in which they were mutilated, injured and ill treated shows that those crimes were not random acts of undisciplined soldiers. According to the Trial Chamber in the AFRC trial, it is sufficient that the Accused gave practical assistance, encouragement, or moral support and that this had a substantial effect on the perpetration of the crime.[2321] The contribution can be provided through an intermediary[2322] and irrespective of whether the participant was present or removed both in time and place from the actual commission of the crime.[2323] The presence at a crime scene of a person who is in a position of authority, as the Accused, may be regarded as an important indication for encouragement or support.[2324] Further the "persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting."[2325] As to the *mens rea* requirement, taking into consideration the importance of their positions within the RUF hierarchy, the Accused cannot deny that they had the necessary knowledge that their acts or omissions would assist the commission of the crime. They were at least aware of the substantial likelihood that their acts or omissions would assist the principal perpetrator in the commission of the crime.[2326]

745. The evidence adduced proves that physical violence, especially mutilations in the form of amputations of extremities or other organs, were widespread and systematic during the indictment period and followed a clear pattern. There were specific operations with the sole purpose of mutilating captured persons.[2327] Acts of physical violence were committed in a way and with a level of cruelty, often together with other atrocities, that indicates that the primary purpose was to control the civilians in captured areas by terrorizing and subduing them, and to punish the civilian population who lived in areas controlled by the

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[2321] *Brima et al* Trial Judgement, para. 775, referring to *Blaškić* Appeal Judgement, para. 46.
[2322] Ibid., referring to *Limaj* Trial Judgement, para. 516.
[2323] Ibid., referring to *Blaškić* Appeal Judgement, para. 48.
[2324] Ibid., referring to *Kayishema* Appeal Judgement, para. 201; *Aleksovski* Trial Judgement, para. 65; *Kajelijeli* Trial Judgement, para. 769.
[2325] *Brima et al* Trial Judgement, para. 777, citing the AFRC Prosecution Final Brief, para. 431. It explicitly held that "while such failure entails a superior's responsibility under Article 6(3) of the Statute, it may also be a basis for his liability for aiding and abetting, subject to the *mens rea* and *actus reus* requirements being fulfilled." Ibid., *in fine*.
[2326] *Brima et al* Trial Judgement, para. 776, referring to *Blaškić* Appeal Judgement, para. 50. It suffices that the aider and abettor was aware that one of a number of crimes would probably be committed, including the one actually committed.
[2327] TF1-360, Transcript 20 July 2005, p. 57 (lines 2-7).

Government, ECOMOG or Kamajors and who supposedly voted for the Government. Amputations of hands and fingers had the symbolic meaning of punishing civilians for using their hands to vote for Kabbah. This was what amputees were regularly told. After abductions, they would be ordered to report to ECOMOG or Kabbah, some were even given a letter for Kabbah.[2328] This indicates that mutilations were part of a larger plan that was premeditated, developed and ordered at the highest level. In addition, individual soldiers would just walk around and mutilate civilians without such orders.

746. This scale of cruelty and its systematic manner is not accidental or random but rather reflects a premeditated plan: mutilations and other forms of physical violence were part of the war technique of the RUF and the AFRC and the Accused, by their acts and omissions clearly encouraged and furthered those horrific acts knowingly and intentionally as aiders and abettors.

c) Liability under Article 6(3) of the Statute

747. In addition, there is evidence that the three Accused in their respective functions as commanders accepted some acts of physical violence committed by their troops. For the general requirements establishing command responsibility, the Prosecution refers to Section V (B) above.

748. Several witnesses testified, that acts of physical violence occurred in time periods and in places, where the three Accused were in a command position and they clearly fulfil the three-pronged test of Article 6(3) of the Statute for criminal liability. There existed superior-subordinate relationship between the Accused as superiors and the perpetrators of the crime as shown above in Section V (B), and the Accused had the knowledge that the crime was about to be or had been committed, as set out above in paras 744-746; and the Accused failed to take necessary and reasonable measures to prevent the crime or punish the perpetrators thereof.[2329]

[2328] TF1-093, Transcript 29 November 2005, p. 109; Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 14 June 2005, pp. 81-82; TF1-097, 28 November 2005, p. 94; Exhibit 102, TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, pp. 40-41; TF1-028, Transcript 20 March 2006, pp. 21-23; TF1-343, Transcript 17 March 2006, pp. 68-69; TF1-196, Transcript 13 July 2004, pp. 24-25; TF1-213, Transcript 2 March 2006, p. 16; TF1-172, Transcript 17 May 2005 p. 24-25.

[2329] *Brima et al* Trial Judgement para. 781, referring to *Čelebići* Trial Judgement, para. 346.

i) First Accused

749. The First Accused was Battle Field Commander in 1998, when most of the atrocities described above occurred. He was just below Sam Bockarie, who headed the RUF military structure. The Second Accused reported to the First Acused, and as the Battle Field Commander he was in charge of the Battle Group Commander, who commanded brigades, the brigade commanders command the battalions, the battalions command the companies, platoons, and squads.[2330]

750. The evidence adduced further proves that the First Accused was in charge of the troops in Kenema during at least part of the indicted period, and as a commander was responsible for the physical violence inflicted upon suspected Kamajors as described by the witnesses TF1-125 and TF1-129. As a military commander he was also responsible for the ill-treatment against and the violence inflicted upon civilians who were forced to mine in the Tongo area, as described by a number of witnesses.[2331]

ii) Second Accused

751. The Second Accused was a senior commander in Kono District.[2332] Some of the events described in the evidence clearly fall in this period. As a military commander he failed to prevent and punish the large scale mutilations that were committed in Kono District. Even more compelling is the clear evidence that he gave direct orders to amputate civilians, as shown above.[2333]

iii) Third Accused

752. The Third Accused as RUF's Overall Security Commander was in charge of the G5 commander, who reported to him.[2334] He knew what happened to civilians, since G5 commanders were those receiving *inter alia* complaints from civilians and were reporting

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[2330] TF1-071 Transcript 21 January 2005, pp.24-26. See also TF1-361, Transcript 11 July 2005, pp.67-69: Mosquito was the leader of the RUF and Issa Sesay was his Deputy.
[2331] TF1-371, Transcript 20 July 2006, pp. 52-53; TF1-041, Transcript 10 July 2006, pp. 19-20; TF1-045 Transcript 18 November 2005, pp. 97; TF1-035, Transcript, 5 July 2005, pp. 81-87; DIS-293, Transcript 13 November 2007, pp. 92-93.
[2332] TF1-041, Transcript 10 July 2006, p. 50.
[2333] TF1-360, Transcript 20 July 2005, pp. 46, 55-57.
[2334] TF1-041, Transcript 17 July 2006, p. 65.

them to him as Overall Security Commander from July 1997 until 2002.[2335] He also controlled the MP units.[2336] The Third Accused was in charge of investigating crimes committed within the RUF.[2337] As head of the Internal Defence Units, which were responsible for investigations in every battalion,[2338] he was heading all the intelligence officers who worked within the IDU.[2339] Due to the widespread and systematic nature of the mutilations committed by RUF combatants, especially in the District listed in the Indictment the Accused cannot claim, he had no knowledge of these acts.

[2335] TF1-371, Transcript 20 July 2006, p. 30.
[2336] TF1-168, Transcript 3 April 2006, Closed Session, p. 75; TF1-361, Transcript 19 July 2005, Closed Session, pp. 60-61.
[2337] TF1-366, Transcript 8 November 2005, pp. 52-53; Transcript 17 November 2005, pp. 33-35.
[2338] TF1-036, Transcript 27 July 2005, pp. 33.
[2339] TF1-371, Transcript 24 July 2006, pp. 35-36.

IX. COUNT 12 – CHILD SOLDIERS

753. Count 12 of the Indictment charges Issa Sesay, Morris Kallon and Augustine Gbao under Article 6(1) of the Statute and, or alternatively, under Article 6(3), with the crime of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law, punishable under Article 4.c. of the Statute.[2340]

A. Applicable Law - Elements of the Crime

a) Chapeau Elements

754. The contextual elements of Article 4(c) are discussed above in the general section on the chapeau elements. The nexus requirement between the armed conflict and the crime of recruitment of children under the age of 15 is satisfied, as the systematic recruitment of children was a means for the RUF to fill in its ranks and therefore directly served its military campaign.

b) Actus Reus and Mens Rea

755. The Appeals Chamber ruled that the offence of recruitment of child soldiers below the age of 15 did amount to a crime under customary international humanitarian law "before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time relevant to the Indictment", the implication being that "the principle of legality and the principle of specificity are both upheld".[2341] With regard specifically to the crime of use of child soldiers, the Trial Chamber in the CDF Judgement observed that, even if the Appeals Chamber did not make a finding expressly on "using child soldiers to participate actively in hostilities", it considered that it was also a crime proscribed under customary international humanitarian law prior to the events charged in the Indictment, considering that "it would make no sense to say that recruiting

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[2340] Indictment, para. 68.
[2341] *Prosecutor v. Norman,* SCSL-04-14-AR72(E)-131, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)', Appeals Chamber, 31 May 2004, ("**Appeals Chamber Decision on Child Recruitment**"), para. 53; *Fofana et al* Appeal Judgement, para. 139

children under 15 years of age for the armed forces was prohibited, but using them to fight was not."[2342]

756. Trial Chamber II in the AFRC Judgement relied upon the Rome Statute and adopted, the following additional elements of Article 4(c):

> a) The perpetrator conscripted or enlisted one or more persons into an armed force or group, or used one or more persons to participate actively in hostilities;
>
> b) Such person or persons were under the age of 15 years;
>
> c) The perpetrator knew or should have known that such person or persons were under the age of 15 years;
>
> d) The conduct took place in the context of and was associated with an armed conflict; and
>
> e) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[2343]

757. The definition of the *actus reus* of the crime, as found by Trial Chamber II[2344] was as follows:

> "734. 'Conscription' implies compulsion, in some instances through the force of law.[2345] While the traditional meaning of the term refers to government policies requiring citizens to serve in their armed forces, the Trial Chamber observes that Article 4(c) allows for the possibility that children be conscripted into "[armed] groups". While previously wars were primarily between well-established States, contemporaneous armed conflicts typically involve armed factions which may not be associated with, or acting on behalf, a State. To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict 'conscription' to the prerogative of States and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations. Rather, the Trial Chamber adopts an interpretation of 'conscription' which encompasses acts of coercion, such as abductions[2346] and forced recruitment[2347], by an

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[2342] *Fofana et al* Trial Judgement, para. 197.
2343 *Brima et al* Trial Judgement, para. 729 referring to the Rome Statute, Elements of Crimes, Article 8(2)(b)(xxvi); see also *Fofana et al* Trial Judgement, paras 195-196.
[2344] *Brima et al* Trial Judgement, paras 734-737.
[2345] Dissenting Opinion of Justice Robertson to Appeals Chamber Decision on Child Recruitment, para. 5.
[2346] See Secretary-General's Report on the Establishment of the Special Court, UN Doc. S/2000/915, para. 18: "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 children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; [...]". This proposal was however rejected by the Security Council.
[2347] See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of charges, 29 January 2007 (**"Lubanga Decision on the Confirmation of Charges"**), para. 246.

armed group against children, committed for the purpose of using them to participate actively in hostilities.

735. 'Enlistment' entails accepting and enrolling individuals when they volunteer to join an armed force or group. Enlistment is a voluntary act, and the child's consent is therefore not a valid defence.[2348]

736. 'Using' children to "participate actively in the hostilities" encompasses putting their lives directly at risk in combat.[2349] As a footnote attached to the Preparatory Conference on the establishment of the International Criminal Court states:

> The words "using" and "participate [actively]" have been adopted in order to ***cover both direct participation in combat and also active participation in military activities*** linked to combat such as scouting, spying, sabotage and use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.[2350]

737. 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."

758. Trial Chamber II found further that forcing children to undergo military training in a hostile environment constitutes illegal use of children pursuant to Article 4(c).[2351]

759. In employing the words "*using them to participate actively*" the Statute criminalizes the use of children who "actively participate" in hostilities. This proscribes a broader range

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[2348] See also Lubanga Decision on the Confirmation of Charges, para. 247 and *Fofana et al* Appeal Judgement, para. 140.
2349 Dissenting Opinion of Justice Robertson to Appeals Chamber Decision on Child Recruitment, para. 5.
[2350] Report of the Preparatory Committee on the Establishment of an International Criminal Court, (**ICC Preparatory Committee Report**), A/ CONF.183/2/Add.1, 14 April 1998, p. 21, footnote 12 (emphasis added).
[2351] *Brima et al* Trial Judgement, para. 1278.

of participation than the wording "take direct part in hostilities" used in the Additional Protocols to the Geneva Conventions.[2352] The *Lubanga* Decision on the Confirmation of Charges states that the "participate actively" standard "does not apply if the activity in question is clearly unrelated to hostilities."[2353] The footnote from the Preparatory Committee Report, referred to in the above passage from the *Brima et al* Trial Judgement,[2354] provides that "using children to participate actively in hostilities" does not require any formal induction into a military unit. The criminal act is using a child in hostilities regardless of the tasks the child is instructed to perform, as long as those tasks are in relation to or in support of military operations

760. With regard to the crime of conscripting child soldiers, the extended interpretation given by Trial Chamber II to include acts of coercion such as abductions or forced recruitment should be adopted. According to the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, this standard "reflects the Trial Chamber's recognition of the changed nature of warfare".[2355] Even if the terms conscription and enlistment refer to the moment of formal incorporation into the armed forces, they should cover any circumstances in which an armed group compels a person to serve in that armed group, whether by simple abduction, coercion or other means.

761. The Appeals Chamber in the CDF Appeal Judgement, after noting that "there was a paucity of jurisprudence on the question of how direct an act must be to constitute enlistment [...], as well as the possible modes of enlistment"[2356], confirmed that when "an armed group is not a conventional military organisation, enlistment cannot narrowly be defined as a formal process" and "regarded enlistment in the broad sense as including any

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[2352] This interpretation is supported by the Lubanga Decision on the Confirmation of Charges, para. 261: "Active participation" in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities" and in Prosecutor v. Thomas Lubanga Dyilo, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, 18 March 2008 (pursuant to the Trial Chamber I Decision inviting Observations from the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, 18 February 2008), para. 18.

[2353] Lubanga Decision on the Confirmation of Charges, para. 262; Written Submissions of the SRSG on Children and Armed Conflict, paras 19 and 21 (referring to the Trial Chamber's definition of "use" in the *Brima et al* Judgement).

[2354] *Brima et al* Trial Judgement, para. 736.

[2355] Written Submissions of the SRSG on Children and Armed Conflict, paras 8-9, which support Trial Chamber II's interpretation.

[2356] *Fofana et al* Appeal Judgement, para. 141.

conduct accepting the child as part of the militia."[2357] The Appeals Chamber held further: "[...] for enlistment there must be a nexus between the act of the accused and the child joining the armed force or group. There must also be knowledge on the part of the accused that the child is under the age of 15 years and that he or she may be trained for combat. Whether such a nexus exists is a question of fact which must be determined on a case-by-case basis."[2358] It accordingly considered that where a child under 15 was forced to carry looted property by the CDF, "this act, in the opinion of the Appeals Chamber constituted enlistment."[2359]

762. The *Fofana et al* Appeal Judgement further held that "the modes of recruiting children are distinct from each other and liability for one form does not necessarily preclude liability for the other".[2360] Therefore, separate findings should be made in respect of each mode of recruitment, especially the conscription and the use of child soldiers.

763. Finally, regarding the level of knowledge that an accused must have with regard to the age of the child, the *mens rea* requirement "would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences."[2361] Mere belief that the victim is over a certain age limit is not a defence if the victim is in fact under it.[2362] The awareness of the perpetrator may therefore include *dolus eventualis*, that is, "a situation in which the perpetrator did not know that the child was under 15, but thought this might be possible and went ahead anyway." [2363]

[2357] *Fofana et al* Appeal Judgement, para. 144.
[2358] *Fofana et al* Appeal Judgement, para. 141.
[2359] *Fofana et al* Appeal Judgement, para. 142.
[2360] *Fofana et al* Appeal Judgement, para. 139. See also para. 134, in which the Appeals Chamber held that the Trial Chamber should have considered any evidence on the alternative charge [of use of child soldiers] and made findings in that regard, even if, in the end, a verdict could be pronounced only on one of the alternative charges.
[2361] *Regina v. Finta*, quoted in Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court, Cambridge University Press, 2002, p. 379.
[2362] See for example, *Regina v. Prince*, quoted in Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court, Cambridge University Press, 2002, pp. 379-381; the author, after having examined the national jurisprudence concludes that the bottom line is that the accused must have realised the possibility that the victim was under the age limit.
[2363] M. Cottier, "Participation of children in hostilities", in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Oxford, 2008, N 234, p. 475, also emphasising that the 'should have known' standard "implies that it is sufficient that the perpetrator could have known the age of the child had he not been wilfully blind to it or had he taken reasonable and

764. Furthermore, Trial Chamber II in the AFRC Judgement found that "while 'widespread or systematic use' of children is not a chapeau element for a finding of liability under Article 4(c) of the Statute, ... the information may be useful in assessing whether a perpetrator 'knew or should have known' that persons recruited were under the age of 15."[2364]

B. Evidence

a) Introduction

765. The Indictment alleges that "at all times relevant to this Indictment, throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters".[2365]

766. The evidence shows the widespread practice of the RUF to conscript and use children in hostilities, at all times during the period covered by the Indictment. Several reports documented the use of child soldiers by AFRC and RUF forces.[2366] Amnesty International reported in August 2000 that the use of child combatants in Sierra Leone's armed conflict was widespread.[2367] There have been reports on the use of child soldiers in various parts of Sierra Leone, including Makeni[2368], Masiaka[2369], the Northern and Eastern provinces during the Intervention and Kabala[2370], as well as during the January 1999 Freetown invasion.[2371]

767. The evidence presented below portrays general facts and figures from the Prosecution expert witness and from [redacted], [redacted] The

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feasible safeguards to avoid using or conscripting or enlisting a child under 15, in particular when the person's appearance did not permit to exclude with certainty that he or she clearly was above 15 years".

[2364] *Brima et al* Trial Judgement, para. 1248.

[2365] Indictment, para. 68.

[2366] Exhibit 155, Fourth Secretary General Report, 1998, para. 28; Exhibit 158, Humanitarian Situation Report, 1999, p. 4 (19112); Exhibit 162, Fourth UNOMSIL Report 1998, para. 32; Exhibit 175, HRW Report, 1998, pp. 21-23 (19454-19456).

[2367] Exhibit 177, AI Report 2000, pp. 3-7, 16-18 (19542-19546, 19555-19557).

[2368] Exhibit 161, Third UNOMSIL Report 1998, para. 32.

[2369] Exhibit 173, Fourth Secretary-General Report on UNAMSIL, paras 49-50.

[2370] Exhibit 176, AI Report 1998, pp. 25-27 (19503-19505).

[2371] Exhibit 147, UNOMSIL Human Rights Assessment 1999, pp. 6-7 (19046-19047).

evidence of former child soldiers follows, then that of military insiders, UNAMSIL officials involved in the disarmament of the fighting forces and victims, mostly civilians who had been abducted by the RUF. Finally, reference is made to Defence witnesses, whose testimony corroborate that children under the age of 15 were conscripted, enlisted or used in hostilities.

768. TF1-296, [redacted] states in her report that 70% of the individuals that came into the care of child protection agencies from the fighting forces during 1998, 1999 and 2000 were child combatants under the age of 15 at the time they came into such care and that the total number of children received by Interim Care Centres ("**ICC**") by 2000 was 2,720.[2372] She testified that at least 3,200 children were associated with the RUF, which included child combatants and others such as girls who may not have been combatants but who were used for other purposes, domestic or sexual.[2373] From the AFRC coup onwards during the Junta period, UNICEF had continuous reporting of abductions and forced conscriptions of children both from the RUF and AFRC.[2374] In 1997 the Secretary of State for Social Welfare, Children and Gender Affairs, reported that an estimated 2,900 children were in the custody of the AFRC and RUF forces. Children in this study had been defined as individuals under the age of 15.[2375] These 2,900 children filled various capacities: sex slaves, carrying looted goods, general work in the camps, spying, bodyguards, and others.[2376] The expert report states further that:

> Children from the Small Boys Unit who were interviewed throughout 1998-2002 informed us that they were given specialised training. They were equipped with specialised skills in communications, intelligence

2372 Exhibit 127, Report on the situation in Sierra Leone in relation to children with the fighting forces ("**Expert Report on Children with the fighting forces**"), p. 11432, para. 76. The Prosecution expert also observed that the numbers of child combatants stated in the report likely under-represents the number of child combatants for a number of reasons, including the fact that it was not possible to document children in certain areas of the country, girls were overlooked in the disarmament process, and a number of other reasons: see Exhibit 127, p. 11432, para. 77 and TF1-296, Transcript 12 July 1996, pp. 46-47.
2373 TF1-296, Transcript 12 July 2006, pp. 17-18.
2374 TF1-296, Transcript 12 July 2006, p. 21. According to the expert report, reports from children, from the year 1996 onwards, were all of recruitment following abductions (Exhibit 127, p. 11425, para. 41).
2375 Exhibit 127, Expert Report on Children with the fighting forces, p. 11422, para. 24; TF1-296, Transcript 12 July 2006, pp. 21-22. TF1-296 mentioned that she learned that the RUF also defined children as persons under 15 years of age (See Exhibit 127, Expert Report on Children with the fighting forces, p. 11418, para. 9; TF1-296, Transcript 12 July 2006, p. 16)
2376 TF1-296, Transcript 12 July 2006, p. 22.

> gathering, guerrilla warfare etc. They spoke of hard physical training they had to undergo and the injuries they suffered.[2377]

769. From September 1997 to January 1998 the Child Protection Committees established in Sierra Leone obtained the release of approximately 340 children from the RUF. Of those 340, located in Makeni, Bo and Freetown, 188 were determined to have been child combatants following interviews and assessments.[2378] However, another 2,900 children in AFRC/RUF custody were not released due to the overthrow of the AFRC Junta.[2379] By the end of November 1999, UNICEF reported that 773 children had been released from the AFRC/RUF and 139 children were handed over by ECOMOG. Only children who had been screened and who were verified as combatants underwent demobilisation. 342 children were officially demobilised.[2380] [redacted], in May 2000, there were 200 children [redacted] in Lunsar and 189 in Makeni. Plans to transfer the children were refused by the Second Accused, so that approval had to be sought from Foday Sankoh. Of these 389 children, the youngest child combatant was 7 years old, and the majority of these child combatants were between 12 and 16 years old.[2382] The expert report explains that age verification was determined by using medical examinations, the use of teeth charts, and interviews with parents and other relatives.[2383]

[redacted]

[2377] Exhibit 127, Expert Report on Children with the fighting forces, p. 11421, para. 19.
2378 Exhibit 127, Expert Report on Children with the fighting forces, p 11422, para. 26.
2379 Exhibit 127, Expert Report on Children with the fighting forces , p. 11422, para. 26.
2380 Exhibit 127, Expert Report on Children with the fighting forces, p. 11422, para. 28; TF1-296, Transcript 12 July 2006, pp. 23-24.
2381 Exhibit 127, Expert Report on Children with the fighting forces, p. 11424, para. 36 ; TF1-296, Transcript 11 July 2006, p. 118.
2382 TF1-296, Transcript 12 July 2006, p. 35.
2383 Exhibit 127, Expert Report on Children with the fighting forces, p. 11428, paras 59 and 68.

[redacted]

[redacted] They also participated in attacks.[2391] Prior to their emergence from the bush, the children at Teko had fought on the Magburaka-Kono Highway and the Makeni-Foredugu Highway.[2392] The majority of the children at Teko were abducted from the Southern and Eastern provinces, but some of them were abducted from Kabala and Kambia.[2393] When the infighting between RUF and AFRC took place in Makeni and Magburaka, the witness saw some of these children fighting with guns.[2394] [redacted]

[redacted]

772. [redacted] There were AFRC and RUF children but the majority was RUF.[2403] The children were from infants to 17 years and 70% of them were aged 11-15. The number of female children ranged from 45 to 100. A few of these girls were actual fighters.[2404] The children aged 16-18 were all fighters and the majority of those aged 12-13 were fighters.[2405] The youngest child [redacted] who had killed was aged 11 and he had RUF marked into his chest. The youngest to have participated in rape was aged 14.[2406]

[redacted] In February 2000 [redacted]

774. [redacted]

[redacted]

the time in Lunsar.[2413] At the end of May 2000,[2414] [redacted] At Lungi, there were children of all ages but the majority were aged 11-15. At one point, there were over 100 girls, most of them aged 13-15.[2417] [redacted]

b) Evidence of Former Child Soldiers

775. TF1-314, 21 at the time of her testimony,[2419] gave evidence of being trained by the RUF in Buedu in 1994[2420] when she was aged 10, after having been captured by CO Blood in Masingbi.[2421] She stayed in Buedu between 1994 and 1998.[2422] She testified that, upon her arrival in Buedu, it was the First Accused, as overall commander, who gave the order for all civilians taken to be trained.[2423] Other commanders present in Buedu at that time included the Second and Third Accused and Scorpion, who was the witness' boss.[2424] After the First Accused had passed the order for civilians to be trained, they were all counted and taken to the training base at Buedu. More than 50 civilians were selected by Scorpion for training, ranging from 10 to 25 years old.[2425] She identified the training commander to be Monica Pearson.[2426] The training lasted for 2 weeks and entailed how to prepare an ambush, to cock a gun and fire. She was specifically trained to handle a two-pistol grip and

[redacted]

2419 TF1-314, Transcript 2 November 2005, p. 24.
2420 TF1-314, Transcript 2 November 2005, pp. 27 and 30.
2421 TF1-314, Transcript 2 November 2005, p. 26.
2422 TF1-314, Transcript 2 November 2005, p. 36.
2423 TF1-314, Transcript 2 November 2005, p. 27.
2424 TF1-314, Transcript 2 November 2005, p. 27.
2425 TF1-314, Transcript 2 November 2005, p. 28.
2426 TF1-314, Transcript 2 November 2005, p. 29, see also Exhibit 45.

described the use of such an arm.[2427] She was sent twice on a food finding mission by her commander Scorpion, as part of a group of 25 RUF members aged 10, 11, 12 and 13 to 15. Those aged 15, 10 of them in her group, were armed with two pistol grips, AK-48s and AK-58's.[2428] She distinguished between two units, the Small Boys Units or SBU for boys and the Small Girl Units or SGU for girls. She testified to belonging to the SGU and said that there were many such SBU's and SGU's in Buedu, the age range of the children being from 10, 11 to 12 years old. All of the commanders had SBU's and SGU's in Buedu, namely Scorpion, as well the First, Second and Third Accused. Scorpion had 5 SBU's and 5 SGU's.[2429] SBU's were mainly used as bodyguards, while SGU's would launder, cook and do other chores. Some SBU's and SGU's were armed with AK47s.[2430] She saw Issa Sesay returning from Kailahun with weapons.[2431] Escape was impossible from Buedu, because, if caught, she feared she would be killed by rebels or by Kamajors, if they learnt she was coming from a rebel zone.[2432] In late 1998, early 1999, she moved from Buedu to Kono for a month and then went to Makeni.[2433]

776. TF1-263, 21 at the time of testimony, was abducted in early 1998 by the RUF near Koidu when he was about 14 years of age.[2434] He was brought to Kissi Town, where he saw the First and Second Accused with Superman in front of Superman's house.[2435] He testified that Superman had bodyguards that were 14, and that the First Accused also had bodyguards who were the same height as the witness, who was then 14. The Second Accused had male and female bodyguards, one of whom was 15. He said that both the First and Second Accused later used their bodyguards in combat.[2436] Civilians from Banya Ground, PC Ground and Kissi Town, about 200 of them, were all assembled in PC Ground and were told by General Sesay that Mosquito had sent an order that all captured civilians

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2427 TF1-314, Transcript 2 November 2005 , pp. 30-31. See Exhibit 180, Women Waging Peace Report, p. 19782, which notes that "once recruited, women and girls had numerous roles, including that of frontline fighters. In fact, nearly half (44%) of the study population received basic military and weapons training from their commanders or captor husbands".
2428 TF1-314, Transcript 2 November 2005, pp. 31-32.
2429 TF1-314, Transcript 2 November 2005, pp. 33-35.
2430 TF1-314, Transcript 2 November 2005, pp. 35-36.
2431 TF1-314, Transcript 2 November 2005, p. 36.
2432 TF1-314, Transcript 2 November 2005, p. 43.
2433 TF1-314, Transcript 2 November 2005, pp. 45-46.
2434 TF1-263, Transcript 6 April 2005, pp. 6-7.
2435 TF1-263, Transcript 6 April 2005, p. 14.
2436 TF1-263, Transcript 6 April 2005, pp. 25-26.

should be taken to Kailahun.[2437] The reason for this meeting was to select people to undergo training to fight ECOMOG. The First Accused therefore asked the Second Accused to select people, starting with adults and then the young boys who were fit. In the selected group of which he was part, 6 were aged about 14 years old.[2438] He was then taken to Kailahun with his group, escorted by two commanders named Five-Five and Blood, whose boss was the First Accused.[2439]

777. After arriving in Kailahun District, the [redacted], distributed the trainees in companies, namely into 4 companies of 15 persons. There were 10 persons aged around 14 in the witness' company.[2440] He then described his training in detail: it took place in Camp Lion, lasted for 2 months and comprised of running, how to attack towns, to burn houses, to fight, to fire AK 47, RPG's and 2-barrel guns.[2441] When the training was completed, Mosquito came with a truck of weapons and addressed the new recruits. He told them that they were to go and clear Koidu as part of Operation No Living Thing and that General Sesay was waiting for them in Kono. Children were then given AK47's and adults bigger guns. Everyone left for Kono. In Kono, they slept at PC Ground where the First Accused told them that they were to attack Koidu the next morning.[2442] The witness saw the commanders leading the attack the next day and said it was the First and Second Accused, and Superman.[2443] He was later part of Superman's group which, together with Savage's group, went from Tumbodu to Krobula, where he saw SAJ Musa and Five-Five.[2444]

778. TF1-141, 18 years of age at the time of testimony, was captured in 1998 by the RUF in Koidu Town with other civilians.[2445] In Koidu, he stayed at Opera where he saw the First and Second Accused, Superman, Rambo and Colonel Banya.[2446] The commander he was given to, [redacted] then took him to Guinea Highway where he was sent on food

2437 TF1-263, Transcript 6 April 2005, p. 28.
2438 TF1-263, Transcript 6 April 2005, p. 29.
2439 TF1-263, Transcript 6 April 2005, p. 32.
2440 TF1-263, Transcript 6 April 2005, p. 34-35.
2441 TF1-263, Transcript 6 April 2005 , pp. 35-38.
2442 TF1-263, Transcript 6 April 2005, pp. 38-40.
2443 TF1-263, Transcript 6 April 2005, p.41.
2444 TF1-263, Transcript 6 April 2005, p.45-48.
2445 TF1-141, Transcript 11 April 2005, p. 81-84. Witness said he was 14 at the time of disarmament in 2000, so that he was 11 or 12 when he was abducted in 1998.
2446 TF1-141, Transcript 11 April 2005, p. 88-89.

finding missions and used as a guard at night.[2447] Instructions came from the Second Accused, to whom he was a subordinate. Kallon gave instructions, and how they should be implemented, at the muster parade in the morning, attended by officers, combatants and SBU's. There were many SBU's and almost all commanders had some. The Second Accused had several SBU's under his command. All the SBU's at the muster parade were subordinate to the Second Accused, since he was the one in charge at Guinea Highway. Besides food finding missions, SBU's served as security for commanders, did domestic jobs and also fought at the battle front.[2448]

779. TF1-141 travelled to Kailahun with a group that included Johnny Paul Koroma and the Second Accused.[2449] At Kailahun Town, they were introduced to the Third Accused, who himself told the young boys that he was the G5 commander, as they were going through the screening process.[2450] The witness was then forced to go to the training base at Bunumbu, called Camp Lion[2451], and there were many other boys like him. They were taught how to dismantle and assemble a gun and trained in fighting positions and were taught "FFAP", meaning firing from all positions.[2452] They were later taken to a place called Alaka (Halaka), where they would be so badly beaten that some died there.[2453] Most of those the witness trained with died. Some died at the monkey bridge (made of sticks on which you cross using your hands), which had barbed wire under it, some died of the pain and others were shot.[2454] During the training, most were SBU's, but there were also SGU's, some of them were the ones the witness travelled with from Kono.[2455] The following commanders came to Camp Lion during his training: CO Vandi, Colonel Denis Monkey Brown, who was brigadier commander at Pendembu, and Povei, the First Accused.[2456] The First Accused came to make a speech at a recruits gathering at Camp Lion. After introducing himself, he gave them "morale booster" (which the witness later explained was diamba and other drugs) and said that he had security among them and that whoever made

2447 TF1-141, Transcript 11 April 2005, p.90.
2448 TF1-141, Transcript 11 April 2005, pp. 90-92 and 94.
2449 TF1-141, Transcript 12 April 2005, p. 6.
2450 TF1-141, Transcript 12 April 2005, pp.14 and 19-20.
2451 TF1-141, Transcript 12 April 2005, pp. 22-23.
2452 TF1-141, Transcript 12 April 2005, pp.24-25.
2453 TF1-141, Transcript 12 April 2005, pp. 22-24.
2454 TF1-141, Transcript 12 April 2005, pp. 25-26.
2455 TF1-141, Transcript 12 April 2005, p. 27.
2456 TF1-141, Transcript 12 April 2005, pp. 29-30.

blunders would be executed. Sesay told them that his security, that is the boys standing behind him, were capturing civilians and sending some to the training base. He also said that after going through the training, they should do whatever they would be requested to do, otherwise they would be executed.[2457]

780. The witness saw the First Accused again at Baima, the Battalion headquarters. They had alcohol and other drugs which they later distributed.[2458] After his training at Camp Lion, the witness was sent to join Baima 4th battalion in which SBU's were mixed with bigger fighters and sent to the frontline. War Eagle was the battalion commander.[2459] The witness said that some of the young boys with him in the battalion were younger than him, or of the same height and stature.[2460] When he reached Baima, almost all of the recruits were sent to Benduma, a combat camp, where SBU's became security guards, with guns, watching for enemies. The SBU's and others received instructions from the platoon commander, Lt. Swallow. Apart from doing security for the camp, SBU's would also take active part at the battle field.[2461] The witness was given a gun and ammunition at the muster parade, when they were told that they were combatants.[2462] He actively participated in village and town attacks, for example, Daru[2463], Manowa and Segbwema in Kailahun District,[2464] and in RUF combat operations, including Operation Born Naked in Joru Nyiama, Kenema District.[2465]

781. TF1-117, 23 years old at the time of testimony, was captured in 1992 in Gboajibu, between Kenema and Tongo, by an RUF group led by the Third Accused. He was 10 years old at the time.[2466] Together with other civilians of his age group, including girls, he was taken to Kono and given both jamba and cocaine.[2467] They were given training to cock and fire and use arms such as G3, AK 47 and LAR.[2468] He participated in the attack on Kono

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2457 TF1-141, Transcript 12 April 2005, pp. 30-32.
2458 TF1-141, Transcript 12 April 2005, pp. 32-33. The First Accused came in a white Hilux vehicle with Mike Lamin and they were drunk.
2459 TF1-141, Transcript 12 April 2005, pp. 35-36.
2460 TF1-141, Transcript 12 April 2005, pp. 37-38.
2461 TF1-141, Transcript 12 April 2005, pp.38-40
2462 TF1-141, Transcript 12 April 2005, p. 45.
2463 TF1-141, Transcript 12 April 2005, pp. 40-45.
2464 TF1-141, Transcript 12 April 2005, pp. 46-53.
2465 TF1-141, Transcript 12 April 2005, pp. 57-63.
2466 TF1-117, Transcript 29 June 2006, p. 86 and p. 88 (line 6).
2467 TF1-117, Transcript 29 June 2006, p. 90.
2468 TF1-117, Transcript 29 June 2006, p. 91.

and thereafter came under the command of the First Accused, whom he called master.[2469] The witness and other SBU's who he defined as smaller children of his age group, were then sent to Camp Zogoda in Kailahun upon the order of the First Accused. The witness saw Foday Sankoh there, who used to bring them ammunitions.[2470] Commanders present in Kailahun included Mosquito, and the First, Second and Third Accused. The witness participated in various attacks from 1992 to 1995 and was in Kono at the time of the coup.[2471] He later went to Makeni in a group led by the First Accused and was taken to Teko Barracks, before he went to the pastoral center of Father Victor.[2472] When Johnny Paul Koroma was overthrown, he took up arms again and joined the RUF advancing towards Freetown, which was led by Superman, the First and Third Accused, and other commanders.[2473] He took part in Operation Pay Yourself and engaged in looting activities on the way back to Makeni. Superman, Kallon and Gbao were present in the same convoy.[2474] TF1-117 participated in the capture of an ECOMOG moak and killed an ECOMOG RSM. He took that officer's arm band and reported the incident to the First Accused, who promoted him to the rank of RSM.[2475]

782. TF1-093 was abducted by the RUF in [redacted] District, in 1996 when she was 15.[2476] She was forced to be the wife of [redacted].[2477] She was then taken to Kailahun[2478], where they built a camp for training purposes. She was trained with other civilians, about 300 in number[2479], on how to launch an attack on a town and on how to fire a gun. Civilians were aged 8, 10, 11, 15 and up to 17 years old.[2480] Training was given in separate groups led by Superman, Tactical, CO Papey and Bendu[redacted][2481] The witness participated in 20 fights in Kailahun. She estimated the age group of the other fighters to be between 8 and 10 years old, whilst some were of her age, namely

2469 TF1-117, Transcript 29 June 2006, p. 92.
2470 TF1-117, Transcript 29 June 2006, p. 94 (lines 16-23).
2471 TF1-117, Transcript 29 June 2006, pp. 95-96.
2472 TF1-117, Transcript 29 June 2006, pp. 98-99.
2473 TF1-117, Transcript 29 June 2006, p. 100.
2474 TF1-117, Transcript 29 June 2006, p. 103.
2475 TF1-117, Transcript 30 June 2006, pp. 13-16. Regarding the word "moak", Witness said : "It has a bomb. It has a war tank, with chains, has a long mouth".
2476 TF1-093, Transcript 29 November 2005, p. 74 (lines 2-3) and p. 79 (line 5).
2477 TF1-093, Transcript 29 November 2005, p. 76 and p. 82 (lines 22-24).
2478 TF1-093, Transcript 29 November 2005, p. 83.
2479 TF1-093, Transcript 29 November 2005, p. 89 (line 5).
2480 TF1-093, Transcript 29 November 2005, pp. 87-88.
2481 TF1-093, Transcript 29 November 2005, p. 89

between 15 and 17 years, and others older.[2482] All combatants were armed with guns, sticks and knives that looked like cutlasses. She had an RPG and a knife.[2483] When asked if she participated in the killing of civilians, she replied "Yes, I don't want them to kill me, so I just had to do it because they commanded me to do it".[2484] Fighters between 10 and 17 years old who were armed and went on attacks were given cannabis sativa and gunpowder by the rebels to make them brave[2485], the effect of which would be that "you'll be looking at humans like a chicken to kill".[2486] They would for example cut off people's heads, place them on sticks and walk about the town with them.[2487]

783. TF1-199, 17 years old at the time of his testimony, was abducted in June 1998 when he was 12, with his three brothers, by rebels in the bushes near the village of Madina Loko, near Makeni.[2488] He was brought to Madina Loko, placed in a single line at gunpoint and the rebels said: "Presently you're going to move with us and you're going to stay with us, and from here you will go with us."[2489] In the line with him, there were 18 other boys who he described as "really really small boys". Each commander had to pick his or her own SBU. The abductees were told they were going to be trained.[2490] The witness was picked by a commander named Marrah who told him he was going to be with him as a soldier, as his own bodyguard.[2491] There were also girls in the group, aged 12, 13, 14 and 15 years old.[2492] He was forced to move along with a group of rebels and went through villages such as Karina, Fadugu and Bafodia, systematically burning houses on the way, looting property and capturing people.[2493] In Bafodia, the group met other rebels, over 300 in number, among which the witness saw very young ones, according to him aged 14, 10 and even 9 years old. Such young boys were used to do domestic work, for food-finding missions and

2482 TF1-093, Transcript 29 November 2005, p. 93.
2483 TF1-093, Transcript 29 November 2005, p. 94.
2484 TF1-093, Transcript 29 November 2005, p. 95 (lines 8-10).
2485 TF1-093, Transcript 29 November 2005, p. 95-96.
2486 TF1-093, Transcript 29 November 2005, p. 95 (line 17).
2487 TF1-093, Transcript 29 November 2005, p. 96, lines 12-13.
2488 TF1-199, Transcript 20 July 2004, pp. 20-21.
2489 TF1-199, Transcript 20 July 2004, p. 23.
2490 TF1-199, Transcript 20 July 2004, p. 23.
2491 TF1-199, Transcript 20 July 2004, p. 24.
2492 TF1-199, Transcript 20 July 2004, p. 24.
2493 TF1-199, Transcript 20 July 2004, pp. 25-26.

also sometimes directly in attacks.[2494] Many SBU's were used as bodyguards, following the commander wherever he would go.[2495]

784. The witness and the other boys were trained how to shoot a gun and were given an AK47.[2496] He himself went on food-finding missions with his commander.[2497] He was also forced to smoke marijuana.[2498] The first attack he was involved in was Kabala and other SBU's also participated in this attack.[2499] The man in charge of the rebels in Bafodia was Colonel Savage[2500] who also had his own SBU's[2501] and who gave the orders for the attacks in which the witness took part.[2502] The witness once tried to escape from the camp in Bafodia but was caught, punished and threatened with death if he tried to escape again.[2503] He stayed with the rebels until about December 1999/January 2000, when he was released to UNAMSIL. He had been a member of the SBU's for two years.[2504] At the time of his demobilization, he explained being taken to Lunsar in a UNAMSIL truck with about 300 other SBU's and said he saw ten other trucks, also full of SBU's.[2505]

c) Insider Witnesses

785. TF1-168 [redacted] said that being trained was in and of itself a status symbol within the RUF and that this applied to children as well. For example, a trained commando aged 10 would have more respect than somebody who was 25 but untrained.[2507] The children he trained were between 9 and 12 years old[2508] and some were recruited voluntarily and some by force.[2509]

2494 TF1-199, Transcript 20 July 2004, p. 26.
2495 TF1-199, Transcript 20 July 2004, pp. 27-28.
2496 TF1-199, Transcript 20 July 2004, pp. 26-27.
2497 TF1-199, Transcript 20 July 2004, p.27.
2498 TF1-199, Transcript 20 July 2004, p. 28: He was told that this would help him be comfortable during the attack.
2499 TF1-199, Transcript 20 July 2004, pp. 28-29: The Witness gave a detailed account of the rebel attack on Kabala and another village.
2500 TF1-199, Transcript 20 July 2004, p. 27 and 31.
2501 TF1-199, Transcript 20 July 2004, p. 68.
2502 TF1-199, Transcript 27 July 2004, pp. 4-5. The witness also mentioned the name of Brigadier Mani, who he said was superior to Colonel Savage and who was the highest authority in the group although he did not reside in Bafodia. (See TF1-199, Transcript 20 July 2004, p. 31).
2503 TF1-199, Transcript 20 July 2004, pp. 31-32.
2504 TF1-199, Transcript 27 July 2004, p. 2.
2505 TF1-199, Transcript 20 July 2004, pp. 34-35.
2506 TF1-168, Transcript 3 April 2006, p. 91.
2507 TF1-168, Transcript 3 April 2006, p. 24.

786. TF1-045, [redacted], testified that, whilst in Tongo around September 1997, he observed that there were boys 12, 13 and 15 years of age among the AFRC and RUF forces. These boys were armed and were mainly from the SBU.[2510] SBU's guarding the Cyborg pit had orders to shoot or beat people who mined outside the prescribed hours. This evidence was corroborated by TF1-060.[2511] Children, aged about 12, 13 and 14 years old, were captured in Kenema, and were SBU members, used to carry loads, assist with domestic work, carry weapons and also to fight.[2512] TF1-045 saw SBU's being used by the AFRC and RUF forces whilst he was in Tongo and Kenema.[2513] He saw SBU members with several RUF commanders and said that the majority of RUF commanders had SBU's. From 1997 until disarmament, the witness personally saw Mosquito, the First and Second Accused, and Mike Lamin with SBU's. Particularly, he saw the First Accused with SBU's in Buedu, Pendembu and in Makeni.[2514] The Second Accused was also accompanied by SBU's in Freetown and Buedu in 1997 and in Makeni in 1999 and 2000. Those SBU's were as young as 13.[2515]

787. TF1-366 testified that while in Kono after the intervention, people would be sent to a training base in Kailahun. After the training, those people would be sent back to Kono. Young men, young boys and children would be captured and sent to Bunumbu to be trained as soldiers. Many were minors since old people would not be sent. Women too underwent training and fought in the war. This order was given by the Second Accused and Superman and that even the First Accused sent messages.[2516] Many of the people sent were SBU's, meaning children who carried guns for commanders and acted as their bodyguards. They were also trained to use guns. Some of them were bodyguards, whilst some stayed with the wives of commanders. However, many of them would go with the troops to fight. As to their age, the witness stated that some of the SBU's were 10, 11 years old and some even 9 years old. They stayed with the RUF till they became grown-ups.[2517] [redacted]

2508 TF1-168, Transcript 3 April 2006, p. 93
2509 TF1-168, Transcript 3 April 2006, p. 92.
2510 TF1-045, Transcript 18 November 2005, p. 79 (lines 11-14).
2511 See para. 805 below.
2512 TF1-045, Transcript 21 November 2005, pp. 14-15.
2513 TF1-045, Transcript 21 November 2005, p. 16.
2514 TF1-045, Transcript 21 November 2005, p. 38.
2515 TF1-045, Transcript 21 November 2005, p. 39.
2516 TF1-366, Transcript 8 November 2005, p. 67.
2517 TF1-366, Transcript 8 November 2005, pp. 69-70

[redacted] The First Accused had SBU's in Kailahun , Freetown, Makeni, Buedu, Giema, Guinea Highway from 1991, 1992 up to 2002 and the witness saw him with them. One was called Black Fire, the SBU commander, and he was 11 years old. The First Accused's wife also had SBU's, one of whom was called Brima Pleasure. All SBU's were little children.[2518] As to the Second Accused, he had such SBU's in Freetown, Makeni, Magburaka, Kono, Guinea Highway, Kailahun, Kangari Hills, from the time period between 1997 up to 2002. Some of them were 10 years old, 14 and 15.[2519] The witness finally saw the Third Accused with many SBU's in Kailahun, Makeni, Magburaka and Kono. It was in 1990, 1991, up to 1992, and 2000.[2520]

788. TF1-071 testified that on the way back to Kono, just after the intervention, children were massively abducted by the RUF forces. He explained that some of these children later became child soldiers, which he defined as "an under-aged child carrying a weapon for fighting".[2521] They were used for fighting and for home caretaking of commanders. There were both male and female. He explained that by 'child' he means less than 10, 11, 15 years old. At Yengema, the RUF had organized these children in categories named SBU that is Small Boys Unit and Small Girls Unit for female children.[2522] They were trained mostly "for purpose of recce. That is, they used them in the war for spying enemy positions and as media of information." They were used almost throughout the life of the war, from 1997 up to disarmament in 2001.[2523]

789. TF1- 362, [redacted], testified that a large number of recruits were sent to Kono after training and that these included adults and SBU's. [redacted] that the age of the recruits ranged from 9 years to adulthood and that SBU's ranged from 9 to 14 years old.[2524] Instructions on the need of the front lines came from the high command through the deputy, "who was General Issa".[2525] For example: "the frontline soldiers at Daru or Kono

2518 TF1-366, Transcript 8 November 2005, p. 69.
2519 TF1-366, Transcript 8 November 2005, pp. 69-70.
2520 TF1-366, Transcript 8 November 2005, p. 70.
2521 TF1-071 Transcript 19 January 2005, pp.34-35 (line 15).
2522 TF1-071 Transcript 19 January 2005, p. 36.
2523 TF1-071 Transcript 19 January 2005, p. 37
2524 TF1-362, Transcript 20 April 2005, Closed Session, p. 47.
2525 TF1-362, Transcript 20 April 2005, Closed Session, p. 47 (lines 21-22).

will request that we need manpower and the instruction will be given [redacted] from the deputy that they are coming to collect these soldiers to go to the frontline."[2526] [redacted] the frontline commanders in Kono were Dennis Mingo, the Second Accused and Rambo.[2527]

790. The [redacted] procedure once a recruit arrived at the base: "We'll take their names, where they come from, where they were born, their ages and their health."[2528] For those children who could not give their age, the adjutant estimated their age. The recruits were then placed in platoons. There were 5 platoons in Bunumbu: SBU's, SGU's, wives, adult men and old age.[2529] The age range in SBU and SGU units was the same, from 8 to 15 years old.[2530] [redacted] training commander in Bunumbu, [redacted] reported to the second in command of the RUF, namely the First Accused.[2531] The list of recruits containing their names, age and other personal data was "taken to the deputy at the training base. From the deputy it goes to the training commandant. From the training commandant it goes to the advisor to seek advice. From the advisor it then goes to General Issa. From General Issa it is taken to General Mosquito."[2532] In Bunumbu, such lists reached the First Accused regularly since there were weekly reports from the Bunumbu training base which were communicated to the First Accused by the adjutant. He would either take them physically to him or send them through radio communication.[2533] Whenever such reports were sent, she had the means to know that they had been transmitted because a response was received. [redacted] that the training base at Bunumbu was closed and transferred to Yengema after the complete capture of Kono.[2534] [redacted] set up the base at Yengema upon the order of the First Accused who met her personally to give this specific instruction.[2535] The Yengema base operated until the end of the disarmament and recruits from Bunumbu as well as those captured in Kono were trained there.[2536] The structure,

[redacted]

organisation and procedure[2537] were the same as Bunumbu, as there were also five platoons. The age range was also the same, namely from 8 to 15 for both the SBU and SGU.[2538] Adults and children were given the same training, which the witness called guerrilla training, involving infantry, discipline, physical endurance, armour and artillery class, as well as how to set ambushes.[2539] Upon graduation from training at Yengema, SBU's and men were sent to the frontlines at Yengema and the Guinea Highway, while SGU's were taken to serve the commanders at home.[2540] The [redacted] reported to Mosquito through the First Accused, and later to the First Accused only. The reports were communicated through radio communication, or physically, either by the adjutant or the witness herself.[2541]

791. TF1-367 testified that Mosquito passed an order to Superman to burn down houses and vehicles in Koidu. Superman then passed the order to the SBU's and they implemented it. Some of the SBU's "could be up to 12 years and others 15 years."[2542] At Guinea highway, at the time of the attack on Koidu in December 1998, the First Accused had his boys with him, his security who defended him, and there were children among them, between 12, 14 to 12 and 15 years old.[2543]

792. [redacted] was used in the training base in Bunumbu in 1998.[2545] The witness was asked to comment on Exhibit 25, a report from the training commandant to the G1 in Buedu, indicating the presence of 53 SBU recruits at the Bunumbu training base in May 1998. He said that the age of those SBU's in Bunumbu ranged from 8 to 15 years old and confirmed that they underwent training.[2546] Training took place from 1997 throughout 1999, during which the use of arms such as AK was taught, as well as discipline and ideology.[2547] Some of the SBU's were with the commanders in their houses, but some were also going to the frontline. Between 1997 and 1999, all senior

[redacted]

2542 TF1-367, Transcript 22 June 2006, pp. 16-17.
2543 TF1-367, Transcript 22 June 2006, pp. 34-35.
2544 Exhibit 38, RUF Training Manual.
2545 TF1-036, Transcript 28 July 2005, pp. 2-3 and p. 5.
2546 TF1-036, Transcript 28 July 2005, p.15.
2547 TF1-036, Transcript 28 July 2005, p.16.

commanders had SBU's, including Bockarie, the First and Second Accused, and Peter Vandi. Particularly, he saw them in Buedu in 1998 and 1999.[2548]

793. TF1-041 was sent to Makeni by the First Accused to work [redacted] arrived there 3 December 1998.[2549] He was given the order that all gallant men in Makeni should be captured and sent to Kono to be trained. [redacted] He estimated the age of the people captured to be from 8 up to 50 years old.[2550]

794. TF1-371 testified that members of the RUF could be as young as 12 years old and children between 12 and 18 years old were classified as SBU's. They engaged in activities that ranged from providing personal security to senior commanders to combat missions. Most senior commanders had SBU's attached to their personal security: Sam Bockarie, the First and Second Accused, Dennis Mingo and Isaac Mongor had some.[2551] Issa Sesay had SBU's throughout the RUF operations until the time of disarmament in 2002.[2552] The witness knew 2 SBU's attached to the First Accused, one was 15 years old and the other 16, whilst the one used by the Second Accused was 16.

795. Dennis Koker was with Johnny Paul Koroma and the convoy retreating from Makeni to Kono, travelling in Eldred Collins'vehicle. Upon their arrival in Kono, he saw the First and Second Accused, Superman and Gullit.[2553] He testified that the First Accused launched Operation No Living Thing, after which RUF and AFRC forces started to burn houses and capture civilians in Kono.[2554] Both the First and Second Accused had a lot of children with them but they were not theirs.[2555] As an MP Adjutant in Buedu from 1998 to 1999, he confirmed that both the First and Second Accused had children which were "people's children" and which they took as domestic servants. This was "a sort of practice which was prevalent among the commanders".[2556] He witnessed on two occasions the

[2548] TF1-036, Transcript 28 July 2005, pp.17-18.
[2549] TF1-041, Transcript 10 July 2006, pp. 56-57.
[2550] TF1-041, Transcript 10 July 2006, pp. 60-61.
[2551] TF1-371, Transcript 21 July 2006, p. 63.
[2552] TF1-371, Transcript 21 July 2006, p. 64.
[2553] Dennis Koker, Transcript, 28 April 2005, pp. 43-44.
[2554] Dennis Koker, Transcript, 28 April 2005, pp. 45-46.
[2555] Dennis Koker, Transcript, 28 April 2005, p. 47.
[2556] Dennis Koker, Transcript, 28 April 2005, p. 62 (lines 12-13).

Second Accused coming to Buedu with a group of people, which included men and women below the age of 15. Their names were taken and they were sent to be trained as combatants in Bunumbu. About 100 to 500 people had been sent for training and that among them, 45 % were below 15.[2557]

796. George Johnson testified that plenty of civilians were abducted on the trip to Rosos,[2558] including children who were then trained to become combatants. The under-aged abductees trained to fight were called Small Boys Unit. The total number of those trained at Camp Rosos, including children, were 526, and of those about 30 to 35 were boy children and 6 were female children. The witness estimated their age range between 8 and 14 years.[2559]

797. [redacted] Santigie Borbor Kanu, 55, was in charge of the training, deputized by Junior Sheriff.[2562] Trainees were captured at Karina and *en route* from Mansofinia to Camp Rosos. There were boys aged 10 to 12 years old and girls aged 15.[2563] [redacted] FAT Sesay recorded the names, ages and addresses of the recruits. The witness recalled that the youngest was a 10 year old boy.[2564] [redacted] Then, the brigade commander, the deputy brigade

[2557] Dennis Koker, Transcript, 28 April 2005, pp. 66-67.
[2558] George Johnson, Transcript 14 October 2004, p. 86.
2559 George Johnson, Transcript 14 October 2004, pp. 87-88.
[2560] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, pp. 61 and 23-25.
[2561] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, p. 23 (lines 28-29); " I myself counted the number before telling the commander the strength of the people who came for training."
[2562] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, p. 24.
[2563] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, pp. 24 and 60-61.
[2564] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, pp. 25-27; Transcript 17 June 2005, p. 73.
[2565] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, p. 25, p. 26 (lines 22-24): "muster" means to gather the men together for an address.
[2566] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, pp. 28.
[2567] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, p. 31.
[2568] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, pp. 28-29.

commander, the military supervisors and battalion commanders arrived and Five-Five handed over the parade to Commander Gullit.[2569]

798. [redacted] He participated in the RUF farming in Giema from 1995 to 1999, including farming for the First and Third Accused, as well as Mosquito.[2572] While working on the farm of the First Accused, the civilians were being guarded by RUF kids carrying guns, named Musa Vandi, Abdulai Musa, aka "X" and Moses. Abdulai Musa and Moses were Issa Sesay's SBU's and Musa Vandi his bodyguard. When the witness saw them in 1996, Abdulai Musa was between 9 and 11 years old, Musa Vandi was between 18 to 20 years old and Moses no more than 12 years old.[2573] The witness also testified to training taking place from 1997 to 2000, first in Kailahun district, in Bayama[2574] and then in Bunumbu, then in Kono. Both boys and girls were trained and some were around 8 or 9 years old.[2575]

d) Evidence of UNAMSIL personnel

799. TF1-288, Lt. Col. Edwin Kasoma, the Commanding Officer of the UNAMSIL Zambian contingent testified that on 2 May 2000[2576] he and his men were on their way to Makeni through Lunsar.[2577] After 10-12 kms from Lunsar along Makeni road, the witness and his men were surrounded in an RUF ambush. The whole group was disarmed and locked in a house.[2578] There were over 100 RUF combatants, carrying light weapons, rocket launchers and grenades, including children, aged about 10 and 12 years, who were also armed.[2579] The commander in charge was the Second Accused, who held the witness at gunpoint.[2580] Later, at Yengema, the UNAMSIL soldiers were taken to a school block,[2581]

[2569] Exhibit 119, TF1-334 Transcript from AFRC Trial, Transcript 24 May 2005, pp. 29-30.
2570 TF1-108, Transcript 7 March 2006, pp. 81-84.
2571 TF1-108, Transcript 7 March 2006, p. 91.
2572 TF1-108, Transcript 7 March 2006, pp. 111-112.
2573 TF1-108, Transcript 7 March 2006, pp. 112-116.
2574 TF1-168, Transcript 31 March 2006, p. 58 (lines 20-21).
2575 TF1-108, Transcript 8 March 2006, pp. 42-43.
[2576] Edwin Kasoma, Transcript 22 March 2006, p. 10.
[2577] Edwin Kasoma, Transcript 22 March 2006, pp. 12-13.
[2578] Edwin Kasoma, Transcript 22 March 2006, p. 17.
[2579] Edwin Kasoma, Transcript 22 March 2006, pp. 18-19.
[2580] Edwin Kasoma, Transcript 22 March 2006, p. 19 (lines 7-14).
[2581] Edwin Kasoma, Transcript 22 March 2006, p. 25.

while [redacted] and Lt. Col. Kasoma were taken to the house of [redacted] where they stayed for 23 days.[2582] While at Yengema, the witness saw lots of RUF, particularly he saw the First and Second Accused, as well as Lansana. They all visited [redacted] residence from time to time. The First and Second Accused came there about 4 times.[2583] Every time they came, they had a lot of RUF soldiers (30 to 40) guarding them, some would be child soldiers aged about 10 – 12 years.[2584]

800. TF1-042, Major Jaganathan Ganese, served as United Nations Military Observer in Sierra Leone in 2000 during the disarmament and demobilisation process.[2585] He was based in Kenema and Makeni and was involved with the disarmament and demobilisation of the CDF, the AFRC, the RUF and the SLA.[2586] The Military Observers were responsible for both child and adult combatants. The age group of the combatants involved in the DDR process ranged from 10 to adulthood. Combatants informed disarmament officials of their age by filling a form.[2587]

801. TF1-044, Lt. Col. Mendy, was at the DDR reception centre in Makeni on April 17th, 2000 when the Third Accused came with armed men and surrounded the reception centre, objecting to the disarmament process.[2588] After negotiation, the Third Accused and his men finally withdrew.[2589] While patrolling the town, on the Highway from Makeni to Magburaka, the witness saw the Third Accused with armed children who he estimated to be under 15 years old. He saw Gbao with such SBU's armed with AK-47 on more than one occasion. Gbao was usually with more than 3 boys.[2590]

[2582] Edwin Kasoma, Transcript 22 March 2006, pp. 26-27.
[2583] Edwin Kasoma, Transcript 22 March 2006, p. 27.
[2584] Edwin Kasoma, Transcript 22 March 2006, p. 28.
[2585] Ganase Jaganathan, Transcript 20 June 2006, pp. 5-7.
[2586] Ganase Jaganathan, Transcript 20 June 2006, pp. 6-7.
[2587] Ganase Jaganathan, Transcript 20 June 2006, p .9.
[2588] Joseph Mendy, Transcript 26 June 2006, pp. 85-86.
[2589] Joseph Mendy, Transcript 26 June 2006, p. 87. Before that day, the witness had seen the Third Accused who he understood to be in charge of intelligence for the RUF and had an office at a place they used to call Agriculture.
[2590] Joseph Mendy, Transcript 26 June 2006, p.88-90 and p. 92 (lines 8-9).

e) Victim Witnesses

802. TF1-113 was captured in Pendembu and was a [redacted] for the RUF from 1991 until 2000.[2591] After the RUF was dislodged from Pendembu, she was in [redacted] and she defined him as "the go-between the soldiers and the civilians", the person who knows whatever the civilians are doing and to whom the civilians would report.[2592] After the overthrow of President Kabbah[2593], in 1997, she was [redacted][2594], where the G5 Office was located, headed by the Third Accused.[2595] A lot of captured civilians brought by the RUF in Kailahun after the intervention in Freetown[2596] were screened at the G5 Office.[2597] These civilians included children as young as or 10, who were then sent to a base called Bunumbu for training and would be called SBU or SGU.[2598] Her own children had been taken to the training base, one of which was only 8 years old.[2599]

803. When she was in Kailahun and would go to Buedu, she used to see SBU's with the First and Third Accused, and Mosquito. There were SBU's following the First Accused until the end of the war, some of them being not up to 10 years old.[2600] She also saw the Third Accused with SBU's from 1996 to 1997 when he was in Kailahun.[2601] She encountered an incident involving SBU's who said they were the Third Accused's bodyguards, one of whom was called Morie, aged 10.[2602] The incident was reported to Gbao, who sent 3 SBU's to arrest the witness in Bunumbu and bring her to see him in Kailahun.[2603] She was stripped naked and while in custody was beaten by SBU's under the command of the Third Accused.[2604] She said that SGU's were generally with the "big men"

[2591] TF1-113, Transcript 2 March 2006, pp. 38-39.
[2592] TF1-113, Transcript 2 March 2006, pp. 41-42.
[2593] TF1-113, Transcript 2 March 2006, pp. 43-44.
[2594] TF1-113, Transcript 2 March 2006, p. 46.
[2595] TF1-113, Transcript 2 March 2006, pp. 49-50.
[2596] TF1-113, Transcript 2 March 2006, p. 51 (lines 19-28).
[2597] TF1-113, Transcript 2 March 2006, p. 53.
[2598] TF1-113, Transcript 2 March 2006, p.54 and p. 64 (lines 18-23).
[2599] TF1-113, Transcript 2 March 2006, pp. 65-66.
[2600] TF1-113, Transcript 2 March 2006, p. 64.
[2601] TF1-113, Transcript 2 March 2006, p. 66.
[2602] TF1-113, Transcript 2 March 2006, p. 67.
[2603] TF1-113, Transcript 2 March 2006, p. 68.
[2604] TF1-113, Transcript 7 March 2006, pp. 36-37.

and they would launder clothes, sweep and cook. Such SGU's, some not even aged 10[2605], were with the wives of the First and Third Accused, Mosquito and the Liberian big men. Some of the SGU's working for the First Accucsed's wife were under the age of 15.[2606]

804. TF1-129, [redacted], was beaten during the AFRC junta and thrown into the boot of a vehicle by six rebels under the instructions of the First Accused. The First Accused then brought a boy about the age of seven, gave him an AK-47 and told him to watch the witness. The boy was instructed by the First Accused to shoot the witness if he moved. The boy who could hardly handle the rifle sat down and put it on his leg pointing it towards the witness's head.[2607] He was then taken to Mosquito by Issa Sesay.

805. TF1-060 testified that in September 1997, mining at Cyborg near Tongo was done under Sam Bockarie's command. The witness saw as many as 100 child combatants in Tongo, aged between 12 and 14. Those children were clearly RUF combatants and were responsible for most of the killings.[2608] At Cyborg, Sam Bockarie gave the order to child soldiers to fire at anyone who tried to take gravel or steal diamonds.[2609] In October 1997, while people were digging for diamonds around the church at Pendembu, Mosquito sent child combatants who opened fire, killing 3 people and injuring many more.[2610] Similarly, In Sandeyeima swamp, child combatants opened fire, killing 2 people and injuring many others because people were washing gravel.[2611]

806. Further evidence given by numerous witnesses in various locations relate to the presence of child soldiers within RUF ranks and to the age of those children:

- TF1-035 testified that civilians were forced to mine in Tongo Field and that SBU's armed with guns,[2612] aged 9, 10 to 12 years old, were guarding them under Mosquito's orders.[2613] The witness reported an incident involving SBU's standing

[2605] TF1-113, Transcript 2 March 2006, p. 69.
[2606] TF1-113, Transcript 6 March 2006, p. 21.
2607 TF1-129, Transcript 10 May 2005, Closed Session, pp. 64-65.
2608 TF1-060, Transcript 29 April 2005, Closed Session, pp. 70-71.
2609 TF1-060, Transcript 29 April 2005, Closed Session, p. 74.
2610 TF1-060, Transcript 29 April 2005, Closed Session, p. 72.
2611 TF1-060, Transcript 29 April 2005, Closed Session, pp. 72-73
[2612] TF1-035, Transcript, 5 July 2005, p. 84.
2613 TF1-035, Transcript, 5 July 2005, pp. 81-83.

next to Mosquito who fired and killed civilians who had tried to mine for themselves.[2614]

- TF1-122 saw many child soldiers during the Junta period in Kenema Town, some carrying AK-47 rifles, including female soldiers as young as 12.[2615]
- TF1-212 said that about 120 children were taken away from Koinadugu village in October 1998 by Superman's men to be turned into rebels. Some of these children were as young as 5 or 6 years old.[2616]
- TF1-343 was captured near Rosos by a group of about eight rebels. Among them were three children aged about 10, 11 and 12 years. This group proceeded to amputate people, including the witness.[2617]
- TF1-015 was taken to [redacted] together with a group of about 250 people after being captured by rebels at Tongoro bush, Kono District, in March 1998.[2618] He was then taken to [redacted] where adults were separated from women and children,[2619] and where he witnessed the killing of 101 people.[2620] He saw "small small" soldiers who wanted him to be killed as well[2621], some of them were under 15 years of age.[2622] He saw them taking cutlasses and cutting off the heads of the [redacted] people killed by Major Rocky.[2623] CO Pepe, who was about 16 years old,[2624] was the SBU commander at Wundidu (Wendedu or Wondedu) where the witness was held in captivity.[2625] In April 1998,[2626] the witness observed about 25-30 SBU's in Wundidu, the oldest of which was about 16 and the youngest 12 years old.[2627]

[2614] TF1-035, Transcript 5 July 2005, p. 87.
[2615] TF1-122, Transcript 7 July 2005, pp. 58-60, 97-98; TF1-122, Transcript 8 July 2005, p. 2. The witness personally met some of them at the National Insurance Company building, where Mosquito was residing.
[2616] TF1-212, Transcript 8 July 2005, pp. 112-113.
2617 TF1-343, Transcript 17 March 2006, pp. 67-68.
2618 TF1-015, Transcript 27 January 2005, pp. 104-106.
[2619] TF1-015, Transcript 27 January 2005, p. 115.
2620 TF1-015, Transcript 27 January 2005, p. 128.
2621 TF1-015, Transcript 27 January 2005, p. 134.
2622 TF1-015, Transcript 27 January 2005, pp. 135-136.
2623 TF1-015, Transcript 27 January 2005, p. 136.
2624 TF1-015, Transcript 27 January 2005, p. 14 (line 9).
2625 TF1-015, Transcript 28 January 2005, pp. 8-9 and p. 11 (line 5-6).
2626 TF1-015, Transcript 27 January 2005, p. 13 (line 2).
2627 TF1-015, Transcript 27 January 2005, pp. 11-12.

- TF1-330, a civilian used by the RUF for labour in Kailahun[2628], testified that [redacted] was the first place where captured young boys and girls, aged 9 to 14, were being trained to fight. The RUF left [redacted] and established a training base in Bunumbu in 1998 to 1999. He never saw commanders without children with them.[2629]

- TF1-029 was captured in January 1999 in Calaba Town by the RUF and AFRC forces, which included little boys, which she called SBU's aged about 13, 14, and 16 years old.[2630]

- TF1-023 testified that about 100 civilians had been captured at Allen Town and that there were boys placed around with guns, called SBU's, from about 13 to 15 years old, in order to prevent civilians from going anywhere. There were 4 of such SBU's to guard her own group of 6 people.[2631]

- TF1-022, a civilian living in Kissy, eastern Freetown, was forcibly brought to a commando together with other civilians on 22 January 1999.[2632] He had three boys with him, one carrying an axe, one a cutlass and the other a gun. The witness estimated their ages to 8, 10 and 11 years old. They were wearing combat trousers, a red T-shirt and red headband, which made it clear to the witness that they were RUF boys.[2633] The commando ordered these boys to cut the witness' and other civilians' hands off and the boys carried out the order.[2634]

- TF1-104, a [redacted] from 6 to 14 January 1999, RUF and AFRC forces came to the hospital. There were three persons that he knew from 1996 when they were in the Children Associated with War (CAW) programme. One was about 10 or 12 years old, another 14 and the last one was 25. He learnt from them that they had since rejoined the RUF in Makeni before coming to Freetown.[2635]

2628 TF1-330, Transcript 14 March 2006, pp. 41-46.
2629 TF1-330, Transcript 14 March 2006, p. 51.
2630 TF1-029, Transcript 28 November 2005, p. 13.
2631 Exhibit 59a, TF1-023, Transcript from AFRC Trial, Transcript 9 March 2005, p. 35.
2632 TF1-022, Transcript 29 November 2005, pp. 29-30.
2633 TF1-022, Transcript 29 November 2005, p. 34-35.
2634 TF1-022, Transcript 29 November 2005, pp. 35-36.
2635 Exhibit 60, TF1-104, Transcript from AFRC Trial, Transcript 30 June 2005, pp. 12-14.

- TF1-255 saw rebels which came from the direction of Masiaka on 29th May 1999 near Chendekom in Port Loko District.[2636] They were carrying cutlasses and guns and some were as young as 9 or 10 years old.[2637]

f) Defence Witnesses

807. Numerous Defence witnesses have confirmed that the use of children in hostilities was a practice which started in the early years of the RUF and which persisted throughout the conflict. DIS-188 testified that when the NPFL was in Kailahun, they had children carrying AK-47, whom they used as child soldiers and who later became the SBU units.[2638] DIS-163 was in the Northern and Western Jungle in 1994 and 1995 and testified to children undergoing military training in the different bases and then being given to commanders as bodyguards. There were at that time units for children, called SBU.[2639] During the jungle period Mohamed Tarawallie allowed the training of children and their use as bodyguards to commanders, as Tarawallie himself had children as bodyguards.[2640] DIS-252 said that when the Gios came, they had children with them, as young as 11 or 12, carrying guns and participating in the fighting.[2641] DIS-191, who was living near Giema when the war began, corroborated that evidence, asserting that the Gios were accompanied by many child soldiers.[2642] Former President Kabbah also testified that from the inception of the war child soldiers were used extensively and that the involvement of children under 15 years of age with the RUF in combat was "a common thing".[2643] He received information that child soldiers came with other fighters when the RUF was invited to join the AFRC.[2644]

808. DAG-101 testified that some RUF combatants were in the habit of giving guns to children and making them act as their bodyguards. He accepted that some of those children were under 15 years of age and that this practice went on from 1996 up to 2000. The

2636 TF1-255, Transcript 18 July 2006, pp. 69-70.
2637 TF1-255, Transcript 18 July 2006, p. 72.
2638 DIS-188, Transcript 25 October 2005, p. 91.
2639 DIS-163, Transcript 10 January 2008, pp. 39-41.
2640 DIS-163, Transcript 14 January 2008, p. 77.
2641 DIS-252, Transcript 18 January 2008, p. 42.
2642 DIS-191, Transcript 18 January 2008, pp. 74-75.
2643 Ahmad Tejan-Kabbah, Transcript 16 May 2008, pp. 101-102.
2644 Ahmad Tejan-Kabbah, Transcript 16 May 2008, p. 92.

witness added that when Sam Bockarie took over from Foday Sankoh, the law relating to child soldiers was weakened.[2645]

809. DIS-174, [redacted] based in Kailahun from 1996 to 2000, testified that there were children at Bunumbu who were under the age of 14 and 13 and that some of them were at the Pendembu front lines, namely at Kuiva, Juru Jungle, Koindu and Baima. The majority of the combatants at the various front lines he visited were above 20 but he conceded that sometimes there were SBU's among them.[2646] He said that not everybody at the front line was engaged in the fighting, because some people were assigned to S4 for cooking, some to G4 to take care of materials such as arms and ammunitions, and some to G5 to look for food.[2647] With respect to SBU's, he said: "it's not all the time that they fight, sometimes they don't even fight, they are either MP's, they join the S4, the G5". He made clear that when somebody is a SBU, it means under the age of 15.[2648] When asked what was going on at the front line in 1998 with the SBU's, he replied that they were in various units under SBU commanders and that they would perform any operation requested. Since the front line was a combat area, upon an enemy attack, combatants had to fight and SBU's themselves had to fight too.[2649]

810. DAG-101 testified that it was the RUF combatants and junior ranks rather than the commanders who were using children to carry guns, because the soldiers were lazy.[2650]

811. The Second Accused testified that, during the junta period when he was at Teko Barrack, "there were some displaced children who RUF got after attack on towns without parents". He used to see Isaac Mongor with children carrying guns in Kangari Hill,

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[2645] DAG-101, Transcript 10 June 2008, pp. 8-10.
2646 DIS-174, Transcript 21 January 2008, pp. 118-119. The following day, when the witness was cross-examined by the Third Accused, it was suggested to the witness that the time frame was from 1991 to 1993 and the witness accepted that suggestion (see DIS-147, Transcript 22 January 2008, p. 21 (line 4)). The questions posed on the 21 January 2008 were specific as to time frame and location, and the witness gave emphatic answers that there were children under 15 years of age in combat during the Indictment period.
2647 DIS-174, Transcript 21 January 2008, p. 120.
2648 DIS-174, Transcript 21 January 2008, p. 121 (lines 17-23).
2649 DIS-174, Transcript 21 January 2008, p. 122. In cross-examination, Witness clarified again that this instance of SBU having to fight happened only in 1993 and never after 1996 (See DIS-174, Transcript 22 January 2008, p. 19.)
[2650] DAG-101, Transcript 9 June 2008, p. 145.

Northern Jungle and that Isaac Mongor was the one who brought some of these children at Teko Barracks.[2651]

812. General Opande testified that after the RUF had agreed to the demobilization of children on 18 May 2001[2652], a total of 1170 children associated with the RUF forces had been handed over to UNAMSIL by 16 July 2001.[2653] In May and June 2001, the Third Accused attended three demobilisation ceremonies in Port Loko, Makeni and Kailahun Town.[2654] In relation to 178 RUF children demobilised in Kailahun Town on 4 June 2001, the witness observed: "[...] Our military observers interviewed these kids and identified those who actually participated. The majority of them were actually non -- what I would characterise as non-combatants, but they were kids who actually fought and we identified them. We even had their names."[2655]

813. The witness said that among the child combatants who were handed by RUF to UNAMSIL, some were aged less than 15 years old.[2656] He saw children under 15 years of age who to his understanding had been combatants with the RUF. Furthermore, when he was in Kailahun, there were children under 15 years old who were combatants and who

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[2651] Accused Morris Kallon, Transcript 18 April, pp. 101-102.
[2652] Daniel Ishmael Opande, Transcript 11 March 2008, p.75.
[2653] Daniel Ishamel Opande, Transcript 11 March 2008, p.68 (line 11).
[2654] Daniel Ishamel Opande, Transcript 11 March 2008, pp. 53-55, pp. 57-59, pp. 60-62 and pp. 66-67. Between 18 and 21 May 2001, UNAMSIL carried out the disarmament of 813 RUF combatants, 618 adults and 195 children, in the Kambia and Port Loko areas. The UN Secretary General as well as the SRSG, Omrie Golley, the chairman of Political and Peace Council of the RUF and the Third Accused were present. On 25 May 2001, in compliance with the Peace Agreement, the RUF released about 600 child combatants and children associated with the fighting forces in Makeni to the UN. This was a significant occasion also attended by the SGSR and the Third Accused was present. On 4 June 2001, 178 RUF children were released by the RUF in Kailahun Town, mainly boys, but also 40 girls and two infants, later cared for by UNICEF. Again, the SRSG and the Third Accused attended the ceremony. On 9 June 2001, the RUF handed another 59 children, including 4 girls, to UNAMSIL in Kailahun Town. On 22 June 2001, over 131 alleged former child combatants, including two girls, were handed over to UNAMSIL in a ceremony in Tongo and Kenema. Finally, on 16 July 2001, 107 children associated with RUF forces were handed over to UNAMSIL in Makeni.
[2655] Daniel Ishmael Opande, Transcript 11 March 2008, pp. 71-72. The witness explained that UNAMSIL used the definition of child soldiers as embodied in the Cape Town Principles adopted by UNICEF in 1997, which reflect the guidelines that the witness employed on the ground in 2000. He stressed that this definition did not only refer to a child who is carrying or has carried arms. (See Daniel Ishmael Opande, Transcript 11 March 2008, pp. 71-73). The Cape Town Principles and Best Practices read as follows: "Child soldier in this document means any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and those accompanying such groups other then purely as family members, includes girls recruited for sexual purposes, and forced marriage."
2656 Daniel Ishmael Opande, Transcript 11 March 2008, p. 82.

were being disarmed by UNAMSIL.[2657] He said that among the general figure of 1000 children handed over, there were those who were actually categorized as child soldiers, and amongst them there were also children who were categorized as having been associated with the fighting forces, which could have been cleaners, cooks or just displaced children.[2658] He stated that "kids joined even as early as 6 years of age is what I was told".[2659] He further testified to having seen about 10 to 20 RUF children under 15 years of age during the meeting with the RUF high command in Magburaka in February 2001, where the three Accused were present. The children were hanging on to the RUF vehicles and he saw maybe one or two of them with AK-47.[2660] Nothing was blocking the view of the three Accused for them to see these children who had come along.[2661] He further reported having seen, in various localities, children under 15 at roadblocks, without weapons, but mixed up together with RUF combatants who would stop cars.[2662] During his time in Sierra Leone, he considered it possible that in the different locations he went to, he might have seen over 100 children under the age of 15 who were part of the RUF fighting forces.[2663]

814. DMK-146, deployed as a [redacted], saw children in Magburaka wearing weapons but not fighting. He saw some of these children at a roadblock as he was going to Bomborna, which he believed "is a sign [...] that they would take part in combat or fighting. Rebels at that roadblock were under the authority of the Second Accused.[2664] DMK-159, [redacted], was the [redacted] and later the [redacted]. He confirmed that before his duties with UNAMSIL, he had received information that the RUF was using child soldiers in combat.[2665]

815. DIS-018 agreed that there were child soldiers with the RUF when the troops entered Makeni in December 1998, that some of the commanders had child soldiers aged between

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[2657] Daniel Ishmael Opande, Transcript 11 March 2008, p. 84.
[2658] Daniel Ishmael Opande, Transcript 11 March 2008, p. 98.
[2659] Daniel Ishmael Opande, Transcript 11 March 2008, p. 85 (lines 15-16).
[2660] Daniel Ishmael Opande, Transcript 11 March 2008, pp. 93-94.
[2661] Daniel Ishmael Opande, Transcript 11 March 2008, p. 96.
[2662] Daniel Ishmael Opande, Transcript 11 March 2008, p. 95.
[2663] Daniel Ishmael Opande, Transcript 11 March 2008, p. 97.
[2664] DMK-146, Transcript 8 May 2008, Closed Session, pp. 106-107.
[2665] DMK-159, Transcript 12 May 2008, Closed Session, p. 114. However, the witness was not able to say whether he fought against child soldiers while serving with ECOMOG.

11 and 14 years old with them, and that, while in Makeni, the RUF took away more children to be trained as fighters.[2666] DIS-034 also testified that he saw child soldiers in Makeni who were so small that they dragged the gun behind them.[2667] DIS-010 saw child soldiers with the rebels in Makeni in 1999 and child soldiers remained in Makeni after the First Accused left Makeni.[2668] DIS-015 gave evidence that around February 1999 at Makarie, near Makeni, he saw child soldiers with Superman carrying guns. They were 10 to 15 years old.[2669] He was chased by the RUF and, when chased, he saw child soldiers with guns.[2670]

816. DAG-080 testified that it was just the RUF High Command, namely Mosquito, who was using child soldiers and that Mosquito did not consider it an offence. Bockarie would not have punished anybody for the use of child soldiers, as he himself was using some. The witness added that he was not aware of anybody in the RUF who was ever punished for allegedly using child soldiers.[2671]

C. Liability of the Accused

a) Analysis

817. The evidence shows that the forced conscription and subsequent use of children in hostilities was a practice which started at the inception of the war and continued throughout the decade-long armed conflict. Children were abducted, trained for purposes of the war and then used in different types of military activities, on a systematic and massive scale, at all times relevant in the Indictment. The AFRC Trial Judgement found that the Prosecution expert report "provided an overview on the widespread use of children under the age of 15 as combatants by the parties to the conflict" and "emphasized that the illegal recruitment and/or use of children as combatants was not an isolated, localised, or accidental phenomenon."[2672]

[2666] DIS-018, Transcript 3 March 2008, pp. 100-101.
[2667] DIS-034, Transcript, 18 February 2008, pp. 76-77.
[2668] DIS-010, Transcript 15 February 2008, p. 18.
[2669] Exhibit 286, Statement of DIS-015, p. 2.
[2670] DIS-015, Transcript 15 February 2008, pp. 54-55.
[2671] DAG-080, Transcript 9 June 2008, pp. 39-40.
2672 *Brima et al* Trial Judgement, para. 1248 (emphasis added).

i) The Accused Conscripted or Enlisted One or More Persons Into an Armed Force or Group, or Used One or More Persons to Participate Actively in Hostilities

818. Former child soldiers gave evidence against all three Accused regarding their conscription and subsequent use in military activities or activities closely related to combat, mostly as SBU's. Significantly, other witnesses such as insider witnesses, abducted civilians, or UNAMSIL officials corroborate the evidence given by former child soldiers and also implicate the three Accused in the commission of the crime.

819. The evidence of abductions followed by forced military training of children is extensive, especially in Kono and Kailahun Districts. Such evidence demonstrates beyond reasonable doubt the commission of the crime of forced conscription by the RUF and the involvement of the Accused in its perpetration. Forcing children to undergo military training in the context of an ongoing war, as systematically carried out by the RUF forces, amounts to using children to participate actively in hostilities.[2673]

820. The evidence shows that the First, Second and Third Accused participated in the training scheme of the RUF, which involved the forceful training of children under the age of 15 years old. [redacted] The reports provided the First Accused with detailed information about the recruits, including their age.[2675] One report showed that there were 53 SBU's at the Camp Lion Training Base at Bunumbu in May 1998 and TF1-036 confirmed that they did undergo training.[2676] Furthermore, it was also the First Accused, in December 1998, who gave TF1-041 an order to capture civilians in Makeni in order for

[2673] *Brima et al* Trial Judgement, para. 1278.

[redacted]

[2676] TF1-036, Transcript 28 July 2005, p.15; Exhibit 25, Camp Lion Training Base Report.

them to be sent to training in Kono. Such captured civilians included children as young as 8.[2677]

821. The evidence of TF1-263 and TF1-141 both provide an extremely detailed account of their compulsory training in Camp Lion. TF1-141, who was a subordinate to the Second Accused, met the Third Accused at the screening point before his submission to training and attended a speech given by the First Accused to the recruits at Camp Lion upon his graduation from training.[2678] TF1-263 reported that it was the First Accused who gave the order at a gathering in PC Ground that civilians should be sent to training and that the Second Accused then carried the order by selecting people, including children under the age of 15. Upon his completion of training and return to PC Ground, it was also the First Accused who gave the order to attack Koidu the next day. The attack was led by the First and Second Accused and TF1-263 took part, along with other children his age who also had undergone the training.[2679]

822. Insider witnesses TF1-366 and TF1-071 corroborate the evidence regarding massive abductions and subsequent training, as they both acknowledge that, after the intervention in 1998, children were massively abducted on the way back to Kono, sent to Kailahun for training and then sent back to Kono to the frontline.[2680] TF1-113 also confirms this evidence. She saw a lot of abducted civilians brought by the RUF to Kailahun after the intervention in Freetown, who were then screened at the G5 office. There were children as young as 10 years old among them and they were then sent to Bunumbu for training.[2681]

823. Overwhelming evidence also shows that the use of children in the RUF, whether at the front line or not, covered a range of activities closely related to combat activities. Children were assigned to units distinctively created for under-aged children, SBU and SGU, and were performing various roles within the RUF. Some were directly involved in fighting[2682], while some were used as bodyguards to commanders, as it was a common

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[2677] TF1-041, Transcript 10 July 2006, pp. 60-61.
[2678] See above paras 778-780.
[2679] See above paras 776-777.
[2680] TF1-366, Transcript 8 November 2005, p. 67; TF1-071 Transcript 19 January 2005, pp.34-35.
[2681] See above paras 802-803 and TF1-113, Transcript 2 March 2006, p.54 and p. 64 (lines 18-23).
[2682] TF1-036, Transcript 28 July 2005, pp. 17-18; TF1-362, Transcript 22 April 2005, Closed Session, p. 26; TF1-371, Transcript 21 July 2006, p. 63; TF1-141, Transcript 12 April 2005, pp. 35-36; TF1-263, Transcript 6 April 2005, pp. 25-26 and pp. 38-40; TF1-174, Transcript 20 March 2006, pp. 95-96; TF1-174, Transcript

practice for RUF commanders to have SBU's attached to their security.[2683] SBU's were also used for reconnaissance missions, food finding missions, to carry arms and ammunitions, and other activities relating to and in support of hostilities. The use of children to participate actively in hostilities prohibited by Article 4(c), is not limited to direct participation in combat, but also encompasses all ancillary activities supporting or helping to maintain military operations. The conduct of each of the three Accused has been proven to be a violation of Article 4 and, at a minimum, such conduct has put children under the age of 15 at sufficient risk to consider such conduct illegal.[2684]

824. In addition, the evidence confirms that each Accused can be directly linked to under-aged children, thereby proving that they were openly in contact with child combatants. The three Accused were directly involved in the commission of the crime of conscription and/or use of child soldiers, as they have been seen with children called SBU's, who most of the time were acting as their bodyguards. Striking evidence in that regard includes the following:

- TF1-314, TF1-263 and TF1-141 are former child soldiers whose testimony directly associate all three Accused with SBU's mainly used as bodyguards, throughout the period covered by the Indictment.[2685]
- TF1-045, TF1-366, TF1-036 and TF1-367 are insider witnesses, who testified that they saw the three Accused with SBU's. Notably, TF1-366 said that all three Accused were using SBU's throughout the RUF operations. TF1-045 and TF1-036 implicated both the First and Second Accused with the use of SBU's from 1997 until disarmament. TF1-367 incriminates the First Accused who had SBU's under 15 years old with him at Guinea Highway at the time of the attack on Koidu in December 1998.
- TF1-113 testified that the First and Third Accused used both SBU's and SGU's in Kailahun. She particularly implicates the Third Accused who had sent his own

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21 March 2006, p. 29 and defence witnesses DIS-174, Transcript 21 January 2008, pp. 118-119 and p. 122; Daniel Ishmael Opande, Transcript 11 March 2008, pp. 71-72.

[2683] TF1-036, Transcript 28 July 2005, pp.17-18; Dennis Koker, Transcript, 28 April 2005, p. 47 and 62; TF1-371, Transcript 21 July 2006, p. 63.

[2684] *Brima et al* Trial Judgement, para. 737.

[2685] See above paras 775-780.

SBU's to [redacted] Kailahun. As head of the G5 office, the Third Accused was in a position to see all the captured civilians, including under-aged children going through the so called screening process for training.[2686]

- TF1-108 reported that in 1996, while working on the First Accused's farm in Kailahun, civilians were guarded by children, including 2 SBU's aged less than 12 years old, named Abdulai Musa and Moses, who were the First Accused bodyguards.

ii) Such Person or Persons were Under the Age of 15 Years

825. Overwhelming evidence demonstrates that numerous children under the age of 15 years old were RUF members, specifically incorporated in SBU's and SGU's. Four former child soldiers who gave evidence before the Court were under 15 years old when they were recruited.[2687] There is no ambiguity or uncertainty that such SBU's and SGU's existed within the RUF. TF1-362 and TF1-036 testified that the age of the SBU's ranged respectively from 9 to 14 years old and from 8 to 15 years old.[2688] Those units were therefore for children under 15, as confirmed also by Defence witness DIS-174.[2689] A large number of witnesses, including Defence witnesses, testified to SBU's or SGU's being under the age of 15 or to children aged less than 15 being captured and sent to training, even as young as 8, 9 or 10 years old.[2690] This evidence is corroborated by the testimony of

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[2686] See above para. 802

[2687] TF1-314 was 14 in 1998 and she had been with the RUF since 1994. (see Transcript 2 November 2005, p. 26); TF1-263 was abducted in 1998 when he was 14 (see Transcript 6 April 2005, pp. 6-7); TF1-141 was 14 at the time of disarmament in 2000, so he was about 11 or 12 when he was abducted in 1998 (see Transcript 11 April 2005, p. 81-84); TF1-199 was 12 when he was abducted in 1998 (see Transcript 20 July 2004, pp. 20-21).

[2688] Exhibit 25, Camp Lion Training Base Report; TF1-362, Transcript 20 April 2005, Closed Session, p. 47; TF1-036, Transcript 28 July 2005, p.15.

[2689] DIS-174, Transcript 21 January 2008, p. 121.

[2690] TF1-093, Transcript 29 November 2005, pp. 87-88 and p. 93; TF1-041, Transcript 10 July 2006, pp. 60-61; George Johnson, Transcript 14 October 2004, pp. 87-88; TF1-113, Transcript 2 March 2006, p. 54 and pp. 64-66; TF1-022, Transcript 29 November 2005, p. 34-35; TF1-255, Transcript 18 July 2006, p. 72; TF1-314, Transcript 2 November 2005, pp. 30-32; TF1-199, Transcript 20 July 2004, p. 26; TF1-168, Transcript 3 April 2006, p. 92; TF1-366, Transcript 8 November 2005, pp. 69-70; TF1-367, Transcript 22 June 2006, pp. 16-17; TF1-045, Transcript 21 November 2005, p. 39; TF1-071 Transcript 19 January 2005, p. 36; Eddie Kasoma, Transcript 22 March 2006, p. 28; Joseph Mendy, Transcript 26 June 2006, p.88-90; TF1-129, Transcript 10 May 2005, Closed Session, pp. 64-65. See also para. 806. Furthermore, Defence witnesses also mentioned that the age of certain children were under 15:Daniel Ishmael Opande, Transcript 11 March 2008, pp. 93-94; DIS-018, Transcript 3 March 2008, pp. 100-101; Exhibit 286, Statement of DIS-015, p. 2.

witnesses involved in disarmament activities, namely TF1-174[2691] and UNAMSIL personnel.[2692]

iii) The Perpetrator Knew or Should have Known that Such Person or Persons were Under the Age of 15 Years

826. The three Accused were fully aware that children were being abducted, trained and used as soldiers to fight for the RUF. Their knowledge is transparent from the evidence adduced, especially given that they themselves used children under the age of 15. Alternatively, it is reasonable to infer from the widespread practice of recruitment of under-aged children within the RUF, as clearly proved by the evidence, that the three Accused, as senior commanders of the RUF, should have known about it.[2693]

b) Joint Criminal Enterprise

827. The three Accused are individually criminally responsible as members of a joint criminal enterprise. The recruitment of children under the age of 15 was within the contemplation of the common enterprise and the training and use of child soldiers was a key element in the RUF strategy to achieve its goals. Given the finding of the Appeals Chamber that not only the objective, but also the means to achieve the objective constitute the common criminal purpose underlying the JCE[2694], the crime of conscription or enlistment or use of child soldiers was clearly an essential means of the RUF criminal plan or design, in which each of the Accused participated. The *mens rea* requirement is fulfilled, as the three Accused, who intended to take part and contribute to the common plan, also intended to commit the crime charged under Count 12.

c) Liability under Article 6(1) of the Statute

First Accused

828. The evidence has proven that the RUF as an armed group was deeply involved in the conscription, enlistment and/or use of child soldiers under the age of 15 to participate actively in hostilities and has demonstrated beyond reasonable doubt that the First Accused conscripted, enlisted and/or used children to participate in hostilities, knowing that a large

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[2691] See paras 770-774.
[2692] Ganase Jaganathan, Transcript 20 June 2006, p .9 ; Daniel Opande, Transcript 11 March 2008, pp. 82-84.
[2693] *Brima et al* Trial Judgement, para. 1248.
[2694] *Brima et al* Appeals Chamber Judgement, para. 76.

number of those children were under the age of 15. The First Accused bears individual criminal responsibility under Article 6(1) of the Statute for committing, or alternatively, planning, instigating, ordering, or otherwise aiding and abetting in the planning, preparation or execution of the crime of conscripting, enlisting and/or using children to participate actively in hostilities during the timeframe charged in the Indictment.

Second Accused

829. The submissions made in respect of the First Accused are equally applicable for the Second Accused.

Third Accused

830. The submissions made in respect of the First Accused are equally applicable for the Third Accused.

d) Liability under Article 6(3) of the Statute

831. The Prosecution refers to sections V (B) on superior responsibility and V (C) on joint criminal enterprise, above, which details the senior position held by the three Accused within the RUF chain of command and which shows that they exercised effective control and had authority over RUF combatants. The evidence demonstrates that the three Accused undoubtedly knew or had reason to know that their subordinates were committing the crime of conscription, enlistment and/or use of children for combat activities.

832. Their superior position is a significant indication from which their knowledge can be inferred, given that the RUF was an organised structure with a thorough reporting and communicating system, as explained at length in previous sections of this Brief on the RUF organisation and on JCE. Furthermore, the fact that the crime was a policy and continuous practice in the RUF and the fact that it was committed so frequently by RUF combatants indicate clearly that the three Accused had knowledge of the crime.[2695] Significantly, TF1-366, a direct subordinate to the First Accused, said he himself had child soldiers.[2696] TF1-141, 14 years old, was a subordinate to the Second Accused and the latter also had many

[2695] *Čelebići* Trial Judgement, para. 770.
[2696] TF1-371, 20 July 2006, pp. 75-76; TF1-367, Transcript 22 June 2006, pp. 95-97; TF1-041, Transcript 10 July 2006, pp. 92-93; TF1-366, Transcript 8 November 2005, p. 69.

other SBU's under his direct command at Guinea Highway.[2697] An order was passed from the First Accused to the Second Accused to select captured civilians for training in Kailahun, including children under 15 and TF1-263 who was 14 years old.[2698]

833. In their capacity as superiors, the three Accused failed to take disciplinary measures to prevent the recruitment by RUF combatants and commanders of children under the age of 15 into RUF ranks. No investigation on the matter was conducted by the First, Second or Third Accused, nor any subordinate punished or any orders issued to put a halt to the systematic recruitment of children. No evidence even suggests that the three Accused ever protested or criticized the large scale practice regarding children involved in hostilities with the RUF.[2699] The fact that Bockarie was a higher authority than the three Accused did not impact on their material ability to take certain measures, since it is well-established that command responsibility applies to every commander at every level.[2700]

834. The Prosecution submits, in addition or in the alternative, that the three Accused bear individual responsibility pursuant to Article 6(3) of the Statute for the crime of conscription, enlistment and/or use of children under the age of 15 to participate actively in hostilities.

[2697] TF1-141, Transcript 11 April 2005, pp. 90-92 and 94.
[2698] TF1-263, Transcript 6 April 2005, pp. 28-29.
[2699] The Defence has adduced evidence that there were laws against children participating in fighting and that children were not being trained. However, DAG-101 admitted that when Sam Bockarie was acting as the leader of the RUF, the law relating to child soldiers was weakened (See DAG-101, Transcript 10 June 2008, pp. 8-10).
[2700] *Halilović* Trial Judgement, paras 61-62; *Blaškić* Trial Judgement, paras 296, 302, 303; *Krnojelac* Trial Judgement, para. 93; *Naletilić and Martinović* Trial Judgement, para. 69.

X. COUNT 13: ABDUCTION AND FORCED LABOUR

835. The Accused are charged under Count 13 with enslavement as a crime against humanity, punishable under Article 2(c) of the Statute, in that at all times relevant to the Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour. The Indictment alleges that the abductions and forced labour included the Districts of Kenema, Kono, Koinadugu, Bombali, Kailahun, Freetown and the Western Area and Port Loko. It is alleged that the Accused, by their acts or omissions in relation to these events, pursuant to Article 6(1) and, or alternatively, Article 6(3) of the Statute, are criminally responsible for enslavement punishable under Article 2(c) of the Statute.[2701]

A. Applicable Law and Elements of Crime

a) Chapeau Elements

836. This Court has previously defined the contextual elements that must be proven in relation to any crime against humanity.[2702] Those elements are discussed in above in Section IV and it is submitted, the abductions and the forced labour campaigns of the RUF and AFRC were part of an attack against a civilian population as prohibited by Article 2 of the Statute.

837. The massive campaign led by the RUF, of which the Accused were Vanguards and senior commanders, included the violent abduction of large numbers of civilians and the use of those civilians as forced labour, entailing mistreatment on a large scale, meets the meaning of an *attack* as a an element of crimes against humanity, since such an attack is not limited to the use of armed force, but refers to a campaign, operation or course of conduct directed against a civilian population, encompassing any mistreatment of the civilian population.[2703]

838. The large scale abduction of civilians and the use of forced labour for mining, farming and other work, such as, *inter alia,* transporting loads, carrying out household

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[2701] Indictment, paras 69-76.
[2702] E.g. *Brima et al* Trial Judgement, paras 213-222; *Norman et al* Trial Judgement, para. 110, and paras 111-121; see also *Brima et al* Decision on Motion for Acquittal, para. 42; *Sesay et al* Decision on Motion for Acquittal, p. 14, referring to *Norman et al* Decision on Motion for Acquittal, paras 56-59.
[2703] *Norman et al* Decision on Motion for Acquittal, para. 56; *Brima et al* Decision on Motion for Acquittal, para. 42; *Limaj et al* Trial Judgment, para. 182, *Kunarac* Appeals Judgement, para. 86.

chores and supporting armed attacks was *widespread* and/or *systematic*. It was an "organized action following a regular pattern and carried out pursuant to a pre-conceived plan or policy".[2704] The systematic use of forced labour was one of the pillars of the RUF planning and strategy to gain control over the resources of Sierra Leone and over the country as a whole. The use of forced labour was part of a larger plan and purpose, since it was essential for the maintenance of the fighting strength of the RUF throughout the conflict[2705], especially during the period covered by the Indictment, and to extract diamonds which were used to fund the RUF. The evidence shows that it also constituted a "massive, frequent, large-scale action carried out collectively with considerable seriousness and directed to multiple victims."[2706] The three Accused played an essential role in planning, organizing and carrying out this policy as senior RUF commanders.

839. The *civilian population* was clearly the target of these attacks. Civilians, including young children, were systematically captured, abducted, held captive and forced to work by the RUF throughout the conflict in Sierra Leone. The acts were motivated by the need for labourers and the intention to control and subdue the civilians in captured areas. Where material had to be transported, civilians were forced to carry it, where food was required, civilians were forced to farm; and the main source of income for the RUF, which was diamond mining, was entirely dependent on the use of civilian labour, since RUF combatants were carrying out military activities.[2707]

840. The evidence demonstrates that the acts of the three Accused formed part of this widespread and systematic attack against the civilian population and that they were aware of this.

[2704] *Brima et al Trial* Judgement, para. 215; *Kunarac* Appeals Judgement, para. 94.
[2705] TF1-367, Transcript 22 June 2006, Closed Session, p. 26, (lines 17-19): "Wherever we occupied, that was where it was happening. … Since the beginning of the war."
[2706] Exhibit 38, RUF Training Manual, p. 11076 (00007630); TF1-371, Transcript 20 July 2006, Closed Session, p. 35 (lines 14-22).
[2707] E.g. TF1-371, Transcript 21 July 2006, Closed Session, p. 60 (lines 4-6): "…when I talk about government job, it means jobs for the RUF movement which the combatant cannot do because of their engagement in combat activities."

b) Actus Reus

841. In the AFRC case, the Trial Chamber referred to the customary character of the criminalization of 'enslavement' in international law[2708] and its conventional prohibition based on the Slavery Convention of 1926,[2709] which defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[2710] The Trial Chamber pointed out that convictions for this crime were entered in a number of cases during the Nuremberg Trials and that "the International Law Commission consistently included 'enslavement' as a crime against humanity in its Draft Codes of Crimes Against the Peace and Security of Mankind,"[2711] and cited the *Kunarac* Trial Judgement:

> 745. The *Kunarac* Trial Chamber held that "[u]nder this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."
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> 746. The ICTY Appeals Chamber further clarified this definition by finding that "lack of consent" is not an element of the crime of enslavement, although it may be a significant issue in terms of evidence of the status of the alleged victim.[2712]

[2708] *Brima et al* Trial Judgement, para. 742, referring to *Krnojelac* Trial Judgement, para. 356.
[2709] Slavery Convention, 25 September 1926 (entry into force on 9 March 1927, resp. 7 July 1955), United Nations, Treaty Series, vol. 212, p. 17. ("**Slavery Convention**")
[2710] Article 2 Slavery Convention.
[2711] *Brima et al* Trial Judgement, paras 743-744. The customary character of this crime had been confirmed in *Kunarac*, where the ICTY Trial Chamber held that "enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person. *Kunarac* Trial Judgement, para. 540.
[2712] *Brima et al* Trial Judgement, paras 745-746, citing *Kunarac* Trial Judgement, para. 120.

842. The ICC Elements of Crime for Article 7(1)(c) of the Rome Statute[2713], regarding the crime against humanity of enslavement, define the elements of enslavement as follows:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[2714]
>
> 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[2715]

843. Footnote 11 to para. 1 of the ICC Elements of Crimes regarding enslavement says: "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status." Similarly the Trial Chamber in the AFRC Judgement found that, being an indication of 'enslavement', forced labour has been defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself or herself voluntarily."[2716]

844. The RUF exercised control and ownership over the abducted civilians and used them for different forms of forced labour, in particular forced mining, forced farming, the transport of loads, household chores, and military tasks. Further, the RUF restricted or controlled the autonomy, freedom of choice or freedom of movement of the abducted civilians and the forced labour clearly accrued gain to the perpetrator. The consent or free will of the victims was absent or was rendered impossible or irrelevant, since RUF and Junta combatants exercised threats or use of force or other forms of coercion in compelling

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[2713] This Trial Chamber explicitly said, that "[a]s regards enslavement, the subject matter of the allegations in count 13", it was "guided by the Rome Statute,...", *Sesay et al* Decision on Motion for Acquittal, p. 30 (lines 27-29).

[2714] See also: *Brima et al* Trial Judgement, paras 743-747; *Kunarac* Trial Judgement, paras 540-542.

[2715] ICC Elements of Crimes, p. 117. (footnote omitted)

[2716] *Brima et al* Trial Judgement, para. 742, referring to *Krnojelac* Trial Judgement, para. 357; *Kunarac* Trial Judgement, para. 542 and to the "Convention Concerning Forced or Compulsory Labour", International Labour Organisation ("ILO"), No. 29, 39 U.N.T.S. 55 (entry into force 1 May 1932) ("Forced Labour Convention"), Article 2(1): "For the purposes of this convention, the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"; see also Convention Concerning the Abolition of Forced Labour, adopted on 25 June 1957 by the General Conference of the ILO at its fortieth session, (entry into force 17 January 1959)("Abolition of Forced Labour Convention").

the civilians to work[2717] for them and detain them in camps.[2718] Most witnesses described their fear of violence and their position of vulnerability, detention or captivity. In some cases the socio-economic conditions created by years of conflict in areas that were cut off from public services for a prolonged period of time put the victims in a situation where they had no other choice than to render involuntary services to the RUF or Junta forces. Further indications of enslavement as cited in the relevant international case law, such as the "exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; ...." were present.[2719]

845. Enlistment, recruitment and service in regular armed forces are explicitly excluded from the definition of forced labour pursuant to the ILO Forced Labour Convention.[2720] However, the evidence adduced shows that the recruitment, training and use of civilians in the RUF and Junta forces contains clear elements of enslavement.

c) Mens Rea

846. The general *mens rea* elements to be fulfilled for a crime against humanity are described above under Section IV on the contextual elements, above. The Accused had the necessary knowledge, or reason to know, that the abduction and the enslavement of civilians occurred in the general context that establish crimes against humanity and that there existed a nexus between their acts and that context.[2721] They understood the "greater dimension of criminal conduct."[2722] The fact, that certain acts establishing crimes against humanity may have been committed for purely personal reasons, for instance forced labour in private farming or mining[2723], is irrelevant.[2724]

[2717] TF1-367, Transcript 22 June 2006, p. 48-50; TF1-371, Transcript 21 July 2006, pp. 69-70; TF1-366, Transcript 10 November 2005, pp.12-13 and pp. 29-34.
[2718] TF1-367, Transcript 22 June 2006, p. 37; TF1-366, Transcript 10 November 2005, pp. 12-13 and pp. 29-34. TF1-060, Transcript 29 April 2005, Closed Session, p. 69.
[2719] *Kunarac* Trial Judgement, para. 542.
[2720] Art. 2 para. 2 of the Forced Labour Convention reads: "... for the purposes of this Convention the term "forced or compulsory labour" shall not include: (a) Any work or service exacted in virtue of compulsory military service laws for work of a purely military character; (b) Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;..."
[2721] *Kunarac* Appeal Judgment, para. 102.
[2722] *Bagalishema* Trial Judgment, para. 94; *Limaj* Trial Judgment, para. 190.
[2723] *Kordić and Čerkez,* Appeal Judgement, para. 99; *Kunarac* Appeal Judgement, para. 103 (footnotes omitted); *Blaškić*, Appeal Judgement, para. 124.

847. In addition to these general requirements, the requisite *mens rea* for the underlying offence must be established. To prove the requisite *mens rea* for the crime of enslavement it is not necessary to show that the accused intended to detain the victims under constant control for a prolonged period of time. Thus, neither the duration nor the victim's lack of consent is significant. Circumstances which render it impossible to express consent suffice to presume the absence of consent.[2725]

848. The abundant evidence presented establishes the legal requirements for enslavement as a crime against humanity. The perpetrators abducted and detained civilians, and/or forced them to mine, to farm, to carry loads or perform various other tasks. The perpetrators acted intentionally by deliberately depriving these civilians of their liberty. The only reasonable conclusion from the evidence is that the three Accused had the required *mens rea* for the charged crimes. As high level commanders of the RUF they also had the required knowledge that their acts and the acts of their subordinates form part of a widespread and systematic attack against the civilian population.

B. Evidence

849. The evidence of victims, insiders and expert witnesses as well as reports rendered by the UN and by human rights organisations, show that enslavement was systematic, widespread and part of a larger plan, and that all three Accused were part of this plan and actively participated in, ordered or aided and abetted the commission of these crimes or were responsible for them as superiors.

a) Evidence Applicable to All Crime Bases

850. The evidence regarding abduction of civilians and forced labour is abundant. Civilians were forced to mine diamonds, to farm, to carry loads including arms and ammunition, to do housework, and other labour. A pattern of those acts was observed all over Sierra Leone and certain evidence applies to all the crime bases alike.

[2724] TF1-367, Transcript 22 June 2006, pp. 49-50; TF1-366, Transcript 7 November 2005, pp. 91-92 and Transcript 11 November 2005, pp. 39-41; TF1-371, Transcript 21 July 2006, Closed Session, pp. 60-62. Also: Dennis Koker, Transcript 29 April 2005, pp. 38-39.
[2725] *Kunarac* Appeal Judgment paras 121-122.

851. The practice of *abducting civilians* in RUF dominated areas, or areas attacked by the RUF, was widespread throughout the years 1998[2726], 1999[2727] and 2000 and from then on decreased considerably.[2728] There are estimations that between February and June 1998 thousands of civilians were abducted by the AFRC/RUF.[2729] The NGO Human Rights Watch ("**HRW**") wrote in a 1998 report that "[t]he abduction of civilians by the AFRC/RUF is commonplace. People of all ages are abducted, but witnesses point to young men, women, and girls and boys as preferred targets. The soldiers capture individuals and groups to labor for them and in general perform tasks necessary for their subsistence and advancement...."[2730] [underlining added]

852. The RUF also employed an extensive pass system. Civilians without a pass would not be allowed movement, and would perhaps be subjected to more severe punishment.

[2726] Exhibit 159, First UNOMSIL Report 1998, para. 36 reads: "The rebels are estimated to hold several thousand civilian captives, including women and children. They are used as porters, human shields and for forced sexual activity. Abductions continue to be reported in the north. It is believed that many RUF/AFRC fighters were themselves abducted as children and subjected to brutal initiation ceremonies." Human Rights abuses, including abductions seem to have risen by the end of 1998: "... During the month of September, UNOMSIL received an escalating number of reports of mutilations, amputations, summary executions, abductions .... It is reported that no less than 50 people were abducted." Exhibit 160, Second UNOMSIL Report 1998; Exhibit 161, Third UNOMSIL Report 1998, para. 36. "Widespread rebel attacks on civilian populations have characterized the period since my last report. Attacks and forms of abuse of civilians exhibited a characteristic modus operandi: ..., abduction and ... At the end of November, the northern town of Yifin was again devastated in a rebel attack, during which up to 50 youths were abducted." See also: Exhibit 163, UNOMSIL Human Rights Report 1998, pp. 19186-19187.

[2727] Exhibit 162, Sixth UNOMSIL Report 1999, para. 32: "A large number of civilians are believed to have been abducted by RUF/AFRC over the past three months. The abductions have reportedly followed a consistent pattern where RUF/AFRC retreating from a town or village have forced men, women and children to go with them to serve as porters, potential recruits or sex slaves. Most of these abductees are still being held by RUF/AFRC. In Matteh village near Masiaka, the section chief estimated the number of abductees in the area to be in the thousands. Most of the people interviewed in the Port Loko and Masiaka areas said they had lost close family members through abduction. One man told UNOMSIL that 15 members of his immediate family had been abducted by RUF/AFRC."

[2728] The NGO "No Peace Without Justice" nevertheless reported that: "Starting in July, the hostilities were however sporadic and in August 2000, AFRC/RUF surrendered to UN peacekeepers in Kabala. The disarmament process continued. However, AFRC/RUF were still engaged in mining activities, mainly in the centre of Koidu town". And: "By January 2001, thousands of Sierra Leoneans were thus brought back to the East of Kono District were they were relocated by the AFRC/RUF to different towns across AFRC/RUF territory. Harassment however continued and some were sent to Koidu for mining purposes." Exhibit 181, NPWJ Conflict Mapping, p. 40.

[2729] Exhibit 175, HRW Report 1998, p. 4 (19437).

[2730] Exhibit 175, HRW Report 1998, p. 20 (19453). The report further states: "Young men and boys are also abducted for forced recruitment as soldiers. ... the AFRC/RUF abducts these groups for use as human shields against attacking ECOMOG forces, in the belief that ECOMOG would hesitate to target civilians, particularly women and children, or that in the event of an attack, the "shield" would be hit first." and "As described below, many witnesses are under the impression that abductions number in the thousands. The AFRC/RUF captures many civilians apparently with the intention of holding them permanently to reinforce their numbers and ensure their future existence. Others abducted are executed or ultimately allowed to go free after having suffered a number of abuses." *ibid.* [underlining added].

This powerful form of control and detention was systematically put in place by the RUF. TF1-113, who resided in Kailahun District throughout the Indictment period, said with regard to passes, "...if you hadn't that paper, that RUF paper, they would either say that you have been connap [*sic* conniving] or they would arrest you and keep you in custody or they would beat you until something else happens to you."[2731] Similarly, TF1-071, based in Kono District during the Indictment period, stated that "...if there is any chance by any civilian escaping without a notice, if caught some could be punished by beating or given extra work to do on the farms."[2732]

853. The RUF used civilians for *various forms for forced labour*. While some were used in the diamond mines, many others were forced to carry out other tasks, for instance carrying loads of looted goods, ammunition or food, farming, and household chores.[2733]

854. RUF did *diamond mining* as early as 1996.[2734] The RUF Training Manual listed "Minerals" as one of the "Pillars of the RUF Movement."[2735] It was one of the most important sources of income of the RUF, and later of the AFRC/RUF Junta. Revenue generation for the sustainability of the AFRC/RUF "government" was regularly one of the major issues discussed at meetings of the Supreme Council.[2736] As discussed in more detail in the section on diamond mining above under "Joint Criminal Enterprise Mode of Liability", paras xx-xx, the diamond proceeds were mainly used for military supply and food.[2737] As explained earlier, it was mainly alluvial diamond mining that was conducted during the Junta period since commercial mining companies did not operate any more. Alluvial mining used manual labour instead of machines.[2738] Therefore the RUF needed a lot of manpower to sustain its mining activities. The work in the mines was carried out by

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[2731] TF1-113, Transcript 2 March 2006, p. 46.
[2732] TF1-071, Transcript 21 January 2005, pp. 41-42.
[2733] Exhibit 175, HRW Report 1998, p. 20 (19453): "Many who had been captured by the AFRC/RUF and either escaped or were released testified to Human Rights Watch that they were forced to "carry loads" and perform other tasks for them. The civilians were collected or called upon individually to transport items that the fighters looted from town to town and from one point to another within villages. They prepared food for the soldiers and performed any task required of them to contribute to meeting the daily needs of the soldiers."
[2734] TF1-367, Transcript 23 June 2006, Closed Session, pp. 42-43.
[2735] Exhibit 38, RUF Training Manual, p. 11076.
[2736] TF1-371, Transcript 20 July 2006, Closed Session, p. 35 (lines 14-22).
[2737] TF1-371, Transcript 20 July 2006, Closed Session, p. 36.
[2738] TF1-371, Transcript 20 July 2006, Closed Session, pp. 35-36.

civilians who were forced to work under the supervision of AFRC/RUF soldiers.[2739] Thousands of civilians were abducted and brought to the mining areas, mainly in the western part of Kono District, many of them dying as a result of the living conditions.[2740] Throughout AFRC/RUF occupied areas of Sierra Leone, civilians were forcibly transported into Kono to work in the mines.[2741] The abundant evidence shows that civilians worked at gunpoint[2742] and that mining was carried out both for the Junta "Government" as well as privately, for individual commanders.[2743] Bockarie, Johnny Paul Koroma and other Junta commanders, including the First and Second Accused, had diamonds mined privately by civilians under the control of their bodyguards.[2744] Diamond mining took place mainly in different areas of Kono District, at Tongo Fields in Kenema District,[2745] and at Yenga, Morfindo, Jojoima and Jabama, Golahun in Kailahun District.[2746]

855. Civilians were also *forcefully used for military purposes*. TF1-360 explained the difference between trained guerrilla fighters and civilians that were forced to fight:

> These are people who are trained under emergency, did not undergo serious training. That was why we called them Junta troops. ..., when we are under emergency situation, we capture them and they carry loads for them. If there is a problem, we give them guns and we call them Junta troops.[2747]

856. The witness also made a clear difference between captured civilians and civilians that jointed the RUF or Junta troops voluntarily, or at least not at gunpoint:

> ... some people, it was because they had - because they were friendly to rebels. So, while rebels were retreating, they were afraid that government would handle them. So as not to be called collaborators, that is why they joined the rebels to go.[2748]

[2739] TF1-367, Transcript 21 June 2006, Closed Session, p. 58-60;Transcript 22 June 2006, Closed Session, p. 51.
[2740] Exhibit 181, NPWJ Conflict Mapping, p. 25.
[2741] Exhibit 181, NPWJ Conflict Mapping, p. 34.
[2742] TF1-367, Transcript 22 June 2006, p. 48; TF1-366, Transcript 10 November 2005, pp.7 . TF1-060, Transcript 29 April 2005, Closed Session, p. 69.
[2743] TF1-367, Transcript 22 June 2006, pp. 49-51.
[2744] TF1-366, Transcript 7 November 2005, p.91
[2745] TF1-371, Transcript 20 July 2006, Closed Session, p. 52; TF1-371, Transcript 31 July 2006, Closed Session, pp. 55-57.
[2746] TF1-366, Transcript 10 November 2005, pp. 7-8; However, mining in Giema, Kailahun District was stopped, since the returns were poor. TF1-367, Transcript 23 June 2006, pp. 52-53.
[2747] TF1-360, Transcript 22 July 2005, Closed Session, p. 13 (line 29) and p. 14 (lines 1-5).
[2748] TF1-360, Transcript 22 July 2005, Closed Session, p. 65, (lines 4-7).

> ... I cannot say the people volunteered. Because of food shortage and security, civilians were with us.[2749]

857. TF1-041, testified that Foday Sankoh had ordered him to be flogged when civilians escaped.[2750]

b) Kenema

858. The Tongo area was strategically important for the Junta, since diamonds were its main source of income. It had to be controlled at all means.[2751] On 11 August 1997 unified RUF and AFRC forces collectively attacked Tongo[2752], which had been controlled by the Kamajors since May 1997. In August 1998, Bockarie led the AFRC/RUF Junta attack on Tongo and captured Tongo. He entered Tongo with over 300 combatants and gathered around 1000 civilians at the NDMC football field in Tongo. He introduced himself and told the people that the AFRC/RUF had taken over Tongo and the whole of the country and that everyone was now under his command. He would organise the so called "AFRC government mining". Everybody should mine diamonds for 5 hours for the government and 2 hours for the civilians.[2753] Bockarie controlled mining in Tongo.[2754] Mining was taking place at Cyborg Pit, at Weama, 9 miles from the township of Tongo.[2755]

859. TF1-334 testified that the SLA and RUF were mining in Tongo during the Junta, which was controlled by the AFRC secretariat under the command of the Secretary of State East, Captain Eddie Kanneh, who worked closely together with Bockarie.[2756] However, the actual mining was predominantly done by the RUF[2757] and diamonds found at Tongo Field went to the RUF High Command - the highest positions in the RUF, controlled by Bockarie, the First Accused who was his deputy in the position of a field commander, and the Second Accused, who was a battle group commander.[2758]

[2749] TF1-360, Transcript 22 July 2005, Closed Session, p. 68, (lines 14-16). See also, ibid. p. 69.
[2750] TF1-041, Transcript 17 July 2006, Closed Session, pp. 70-71.
[2751] TF1-036, Transcript 28 July 2005, p. 44.
[2752] TF1-035, Transcript, 5 July 2005, p. 78, DIS-293, Transcript 13 November 2007, pp. 62.
[2753] TF1-035, Transcript, 5 July 2005, pp. 79-81; DIS-293, Transcript 13 November 2007, pp. 63.
[2754] TF1-060, Transcript 29 April 2005, Closed Session, p. 69; TF1-035, Transcript, 5 July 2005, p. 79-81.
[2755] TF1-060, Transcript 29 April 2005, Closed Session, p. 68.
[2756] Exhibit 119, TF1-334 Transcript from AFRC Trial 17 May 2005, pp. 54 and 57.
[2757] TF1-371, Transcript 20 July 2006, Closed Session, p. 52.
[2758] TF1-371, Transcript 20 July 2006, p. 54.

860. TF1-371, saw hundreds of civilians mining in Tongo Field. They were treated inhumanely and they were compelled to mine at gunpoint by armed AFRC/RUF combatants.[2759] This information was corroborated by TF1-041, who saw 100 to 200 civilians digging diamonds in December 1997, who added, that the civilians were treated badly.[2760]

861. TF1-035 said mining under the AFRC/RUF was not like the usual private mining, where people used to negotiate a mining licence with the owner of the mining bush and the mine warden would measure the place, where workers were employed to do the mining, and the diamond dealers needed a licence to buy diamonds. During the AFRC/RUF mining this was not the case: civilians were captured and forced to mine as slaves, by force, at gunpoint without any payment.[2761] The AFRC/RUF would collect 100 strong men and send them down in the pit to cut the steps to climb up. Others were down in the pits, putting gravel into buckets, handing them up to the ones at the top. Women, small boys and older men washed the gravel using empty rice bags. The workers could not move without permission. They were guarded by Mosquito's small boys, aged 10 to 12, the SBUs. Some were so small that they had to drag the gun along. Older boys were called junior commanders. The senior commanders had the rank of colonels or majors.[2762] Subordinate RUF commanders at Tongo were Major Goyeh (or Gweh), his assistant OG, [redacted] BCH and Boys (or Boyce), two of the First Accused's bodyguards, as well as JR, a Liberian.[2763]

862. TF1-367, [redacted] witnessed the AFRC/RUF mining commanders capturing about 200 to 300 civilians every morning and coercing them to mine by force when he was in Tongo in the dry season of 1997.[2764] TF1-045 testified that he participated in the capture of civilians who were forced to mine. They were left naked so they would not escape.[2765] In December 1997, forced mining under the AFRC/RUF was

[2759] TF1-371, Transcript 20 July 2006, pp. 52-53.
[2760] TF1-041, Transcript 10 July 2006, pp. 19-20.
[2761] TF1-035, Transcript, 5 July 2005, p. 82.
[2762] TF1-035, Transcript, 5 July 2005, p. 83.
[2763] TF1-367, Transcript 21 June 2006, Closed Session, pp. 58-59, "Goyeh" has also been reproduced as Gweh in other parts of the transcript.
[2764] TF1-367, Transcript 21 June 2006, Closed Session, pp. 60-61.
[2765] TF1-045 Transcript 18 November 2005, pp. 59-60.

still going on and the captured civilians were treated worse than before.[2766] At Tongo there was mining at Pump Station close to NDMC, Labour Camp, Kpandebu, Lalehun, Giehun, Geliama, Bomi, Tongola and Tongo itself.[2767]

863. TF1-035, a civilian living in Tongo, testified about two incidents that occurred in Cyborg Pit in the first weeks after Junta forces took control of Tongo. In the first three days Mosquito took all the diamonds that were found. On the third day some civilians started to mine for themselves. Mosquito ordered everybody to get out of the pit and told Colonel Manawa to fire at the people in order to get them out of the pit. Colonel Manawa fired an RPG in the air. Mosquito was standing there and the SBUs opened fire and killed 20 people in the pit.[2768] After that incident the civilians went on strike and refused to mine for the AFRC/RUF even it they were to be killed. TF1-035 was captured in his house by AFRC/RUF combatants, beaten up, dragged to the old security headquarters and accused of instigating the strike. He was locked in a cell with other civilians for three days and then released. Three days later, they were gathered again at gunpoint and ordered to mine at the Cyborg pit. Mosquito himself was present with a number of commanders.[2769] After Mosquito left, a junior RUF commander, called Mustapha and some other commanders came. He told the civilians that they came from the bush and had no good trousers or footwear; therefore the civilians should mine for them so that they could get money and buy things for themselves. Some boys, including the witness's nephew, went down into the pit. One of the SBU boys came and said "who allowed you to do some mining in this pit?" Mustapha told the SBU that he had ordered them to go down and mine for them. They argued and the SBU boy said he was going to report this to the Second Accused. They boy went over to the pit, where about 20 commanders, including the Second Accused were standing. There, the SBU boys fired directly into the pit and killed 25 people. Since the shooting continued, TF1-035 and other civilians ran away. Later, they were ordered to retrieve the corpses from the pit. Witness TF1-035's nephew's body was amongst them.[2770] Two weeks later another 15 civilians were killed, three of them were neighbours of witness

[2766] TF1-045 Transcript 18 November 2005, p. 97.
[2767] TF1-366, Transcript 7 November 2005, pp. 94.
[2768] TF1-035, Transcript, 5 July 2005, p. 84-87.
[2769] TF1-035, Transcript, 5 July 2005, pp. 87-90.
[2770] TF1-035, Transcript, 5 July 2005, pp. 90-92.

TF1-035. The incident was reported to the Second Accused. [2771] TF1-035 said, the civilians were kept as slaves and everyday people were killed.[2772]

864. There was a system in place by which captured civilians were formed into a committee. Members of this committee would go round with armed men and force civilians to mine. When the committee proved ineffective the armed men went out on their own from house to house to capture civilians and bring them to mine. Any civilian who did not go with them would be flogged.[2773]

865. High ranking RUF commanders did private mining in Tongo. TF1-366 testified that the First and Second Accused, Sam Bockarie, and Johnny Paul Koroma did so during the Junta period. While Major Goy (Gweh), the head of mining in Tongo was in charge of the Government mining, Boys, the First Accused's bodyguard, did the private mining for the First Accused.[2774] Other witnesses corroborated this information. Civilians mined diamonds for all three Accused and for Johnny Paul Koroma. The second Accused had his bodyguard, Sankoh Trouble, mining for him.[2775]

866. DIS-293, a civilian who worked as a miner in different places and who came to Tongo in 1997 for mining, testified that there were about 200 people working at the Cyborg pit in 1997.[2776] He confirmed, that although fights about stolen diamonds are not unusual at diamond mining sites, they did not occur during the AFRC/RUF period, since there were armed men standing guard[2777] at the top of the pits and that they would shoot to maintain control over the mining site.[2778] Miners were not allowed to work at night and if they did so, they were punished.[2779]

[2771] TF1-035, Transcript, 5 July 2005, p. 94-97.
[2772] TF1-035, Transcript 5 July 2005, p. 127 (lines 15-18).
[2773] TF1-045, Transcript 18 November 2005, pp. 69-71; DIS-293, Transcript 13 November 2007, pp. 75-76.
[2774] TF1-366, Transcript 7 November 2005, pp. 91-92 and Transcript 11 November 2005, pp. 39-41.
[2775] TF1-366, Transcript 7 November 2005, pp. 92-93.
[2776] DIS-293, Transcript 13 November 2007, p. 76.
[2777] DIS-293, Transcript 13 November 2007, pp. 78 and 94.
[2778] DIS-293, Transcript 13 November 2007, p. 81-82 and p. 96.
[2779] DIS-293, Transcript 13 November 2007, pp. 92-93.

c) Kono

i) Abductions and Enslavement

867. Evidence shows how civilians were forcefully captured, abducted and held as slaves for different forms of forced labour in Kono District. The abductions were often very brutal, civilians were killed and injured, families separated, property destroyed.[2780] Some witnesses described how civilians were held captive in camps, sometimes in appalling circumstances with scarce food and always guarded by armed combatants. Many would not survive the harsh living conditions.

868. Carving the letters "RUF" and/or AFRC on the bodies of the captured civilians, as described in detail in the evidence to Counts 10 and 11, was a practice which was part of the enslavement. It is an example of how the RUF exercised "its powers attaching to the right of ownership" over the captured civilians.[2781] Witness TF1-074, who was captured by Junta combatants in February 1998 together with his brother and other civilians in Baiwandu[2782] explained how and why they were marked (details about the marking are described under Count 10 and 11, above). Their captor said: "We were not going to kill them, we were going to cut their hands, but we are coming to carve AFRC on their bodies. They are going to stay in this way, they are going to stay with us and they are going to work for us."[2783] The witness said that the commanders in charge in Kayima, in the North of Kono District, where these events occurred, were an AFRC commander called Bangali and an RUF commander, Major Komba Gbundema.[2784] TF1-016, a farmer from Tomandu (or Tomendeh), was abducted by ten RUF combatants about four months after the Junta forces had entered Koidu in 1998 with 13 other civilians, including her 11-year-old daughter and her husband, testified similarly that a RUF combatant marked the men of the group with the letters RUF.[2785] He said "he was going to mark them "RUF", so that in case any of them happen to go to Guinea, he will be killed there."[2786] After the marking, they

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[2780] TF1-366, Transcript 10 November 2005, pp.13-14.
[2781] As set out in detail in the Slavery Convention of 1926, which defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."
[2782] TF1-074, Transcript 12 July 2004, pp. 5-8.
[2783] TF1-074, Transcript 12 July 2004, p. 12, (lines 36-37) and p. 13 (lines 1-4, lines 14-15 and line 23).
[2784] TF1-074, Transcript 12 July 2004, pp. 13 and 20/
[2785] TF1-016, Transcript 21 October 2004, pp. 5-11.
[2786] TF1-016, Transcript 21 October 2004, p. 10 (lines 23-25).

were forced to carry the food they had collected for themselves to Kissi where they were brought to a commander called Alpha.[2787] The witness described how civilians were kept by the RUF: "There was no time for us to go about freely, because where we were taken there was no place to go, and we are very much afraid that if we attempt to go somewhere, they will do something bad with us."[2788]

869. [redacted] RUF camps in Kono District, where civilians were kept for forced labour, such as carrying material from Kono to Kailahun, so called "food finding missions"[2789], and forced farming. Civilians were also retained to prevent them from fleeing to places controlled by ECOMOC troops: "We used to keep these civilians so that they cannot go and contact to enemies, so that they cannot reveal our secret or information." They were not free to leave, and if they were caught trying to escape they would be severely punished.[2790]

870. TF1-074 corroborated this testimony. AFRC/RUF combatants threatened to kill civilians, if they wanted to leave: "If we release you, you will go and tell the government that we are here, and that we have people here, and that they would commission a jet to come and bomb us."[2791] TF1-074 was handed over to other RUF commanders several times without ever being asked or having consented to it.[2792] After having worked for different commanders the witness was finally forced to work for the RUF commander Captain Ibrahim Tucker until 2002.[2793] The witness testified that he was forced to stay with the commanders, otherwise he would have been killed:

[2787] TF1-016, Transcript 21 October 2004, pp. 11-14.
[2788] TF1-016, Transcript 21 October 2004, p. 17 (lines 12-15).
[2789] Exhibit 181, NPWJ Report, p. 32: "In some places, more sophisticated methods of extracting support from civilians were put into place by the RUF/AFRC, including local tax administrations and systems allowing the regime to communicate demands to civilians less violently. Nevertheless, "food finding missions" ballooned, including such plainly-titled looting sprees as "Operation From your Hand to My Hand, from Your Pocket to my Pocket."
[redacted]
[2791] TF1-074, Transcript 12 July 2004, p. 12 (lines 27-30).
[2792] "The people who captured us, they met me in the house and they took me and explained to me that they were the ones that captured me the other time. And they took with me (sic) and I was with their boss.... They took me to their boss who was called S.K. That S.K was a rebel. We were there and ... we were being sent,..., to cut sticks and to burn charcoal.", TF1-074, Transcript 12 July 2004, p. 29, (lines 13-21).
[2793] TF1-074, Transcript 12 July 2004, p. 54.

> ... we were forced to join. The men were with the weapons and I cannot sit down. When they asked you to sit down, you have to sit down. If they asked you to lie down, you have to lie down. If I did not honour that, I wouldn't have been alive today. I was subject to order in their care until they disarmed.[2794]

871. Other witnesses also testified that they were forcefully abducted in different locations in Kono District. Witness TF1-064, a farmer who lived in Foedor (or Foendor), was abducted during the Junta period.[2795] After witnessing the killing of family members, including her children, she was forced to carry loads from Foedor to Tombodu. A boy who was with her was forced to carry a bag with the heads of the killed civilians in it.[2796] She was threatened by the rebel commander who decapitated the civilians in Foedor, called Tamba Joe[2797] and was then forced to marry an old man for whom she carried out household chores because she knew that she would be killed otherwise.[2798] TF1-217, who fled from Koidu, when the Junta forces entered in February 1998,[2799] witnessed the abduction of several girls, aged between 13 and 16 by Junta combatants. His 16 year old sister was amongst them. The rebels said that she will be Captain Bai Bureh's wife.[2800] He also told the court that he had stopped diamond mining because all the mining was done for the rebels only; the miners had to give them all the gravel.[2801]

872. TF1-197, a trader from Koidu, was abducted three times by AFRC/RUF forces. First, the witness was captured together with other civilians in the bush around Tombodu,

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[2794] TF1-074, Transcript 12 July 2004, p. 65, (lines 10- 13).
[2795] Although the witness could not remember the year of the events there are indications in her testimony that allow determining, if read together with other testimonies, that the events took place during the Junta period. Witness TF1-064 testified that the atrocities she described were committed by a rebel commander called "Tamba Joe", in particular: Transcript 19 July 2004, pp. 48 -49 and 58-59. Tamba Joe was identified by TF1-217 as a member of the Junta. His description of "junta" clearly indicates that he refers to the Junta period from May 1997 to February 1998, by saying: "Juntas were soldiers, they ceded and went to the bush, so they are the ones that we call juntas ....They were all together, they joined forces together to fight against the country.", TF1-217, Transcript 22 July 2004, p. 8 (lines 22-24). TF1-217 said that Tamba Joe was a former SLA soldier and that they had said that Johnny Paul Koroma was their head, ibid. pp. 30, 37-38. Witness TF1-064 further refers to the ECOMOG presence in Kono District, especially in Koakoyima, which also indicates, that the events occurred during the Junta period., Transcript 19 July 2004, p. p. 75
[2796] TF1-064, Transcript 19 July 2004, pp. 52-53, 56-57.
[2797] TF1-064, Transcript 19 July 2004, pp. 59, and 66-67; TF1-071 testified that "Tamba John" was a G5 at Bukuma, Kono District, Transcript 21 January 2005, pp. 18.
[2798] TF1-064, Transcript 19 July 2004, p. 67 (line 26): "They brought an old man and they said he is my husband and I am his wife." and (lines 34-36): "...I knew if the complaint went to the boss man that would be the end of my life, so in the morning I gathered all his belongings that were to be washed and I washed them so that he did not complain me to the boss man any more."
[2799] TF1-217, Transcript 22 July 2004, p. 7.
[2800] TF1-217, Transcript 22 July 2004, p. 12
[2801] TF1-217, Transcript 22 July 2004, p. 7.

where they had been when the Junta forces attacked Tombodu during the dry season 1998. The witness and other civilians were abducted and ill-treated (see evidence for Count 10 and 11, above) by AFRC/RUF combatants under the command of a certain commander Musa. They looted all their belongings and injured the witness. They mentioned their commanders Alhaji and Commando.[2802] After this incident the witness fled to Guinea but returned when it was announced that ECOMOG has arrived in Kono. He was then captured again together with his younger brother around Tombodu, still during the dry season, by about six armed AFRC/RUF combatants. They were taken to Tombodu to commander Staff Alhaji, where they were ill-treated. They were told that they would be killed and they were locked in a cell with about seven other people. Later they were forced to carry dead bodies to a ditch, Savage Pit as the witness later learned. The captives managed to escape and fled to the bush.[2803] The third time, the witness was captured in April 1998 by armed AFRC/RUF combatants on his way to Koiduwoor, together with a group of other civilians. The rebels took their belongings and forced the witness and seven other men to carry the loot to Yardu, while the rest of the group stayed behind.[2804] The commander in Yardu ordered that the six other men were to be executed. Finally, the witness was not killed, but his left hand was amputated (see evidence for Count 10 and 11, above) and he was released.[2805]

873. TF1-361, stated that there were 700 or 800 people living at Superman Ground after the AFRC/RUF forces had been pushed out from Koidu town by ECOMOG in early 1998. There were captured civilians amongst them, mainly those captured during the retreat of the AFRC/RUF forces. They were used for household chores.[2806]

874. TF1-015 was captured at Tongoro Bush near Koidu at the end of March 1998 by five AFRC/RUF combatants and put in a group of about 250 captives being moved to Kania and Koidu, [redacted], by rebels dressed in ECOMOG uniform. One civilian was shot during the march.[2807] In April 1998 he witnessed [redacted] abductees, children, women, men, were shot [redacted] in Koidu and a boy was cut into pieces.

[2802] TF1-197, Transcript 21 October 2004, pp. 56-62, 72-79.
[2803] TF1-197, Transcript 21 October 2004, pp. 80- 93.
[2804] TF1-197, Transcript 22 October 2004, pp. 2-7.
[2805] TF1-197, Transcript 22 October 2004, pp. 7-9, 12-18.
[2806] TF1-361 Transcript 12 July 2005, Closed Session, pp. 18-20.
[2807] TF1-015, Transcript 27 January 2005, pp. 104- 113.

[redacted] Major Rocky of the RUF who was under Commander Rambo had given the orders.[2808] Major Rocky took TF1-015 to Wendedu (or Wondedu or Wundidu) some 4 miles from Koidu where he was kept in captivity together with other civilians, guarded by armed combatants. The witness testified that he was constantly guarded and could not even ease himself without being escorted. There were about 500 AFRC/RUF combatants at Wendedu, including commanders, such as Major Rocky, CO Pepe, Rebel Father, Captain KS Banya, and around 150 civilians, including women and children. The civilians were forced to loot food for the rebels.[2809] TF1-015 survived at Wendedu by eating guava as he was not allowed to go and find food. He was not allowed to speak freely to other civilians.[2810] Civilians could not leave as the road outlets were being guarded by armed men day and night, and they could not refuse to go on food finding as they risked being killed by rebels.[2811] The commander of Wendedu camp, Captain KS Banya threatened to kill him, when he heard that the witness had told his fellow captives to flee to the woods.

875. TF1-078, had fled from Koidu with his family and other civilians in February 1998 when the RUF entered. The RUF commander in charge was a Captain Rocky.[2812] In mid-March 1998 there were over 100 armed men in Kaidu, who prevented civilians from escaping to the enemy, and 3-4 checkpoints were set up between Kaidu to Koidu, and several more going from Kaidu into other directions, all manned by armed combatants. Civilians in Kaidu would harvest palm fruits and process palm oil for combatants and catch fish under armed escort. The Junta would ask G5 to call civilians to do what they needed. The Second Accused visited Kaidu and the day after he left, Captain Rocky assembled the civilians and told them that they should not attempt to escape or communicate with the enemies and they should obey orders from combatants.[2813] TF1-078 further testified that civilians had to return to Koidu around mid-December 1998, when the ECOMOG troops were removed from Koidu by AFRC/RUF forces, there were checkpoints around Koidu and civilians were not allowed to go freely outside Koidu without a pass from the G5

[2808] TF1-015, Transcript 27 January 2005, Closed Session, pp. 127-132, and pp. 136-137.
[2809] TF1-015, Transcript 28 January 2005, pp. 3, 9-11 TF1-015, Transcript 31 January 2005, p. 64.
[2810] TF1-015, Transcript 31 January 2005, pp. 48-52.
[2811] TF1-015, Transcript 31 January 2005, pp. 64-65.
[2812] TF1-078, Transcript, 22 October 2004, pp. 45-49 and p. 61.
[2813] TF1-078, Transcript, 22 October 2004, pp. 74-76.

commanders.[2814] The witness also said that after the signing of the Lomé Peace Accord on 7 July 1999 he was in Koidu and observed that the living conditions for civilians improved but forced labour continued in Kono although it decreased.[2815]

ii) Diamond Mining

876. Kono was an economical focal point in Sierra Leone because it is a diamondiferous area. It was strategically important to the RUF, since diamonds provided the essential resources supporting the combat activities. Sam Bockarie ordered that Kono must be maintained by all means. Bockarie said that he had received instructions from Charles Taylor to do so. The recapture of Kono after the entry of ECOMOG in 1998 was important to consolidate the position of the RUF and AFRC and to enable the Junta to sustain its military operations.[2816]

877. RUF diamond mining took place at Kono from 1998 up to 2001.[2817] [redacted] testified that during the retreat of the Junta force, there was not much mining for diamonds and that the money needed to buy ammunition came from the sale of coffee, cocoa or palm oil.[2819] After Koidu was re-captured by the Junta forces in December 1998, the mining manpower at Koidu Kokwima camp, was increased from about 60, 70 civilians to around 300 miners.[2820]

878. TF1-334, [redacted] that during the time he was in Kono District, from March to mid-May 1998, "government mining" took place in Kono District.[2821] The overall control over the mining during the Junta period was with Secretary of State East, Captain Eddie Kanneh.[2822] He reported to the First and Second Accused and

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[2814] TF1-078, Transcript, 25 October 2004, pp. 39-40 and 44
[2815] TF1-078, Transcript, 25 October 2004, pp. 51-52.
[2816] TF1-371, Transcript 20 July 2006, p. 79; TF1-071 Transcript 19 January 2005, Closed Session, pp. 50 and 55 and Transcript 21 January 2005, Closed Session, pp. 86-87.
[2817] TF1-071 Transcript 21 January 2005, Closed Session, p. 100-101.
[redacted]
[2821] Exhibit 119, TF1-334 Transcript from AFRC Trial 17 May 2005, pp. 52.
[2822] Exhibit 119, TF1-334 Transcript from AFRC Trial 17 May 2005, pp. 52-53. This information was corroborated by the testimony of George Johnson, who testified that during the Junta period Johnny Paul

to Sam Bockarie. Diamonds were brought to the First Accused in Kailahun, and the First Accused would give them to Bockarie. At that time [redacted] He reported to the Second Accused.[2823] TF1-371 said that diamond mining in Kono during the Junta period was predominantly organised by the AFRC secretariat, although the Second Accused was present there.[2824] Alex Brima was in Koidu for parts of the Junta period overseeing the mining there.[2825] Just before the intervention in February 1998, [redacted] Kono District in order to control the Junta soldiers, since the Junta had lost control over their mining activities.[2826] After Superman had gone to the Northern Jungle the Second Accused was the overall commander in Kono.[2827]

879. In addition to "government mining", RUF commanders were also mining privately; the First Accused was mining and he sent his own boys to do mining in Kono such as Bukero, Colonel Lion, Small Kamara, Officer Med and others. They were mining at Kaisambo and Number 11 (same as Tombodu). [redacted] Other commanders were also involved in private mining; the Second Accused, Superman, Komba Gbundema,[2828] and Alpha Fofana, a former SLA. CO Med was mining for the First Accused. Most of the bodyguards/securities were the mining bosses for their commanders and civilians were forced to mine for them.[2829] The Second Accused had a house in Kono where his boys lived. For the private mining forced labour was also used; civilians were captured and then forced to mine.[2830] They were working under the supervision of soldiers of all three Accused.[2831]

Koroma posted Gullit to Kono to oversee all diamond companies and to take care of the diamond mining areas there, Transcript 14 October 2004, p. 41, and TF1-371, Transcript 20 July 2006, pp. 55-56.

[2823] TF1-366, Transcript 10 November 2005, pp.10-11.

[2824] TF1-371, Transcript 20 July 2006, p. 55.

[2825] Exhibit 119, TF1-334 Transcript from AFRC Trial 17 May 2005, pp. 52-53.

[2826] TF1-366, Transcript 7 November 2005, pp.89-91.

[2827] TF1-041, Transcript 10 July 2006, Closed Session, pp. 49-50.

[2828] TF1-367, Transcript 22 June 2006, Closed Session, pp. 49-50.

[2829] TF1-071 Transcript 21 January 2005, pp. 123-124.

[2830] TF1-367, Transcript 22 June 2006, Closed Session, pp. 51-52. TF1-367 said "... civilians were captured just like you would capture a chicken.", ibid. p. 51 (line 1).

[2831] TF1-366, Transcript 7 November 2005, pp. 92-93. TF1-366 stated that Sankoh Trouble was the one working for the second Accused. He was the second Accused's bodyguard.

880. The mining was carried out by hundreds of civilians who were forced to mine by armed combatants and they were treated inhumanely.[2832] [redacted] Civilians were not willing to mine during 1998 and up to 1999 and they were forced to mine.[2833] The miners had to live in camps on the mining sites. Since food was often scarce, the workers had to get their food themselves in addition to not being paid for their work. If they fell ill they had to get medical treatment themselves. Miners were flogged, if they did not work. RUF mining changed in 2000 and 2001 to a so called "two-pile system", in which the gravels were divided into two shares, one for the RUF government, one for the miner. The diamonds found in the miner's pile had to be sold to the RUF solely for prices fixed by the RUF agents.[2834] On the order of the First Accused checkpoints were put up by the RUF around Koidu from 1999 to 2000, and the RUF would take diamonds found on civilians at the checkpoints.[2835]

881. [redacted] was told by Superman and the Second Accused to continue forcing civilians to do work, which he considered as forced labour since the civilians were threatened with weapons.[2836]

882. In 1998 forced mining in Kono District was carried out at camps like Tuiyor, Bombodu, and Tombodu. After the capture of Koidu by Junta forces, the mining expanded up to the Nimikoro Chiefdom, Nimiyama Chiefdom, Sewafe areas, in Kamara Chiefdom at Tombodu, Sukudu, Peyima, in Gbense Chiefdom (where Koidu is located) at Number 11, Yaradu Gbense, Boroma-38, Konokortah, Gbukuma. In Tankoro Chiefdom existed the camps Kwakoyima, Sokogbeh, Kongo Creek, Benz Garage area and the Opera Cinema area, in Nimikoro Chiefdom at Simbakoro, Motema, Yengema Guiyor, Bumpe and in Nimiyama Chiefdom Sewafe, Gold Town, Ndorgboi, Sandiya. In Sandor Chiefdom mining

[2832] TF1-371, Transcript 20 July 2006, p. 56; TF1-367, Transcript 22 June 2006, Closed Session, pp. 29-30 and pp. 36-38.
[redacted]
[2834] TF1-071 Transcript 21 January 2005, pp. 120-123.
[2835] TF1-071, Transcript 25 January 2005, pp. 69, 75-76.
[2836] TF1-041, Transcript 10 July 2006, pp. 48-49.

camps existed in Yomadu, Yorkodu, along the Baffin River, and at Bagbema.[2837] This information was corroborated by [redacted] who mentioned the mining sites at Bandafaye, Simbakoro, Gbeko, Bumpe, Gieya, Yengema, Number 11, Kaisambo, Kimberlite, 27 and Yellow Mosque, Number 27, Mortema, John Kelly Street and Congo Bridge. Ample evidence of victim and insider witnesses present on specific sites in Kono District corroborates the above information and sheds light on the treatment of civilians and the mining process.

883. [redacted] the morning the operation commander, at that time Alpha Turay, took the workers to the pits. They were divided into groups of about 9 persons and each group had a so called "gang leader" who was in charge of the group of miners. Every diamond the miners found had to be handed over by the gang leader to the operation commander.[2839] The operation commander would then show the diamonds to the deputy [redacted] and both together would take the stones to [redacted].[2840] A committee made up of the mining commander, his deputy, the operations commander, the overall gang leader and the gang leader, and the adviser for the civilians would meet to open the packet, count the stones and sort out the good ones. All this was recorded and the diamonds were returned into the parcel, which was sellotaped, [redacted] until handed over to the First Accused at Lebanon, in Kokwima. The First Accused would tell them to work harder to find more diamonds. The daily outcome was 50 to 70 pieces.[2841] The miners were coerced to work: "... they are doing it forcefully, because you have nowhere to go. Even if you do not want to do it, you will do it, because we had guns, you hadn't any gun. So whatever we told you to do you would have to do it forcefully."[2842]

884. At Kaisambo between 200 and 300 civilians from the Makeni and Magburaka area were forced to mine. They were brought in trucks, organised by the First and the Second

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[2837] TF1-071 Transcript 21 January 2005, Closed Session, pp. 117-119.
[2838] TF1-367, Transcript 23 June 2006, Closed Session, pp. 48-49. Kokwima has been spelled differently in the transcripts; see also Koakoyima or Koquima.
[2839] TF1-367, Transcript 22 June 2006, Closed Session, p. 38.
[2840] TF1-367, Transcript 22 June 2006, Closed Session, pp. 38-39.
[2841] TF1-367, Transcript 22 June 2006, Closed Session, pp. 42-44.
[2842] TF1-367, Transcript 22 June 2006, Closed Session, p. 48 (lines 20-24).

Accused and were supervised by armed RUF combatants, some of them between 12 and 15 years old.[2843] [redacted] about 50 civilians were forced to mine and that they worked because they were forced to do so at gunpoint.[2844]

885. TF1-077, a civilian from Tombodu in Kono District, was arrested during the re-capture of Koidu Town by the RUF.[2845] Armed RUF combatants gathered about 50 civilians from the village, placed looted goods, such as household equipment, clothes and radios, on their heads and told them to go with them to Tombodu. Some of the officers presented themselves as RUF commanders, Officer Med, Colonel Gibbo, Major Tactical, and told them that they were ordered by the First Accused to send all the abductees to Tombodu Bridge to mine.[2846] They had to take all the clothes off and were left in their underpants so that they would not run away. The conditions at Tombodu were harsh. The miners got only one plantain per day and had to work hard. There were two shifts; the day shift lasted from sunrise until the sunset and the night shift started in the evening, and lasted until morning. They worked at gun point, guarded by around 20 little boys; some of them were only about 6 years old, others between 10 and 15. The miners were bitten by mosquitoes and ants. There was no medication and some workers died. Their bodies were thrown into the water. The mining place where the witness worked was huge and at times new civilians were brought in chains from Sandu Chiefdom. If a diamond was found it was given to Officer Med.[2847] It was impossible to escape, there was nowhere to run to, and there were checkpoints, and they were naked.[2848] Officer Med, the most superior mining commander, reported to the First Accused, who would at times come himself to the mining site. One day TF1-077 witnessed how Officer Med handed over a diamond to the First Accused who had come to the mining site in a vehicle.[2849]

[2843] TF1-367, Transcript 22 June 2006, Closed Session, pp. 52-54.
[2844] TF1-041, Transcript 10 July 2006, pp. 52.
[2845] TF1-077, Transcript 20 July 2004, pp. 77-78, the date 16 December 1999 was put to the witness and his evidence was given in that clearly erroneous context, considering all of the surrounding and circumstances and the corroborating evidence the time frame the witness is referring to in December 1998.
[2846] TF1-077, Transcript 20 July 2004, pp. 76-78, and Transcript 21 July 2004, p. 15.
[2847] TF1-077, Transcript 20 July 2004, p. 78-81 and Transcript 21 July 2004, pp. 28.
[2848] TF1-077, Transcript 20 July 2004, p. 81-82.
[2849] TF1-077, Transcript 20 July 2004, p. 80 and Transcript 21 July 2004, p. 30.

886. One day the mining commanders Tactical, Officer Med and Gibbo brought one of the town chiefs, called S.E. Sogbeh. They said that he had not paid the duties that were levied on him. They told him to work in the mine but he refused, telling them that he was not able to mine, since he had been badly flogged by the little boys. Officer Med said that anyone who refused to work would be shot. S.E. Sogbeh was subsequently shot by a child soldier called Samuel, who was about 12 years old. They were told that anybody who refused to do this work would end like this.[2850]

iii) Other Forms of Forced Labour

887. Civilians were used to carry loads, including ammunition and arms. They were also forced to assist in armed attacks and other military activities and some of them were forcefully trained in camps specifically established for this purpose. During the preparation of the recapture of Koidu in 1998 by the Second Accused, Peter Vandi, Akim Turay, Superman and TF1-366, operations took place to capture ammunition and arms. During these operations civilians were captured and brought to Guinea highway to the Second Accused. Shortly before Sani Abacha, the President of Nigeria, died (8 June 1998[2851]) they received arms and ammunition from Liberia coming through Kailahun up to Kono. Civilians were forced to carry it. The civilians were treated badly; they were coerced to carry the loads by the First and Third Accused in Kailahun and by the Second Accused, Superman, Rambo and TF1-366 in Kono.[2852]

888. TF1-141, a former child soldier who had been abducted by the RUF [redacted][2853], testified that while he was at Guinea Highway in 1998, civilians were captured during so called "food finding missions" and were forced to carry the loot. The RUF combatants would threaten to execute them if they failed to carry the loads and actually killed civilians who did not manage to bear the burden anymore because they did not want them to tell what they had seen the RUF doing. Some of the women were raped on such "food finding missions" some abducted and used as bush wives. The witness said it was the Second Accused who was in charge of his group at Guinea Highway and it was

[2850] TF1-077, Transcript 20 July 2004, pp. 80-81.
[2851] Ex. 54, The New York Times obituary of former Nigerian President Sani Abacha.
[2852] TF1-366, Transcript 8 November 2005, pp. 63-66.
[2853] TF1-141, Transcript 11 April 2005, pp. 79-82.

him who sent them on such food patrols.[2854] The witness said: "... early in the morning we would have our usual parade called the muster parade and that's where he would pass on those instructions. He would appoint who would become the commander for that particular patrol. He would give his instructions and how we should implement it. He would advise and we would leave for the food finding mission."[2855]

889. [redacted] They had to transport arms, ammunition, food, medicine from Kono to Kailahun and vice versa. This was very frequent from March 1998 up to December 1998. Before the Kono attack in December 1998, up to 150 civilians were sent to Kailahun to get ammunition.[2856] Witness TF1-141 described how the RUF used civilians, including women and children to carry loads when leaving Guinea Highway in 1998 for Kailahun. After walking for two days, some women were unable to walk any longer. Their feet were swollen and some cried in pain. Some were too tired to carry the heavy loads and they were all executed by RUF combatants at Gandorhun Gbane, in Kono District, and in the hills towards Sandaru.[2857]

890. TF1-263, who was captured as a 14 year old school boy by rebels in a village near Koidu during the mango season of 1998,[2858] testified that they forced him to carry loot, like rice, clothes, and zinc to Kissi Town.[2859] The commander there was Superman. Abducted civilians were guarded and there were camps near Kissi town - PC Ground and Banya Ground.[2860] The First Accused was the overall commander and in charge of PC Ground. The Second Accused was in charge of Banya Ground and Superman was in charge of Kissi Ground.[2861] In Kissi Town the witness had to work for [redacted], who was the commander of the rebels that had captured him and the subordinate of Superman.[2862] He had to perform domestic chores for [redacted] wife like pounding rice until his hands were blistered. The witness testified that there were many other abducted civilians held in Kissi

[2854] TF1-141, Transcript 11 April 2005, pp. 90-93.
[2855] TF1-141, Transcript 11 April 2005, p. 91 (lines 20-25).
[2856] TF1-071 Transcript 21 January 2005, p. 85-86.
[2857] TF1-141, Transcript 11 April 2005, pp. 106-108
[2858] TF1-304, testified that the mango season in Kono District is in April and May: Transcript 13 January 2005, p. 50.
[2859] TF1-263, Transcript 6 April 2005, pp. 5-9.
[2860] TF1-263, Transcript 6 April 2005, pp. 11-12, 16.
[2861] TF1-263, Transcript 6 April 2005, pp. 13-15.
[2862] TF1-263, Transcript 6 April 2005, pp. 10-11,

and that they were forced to stay by armed guards. "While we were there, even when we went to fetch water, someone who had a gun was with us so that we wouldn't run away."[2863] Junior, another civilian held captive in Kissi Town, told the witness that people were killed at PC Ground because they had moved around too freely: "He said if you move around and they see you, it's easily you could be killed, especially civilians."[2864] The witness himself witnessed the killing of several people, presumably civilians, near PC Ground in the same mango season of 1998, when he went there [redacted] to get rice.[2865] A week later, the witness was amongst some civilians who were selected to carry rice and palm oil, TF1-263 witnessed in Banya Ground how the Second Accused had just shot his boy because the boy had allegedly dragged a goat so hard that it had died.[2866] The witness was later together with around 200 other civilians from Kissi Town, PC Ground and Banya Ground taken to PC Ground where they were all gathered. The First and the Second Accused were there and told them that Mosquito wanted to see everybody in Kailahun to have training and fight the ECOMOG troops. The First Accused told the Second Accused to select people for training. Many were chosen and told that if they would not turn up for the transfer to Kailahun, they would be killed.[2867] The witness and the other civilians were escorted by some rebels under the command of commander "Blood" and commander "Five-Five" to Buedu, in Kailahun District. The rebels told them that they were under the command of the First Accused. They travelled on foot through the bush for four days. In Buedu they were told that it was Mosquito who had ordered to bring all the civilians there to be trained.[2868] The training commander was [redacted] and the witness got military training in Buedu (see evidence in Count 12).[2869]

891. TF1-367 said that when he travelled from Koidu to Kailahun District following the ECOMOG intervention in Freetown, he went with RUF soldiers and some civilians who were captured on the way; the civilians were used to carry loads and to carry out other jobs.[2870] TF1-015 testified that civilians were forced to go on food-finding missions by

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[2863] TF1-263, Transcript 6 April 2005, p. 12 (lines 8-9).
[2864] TF1-263, Transcript 6 April 2005, p. 18, (lines 26-27).
[2865] TF1-263, Transcript 6 April 2005, pp. 19-22.
[2866] TF1-263, Transcript 6 April 2005, pp. 22-24.
[2867] TF1-263, Transcript 6 April 2005, pp. 27-31.
[2868] TF1-263, Transcript 6 April 2005, pp. 32-34.
[2869] TF1-263, Transcript 6 April 2005, pp. 34-37.
[2870] TF1-367, Transcript 22 June 2006, Closed Session, p. 21.

commanders and the food they found was called "government property" or "government food"[2871] and was used to feed the combatants only, not the civilians.[2872] Once, Capt Banya sent civilians for food-finding to Koranko, in Koinadugu District.[2873] They came back to Wundidu (or Wendedu) after one week with sore and blistered feet from the long walk.[2874] At times they would go for three days and return on the fourth.[2875] During this period they would not eat anything. At one point, the witness was forced to tote 175 cups of rice, but he was too weak to do so.[2876]

892. TF1-015, described how the civilians were sent on food-finding missions from Wundidu (or Wendedu) camp, to loot food: "When they went, they were there for one week. They came back. They came, I saw them. Most of them who came had problem with their feet, with loads on their head. Some could not even walk properly. They brought the loads. ... They gave the loads to KS Banya, who was the commander, because they said it was a government property, the food was the government's."[2877]

893. TF1-015's duties at Wundidu (or Wendedu) were [redacted].[2878] He was forcefully moved from Wundidu to Superman Ground to render his services there.[2879]

iv) Forced Military Tasks

894. TF1-360 described how Superman used civilians to carry ammunition and other loads between Kailahun and Kono after the meeting in Buedu in late 1998 where the decision was taken to attack Koidu.[2880] While most civilians were used to get food for them and to do some other domestic works, the stronger ones were trained to increase the military manpower of the RUF.[2881]

[2871] TF1-015, Transcript 31 January 2005, pp. 63 and 66 Transcript 28 January 2005, p. 17.
[2872] TF1-015, Transcript 31 January 2005, pp. 66.
[2873] TF1-015, Transcript 31 January 2005, p. 52, TF1-015, Transcript 28 January 2005, p. 16-17.
[2874] TF1-015, Transcript 31 January 2005, p. 42 and Transcript 28 January 2005, p. 17.
[2875] TF1-015, Transcript 31 January 2005, p. 54.
[2876] TF1-015, Transcript 31 January 2005, p. 24
[2877] TF1-015, Transcript 28 January 2005, p. 17 (lines 4-7 and lines 13-15).
[2878] TF1-015, Transcript 28 January 2005, p. 16.
[2879] TF1-015, Transcript 31 January 2005, p. 25.
[2880] TF1-360, Transcript 20 July 2005, Closed Session, p. 54, for the time frame 46-48.
[2881] TF1-360, Transcript 22 July 2005, Closed Session, pp. 68-69; see also, more general: TF1-360, Transcript 22 July 2005, Closed Session, p. 13 (line 29) and p. 14 (lines l-5).

d) Koinadugu

895. TF1-263, who had been abducted as a child by rebels in Kono[2882], testified that when they advanced from Tombodu to Krubola (or Kurubonla) towards the end of the rainy season of 1998, with Superman and Savage's groups, they had civilians, including nursing mothers, with them and combatants abducted young and able-bodied civilians to carry loads.[2883]

896. TF1-329, a civilian from Fadugu, south-west of Kabala, said that after a rebel attack on Fadugu, on 22 May 1998, she was told by her daughter that the rebels had abducted five children from Fadugu.[2884] TF1-215, a civilian from Kondembaia in Diang Chiefdom, testified that the AFRC/RUF passed through Kondembaia, during the retreat from Freetown on their way to Kono District from February 1998 on. They passed by in groups, every day, until the end of April 1998. Some combatants would stay for some days in Kondembaia and then go on. The witness testified that the combatants abducted people, when they were leaving. They even intended to capture a child to make him carry loads. TF1-215 himself was captured when coming from his farm and forced to carry a tire to town.[2885] When the people in Kondembaia heard about the attacks on Yifin and Kromanta village and when they saw the people who fled from there - some had their hands chopped off or were otherwise injured - and when they heard that both villages were burned down, they started to panic. They started to flee to the bush. There rebels captured three people and made them carry loads for them. They shot one civilian, Sorie Kamara, and forced one of the three captured men at gunpoint to drink his blood. Finally the rebels shaved the three men's heads with the inscription RUF and made them carry loads to Sandia village.[2886] During the attack on Kondembaia, RUF combatants captured five women and took them away. Two of them, Seray Conteh and Yaba, returned after three days, while the other three returned only after the ceasefire, three years later.[2887] On 19 May 1998 the witness was also captured by RUF combatants in Kondembaia, when he returned from the bush in the false

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[2882] See testimony above under paras 889-890.
[2883] TF1-263, Transcript 6 April 2005, pp. 40-47.
[2884] TF1-329, Transcript 2 August 2005, pp. 31-33.
[2885] TF1-215, 2 August 2005, pp. 66-70.
[2886] TF1-215, 2 August 2005, pp. 70-77.
[2887] TF1-215, 2 August 2005, pp. 82-84.

belief that the village was under ECOMOG control. He was forced to carry a load on his head, including looted ECOMOG equipment.[2888]

897. TF1-213, [redacted] lived in Lengekoro, testified that a group of RUF combatants led by Superman came to Lengekoro on 18 March 1998 and captured 25 girls.[2889] One of the girls was abducted for three years.[2890] TF1-212, a woman from Koinadugu, testified how she and her family fled several times to the bush when the RUF and AFRC Junta arrived in 1998 at Koinadugu village. In August 1998, the rebels captured her, her family and other civilians and took them to Koinadugu village. They were all placed in a guardroom and kept there for one night. Some of the women were raped. Later, the rebels told her [redacted] sister to join the children rebels to be trained. Since the witness's sister did not agree, they hit and kicked her. The witness told her sister to agree, since she feared that the rebels would otherwise kill her. They marked "RUF" on her chest and said they marked the children to prevent them from escaping and if they were caught, they would be killed.[2891]

e) Bombali

898. The massive abduction of civilians and using them for forced labour which occurred in Bombali district between about 1 May 1998 and 31 November 1998[2892], were committed by mixed RUF and AFRC forces under the command of Gullit, which left Koinadugu District to establish Camp Rosos, in the North-Western part of Bombali District, around July or August 1998.[2893] Several insider and victim witnesses talked about these massive abductions and the forced labour.

899. According to George Johnson thousands of civilians were abducted while this mixed AFRC and RUF group passed through Yarya, Binkolo Highway, Karina, Matehun,

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[2888] TF1-215, 2 August 2005, pp. 87-88.
[2889] TF1-213, Transcript 2 March 2006, pp. 10-12. On p. 29 of the same transcript the witness said "Kumba explained to me that that group that did havoc to us was the group of Superman."
[2890] TF1-213, Transcript 2 March 2006, p. 32.
[2891] TF1-212, Transcript 8 July 2005, pp. 101-102 and 105-108.
[2892] Indictment, para. 73.
[2893] George Johnson, Transcript 19 October 2004, p. 43. Amongst the RUF fighters that went to Rosos was also RUF Captain Arthur who was part of the command structure and controlling the third battalion. George Johnson, Transcript 19 October 2004, p. 47; corroborated by TF1-184, Transcript 5 December 2005, pp. 24-27; TF1-167, Transcript 19 October 2004, pp. 47-48; and TF1-334, who testified that Captain Arthur was the commander of the C Company and brought a few men from Kono but mostly those who had come from Mongor Bendugu. Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, p. 105.

Batkanu to Rosos.[2894] The witness said that they were abducted because "in the jungle route they -- civilians, strong men, are the ones we use to show us the routes which will be safer for us not to encounter ECOMOG troops or enemy persons. Two, they were abducted for them to carry arms and ammunitions, looted properties, and if even a commander is sick, he cannot walk, he will carry the commander."[2895] [redacted] before the mixed RUF and AFRC group headed for Rosos, where Gullit reorganized the command structure and held a speech to the commanders.[2896] At this commanders' meeting Gullit gave a strict orders regarding the trip towards the north, saying that "any civilian whom we saw on the way, who was a strong civilian, should be captured and should be part of the troop." He further said "any civilian who attempted to run away as well they were moving further, ... should be shot on sight."[2897] When they reached Karina, Gullit said that this was a strategic point since there were Mandingos living there and it was the home town of Kabbah and therefore "Karina should be a place that should be the number one point of demonstration of the junta forces." and further "everybody should take part in this demonstration wherein ... Karina should be burnt down and, if possible, we should capture strong men."[2898] The same witness testified that once Gullit was in Rosos and had access to a radio set, he contacted the RUF High Command from Rosos to confirm the continuing RUF and AFRC cooperation.[2899] At Rosos civilians, including children and women, were militarily trained. The people trained were those captured at Karina and on the way from Mansofinia to Camp Rosos.[2900]

900. TF1-360, a [redacted] to provide

[2894] George Johnson, Transcript 14 October 2004, pp. 85-88. The witness stated: "Civilians abducted on the route to Camp Rosos were plenty of them. I cannot give a specific number, but they were thousands." Ibid., p. 86 (lines 22- 24).
[2895] George Johnson, Transcript 14 October 2004, p. 85 (lines 26-29) and p. 87(lines 1- 3).
[2896] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, p. 88.
[2897] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, p. 17. Once they were on their way to Roso, Gullit actually ordered Commander Tito to shoot civilians who run away from the village Kamagbengbe. He said they should be an example as he had said at Mansofinia that civilians who attempted to run away would be shot on sight. Gullit gave the order and a company commander Tito shot them. Ibid., p. 55.
[2898] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, p. 17.
[2899] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 24 May 2005, pp. 31-40 and pp. 55-56.
[2900] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 24 May 2005, pp. 23-24.

Gullit with manpower, which left Koinadugu [redacted] The witness testified that on the route to Rosos many atrocities were committed (see evidence of Count 3-11) and people in the village were killed except civilians needed to carry loads on their heads.[2902] O5's group with the witness arrived at CO Eddie Ground (or Major Eddie Town) on 21 September 1998.[2903]

901. TF1-184 testified that when SAJ Musa was on the way to Camp Rosos, he sent some of his men to capture Father Mario, a white priest, from his village. He was held hostage by SAJ Musa for certain demands to be met by the government.[2904]

902. Numerous victim witnesses mentioned that they had been abducted during that period of time or had seen other civilians who had been abducted. TF1-031 testified that while living in Karina during the war, she was attacked in 1998[2905] by a group of rebels who told her that they were Foday Sankoh's people. They were armed and some were dressed in country clothes, while others were in combat.[2906] After burning her house, they stripped her naked, brought her outside and tied her with a rope around her waist.[2907] The witness was taken with other civilians, who were also stripped naked, to Daraya, then to Mayombo, Karina and finally to Mayayi.[2908]

903. TF1-343, who lived in Mateboi during the war and remembered that the "war came from the North", testified that the [RUF] rebels would hide in Rosos and knew that some of the commanders there were called Sergeant Musa, Five-Five and Adama Cut Hand.[2909] The witness said that someone called Asana was captured and taken away by the Rebels and

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[2901] TF1-360 Transcript, 21 July 2005, pp. 10-11.
[2902] TF1-360 Transcript, 21 July 2005, pp. 16-17. George Johnson said that he had left Rosos about 2 ½ months after his groupt had arrived there and moved on to a village they named Major Eddie Town after ECOMOG bombed Rosos, Transcript 14 October 2004, pp. 100-101. TF1-334 testified that he was at Rosos for about three months after arriving there at the beginning of the rainy season in 1998 and that they left Rosos in September 1998: Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, p. 103.
[2903] TF1-360, Transcript, 21 July 2005, pp. 13-14.
[2904] TF1-174, Transcript 05 December 2005, p. 28.
[2905] TF1-031 said, she could not remember the exact year of the event but said it was the rainy season, about eight years before her testimony in 2006, Transcript 17 March 2006, p. 79.
[2906] TF1-031, Transcript 17 March 2006, p. 80.
[2907] TF1-031, Transcript 17 March 2006, pp. 78.
[2908] TF1-031, Transcript 17 March 2006, pp. 81-84.
[2909] TF1-343, Transcript 17 March 2006, pp. 58-64. The witness said they called those who fought in "Foday Sankoh's war" rebels. He could not remember the time when they came, ibid p. 62.

released later[2910] and "at Mafabu someone called Ibra was captured by the Rebels who later stayed at Rosos".[2911]

904. TF1-028, who was in Karina when the AFRC and RUF Junta retreated from Freetown in February 1998 testified that a group of people, both in civilian cloths and in uniforms, entered Karina on the 6 April 1998, at 4 a.m.[2912] The witness gathered her family and fled to the bush, but had to go back to get her two nephews in her house. While running back to the bush with the children she was captured. The uniformed man threatened to kill her, he stripped her naked with a knife, tied her hands and brought her back to the village. Her little nephew was left alone in the bush.[2913] The witness was tied together with two other women who were also naked, brought to the village,[2914] and then to a field. There, the men in uniforms told them that they would be killed. The witness was saved by a man who said that she was his sister, since she was Limba-Madingo.[2915] She was then abducted by combatants together with other civilians, including her sister and her brother. They were taken to Makabie, Manyaie and finally to Kambia then to Mandaha, Makith and Kortu.[2916] In Makith, the rebels wanted to kill her sister, accusing her and the others of being "members of the Tejan Kabbah family". The witnesses' sister was saved by a man called [redacted] who took her away as his wife. The combatants then came for the witness and her brother and wanted to kill them. The witness was saved a second time by the man who had saved her already in Karina, [redacted].[2917] They were brought to Rosos and kept there. The commanders there were Five-Five and Gullit. There were also RUF combatants at Rosos. The witness said, they had to move to Tufayim when Rosos was bombed and they were later joined by the groups of Red Lion, Tito and SAJ Musa who were coming from Kurubonla.[2918] The witness learned that the groups gathered to retake

[2910] TF1-343, Transcript 17 March 2006, pp. 59-60.
[2911] TF1-343, Transcript 17 March 2006, pp. 72-73.
[2912] TF1-028,Transcript 17 March 2006, pp. 107-111 and p. 115.
[2913] TF1-028,Transcript 17 March 2006, pp. 113-117.
[2914] TF1-028, Transcript 17 March 2006, pp. 119-120.
[2915] TF1-028, Transcript 20 March 2006, pp. 6-8.
[2916] TF1-028, Transcript 20 March 2006, pp. 10-20.
[2917] TF1-028, Transcript 20 March 2006, pp. 13-18.
[2918] TF1-028, Transcript 20 March 2006, pp. 24-26.

Freetown and that she was to be trained to fight. The witness then left with the AFRC and RUF combatants from Rosos to Port Loko, Waterloo and finally Freetown.[2919]

905. TF1-179, a civilian from Batkanu, fled with his family to the bush, when the Junta forces entered Batkanu in around March 1998 and hid in the bush for two months. The witness and his family wanted to move to Makeni on 10 May 1998. On their way, they were stopped near Mateboi village by seven armed Junta soldiers, dressed in combat uniforms.[2920] The combatants attacked them, robbed, ill-treated and mutilated some of the witness' family members and killed an old woman. They abducted TF1-179's two sons and took them to their base. [2921] A man who had been captured as well and who had managed to escape told TF1-179 later that his sons had been killed.[2922]

f) Kailahun

906. In Kailahun District the RUF ran a number of so-called RUF or Government farms which were essential for the food supply to the RUF troops throughout the conflict. The evidence proves that serious human rights violations were widespread and systematic and included abductions of civilians and their use as forced labour for farming, diamond mining, carrying material and other work. In addition, the RUF had established an extensive levy system which forced farmers in Kailahun District to hand over large amounts of their harvest to the RUF or to hunt and fish for specific periods of time each year for the RUF.[2923]

907. TF1-371, testified that civilians were mainly used for forced farming and carrying loads; for so called "government jobs".

> ... jobs for the RUF movement which the combatant cannot do because of their engagement in combat activities. Specifically, ... the state farm and individual farms that were run by commanders in Kailahun did use the civilian manpower for such activities. Secondly, the civilians in Kailahun were used to carry logistical materials, including ammunition, rice across the Moa, to the front line areas in the Kono District. In addition, to that, the

[2919] TF1-028, Transcript 20 March 2006, pp. 26-28.
[2920] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 23 May 2005, pp. 59-60.
[2921] Ibid., TF1-179, Transcript 27 July 2005, pp 38-41.
[2922] Ibid., TF-179, Transcript 27 July 2005, p. 43.
[2923] Exhibit 181, NPWJ Conflict Mapping, p. 32. Describes RUF tax system in general.

building of bridges and an air strike that was being constructed in Buedu township. Civilians were used extensively for such activities.[2924]

908. This information was corroborated by other witnesses.[2925] The RUF worked with a network of so called "civilian commanders" who would organise the civilians and their contributions. [redacted] The Third Accused also told them that the women should go hunting and fishing and that those who refused would be in trouble. [redacted] From 1997 to 2000 the civilians of Giema had to deliver cacao, palm oil and meat of animals they had hunted to the RUF. They had to provide manpower for farming and transporting produce for the RUF.[2927] They had to transport the goods to Kailahun town, where they were delivered to the Third Accused in the Gbanyawalu area of Kailahun town. It took up to 200 people to carry the loads of cacao.[2928] The First Accused and other RUF commanders, for instance Mosquito, would request whatever they wanted from the civilians, passing their orders through the Third Accused, who would in turn order the civilians to carry out the task.[2929]

909. TF1-366, stated that civilians were captured at Nimikoro, Sewafe, Guinea, Kombayende and sent to Kailahun to mine diamonds and cultivate farms for the RUF. The witness himself was ordered by the First and the Second Accused, and Bockarie to send civilians to Kailahun.[2930]

910. Defence witnesses, such as DIS-302 affirmed that the RUF captured civilians.[2931] The RUF combatants removed civilians from Kailahun and took them to Giema, specifically into the Joe Bush. Wherever the RUF combatants went, civilians would go with them. Under the command of the first Accused, RUF combatants brought back

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[2924] TF1-371, Transcript 21 July 2006, Closed Session, p. 60 (lines 3-14). See also p. 62-63.
[2925] TF1-367, Transcript 22 June 2006, Closed Session, p. 26 (lines 22-23).
[redacted]
[2930] TF1-366, Transcript 15 November 2005, Closed Session, pp.59-60.
[2931] DIS-302, Transcript 26 June 2007, p. 105, Transcript 27 June 2007, pp. 23-24, p. 62.

captured civilians from the warfront supposedly to save their lives. These captives would be handed over to "chiefs".[2932] The G5 commander was responsible for handing over captives to whosoever wanted them.[2933] The captives, who remained, would stay with the chiefs and were forced to work for them.[2934] Within RUF territory, civilians had to get a pass from the G5 to travel and nobody would dare to travel without it, since persons were arrested, if they did so.[2935] The passes contained the destination, purpose and length of the trip.[2936] DIS-080, a farmer from Bombohun, Pendembu, Bambara Chiefdom,[2937] while testifying that people were brought from the front line for their own security, he nevertheless expressly used the word "capture", saying that RUF combatants would go and capture civilians at the war front and hand them over to G5 commanders.[2938] TF1-330 testified about the G5 in Kailahun District. He said the G5 were RUF soldiers, but it was the unit in control of civilians. Referring to farm produce, TF1-330 said that the civilians would "give everything to the G5s and then they will hand it over to Augustine Gbao who, in return, will give it to Issa Sesay."[2939] Captured persons could move around in RUF controlled territory only and were not allowed to travel to other areas.[2940] DIS-080 further testified that some captured children were under the age of 15.[2941] Some of them stayed with combatant's wives and did domestic work in their houses.[2942]

911. Several witnesses expressly used the word slavery when describing the system of forced labour established in Kailahun.[2943]

[2932] DIS-302, Transcript 26 June 2007, pp. 105-107.
[2933] DIS-302, Transcript 27 June 2007, p. 24.
[2934] DIS-302, Transcript 27 June 2007, pp. 24-25.
[2935] DIS-302, Transcript 27 June 2007, p. 28-29, 31-33.
[2936] DIS-302, Transcript 26 June 2007, pp. 109-110.
[2937] DIS-080, Transcript 5 October 2007, Closed Session, p. 38.
[2938] DIS-080, Transcript 5 October 2007, p. 87; DIS-080, Transcript 8 October 2007, p. 9. This part of the testimony is consistent with the evidence of TF1-036 who states that the G5 would decide who to send to the training base, who to send for farming, and who to send for other domestic works; TF1-036, Transcript 27 July 2005, Closed Session, pp. 41-42.
[2939] TF1-330, Transcript 14 March 2006, p. 25.
[2940] DIS-080, Transcript 8 October 2007, p. 9.
[2941] DIS-080, Transcript 8 October 2007, p.11; DIS-080, Transcript 5 October 2007, p. 88.
[2942] DIS-080, Transcript 5 October 2007, p. 88.
[2943] TF1-330, Transcript 14 March 2006, p. 92; TF1-113, Transcript 2 March 2006, p. 71; TF1-108, Transcript 10 March 2006, p. 43 and Transcript 13 March 2006, p. 99.

i) Forced Farming

912. Several witnesses testified that so called "government farms" or "state farms" were the same; they were farmed for the RUF.[2944] TF1-371, said that at least a dozen civilians worked on each of the RUF government farms. In addition RUF senior commanders had there own private or individual farms that used forced labour as well. The biggest farms belonged to the three Accused and Sam Bockarie. Civilians would usually have their own farm and at times would be requested to go and farm on the RUF or commanders' farms.[2945] The witness defined forced farming as follows:

> They did work on these farms against their will and they were not compensated for the jobs done on the farms and they did not participate in any negotiations, in terms of the timing they are supposed to work there. A person may be busy doing something else on his own farm and he received instruction to go and work on a particular commander's farm, he has to abandon his own farming activities, go to that commander farm, do the work. That is what I mean by forced labour.[2946]

913. The witness was present once at the Third Accused's house in Kailahun town, when the latter organised the civilians who were supposed to go to work on his farm. The witness confirmed that the Third Accused's family had a farm in Sandaru, about 10 miles from Kailahun town and used forced labour as well.[2947]

914. Dennis Koker testified that the Second Accused had a rice farm in Buedu, going towards the Dawa Road. People of the surrounding localities worked there.[2948] TF1-367, testified that forced labour was used by the RUF since the war started in Kailahun. In 1998, when he was there, coffee and cocoa and palm oil were taken from civilians who were forced to work for the RUF in all the small towns. The produce was bagged, sent to the riverside and sold and the money was used to buy ammunition from ULIMO. When forced labour was taking place at a location they would bring people from different villages and put them together, some times there would be up to 100 civilians working.[2949]

[2944] TF1-371, Transcript 21 July 2006, Closed Session, p. 60; TF1-367, Transcript 22 June 2006, p. 26.
[2945] TF1-371, Transcript 21 July 2006, Closed Session, pp. 60-61. Also: TF1-367, Transcript 23 June 2006, Closed Session, p. 34 on Sam Bockarie's CDS - Chief of defence staff – farm. Corroborated by Dennis Koker, Transcript 29 April 2005, pp. 38-39.
[2946] TF1-371, Transcript 21 July 2006, Closed Session, p. 61 (lines 14-21).
[2947] TF1-371, Transcript 1 August 2006, Closed Session, pp. 154-158.
[2948] Dennis Koker, Transcript 28 April 2005, p. 68 and Transcript 29 April 2005, pp. 29-30 and 39.
[2949] TF1-367, Transcript 22 June 2006, Closed Session, pp. 25-26.

915. TF1-113 testified that civilians were forced to work, both on the Government farms and private farms. They would not get any food or a decent place to sleep. The Third Accused and a G5 Officer gathered them[2950] and it was the Third Accused who sent them to the working places.[2951] This information was corroborated by TF1-108, who testified in detail how 200 to 300 civilians were used to farm on the RUF [redacted]. They were forced to work and were guarded by gunmen while working, usually by the RUF boys. During the time that they were working on the RUF farms, they would not be fed. The Third Accused told them to farm on the RUF farm, as well as on private farms.[2952] In 1996 there were 200 people who cultivated the RUF farm in Giema, in 1997 and 1998 there were 400. At that time the RUF captured civilians and forced them to farm. Further, civilians not only had to cultivate the crops but also to carry the produce to the Third Accused in Kailahun. Besides working on the RUF farms and their own farms, the civilians had to cultivate the private farms of the First and Third Accused, and of Mosquito.[2953]

916. TF1-108 testified that the RUF captured civilians forcefully.[2954] For instance, the Third Accused's bodyguard, Korpomeh, was capturing civilians starting from 1998 to 2000. Women had to carry coffee, provided by the villages in Luawa Chiefdom, to the Third Accused in Sandaru.[2955] [redacted] The civilians carried the loads, including ammunition, from Kailahun to Pendembu.[2956]

917. From 1996 to 1998 approximately 200 people were involved in the production of cocoa for the RUF.[2957] Between 1996 and 1998 more than 200 civilians were involved in

[2950] TF1-113, Transcript 2 March 2006, pp. 71-72.
[2951] TF1-113, Transcript 7 March 2006, pp. 28-29
[2952] TF1-108, Transcript 7 March 2006, pp. 104-105.
[2953] TF1-108, Transcript 7 March 2006, pp. 107-111. Also: TF1-108, Transcript 9 March 2006, Closed Session, p. 63.
[2954] TF1-108, Transcript 8 March 2006, p. 46.
[2955] TF1-108, Transcript 8 March 2006, p. 23.
[2956] TF1-108, Transcript 8 March 2006, p. 29.
[2957] TF1-108, Transcript 10 March 2006, p. 27.

the cultivation of farms for the RUF between [redacted] Armed guards would beat the workers if they didn't work properly.[2959]

ii) "Subscription" System

918. Several witnesses described in detail, what they called "subscription". It was some form of levy system, where the villagers had to hand over on a regular basis a certain amount of their agricultural products to the RUF. In Kailahun district this was mostly coffee, cacao and palm oil, meat and fish. The system existed throughout the RUF regime from 1996 to 2001. The Third Accused collected the products through his G5 commanders. The civilians were also forced to carry these products wherever they were ordered to take them.[2960] TF1-108 described the "subscription" system as follows:

> ...whatever the RUFs needed to pursue the war, they would tell us, the civilians, then we too would tell our people and then we would subscribe what they needed to pursue the war.[2961]

919. TF1-330, described how civilians [redacted] had to deliver coffee from 1997 to 2000. It was handed over by the G5 officer to the Third Accused. [redacted] civilians had to hunt and fish for the RUF from 1997 to 2000.[2962] Also the cacao that was harvested was traded by the RUF who kept the commodities.[2963] Since the civilians were not compensated for their work they had to find food to feed their families besides the work they were forced to do for the RUF.[2964] From February to March each year, Lieutenant Morie Fekai, the G5 officer in charge for the RUF farming in Kailahun District under the Third Accused[2965], gathered women for fishing and men for hunting.[2966] All the orders regarding farming, fishing and hunting, as well as the handing over all the "subscriptions" passed through the

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[redacted]

[2959] TF1-108, Transcript 13 March 2006, p. 37. When asked, whether "armed guards, where there were armed guards, were on site equally to protect the farm, weren't they?" the witness answered "No, we were looking after the farms. We, the civilians, who were driving the birds away." Ibid.
[2960] TF1-330, Transcript 14 March 2006, pp. 41-44; TF1-108, Transcript 8 March 2006, pp. 23-24; Transcript 7 March 2006, p. 96.
[2961] TF1-108, Transcript 7 March 2006, p. 91.
[2962] TF1-330, Transcript 14 March 2006, pp. 45-46.
[2963] TF1-330, Transcript 15 March 2006, pp. 45-46
[2964] TF1-330, Transcript 14 March 2006, pp. 83-84.
[2965] See Exhibit 84, Note dated 15 February 1999 from the G5 Office 4th Battalion Headquarters, Kailahun (confidential) and TF1-330, Transcript 16 March 2006, Closed Session, p. 91.
[2966] TF1-330, Transcript 16 March 2006, p. 59.

G5.[2967] All the work that civilians did for the RUF was forced labour[2968], including the "subscription" system.[2969]

920. Defence witness DIS-080, a farmer from [redacted], admitted that from 1993 onwards civilians took palm oil and rice to the riverside at Tedu and Pumaru at the Guinea border. Although he described this as trade, he said that RUF combatants accompanied civilians to the waterside.[2970] This information was corroborated by TF1-367 who said that in 1998 civilians took the products of their private farming, to the riverside markets at the border and sold them there, while the earnings had to be handed over to the RUF.[2971]

921. TF1-093 was abducted by the RUF in Njala in 1996, when she was 15. The rebels captured many civilians from the villages of Njala, Manjehun, and Helawa. TF1-093 and other captured civilians were brought to Kailahun town, where fighting was going on between the Kamajors and the rebels, who captured civilians as they entered Kailahun.[2972] More than 300 RUF's and civilians were based at Bagalagao camp in Kailahun[2973] where [redacted] who took her as his wife.[2974]

922. [redacted] he witnessed how suspected Kamajors or Kamajor collaborators who were detained in the same cells in Kailahun, were taken from the cells by RUF combatants and forced to work for them in their homes and farms.[2975] A record was kept those who were taken away to ensure that the commanders brought the prisoners back. The prisoners were under the direct control of the Third Accused who was the most senior RUF officer in Kailahun Town.[2976] If a battle front

[2967] TF1-330, Transcript 16 March 2006, p. 76.
[2968] TF1-330, Transcript 17 March 2006, pp. 7-8.
[2969] TF1-330, Transcript 16 March 2006, pp. 79-80.
[2970] DIS-080, Transcript 5 October 2007, p. 89-90 and Transcript 8 October 2007, p. 20.
[2971] TF1-367, Transcript 23 June 2006, Closed Session, p. 40.
[2972] TF1-093, Transcript 29 November 2005, p. 81-85.
[2973] TF1-093, Transcript 29 November 2005, p. 89.
[2974] TF1-093, Transcript 29 November 2005, p. 76-77.
[redacted]

soldier came to town and was travelling to the next village, he would call for a civilian to carry his load.[2977]

iii) Diamond Mining

923. TF1-108, [redacted], testified that he and some other civilians were forced to mine diamonds for Bockarie, who had people under his command who would capture civilians and force to mine diamonds for him.[2978] The Third Accused was present while there was diamond mining going on in Giema. Forced mining for the RUF was also carried out in Yandawahun, in Mafindo (Mafindor), on the Guinea border, and in Jojoima in Malema Chiefdom.[2979] TF1-330 testified that he went to Giema and on the route Boabu he saw civilians mining for diamonds. The Third Accused was overseeing the miners, there were many miners working, the witness felt pity for the miners and they were working without food. The same witness also heard that mining was also being done at Mafindor and Nyandehun.[2980]

924. TF1-366, [redacted], said that diamond mining in Kailahun started in 1996 and continued up to 2002. Kennedy was the mining commander in 1998. He reported to the First and the Second Accused and to Bockarie. At that time, about 200 civilians were forced to mine. The RUF captured them and brought them to the site forcefully.[2981] Diamonds were mined in Kailahun District at Yenga, Morfindo, Jojoima and Jabama, Golahun. The diamonds were brought by Sam Kolleh to TF1-366, who gave them to the First Accused.[2982] [redacted] All the diamond proceeds came [redacted] he supplied all of the materials and deployed people in all those areas to do mining. TF1-366 reported to the first Accused. He was replaced as [redacted] in 2002.[2983]

[2977] TF1-168, Transcript 3 April 2006, p. 24.
[2978] TF1-108, Transcript 8 March 2006, p. 37. The information that in Giema civilians were mining diamonds was corroborated by TF1-330, Transcript 14 March 2006, pp. 48-49.
[2979] TF1-108, Transcript 8 March 2006, pp. 38-40.
[2980] TF1-330, Transcript 14 March 2006, pp. 48-50.
[2981] TF1-366, Transcript 10 November 2005, Closed Session, pp. 8-13.
[2982] TF1-366, Transcript 10 November 2005, Closed Session, pp. 7-8.
[2983] TF1-366, Transcript 10 November 2005, Closed Session, pp. 14-16.

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iv) Other Forms of Forced Labour

925. TF1-371, testified that civilians in Kailahun District were used to carry logistical material, ammunition, weapons, food for the RUF across to the front lines. The number of civilians they used depended on the quantity of items that were to be transported and the civilians were forced to carry the loads:

> They were again forced to do it. They didn't have option, of course. They were not paid. They did not negotiate it with anybody. The fact of the matter is that the number required would be produced and they just take the items to the destination they are supposed to.[2984]

926. [redacted] There, he should meet Mohamed Kamara, the mining commander in Kono. Mohamed Kamara sent some of the civilians mining for him to Buedu.[2985] They were forced to carry those loads for two days and "they wouldn't refuse to do it" since "everybody was fighting for survival. So they would do those works just so that they would survive to the end of the war."[2986]

927. Dennis Koker, a former SLA soldier who retreated with the Junta from Freetown in 1998 and subsequently became an MP adjutant at Buedu under the overall command of Mosquito[2987], testified that about 500 civilians were forced to work on the farms in Buedu for no salary and no benefits. When a civilian tried to hide, his property would be looted.[2988] If work had to be done, they would gather civilians from the whole of Kailahun District. Some had to walk about 20 miles back home after work. The witness said civilians were treated like slaves, and he observed this enslavement during the two years he was in Buedu, from 1998 to 1999. Once the witness was told by the First Accused to gather civilians for work. The practice in place during the time was that all captives were brought to Mosquito. The fate of the captives was then determined by the First Accused, [redacted]

[2984] TF1-371, Transcript 21 July 2006, Closed Session, p. 62 (lines 24-28).

[redacted]

[2987] Dennis Koker, Transcript 28 April 2005, pp. 42, 52-55.
[2988] Dennis Koker, Transcript 28 April 2005, pp. 57 and 61.

[redacted] and Mosquito.[2989] Mosquito never decided anything without the First Accused.[2990] Some of the captured civilians were sent for military training. The Second Accused would personally bring people from all parts of the country where the Junta troops had attacked to be trained as soldiers.[2991]

928. The witness further testified that it was a common practice amongst Junta commanders, including the First and Second Accused, to enslave children as domestic servants:

> Like General Issa, he had children but they were not his own children, they were people's children. They took them as domestic servants. In like manner, Morris Kallon. It was a sort of practice which was prevalent amongst the commanders.[2992]

929. TF1-314 was abducted at the age of 10 in Masingbi, Tonkolili District, in 1994 by [redacted] and other RUF combatants. She was raped by three RUF combatants and then forced to carry a bag, although she had problems to move. She was taken to Buedu together with 50 other civilians. In Buedu the First Accused, the overall commander there, passed the order for civilians to be trained. The Second and Third Accused, CO Blood and Scorpion were other RUF commanders present in Buedu at that time. More than 50 civilians, of the age between 10 and 25 years, were trained in the jungle by TF1-362.[2993] TF1-314 stayed in Buedu from 1994 to 1998 in a SGU. The children were used for "food finding missions", during which they would loot goods from villages. At Buedu, the RUF commanders, including the three Accused kept girls (also called SGUs) to launder, cook and do other domestic chores.[2994] TF1-314 was again raped and became pregnant twice when she was 11 years old. She stayed with the second RUF combatant who had raped her and worked for him. The First Accused was his commander.[2995] Elderly men and women were captured and brought to Buedu to uproot grass from RUF farms. The civilians kept at

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[2989] Dennis Koker, Transcript 28 April 2005, pp. 61-62 and 80-81.
[2990] Dennis Koker, Transcript 28 April 2005, p. 86.
[2991] Dennis Koker, Transcript 28 April 2005, pp. 66-67.
[2992] Dennis Koker, Transcript 28 April 2005, p. 62.
[2993] TF1-314, Transcript 2 November 2005, pp. 24-29 and Exhibit 45.
[2994] TF1-314, Transcript 2 November 2005, pp. 32-36.
[2995] TF1-314, Transcript 2 November 2005, pp. 38-40 and Exhibit 47.

Buedu could not escape because they would have been killed if they were caught attempting to escape.[2996]

930. TF1-113, testified that she and her family were captured by the RUF in [redacted] without getting food for her work.[2997] She was taken to [redacted] where she would stay for three years. There, the First Accused was the overall commander and the Third Accused was the G5 officer. If the RUF needed civilians to carry properties or for farming they would go to the Third Accused's office and he would allocate people for that.[2998]

931. In 1997 the witness moved to Kailahun town. After the Coup, the people were told to return to their villages, since the war was over. However, one day the two RUF commanders who were in charge of Kailahun town, the Third Accused and the MP commander, Joe Fatoma, went to those villages and brought these people back to Kailahun since Mosquito had ordered to summon them and investigate them; to "screen" them for Kamajors. They were brought to the Third Accused's office and 67 people were set aside for being alleged Kamajors. They were kept in custody and used to do different kind of labours. They had to weed, brush the town, find food in the bush and cook all day long.[2999] Later, after the retreat from Freetown in February 1998, they were shot near the police station in Kailahun Town.[3000] [redacted]

[redacted] After the ECOMOG intervention in Freetown in 1998, many RUF and AFRC combatants would come to Kailahun. Johnny Paul Koroma passed through Kailahun town

[2996] TF1-314, Transcript 2 November 2005, pp. 43-44.
[2997] TF1-113, Transcript 2 March 2006, Closed Session, pp. 37-39.
[2998] TF1-113, Transcript 2 March 2006, pp. 41-42.
[2999] TF1-113, Transcript 2 March 2006, pp. 45-51. Also see: p. 53.
[3000] TF1-113, Transcript 2 March 2006, pp. 60-61.
[3001] TF1-113, Transcript 2 March 2006, pp. 66-69.

on his way to Kangama. The Junta forces brought many civilians they had captured in different places and forced them to carry their luggage. They would then be taken to the G5 office in Kailahun and investigated.[3002] The adults were forced to farm.[3003] [redacted]

933. TF1-141, a former RUF child soldier, testified that civilians, including women and children, were forced to carry looted goods during two day trip from Kono to Kailahun just after RUF and AFRC were forced out of Freetown in February 1998. Those who were not able to carry the heavy loads and could not walk any longer were executed in the hills towards Sandaru.[3005] Upon arrival in Kailahun town, they were brought to the G5 Headquarters where they met the Third Accused, who was the G5 commander. He "screened" them and the older women were taken to work on the government farm owned by the RUF, located between Benduma and Buedu. The witness saw civilians working on the farm supervised by combatants, who at times hit them. The civilians stayed at Benduma and would go to the farm every morning. Others slept at Buedu. TF1-141 and other young men were taken to the training base.[3006]

934. TF1-360 testified that when Superman was summoned to Buedu in 1998 by Mosquito and given ammunition for the Fitti Fatta mission, they used civilians to carry the ammunition and other material from Kailahun to Kono.[3007] TF1-330, testified that when the RUF came to his town in 1991, Mosquito, the First and Third Accused and Foday Sankoh told them that "whatever thing somebody had, even yourself, your individual self, was theirs."[3008] Based on his position as civilian commander the witness would relay orders from the RUF to civilians. These orders included cultivating farms for the RUF as well as for RUF commanders. The produce from the farms would be given to the G5, who would give it to the Third Accused, who then gave it to the First Accused. The witness further testified that they cultivated the private farms for Mosquito, the First and the Third

[3002] TF1-113, Transcript 2 March 2006, pp. 52-54.
[3003] TF1-113, Transcript 2 March 2006, pp. 71-72.
[3004] TF1-113, Transcript 6 March 2006, p. 37.
[3005] TF1-141, Transcript 11 April 2005, pp. 106-108.
[3006] TF1-141, Transcript 12 April 2005, pp. 15-19.
[3007] TF1-360, Transcript 20 July 2005, p. 54.
[3008] TF1-330, Transcript 14 March 2006, p. 20 (lines 25-26).

Accused. Forced farming for the RUF occurred from 1996 up to 2000. The people who worked on the First Accused's farm were treated like slaves. If they did not do the work, they would be beaten. Civilians were also forced to build a barn to store the rice they harvested.[3009] The witness himself had developed a hernia from carrying heavy loads.[3010]

[redacted] TF1-366, said that civilians carried military supplies coming from Liberia from Kailahun to Kono. The civilians were forced to carry loads. Sometimes they were detained during a night if they refused to do so. When the RUF prepared an operation, the Third Accused would dispatch his "boys" together with MPs to summon civilians and assign the civilians to where they were needed. TF1-366 said all the civilian manpower the RUF commanders received, was organised by the Third Accused. He was the one who dispatched the civilians to the RUF in the jungle and he was the one who would send message to them.[3011] That was the reason why the Third Accused was stationed in Kailahun.[3012] [redacted]

936. Dennis Koker said that between 100 to 500 civilians were used as slaves in Kailahun District, including to work on an air field. Koker testified that that he went to the air field where the civilians were forced to work and that Sesay "told me that we should make people to work there."[3014]

937. Defence witness DIS-225, who was [redacted] in Giema and Giehun during the war, stated that his main role was to organise civilians to carry loads for RUF fighters whenever they were returning from the frontlines to their homes. His evidence also suggests that the civilians were forced to carry the loads.[3015]

[3009] TF1-330, Transcript 14 March 2006, pp. 24-25, 27, 28, 30-31.
[3010] TF1-330, Transcript 14 March 2006, pp. 50-51.
[3011] TF1-366, Transcript 17 November 2005, Closed Session, pp. 85-87.
[3012] TF1-366, Transcript 17 November 2005, Closed Session, p. 87.
[3013] TF1-330, Transcript 15 March 2006, pp. 36-38.
[3014] Dennis Koker, Transcript 28 April 2005, p. 61.
[3015] DIS-225 Transcript 11 October 2007, pp.44-47.

g) Freetown and the Western Area

938. Between 6 January 1999 and 28 February 1999, in particular as the AFRC/RUF were being driven out of Freetown and the Western Area, members of the AFRC/RUF abducted hundreds of civilians, including a large number of children, from various areas in Freetown and the Western Area, including Kissy, and Calaba Town.[3016] These abducted civilians were used as forced labour. The January 1999 occupation of Freetown by AFRC/RUF forces "was characterized by the systematic and widespread perpetration of ... gross human rights abuses against the civilian population..." Abductions were widespread throughout the offensive.[3017]

939. George Johnson testified that when over 2,000 AFRC/RUF combatants entered Freetown on 6 January 1999, they brought around 2,000 civilians with them. These civilians had been captured between Mansofinia, Camp Rosos, Major Eddie Town and Newton, and they were used to carry arms and ammunition on the route to Freetown.[3018] During the retreat from Freetown civilians were abducted. At the Kissy Mental Hospital Bishop Ganda, eight Catholic nuns and other civilians were abducted. Three nuns were later killed by Foday Bah Marah, the civilians were forced to go along with the retreating troops.[3019]

940. TF1-334, witnessed numerous abductions in Freetown and the surrounding areas in January 1999.[3020] At the time the AFRC/RUF troops lost the Eastern Police, Gullit said they should start to abduct civilians from Freetown to attract the attention of the international community. When the troops lost Upgun, abductions started immediately. The combatants broke into houses and civilians, especially young girls, young children, were taken to the HQ at PWD Junction.[3021] At the time Gullit passed this order almost everybody had civilians and it was the responsibility of the commander who abducted the civilians to secure them. These civilians carried loads and did household chores when the troops started

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[3016] Indictment, paras 69-76. However, in the Decision on Motion for Acquittal the Trial Chamber found, upon review of the existing evidence, in accordance with the Prosecution's concessions that no evidence was adduced with respect to Peacock Farm in the indictment. Decision on Motion for Acquittal, p. 31.
[3017] Exhibit 174, Human Rights Watch Report June 1999, "Getting Away With Murder Mutilation Rape", Vol. 11, No. 3(A., highlighted portions at pp. 7-9 (19375-19377), Section entitled "Systematic Targeting of Civilians" at pp. 10-11 (19378-19379)] ("Exhibit 174, HRW Report 1999"), p. 10 (19378).
[3018] George Johnson, Transcript 18 October 2004, pp. 63-65.
[3019] George Johnson, Transcript 18 October 2004, pp. 67-68 and 72,75.
[3020] Exhibit 119, TF1-334 Transcript from AFRC Trial, 14 June 2005, p. 25.
[3021] Ibid., Transcript 14 June 2005, pp. 63-64.

retreating from PWD Junction up to the mental home towards Benguema. Young girls abducted in Freetown became the wives of the various commanders.[3022] More than 300 civilians were with the troops in Benguema and were taken with them when they pulled out of Benguema.[3023] The abducted civilians carried the loads of the commanders. There was no way they could escape.[3024] Abducted children, most of them 9 or 10 years old, were later trained as SBUs.[3025] The RUF was at Waterloo, headed by Colonel Senegeles who was with the First and Second Accused and Superman when they withdrew after the Tombo operation.[3026]

941. This insider information was corroborated by crime base and expert witnesses. TF1-028, a woman who had been abducted in Karina, Bombali District, by Junta forces, was taken by SAJ Musa and Tito's group to Port Loko and from there to Waterloo,[3027] Benguema, Tombo Hill, Grafton, Calaba Town Hill, before finally entering Freetown, on 6 January 1999. The group that abducted TF1-028 stayed in Freetown for about a month until they had to retreat from the ECOMOG troops. They left Freetown through Yams Farm to Waterloo and Masiaka.[3028] TF1-029, who was 16 at that time and lived in Wellington, testified that she and about fifty other civilians were abducted on 22 January 1999 from Wellington by the retreating RUF and SLA forces and taken away through Calaba town on to Benguema. In Calaba she was raped ten times by [redacted] of the AFRC who took her as his wife.[3029] TF1-097, a fisherman from Tombo, was forced by RUF under the command of a Captain Blood to carry a bag with things they had looted from him when they attacked and burned Tombo on 23 December 1998. They said that if he turned he would be fired at.[3030] The witness ran to the bush and decided not to return to Tombo since the RUF was there, had burned houses and since he saw seven civilians corpses in the street. It took him five days to get to Freetown where he stayed with family members in Kissy.[3031] When Junta forces entered Freetown on the 6 January 1999 the witness and his family members

[3022] Ibid., Transcript 14 June 2005, pp. 119-120.
[3023] Ibid., Transcript 14 June 2005, pp. 115-116.
[3024] Ibid., Transcript 14 June 2005, pp. 119.
[3025] Ibid., Transcript 14 June 2005, pp. 121-122.
[3026] Ibid., Transcript 15 June 2005, pp. 12-13.
[3027] TF1-028, Transcript 20 March 2006, pp. 26-28.
[3028] TF1-028, Transcript 20 March 2006, pp. 29-33.
[3029] TF1-029, Transcript 28 November 2005, pp. 10-14.
[3030] TF1-097, Transcript 28 November 2005, pp. 77-78.
[3031] TF1-097, Transcript 28 November 2005, pp. 79-80.

fled from Kissy for a week. When the witness went back to his house he was captured by RUF combatants who flogged him and threatened to kill him. He saw RUF fighters with machetes, sticks and axes. He was then released but later on, his hands were chopped off by a Captain Blood who said, he was AFRC/RUF.[3032]

942. TF1-167 talked about the attack against Masiaka, where arms and ammunitions were seized and civilians abducted to carry the seized material.[3033] When the RUF and AFRC troops pulled out from Freetown, civilians were abducted in Kissi as well.[3034] TF1-022 told about a woman who was abducted by the rebels in Freetown and was finally released from Okra Hills.[3035] TF1-081 was captured by rebels when he brought his wife's younger brother to the hospital. He had to leave him behind since he was accused of supporting the ECOMOG.[3036]

943. TF1-081, a [redacted] testified that after the January 1999 invasion of Freetown, many abducted children subsequently returned. [redacted] were abducted in Freetown during the January 6 invasion.[3039] TF1-296, who worked as child protection officer for UNICEF in Sierra Leone between 1998 and 2002, said that due to the events in Freetown in January 1999 UNICEF registered 4,800 missing children in February 1999. The first meeting with the RUF and AFRC was to persuade them to release the children who had been abducted by the rebel forces. [3040]

[3032] TF1-097, Transcript 28 November 2005, pp. 85-86, 89-93, p. 109.
[3033] TF1-167, Transcript 19 October 2004, pp. 63-68.
[3034] TF1-167, Transcript 18 October 2004, pp. 62 and 65-72.
[3035] TF1-022, Transcript 29 November 2005, pp. 51-54.
[3036] TF1-093, Transcript 29 November 2005, pp. 28-30.
[3037] Exhibit 104a, TF1-081 Transcript from AFRC Trial, pp. 5-6 (17084-17085).
[3038] Exhibit 104a, TF1-081 Transcript from AFRC Trial, pp. 5-6 (17084-17085) and 8 (17087).
[3039] Exhibit 104a, TF1-081 Transcript from AFRC Trial, Transcript 6 April 2006, p. 19.
[3040] TF1-296, Transcript, 11 July 2006, pp. 108-109.

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h) Port Loko

944. About the month of February 1999, the AFRC/RUF fled from Freetown to various locations in the Port Loko District. Members of the AFRC/RUF used civilians, including those that had been abducted from Freetown and the Western Area, as forced labour in various locations throughout the Port Loko District including Port Loko, Lunsar and Masiaka. AFRC/RUF forces also abducted and used as forced labour civilians from various locations the Port Loko District, including Tendakum and Nonkoba.[3041]

945. TF1-345, testified that she was captured by rebels around the 6 January 1999, as part of a group of about 40 Nonkoba residents hiding in the bushes near Nonkoba and Chendekom (or Tendakum).[3042] They were detained there for several days. During their captivity, they had to pound rice throughout the day until night time.[3043] They were not given anything to eat or drink and told, if they wanted to eat, they should eat faeces. TF1-345's daughter aged 9 was in the hands of the rebels and was used to do "little errands" like cooking. Some captives had to build huts for the rebels.[3044] TF1-345 was not free to leave. The commander who gave the orders was called Abu Kanu and the witness learned later on that the commander of these rebels was Superman.[3045] This information was corroborated by TF1-255, a farmer from Chendekom, who was working on his farm on the 29 May 1999 when Chendekom was attacked by rebels coming from the direction of Masiaka.[3046] After being captured, TF1-255 and some of his family members were forced to build 50 huts for the combatants' accommodation during two days after they had been threatened with death. They needed the huts since all the houses in the village were burnt in the attack.[3047] The forced workers were seriously ill-treated, flogged, hacked with cutlasses, locked up[3048] and threatened to be killed if they escaped: "...The one who was guarding us had a gun and he wore combat, and he was the one that was mandated to shoot at us if we attempted to run."[3049]

[3041] Indictment, para. 76.
[3042] TF1-345, Transcript 19 July 2006, pp. 26-27, 30 and 43.
[3043] TF1-345, Transcript 19 July 2006, p. 32.
[3044] TF1-345, Transcript 19 July 2006, pp. 31-36.
[3045] TF1-345, Transcript 19 July 2006, pp. 42-43.
[3046] TF1-255, Transcript 18 July 2006, p. 68-72.
[3047] TF1-255, Transcript 18 July 2006, p. 82-84.
[3048] TF1-255, Transcript 18 July 2006, pp. 86-91.
[3049] TF1-255, Transcript 18 July 2006, p. 86, (lines 4 to 6).

946. He was also forced at gunpoint to search for rice in the bush. While going there he saw five dead bodies in the outskirts of Cheren.[3050] After eight days imprisonment in Cheren, a Captain Rittin, the commander of the rebels, told TF1-255 and the other captives that they must move to Lunsar. The witness and other civilians carried rice to Lunsar. Before entering the town, they were stopped by another group of soldiers sent by Superman.[3051] While in Lunsar, soldiers under Superman forced them to fetch and to pound rice.[3052]

C. Liability of the Accused

947. The evidence shows that the RUF as an armed group committed the crimes listed in Count 13. Additionally, the evidence demonstrates beyond reasonable doubt that the three Accused planned, organized and ordered widespread abduction, capture and use of civilians as forced labour, and also participated directly in and incited others to participate in the criminal acts charged under Count 13 of the Indictment.

a) Joint Criminal Enterprise

948. The Prosecution submits that on the evidence presented in relation to the Junta period above in Section V (C) on joint criminal enterprise, the Trial Chamber should be satisfied beyond a reasonable doubt of the guilt of the three Accused for the crimes under Count 13, committed pursuant to the theory of joint criminal enterprise.

949. The practice to capture civilians in RUF controlled areas, to detain them and use them in forced labour for different tasks, such as carrying looted goods, weaponry and ammunition was clearly part of a common war effort and a key element of the RUF strategy to achieve its goal to gain control over Sierra Leone. Diamond mining for instance was a pillar of the RUF movement and the main source of income that enabled the RUF to lead a brutal, 11 year long armed conflict. The use of forced labour on RUF farms was necessary to feed the troops[3053] and the use of civilians for other tasks, in particular the carrying of arms, ammunition and looted goods by captured civilians was indispensable for the war logistics of the RUF movement. The evidence adduced shows that civilians in the

[3050] TF1-255, Transcript 18 July 2006, pp. 79 and 96.
[3051] TF1-255, Transcript 18 July 2006, pp. 97-98 and 100.
[3052] TF1-255, Transcript 18 July 2006, p. 104-105.
[3053] TF1-108, Transcript 7 March 2006, p. 91.

RUF controlled areas were considered as some kind of RUF property, as the land, the produce, the goods and the private property of the people. [3054] Given the finding of the Appeals Chamber in the AFRC case that not only the objective, but also the means to achieve the objective, constitute the common criminal purpose underlying the joint criminal enterprise[3055], it is submitted that the crimes charged in Count 13 constituted an essential means of the RUF criminal design, in which each of the Accused participated. The Prosecution submits further that the *mens rea* requirement is fulfilled, as the three Accused, who intended to take part and contribute to the common plan, also intended to commit the crimes charged under Count 13.

b) Liability under Article 6(1) of the Statute

950. According to Article 6(1) a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime. "Committing" generally means the direct and physical perpetration of the crime by the offender.[3056] "Planning" entails that one or more persons design the commission of a crime at both the preparatory and execution phases,[3057] and proof of the existence of a plan can be deduced from circumstantial evidence.[3058] The accused's participation is substantial even when the crime is committed by another person.[3059]

951. The evidence adduced shows that all three Accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes charged under Count 13 of the Indictment.

i) First Accused

952. The First Accused directly ordered subordinates to gather civilians for forced labour.[3060] Diamonds mined by forced labour were given to the First Accused.[3061] The First

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[3054] TF1-330, Transcript 14 March 2006, p. 20 (lines 25-26).
[3055] *Brima et al* Appeal Judgement, para. 76.
[3056] *Kayishema and Ruzindana* Appeal Judgment, para. 187; ICTY, *Tadić* Appeal Judgment , para. 188; ICTY, *Kunarac* and Others Judgment (TC), para. 390; *Semanza* Judgment (TC), para. 383.
[3057] *Brđanin* Trial Judgement, para. 268; *Stakić* Trial Judgement, para. 443; Krstić Trial Judgement, para. 601.
[3058] *Blaškić* Trial Judgement, para. 279.
[3059] *Bagilishema* Trial Judgement, para. 30.
[3060] Dennis Koker, Transcript 28 April 2005, pp. 61.

Accused took diamonds to Liberia to Charles Taylor in exchange for weapons, food and medicines.[3062] He had his bodyguards mining for him in different diamond mines. They were capturing civilians and forcing them to labour in the mines.[3063] It was the first Accused who sent products from the RUF farms to the frontlines.[3064] The First Accused used civilians in forced labour to work on his private farm in Buedu[3065] and he headed a RUF farm.[3066] The First Accused used children as domestic slaves.[3067] The first Accused forced civilians to take part in military operations he commanded.[3068]

ii) Second Accused

953. The Second Accused directly ordered civilians to carry looted goods under inhuman conditions for several days.[3069] He would personally bring captured civilians from all parts of the country to be trained for military purposes.[3070] The Second Accused enslaved children as domestic servants.[3071] As overall commander in Kono the second Accused planned, instigated and ordered the capture and abduction of civilians and their forceful use in the mining sites in Kono district.[3072] The Second Accused had a farm in Buedu and had civilians of the surrounding localities working for him.[3073] The Second Accused ordered civilians to be sent to Kailahun for forced labour.[3074] The Second Accused forced civilians to take part in military operations; he personally selected those who should be trained.[3075] The Second Accused punished civilians brutally, for instance if they did not do their work

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[3061] TF1-366, Transcript 10 November 2005, Closed Session, pp. 7-8 and 14-16.
[3062] TF1-366, Transcript 10 November 2005, pp. 33-34.
3063 TF1-366, Transcript 7 November 2005, 91-94; TF1-367, Transcript 21 June 2006, Closed Session, pp. 58-59
[3064] DIS-177 Transcript 4 October 2007, pp. 102-103 and Transcript 5 October 2007, pp. 13-15. In cross-examination DIS-177 admitted, that the first Accused had given him food once in Pendembu and that was the reason why he came to testify for the first Accused. Transcript 5 October 2007, p. 25.
[3065] DIS-178 Transcript 19 October 2007, pp. 5-7 and DIS-177 Transcript 5 October 2007, p. 18; TF1-108, Transcript 7 March 2006, pp. 104-105.
[3066] DIS-302, Transcript 27 June 2007, pp. 7.
[3067] Dennis Koker, Transcript 28 April 2005, pp. 46 and 62.
[3068] TF1-263, Transcript 6 April 2005, pp. 27-31.
[3069] TF1-141, Transcript 11 April 2005, pp. 106-108; TF1-366, Transcript 8 November 2005, p. 66.
[3070] Dennis Koker, Transcript 28 April 2005, pp. 66-67.
[3071] Dennis Koker, Transcript 28 April 2005, pp. 57 and 61.
[3072] TF1-366, Transcript 10 November 2005, Closed Session, pp. 7-13; TF1-041, Transcript 10 July 2006, Closed Session, pp. 48-50.
[3073] Dennis Koker, Transcript 28 April 2005, p. 68 and Transcript 29 April 2005, pp. 29-30 and 39.
[3074] TF1-366, Transcript 15 November 2005, pp.59-60.
[3075] TF1-263, Transcript 6 April 2005, pp. 27-31.

properly.[3076] The Second Accused was the commander in charge of camps where civilians were detained.[3077] The Second Accused instructed and ordered captured civilians to go on so called "food finding missions" where they had to loot from other civilians.[3078] He brought captured civilians in trucks from RUF controlled areas for forced mining in Kono[3079] and ordered RUF commanders to do so.[3080] The Second Accused used forced labour for private mining.[3081]

iii) Third Accused

954. As a senior RUF commander in the logistically and strategically important Kailahun District, the Third Accused had from 1996 until 1998 a key function in the forced exploitation of the civilian manpower for the RUF.[3082] He was the one who dispatched the civilians to the RUF commanders when they needed manpower[3083] and he was the one who organized the forced RUF farming through his G5 commanders at private and "government" farms.[3084] The Third Accused was also in charge of the so called "subscription" system, established mainly in Kailahun which forced civilians to render their harvest to the RUF.[3085] In addition, the Third Accused had his own farm where he used forced labour.[3086] The evidence clearly shows that the civilians were coerced by force to work for the RUF[3087] and several witnesses referred to the living and working conditions in Kailahun as "slavery."[3088]

[3076] TF1-263, Transcript 6 April 2005, pp. 23-24.
[3077] TF1-263, Transcript 6 April 2005, pp. 11-13 and pp. 15-16.
[3078] TF1-141, Transcript 11 April 2005, pp. 90-94.
[3079] TF1-367, Transcript 22 June 2006, Closed Session, pp. 52-53.
[3080] TF1-041, Transcript 10 July 2006, pp. 48-49.
[3081] TF1-367, Transcript 22 June 2006, Closed Session, pp. 51; TF1-366, Transcript 7 November 2005, pp. 92-93.
[3082] TF1-108, Transcript 8 March 2006, p. 29.
[3083] TF1-366, Transcript 17 November 2005, Closed Session, pp. 85-87; TF1-113, Transcript 2 March 2006, pp. 41-42; TF1-108, Transcript 9 March 2006, p. 63.
[3084] TF1-330, Transcript 14 March 2006, pp. 41-44; TF1-108, Transcript 7 March 2006, pp. 104-105 and Transcript 8 March 2006, pp. 23-24; Transcript 7 March 2006, p. 96; TF1-330, Transcript 14 March 2006, pp. 24-25, 27, 28, 30-31; TF1-113, Transcript 2 March 2006, pp. 71-72 and Transcript 7 March 2006, pp. 28-29.
[3085] TF1-330, Transcript 14 March 2006, pp. 41-46.
[3086] TF1-108, Transcript 7 March 2006, pp. 107-111; TF1-371, Transcript 1 August 2006, Closed Session, pp. 154-158; Also see: TF1-108, Transcript 9 March 2006, p. 63.
[3087] TF1-371, Transcript 1 August 2006, Closed Session, pp. 154-158.
[3088] TF1-330, Transcript 14 March 2006, p. 92; TF1-113, Transcript 2 March 2006, p. 71; TF1-108, Transcript 10 March 2006, p. 43 and Transcript 13 March 2006, p. 99.

955. The Third Accused ensured that captured civilians were "screened" (investigated) and dispatched them for various tasks.[3089] Further, he was directly in charge of the RUF detainees in Kailahun.[3090] Evidence shows that in this function the Third Accused gave the order to severely ill-treat TF1-113 [redacted].[3091] The Third Accused was also in charge of the detention of 67 alleged Kamajors in Kailahun and their use for different kind of labours, and he was also the senior commander when they were subsequently executed following an order of Sam Bockarie.[3092] The Third Accused was a high ranking RUF commander where captured civilians were trained for military purposes.[3093]

956. The Prosecution therefore submits that the three Accused bear individual criminal responsibility under Article 6(1) of the Statute for committing, planning, instigating, ordering, or alternatively otherwise aiding and abetting in the planning, preparation or execution of the crime of conscripting, enlisting and/or using children to participate actively in hostilities during the timeframe charged in the Indictment.

c) Liability under Article 6(3) of the Statute

957. The general requirements to be fulfilled for a superior to be criminally responsible for the acts of his subordinates as set out in Article 6 para. 3 of the Statute, including the existence of a superior-subordinate relationship and the Accuseds' effective control over their subordinates,[3094] have been discussed earlier in section V. B. Superior Responsibility: Article 6(3) of the Statute, above. Remains to show that the three Accused as superiors had effective control over subordinates, to the extent that they would have been able to prevent them from committing crimes or punish them after they committed the crimes[3095], and that they knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to

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[3089] TF1-141, Transcript 12 April 2005, pp. 14-15; Witness TF1-113 describes what is meant by "screening," TF1-113, Transcript 2 March 2006, p. 53.
[3090] TF1-168, Transcript 31 March 2006, pp. 66-67.
[3091] TF1-113, Transcript 2 March 2006, pp. 66-68.
[3092] TF1-113, Transcript 2 March 2006, pp. 48-51 and 60-63.
[3093] TF1-314, Transcript 2 November 2005, pp. 27-29 and Exhibit 45.
[3094] *Brima et al* Appeal Judgement, para. 39.
[3095] *Delalić et al* Appeal Judgement, para. 198.

prevent such acts or to punish the perpetrators thereof, in relation to the specific crimes of Counts 13.

958. As the Trial Chamber found in the AFRC case, the effective control of the Accused can be derived at least in part by virtue of their positions within the RUF as a military organisation with a clear hierarchy and chain of command, as described above in the section V. B. Superior Responsibility: Article 6(3) of the Statute.[3096]

959. In the light of the above the Prosecution submits, that all three Accused are criminally responsible as superiors under Article 6(3) of the Statute for the crimes committed by their subordinates for the criminal acts charged under Count 13 of the Indictment.

[3096] *Brima et al* Trial Judgement, paras 538-539.

XI. COUNT 14 – PILLAGE

960. Count 14 of the Indictment charges Issa Sesay, Morris Kallon and Augustine Gbao under Article 6(1) of the Statute and, or alternatively, under Article 6(3), with the crime of pillage. Count 14 alleges that "[a]t all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property." Pillage is a violation of Common Article 3, punishable under Article 3(f) of the Statute.[3097]

A. Applicable Law and Elements of Crime

961. Article 8(2)(a)(iv) of the ICC Statute refers to "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" under grave breaches of the Geneva Conventions. Article 8(2)(b)(xvi) of the same Statue refers to "Pillaging a town or place, even when taken by assault" under "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law".

962. Accordingly and in addition to the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute, both Trial Chambers in their respective judgements held that the crime of pillage within the meaning of Article 3(f) of the Statute is comprised of the following specific elements:

1. The perpetrator unlawfully appropriated property.[3098]
2. The appropriation was without the consent of the owner.
3. The perpetrator intended to deprive the owner of the property.[3099]

963. The *mens rea* for pillage is satisfied where it is established that the Accused intended to appropriate the property by depriving the owner of it.[3100]

964. Both Trial Chambers considered the inclusion of the additional requirement that the appropriation be for private or personal use to be "an unwarranted restriction on the

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[3097] Indictment, paras 77-82.
[3098] *Kordic and Cerkez* Appeal Judgement, paras 79 and 84.
[3099] *Brima et al* Trial Judgement, para. 755 and *Fofana et al* Trial Judgement, para. 165.
[3100] *Kordic and Cerkez* Appeal Judgement, para. 84. *See also Naletilic and Martinovic* Trial Judgement, para. 612, fn. 1498; *Celebici* Trial Judgement, para. 590.

application of the offence of pillage" [3101] and "unduly restrictive", so that it "ought not to be an element of the crime of pillage."[3102] The prohibition against pillage contained in Article 3(f) of the Statute covers both organised pillage and pillage resulting from isolated acts of indiscipline. It extends to all types of property, including State-owned and private property:[3103]

> ...the ICTY in the case of *Čelebići* noted that 'plunder' should be understood as encompassing acts traditionally described as 'pillage', and that pillage extends to cases of 'organised' and 'systematic' seizure of property from protected persons as well as to 'acts of looting committed by individual soldiers for their private gain'.[3104]

965. The protected property is not limited to civilian property and the offence includes cases where property is given to third persons and not only used by the perpetrator.[3105]

966. Pillage does not require the appropriation to be extensive or to involve a large economic value.[3106] In that regard, the Prosecution recalls that the Trial Chamber in the CDF Judgement concurred with the ICTY Trial Chamber in *Naletilic and Martinovic* in that pillage "may be a serious violation not only when one victim suffers severe economic consequences because of the appropriation, but also, for example, when property is appropriated from a large number of people. In the latter case, the gravity of the crime stems from the reiteration of the acts and from their overall impact".[3107]

967. Regarding specifically acts of burning charged as pillage under Count 14, both Trial Chambers in the AFRC and CDF Judgements have considered that the core element of appropriation required for the crime of pillage was not satisfied in the commission of an act of burning.[3108] Trial Chamber I in the CDF Judgement held that:

[3101] *Fofana et al* Trial Judgement, para. 160 referring to *Norman et al* Decision on Motion for Acquittal, para. 102, where the Chamber found that one of the elements of pillage was that: "[t]he perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use".
[3102] *Brima et al* Trial Judgement, paras 753-754.
[3103] *Fofana et al* Trial Judgement, para. 159 referring to *Celebici* Trial Judgement, para. 590 and ICRC Commentary on Additional Protocols, para. 4542.
[3104] *Čelebići* Trial Judgement, para. 590.
[3105] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Cambridge University Press*, 2002, p. 273 and pp. 464-465.
[3106] *Naletilic and Martinovic* Trial Judgement, para. 612.
[3107] *Fofana et al* Trial Judgement, para. 162 citing *Naletilic and Martinovic* Trial Judgement, para. 614.
[3108] *Brima et al* Trial Judgement, paras 757-758. See also *Brima et al* Decision on Motion for Acquittal, paras 262-268.

> 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. According to the definition of pillage as stated above, an essential element of pillage is the unlawful appropriation of property. Black's Law Dictionary defines appropriation as "the exercise of control over property; a taking or possession." In the act of looting, the offender unlawfully appropriates the property. Destruction of property by burning, however, does not, by itself, necessarily involve any unlawful appropriation. Thus, while both looting and burning deprive the owner of their property, the two actions are distinct since the latter crime may be committed without appropriation *per se*. As a result, the Chamber is of the view that the destruction by burning of property does not constitute pillage. The Chamber will not, therefore, take into account acts of destruction by burning for the purposes of determining the individual criminal responsibility of the Accused under Count 5.[3109]

968. The Appeals Chamber settled the issue by affirming that the crime of pillage cannot include acts of burning. It considered that "the prohibition against pillage and the prohibition against destruction not justified by military necessity have been maintained as separate prohibitions" and "considered distinct in the conventional law"[3110]. It held further that the interpretation of pillage at other international courts as well as State practice also demonstrate that pillage relates specifically to unlawful appropriation and does not include acts of destruction. It concluded that :

> Taking into consideration the definition of pillage applied by the ICTY and ICTR which logically excludes acts of destruction, the distinction between the prohibitions against pillage and destruction not justified by military necessity, which is preserved throughout applicable conventional international law and the drafting history of the Statute of the Special Court, the Appeals Chamber finds that a necessary element of the crime of pillage is the unlawful appropriation of property. Consequently, burning and other acts of destruction of property not amounting to appropriation as a matter of law, cannot constitute pillage under international criminal law.[3111]

969. Hence, acts of burning will no longer be pursued under Count 14. However, acts of burning satisfy the elements of terrorism and collective punishments and will be relied on in Counts 1 and 2. In order not to repeat evidence in later sections and because the context is clearer by referring to acts of burning with surrounding events, some acts of burning are

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[3109] *Fofana et al* Trial Judgement, para. 166.
[3110] *Fofana et al* Appeal Judgement, paras 391 and 400.
[3111] *Fofana et al* Appeal Judgement, para. 409.

recited under the evidence heading of this section. The law established by the Special Court is that acts charged as "burning" fall within the scope of acts of terrorism charged under Count 1. In the AFRC Judgement, the Trial Chamber stated:

> 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 terror as an act of violence directed against protected persons or their property.[3112] [...] In relation to the crime of terror, the Trial Chamber will consider evidence of burning of civilian property as an act of violence.[3113]

970. The Appeals Chamber in the CDF case[3114] confirmed that acts of burning of property charged in Count 14 do satisfy the elements of acts of terrorism under Count 1.

B. Evidence

971. The evidence demonstrates that the three Accused are guilty of the crime of pillage at locations in Bo, Koinadugu, Kono, Bombali and Port Loko Districts, as well as in Freetown and the Western Area. It has been well documented that the RUF and AFRC engaged in looting, burning and pillaging throughout Sierra Leone.[3115] Several reports document the looting, burning and pillaging committed by the RUF/AFRC in various parts of Sierra Leone during "Operation Pay Yourself"[3116], and "Operation No Living Thing"[3117], in Freetown, during the *Coup* in 1997[3118] and during the Freetown Invasion in 1999[3119].

[3112] *Brima et al* Trial Judgement, para. 1438.
[3113] *Brima et al* Trial Judgement, para. 1510; see also para. 1532.
[3114] *Fofana et al* Appeal Judgement, para. 359.
[redacted]
[3116] Exhibit 176, AI Report 1998, pp.15-16, 19-24 (19493-19494, 19497-19502).
[3117] Exhibit 176, AI Report 1998, pp. 19-24 (19497-19502).
[3118] Exhibit 176, AI Report 1998, pp.15-16 (19493-19494); Exhibit 178, US State Department Report 1998, pp. 5-6 (19585-19586).
[3119] Exhibit 147, UNOMSIL Human Rights Assessment 1999, pp. 8-9 (19048-19049)

a) Bo District

[redacted]

973. TF1-004 testified that within days after the AFRC Junta took power soldiers came to Tikonko, burned houses and scattered properties on the streets.[3125] Up to 500 houses were burned in Tikonko in June 2007.[3126]

974. TF1-008 testified that Mosquito's group came to Sembehun 17 one month after the overthrow of President Kabbah.[3127] Mosquito, who said he was an RUF, took about 800,000 Leones from Ibrahim Kamara.[3128] He said that he had captured Sembehun 17 and that it was under his control. Mosquito's men then went around the town setting houses on fire, over 30 houses altogether.[3129]

b) Koinadugu District

975. TF1-172 , who was hiding in the bush during a rebel attack on Seraduya, testified to viewing from a hilltop, about 1 mile from Seraduya, rebels looting poultry and cattle in the village, after which they burnt down half of the 80 houses there.[3130] He said this happened during the brushing phase of the rainy season in 1998.[3131] Later, near the close of the rainy

[3120] TF1-054, Transcript 30 November 2005, p. 13.
[3121] TF1-054, Transcript 30 November 2005, pp. 14-17.
[3122] TF1-054, Transcript 30 November 2005, pp. 17-18.
[3123] TF1-054, Transcript 30 November 2005, pp. 18-19.
[3124] TF1-054, Transcript 30 November 2005, pp. 18-19
[3125] TF1-004, Transcript 7 December 2005, pp. 65-66.
[3126] TF1-004, Transcript 8 December 2005, pp. 13-14; and TF1-004, Transcript 7 December 2005, pp. 66-67.
[3127] TF1-008, Transcript 8 December 2005, pp. 33-35.
[3128] TF1-008, Transcript 8 December 2005, pp. 35-36.
[3129] TF1-008, Transcript 8 December 2005, p. 36.
[3130] TF1-172, Transcript 17 May 2005, pp. 6-7.
[3131] TF1-172, Transcript 17 May 2005, p. 8 and 32. Witness said that Tejan Kabbah was President then and that it was the dry season, almost entering the rainy season.

season of 1998,[3132] The witness and 5 others were captured half a mile from Seraduya by 12 Rebels in combat who said they were "Sankoh's rebels".[3133] They took 500,000 Leones from the witness[3134] and proceeded to amputate his hand with his own cutlass.[3135] When the captives were then led back to Seraduya, the rebels burnt down the rest of the town, including the witness's house and store in his presence.[3136] He further testified that he heard the rebels mention the name of somebody called Captain Blood, as well as Killer and "Cutty Hand", who was the one performing the amputations.[3137]

976. TF1-212 testified that in April 1998, as she was going back to Kabala with her family, she saw smoke from Dankawalie, Koinadugu District. The following day her brothers and cousins came from Dankawalie to say that the rebels had burnt down Dankawalie. She said that the rebels went by the name of RUF and AFRC junta.[3138] In July 1998, after having stayed 3 months in the bush, she returned to Koinadugu village. As the rebels were coming, she and her family fled into the bush again. They came back the next day, when the rebels were gone, to see that all of her family's belongings had been taken away. Witness recalled that the commanders of these rebels were Superman, SAJ Musa and Brigadier Mani.[3139] In August 1998, she was captured by the rebels while hiding in the bush and taken to Koinadugu village.[3140] She testified that SAJ Musa addressed the civilians at a meeting at the barri and that both Superman and Brigadier Mani were there.[3141] Later, pursuant to an argument between SAJ Musa and Superman over the killing of a rebel who killed the son of the witness, Superman and his boys burnt down Koinadugu village, except the mosque.[3142]

977. TF1-329 testified that, on 22 May 1998, rebels entered Fadugu.[3143] She was shot in the leg by a rebel that day, so that she had to crawl into a house.[3144] A rebel entered the

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[3132] TF1-172, Transcript 17 May 2005, p. 33.
[3133] TF1-172, Transcript 17 May 2005, pp. 9-10 (line 25)
[3134] TF1-172, Transcript 17 May 2005, pp. 11-12.
[3135] TF1-172, Transcript 17 May 2005, p. 15.
[3136] TF1-172, Transcript 17 May 2005, pp. 18- 20.
[3137] TF1-172, Transcript 17 May 2005, pp. 34-35.
[3138] TF1-212, Transcript 8 July 2005, p. 98-99.
[3139] TF1-212, Transcript 8 July 2005, p. 101.
[3140] TF1-212, Transcript 8 July 2005, p. 105.
[3141] TF1-212, Transcript 8 July 2005, p. 106.
[3142] TF1-212, Transcript 8 July 2005, pp. 111-112.
[3143] TF1-329, Transcript 2 August 2005, p. 4.
[3144] TF1-329, Transcript 2 August 2005, pp. 8-9.

house, asked her to give him the key to the drawer, and said that he would shoot her if she did not do it.[3145] The witness replied that she was not the owner of the house and did not have the key. The rebel then broke open the drawer and took money, clothes and jewellery, including gold ear rings and a chain.[3146] After the rebel left the room, the witness saw a car parked outside which had been set on fire.[3147] She crawled to hide in the toilet and shortly after that, the house was set on fire.[3148] She said the rebels attacked Fadugu again in September 1998 and burnt more houses.[3149] She estimated that altogether 150 houses were burnt by the rebels in Fadugu.[3150]

978. TF1-215 testified that the rebels who came from the bush to join Johnny Paul Koroma were called the People's Army and that members of the People's Army came to Kondembaia. They used to set up checkpoints, where they searched persons' bags and took their property from them. Witness said that they were paying themselves and that it was called Operation Pay Yourself.[3151] The witness was in the bush when he heard about various attacks in Yiffin area by the end of April 1998 and said that both Yiffin and Badela were burnt.[3152] The rebels then attacked Kondembaia in April 1998, started to burn the town and captured people. The witness met the smoke when he arrived in town and ran back to the bush.[3153] He returned to the village on 19 May 1998, when ECOMOG was present, but was later captured by rebels who reattacked the village. They identified themselves as Foday Sankoh's rebels.[3154] He said that the commander ordered to set fire and the younger rebels carried out the order.[3155]

c) Kono District

979. [redacted] testified that there was

[3145] TF1-329, Transcript 2 August 2005, pp. 10-11.
[3146] TF1-329, Transcript 2 August 2005, pp. 12-13.
[3147] TF1-329, Transcript 2 August 2005, p. 20.
[3148] TF1-329, Transcript 2 August 2005, p. 22.
[3149] TF1-329, Transcript 2 August 2005, p. 33 (lines 16-29) and pp. 34-35.
[3150] TF1-329, Transcript 2 August 2005, p. 39 (lines 16-22).
[3151] TF1-215, Transcript 2 August 2005, p. 65.
[3152] TF1-215, Transcript 2 August 2005, pp. 72-73 and p. 108.
[3153] TF1-215, Transcript 2 August 2005, pp. 82-84.
[3154] TF1-215, Transcript 2 August 2005, p. 87 and 102.
[3155] TF1-215, Transcript 2 August 2005, p. 91.
[redacted]

burning of houses in Masingbi. The witness specified that this was done by the combatants of the joint forces of the RUF and AFRC.[3157] He then said that the whole township of Koidu Town was occupied by the joint forces and that there was looting of household properties. At the outskirts of the town, some combatants were burning houses during the night and abandoned villages in Kono District were burned down.[3158]

980. TF1-366 testified that Issa Sesay, Morris Kallon and Superman gave the order for Operation Pay Yourself, which started in Masiaka but continued from Makeni to Kono. [redacted] The looting started the very day Johnny Paul Koroma arrived, namely when Koidu was captured.[3162] After the complete capture of Koidu, the troops started searching the villages, namely looking for money, ammunitions and vehicles.[3163] He explained further that after capturing Koidu, two meetings were held in Koidu. The first meeting, held at Kimberlite the day after the capture of Koidu, had in attendance, among others, Johnny Paul Koroma, the witness, as well as the First and Second Accused.[3164] During the meeting, the First Accused explained that pursuant to a message sent by Sam Bockarie, Johnny Paul Koroma was to be dispatched to Kailahun. He also said that Kono should be defended and that the Second Accused should be the one making sure that all the roads to Kono be distributed among the brigade commanders.[3165] After the meeting, the Second Accused sent the troops to look for Kamajors and they started looting the villages.[3166]

[3157] TF1-371, Transcript 20 July 2006, p. 67.
[3158] TF1-371, Transcript 20 July 2006, p. 69.
[3159] TF1-366, Transcript 7 November 2005, pp. 108-109.
[3160] TF1-366, Transcript 7 November 2005, p. 110 (lines 1-2).
[3161] TF1-366, Transcript 7 November 2005, pp. 109-110.
[3162] TF1-366, Transcript 8 November 2005, pp. 5-7.
[3163] TF1-366, Transcript 8 November 2005, p. 5.
[3164] TF1-366, Transcript 8 November 2005, pp. 4-5; TF1-366, Transcript 14 November 2005, p. 18 (lines 1-4) and pp. 23-24.
[3165] TF1-366, Transcript 8 November 2005, p. 6.
[3166] TF1-366, Transcript 8 November 2005, p. 7.

981. [redacted] where they burnt up to 10 houses and looted the entire village, under the command of the Second Accused, Akim and Peter Vandi.[3167] [redacted] The First Accused told the Second Accused about the deployment instructions before he left for Kailahun and it was Kallon who gave the instructions in Koidu. The Second Accused accordingly gave various orders at the meeting, including that the Kono should be burnt down entirely and that they should not leave a single house in Koidu Town.[3170]

982. TF1-366 testified further that complaints came to the Second Accused and Superman, who were the commanders on the ground, that soldiers were harassing civilians and taking civilians' property. However, he did not see them do anything about the complaints.[3171] He said that he was in Koidu for more than a month, until ECOMOG pushed them from Koidu. The troops then retired in the jungle and [redacted] The last order given by the Second Accused before they left Koidu was that they should burn the town[3172]. The witness explained that up to 200 houses were burned down and that the reason behind the burning was for ECOMOG not to be able to defend the town. He said that he did not send a report to the First Accused about the burning because the First and Second Accused, and Bockarie had already said that Kono should be defended and because it was an order given to the Second Accused. [3173]

[3167] TF1-366, Transcript 8 November 2005, pp. 22-23.
[3168] TF1-366, Transcript 8 November 2005, p. 24.
[3169] TF1-366, Transcript 8 November 2005, pp. 25-26.
[3170] TF1-366, Transcript 8 November 2005, pp. 26-27 (lines 25-27); TF1-366, Transcript 14 November 2005, pp. 24-25.
[3171] TF1-366, Transcript 8 November 2005, p. 43.
[3172] TF1-366, Transcript 8 November 2005, p. 44 (lines 16-17).
[3173] TF1-366, Transcript 8 November 2005, pp. 44-45.

983. TF1-360 testified that during the advance from Makeni towards Kono, villages were being looted and burnt on the way. The witness named particularly Magburaka, Matotoka, Makali and Masingbi.[3174] He testified further that in late February 1998, upon the arrival of the Junta in Kono, Bockarie was based in [redacted] The First Accused appointed Superman as the overall commander on the ground and the Second Accused deputised Superman. The First Accused also told the Second Accused that if the forces were to pull out from Kono, he should "ensure that nobody should come and stay in Kono and ensure that Kono should be burnt down." The Second Accused passed the order to the soldiers and appointed about 10 to 12 soldiers, who would be responsible for burning Kono. He promised a promotion to whoever would accept the mission.[3176] The witness recalled that it was the next day after his arrival that the Second Accused received the instructions from the First Accused.[3177] Kallon passed the order that Koidu should be burnt down at a meeting and said it was an order given to him by the field commander.[3178] The order was that if ECOMOG was to take Koidu town, the RUF should burn the town.[3179] TF1-360 had arrived in Koidu[3180] around late February to March 1998. The witness testified that he himself took part in the looting and that, in Koidu, he also participated in the burning.[3181] He was then at Superman's Ground, where he was given a mission by the Second Accused. The mission, led by Rocky, was initially to Nimikoro, between Bumpe and Tongo, but it continued to Bumpe. The witness said that according to the Second Accused's instructions, they were burning all the villages on the way and cutting off people's hands.[3182] In Bumpe, almost all the houses were burnt.[3183] The witness also explained that the Bumpe mission, which preceded the Fitti Fatta mission, was a

[3174] TF1-360, Transcript 20 July 2005, p. 13.
[3175] TF1-360, Transcript 20 July 2005, p. 14.
[3176] TF1-360, Transcript 20 July 2005, pp.15-16
[3177] TF1-360, Transcript 20 July 2005, p.17.
[3178] TF1-360, Transcript 22 July 2005, p. 82.
[3179] TF1-360, Transcript 25 July 2005, p. 11.
[3180] TF1-360, Transcript 20 July 2005, p. 59
[3181] TF1-360, Transcript 26 July 2005, p.109
[3182] TF1-360, Transcript 20 July 2005, pp. 55-57.
[3183] TF1-360, Transcript 20 July 2005, p. 58.

looting operation before he went to Buedu and that it happened when the troops had left Koidu.[3184]

984. TF1-041 testified that ECOMOG entered Kono on 15 April 1998. As ECOMOG were advancing[3185], Witness observed that some men, members of the AFRC, the RUF and the STF, were burning houses in Kono. As the ideology of the RUF was against the damaging of property, he approached some of the men to enquire about the burning. They replied that the Second Accused had said that whoever would take part in the burning would be promoted.[3186] The witness said that he went to report the burning to Superman first, at Dabundeh street, and then to the Second Accused who was at Hill Station on the Guinea Highway. Kallon only told him that the ECOMOG were advancing.[3187] Witness reported that no action at all was taken.[3188]

985. TF1-141 was captured by the RUF in 1998 at Opera Roundabout, together with other civilians.[3189] He stayed at Opera for 14 to 15 days and while there, both the First and Second Accused, as well as Colonel Banya, Superman and Rambo. From Opera, the witness and the other civilians were moved to Guinea Highway by the artillery commander, [redacted] who was close to the Second Accused. On the way to Guinea Highway, the witness observed that all the houses at Pimbi Lane and other main streets were on fire. He said that it was the combatants who had set them on fire and that all the civilians had fled into the bush and the surrounding villages.[3190] TF1-141 further testified that while at Guinea highway, he, along with other SBUs, was sent on food finding missions, food patrol and night guard duties. During food finding missions, they would take food from civilians and force them to carry it for them to town. TF1-141 was instructed to go on such food finding missions by the Second Accused, who at the usual muster parade would issue the instructions and appoint a commander.[3191] The witness testified that he then travelled with the RUF from Guinea Highway to Baoma, Kailahun District, and gave details about his

[3184] TF1-360, Transcript 26 July 2005, pp.73-74.
[3185] TF1-041, Transcript 17 July 2006, p. 40: The witness specified that ECOMOG were at Sewafe when the burning started.
[3186] TF1-041, Transcript 10 July 2006, pp. 45-46.
[3187] TF1-041, Transcript 10 July 2006, p. 46; TF1-041, Transcript 17 July 2006, pp. 41-42.
[3188] TF1-041, Transcript 17 July 2006, p. 41 (line 1).
[3189] TF1-141, Transcript 11 April 2005, pp. 79-80.
[3190] TF1-141, Transcript 11 April 2005, pp. 88-90.
[3191] TF1-141, Transcript 11 April 2005, pp. 90-91.

journey. Civilians were made to carry loads, including property looted in Koidu, such as rice, a satellite, a video, shoes and household property. The combatants would break into houses and if nothing was found, they would set it on fire. The witness himself took part in the looting in Koidu Town, which he said started from the day Koidu was captured.[3192] He said: "from that moment on, it was all looting, burning and finding food".[3193] When asked about the reason for looting, he replied that the common password among combatants was "pay yourself", used for example by commanders like Akisto and Forty Barrel. He explained that valuables were taken away by commanders, as they considered it to be government property. Witness finally said that the looting, mainly during food finding missions, happened throughout his 3 days stay in Koidu Town, but that it went on to the surrounding villages, where they would take anything – such as rice, salt and maggi. He said that once finished with the villages, they even started to go to the bushes where the civilians were in hiding.[3194]

986. TF1-361 testified about Operation Pay Yourself. He said that everybody was looting whilst retreating from Masiaka to Koidu Town. The witness said that in Koidu Town the Second Accused collected and seized some of the looted property in order to send it to Buedu. To the Defence's allegation that the RUF command did not support looting activities, the witness clarified that, on the contrary, the RUF was not against looting at that time, as they needed property to get ammunition.[3195]

987. TF1-217, was living in Koidu in February 1998. He testified that the rebels and the Junta were going from house to house taking people's property.[3196] Witness said that it also happened to him personally, as rebels took property from his own house.[3197] He testified that after a group led by Akim drove the Kamajors out of Koidu, the rebels and the Junta started to burn houses, saying that they did not want to see any civilians.[3198] The rebels burnt the whole of Koidu and the witness' house was also burnt in the process. Thereafter,

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[3192] TF1-141, Transcript 11 April 2005, pp. 108-109.
[3193] TF1-141, Transcript 11 April 2005, p. 109 (lines 11-12).
[3194] TF1-141, Transcript 11 April 2005, pp. 109-112.
[3195] TF1-361, Transcript 18 July 2005, p. 123. See also Transcript 15 July 2005, p. 100. TF1-361 said that to get arms and ammunition from ULIMO, the RUF exchanged cocoa and coffee that they looted from the people: "It was the people's crops that they were harvesting by force".
[3196] TF1-217, Transcript 22 July 2004, p. 8.
[3197] TF1-217, Transcript 22 July 2004, p. 9.
[3198] TF1-217, Transcript 22 July 2004, p. 10.

the witness fled with his family and many other civilians to Wendedu, about 2 miles away from Koidu.[3199] The witness went into hiding for 2 months and came back to Wendedu when he heard over the radio that ECOMOG had repelled the rebels from Koidu. Upon his arrival in Wendedu, he saw that the village had been burnt down.[3200]

988. TF1-263, a former child soldier abducted in Koidu in 1998, testified that the 3 rebels who abducted him took all the property in the house where he was staying, including rice and clothes, and made him carry the looted property to Kissi Town.[3201]

989. TF1-197, who was hiding in the bush near Tombudu, testified that he, his family and other civilians were beaten by RUF and AFRC forces and asked to surrender diamonds, palm oil, rice and money.[3202] He was forced to hand over what he was selling for business purposes, namely 2 maggi cartons and 3 cigarettes cartons. Then, after being stabbed in the head, 500'000 Leones, all his documents and a bicycle were taken from him.[3203] The witness stated that the leader of the rebels who looted his property was Musa and that he learned from a friend that they were based in Maima under Staff Alhaji.[3204] He said that the rebels quarreled among themselves to decide whom to take the looted property to. In the end, the man who was leading, named Musa, said that he was going to carry his own share to their boss, Alhaji.[3205] After the announcement that ECOMOG had arrived in Kono, the witness was captured by the rebels around Tombodu, as he was on his way to Koidu. It was the second time they captured him.[3206] Witness was then taken to Tombodu to Staff Alhaji[3207] and imprisoned overnight in a cell with about 9 other captives.[3208] He explained that when he got out of the cell, from which he managed to escape, the whole town was on fire and no rebels were around.[3209] He was then captured a third time by 7

[3199] TF1-217, Transcript 22 July 2004, p. 11.
[3200] TF1-217, Transcript 22 July 2004, p. 14 (line 33).
[3201] TF1-263, Transcript 6 April 2005, pp. 8-9.
[3202] TF1-197, Transcript 21 October 2004, pp. 72-73.
[3203] TF1-197, Transcript 21 October 2004, p. 74 (line 29) and p. 76.
[3204] TF1-197, Transcript 21 October 2004, p. 77.
[3205] TF1-197, Transcript 21 October 2004, pp. 78-79.
[3206] TF1-197, Transcript 21 October 2004, pp. 81-82.
[3207] TF1-197, Transcript 21 October 2004, p. 83.
[3208] TF1-197, Transcript 21 October 2004, pp. 88-89.
[3209] TF1-197, Transcript 21 October 2004, pp. 91-93.

rebels while heading for Kwakoyima.[3210] He said that they asked for money and diamonds and took some of the belongings of the other captives.[3211]

990. DIS-089 testified that RUF attacked Koidu Town in 1998 when they were running out of Freetown. He was not in Kono at that period but heard that a great number of civilians were killed, properties were looted and houses burnt down.[3212]

i) Bank Robbery in Koidu Town

991. TF1-141 testified that one morning he heard some serious bombardments and gunshots. Everybody was called to assemble in the muster parade ground and the Second Accused addressed the RUF fighters, explaining that SLAs were robbing the bank along Post Office Road in Koidu Town. He told them to go there with him and, before reaching the bank, undressed and said "this is born naked". Everybody undressed and the Second Accused made the first shot with a pistol. Then, everyone, including the witness, took positions under the Second Accused's command. They finally captured the bank and the money was brought in empty bags of rice.[3213] As Kallon was with SBUs who could not carry the money, he sent a message via his communication set to ask other combatants for help in bringing the money back to the base in Guinea Highway.[3214] In the evening, the Second Accused addressed a muster parade saying that he received a message from Bockarie who requested the money, and all other government properties, to be taken to Burkina or Kailahun District.[3215]

[redacted]TF1-366 also gave evidence that, about 3 weeks after their arrival in Koidu Town, Morris Kallon and the STF broke into a bank situated at the back of Opera, at Konomanyi Park. He said that money and diamonds were taken to the First Accused in Kailahun. [redacted]

[redacted]

[3210] TF1-197, Transcript 22 October 2004, pp. 3-4.
[3211] TF1-197, Transcript 22 October 2004, pp. 5-6.
[3212] DIS-089, Transcript 29 February 2008 p. 92
[3213] TF1-141, Transcript 11 April 2005, pp. 95-96. See also TF1-360, Transcript 20 July 2005, p. 24: "I was operating the radio at Superman's residence, there was a meeting with Morris Kallon, Isaac, Superman, Peter Vandi and others, they said they should get money from the bank."
[3214] TF1-141, Transcript 11 April 2005, p. 97 (line 3), p. 99 (lines 19-20), pp. 101-103.
[3215] TF1-141, Transcript 11 April 2005, pp. 101-103.
[3216] TF1-366, Transcript 8 November 2005, p. 31.

[redacted]

993. Dennis Koker testified that he saw that "they damaged the bank and took money from there". He was able to count about 18 rice bags filled with money.[3218]

994. TF1-371 testified that a bank in Koidu was looted of millions of Leones before the ECOMOG forces occupied Koidu. He said that the information reached Bockarie, who requested Mingo to ensure that all the money in possession of combatants should be collected and brought back to Buedu. The witness identified Kennedy as the commander who was instructed to go to Koidu and bring the money to Buedu. He could not recall the name of the bank but said that it was a commercial bank. [3219]

995. DMK-087 found out in early March about a bank robbery in Koidu Town. The witness heard from friends that were soldiers that the STF and some SLAs had broken into the bank. The witness could not recall the names of the people who told him. He stated that after the robbery, Sam Bockarie gave orders to investigate to an MP officer named A.S. Kallon, who sent Peleto to carry the investigation.[3220]

ii) Pillaging of Diamonds

996. The evidence shows that mineral resources such as diamonds have been systematically stolen. TF1-367 testified RUF started diamond mining as early as 1996[3221] and TF1-071 stated that the RUF diamond mining in Kono took place from 1998 up to 2001.[3222] TF1-334 testified that during the time he was in Kono District, from March to mid-May 1998, "government mining" took place in Kono District.[3223] Reference is made to the JCE section as well as the "diamond mining" section of Count 13 above which provides additional details about the RUF mining practice, necessary to sustain the war effort.

[3217] TF1-366, Transcript 16 November 2005, pp. 22-24.
[3218] Dennis Koker, Transcript 28 April 2005, p. 46. See also Exhibit 44, Letter from Major A.S. Kallon,Chairman, Joint Security, Kono, to Colonel Sam Bockarie, 6 May 1998.

[3219] TF1-371, Transcript 20 July 2006, pp. 77-78.
[3220] DMK-087, Transcript 22 April, 2008, pp.114-116.
[3221] TF1-367, Transcript 23 June 2006, Closed Session, pp. 42-43.
[3222] TF1-071 Transcript 21 January 2005, Closed Session, p. 101.
[3223] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 May 2005, pp. 40-44.

997. The Defence military expert witness confirmed that taking minerals is a common practice in guerilla movement. He explained that "in new conflicts the question of local resources is often a triggering factor. In some cases these resources may be traded internationally (for example minerals). Whether control ought to be viewed as a goal in itself or merely as a means of providing resources for the contending groups varies [...]".[3224] Indeed, the RUF Training Manual referred to "Minerals" as one of the "Pillars of the RUF Movement."[3225]

998. TF1-217, who was working as a miner in Kono, testified that he stopped working as a diamond miner in 1997, when the rebels entered Kono, because the RUF was taking diamonds from the miners.[3226]

999. The "Government mining" was organised and supervised by an overall mining commander and sub-mining commanders for certain areas. M S Kennedy, who reported directly to the First Accused was [redacted] in RUF controlled areas [redacted].[3227] [redacted] had an office in Tongo, Kailahun, Kono District, and Kamakwie in Bombali District.[3228] All the diamond proceeds came to his office. He supplied the materials for mining, deployed people in all the mining areas to do mining and he reported to the First Accused who was under Sam Bockarie.[3229]

[redacted]

[3224] Exhibit 389, Military Report from John Hederstedt, pp. 26757-26758.
[3225] Exhibit 38, RUF Training Manual, p. 11076.
[3226] TF1-217, Transcript 22 July 2004, p. 7.

[redacted]

1001. Exhibit 42 provides evidence of the different diamond mining areas and stages where the RUF was active between 30 October 1998 and 31 July 1999 in both Kono and Tongo field. The records reveal that altogether about 8000 pieces of diamonds have been extracted from Sierra Leonean soil and made RUF property.[3231] Exhibit 41 further shows the RUF diamond production in Kono from 2 February 1999 to 11 January 2000 and indicates that 2134 pieces of diamond were unlawfully appropriated by the RUF.[3232]

1002. In addition to "government mining", RUF commanders were also mining privately. The First Accused was mining and he sent his own boys to do mining in Kono. For example, Bukero, Colonel Lion, Small Kamara, Officer Med and others were mining at Kaisambo and Number 11 (Number 11 is the same as Tombodu) for him. [redacted] Other commanders were also involved in private mining, including the Second Accused, Superman, Komba Gbundema, and Alpha Fofana. CO Med was mining for the First Accused.[3233]

d) Bombali District

1003. TF1-071 testified that a meeting was called by Superman upon the arrival of the troops in Masiaka after the overthrow of the AFRC Government. He himself was present and said that the First Accused, [redacted] and General Bropleh were present, as well as other Junta commanders such as Five-Five, Code8, 05, Bakar and Brigadier Mani. Superman spoke at the meeting and announced "Operation Pay Yourself".[3234] The witness heard Superman saying: "Gentlemen, we have no pay for you the fighters but as from now it is Operation Pay Yourself."[3235] The witness understood this to mean looting and false possession of properties. He explained that he only heard the order from Superman, but that he did not know whether the command came from the First Accused or from Bockarie.[3236]

[3231] Exhibit 42, RUF Mining Units Record Book.
[3232] Exhibit 41, Diamond Production Records, p. 2394.
[3233] TF1-367,Transcript 22 June 2006, Closed Session, pp. 49-52; TF1-071,Transcript 21 January 2005, pp.123-124.
[3234] TF1-071, Transcript 19 January 2005, pp. 26-27.
[3235] TF1-071, Transcript 19 January 2005, p. 27 (lines 6-7).
[3236] TF1-071, Transcript 26 January 2005, p. 60.

The troops were then instructed to move on to Makeni.[3237] The witness asserted that Makeni to Kono was the most effective area for Operation Pay Yourself.[3238]

1004. TF1-361 testified that he traveled with the First Accused from Masiaka to Makeni in the same convoy as Superman, whilst Operation Pay Yourself was in place. He said that all the commanders and soldiers were involved in massive looting in the villages along the route. In Makeni, all the commanders, including Superman, the First Accused and Johnny Paul Koroma, were taking vehicles and properties from other people.[3239]

1005. [redacted] was attended by the First Accused, as the RUF commander, the Second Accused, Superman, CO Isaac, 55, Bazzy and JPK. The Second Accused reported to the witness what was discussed and decided at the meeting, namely that the troops should retreat to Kono and that the First Accused had declared Operation Pay Yourself, the purpose of which was to collect food and vehicles to take to the bush. Then, at the same meeting, the order was given to take arms and ammunition from Teko Barracks to carry out the operation and move to Kono.[3240] The witness said that shortly after the meeting, the looting started in Makeni.[3241]

1006. TF1-367 testified that he traveled from Masiaka to Makeni and that both SLA soldiers and RUF soldiers were in Makeni. When he arrived there, both factions were looting, so that the witness and his group joined in the looting. The witness described the items which they were interested in looting, comprising vehicles that they needed to go to Kono, food, clothing and other things easy to take along. He explained that the vehicles were used to transport the looted items, but also, that civilians were captured to carry things along. [3242] The witness finally explained that there were two groups going from Makeni to Kono and that he was part of the RUF, along with the First Accused, Superman, [redacted] and Isaac. He also mentioned that the Second Accused, who was in Bo initially, joined them in Makeni and was part of the group.[3243]

[3237] TF1-071, Transcript 19 January 2005, p. 27.
[3238] TF1-071, Transcript 26 January 2005, p. 59
[3239] TF1-361, Transcript 11 July 2005, pp. 71-72.
[3240] TF1-360, Transcript 20 July 2005, pp. 9-11; TF1-360, Transcript 22 July 2005, pp. 54-55.
[3241] TF1-360, Transcript 20 July 2005, p. 12.
[3242] TF1-367, Transcript, 22 June 2006, pp. 11-12.
[3243] TF1-367, Transcript 22 June 2006, p. 13.

1007. TF1-334 testified that Operation Pay Yourself was an order from Johnny Paul Koroma for the soldiers to pay themselves, since he could not pay them. The witness reported the announcement of Johnny Paul Koroma as being that "whatever you can lay your hands on, then you can leave with it". He recalled that in Makeni during the operation, everybody was busy looting and shops were broken into.[3244]

1008. TF1-167 testified that there was heavy looting in Makeni when the troops retreated from Freetown after the overthrow. He said that business shops, fuel stations as well the Catholic School and vehicles were looted. Looting also occurred on the way between Masiaka and Makeni. For example, he said that Superman looted the hospital in Lunsar and [redacted] some missionaries' vehicles.[3245]

1009. TF1-263, a former child soldier, testified that before reaching Makeni, he participated in an attack on Binkolo, led by Savage. He said that after launching the attack, Savage ordered to bomb the houses in order to get light in the town, which was too dark. The witness said explicitly: "we started torching houses and we have burnt houses from end to end".[3246] After the successful attack on Binkolo, witness was assigned to guard Blood who received a message from the First Accused, which was immediately given to Superman.[3247] Superman then gave the troops the order to move to Makeni.[3248] The witness testified further that on the 4th day after having captured Makeni, they started the looting.[3249]

1010. TF1-199 testified that, in 1998, as rebels were approaching his village, Madino Loko, he went to hide in the bush. Whilst coming back from fetching water, he and his brother met a group of armed rebels who themselves said that they were rebels.[3250] After the rebels had searched them and took the money that they were carrying, they forced them to go to Madina Loko. There, the witness saw smoke, fire and houses that had been burnt.

[3244] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 20 June 2005, p. 105.
[3245] TF1-167, Transcript 14 October 2004, pp. 54-56.
[3246] TF1-263, Transcript 7 April 2005, p. 20 (lines 7-12).
[3247] TF1-263, Transcript 7 April 2005, pp. 21-22. The message was that Sesay was in Magburaka heading to Makeni.
[3248] TF1-263, Transcript 7 April 2005, p. 24.
[3249] TF1-263, Transcript 7 April 2005, p. 27.
[3250] TF1-199, Transcript 20 July 2004, p.19.

He also saw the rebels burning some more houses and looting items such as food and clothes.[3251]

[redacted] He said that before the ECOMOG arrived in March 1998, both the RUF and AFRC started an operation called Pay Yourself, which lasted for 17 days and involved widespread looting by the RUF forces. He reported that during this operation, almost all the shops and houses in Makeni were looted. The Catholic mission, the Bishop's compound, the major seminary and the junior seminary were among the looted places.[3253] He specifically indicated that the looting started on the night of 17 February 1998.[3254] [redacted]

1012. TF1-117 testified that at Camp Adra, towards Waterloo, he was given the information that Johnny Paul Koroma had ordered the soldiers to "fend" for themselves as he could not pay them. The witness said that it was later called Operation Pay Yourself and that he himself took part in it on the way to Makeni. RUF combatants used to loot, take people's property, as well as money and cars.[3257] The witness stated that he was in a convoy which included among others Superman, Bropleh, the Third and Second Accused.[3258] He said that the RUF engaged in looting activities upon their arrival. He described specific instances of looting in Makeni which he took part in, for example the

[3251] TF1-199, Transcript 20 July 2004, pp. 20-21.
[redacted]
[3257] TF1-117, Transcript 29 June 2006, pp. 101-102.
[3258] TF1-117, Transcript 29 June 2006, p.103.

looting of Lebanese shops along Rogbaneh Road and the breaking into an agricultural store from which cutlasses were taken.[3259]

1013. TF1-028 testified that she was in Karina at the time of the intervention in February 1998. She said that soldiers came to Karina three times and that the first two times, they took away civilians' properties. The second time, they also took her own property.[3260] She said that people, some of whom wearing combat uniforms and others wearing civilians' clothes came a fourth time on 6 April 1998 at 4 am, when she saw fire in another village close by.[3261] She was captured and taken to Karina, where she also saw that houses were on fire.[3262] Together with her captors and other captives, she was taken to Makabie and then Manyaie,[3263] where she saw four young boys holding matches and burning houses.[3264] She then went to Rosos and described that the boss of her group was Five-Five, but that the group also comprised RUF members. She then attended a meeting in which it was decided that the troops would go to Freetown.[3265] She explained that she was forced to follow her captors to Port Loko and then Waterloo, where she saw houses being burnt by the people of her group.[3266]

1014. TF1-179 testified that in 1998, he had to go into hiding in the bush because the Junta had entered Batkanu. He explained that it was only when he heard that the Junta had passed through Kenema village that he decided to go back to Batkanu. There, he found his house burnt down.[3267] The witness said he had to run away again as a mixed group of rebels and Junta was coming back to town.[3268] He testified further that he and his family made their way to Makeni on 10 May 1998.[3269] Before reaching there, they were halted and attacked by 7 armed men, dressed in combat uniforms. These men asked for money and took 10 dollars from the witness;[3270] the group was a mixture of Junta and rebels.[3271] He

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[3259] TF1-117, Transcript 29 June 2006, pp. 104-105.
[3260] TF1-028, Transcript 17 March 2006, pp. 108-109.
[3261] TF1-028, Transcript 17 March 2006, pp. 110-111.
[3262] TF1-028, Transcript 17 March 2006, pp. 116-117 and p. 119 (line 21).
[3263] TF1-168, Transcript 20 March 2006, p. 10.
[3264] TF1-028, Transcript 20 March 2006, pp. 11-12.
[3265] TF1-028, Transcript 20 March 2006, pp. 23-24 and pp. 26-27.
[3266] TF1-028, Transcript 20 March 2006, pp. 28-29.
[3267] Exhibit 102, Transcript from AFRC Trial, TF1-179, Transcript 27 July 2005, pp. 32-33.
[3268] Exhibit 102, Transcript from AFRC Trial, TF1-179, Transcript 27 July 2005, pp. 34-35 and p. 57 (lines 22-24).
[3269] Exhibit 102 Transcript from AFRC Trial, TF1-179, Transcript 27 July 2005, pp. 36-37.
[3270] Exhibit 102 Transcript from AFRC Trial, TF1-179, Transcript 27 July 2005, pp. 38-39.

said he did not know the name of the commander of the rebels who detained them, but that he heard from captives who had escaped, that it was men under SAJ Musa who were operating in the area.[3272]

1015. Defence witnesses testified that numerous looting activities occurred. DIS-018 testified that when the RUF and AFRC forces were chased from Freetown, they passed through Makeni on their way to Kono. He admitted that when the troops reached Makeni,they looted properties , but houses were not burnt.[3273] DIS-009 testified that during the time they were in Makeni, the Junta engaged in a lot of looting but no burning.[3274] DIS-034 said that he heard of looting taking place in Makeni after the overthrow of the Junta in 1998.[3275] DMK-032 testified that following the ECOMOG intervention in 1998 there was looting from Makeni to Kono. RUF, AFRC, civilians called Junta 2, were doing looting. He said that whosoever had a gun was doing looting.[3276] RUF combatants also carried out looting as they travelled from Masiaka to Makeni.[3277] While in Makeni, SLAs and RUF were looting.[3278] DAG-018 said that he did hear about rebels burning houses in Makeni, although he did not see it and he also heard that they looted property.[3279] DMK-082 testified that when the Junta passed through Masingbi after the intervention, they took away some property from the people.[3280] He also agreed that when the Junta passed through Masingbi, Makoni Junction, Makali, Matotoka, and Magburaka, "all the houses remained intact but there was looting by all sorts and all kinds of groups".[3281] He further said that they looted from Makeni up to Koidu town[3282], that the looting was open and that everybody was looting.[3283]

1016. The First Accused testified that "those who went with this Operation Pay Yourself were the people who retreated from Freetown, like [redacted] They took people's

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[3271] Exhibit 102, Transcript from AFRC Trial, TF1-179, Transcript, 27 July 2005, p. 56 and 64.
[3272] Exhibit 102, Transcript from AFRC Trial,TF1-179, Transcript, 27 July 2005, pp. 65-66.
[3273] DIS-018, Transcript 3 March 2008, pp. 103-105.
[3274] DIS-009, Transcript 22 February 2008 p. 70.
[3275] DIS-034, Transcript 18 February 2008, pp. 63-64.
[3276] DMK-032, Transcript 6 May 2008, pp. 13-14.
[3277] DMK-032, Transcript 6 May 2008, p. 14.
[3278] DMK-032, Transcript 6 May 2008, pp. 15-16.
[3279] DAG-018, Transcript 16 June 2008 p. 46.
[3280] DMK-082, Transcript 13 May 2008 p. 29.
[3281] DMK-082, Transcript 13 May 2008 pp. 30-32.
[3282] DMK-082, Transcript 13 May 2008, p. 90.
[3283] DMK-082, Transcript 13 May 2008, p. 31.

vehicles". He admitted that both the RUF and the AFRC, who retreated from Freetown, looted people in Lunsar and Makeni, taking people's cars, but stated that he was not present. He said that [redacted] and others took the car that belonged to the eye clinic in Lunsar.[3284] Issa Sesay testified futher that after the fight in Makeni, Superman, Gibril Massaquoi, Isaac Mongor, Rocky CO and Colonel Nyaa looted NGO vehicles.[3285]

e) Fretown and the Western Area

[redacted]Several reports of UN agencies and NGOs mentioned the massive looting during the Freetown invasion in 1999.[3286] This information was corroborated by a number of insider and victim witnesses. TF1-334 testified that when the troops attacked Waterloo the second time, there was heavy looting of food, as the troops suffered a shortage of food.[3287]

[redacted]

1018. TF1-097 testified that on 23 December 1998, he was in his house in Tombo when he suddenly woke up at night and saw fire on the roof of his house. He gathered his belongings and his money in a bag.[3289] As soon as he stepped outside, he was attacked by RUF men, including someone called Captain Blood, who took all of his possessions away and ordered him to carry his bag on his head, threatening to shoot him if he turned around.[3290]The witness fled into the bush and stayed there until the RUF left Tombo. When he returned to Tombo, he saw that they had set fire and burnt houses.[3291] Later, on 6 January 1999, the witness was in Kissy[3292], when he saw that there was fire. He hid in the Academy School compound for a week and said that, outside the gates, he saw combatants in civilian clothes who said they were RUF members.[3293] He was then captured by people claiming to be RUF at PWD junction, as he was trying to return to Kissy to search for his

[3284] Accused Issa Hassan Sesay, Transcript 22 June 2007, pp. 62-63.
[3285] Accused Issa Hassan Sesay, Transcript 22 May 2007, pp. 93-94.
[3286] Exhibit 147, UNOMSIL Human Rights Assessment 1999, pp. 8-9 (19048-19049).
[3287] Exhibit 119, Transcript from AFRC Trial, TF1-334 ,Transcript 13 June 2005, pp. 89-90.
[3288] Exhibit 119,Transcript from AFRC Trial, TF1-334, Transcript 14 June 2005, pp. 40-45.
[3289] TF1-097, Transcript 28 November 2005, p. 77.
[3290] TF1-097, Transcript 28 November 2005, p. 78.
[3291] TF1-097, Transcript 28 November 2005, pp. 78-79.
[3292] TF1-097, Transcript 28 November 2005, pp. 80-81.
[3293] TF1-097, Transcript 28 November 2005, p. 82.

sister. He was ordered to give them his money and was flogged because he did not have any.[3294] They left him and he continued into Kissy.[3295] That night, the RUF were setting houses on fire and witness could see the smoke and fire in Kissy.[3296] He was able to recall that on Wednesday 21 January 1999, around 3 pm., when he was on his veranda, a passerby said that ECOMOG were coming. He went back in the house and noticed from the window that the same person who had attack him in Tombo was outside of his house, namely Captain Blood. [3297] He heard somebody outside threatening to set the house on fire, if he did not open the door.[3298] He opened the door and Captain Blood accompanied with someone who identified himself as a mercenary both entered the house. Captain Blood asked the witness for 400,000 Leones and proceeded to amputate his hand because he did not receive the money.[3299] The witness then hid in the toilet until midnight, during which time his house was set on fire.[3300]

1019. [redacted]

they were based. He said that looting was going on and that houses were on fire. He said that it was the RUF, AFRC and STF who were committing the burning and looting, as they had become a joint force. [3301] He explained that the First Accused had received an order from Bockarie that anything taken was to be considered government property. The First Accused then convened a meeting and passed the order to the Second Accused, so that the witness and Rambo implemented it by packing the looted items in one place for Sesay to take to Makeni.[3302] The witness explained that after the 6 January 1999 attack on Freetown, and following a meeting, another attempt was made to attack Freetown. One route was through Tombo and the other was through Hastings. The First Accused chaired the

[3294] TF1-097, Transcript 28 November 2005, pp. 82-83.
[3295] TF1-097, Transcript 28 November 2005, p. 85.
[3296] TF1-097, Transcript 28 November 2005, p.86.
[3297] TF1-097, Transcript 28 November 2005, p. 87.
[3298] TF1-097, Transcript 28 November 2005, p. 88 (lines 16-17).
[3299] TF1-097, Transcript 28 November 2005, pp. 89-92.
[3300] TF1-097, Transcript 28 November 2005, p. 96.
[3301] TF1-366, Transcript 9 November 2005, pp. 32-33.
[3302] TF1-366, Transcript 9 November 2005, p. 34.

meeting. The attack failed but the witness stated that whilst coming back from Tombo to Waterloo, the troops looted and burnt villages on the way.[3303]

1020. TF1-022 said that on 22 January 1999, he was stopped by seven members of the RUF as he was taking an injured relative to Connaught Hospital in Freetown. The seven RUF combatants took his money, clothes and his watch.[3304]

f) General Defence Evidence

1021. DIS-188 testified that sometimes, after having attacked or captured a place, the RUF forces would get properties such as machinery, generators, tapes or refrigerators and that these properties would be used for trade purposes. He said that properties considered as government property, for example the house of a government officer, would be taken.[3305] After the overthrow of the Junta, the witness heard from people who were retreating from Freetown that there was heavy looting during the retreat. Both civilians and combatants, as well as some of his secret informants who had been in Freetown and who went back to Pendembu told him about the looting.[3306] About the RUF presence in Kono after the retreat, he said that there were information reports reaching the joint security office in Pendembu that Kono was not properly organized and that there was continuous harassment and looting.[3307] He conceded that many of the fighters in Kono at this time were concentrating in looting properties.[3308]

1022. In cross-examination, he said that the taking of property in a place that had been captured from the enemy was not looting of property, because the property in that place, declared an RUF zone, became RUF property as soon as the place was captured. He specifically agreed that according to the RUF understanding and ideology, everything found in a captured location automatically became RUF property, including civilians present in that location. The witness then conceded that it was a rule within the RUF from 1991 up to the disarmament and that it had been applied in Kono District, as well as in

[3303] TF1-366, Transcript 9 November 2005, pp. 36-37; see also TF1-167, Transcript 18 October 2004, pp. 78-80, which corroborates the meeting and the second attempt to attack Freetown.
[3304] TF1-022, Transcript 29 November 2005, pp. 28-29.
[3305] DIS-188, Transcript 26 October 2007, Closed Session, pp. 36-37.
[3306] DIS-188, Transcript 26 October 2007, Closed Session, pp. 80-81.
[3307] DIS-188, Transcript 26 October 2007, Closed Session, p. 106.
[3308] DIS-188, Transcript 26 October 2007, Closed Session, p. 107.

Kenema, Bombali and Kailahun Districts.[3309] He also agreed that, in the context of a guerrilla war, it was part of RUF approved procedure that fighters would be permitted to go in search for food to survive. The procedure was actually organized in food-finding missions, during which any food found in a captured location would become RUF property. For example, he said: "if rice is there, we'll get rice". He denied that this taking of property was in fact looting. Similarly, he agreed that commanders in Kono had two or three vehicles which they had not bought from a used car dealer. However, he explained that these cars were not looted but that they were captured property.[3310]

C. Responsibility of the Accused

a) Joint Criminal Enterprise

1023. Given the evidence adduced to prove the existence of a joint criminal enterprise, as presented in the JCE section above, the three Accused bear individual criminal responsibility, pursuant to their participation in a joint criminal enterprise, for the crime of pillage committed in Bo, Koinadugu, Kono and Bombali districts, as well as in Freetown and the Western Area.

1024. The common criminal plan involved engagement in looting activities, as it is a guerrilla war that the RUF was pursuing. In such a context, fighters in possession of arms need to plunder for survival. The testimony of TF1-360 made this clear, he said that commanders carried guns and went to fight and that "...in the guerrilla army you are not paid. You live on what you capture."[3311] The looting of civilian property by RUF forces therefore had to be part of the plan for it to come into realization. Looting was necessary for the RUF to be able to trade valuables, including diamonds, in exchange for war materials. The crime of pillage, beyond benefiting the private gain of the soldiers, served a specific purpose within the criminal plan

1025. Consequently, the three Accused should be held responsible for the crime of pillage pursuant to their participation in a joint criminal enterprise. Pillage was part of the common plan and the crime was widely committed by the members of the joint criminal enterprise.

[3309] DIS-188, Transcript 2 November 2007, Closed Session, pp. 99-100.
[3310] DIS-188, Transcript 2 November 2007, Closed Session, pp. 101-103.
[3311] TF1-360, Transcript 22 July 2005, p. 24.

The evidence of DIS-188 makes clear that pillage was an accepted and approved means by which members of the RUF could survive and by which the RUF could obtain goods to trade for necessary military supplies. Each of the Accused must have known of the importance of pillage to the RUF and that members of the joint criminal enterprise committed the crime of pillage systematically and frequently. In the alternative, pillage was a natural and reasonably foreseeable consequence of the execution of the common plan.

b) Liability under Article 6(1) of the Statute

1026. Looting was a widespread practice within the RUF in the various areas which have fell under its control. Acting either independently or together with the AFRC, the RUF caused extensive damage to civilian property, whether by appropriation or by destruction in Bo, Koinadugu, Kono, Bombali and Districts, as well as in Freetown and the Western Area. Even if acts of burning no longer fall within the ambit of Count 14, they are considered of relevance to acts of pillage since those two acts were both part of the same systematic pattern: RUF combatants would plunder a village and then proceed to its burning.[3312]

1027. The overwhelming evidence of acts of looting fulfils the legal requirements for the crime of pillage. The perpetrators unlawfully and systematically appropriated property belonging to civilians without their consent and with the intention to deprive them permanently of their property. Furthermore, the victims were persons not taking an active part in the hostilities at the time that the acts occurred and the perpetrators knew that they were not taking an active part in the hostilities. It is also recalled that the widespread looting in which the RUF engaged cannot be justified by military necessity.[3313]

1028. Defence witness DIS-188 admitted that wherever the RUF was capturing locations in Sierra Leone, the property in that location would become the property of the RUF.[3314] This confirms the existence of a consistent and continuous pattern of the RUF in respect of

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[3312] See Exhibit 175, HRW Report 1998, p. 19456 : "The private property of civilians was frequently looted and their homes intentionally burned. Witnesses spoke regularly of theft and mass destruction by the AFRC/RUF as they retreated form ECOMOG forces. Members of the AFRC/RUF completely stripped civilians of their belongings on a regular basis. Many of those fleeing Sierra Leone arrived in refugee camps with little more than their clothing; and several witnesses explained how they had been left naked by the AFRC/RUF and spent days in flight without clothing."

[3313] *Blaškić* Appeal Judgement, para. 109; *Simic* Trial Judgement, para.100; *Naletilic* Trial Judgement, para. 616.

[3314] DIS-188, Transcript 2 November 2007, Closed Session, p. 101 (lines 4-7).

the taking of property belonging to civilians. Furthermore, DIS-188 explained that, according to the RUF perspective, the taking of property from captured territories was different from the looting of property. It is evident however that the RUF understanding of looting equates the crime of pillage.

1029. Compelling evidence demonstrates that Operation Pay Yourself was a joint RUF and AFRC operation which involved heavy and systematic looting from civilians during the retreat to Kono after the overthrow of the Junta. The evidence above proves that the First Accused was part of the convoy heading from Freetown to Kono.[3315] TF1-361 also explicitly said that commanders, including the First Accused, were involved in the massive looting which occurred in Makeni.[3316] With respect to the Second Accused and contrary to the Defence's allegations, TF1-367 specifically indicated that the Second Accused was stationed in Bo, but that he then joined the troops in Makeni.[3317] The Second Accused was therefore also part of the convoy moving towards Kono. The numerous testimonies regarding Operation Pay Yourself leave no doubt that the RUF forces were engaged in looting activities on the way from Masiaka to Makeni and further, until they reached Koidu Town. This is confirmed by insider witnesses TF1-360, TF1-361, TF1-366 and TF1-071. The evidence therefore reveals that the First and Second Accused were accompanying the forces *en route*. Combatants were expressly instructed to "pay themselves" by looting civilian property. TF1-174 provided the Court with a credible testimony in respect of the extent and widespread nature of the operation in Makeni, largely corroborated by other witnesses, such as TF1-263, or TF1-361, TF1-167, TF1-367 and many Defence witnesses. The prohibition against pillage entails that no orders authorizing or encouraging pillage should be issued. Operation Pay Yourself was a deliberate, premeditated and manifest operation during which fighters were allowed to loot and keep stolen items. It was an authorised action sanctioned by the High Command of both the RUF and the AFRC, in direct violation of the prohibition against pillage. The evidence proves that the First and Second Accused, holding senior positions within the RUF, were both part of the convoy which retreated from Masiaka to Koidu Town, whilst the looting was being committed by the forces.

[3315] TF1-367, Transcript, 22 June 2006, p. 13 (lines 24-25); TF1-361, Transcript 11 July 2005, p. 71.
[3316] TF1-361, Transcript 11 July 2005, p. 72.
[3317] TF1-367, Transcript, 22 June 2006, pp. 13-14.

1030. The evidence also shows that, once the troops reached Kono District, there was continuous looting in Koidu and the surrounding villages during the entire time RUF forces were in control of the area. Witnesses TF1-366, TF1-371, TF1-217 and TF1-141 have in fact given credible and reliable testimonies to that effect. The account of Defence witnesses also mentions the occurrence of heavy looting in Kono at the relevant period of time. TF1-141 explicitly said that the looting of property was systematic in Koidu and the surrounding villages. He pointed out that the Second Accused was the commander sending SBUs on food finding missions, during which they would loot property from the civilians.[3318] TF1-366 also pointed at the Second Accused, who after the Kimberlite meeting where the First Accused was also present, was the commander assigned to deploy troops in Kono, upon instruction of the First Accused. Combatants under the command of the Second Accused then looted villages in Kono.[3319] Furthermore, TF1-361 mentioned that, in Koidu, the Second Accused seized looted property to send to Buedu.[3320] Evidence has also been adduced by TF1-366, TF1-141 and TF1-371 concerning the looting of the bank in Koidu. Notably, two of those witnesses, namely TF1-141 and TF1-366, directly implicated the Second Accused in the break-in.[3321] The evidence submitted demonstrates that the First and Second Accused were both present in Koidu Town at the time of its capture by the RUF in February 1998 and that they were both actively involved in the leadership of the activities of the RUF forces in Kono District.

1031. The Prosecution also submits that the widespread and systematic pillaging of diamonds, as extensively demonstrated by the evidence and in which the First and Second Accused were deeply involved, were acts of looting through which the RUF deprived the civilian population of Sierra Leone.[3322]

[3318] See above para. 985 and TF1-141, Transcript 11 April 2005, pp. 90-91.
[3319] See above para. 980 and TF1-366, Transcript 8 November 2005, p. 7.
[3320] TF1-361, Transcript 18 July 2005, p. 123.
[3321] See above paras 991-992.
[3322] The Prosecution recalls however that this Trial Chamber found in the CDF Judgement that Article 3(f) of the Statute contains a general prohibition against pillage which covers all types of property, including State-owned and private property. See *Fofana et al* Trial Judgement, para. 159 referring to *Celebici* Trial Judgement, para. 590 and ICRC Commentary on Additional Protocols, para. 4542: "The prohibition has a general tenor and applies to all categories of property, both State-owned and private". Hence, the widespread illegal extraction of diamonds from Sierra Leonean soil can amount to a violation of Article 3(f), since it qualifies as an act of pillage against the State of Sierra Leone.

1032. In respect of the acts of looting committed in the Freetown and Western Area in January and February 1999, the evidence shows that heavy looting occurred whilst the RUF forces were stationed in Waterloo, after the 6 January 1999 invasion, as well as during the Tombo attack, during which many nearby villages were looted.[3323] The First and Second Accused led the attack launched on Tombo from Waterloo. The looted items were then packed together to be sent to Makeni. This was done by the Second Accused upon instruction of the First Accused and Bockarie.[3324]

i) First and Second Accused

1033. Given the foregoing, the evidence adduced has demonstrated beyond reasonable doubt that the First and Second Accused at all relevant times knew that RUF combatants were continuously engaged in acts of looting in villages on their way or in locations under their control. It is recalled that direct orders were even given to that effect. Hence, it has been proved beyond reasonable doubt that the First and Second Accused bear responsibility pursuant to Article 6 (1) by way of committing, ordering, planning and/or instigating the systematic looting of civilian property. It is also submitted, alternatively, that the First and Second Accused both aided and abetted the crime of pillage through their senior positions within the chain of command and their active support of the operations, which included looting activities.

ii) Third Accused

1034. The Third Accused is guilty of aiding and abetting the crime of pillage. In his position as RUF Overall Security Commander, it was his specific function to ensure that crimes against civilians such as pillage were investigated and punished. It was clearly an RUF policy to permit pillage and the Third Accused must have known of this, and accepted it, just as DIS-188 saw pillage as simply the taking of "government property" to which the RUF was entitled.

1035. The law states that the *actus reus* of aiding and abetting can take place before, during or after the crime has been committed, and this form of participation may take place

[3323] TF1-366, Transcript 9 November 2005, pp. 36-37.
[3324] TF1-366, Transcript 9 November 2005, p. 34.

geographically and temporally removed from the crime's location and timing.[3325] It is not necessary for the person aiding or abetting to be present during the commission of the crime. [3326] A persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting.[3327] Aiding and abetting does not require a pre-existing plan or arrangement to engage in the criminal conduct in question and the principal may not even know about the accomplice's contribution.[3328]

1036. The Third Accused must have known of the pillage, at least when the pillaged goods were brought into Kailahun District by RUF and AFRC combatants. The *mens rea* requirement for aiding and abetting is satisfied if the accused knows – in the sense of awareness – that his actions or omissions will assist the perpetrator in the commission of a crime.[3329] Awareness may be inferred from all relevant circumstances and need not be explicitly expressed,[3330] nor is it 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.[3331]

1037. Conduct held to constitute aiding and abetting includes failing to prevent others from perpetrating crimes in circumstances where the accused is under a legal obligation to protect a victim and[3332] failing to maintain law and order by a person in a position of authority.[3333] It should be inferred from all of the facts that the Third Accused was aware

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[3325] *Blaškić* Appeal Judgement, para. 48; *Simić* Trial Judgement, para. 162; *Naletilić and Martinović* Trial Judgement, para. 163; *Vasiljević* Trial Judgement para. 70; *Kvočka* Trial Judgement, para. 256; *Blaškić* Trial Judgement, para. 285; *Krnojelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Aleksovski* Trial Judgement, paras 62, 129.

[3326] *Akayesu* Trial Judgement, para. 484.

[3327] *Blaškić* Trial Judgement, para. 337.

[3328] *Kordić and Čerkez* Trial Judgement, para. 399; *Tadić* Trial Judgement, para. 677; *Čelebići* Trial Judgement, paras 327-328.

[3329] *Strugar* Trial Judgement, para. 350 (citing *Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 162; *Blaškić* Appeal Judgement, para. 49); *Furundžija* Trial Judgement, para. 245; *Čelebići* Trial Judgement, paras 327-328; *Kunarac* Trial Judgement, para. 392. The principal need not know that he has been assisted by the aider and abettor. *Tadić* Appeal Judgement, para. 229 (ii); *Brđanin* Trial Judgement, para. 272.

[3330] *Strugar* Trial Judgement, para. 350; *Tadić* Trial Judgement, paras 675-676; *Čelebići* Trial Judgement, paras 327-328.

[3331] *Strugar* Trial Judgement, para. 350 (citing *Blaškić* Appeal Judgement, para. 50); *Brđanin* Trial Judgement, para. 272.

[3332] *Tadić* Trial Judgement, para. 686 (referring with apparent approval to the *Borkum Island Case*); *Akayesu* Trial Judgement, paras 704-705 (failure of *bourgmestre* to maintain law and order in a commune, and failure to oppose killings and serious bodily or mental harm, found to constitute a form of tacit encouragement, which was compounded by being present at such criminal acts); *Aleksovski* Trial Judgement, para. 88.

[3333] *Akayesu* Trial Judgement, paras 704-705.

that widespread pillage was taking place and because of his specific position of authority and his unwillingness to investigate and punish the crime of pillage, the Third Accused is guilty as an aider or abettor.

c) Liability under Article 6(3) of the Statute

1038. The Prosecution refers to section V (B) of this Final Trial Brief on Superior Responsibility, where it has already proven that the First and Second Accused and Third Accused were holding senior positions within the RUF chain of command. They consequently possessed the required effective control over the RUF forces at all relevant times for this Count.

1039. The three Accused knew or had reason to know that acts of looting were about to be or had been committed. Express orders were issued to that effect by the RUF high command, including the First and Second Accused. In view of the widespread nature of the acts of looting and given the command position of the three Accused, the only possible inference is that they were aware of their commission, especially within the areas under RUF control. In addition, consistent evidence proves that the Accused did possess sufficient information which could have put them on notice that such crimes were committed or would be committed.

1040. The First and Second Accused did not fulfil their duty as superiors to take the necessary and reasonable measures preventing the commission of the crime of pillage or to punish the perpetrators thereof. On the contrary, looting was a common occurrence which was actually encouraged within RUF ranks. During Operation Pay Yourself, looting was explicitly allowed. No witnesses have reported any action having been taken against acts of looting whether in Bombali, Kono or any other location during the Indictment period. Furthermore, TF1-361, present in Kono District in the relevant time period, expressly said that the RUF was not against looting at this time.[3334]

1041. Consequently, it is submitted that the First, Second and Third Accused all bear individual criminal responsibility for the crime of pillage pursuant to Article 6 (3) of the Statute.

[3334] TF1-361, Transcript 18 July 2005, p. 123 (line 19).

XII. COUNT 1: TERRORISING THE CIVILIAN POPULATION AND COUNT 2: COLLECTIVE PUNISHMENT

1042. Count 1 charges the Accused with acts of terrorism, a violation of Common Article 3 and Additional Protocol II, punishable under Article 3(d) of the Statute and with collective punishments, a violation of Common Article 3 and Additional Protocol II, punishable under Article 3(b) of the Statute. It is alleged that "members of the AFRC/RUF subordinate to and/or acting in concert with the Accused committed the crimes charged in Counts 3 through 14, as part of a campaign to terrorise the civilian population of the Republic of Sierra Leone, and did terrorise that population. The AFRC/RUF also committed the crimes to punish the civilian population for allegedly supporting the elected government of President Ahmad Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF."[3335]

A. Applicable Law and Elements of Crime

a) Count 1: Terrorising the Civilian Population

i) Actus Reus

1043. The prohibition and criminalisation of the intentional use of 'terror violence' in armed conflict against a civilian population for strategic purposes is well settled in customary international law.[3336] Additional Protocol II contains two separate articles prohibiting acts of terrorism.[3337] Article 13(2) being a *lex specialis* to Article 4(2)(d) under international humanitarian law, the Prosecution adopts the Appeals Chamber's finding in the *Fofana et al* Appeal Judgement that "Article 13(2) is a narrower derivative of Article 4(2)(d)", as "acts of terrorism under Article 4(2)(d) inherently encompass the narrower elements of acts of terrorism prohibited under Article 13(2)".[3338] The Prosecution considers Count 1 as being charged under Article 13(2) and adopts the Appeals Chamber's articulation of the core elements of the crime of acts of terrorism under Article 13(2), set out as follows:

(i) Acts or threats of violence;

[3335] Indictment, para. 44.
[3336] *Brima et al* Trial Judgement, para. 662 citing *Galić* Appeal Judgement, para. 86.
[3337] *Fofana et al* Appeal Judgement, para. 344.
[3338] *Fofana et al* Appeal Judgement, para. 348.

(ii) The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts or threats of violence; and

(iii) The acts or threats of violence were carried out with the specific intent of spreading terror among the civilian population.[3339]

1044. The Prosecution fully endorses the interpretation of "acts or threats of violence" as articulated by the Appeals Chamber:[3340]

> 351. The *actus reus* of the crime, acts of terrorism, may be proved by acts or threats of violence. Acts or threats of violence may comprise not only of attacks but also threats of attacks against the civilian population. Consistent with the ICRC Commentary to Additional Protocol II, this "covers not only acts directed against people, but also acts directed against installations which would cause victims terror as a side-effect."[3341] Acts or threats of violence are also not limited to direct attacks against civilians or threats thereof but include indiscriminate or disproportionate attacks or threats.[3342]
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> 352. Acts of terrorism may, therefore, be established by acts or threats of violence independent of whether such acts or threats of violence satisfy the elements of any other criminal offence. Not every act or threat of violence, however, will be sufficient to satisfy the first element of the crime of "acts of terrorism." The Appeals Chamber is of the view that whilst actual terrorisation of the civilian population is not an element of the crime,[3343] the acts or threats of violence alleged must, nonetheless, be such that are at the very least capable of spreading terror. Whether any given act or threat of violence is capable of spreading terror is to be judged on a case-by-case basis within the particular context involved. For this purpose, the Appeals Chamber

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[3339] *Fofana et al* Appeal Judgement, para. 350 referring to *Galić* Appeal Judgement, paras 99-104 and *Blagojević* Trial Judgement para. 589. See also *Fofana et al.* Trial Judgement para. 170 and *Brima et al.* Trial Judgement para. 667.

[3340] *Fofana et al* Appeal Judgement, paras 351-352.

[3341] ICRC Commentary on Additional Protocol II, Article 13(2), para. 1375. The Appeals Chamber upheld the finding of the Trial Chamber in that respect in the *Fofana et al* Trial Judgement, para. 173: "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." This approach was also adopted in *Brima et al* Trial Judgement, para. 671.

[3342] *Galić* Appeal Judgement, para. 102.

[3343] *Galić* Appeal Judgement, para. 104, which added : "since actual infliction of terror is not a constitutive legal element of the crime of terror, there is also no requirement to prove a causal connection between the unlawful acts of violence and the production of terror". See also *Brima et al* Trial Judgement, para. 669 and *Fofana et al* Trial Judgement, para. 174.

agrees with the Trial Chamber in *Galić* that "terror" should be understood as the causing of extreme fear.[3344]

1045. Whether or not unlawful acts do in fact spread terror among the civilian population can be proved either directly or inferentially. It can be demonstrated by evidence of the psychological state of civilians at the relevant time, including the civilian population's way of life during the period, and the short and long term psychological impact. The *Galić* Appeals Chamber held that "the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is [...] rather a case of 'extensive trauma and psychological damage' being caused by 'attacks which were designed to keep the inhabitants in a constant state of terror.' Such extensive trauma and psychological damage form part of the acts or threats of violence.[3345]

1046. The Appeals Chamber in the CDF case further stressed "that acts of terrorism need not involve acts that are otherwise criminal under international criminal law".[3346] Notably, it specified that all conduct and material facts adequately pleaded in the Indictment, irrespective of whether such conduct satisfied the elements of any other crimes, should be considered.[3347] Therefore the Trial Chamber is not restricted to crimes charged and found to have been committed under Counts 3 to 14 of the Indictment.

1047. According to the Appeals Chamber, the second element requires proof "that an accused acted consciously and with intent or recklessness in making the civilian population or individual civilians the object of an act or threat of violence. Negligence, on the other hand, is not enough".[3348]

b) Mens Rea

1048. The *mens rea* of the crime is also composed of the specific intent to spread terror among the civilian population. The Appeals Chamber recalled that "the spreading of

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[3344] *See also Galić* Trial Judgement, para. 137. The majority in *Galić* accepted the Prosecution's submission that terror may be defined as "extreme fear," commenting that the *travaux préparatoires* of the Diplomatic Conference did not suggest an alternative meaning.
[3345] *Galić* Appeal Judgement, para. 102 referring to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Indictment, paras 4(b), 4(c), cited in *Brima et al* Trial Judgement, para. 668.
[3346] *Fofana et al* Appeal Judgement, para. 359.
[3347] *Fofana et al* Appeal Judgement, para. 364.
[3348] *Fofana et al* Appeal Judgement, para. 355 referring to *Galić* Trial Judgement, para. 54. The civilian population or individual civilians must willfully have been made the object of an attack or threat of violence and the notion of "willfully" incorporates the concept of recklessness whilst excluding mere negligence.

extreme fear must be specifically intended." Therefore, not only must the perpetrators of acts or threats of violence have accepted the likelihood that terror would result from their illegal acts or threats, but additional proof is required that that was the result which was specifically intended.[3349] However, "the specific intent to spread terror need not be the only purpose of the unlawful acts or threats of violence."[3350] Relying on the *Galić* Appeal Judgement, the Appeals Chamber gave further guidance on the requirement mentioned by both Trial Chambers that the specific intent be 'the primary purpose' of the perpetrators:[3351]

> 357. It is well established that "[t]he fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge."[3352] The existence of a coexisting purpose does not, however, detract from the requirement that what must be proved irrespective of any other coexisting purpose, is the specific intent to spread terror. Whether the specific intent to spread terror is satisfied is determined on a case-by-case basis and may be inferred from the circumstances, the nature of the acts or threats and the manner, timing or duration of acts or threats of violence.[3353]

1049. The specific intent to spread terror needs to be proven, but the conduct may remain a crime even where purposes additional to the intent to spread terror exist. For example, members of a joint criminal enterprise may seek to spread terror amongst civilians by attacking their village and burning all of the dwellings. At the same time the purpose of the burning may be to eradicate shelters so that no one can live in a certain geographical area. Two purposes may co-exist during the same attack. Similarly, women may be raped throughout a village in order to spread terror amongst the civilians in the village, and for the purpose of committing rape. Whether both purposes co-existed on any attack would, as stated by the Appeals Chamber, be "determined on a case-by-case basis and may be inferred from the circumstances, the nature of the acts or threats and manner, timing or duration of acts or threats of violence."[3354]

[3349] *Fofana et al* Appeal Judgement, para. 356 referring to *Galić* Trial Judgement, para. 136.
[3350] *Fofana et al* Appeal Judgement, para. 357.
[3351] *Fofana et al* Trial Judgement para. 170 and *Brima et al* Trial Judgement para. 667.
[3352] *Galić* Appeal Judgement, para. 104 which was not mentioned in full by the Appeals Chamber and which reads as follows: "The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, ***provided that the intent to spread terror among the civilian population was principal among the aims***."
[3353] *Fofana et al* Appeal Judgement, para. 357 citing *Galić* Appeal Judgement, para. 104.
[3354] *Fofana et al* Appeal Judgement, para. 357.

1050. To suggest that there cannot be co-existing purposes would mean that even in cases where a finding is made that the spreading of terror was one of the purposes of the attack, but not the only purpose, there could be no violation of Article 3(d) of the Statute. The Appeals Chamber held that such is not the law. The cases turn on the facts accepted by the court, but the specific intent to spread terror need not be the only purpose of the unlawful act or threat of violence.[3355]

b) Count 2: Collective Punishment

1051. The prohibition of collective punishment is "virtually equivalent to prohibiting 'reprisals' against protected persons".[3356] This Trial Chamber considered that the prohibition against collective punishments, based on Article 33 of Geneva Convention IV and on Article 4(2)(b) of Additional Protocol II, incurred individual criminal responsibility under customary international law.[3357]

1052. Trial Chamber II set out the core elements of collective punishments as follows:

> (1) A punishment imposed indiscriminately and collectively upon persons for acts that they have not committed; and
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> (2) The intent on the part of the perpetrator to indiscriminately and collectively punish the persons for acts which form the subject of the punishment.[3358]

1053. This Trial Chamber recalled that "the prohibition against collective punishments is identified broadly as one of the fundamental guarantees of humane treatment in Article 4 of Additional Protocol II" and that "this prohibition is to be understood as encompassing not only penal sanctions but also any other kind of sanction that is imposed on persons collectively."[3359] Indeed, the ICRC Commentary of Article 75.2(d) of Additional Protocol I advocates an extensive interpretation of the crime of collective punishments, to include:

[3355] *Brima et al*, Prosecution Appeal Brief, paras 463-490 to which the Prosecution refers for a more detailed discussion in that regard.
[3356] ICRC Commentary on the Additional Protocols, para. 4536. For a general statement of the law see: *Brima et al* Trial Judgement, para. 678 citing ICRC Commentary on the Fourth Geneva Convention, p. 225.
[3357] *Fofana et al* Trial Judgement paras 177-178.
[3358] *Brima et al* Trial Judgement, para. 676. See also *Fofana et al* Trial Judgement, para. 180.
[3359] *Fofana et al* Trial Judgement, para. 179 citing ICRC Commentary on the Fourth Geneva Convention, Article 33, p. 225 and ICRC Commentary on Additional Protocols, paras 4535-4536. *Fofana et al* Trial Judgement, para. 181 added: "The term punishment in the first element is meant to be understood in its broadest sense and refers to all types of punishments. It does not refer only to punishments imposed under penal law". See also *Brima et al* Trial Judgement, para. 681.

"not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) [...]. [I]t is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation."[3360]

1054. Trial Chamber II added that it was not necessary to prove that the victims of the punishment did not actually commit the acts for which they were punished.[3361] Therefore, the punishments inflicted are equally unlawful when committed against civilians who might have resisted against the AFRC and RUF forces.

B. Evidence

1055. The evidentiary basis for the crimes charged in Counts 3 to 14 of the Indictment, taken as a whole, provides the evidentiary basis for acts of terrorism charged under Count 1 and for acts of collective punishments charged under Count 2. Acts not necessarily criminal under international law or not satisfying the elements of those crimes charged under the Indictment may nonetheless be capable of spreading terror. The Prosecution therefore refers to the *acts or threats of violence* contained in the evidence presented above in Counts 3 to 14, including to acts or crimes falling outside of the specific temporal and geographic scope stated for Counts 3 to 14.[3362] The temporal and geographic scope of Counts 1 and 2 are broader and any evidence falling within the broader time period and geographic scope are relied upon as evidence for the crimes of terrorism and collective punishment. [3363]

[3360] ICRC Commentary of the Additional Protocols, para. 1374; see also ICRC Commentary of Geneva Convention IV, Article 33, para. 225, stating that "[the term of collective punishments] does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed."

[3361] *Brima et al* Trial Judgement, para. 680.

[3362] Acts outside the timeframe of the Indictment include for example: TF1-122 testified that in March 1998 there was a massive influx of displaced people from Segbwema Njaluahun in Kailahun District. They said that the RUF rebels and AFRC juntas attacked them in March 1998 and killed many civilians, looted their property and captured able-bodied men to carry their looted property; TF1-122, Transcript 7 July 2005, p. 99. Pursuant to the December 1998 attack on Kono [redacted] 50 corpses in the Lebanon area of Koidu. The 50 bodies were civilians who had been killed by gunshot; TF1-041, Transcript 10 July 2006, pp. 55-56 and pp. 87-89.

[3363] *Brima et al* Trial Judgement, para. 1439: "With regards to the element of the crime of terror that the acts or threats of violence directed against protected persons or their property were committed with the primary purpose of spreading terror among the civilian population, the Trial Chamber may rely on evidence which demonstrates a pattern of similar attacks, the context of the act, or is otherwise indicative of the purpose relative to any acts of violence committed, regardless of the nature of that evidence. The Trial Chamber will therefore examine the whole of the evidentiary record in this regard."

1056. Furthermore, as mentioned in Count 14 of this Brief, acts of burning should also be considered under Count 1 as "acts or threats of violence directed against protected persons or their property", as this was the conclusion that was effectively reached by Trial Chamber II in the *AFRC* Judgement, in relation to Count 1 of the AFRC Indictment, which is an identical pleading to Count 1 of the Indictment in the present case.[3364] Trial Chamber II found that evidence of burning, although not inclusive of the crime of pillage, as alleged by the Prosecution, can be taken into consideration in relation to the *actus reus* of the crime of terror, where burning was sufficiently particularised in the Indictment (Count 14).[3365] This approach was confirmed by the Appeals Chamber in the CDF Judgement, provided there is a specific intent to spread terror among the population.[3366] In respect of collective punishments, this Trial Chamber determined in the CDF case that acts of burning could amount to collective punishments.[3367] The following acts of burning should be considered as *acts or threats of violence* as part of a campaign to spread terror among the civilian population.[3368] The destruction of civilians' homes and means of livelihood is clearly capable of fulfilling the requirements of the crime of instilling fear and terror.

a) Koinadugu District

1057. TF1-361 testified that, a week after the departure of SAJ Musa from Koinadugu, Superman told his men [redacted] that they also had to move, as the manpower was too small to defend the area. Before moving from Koinadugu, Superman and General Bropleh gave instructions that all the houses should be burnt. During this period, Superman

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[3364] *Brima et al* 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 terrorise the civilian population of the Republic of Sierra Leone, and did terrorise that population".

[3365] *Brima et al* Trial Judgement, paras. 758, 1438, 1510 and 1532. See above Count 14.

[3366] *Fofana et al* Appeal Judgement, para. 359: "The Appeals Chamber further agrees that acts of burning are acts or threats that are potentially capable of spreading terror, notwithstanding the finding that acts of burning do not satisfy the elements of pillage."

[3367] *Fofana et al* Trial Judgement paras 796-797: "The Chamber finds that the evidence adduced proves beyond reasonable doubt that the acts described [...] in paragraph 791 [acts of burning considered under Count 4 – Cruel Treatment] were perpetrated with the specific intent to punish the civilian population in Koribondo and the surrounding areas. The Chamber is therefore satisfied, in relation to those acts described [...] in paragraph 791 [Count 4], that both the general requirements of war crimes and the specific elements of collective punishments have been proved beyond reasonable doubt with respect to each incident."

[3368] The subsequent acts of burning have not been mentioned in Count 14.

was in radio contact with Bockarie and Issa Sesay in the control station in Buedu.[3369] TF1-213 testified that the rebels burnt all 95 houses in Lengekoro and that they only spared the school and the mosque.[3370] Former President Kabbah received information about the treatment of civilians in Koinadugu District between February 1998 and September 1998, notably the burning of houses in Koinadugu District by the RUF.[3371]

b) Kono District

1058. Dennis Koker testified that, following the ECOMOG intervention and the retreat to Kono, he saw houses being burnt in Koidu and that both the AFRC and the RUF were responsible for those acts.[3372] He said that the top commander at the time on the ground was the First Accused, but that he also saw the Second Accused there.[3373]

1059. TF1-334 testified that Johnny Paul Koroma addressed [redacted] commanders at a meeting in Kono. He declared Kono to be a "no-go area" and ordered that surrounding houses should be burnt so that civilians could not settle in Koidu.[3374] Witness also said that the First Accused was present at the meeting and reinforced Johnny Paul Koroma's speech by saying that civilians were traitors who should not be tolerated. He then reiterated the order to burn houses in Kono, so that civilians would not come close their area.[3375] The burning started after Johnny Paul Koroma had left for Kailahun and continued until the day the troops pulled out of Koidu by mid May 1998. As a result, Koidu was completely burned down. Surrounding villages were also burned, namely Tombodu, Yengema, Bumpe, Jagbwema Fiama and Yomandu.[3376] RUF commanders present in Koidu when the burning happened included Superman, Eldred Collin and the Second Accused.[3377] He added that the

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[3369] [redacted]

[3370] TF1-213, Transcript 2 March 2006, pp. 18-20. See also the evidence of TF1-214 who testified to the People's Army amputating hands in Koinadugu District in May 1998 and burning of villages: Transcript 14 July 2004, pp. 20-30, 35; TF1-172, Transcript 17 July 2005, pp. 11-21; TF1-329, Transcript 2 August 2005, pp. 12-24 and 33-39; TF1-215, Transcript 2 August 2005, pp. 72, 77, 81-84 and 100-103.

[3371] Ahmad Tejan-Kabbah, Transcript 16 May 2008, p. 115.

[3372] Dennis Koker, Transcript 28 April 2005, pp. 45-46.

[3373] Dennis Koker, Transcript 28 April 2005, p. 47.

[3374] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript 18 May 2005, p. 6.

[3375] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 18 May 2005, p. 7; TF1-334, Transcript 7 July 2006, p. 16. Other commanders present at the meeting included Rambo, Akim Turay and Mike Lamin.

[3376] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 20 May 2005, pp. 8-9. See also p. 29 for Jagbwema Fiama and p. 31 for Bumpe.

[3377] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 20 May 2005, p. 10.

commanders themselves participated in the burning and that they never stopped anybody or warned anybody for these actions.[3378] The burning in Tombodu was an organized joint operation between the SLA and the RUF. [redacted] military supervisors who, together with RUF commanders, moved to the various villages to monitor that the orders had been carried out.[3379] Yomandu and Kayima were completely burned down; so was part of Gandorhun, by Rambo, who was an RUF member, and men under his command.[3380]

1060. TF1-360 testified that before the First Accused left Kono District to take Johnny Paul Koroma to Kailahun District, the First Accused told the Second Accused "to ensure that Kono should be burnt down...," Kallon passed this order to the soldiers and said he would promote those who burned Kono.[3381] [redacted] Mosquito sent a response telling them to burn Koidu. Superman, Mosquito and the First Accused then discussed matters on the radio set directly. During the communication, it was decided that if Koidu was burnt, they should not go far away, set defensive positions close to Koidu and make a zoo bush around Koidu.[3383] [redacted]

[3378] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 20 May 2005, p. 11.
[3379] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 20 May 2005, pp. 16-17.
[3380] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 20 May 2005, pp. 19-22.
[3381] TF1-360, Transcript 20 July 2005, pp. 15-17; see also TF1-360, Transcript 22 July 2005, pp. 82-83, Transcript 25 July 2005, pp. 9-12.
[3382] TF1-361, Transcript 12 July 2005, pp. 2-5.
1. [3383] TF1-361, Transcript 12 July 2005, pp. 6-8.
2. [3384] TF1-361, Transcript 12 July 2005, pp. 8-10.
[3385] TF1-361, Transcript 18 July 2005, p. 105 (lines 18-19) and p. 133 (lines 25-28).
3. [3386] TF1-361, Transcript 19 July 2005, p. 43.

After the withdrawal from Koidu, Superman sent a radio message to the First Accused that Mosquito should be informed that the burning had been carried out.[3387]

1061. TF1-071 indicated that, when he arrived in Koidu in March 1998, Superman, as well as the First and Second Accused were in Koidu.[3388] Nearly all the houses were burnt, so that the town was left "as a ghost town."[3389] [redacted] The First and Second Accused and other SLA commanders were also present at this meeting.[3391] The most serious report was the one regarding Tombodu, where Savage was responsible for the complete burning of the village.[3392] The Second Accused accepted being present at the Tankoro Police Station meeting convened by Superman, where it was discussed that Savage had burnt the entire township of Tombodu.[3393]

1062. TF1-015 testified that in April 1998, he saw SBUs under Co Pepe burn 5 houses while in Wundidu camp and identified Captain K.S. Banya as the one who had ordered the SBUs to "light candle" in Wundidu, meaning to go and burn houses.[3394]

1063. The First Accused testified that when Kono was burnt down, it was both the AFRC and the RUF who were there, whilst the ECOMOG were advancing on Koidu Town in order to capture it.[3395] DMK-161 said that he was unaware of the burning of property in Makeni but agreed that property was burnt in Kono.[3396] DIS-163 said that at the time ECOMOG was advancing towards Koidu Town, there was an order from Superman that all the remaining houses should be burnt, so that ECOMOG will not have a place to settle. He came to know from his Black Guard friends that Superman got the orders from

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[3387] TF1-361, Transcript 18 July 2005, p.17.
[3388] TF1-071, Transcript 19 January 2005, p. 44 and p. 47 (line 7).
[3389] TF1-071, Transcript 19 January 2005, pp. 50-51.
[3390] TF1-071 Transcript 19 January 2005, pp. 45-46 and p. 48.
[3391] TF1-071 Transcript 19 January 2005, pp. 46-47.
[3392] TF1-071 Transcript 19 January 2005, p. 46.
[3393] Accused Morris Kallon, Transcript 14 April 2008, p. 122.
[3394] TF1-015, Transcript 28 January 2005, pp. 13-14.
[3395] Accused Issa Hassan Sesay, Transcript 22 June 2007, p. 66.
[3396] DMK-161, Transcript 22 April 2008, p. 56.

Mosquito.[3397] DIS-214 confirmed that Koidu Town was completely burned down by the RUF and AFRC when retreating, under the command of Superman.[3398]

1064. A number of witnesses stated that Tombodu was completely burnt down. TF1-012 testified that, after ECOMOG had routed them from Freetown, an order was given by Mosquito that houses in Tombodu should be set on fire. The witness said he knew about the order because it was read by Staff Alhaji. Mosquito explained in the order that civilians were not supporting them, since they were leaving town to go in the bush and that they would not need houses in the bush.[3399] 36 houses were burnt that evening and the witness was there when it happened, as he was held in captivity by the RUF.[3400] TF1-077 was captured and made to carry loads.[3401] When they reached Tombodu, they found that the entire village had been burnt down.[3402] TF1-071 testified that Tombodu was like a ghost town, as very few houses were left. He said that all the houses in Tombodu had been set on fire by Savage, before he arrived there.[3403]

c) Freetown and the Western Area

1065. TF1-331 was living in Freetown with her husband at the time of the invasion on 6 January 1999. Fighters wearing combat uniforms came into town, so that she and other civilians escaped to the bush, where they stayed for one week. She returned to Freetown, where she saw that the houses were all burnt and everything was on fire.[3404] TF1-101 was living in Kissy on 6 January 1999.[3405] About 5 or 6 days after 6 January 1999, five rebels came at the witness' house, two of whom were SLAs.[3406] He could hear them talking from inside of his house and one of them said "let's burn this house" and they proceeded to burn the house. The neighbouring house was also burnt down.[3407] Many houses were burnt down

[3397] DIS-163, Transcript 11 January 2008, pp. 63-64. DIS-163 further clarified in cross-examination that it was Superman who gave the orders, DIS-163, Transcript 15 January 2008, p. 2.
[3398] DIS-214, Transcript 17 January 2008, p. 109.
[3399] TF1-012, Transcript 2 February 2005, pp. 16-17.
[3400] TF1-012, Transcript 2 February 2005, pp. 17-18.
[3401] TF1-077, Transcript 21 July 2004, p. 22.
[3402] TF1-077, Transcript 20 July 2004, pp. 77-78.
[3403] TF1-071, Transcript 21 January 2005, p. 98.
[3404] TF1-331, Transcript 22 July 2004, pp. 45-46.
[3405] TF1-101, Transcript 28 November 2005, p. 35.
[3406] TF1-101, Transcript 28 November 2005, p. 42.
[3407] TF1-101, Transcript 28 November 2005, pp. 44-46.

in his neighbourhood on the same day, including up to Thunder Hill area and as far as Looking Town.[3408]

1066. TF1-334 testified that he heard an announcement over the BBC from Mosquito, saying that he was reinforcing the commander in Freetown and ordering that strategic positions, including government buildings, commercial buildings, including banks, should be completely burnt down.[3409] TF1-093 was given a group of 50 people to command on 6 January 1999. People under her command would put petrol on houses and burn them.[3410] She added that usually they would not burn a house that was empty.[3411] She said that the group in question was active in the areas along Upgun, Fourah Bay Road, and Eastern Police and that altogether it burnt more than 20 houses.[3412] TF1-029, who was part of the mixed RUF and SLA force withdrawing from Freetown, testified that on the way from Wellington to Calaba Town, they burnt houses.[3413]

1067. TF1-169 testified that on 6 January 1999, [redacted] when he saw smoke all over Freetown, and especially from the east end.[3414] Rebels were burning everything down and government buildings were specifically targeted.[3415] [redacted] He observed that most buildings which were inspected had been set ablaze with kerosene or petroleum,[3416] which was later confirmed by some of the people [redacted][3417] Fifty-five government quarters were burnt,[3418] as well as almost all police stations in

[3408] TF1-101, Transcript 28 November 2005, p. 46 (lines 8-11).
[3409] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 14 June 2005, p. 48.
[3410] TF1-093, Transcript 29 November 2005, p. 105.
[3411] TF1-093, Transcript 29 November 2005, pp. 105-106.
[3412] TF1-093, Transcript 29 November 2005, p. 106.
[3413] TF1-029, Transcript 28 November 2005, p. 10.
[3414] Exhibit 61a, Transcript from AFRC Trial, TF1-169, Transcript 6 July 2005, p. 9.
[3415] Exhibit 61a, Transcript from AFRC Trial, TF1-169, Transcript 6 July 2005, p.10.
[3416] Exhibit 61a, Transcript from AFRC Trial, TF1-169, Transcript 6 July 2005, pp. 12-13
[3417] Exhibit 61b, Transcript from AFRC Trial, TF1-169, Transcript 7 July 2005, p. 21.
[3418] [redacted]

Freetown[3419] and public facilities in the Western Area such as in Goderich, Waterloo, Hastings and Grafton. The witness has visited those places in January 1999 and said he even found some of the buildings still burning at the time of his visit.[3420] Most of the houses in the east end of Freetown areas were burned down.[3421] The witness recalled that the rebels went on BBC Focus on Africa and announced that they would burn Freetown.[3422]

C. Liability of the Accused

a) Count 1: Terrorizing the Civilian Population

1068. The widespread nature of the attacks on the civilian population throughout the territory of the Republic of Sierra Leone, and the consistent pattern of the crimes committed, are demonstrative of the *specific intent* within the RUF to instil terror in the civilian population of Sierra Leone.[3423] The specific intent to spread terror, as an element of the crime of acts of terrorism, can be inferred from the numerous testimonies of witnesses in various locations within various districts at various times during the conflict.[3424]

1069. A *feeling of 'extreme fear'* has been expressed by numerous witnesses in many different ways. People could no longer be sure of their life and health, for over their heads hung the ever-present and horrific threat of being abducted, ill-treated, mutilated, enslaved or sexually abused by RUF combatants. KS Banya, a former SLA and member of the joint criminal enterprise who worked with the RUF, told [redacted] that Superman had told him that anybody found in the bush was to be considered RUF enemy.[3425] TF1-366 stated that when the RUF and SLA were based in Waterloo, anyone who was not with them, would be

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[3419] Exhibit 61a, Transcript from AFRC Trial, TF1-169, Transcript 6 July 2005, p. 55 (line 19). Also see pp. 52-56 and p. 86 where TF1-169 explains that police buildings burned numbered 9 out of the 11 listed in Exhibit 61d, Copy of Exhibit P29 from the AFRC Trial, "Needs Assesment Following The Rebel Invasion," Confidential, p.16950.
[3420] Exhibit 61a, Transcript from AFRC Trial, TF1-169, Transcript 6 July 2005, pp. 58-60.
[3421] Exhibit 61b, Transcript from AFRC Trial, TF1-169, Transcript 7 July 2005, p. 4.
[3422] Exhibit 61a, Transcript from AFRC Trial, TF1-169, Transcript 6 July 2005, p. 10 (lines 11-13); Exhibit 61b, Transcript from AFRC Trial, TF1-169, Transcript 7 July 2005, p. 19 (lines 28-29) and p. 20 (lines 1-5).
[3423] The defence military expert witness said in his report that "It may be more correct to see the use of terror as just one of many weapons used by an insurgent movement as part of its work towards safeguarding its political and its military progress." See Exhibit 389, Military Report of Johan Hederstedt, para. 16.
[3424] See also Exhibit 174, HRW Report 1999, p. 10: "the arbitrary nature of the attacks served to create an atmosphere of complete terror."
[3425] [redacted]

caught and killed.[3426] This clear identification of civilians as targets establishes that civilians were wilfully made the object of acts or threats of violence.

The inhabitants of towns and villages throughout Sierra Leone clearly did not feel safe. The evidence before the Trial Chamber has shown that civilians were terrorised by rebel attacks. It was out of fear of rebel attacks that civilians would hide and live in the bushes for prolonged periods.[3427] Furthermore, horrifying techniques were used by combatants to instill fear. For instance, TF1-015, captured by rebels in March 1998 in [redacted] Kono District,[3428] witnessed the killing of [redacted] fellow captives.[3429] [redacted][3430] TF1-197 testified that before the killings of six civilians in Tombodu [redacted] civilians were asked to sit on the floor and were seriously beaten. The rebels then told them that they would do some fortune telling:[3431]

> They brought seven stones. … The seven stones were, according to them, to do some fortune telling. According to them, if they send the stone, whosoever the stone meets means you have long life; and you that the stone misses, it means you are to die.[3432]

[3426] TF1-366, Transcript 9 November 2005, p. 33.
[3427] For instance, TF1-064 hid in the bush for a very long time and even gave birth there for fear of going to her village which had been attacked (TF1-064, Transcript 19 July 2004, p. 47); TF1-015 said he "became tormented and fearful" when the AFRC and RUF rebels attacked his village and said everybody was panicking in the town (TF1-015, Transcript 27 January 2005, p. 95); TF1-305 was raped by eight rebels, who threatened to kill her if she moved from the place where she was. She then stayed hidden in the bush with her family for a very long time. She said that after her rape "I was lying there as if I was in the hands of death itself." (TF1-305, Transcript 27 July 2004, p. 56, (lines 14-15) and pp. 55-57); TF1-214 said that upon the rebels arrival "we began panicking and we were terrified". She then hid in the bush for 3 months with her newborn child who then died because of the hard conditions in the bush. (TF1-214, Transcript 14 July 2004, p. 5); TF1-215 said that when Badala was attacked, there was panic all over the place and the witness with his family went into the bush (TF1-215, Transcript 2 August 2005, p. 74); TF1-101 said that before 6 January 1999, people were "panic-stricken" in Freetown as people were saying that rebels were coming (TF1-101, Transcript 28 November 2005, p.36). Numerous other witnesses have testified that they had to hide in the bush for fear of the rebels: TF1-192, Transcript 1 February 2005, pp. 57-58; TF1-218, Transcript 1 February 2005, p. 80; TF1-212, Transcript 8 July 2005, pp. 100-103; TF1-196, Transcript 13 July 2004, p. 19-21; TF1-345, Transcript 19 July 2006, pp. 27 and 29-30; TF1-199, Transcript 20 July 2004, pp.18-20; Exhibit 102 , TF1-179, Transcript from AFRC Trial, Transcript 27 July 2005, p. 32; TF1-097, Transcript 28 November 2005, p. 78.
[3428] TF1-015, Transcript 27 January 2005, pp. 104-106.
[3429] TF1-015, Transcript 27 January 2005, pp. 127-129.
[3430] TF1-015, Transcript 27 January 2005, pp. 147-148.
[3431] TF1-197, Transcript 22 October 2004, p. 13.
[3432] TF1-197, Transcript 22 October 2004, p. 13 (line 9 and lines 11-15)

1070. TF1-031 explained that in Karina and neighbouring villages, rebels who identified themselves as Foday Sankoh's group systematically burnt houses, captured civilians and stripped them naked, amputated their hands or killed them "like chickens."[3433] This sequence of atrocities shows that there was a pattern of successive crimes perpetrated with the objective of immuring civilians in a state of fear and submission. In addition, it is submitted that all amputations and mutilations performed on civilians, besides constituting acts of collective punishment as detailed below, also served as a means to inflict fear and spread terror amongst the population, constantly under the threat of encountering a rebel who might decide to carry out those atrocious acts.

1071. The brutal and gruesome manner of commission of the crimes, particularly killings and mutilations, and the *public display of violence* before members of the civilian population are clearly indicative of the intention to spread terror. These acts were demonstrably aimed at causing fear, panic and extreme apprehension amongst the population:

- TF1-023 reported that she was forced to watch rebels cut both the hands and tongue of a civilian accused of being a Kamajor.[3434]
- TF1-093 went on 20 attacks with the RUF in Kailahun District, where 50 civilians would be killed in each attack. The throats of civilians would be cut and their heads were placed on a stick with which they would go through the town.[3435]

[redacted]

- TF1-217, at gunpoint, was forced to watch his wife being raped by eight rebels and had to count how many of them were raping her, after which one of the attackers [redacted] stabbed his wife to death.[3437]
- Many women were publicly raped or gang raped by rebels.[3438]

[3433] TF1-031, Transcript 17 March 2006, pp. 80-84: For example, in Mayombo, "they captured some people, burnt some houses, brought them to Karina and stripped all of them naked." In Karina they started to kill people. "There were corpses, like chickens, all over the place"; at p. 82 (line 6-7).
[3434] Exhibit 59a, Transcript from AFRC Trial, TF1-023, Transcript 9 March 2005, pp. 36-37.
[3435] TF1-093, Transcript 29 November 2005, pp. 94-95.
[3436] TF1-141, Transcript 13 April 2005, pp. 26-30.
[3437] TF1-217, Transcript 22 July 2004, pp. 17-19.

- TF1-122 saw the AFRC and RUF jubilating around the body of an alleged Kamajor boss and the intestine was placed across the street as a checkpoint.[3439]

[redacted]

- TF1-331 and others were asked by the rebels to line up in Loko Town on 6 January 1999.[3442] In front of everyone present, "they cut one child about the age of six... in the middle." She states that "when he was cut in the middle, we were all afraid."[3443] They said it was a sacrifice for the peace.[3444] She also saw them shoot her husband in the head.[3445]

1072. The enslavement of civilians necessarily involved the use of terror to allow the perpetrators to reach their ultimate objectives. Captured civilians, whether used for forced labour, sexual purposes or military activities, were systematically threatened with death or severe punishment if they tried to escape.[3446] This was clearly a strategy to induce fear in order to ensure obedience and suppress any rebelliousness. Civilians were also *threatened, sometimes with death*, if they failed to support the AFRC Junta or the rebel movement.[3447] TF1-345 spent 3 days hiding in the bush while rebels would come to that area every

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[3438] TF1-064, Transcript 19 July 2004, p. 49; TF1-196 said that "she overheard the rebels talking about one woman who had been raped by ten rebels, ...after being gang raped the woman just laid on the ground motionless". The rebel who raped her said he would " rape her until she is helpless" and that she herself "felt ashamed that she was raped in public", Transcript 13 July 2004, p. 26 (lines 20-24), p. 27 (lines 25-27), p. 28 (line 20); TF1-199, Transcript 20 July 2004, p. 29 (lines 35-37) and p. 30.
[3439] TF1-122, Transcript 7 July 2005, pp. 82-83.
[3440] Exhibit 119, TF1-334, Transcript from AFRC Trial, Transcript, 15 June 2005, pp. 2, 9.
[3441] TF1-334 later went to Mammah junction where he saw 15 dead bodies that were chopped; Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 15 June 2005, pp. 20-21.
[3442] TF1-331, Transcript 22 July 2004, pp. 45-47.
[3443] TF1-331, Transcript 22 July 2004, p. 47 (lines 8-9).
[3444] TF1-331, Transcript 22 July 2004, p. 47.
[3445] TF1-331, Transcript 22 July 2004, p. 49.
[3446] TF1-016, Transcript 21 October 2004, p. 20; TF1-314, Transcript 2 November 2005, p. 43; Exhibit 59a, TF1-023, Transcript from AFRC Trial, Transcript 9 March 2005, p. 51-53; TF1-199, Transcript 20 July 2004, pp. 31-32; TF1-071, Transcript 21 January 2005, pp. 40-42.
[3447] See for instance TF1-060, Transcript 29 April 2005, pp. 58-59: In Kenema, Mosquito threatened civilians hiding in the bush to come out and work with the AFRC. See further evidence in Count 2 paras 1081-1083.

morning, evening and afternoon, searching for civilians who had left. They would, shout "Salaat, cut head" and threaten that those who came out of the bush would be killed.[3448]

1073. *The training methods* imposed in the different camps involved cruel and brutal treatment, designed to inflict pain, with the aim of terrorising the recruits. TF1-141, a child soldier, said that most of those he trained with died. Some died of pain and some fell from the monkey bridge made of sticks with barbed wire under it. Others were fired.[3449] There was a place called the Alaka where conscripts would be seriously beaten and three recruits died there.[3450] The First Accused even made a speech which clearly threatened disobedient recruits,[3451] and sometime after January 2000, the First Accused gave orders to execute six persons who tried to escape from training.[3452]

1074. The specific intent to spread terror should be inferred from *instructions and orders* given to combatants by AFRC and RUF commanders, including the three Accused, which clearly involved the commission of crimes such as amputations, ill-treatment, killing or burning. The strategy of the RUF high command, including the three Accused, was to spread extreme fear among the population so as to suppress resistance, provoke displacement and thereby gain territory. Given the nature and substance of those orders, and the context in which they were given, the three Accused intended for, or at the very least accepted, that criminal acts would be committed to terrorise the civilian population whom they considered to be "collaborating" with the enemy or who were not assisting the RUF:

- [redacted] Mosquito ordered "Operation Spare No Soul" also called "Operation Free Sankoh".[3453] Mosquito said that civilians were not distinct from the enemies as they had taken up arms as well, namely the Kamajors.[3454] The First Accused buttressed the comments and orders of Mosquito and said that the operation would include burning, setting up of blockades

[3448] TF1-345, Transcript 19 July 2006, pp. 39-40.
[3449] TF1-141, Transcript 12 April 2005, pp. 25-26.
[3450] TF1-141, Transcript 12 April 2005, pp. 24-26.
[3451] TF1-141, Transcript 12 April 2005, p. 30 (lines 24-25): "[...] you make any sort of blunder to do that, he said he---he would execute you".
[3452] TF1-362, Transcript 22 April 2005, pp. 21-23. Five of the six who tried to flee were killed.
[3453] TF1-045, Transcript 21 November 2005, pp. 68-69 and Transcript 24 November 2005, p. 106.
[3454] TF1-045, Transcript 21 November 2005, p. 73 (lines 21-23).

and killing. The plan to kill civilians and burn houses was intended to catch the attention of the international community.[3455]

- [redacted] commanders at a meeting held in [redacted]. He declared Kono to be a "no-go area" and ordered that surrounding houses should be burnt to make a strong defensive and so that civilians could not settle in Koidu Town.[3456] The First Accused was present at the meeting and reinforced Johnny Paul Koroma's speech by saying that civilians were traitors who should not be tolerated. He then reiterated the order to burn houses in Kono, so that civilians would not come close to their area.[3457] It was following this meeting that abductions started[3458] and amputations took place in Tombodu.[3459] Civilians were pushed from other towns around Koidu[3460] and those running away were executed.[3461]

- A meeting was held at Opera where the Second Accused gave orders that they should burn all the houses in Koidu and not encourage any civilian in their midst.[3462]

- [redacted] During this mission, Kallon specifically ordered the commander Rocky that "whosoever see us shall never see a rebel again" and that people's hands should be amputated, so that the radio should talk about it.

[3455] TF1-045, Transcript 21 November 2005, pp. 74-75.
[3456] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 18 May 2005, pp. 4-6. At p. 4 (lines 11-14), JPK said that they should not tolerate any civilian who was not part of them to live within the area and they should clear them and execute those not ready to join the movement.
[3457] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 18 May 2005, p. 7 (lines 10-15 [redacted]
[3458] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 20 May 2005, pp. 5-6. Captives were used to carry food, children trained as fighters and captive women became wives to the combatants; cooking for them and being used sexually.
[3459] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 20 May 2005, p. 6.
[3460] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 20 May 2005, p. 4; Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 18 May 2005, p. 9.
[3461] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 20 May 2005, p. 5.
[3462] TF1-366, Transcript 8 November 2005, pp. 26-27.
[3463] TF1-360, Transcript 20 July 2005, p. 46.

According to the Second Accused's instructions, all villages on the way were to be burnt down and people's hands cut off, "whether the person was an old person, a child". The witness said that a report about the mission was then submitted to the Second Accused, containing all the atrocities committed. Witness explained that "it was said that cutting people's hands off was fearful."[3464]

- Bockarie said that Operation No Living Thing meant that no prisoner of war was to be tolerated and no living thing should act as resistance to the fighting forces. Any person who may be a threat or resistant to the movement should be exterminated.[3465] TF1-263 gave evidence that the First Accused gave the instruction for that operation.[3466]

- [redacted] Karina, considered a strategic point as it was the home town of former President Kabbah, was to be the number one point of demonstration of the junta forces. He ordered Karina to be burnt down, civilians to be captured and amputations performed, as a demonstration which would shock the country and make the international community concerned.[3467] Just before the attack on Karina, Gullit had called the First and Second Accused[3468] over the radio and told them about his present location,[3469] saying he would continue to pursue the cause.[3470]

- George Johnson testified that following the 6 January invasion and the retreat, Bazzy Kamara instructed the combatants at Mamamah, "to make the terrain more fearful for the ECOMOG troops to slow down their movement." Civilians killed with machetes were displayed on the main highway.[3471]

[3464] TF1-360, Transcript 20 July 2005, pp. 55-56.
[3465] TF1-371, Transcript 21 July 2006, pp. 45-46. TF1-168 heard Eldred Collins, then spokesman for the RUF, announce the operation on BBC, Focus on Africa (see TF1-168, Transcript 3 April 2006, p. 73).
[3466] TF1-263, Transcript 6 April 2005, p. 42.
[redacted]
corroborated by George Johnson who testified that Brima ordered the massacres in Karina (See George Johnson, Transcript 14 October 2004, pp. 88-90).
[3471] George Johnson, Transcript 18 October 2004, p. 82 (lines 9-11) and p. 83.

i) Analysis

1075. The evidence presented above as well as the evidence relevant to Counts 3 to 14, is clearly indicative of the specific intent to spread terror and of the widespread and systematic attack against the civilian population, within the meaning of Article 2 of the Statute. A campaign of terror, viewed as a whole,[3472] is necessarily composed of individual atrocities,[3473] and each individual atrocity that was committed as part of a campaign of terror has the purpose of contributing to it. It is artificial to assess the purpose of certain particular crimes without considering them together with the other crimes committed as part of the same campaign of terror.[3474] Inasmuch as the overarching goal of that campaign was to terrorise, the primary purpose of all the crimes was also to terrorise.

1076. The evidence shows that the RUF did pursue a campaign intended to terrorise the civilian population of Sierra Leone. A host of different types of crimes, part of that campaign of terror, were committed continuously throughout Sierra Leone during the period of the Indictment, the result of which was to place civilians in fear of the RUF.

1077. As the mere *threat* of attacks on civilians' property or means of survival may satisfy the elements of the crime, the systematic destruction of homes and entire villages by burning, presented in the evidence above did amount to attacks on civilians' property and were intrinsically part of the RUF campaign to spread terror. Furthermore, acts of rape and other forms of sexual violence were committed in a way and with a level of cruelty[3475] that indicates that the primary purpose was to control the civilians in captured areas by terrorizing and subduing them. Such acts are also to be considered a part of that campaign. The Defence military expert witness confirmed that sexual assault of women can be used by insurgent movements to terrorize the civilian population.[3476] In spite of the findings of Trial Chamber II that the evidence of the "three enslavement crimes", namely sexual violence, recruitment of child soldiers and abductions and forced labour,[3477] did not in the

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[3472] See the definition of "campaign" provided in *Galić* Trial Judgement, para. 181.
[3473] See, for example, *Blagogević* Trial Judgement, paras 611-614, 620.
[3474] See *Brima et al* Prosecution Appeal Brief, para. 500.
[3475] For instance, TF1-195, Transcript 1 February 2005, pp. 25-26 :TF1-195 was raped by 2 rebels and one of them inserted a stick in her vagina. TF1-192, Transcript 1 February 2005, p. 65 and p. 68: TF1-192 said that the rebels used a knife to slit the private parts of a lady and of a young boy who had been paired up to have sex together and another female captive had a pistol thrust into her vagina.
[3476] Johan Hederstedt, Transcript 24 June 2008, p. 109.
[3477] Counts 6-9, 12 and 13 in *Brima et al* Indictment are similar than the counts in the present case.

particular context of the conflict in Sierra Leone satisfy the elements of the crimes of "acts of terrorism",[3478] it is submitted that those crimes were also committed with the specific intent to spread terror.[3479] Indeed, whilst military, and utilitarian with regard to Count 13, purposes may have been behind the conscription and use of child soldiers,[3480] the abductions and forced labour,[3481] and whilst sexual slavery may have been committed to use women to satisfy the sexual desire of combatants and to fulfil other conjugal needs,[3482] the connecting thread is that these crimes were all committed as part of a campaign to spread terror among the civilian population. The existence of other more immediate and direct purposes for the commission of the three enslavement crimes, does not negate the presence of the prominent underlying purpose behind these three crimes.[3483] Trial Chamber II observed that the possibility that another purpose to acts of violence may have existed does not in and of itself disprove that the primary purpose was to spread terror among the civilian population.[3484]

1078. The evidence clearly shows that the victims of the acts of terrorism were persons not directly taking part in the hostilities at the time of the violations.

ii) Liability under Article 6(1) and 6 (3) of the Statute

1079. It has been proven beyond reasonable doubt that a campaign of extreme violence and brutality was conducted by the RUF wilfully against civilians, with the primary purpose of terrorizing them in order to ultimately destroy all possible resistance. The Prosecution has established in the case at hand that the perpetrators of acts or threats of violence accepted the likelihood that terror would result from their illegal acts or threats, or were aware of the possibility that terror would be a result.[3485] This is evident from the various orders that were issued and the many different operations launched by the RUF

[3478] *Brima et al* Trial Judgement, paras 1449-1450, 1452-1454; 1459 and 1468.
[3479] The Appeal Judgement in AFRC upheld the ruling on the "enslavement crimes" based *solely* on the fact that there already had been convictions on Counts 1 and 2 and an adequate sentence imposed, without going to the merit of the issue. (*Brima et al* Appeal Judgement, para. 170-174).
[3480] *Brima et al* Trial Judgment, paras 1449-1450.
[3481] *Brima et al* Trial Judgment, paras 1452-1453.
[3482] *Brima et al* Trial Judgment, para. 1459.
[3483] See arguments in *Brima et al* Prosecution Appeal Brief, paras 458-526.
[3484] *Brima et al* Trial Judgement, para. 1443.
[3485] *Fofana et al* Judgement, para 170.

high command, including the three Accused, as shown above in paragraph 1074.[3486] The Prosecution submits that the evidence has established the legal requirements for acts of terrorism. The three Accused, by their acts or omissions, are therefore individually criminally responsible under Article 6(1) for committing, planning, instigating, ordering, or otherwise aiding and abetting in the planning, preparation or execution of the crime charged in Count 1 and/or under Article 6(3) given their position in the high command of the RUF.

b) Count 2: Collective Punishments

1080. Civilians were arbitrarily targeted and punished for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide support to the AFRC and RUF forces. The evidence will show that civilians were amputated *en masse* as "a message to President Kabbah" and particularly targeted because they were considered 'collaborators.'

1081. The evidence firstly confirms that civilians were ill-treated, killed or threatened to be killed, as a punishment for allegedly collaborating with the Kamajors or supporting the Government of President Ahmad Tejan Kabbah. [redacted]

[3486] For instance TF1-045, Transcript 21 November 2005, pp. 74-75; Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript, 18 May 2005, p. 7 (lines 10-15); TF1-366, Transcript 8 November 2005, pp. 26-27; TF1-360, Transcript 20 July 2005, pp. 55-56.
[3487] TF1-113, Transcript 2 March 2006, p. 59; TF1-366, Transcript 8 November 2005, pp. 56, 59; TF1-168, Transcript 4 April 2006, pp. 26-29. The number of the alleged Kamajors was between 60 and 70 people. (See TF1-113, 2 March 2006, pp. 58, 62-63; TF1-366, 8 November 2005, p.61; TF1-168, Transcript 31 March 2006, pp.65-67).
[3488] TF1-113, Transcript 2 March 2006, p. 57; TF1-366, Transcript 8 November 2005, p.61; TF1-168, 4 April 2006, p. 57; TF1-045, 21 November 2005, p.49.
[3489] TF1-113, Transcript 2 March 2006, p. 50.
[3490] TF1-168, Transcript 4 April 2006, p. 27 (lines 24- 28), p. 33 (lines 12- 29) p. 34, (line 1), p. 36 (lines 10-22); Transcript 31 March 2006, p. 64 (lines 8-21) and p. 71 (lines 11-14).
[3491] TF1-113, Transcript 2 March 2006, p. 58.

1082. The RUF fought Kamajors at Dodo Chiefdom in Kenema District. They were defeated and as they retreated, they labelled all civilians on the road Kamajors and killed them.[3492] It was also reported that a man and his wife had been killed by the RUF in a village called Maadahun because they were said to be Kamajors.[3493] TF1-125 testified that SOS Eddie Kanneh and Colonel Mosquito ordered the arrest of those they suspected to be Kamajor collaborators.[3494] There is also evidence of the Second Accused shooting and killing civilians at Five-Five spot, a club near Koidu, after having accused them of being Kamajors.[3495] At the Court Barri in Tombodu, the Second Accused further accused some civilians of being Kamajors and ordered that they be burnt alive. Fifteen civilians died.[3496] Furthermore, figures of authority, such as chiefs, were specifically targeted for failing to support the movement.[3497]

1083. Numerous witnesses have testified to being expressly or directly threatened with punishment by RUF combatants, for not supporting them. In addition to the infliction of terror as mentioned above, these testimonies all clearly indicate, the existence of a distinct intent to collectively punish civilians, shared and encouraged by the three Accused:

- TF1-015 said that before killing [redacted] civilians [redacted] in Koidu, Major Rocky said: "We are junta rebels". "As you see in Kono now, we are now in control". "We are coming to send you to Tejan Kabbah for you to tell him that we own here".[3498]
- TF1-060, based in Kenema District, testified that Mosquito held two meetings in Tongo, where all ethnicities except the Mende were represented.[3499] Mosquito realised he did not have the support of the civilians who were hiding in the bush and the witness

[3492] TF1-060, Transcript 29 April 2005, Closed Session, pp. 92-93.
[3493] TF1-060, Transcript 29 April 2005, Closed Session, p. 67 (lines 27-29).
[3494] TF1-125, Transcript 12 May 2005, p.104.
[redacted]
[3497] For instance, TF1-329 testified that rebels attacked Fadugu in September 1998 and the Paramount Chief, Alimamy Fanneh II was killed by burning down his house and placing a burning mattress on him (TF1-329, Transcript 2 August 2005, pp. 4, 33 and 37-38); On 16 September 1997, there was another report from Panguma about the killing of Pa Vandi Sei, who was the town chief (TF1-060, Transcript 29 April 2005, Closed Session, p. 66).
[3498] TF1-015, Transcript 27 January 2005, pp.123-124.
[3499] TF1-060, Transcript 29 April 2005, Closed Session, p. 56.

heard him declare a general threat to civilians in the chiefdom.[3500] With the consent of the Paramount Chief, a caretaker committee was set up [redacted] for civilians to come out of the bush and feel protected from the RUF and SLA.[3501] However, reports of raping, looting and beating were rampant and not an hour would pass without the committee receiving reports of someone dying.[3502]

- [redacted] came out of hiding from [redacted] following an announcement that all civilians who fled into the bushes and other villages "should come to Makeni" or else "pay the consequence."[3505]
- TF1-101, met 2 SLA's and 3 rebels during the Freetown invasion who told him that: "Now, since ECOMOG had come to fight us, you and we are all going to die together".[3506]
- TF1-235 lost his [redacted] children and 1 grandchild, when rebels opened fire on them while fleeing their home [redacted] on 5 January 1999.[3507] Before they were shot at, one of the rebels said: "These are the very people who rejected our rule. Now they are running away from us. They are the ECOMOG and Tejan Kabbah supporters. They should be taught a lesson. I think we ought to just shoot them down."[3508]

[3500] Mosquito said: "If you don't come and work with us, all these people, we are going to type these names, send them to all the places in this country where we have our men, especially the greats in the country...and if any one of you whose name is on this list, you happen to be caught in any of these places...he said, "We will deal with you severely...the next pain that is after this is to kill you. Therefore, it is better for you people to come and work with us." (See TF1-060, Transcript 29 April 2005, p. 58 (lines 23-29), p. 59 (lines 1-3).
[3501] TF1-060, Transcript 29 April 2005, Closed Session, p. 65.
[3502] TF1-060, Transcript 29 April 2005, Closed Session, pp. 66-75, specifically p. 75 (lines 1-14).
[3503] TF1-174, Transcript 20 March 2006, p.105.
[3504] TF1-174, Transcript 20 March 2006, p. 108 (lines 16-21).
[3505] TF1-174, Transcript 21 March 2006, p. 5 (lines 10-12).
[3506] TF1-101, Transcript 28 November 2005, pp. 42-43.
[3507] TF1-235, Transcript 29 July 2004, pp. 46-47.
[3508] TF1-235, Transcript 29 July 2004, p. 53 (lines 15-19). See pp. 53-55: [redacted]

- TF1-104 testified that on 18 January 1999, a group of AFRC and RUF came to [redacted] Kissy where TF1-104 was [redacted] They claimed that they had information that ECOMOG and Kamajors were [redacted][3509] They lined up everyone outside and proceeded to beat them with sticks. A Nigerian businessman was shot.[3510] The witness and other civilians were lined up and randomly fired upon. More than four civilians sustained injuries and fifteen were killed.[3511]
- TF1-334 testified that during the Freetown invasion, Kingtom was looted and set on fire, whilst some of the civilians were shot and killed because they were deemed traitors for having called ECOMOG there.[3512]

1084. Amputations and mutilations were performed *en masse* on civilians, wherever the RUF and AFRC forces went, as a systematic punishment for their alleged support to the Kabbah Government or on the mere suspicion that they were Kamajors. Overwhelming evidence shows that civilians were targeted randomly and viciously amputated:

[redacted]

- TF1-214 reported what a rebel commander said in front of civilians assembled in front of a cotton tree: "since you say you love a civil government, we are going to chop off your hands" and "If you are ready to cut off their hands, begin with the child so that they should know that they are not going to be spared." The rebels chopped off the hand of the witness and that of her [redacted] child. The rebel commander further said

[3509] Exhibit 60, Transcript from AFRC Trial, TF1-104, Transcript 30 June 2005, p. 22.
[3510] Exhibit 60, Transcript from AFRC Trial, TF1-104, Transcript 30 June 2005, p. 22-24.
[3511] Exhibit 60, Transcript from AFRC Trial, TF1-104, Transcript 30 June 2005, p. 26-28.
[3512] Exhibit 119, Transcript from AFRC Trial, TF1-334, Transcript 14 June 2005, pp. 40-45.
[redacted]

that this was "Operation No Living Thing" and one of the rebels told the witness: "If you look at me, I will chop off the other hand."[3516]

- TF1-023 reported that rebels cut both the hands and tongue of a civilian accused of being a Kamajor, while she was forced by one of the rebels to look. The rebels then placed a note, in bag hung around his neck and told him to go tell ECOMOG that they would be returning and were around.[3517]

- TF1-215 was captured by rebels who said: "we have come for you people, we are Foday Sankoh's Rebels. So you are encouraging ECOMOG Soldiers in this place".[3518] The hands of three men were amputated, one of whom was given a letter, as were the hands of [redacted] girl and her mother.[3519] The witness' hand was also chopped off. Then, they told the amputees that their hands were the hands used to vote for a civilian government and that they would never again vote for a civilian government. They were told to move to Kabala and tell people that Tejan Kabbah has bought one container of hands.[3520]

- The right hand of TF1-192 was chopped off by rebels, as were his 2 friends'.[3521] They were both asked to go to Pa Kabbah to give them false hands.[3522] The rebels chopped off the hand of TF1-343 and then told him and other captives to "go to Tejan Kabbah and explain."[3523] TF1-031 said that "Foday Sankoh's people" partly burnt her leg and left hand after which she was told to go to Kabbah for him to give her a foot.[3524] TF1-097's hand was amputated by a rebel called Captain Blood who then told him to go see Pa Kabbah as Pa Kabbah had brought a lot of hands for amputees.[3525] In April 1998, TF1-197 suffered a hand amputation by an RUF near Koidu. He was told to go to Kabbah for hands and a letter was placed in his pocket for Kabbah.[3526] [redacted]

[3516] TF1-214, Transcript 14 July 2004, p. 28 (lines 11-12), p. 29 (lines 36-37), p. 30 (line 1), p. 31 (lines 1-2).
[3517] Exhibit 59a, Transcript from AFRC Trial, TF1-023, Transcript 9 March 2005, pp. 36-37.
[3518] TF1-215, Transcript 2 August.2005, p. 87 (lines 5-6).
[3519] TF1-215, Transcript 2 August 2005, pp. 95-97.
[3520] TF1-215, Transcript 2 August 2005, pp. 98-100.
[3521] TF1-192, Transcript 1 February 2005, pp. 69-72.
[3522] TF1-192, Transcript 1 February 2005, p. 73.
[3523] TF1-343 Transcript 17 March 2006, p. 68, p. 69 (lines 8-9) and p.70.
[3524] TF1-031, Transcript 17 March 2006, pp. 87-88.
[3525] TF1-097, Transcript 28 November 2005, pp. 93-94.
[3526] TF1-197, Transcript 22 October 2004, pp. 14-16.

testified that soldiers in combat and wearing red head bands came to Lengekoro[3527] in March 1998[3528] and that, after she was raped by one of them, both her hands were amputated and a letter placed under her bosom to take to Pa Kabbah.[3529] TF1-196, captured by rebels on their way to Freetown said that Mosquito passed the order to amputate the civilians because some of them had escaped.[3530] TF1-028 witnessed two men who had had their hands amputated[3531] and one was given a letter for Tejan Kabbah so that he could buy hands for him.[3532] In Manyaie, a man in combat uniform threatened to kill [redacted] because she supposedly was one of the "members of Tejan Kabbah family."[3533]

- A rebel called Cutty Hand amputated the hand of TF1-172 and of his child.[3534] The rebels said they were not interested in civilian support and that they killed civilians.[3535] The amputees were taunted by rebels to take their hands to Tejan Kabbah, who they said had brought hands in 2 containers and to take their hands to show ECOMOG.[3536]
- TF1-179, her father, brother-in-law and uncle got their hands cut off by 7 armed men, a mixture of Junta and rebels. They told them to go to Tejan Kabbah to get their hands back, and to tell ECOMOG that they were on their way to Makeni.[3537]
- TF1-015 said that he saw a child's four limbs being amputated one after the other:

> I saw them place the little child's hand on a stick and chop it off at the wrist ... Then I saw them place the left hand of the child and cut it also ... The left foot at the ankle of the foot they placed it on the stick. They cut that also ... They laid a stick again. They came to the right foot now. At the ankle again that also was chopped off. Then he cried and said: 'What have I done? You're punishing me so.'[3538]

[3527] TF1-213, Transcript, 2 March 2006, p. 8.
[3528] TF1-213, Transcript, 2 March 2006, p. 32.
[3529] [redacted]
[3530] TF1-196, Transcript 13 July, p. 23.
[3531] TF1-028, Transcript 20 March 2006, p. 65 and pp. 21-23.
[3532] TF1-028, Transcript 20 March 2006, p. 23 (lines 18-19).
[3533] TF1-028, Transcript 20 March 2006, p. 14.
[3534] TF1-172, Transcript 17 May 2005 pp. 16-17 and p. 34.
[3535] TF1-172, Transcript 17 May 2005 p. 13-14.
[3536] TF1-172, Transcript 17 May 2005 p. 24- 25.
[3537] TF-179, Transcript 27 July 2005, pp. 38-41 and pp. 64-65.
[3538] TF1-015, Transcript 27 January 2005, p. 129, p. 131 (lines 10-11) and p. 132 (lines 4-7).

- TF1-093 testified that during the Freetown invasion on 6 January 1999, groups of rebels were amputating hands of civilians from Calaba Town to Kissy[3539] calling it long sleeve and short sleeve.[3540] The rebels would also cut off four fingers on the same hand and leave the thumb intact, saying that civilians would then be able to show "one love" to Tejan Kabbah.[3541] She saw more than 100 civilians' hands being chopped off on January 6.[3542]

[redacted]

[redacted]Finally, orders were issued as part of a military strategy aimed at collectively punishing civilians by either killing them or by destroying their property. [redacted]

i) Liability under Article 6(1) and 6 (3) of the Statute

1086. There is an abundance of evidence demonstrating that civilians, especially those living in areas controlled by ECOMOG, government troops or Kamajors, were arbitrarily and indiscriminately punished by RUF forces for failing to support the rebel movement. Acts described above, such as killing, amputations and burning, clearly amounted to collectively punishing people for acts for which they were not responsible.[3546] Furthermore, the perpetrators clearly intended to inflict such punishments on the civilian population.

1087. The evidence meets the legal requirements for collective punishments, as the crimes committed served as a punishment against protected persons. Hence, the three Accused are

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[3539] TF1-093, Transcript 29 November 2005, p. 105 and p. 110 (lines 11-13).
[3540] TF1-093, Transcript 29 November 2005, pp. 108-109.
[3541] TF1-093, Transcript 29 November 2005, p. 109 (lines 11-21).
[3542] TF1-093, Transcript 29 November 2005, p. 111 (lines 25-27).
[redacted]
[3546] *Brima et al* Trial Judgement, para. 680: The Prosecution is not obliged to prove that the victims of the punishment did not actually commit the acts for which they were punished.

to be held liable under Article 6(1) of the Statute for committing, planning, instigating, ordering, or otherwise aiding and abetting in the planning, preparation or execution of the crime collective punishment during the timeframe charged in the Indictment, and/or under Article 6(3) of the Statute given their position of authority described in the Superior Responsibility section above.

c) Joint Criminal Enterprise

1088. The three Accused bear individual criminal responsibility for their participation in a joint criminal enterprise, which involved acts of terrorism and collective punishments as a part of their common criminal design. The civilians terrorised, punished, killed (executed, burnt to death or hacked to death), outraged in their dignity, mutilated, looted, raped or sexually violated, and abducted were inhabitants of villages or towns which the RUF attacked in order to gain or consolidate their control over Sierra Leone's territory. Recourse to terror and the imposition of fear through the commission of atrocious acts constituted the basic means to establish such control and to maintain it. Gaining civilian support by force inevitably implied the use of collective punishment. The crimes charged under Count 1 and 2 were therefore strategically vital for the three Accused to achieve their goals and were part of the common purpose of the joint criminal enterprise. In the alternative, the crimes were the natural and foreseeable consequence of the common purpose of the joint criminal enterprise.

XIII. COUNTS 15-18: ATTACKS ON UNAMSIL PERSONNEL

1089. The Accused are charged under Counts 15 to 18 with committing crimes against personnel involved in a peacekeeping mission as other serious violations of International Humanitarian Law (IHL) punishable under Article 4(b) of the Statute (**Count 15**); and, in addition or in the alternative, for unlawful killings, murder as crime against humanity punishable under Article 2(c) of the Statute (**Count 16**); and, in addition or in the alternative, for violence to life, health, physical and mental well being of a person, in particular murder (**Count 17**), and, in addition or in the alternative, for abductions and holding as hostage, taking of hostages (**Count 18**), both as violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II punishable under Article 3(c) of the Statute.[3547]

1090. The Indictment alleges that between about 15 April 2000 and about 15 September 2000, AFRC/RUF engaged in widespread attacks against UNAMSIL peacekeepers within the Republic of Sierra Leone, including, but not limited to locations within Bombali, Kailahun, Kambia, Port Loko, and Kono Districts. These attacks included unlawful killings of UNAMSIL peacekeepers, and the abduction of hundreds of peacekeepers who were held hostage.[3548]

A) Background

a) United Nations Peacekeeping in Sierra Leone

1091. The United Nations Organisation ("UN") had been present in Sierra Leone since June 1998, when the UN Security Council established the United Nations Observer Mission in Sierra Leone (hereinafter "UNOMSIL") by Resolution 1181 (1998)[3549] to monitor and advise efforts to disarm combatants and restructure the nation's security forces. UNOMSIL teams were unarmed and their mandate consisted mainly in documenting the on-going human rights abuses committed against civilians.

1092. After the Lomé Peace Conference that took place between May and July 1999 in Togo, the parties to the conflict requested an expanded role for UNOMSIL and on 20

[3547] Indictment, para 83.
[3548] Ibid., para 1.
[3549] Security Council Resolution S/RES/1181 (1998), 13 July 1998, Exhibit 154 ("**Security Council Resolution 1181**").

August 1999 the UN Security Council authorized an increase in the number of military observers, and on 22 October 1999 terminated UNOMSIL and at the same time established the United Nations Mission in Sierra Leone ("UNAMSIL") through Resolution 1270 (1999).[3550] With a maximum of 6,000 military personnel, including 260 military observers, this mission was much larger than UNOMSIL and had the mandate to assist the Government of Sierra Leone and the parties in carrying out the provisions of the Lomé Peace Agreement[3551], especially "the implementation of the disarmament, demobilization and reintegration plan".[3552] Before the attacks and hostage-takings took place in May 2000, the Security Council had twice authorized an increase of UNAMSIL strength.[3553]

b) DDR Process and Position of the RUF

1093. One of the cornerstones of the Lomé Peace Agreement was the agreement of all the parties that the disarmament, demobilization and reintegration ("DDR") was an essential step towards achieving lasting peace and that it should be implemented by a "neutral peace keeping force comprising UNOMSIL and ECOMOG."[3554]

1094. UNAMSIL together with the other major stakeholders, ECOMOG, RUF, AFRC, donor representatives, and the Government of Sierra Leone constituted the National Committee for Disarmament, Demobilization and Reintegration (hereinafter "the NCDDR"), the main guiding body of the Disarmament Demobilization and Reintegration program ("**the DDR Program**") that met on a regular basis.[3555] The primary objective of

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[3550] Security Council Resolution S/RES/1270 (1999), 22 October 1999, Exhibit 99 ("**Security Council Resolution 1270**").

[3551] Lomé Peace Agreement between the Government of Sierra Leone and the RUF, dated 7 July 1999, S/1999/777, Exhibit 304 ("the Lomé Peace Agreement"); see also *Prosecutor v. Sesay et al,* SCSL-04-15-T-392, "Judicial Notice Consequential Order ," 24 May 2005, Annex II, Part II, Tab 5.

[3552] Exhibit 99, Security Council Resolution 1270, para. 8(b).

[3553] On 7 February 2000 by Resolution 1289 (2000), Exhibit 168 ("Security Council Resolution 1289"), and on 19 May 2000 through Resolution 1299 (2000), Exhibit 171. After the hostage taking in May 2000, the Security Council increased the strength of UNAMSIL further, to 17,500 military personnel, including the 260 military observers and approved a revised concept of operations by Resolution 1346 (2001) of 30 March 2001, Exhibit 169.

[3554] See Article XVI of the Lomé Peace Agreement, which reads in para. 1: "A neutral peace keeping force comprising UNOMSIL and ECOMOG shall disarm all combatants of the RUF/SL, CDF, SLA and paramilitary groups. The encampment, disarmament and demobilization process shall commence within six weeks of the signing of the present Agreement in line with the deployment of the neutral peace keeping force." UNOMSIL was terminated with the creation of UNAMSIL.

[3555] Article VI para. 2(vi) of the Lomé Peace Agreement and Annex 5 thereto "Draft Schedule of Implementation of the Peace Agreement; also: Exhibit 381 Fourth Report of the Secretary-General on UNAMSIL, S/2000/455, 19 May 2000, ("Fourth Secretary-General Report on UNAMSIL"), para. 3.

the DDR Program was the "consolidation of security and facilitation of the socio-economic reintegration of the ex-combatants into society as the basic step towards lasting peace".[3556] The disarmament process involved combatants voluntarily reporting to a disarmament camp and handing in their weapons and ammunition. The ex-combatants were then taken to a demobilisation camp from where they were handed over to NCDDR officials for further proceedings.[3557]

1095. In a special meeting of the NCDDR on 9 March 2000 all leaders of the factions involved "agreed to grant unhindered access to all parts of the country to UNAMSIL, the humanitarian community and the entire population [...] and to allow the disarmament to take place in selected areas in the Eastern and Northern Provinces where disarmament demobilization and reintegration (DDR) facilities were already in place, and thereafter in the rest of the country as facilities were made available".[3558] However, RUF combatants obstructed UNAMSIL deployment to Kono District. Free movement of UNAMSIL and humanitarian workers was not fully granted and disarmament remained scarce.[3559] Although Foday Sankoh reportedly accepted UNAMSIL as a "neutral peacekeeping force" the RUF seized weapons and equipment of Kenyan and Guinean UNAMSIL troops in January 2000.[3560] The UNAMSIL Force Commander had serious doubts about Foday Sankoh's commitment to the peace process.[3561] The security situation in RUF controlled areas remained precarious and sporadic fighting erupted between RUF and UNAMSIL prior to the hostage-taking, for instance in the Bafodia-Kabala area on in mid-March 2000 and on 8 April at Kenema.[3562] The tension grew especially in the Makeni and Magburaka area, which was largely under RUF control,[3563] mainly because the RUF refused to disarm.[3564] DMK-082 testified that when Sankoh came to a meeting at Masingbi after the

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[3556] Exhibit 302, Operational Order NO 3, January 2000, UNAMSIL doc. 322/OO/Ops./UNAMSIL, ("**Exhibit 302 Operational Order NO 3**"), para 3.
[3557] Ganase Jaganathan, Transcript 20 June 2006, pp. 7-8.
[3558] Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 3.
[3559] Ibid.
[3560] Ibid., para. 5.
[3561] [redacted]; Daniel Ishmael Opande, Transcript 11 March 2008, p. 25.
[3562] Exhibit 381, Fourth Secretary-General Report on UNAMSIL, paras 10, 14, 15.
[3563] Exhibit 302, Operational Order NO 3, para. 13.
[3564] Brigadier Ngondi testified about a meeting with the Third Accused that took place shortly after the 17 April 2000, the date of the commencement of disarmament in the Makeni, Magburaka area: "Q. What reasons did he give for the RUF not disarming? A. He gave me several reasons but I can remember a few. One is that the Lome Peace Accord, which they were signatory, was not being implemented properly, citing that RUF

signing of the Lomé Peace Agreement, Sankoh made it obvious that he did not want the RUF to disarm.[3565]

1096. UNAMSIL covered the Makeni and Magburaka areas with the Fifth Kenyan Battalion ("**KENBATT V**"), which was deployed to the region on 4 January 2000.[3566] It consisted of four (4) combat companies with a total of 921 officers and soldiers. There was also a Headquarter (HQ) company and the battalion HQ. Three (3) companies were deployed in the Makeni area and two (2) at Magburaka.[3567] The DDR-camps were located near Makeni (at Makump aka. Makomp) and near Magburaka (at Mabai) and accompanied by one reception centre at each of these locations.[3568] During the relevant period of time, UN Military Observers ("MILOBS"), NCDDR, as well as a number of humanitarian organizations were present in the area of deployment of KENBATT V.[3569]

c) Summary of the Events Covered by Counts 15 to 18 of the Indictment

1097. The MILOB team working with the support and collaboration of KENBATT V started the DDR program at Makump DDR camp near Makeni. This triggered off RUF

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was promised some certain appointments and they not been given yet. To be specific, ambassadorial appointments and, I think, district -- you know, some of them to be also appointed district commissioners or something of the sort. They were claiming that all combatants, which included Sierra Leone Army, were to be disarmed and weapons taken care of by UNAMSIL. And as the case it were, they were saying even if the SLA combatants were disarmed, the weapons were still kept in the stores in their camps. They complained that their leader, political leader, Foday Sankoh, was not being given the respect that he deserved, even if he had been appointed the vice-president of this country." Leonard Ngondi, Transcript 29 March 2006, p. 18 (lines 18- 29) and p. 19 (lines 1-3).

[3565] At a meeting in Masingbi with RUF commanders Sankoh used gestures, putting his arms and hands behind his back, making it clear that weapons were to be hidden behind and that the RUF should not comply with disarmament. DMK-082, Transcript 13 May 2008, pp. 86-88.

[3566] Exhibit 190, Report of UNAMSIL Headquarters Board of Inquiry NO. 00/19, ("**Exhibit 190 BOI Report NO. 00/19**"), p. 3. This document had been admitted as exhibit upon a motion by the Prosecution because it had been mentioned by the Defence in the cross-examination of the witness Major Ganase Jaganathan. *Prosecutor v. Sesay et al*, SCSL-15-594, Prosecution Motion to admit into Evidence a Document referred to in Cross-Examination", Ganase Jaganathan, Transcript 21 June 2006, pp. 35-40. This exhibit had been admitted "for the sole purpose of understanding the full context of the Defence cross-examination;" *Prosecutor v. Sesay et al*, SCSL-15-620, Decision on Prosecution Motion to admit into Evidence a Document referred to in Cross-Examination", SCSL-15-620, 2 August 2006, p. 4.

[3567] Leonard Ngondi, Transcript 28 March 2006, pp. 130-131. One company was located just before entering Makeni from Lunsar, the Battalion HQ and the HQ company were in same location on the road between Makeni and Kabala, about 4 km from Makeni. At Magburaka, one company was deployed at the Islamic Centre and the other near the river at the waterworks station. Transcript 28 March 2006, p. 132.

[3568] Leonard Ngondi, Transcript 28 March 2006, p. 133 and Transcript 29 March 2006, p. 3. The reception centre at Makeni served the DDR Camp located at Makump, South-East of Makeni, the one at Magburaka was in town while the DDR Camp was at Robol Junction on the road from Magburaka to Kono or to Mile 91.

[3569] Since it was part of its mandate to ensure the flow of humanitarian assistance, the battalion worked together with those entities. Leonard Ngondi, Transcript 29 March 2006, p. 9.

attacks on UNAMSIL camps in Makump, Magana and Mankneh in Makeni and at the Waterworks and other locations in Magburaka. The attacks were characterised by killing and wounding of UNAMSIL personnel, looting of their personal property and equipment, and the taking of UNAMSIL personnel as hostage.[3570] At Moria, a village located between Lunsar and Makeni, the commander and some of his men from the UNAMSIL Zambian Battalion (ZAMBATT), who were moving up to Makeni to assist KENBATT V, were lured into an ambush and then captured. They were disarmed, their vehicles and equipment seized, and then stripped off their personal clothing and belongings. They were subsequently taken hostage. The rest of the Battalion, were then attacked by the RUF and also abducted.[3571] The hostage-taking of around 500 UNAMSIL peacekeepers and MILOB continued on to Kono District, where they were kept as hostages until their transfer to Monrovia and subsequently to Freetown.[3572]

1098. The three Accused planned, ordered, directed and encouraged these acts, and directly committed some of the charged crimes.

B) Applicable Law and Elements of the Crime

a) Count 15: Attacks against Personnel Involved in a Humanitarian Assistance or Peacekeeping Mission

1099. Count 15 charges the Accused pursuant to Article 4(b) of the Statute, which states:

> Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

1100. Article 4(b) of the Statute mirrors Article 8 para. 2 (e) (iii) of the Rome Statute of the International Criminal Court (hereinafter "the Rome Statute"). The ICC Elements of Crimefor Article 8 para. 2 (e) (iii) of the Rome Statute are the following:

> 1. The perpetrator directed an attack.

[3570] See evidence adduced under C) Evidence, pp. 29-51; and Exhibit 381, Fourth Secretary-General Report on UNAMSIL, paras 56-71.
[3571] Ibid., para. 62.
[3572] Ibid., paras 62 and 67.

2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[3573]

1101. The evidence adduced clearly proves that these elements are established *in casu*.

i) Chapeau Elements

1102. For the period between 15 April 2000 and 15 September 2000, the context elements of Articles 3 and 4 of the Statute were present, namely the existence of an armed conflict and the nexus between the armed conflict and the alleged offence, as established in Section V on the contextual elements of Articles 3 and 4, above. Even though the parties had agreed in the Lomé Agreement that hostilities would be brought to a close, fighting did not stop and no general conclusion of peace was reached. Therefore international humanitarian law continued to apply on the whole territory of Sierra Leone.[3574] The nexus between the alleged acts and the armed conflict was given as well, since the perpetrators acted in furtherance of or under the guise of the armed conflict.[3575]

1103. The victims of the alleged crimes were not directly taking part in the hostilities at the time of the alleged violations and were therefore protected by both Common Article 3 and Additional Protocol II, as discussed in detail below, in paragraphs 1119-1123.[3576]

[3573] ICC Elements of Crimes, p. 149.
[3574] *Brima et al* Trial Judgement, para. 245; *Tadić* Appeal Decision on Jurisdiction, para. 70; *Kunarac* Appeal Judgement, para. 64.
[3575] *Brima et al* Trial Judgement, para. 246; *Kunarac* Appeal Judgement, para. 58; *Ru taganda* Appeal Judgement, para. 570.
[3576] *Brima et al* Trial Judgement, para. 248; *Tadić* Trial Judgement, para. 616.

ii) Actus Reus

1104. The *actus reus* elements to be established are the existence of an attack, the object of the attack, namely the personnel, installations, material, units or vehicles of a peacekeeping mission in accordance with the Charter of the United Nations and the entitlement to protection given to civilians or civilian objects under IHL.

a) Peacekeeping mission in accordance with the Charter of the United Nations

1105. The term "peacekeeping mission" is not specifically defined in the Statute of the Special Court for Sierra Leone, however, Article 4(b) of the Statue establishes three elements:

> there must be intentional attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;
>
> the peacekeeping mission must be in accordance with the Charter of the United Nations; and
>
> the members acting under the UN mandate are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

1106. On the basis of facts confirmed by all Prosecution and several Defence witnesses, UNAMSIL was a peacekeeping mission. It was a mission under the UN Charter. It is immaterial that the mission was established under Chapter VII, instead of Chapter VI of the Charter. The questions to be answered are 1) whether the peacekeeping mission was in accordance with the UN Charter, to which the answer is yes; and 2) whether the mission's members were entitled to the protection given to civilians or civilian objects under the international law of armed conflict, to which the answer is again, yes.

1107. Members of peacekeeping missions are permitted to act in self-defence and are armed with small weapons of a purely defensive character.[3577] The term "peacekeeping missions" is understood as covering international military observer missions (observers are unarmed) as well and they may even include supplementary tasks such as mediation or

[3577] E.g. pistols, rifles, had sub-machine guns: DIS-310 (DMK-147), Transcript 6 March 2008, Closed Session, p. 61 (lines 10-12).

settlement of disputes.[3578] Some Defence witnesses referred to peacekeeping and peace enforcement,[3579] in the context of Chapter VI[3580] and Chapter VII[3581] (and in one case an obviously erroneous reference to Chapter VIII[3582]). There was also comment on a change from Chapter VI to Chapter VII.[3583] This debate is irrelevant because the consideration for the Trial Chamber is whether the members of the UN mission are entitled to the protection given to civilians. UNAMSIL, which includes UN Military Observers, were acting as

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[3578] H. M. Kindred, "The Protection of Peacekeepers", *Canadian Yearbook of International Law 1995*, pp. 257-280, at pp. 259-263; M. Cottier, "Attacks on humanitarian assistance or peacekeeping missions", in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Oxford, 2008, N 45.

[3579] Especially during the testimonies of the defence witnesses DMK-444, DIS-310 (DMK-147) and Daniel Ishmael Opande E.g.: "Well, enforcing peace, as I said, you go into real military combat using -- at times I think they referred to it in the United Nations as Chapter 7 -- where the peacekeeping is referred to as Chapter 6.", DMK-444, Transcript 19 May 2008, p. 11 (lines 14-17).

[3580] E.g. Daniel Ishmael Opande, Transcript 11 March 2008, p.32 (lines 20- 23): "When we deployed our troops which was in December, I'm talking about as a Kenyan because I had the responsibility of deploying these troops here. They were deployed under Chapter VI."

[redacted]

[3582] E.g. DMK-444 stated: "Yes, you will say it is within Chapter 8; says the troops come in under Chapter 8." DMK-444, Transcript 19 May 2008, p. 62 (lines 8-9). This statement is obviously erroneous, since Chapter VIII of the Charter of the United Nations is about "Regional arrangements". Article 52 para. 1 of the UN Charter, for instance, reads as follows: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." and Article 53 para. 1 of the UN Charter provides: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article..." It is controversial whether the ECOWAS intervention in both Liberia and Sierra Leone can be considered as Chapter VIII interventions; neither of the missions hat been authorized by the SC before they took place, as required by Article 53 of the Charter, but were only "approved" after they had already been initiated. See: A. C. Arend, '*United Nations, Regional Organizations, and Military Operations: The Past and the Present*', Duke Journal of Comparative and International Law, Vol. 7, 1996, pp. 3-35, at pp. 24-26; A. McGregor, '*Quagmire in West Africa - Nigerian Peacekeeping in Sierra Leone (1997-98)*', International Journal, Vol. 54 (3), 1999, pp. 482-501, at pp. 492-493; H.J. Richardson, 'Peacemaking Practices 'from the South': Africa's Influence to the Law of Peacekeeping', American Society of International Law Proceedings, Vol. 96, 2002, 135-145, at. 139; A. Abass, '*The New Collective Security Mechanism of ECOWAS: Innovations and Problems*', Journal of Conflict and Security Law Vol. 5, 2000, pp. 211-230, at. p. 214; J. Levitt, '*Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of Ecowas in Liberia and Sierra Leone*', Temple International and Comparative Law Journal, Vol. 12, 1998, pp. 333-376, at. pp. 334- 346.

[redacted] Also: Daniel Ishmael Opande, Transcript 11 March 2008, p. 33 (lines 4-9): "And they were deployed under Chapter VI. They were here even January under Chapter VI. I am not sure ... how they could be expected to act under Chapter VII, for example, in January, February, until when the Security Council specifically gave UNAMSIL and I'm talking about UNAMSIL Chapter VII mandate."

peacekeepers, they took no steps other than acting in self-defence, and they are therefore, entitled to the protections given to civilians under international law.

1108. The reason for the reference to peacekeeping missions in Art. 4(b) of the Statute is to distinguish such missions from UN peace enforcement operations.[3584] The mandate of such operations permit UN member state military forces to take a direct part in hostilities, indeed that is their whole point. As the members of such forces are combatants, they may be targeted and killed by members of the opposing forces, who would thereby not be committing an international crime. This was clearly not the mandate of UNAMSIL.

1109. The closest analogy to the position of peacekeepers is that of civilian police forces, who also carry arms, but do not lose their status and protection from attack as civilians so long as they do not take a direct part in hostilities.[3585]

1110. Differences between a peacekeeping mission and a peace enforcement operation stem from the different measures that can be taken within Chapter VII, rather than whether the mission was created under Chapter VI or Chapter VII. In order to determine whether UNAMSIL forces were engaged in a 'peacekeeping mission' in the sense of Article 4(b) of the Statute, the exact parameters of the UNAMSIL mandate must be evaluated, not whether its mandate has been established as a Chapter VI or a Chapter VII measure. The subsequent analysis of the relevant UN Resolutions will show that the powers of UNAMSIL to use force were confined to acting in self-defence and related matters. The UNAMSIL mandate was entirely consistent with that of a peacekeeping mission and the fact that Chapter VII is invoked does not mean that the mission lost its peacekeeping nature. The UN Resolution creating UNAMSIL granted a peacekeeping mandate, and the evidence shows that

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[3584] The latter type of mission involves a use of military force, either through forces under direct operational command of the UN, as originally envisaged in Article 43 of the UN Charter, or through Chapter VII authorizations of the Security Council to UN member states - either individual states, grouping of states or regional organisations such as ECOWAS - as is now the generally accepted practice: J. Sloan, *The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom and Bust?,* Hastings International and Comparative Law Review, vol. 30, no. 3, pp. 358-452, at p. 390. For example the authorisation by the UN Security Council of the US-led "Coalition of the Willing" to expel Iraq from Kuwait in 1990 and 1991 in the so called "Operation Desert Storm" with Resolution 678. Ibid., p. 391; H. M. Kindred, "The Protection of Peacekeepers", *Canadian Yearbook of International Law 1995*, pp. 257-280, at pp. 260.

[3585] M. Cottier, "Attacks on humanitarian assistance or peacekeeping missions", in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Oxford, 2008, N 51. The author points out that "UN personnel and objects not engaged or contributing to hostilities would not constitute military objects." Also: H. M. Kindred, "The Protection of Peacekeepers", *Canadian Yearbook of International Law 1995*, pp. 257-280, at p. 264.

UNAMSIL members acted throughout as peacekeepers. Moreover, a mission may be given certain authority in its mandate, but should it choose not to use that authority and simply act under lesser powers, the mission is entitled to do so.

1111. Chapter VII foresees a number of measures which do not involve any use of force, such as those explicitly mentioned in Article 42 of the Charter, which reads: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[3586]

1112. The UNAMSIL mission in May 2000 complied fully with a peacekeeping mission. The Security Council established UNAMSIL through Resolution 1270 (1999), as agreed upon by the parties in the Lomé Peace Agreement.[3587] According to para. 14 of Resolution 1270, the Security Council was acting under Chapter VII of the UN Charter authorizing UNAMSIL to "take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence." The mandate clearly prohibited any use of force or intervention in internal affairs, and in fact, the members of UNAMSIL only acted in self-defence.[3588]

1113. The Security Council Resolutions, which were enacted following the Lomé Peace Agreement, defined the mandate of UNAMSIL, which consisted mainly in assisting the

[3586] *Prosecutor v. Tadić*, IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, paras 31-32. "... The language of Article 39 is quite clear as to the channeling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter." para. 31 *in fine* and: "As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a *very wide margin of discretion under Article 39* to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. ..." para. 32.

[3587] See Exhibit 304, Article XIV of the Lomé Peace Agreement, which reads in para. 1: "The UN Security Council is requested to amend the mandate of UNOMSIL to enable it to undertake the various provisions outlined in the present Agreement". As well as, Art. XXXIII Lomé Peace Agreement, which reads: "The parties request that the provisions of the present Agreement affecting the United Nations shall enter into force upon the adoption by the UN Security Council of a resolution responding affirmatively to the request made in this Agreement."

[3588] Brigadier Ngondi, Transcript 28 March 2006, p. 127 and Transcript 30 March 2006, pp. 17-18; DIS-310 (DMK-147), Transcript 6 March 2008, Closed Session, p. 72.

Sierra Leonean Government and the parties in carrying out provisions of the Lomé Agreement, in particular "the implementation of the disarmament, demobilization and reintegration plan". To that end, part of its mandate was "to establish a presence at key locations throughout the territory of Sierra Leone, including at disarmament/reception centres and demobilization centres", to "ensure the security and freedom of movement of United Nations personnel", to "monitor adherence to the ceasefire in accordance with the Ceasefire Agreement of 18 May 1999 ... through the structures provided for therein", to "encourage the parties to create confidence-building mechanisms and support their functioning."[3589]

1114. Further, nothing in the subsequent UN Security Council Resolution, 1289 (2000) of 7 February 2000[3590] suggests, that the mandate in Resolution 1270 was altered or that UNAMSIL was no longer a peacekeeping mission.[3591] The additional tasks given to UNAMSIL were to provide security at key locations and Government buildings, important intersections and major airports, including Lungi airport, to facilitate the free flow of people, goods and humanitarian assistance, to provide security in and at all sites of the DDR programme, to assist, in common areas of deployment, the Sierra Leone law enforcement authorities in the discharge of their responsibilities, to guard weapons, ammunition and other military equipment collected from ex-combatants, and to assist in their subsequent disposal or destruction. This resolution does not even mention the use of force for self-defence. All witnesses who were asked about the UNAMSIL mandate, confirmed, that the tasks and duties they carried out were in accordance with this mandate and that force was used only for self-defence.[3592]

[3589] Exhibit 99, Security Council Resolution 1270, para. 8 (a) to (f), see also: Brigadier Ngondi, Transcript 28 March 2006, p. 127.
[3590] Exhibit 168, Security Council Resolution 1289.
[3591] Its paragraph 10 reads as follows: "[The Security Council] Acting under Chapter VII of the Charter of the United Nations, decides further that the mandate of UNAMSIL shall be revised to include the following additional tasks, to be performed by UNAMSIL within its capabilities and areas of deployment and in the light of conditions on the ground: (a) To provide security at key locations and Government buildings, in particular in Freetown, important intersections and major airports, including Lungi airport; (b) To facilitate the free flow of people, goods and humanitarian assistance along specified thoroughfares; (c) To provide security in and at all sites of the disarmament, demobilization and reintegration programme; (d) To coordinate with and assist, in common areas of deployment, the Sierra Leone law enforcement authorities in the discharge of their responsibilities; (e) To guard weapons, ammunition and other military equipment collected from ex-combatants and to assist in their subsequent disposal or destruction,"
[3592] Brigadier Ngondi, Transcript 28 March 2006, p. 127 and Transcript 30 March 2006, pp. 17-18; DIS-310 (DMK-147), Transcript 6 March 2008, Closed Session, p. 72.

1115. The evidence clearly shows, that not only the mandate as provided for in the above mentioned Resolutions did not contain any permission for the use of force, but neither did the more detailed and operational orders and instructions given to the UNAMSIL personnel in the field. All the UNAMSIL witnesses, both of the Defence and of the Prosecution, were very clear about the UNAMSIL mandate:

> Basically about the mandate I was told that we were getting deployed for peacekeeping and it involves basically creating peace between the warring factions and the Sierra Leonean government and the provision of humanitarian assistance to the many people who were displaced because of the conflict that had been going on for some time....
>
> We were only expected to use the force to protect our lives or possibly when our lives were threatened.[3593]
>
> The mandates of UN troops was really peace-keeping, as opposed to peace enforcement.[3594]

1116. Defence witnesses DMK-444[3595] and DIS-310 were very clear about the fact, that the mandate of all the UNAMSIL commanders and soldiers did clearly prohibit the use of force, except for self-defence:

> And my instructions, My Lords, were specifically to get to Makeni and try to stabilize the situation. By stabilizing was to try and defuse the tension and restore normalcy, My Lords.[3596]
>
> Even in daytime when you are attacked you respond to protect your life; self-defence is paramount irrespective of what chapter you apply.[3597]

1117. The Rules of Engagement for UNAMSIL Troops[3598] ("**Rules of Engagement**"), which were, according to defence witness DMK-159[3599], distributed and explained to all UNAMSIL troops in their introduction training upon arrival. The Rules of Engagement complemented the UNAMSIL identity card and served to clarify the role of UNAMSIL personnel in the field and contain strict rules regarding the use of force.[3600] The Rules of Engagement limit the occasions when use of force was allowed, namely:

[3593] Edwin Kasoma, Transcript 22 March 2006, p. 7 (lines 2-7) and (lines 12-13).
[3594] DIS-310 (DMK-147), Transcript 7 March 2008, Closed Session, p. 72, paras 18-19.
[3595] DMK-444, Transcript 5 June 2008, Closed Session, p. 44 (line 21).
[3596] DIS-310 (DMK-147), Transcript 6 March 2008, Closed Session, p. 9 (lines 20-23).
[3597] DMK-444, Transcript 19 May 2008, Closed Session, p. 139 (lines 28-29) and p. 140 (line 1).
[3598] Exhibit 370, Rules of Engagement for UNAMSIL Troops, tendered in the examination in chief of defence witness DMK-159, Transcript 12 May 2008, Closed Session, pp. 14- 20.
[3599] DMK-159, Transcript 12 May 2008, Closed Session, p. 21.
[3600] Ibid., p. 16.

1. To defend oneself, UN and other international personnel against hostile act or intent.
2. To resist abduction or detention of oneself, UN and international personnel.
3. To defend designated UN installation, other key designated installations, areas and goods designated by UN, civilian under imminent threat of physical violence in locations where GOSL protection is not immediately available.
4. To ensure security and freedom of movement of UNAMSIL personnel against anyone who limits or intends to limit UNAMSIL freedom of movement.
5. To maintain UNAMSIL position when threatened with hostile act/intent.
6. To detain any group or person committing a crime or demonstrating hostile intent against UNAMSIL personnel/civilians/ UNAMSIL designated installations, areas of goods when local police authority is not present.
7. To prevent escape of apprehended or detained persons.
8. To search persons who unlawfully attempt to enter or have entered UN premises.[3601]

1118. The UNAMSIL mission before the hostage taking was a typical peacekeeping mission. This becomes evident if one compares its mandate to Security Council Resolution 1313 (2000), in which the Security Council decided to strengthen the mandate of UNAMSIL with the tasks to "deter and, where necessary, decisively counter the threat of RUF attack by responding robustly to any hostile actions or threat of imminent and direct use of force; [...]"[3602] The wording indicates a clear move from traditional peacekeeping to so called robust peacekeeping which in some ways comes closer to peace enforcement. Since such robust UN peacekeeping missions must be able to react to eventual breaches of agreements and violence, the Security Council provides them with a chapter VII mandate, which foresees exceptions to the prohibited use of armed force.[3603] Security Council Resolution 1313 (2000) was issued on 4 August 2000, after the hostage-taking; as a reaction thereto. However, the UNAMSIL mission in the relevant period between April and June 2000, although provided with a Chapter VII mandate, was clearly a peacekeeping mission, and as all of the witnesses stated, the members of UNAMSIL conducted themselves as peacekeepers. They acted no differently from civilians, relying only upon the

[3601] Exhibit 370, UNAMSIL Rules of Engagement, pp. 3-4.
[3602] Exhibit 170, Security Council Resolution S/RES/1313 (2000), 4 August 2000, para. 3 (c).
[3603] Q. Huasun, "Importance of Observing UN Peacekeeping Norms", *Brown Journal of World Affairs*, Vol. 3, 1996, pp. 35-40, at p. 37; B. Boutros-Ghali, "UN Peacekeeping: An Introduction", *Brown Journal of World Affairs*, Vol. 3, 1996, pp. 17-21, at p. 19. See also: DIS-310 (DMK-147), Transcript 7 March 2008, pp. 4-12.

right of self-defence. As such they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict, as guaranteed by Article 4(b) of the Statute.[3604]

b) Entitlement to Protection under International Humanitarian Law

1119. The wording of Article 4(b) of the Statute reflects the basic idea that peacekeepers may become legitimate targets only if they become combatants. As long as they do not, they are to be considered as civilians, even if they are attacked and are obliged to use force to protect themselves.[3605] However, if their mandate extends to a combat mission, or if they take a direct part in hostilities, members of peacekeeping - or rather peace enforcement - forces become combatants,[3606] who are liable to be attacked and lose their immunity as civilians.[3607]

1120. Traditional IHL norms do not foresee any specific rule for the protection of peacekeepers, since this phenomenon did not exist as it does today when the Geneva Conventions and the additional Protocols were drafted. However, the fact that both, the Statute of this Court and the ICC's contain specific norms granting a protection to peacekeeping missions, which is basically identical to the one granted to civilians, shows that peacekeeping forces, not mandated to use force, are entitled to the same protection as civilians. In any case, UN personnel and objects not engaged or contributing to hostilities

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[3604] The distinction should be drawn between UN resolutions. They can vary considerably in the scope and the powers of the mandates they grant. Secondly, the further distinction should be drawn between the mandate granted and the conduct of peacekeeping forces. A mandate may authorize a number of powers, however, commanders may determine that it is unnecessary to rely on all of the powers authorized. Ultimately, it is the conduct of the peacekeepers that should determine whether they are entitled to the protection given to civilians under international law.

[3605] See "Report of the Expert Meeting on Multinational peace operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces", ICRC Publication, ref. 0912, ICRC, Geneva 2004, p. 10.

[3606] One may exclude an entitlement to the protection of civilians in cases where a peacekeeping mission was authorized to use force which basically reaches the use of offensive force, as for instance the use of force by ONUC against the secessionist forces in Katanga province. J. Klinger, "Stabilization Operations and Nation-Building: Lessons from United Nations Peacekeeping in the Congo, 1960-1964", *The Fletcher Forum of World Affairs*, Vol. 29 2005, pp. 83-102, at pp. 97-98.

[3607] R. Kolb, "Background Document 1: Applicability of international humanitarian law to forces under the command of an international organization", *Report of the Expert Meeting on Multinational peace operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, ICRC Publication, 2004, ref. 0912, ICRC, Geneva 2004, p. 68.

would not constitute military objects as defined in Article 52 para. 2 of Additional Protocol I.[3608]

1121. Although no international case law exists with regard to this issue, the indictments in the *Karadzić* and the *Mladić* case both charge the hostage-taking of UN peacekeepers and military observers as a violation of Common Article 3,[3609] and seem to suggest peacekeeping personnel enjoys the status of persons protected by the Geneva Conventions.[3610]

1122. Personnel involved in peacekeeping missions are entitled to act in self-defence to the same extent as protected persons under IHL, as long as they are not drawn into protracted combat. Sporadic illegal attacks do not have this effect, so long as they do not "degenerate into a general pattern and the forces start conducting military operations on their own so as to respond to the acts of war of the other side [...]".[3611] UNAMSIL contingents were compelled to use a certain amount of force in self-defence. The evidence shows that fighting erupted when the DDR camps in Makump and Magburaka were attacked. [3612] However, this use of force was a reaction to the fierce and unexpected attacks by RUF combatants and must be considered as acts of self-defence.[3613]

[3608] Which reads: "[...] military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Furthermore, Article 37 para. 1 (d) of the Additional Protocol I prohibits "the feigning of protected status by the use of signs [...] of the United Nations". This allows the conclusion, that individuals entitled to the use of these signs enjoy a "protected status", similar to the one conferred to ICRC personnel by the distinctive emblem. It is submitted, that this results in the same protection afforded to civilians or persons hors de combat.

[3609] Punishable under Articles 3, and 7(1) and 7(3) of the ICTY Statute. See: Count 11 of *Prosecutor v. Karadzić*, IT-95-5-I, "Amended Indictment", 31 May 2000 ("*Karadzić* Amended Indictment") paras. 53-59, and Count 15 of *Prosecutor v. Mladić*, IT-95-5-I, "Amended Indictment", 11 October 2002 ("*Mladić* Amended Indictment") para. 45-47.

[3610] The initial indictment submits in para. 14 that "[t]he UN peacekeepers and civilians referred to in this indictment were, at all relevant times, persons protected by the Geneva Conventions of 1949." *Prosecutor v. Karadzić and Mladić*, IT-95-5-I, "Initial Indictment", 24 July 1995("*Karadzić and Mladić* Intitial Indictment").

[3611] R. Kolb, "Background Document 1: Applicability of international humanitarian law to forces under the command of an international organization", *Report of the Expert Meeting on Multinational peace operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, ICRC Publication, 2004, ref. 0912, ICRC, Geneva 2004, p. 68.

[3612] Ganase Jaganathan, Transcript 20 June 2006, pp. 34-35.

[3613] Although the relevant Security Council Resolutions do not mention the use of force for self-defence, the wording used in para. 14 of Security Council Resolution 1270 suggests that a certain amount of use of force may be allowed. Para. 14 reads: "Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to

1123. UNAMSIL was fully "entitled to the protection given to civilians or civilian objects under the international law of armed conflict", their members remained civilians, and the attacks on them were crimes under Article 4(b) of the Statute.

c) Intentionally directing attacks

1124. Since Article 4(b) of the Statute obviously refers to the wording of the UN Personnel Convention, the definition of "attack" in Article 9 of the Convention should be relied on to interpret "attack" in Article 4(b).[3614] It punishes the intentional commission of:

> (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
>
> (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
>
> (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
>
> (d) An attempt to commit any such attack; and
>
> (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.

1125. The term "attacks" used in Article 4(b) of the Statute is broader than the one used in traditional international humanitarian law. Article 49 para. 1 of Additional Protocol I for instance, defines "attacks" as "acts of violence against the adversary, whether in offence or defence". According to the ICRC Commentary "attack" means "combat action", independently whether they are offensive or in defence.[3615] Attacks do not have to result in deaths, injury or damages.[3616]

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civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG." See also

[3614] M. Bothe, "War Crimes", in: Antonio Cassese (*et al*)(eds), *The Rome Statute of the International Criminal Court. A Commentary*, Vol. I, Oxford 2002, pp. 379-426, p. 410.

[3615] International Committee of the Red Cross ("ICRC"), Commentary to the Additional Protocols, para. 1880.

[3616] The Convention on the Safety of United Nations and Associated Personnel in addition explicitly obliges every State Party to also criminalize "*threat[s]* to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act" and "violent attack[s] ... *likely to endanger* his or her person or liberty" (emphasis added), *supra* note 223, *article 9 para. 1 (c)* respectively (b) of the Convention on the Safety of United Nations and Associated Personnel.

1126. All of the charged acts fall under the definition of attack as provided for in the UN Personnel Convention. In addition, all of the charged acts fall under the definition of attack in Article 48 para. 1 of Additional Protocol I. The evidence shows, that several peacekeepers were killed in the attacks, that around 500 UNAMSIL members were kidnapped, that they were mistreated, and that at a number of official UNAMSIL premises, or means of transportation violent attacks likely to endanger persons or liberty were committed. The acts charged in Count 15 are therefore to be considered as "attacks" in the sense of Article 4(b) of the Statute.

iii) Mens Rea

1127. The only reasonable finding from the evidence is that the Accused had the required *mens rea* for the charged crimes. They intended the UNAMSIL personnel, installations, material, units or vehicles to be the object of the attack. As high level commanders of the RUF involved in negotiations with UNAMSIL[3617], they were aware that the UNAMSIL personnel, installations, material, units or vehicles were entitled to the same protection as civilians or civilian objects under IHL. They were further aware of the factual circumstances that UNAMSIL was a peacekeeping mission and at no point acted in a manner inconsistent with a peacekeeping mission.

iv) Defences

1128. Although the Statute does not contain any provision regarding defences, the only potentially plausible grounds for excluding criminal responsibility for Count 15 may be mistake of fact or mistake of law or self-defence. The defences of duress and necessity can be excluded, since the perpetrators did not act under a threat of severe and irreparable harm to their life of limb, or to life and limb of a third person.[3618]

1129. Mistake of fact may be invoked as a defence in international criminal law, if the requisite *mens rea* was lacking due to the fact that the person honestly and reasonably

[3617] Leonard Ngondi, Transcript 29 March 2006, pp. 6-10.
[3618] Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 242, Kai Ambos, Other Grounds for Excluding Criminal Responsibility, in Antonio Cassese (et al.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press 2002, pp. 1005-1014, 1038-1040.

believed, that factual circumstances making the conduct lawful existed.[3619] *In casu* this would be the case if the three Accused honestly and reasonably believed that the UNAMSIL peacekeepers were actively taking part in the hostilities, contrary to their mandate. However, the three Accused knew about the mandate of the UNAMSIL peacekeepers. They were also aware and knew that the UNAMSIL personnel and property they attacked were acting within this mandate and, therefore, did not represent legitimate military targets. In particular, if certain Defence evidence is accepted, the Second and Third Accused falsely told other RUF that the UNAMSIL forces had attacked RUF combatants, were blocking roads and forcibly disarming RUF combatants.[3620] Therefore, no mistake of fact existed to allow the assumption that the mental element required by the crime did not exist with regard to Count 15.

1130. Mistake of law (ignorance of law) does usually not exist as a ground excluding criminal responsibility in national legislations, and the Statute does not contain any rule regarding mistake of law. However, Article 32 of the Rome Statute, states: "[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility."[3621] Exceptions to this rule are provided for in para. 2 of the same article: "[a] mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime...." Mistake of law could thus only be pleaded, if one assumes, that the lack of knowledge of the legal obligation to refrain from attacks on peacekeepers constituted an essential mental element of the crime. However, according to established legal doctrine, the "mental element does not require more than the perpetrator's awareness of the social significance of the definitional element, it presupposes neither positive knowledge of the underlying legal provisions nor of their jurisprudential interpretation".[3622] The only reasonable conclusion to be drawn from the evidence is that the three Accused, as senior commanders, were aware that the mandate of UNAMSIL was to mediate between the

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[3619] E.g. as provided for in Article 32 para. 1 of the Rome Statute: "A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime."
[3620] See evidence below in the section on Evidence.
[3621] Art. 32 para. 2 of the Rome Statute, which is considered as the codification of the customary law principle *ignorantia legis non excusat*. Antonio Cassese, International Criminal Law, Oxford University Press 2003, p. 256.
[3622] Albin Eser, 'Mental Elements – Mistake of Fact and Mistake of Law' in Antonio Cassese (et al.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press 2002, p. 941.

conflicting parties and to supervise demobilisation and disarmament.[3623] They were aware of the legal prohibition to attack peacekeepers and MILOBS, since they were not actively participating in the hostilities and were therefore not a legitimate military target which could be lawfully attacked. The evidence further shows that the three Accused knew precisely that they had committed crimes by attacking UNAMSIL personnel, vehicles and equipment.[3624] The defence of mistake of law is simply untenable on the facts.

1131. In national and international law, a person may not be criminally responsible if, he or she acted in legitimate self-defence. This basic principle is reflected in Article 31 of the Rome Statute, according to which criminal responsibility is excluded, if a person "... acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected."[3625]

1132. Nothing in the evidence suggests that any of the RUF combatants, or the three Accused, or their property was at any point of time endangered by an imminent and unlawful use of force by UNAMSIL personnel. On the contrary, the reason for the attack was allegedly to prevent further RUF combatants to voluntary disarm,[3626] and even to seize weapons from the peacekeepers in order to free Foday Sankoh, who was under arrest in Freetown.[3627] It cannot be seriously argued that UNAMSIL, by providing facilities and personnel to facilitate voluntary disarmament or by defending themselves against the unexpected and illegal attacks by RUF fighters, constituted an imminent and unlawful use

[3623] Leonard Ngondi, Transcript 29 March 2006, pp. 6-10. They participated regularly in meetings with UNAMSIL officers and the NCDDR and were well informed about their mandate, activities and tasks.

[redacted]

[3625] Article 31 para. 1(c) Rome Statute, first sentence.

[3626] TF1-314, Transcript 02 November 2005, pp. 47-55, TF1-174, Transcript 21 March 2006, p. 60 (lines 23-25) and p. 62 (lines 10-13).

[redacted]

of force. It was the RUF, especially the Second and the Third Accused, who threatened UNAMSIL personnel. No situation calling for acts of self-defence existed.

b) Count 16: Unlawful Killings, Murder as Crime against Humanity

1133. Count 16 charges the Accused with unlawful killings and murder as crime against humanity pursuant to Article 2(b) of the Statute, which reads as follows:

> The Special Court shall have power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:
>
> a. Murder;

i) Chapeau Elements

1134. As regards the chapeau requirements of crimes against humanity pursuant to Article 2 of the Statute, the Prosecution refers to the assessment given above in Section V on the contextual elements of Article 2, above. The context elements required for crimes against humanity are fulfilled with regard to the charged acts, namely intentional killings and/or murder of UNAMSIL personnel.

1135. International case law defined "*attack*" as a "course of conduct involving the commission of acts of violence"[3628] of the kind listed in Article 2 of the Statute.[3629] It is not limited to the use of armed force and may also encompass any mistreatment of the civilian population[3630] and can even be non-violent in nature, if orchestrated on a massive scale or in a systematic manner.[3631] The acts of the perpetrator must objectively "form part" of the attack by their nature or consequences.[3632] The evidence shows that the attacks on UNAMSIL, which included unlawful killings of UNAMSIL peacekeepers, abduction and holding hostage peacekeepers and military observers, formed part of a campaign or operation planned by the RUF high command, in particular the three Accused, in order to obstruct or delay the disarmament process as agreed upon in the Lomé Peace

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[3628] *Kunarac* Trial Judgement, para. 415; *Kunarac* Appeal Judgement, paras 86, 89.
[3629] *Gacumbitsi* Trial Judgement, para. 298; *Semanza* Trial Judgement, para. 327; *Musema* Trial Judgement, para. 205; *Rutaganda* Trial Judgement Judgement, para. 70.
[3630] *Kunarac* Appeal Judgement, para. 86.
[3631] *Akayesu* Trial Judgement, para. 581.
[3632] *Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, paras 85, 99-101.

Agreement.[3633] As soon as the Accused realized that some RUF combatants intended to disarm, they tried to frustrate these activities. First by threatening the UNAMSIL personnel and RUF combatants involved, then by planning and carrying out targeted attacks on DDR and UNAMSIL locations and personnel, equipment and buildings in the Makeni, Lunsar and Magburaka areas. The attacks were of a military nature, followed a clear strategic plan and were carried out with heavy armament as described in the evidence.[3634] [redacted] using different vehicles, to abduct and transport the UNAMSIL hostages from the site of the hostage-taking to their place of imprisonment several hours away in an RUF strong-hold in Kono District.[3635] And DMK-444 gave evidence of a sophisticated and complete intelligence gathering network used by the RUF so that the High Command, Issa Sesay, was kept aware of any steps taken by UNAMSIL.[3636]

1136. An attack must be *directed against a civilian population.* International tribunals have defined the term "civilian population" extremely widely, including not only civilians in strict sense, as understood in IHL, but all persons who have taken no active part in the hostilities. The targeted population must, according to international case law, be predominantly civilian in nature.[3637] This definition includes peacekeeping forces with a mandate of preserving peace or a ceasefire, mediating between the parties, and securing the movement of humanitarian personnel. UNAMSIL contingents and the MILOBS operated according to a mandate which allowed the use of force only in self-defence and can therefore be considered to be of predominantly civilian nature. The fact that UNAMSIL personnel carried weapons does not alter this conclusion. IHL allows civilians to act in self-

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[3633] See Article XVI of the Lomé Peace Agreement, para. 1: "A neutral peace keeping force comprising UNOMSIL and ECOMOG shall disarm all combatants of the RUF/SL, CDF, SLA and paramilitary groups. The encampment, disarmament and demobilization process shall commence within six weeks of the signing of the present Agreement in line with the deployment of the neutral peace keeping force."
[3634] TF1-366, Transcript 10 November 2005, pp. 35-46 and 18 November 2005, pp. 14-16; Leonard Ngondi, Transcript 30 March 2006, pp. 2-5; Edwin Kasoma, Transcript 22 March 2006, pp. 19-22.
[3635] DIS-310 (DMK-147), Transcript 6 March 2008, pp. 84-87; TF1-314 mentioned a meeting the Second and Third Accused "called a meeting that they should come and attack UNAMSIL", TF1-314, Transcript 2 November 2005, p. 47 (lines 25-26); TF1-360 describes in detail, how the operation was planned and how many RUF troops were deployed to Makeni and Magburaka. TF1-360, Transcript 22 July 2005, Closed Session, pp. 2-8.
[3636] DMK-444, Transcript 19 May 2008, Closed Session, pp. 131-133.
[3637] *Akayesu* Appeal Judgement, para. 582; *Tadić* Trial Judgement, paras 637-638.

defence without losing their status as protected civilians. The fact that peacekeeping missions enjoy the same protection as civilians in Article 4 of the Statute, as described above in paras 1119-1123 is further proof of the civilian character of the target population.

1137. The attack must be *either widespread or systematic.* Even if the attacks on UNAMSIL are not considered as widespread, they were systematic.[3638] Only the attack as a whole, not the individual acts of the Accused, must be widespread or systematic and even a single or relatively limited number of acts could qualify as a crime against humanity, unless these acts may be said to be isolated or random.[3639] Determining factors for an attack to be considered as widespread or systematic are the consequences of the attack upon the targeted population, the number of victims, the nature of the acts and identifiable patterns of crimes.[3640]

1138. The extent of the attacks on different locations, involving RUF combatants and different Battalions of UNAMSIL peacekeepers (KENBATT and ZAMBATT) and two UN helicopters allow a reasonable trier of facts to conclude that the attacks involved a "large scale action, carried out collectively with considerable seriousness and directed at multiple victims".[3641] The evidence shows that the attacks were organised actions "carried out pursuant to a pre-conceived plan."[3642] The attacks on UNAMSIL personnel were both systematic and widespread.

1139. The evidence further demonstrates that the acts of the three Accused were part of this attack since they were the ones planning, instigating and carrying out the attacks on UNAMSIL personnel.[3643] They knew that their acts constituted part of a widespread or systematic attack directed against a civilian population.[3644]

[3638] *Fofana et al* Trial Judgement, para. 112; *Brima et al* Trial Judgement, para. 215; *Kunarac* Appeals Judgement, para. 93.
[3639] *Kunarac* Appeal Judgement, para. 96; *Simić* Trial Judgement, para. 43; *Blaskić* Appeal Judgement, para. 101.
[3640] *Brđanin* Appeal Judgement, para. 336; *Kunarac* Appeal Judgement, para. 95.
[3641] *Akayesu* Trial Judgement, para. 580.
[3642] *Kayishema et al* Trial Judgement, para. 123; *Kunarac* Appeals Judgement, para. 94; *Tadić* Trial Judgement, para. 648.
[3643] *Akayesu* Trial Judgement, para. 579
[3644] *Kunarac* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 255.

ii) Actus Reus of Murder

1140. The elements of murder were referred to under Counts 3-5 above. The evidence proves beyond reasonable doubt that at least four peacekeepers of the KENBATT were killed in the RUF attacks: Corporal Evans Kamande and Corporal Ombuya died when an armoured personnel carrier (APC) that they were in, was attacked by thr RUF and as a result plunged into the Rokel River, where they drowned. The other two killed KENBATT members were Corporal Robert Wanyama and Private Khamis Yunis. Both were shot inside the Makeni DDR camp. Private Khamis Yunis died immediately, Corporal Wanyama was seriously wounded and died subsequently.[3645]

iii) Mens Rea

1141. The *mens rea* required for murder was referred to under Counts 3-5 above.[3646] It is established in the jurisprudence of the International Tribunals that "the *mens rea* is not confined to cases where the accused has a direct intent to kill or to cause serious bodily harm, but also extends to cases where the accused has what is often referred to as an indirect intent."[3647] Therefore, "[t]he necessary mental state exists when the accused knows that it is probable that his act or omission will cause death."[3648] The only reasonable inference is that the Accused intended to kill the victims or acted in the reasonable knowledge that their acts and omissions would result in the victims' deaths.

iv) Defences

1142. As to the grounds for excluding criminal responsibility for Count 16 the Prosecution refers to paras 1128-1132, above.

[3645] Daniel Ishmael Opande, Transcript, 10 March 2008, p. 90 and Transcript 11 March 2008, pp. 101-104; and DIS-310 (DMK-147), Transcript 6 March 2008, pp. 111-112; Leonard Ngondi, Transcript 29 March 2006, p. 43; DMK-159, Transcript 12 May 2008, Closed Session, p. 52.
[3646] *Brima et al* Trial Judgement, 690, referring to *Akayesu* Trial Judgement, para. 588; *Kayishema* Appeal Judgement, para. 151; *Brđanin* Trial Judgement, para. 386; *Orić* Trial Judgement, para. 348.
[3647] *Strugar* Trial Judgement, para. 235.
[3648] Ibid., para. 236.

c) Count 17: Violence to Life, Health and Physical or Mental Well-being of Persons, Murder

1143. Count 17 charges the Accused in addition, or in the alternative, for violence to life, health and physical or mental well-being of persons, in particular murder, as violations of Article 3 common to the Geneva Conventions and of Additional Protocol, punishable under Article 3(a) of the Statute, which reads:

> The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:
>
> a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

i) Chapeau Elements

1144. As regards the context elements of Article 3(a) of the Statute the Prosecution refers to the submissions above in paras 1103 to 1105 and in Section V on the contextual elements, above, since the crimes listed in Article 3 of the Statute possess the same chapeau requirements as those in Article 4 of the Statute.[3649]

1145. As to the persons protected by the provision, the notion of "persons taking no active part in hostilities" in Common Article 3 is even broader than the notion of "civilians" used in Article 4(b) of the Statute. Since the words used in Common Article 3 do not only refer to civilians in the strict sense, the persons protected also include international peacekeeping forces with a peacekeeping mandate that does not involve the use of force, as set out in detail above in paras 1105-1118. The UNAMSIL peacekeepers and MILOBS personnel did fulfil this condition, since their mandate never included combat activities and there is no evidence that they have engaged in combat. Therefore the chapeau elements of Article 3 of the Statute are *in casu* fulfilled.

ii) Actus Reus

1146. Article 3(a) of the Statute prohibits violence to life and persons, and in particular, criminalizes murder of all kinds, mutilation, cruel treatment and finally torture. The term

[3649] *Brima et al* Trial Judgement, para. 257.

"violence" in Article 3(a) expressly covers violence to the mental well-being of a person. Such acts include e.g. mock-executions (giving the impression that a person would be executed) or other threats, which might arise to cruel treatment or torture.

1147. The core elements of the offence of murder in relation to both Articles 2 and 3 of the Statute are the same.[3650]

iii) Mens Rea

1148. For the *mens rea* to be fulfilled the perpetrator must have the intention to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.[3651] However, the Trial Chamber in the *Celebići* case found that the mental element of murder under Common Article 3 to the Geneva Conventions is broader than the one for crimes against humanity, since it includes recklessness.[3652]

> 439. .... the Trial Chamber is in no doubt that the necessary intent, meaning *mens rea*, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life. It is in this light that the evidence relating to each of the alleged acts of killing is assessed and the appropriate legal conclusion reached in Section IV below.[3653]

iv) Defences

1149. As to the grounds for excluding criminal responsibility for Count 17 to consider *in casu* the Prosecution refers to paras 1128-1132.

d) Count 18: Abductions and Holding as Hostages, Taking of Hostages

1150. Count 18 charges the Accused with abductions and holding as hostage, taking of hostages, as a violations of Article 3 common to the Geneva Conventions and of Additional Protocol, punishable under Article 3(c) of the Statute:

[3650] *Brima et al* Decision on Motion for Acquittal, para. 77; *Norman* Decision on Motion for Acquittal, para. 72-73; *Kordić and Čerkez* Trial Judgement, para. 236; *Čelebići* Trial Judgement, para. 422; *Krnojelac* Trial Judgement, para. 323.
[3651] *Akayesu* Trial Judgement, para. 588; *Kayishema* Appeal Judgement, para. 151.
[3652] Christopher K. Hall, "Murder", in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Oxford, 2008, pp. 183-190, N. 20, p. 188.
[3653] *Čelebići* Trial Judgement, para. 439.

> The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:
>
> [...]
>
> c) Taking of hostages;

i) Chapeau Elements

1151. As regards the context elements of Article 3(c) of the Statute, the Prosecution refers to the submissions above in paras 1103-1105, since the crimes listed in Article 3 of the Statute possess the same chapeau requirements as those in Article 4 of the Statute.[3654]

ii) Actus Reus

1152. The prohibition of hostage-taking is considered as customary[3655] and would constitute a grave breach of the Geneva Conventions in the case of an international armed conflict. In internal armed conflicts the taking of hostages is prohibited both in Common Article 3 and in Article 4 para. 2(c) Additional Protocol II. However, none of these provisions contain a definition of "hostage" or "hostage-taking". The Prosecution therefore refers to the definition contained in the Convention Against the Taking of Hostages (hereinafter: "the Hostage Convention"),[3656] which defines the offence of hostage-taking as the seizure, detention together with the threat to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") "in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage ....[3657] In the law of non-international armed

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[3654] *Brima et al* Trial Judgement, para. 257.

[3655] See: Jean-Marie Henckaerts & Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law, Volume 1: Rules* (United Kingdom: Cambridge University Press: 2005), pp. 334, 336, 574.

[3656] G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force 3 June 1983, accessed by Sierra Leone on 26 September 2003.

[3657] Article 1 para. 1 of the Hostage Convention reads: "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention."

conflicts, the definition of hostages is broader. They are persons who are, willingly or unwillingly, "in the power of a party to the conflict or its agent, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them."[3658]

1153. In international criminal law, the ICC Elements of Crime reflect both the text of the Hostage Convention as well as the jurisprudence of the ICTY. The *actus reus* elements of Article 8 (2) (c) (iii) Rome Statute are:

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. [...]
4. Such person or persons were either *hors de combat,* or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
5. [...]
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. [...]

1154. The evidence proves that the elements of the crime of hostage-taking are fulfilled in the present case. The perpetrators seized, detained or otherwise held hostage around 500 UNAMSIL peacekeepers and military observers, they threatened to kill, injure or continue to detain them. The persons held hostage fall under the category of either civilians or persons *hors de combat* as demonstrated in paras 1119-1123.

1155. The *actus reus* elements of Article 3(c) of the Statute as established in international criminal law, are therefore fulfilled in the present case.

iii) Mens Rea

1156. The crime of hostage-taking contains the specific intent to coerce a third party to act or refrain from acting. The ICTY stressed in the *Blaskić* Appeal Judgement that the "essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when

[3658] International Committee of the Red Cross ("ICRC"), Commentary to the Additional Protocols, para. 4537.

a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person."[3659]

1157. In the ICC Elements of Crime, the mental elements of the crime are defined as follows:

> 3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
> 5. The perpetrator was aware of the factual circumstances that established this status.
> 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

1158. The three Accused were aware of the facts that established the existence of an armed conflict and the facts that established the required status of the victims. The evidence further shows that the three Accused acted with the intention to compel the Government of Sierra Leone as well as the UN to refrain from continuing the DDR process, or to continue this process according to conditions set by the RUF as an explicit or implicit condition for the safety or the release of the UNAMSIL personnel.[3660]

iv) Defences

1159. As to the grounds for excluding criminal responsibility for Count 16 to consider *in casu* the Prosecution refers to paras. 1128-1132, above. The Prosecution submits especially, that no error of law or of fact existed as to the status of the hostages. The three Accused were aware of the specific mandate of UNAMSIL and the fact that they were not to be considered as combatants under international humanitarian law.

C) Evidence

1160. The Prosecution relies on the evidence of a number of abducted UNAMSIL personnel: TF1-288, Lieutenant-Colonel Edwin Kasoma and TF1-165, Brigadier Leonard Ngondi who were the Commanding Officers of the UNAMSIL Zambian Battalion

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[3659] *Blaskić* Appeal Chamber Judgement, para. 639; *Kordic and Cerkez* Trial Judgement, paras 311

[3660] Leonard Ngondi, Transcript 29 March 2006, pp. 16-19; Edwin Kasoma, Transcript 22 March 2006, pp. 19-22; TF1-360, Transcript 22 July 2005, Closed Session, pp. 2-5.

(ZAMBATT) and Kenyan Battalion (KENBATT), respectively; TF1-044, Lieutenant-Colonel Joseph Mendy and TF1-042, Major Ganase Jaganathan, both UN Military Observers (MILOB). Further, the Prosecution relies on documentary evidence, including RUF radio logbook entries,[3661] evidence of RUF insiders, crime base witnesses and some Defence witnesses who corroborate the testimonies of the victim witnesses and the documentary evidence.[3662]

a) General Evidence about UNAMSIL, DDR Program and General Overview of Attacks

1161. Brigadier Leonard Ngondi from the Kenyan Armed Forces arrived in Sierra Leone on the 21 February 2000 to take up command of the Fifth Kenyan battalion (KENBATT V) in Bombali and Tonkolili Districts on 25 February 2000.[3663] The deployment area of KENBATT V was under RUF control. During the course of his duties Brigadier Ngondi established contact and interacted with members of the RUF High Command, including the three Accused. He first met the Second Accused and the Third Accused at Magburaka on 26 February 2000. Further meetings followed and recurring issues that came up at these meetings were the freedom of movement of UN personnel and humanitarian workers within these territories and the flow of humanitarian supplies. The witness mostly met with the Third Accused, then with the Second Accused, while he met the First Accused only a few times.[3664] Brigadier Ngondi, testified that the intended launching of the DDR program for the RUF, foreseen on 17 April 2000, did not take place. Instead, armed RUF combatants moved around in Makeni, brandishing their weapons, some requesting the closure of the DDR reception centre, disrupting normal life. The Third Accused informed the witness, that disarmament was refused because the government did not properly implement the Lomé Accord, since promised government positions were not given to the RUF and Foday Sankoh was not being accorded the respect he deserved. The RUF further

[3661] Exhibit 34, Radio Log Book # 4 ("Radio Log Book # 4")and Exhibit 212, Radio Logbook containing instructions given by Issa Sesay, tendered during the examination in chief of Issa Sesay.
[3662] Mainly the testimonies of DIS-310 (DMK-147), dated 7 and 8 March 2008, and of General Opande, dated 10 and 11 March 2008.
[3663] Leonard Ngondi, Transcript 28 March 2006, pp.126 and 129 and Transcript 29 March 2006, p. 8.
[3664] Leonard Ngondi, Transcript 29 March 2006, pp. 6-10.

claimed that all combatants, including those of the SLA were to be disarmed and put under the control of UNAMSIL.[3665]

1162. Lieutenant-Colonel Joseph Mendy, a Gambian military observer who served in Sierra Leone from January 2000 to January 2001, arrived in Makeni in February of 2000. He got to know that the First Accused was in charge of the RUF. As required by the Lomé Peace Agreement, a Ceasefire Monitoring Committee was set up with representatives from MILOBS, the KENBATT, the RUF, the CDF and the local paramount chief. The witness attended three of the fortnightly meetings that started in March 2000. Colonel Jimmy attended on behalf of the RUF. There was a reception camp and a DDR camp in Makeni at that time and the MILOBS received surrendering RUF combatants, who would mostly hand in their arms and ammunitions, at the reception centre. MILOBS or KENBATT members registered what arms and ammunition had been handed in and handled them. The surrendered combatants were then transferred to the DDR camp, where military observers would register them and refer them to the NCDDR staff, for the final process.[3666] On 17 April 2000, while Lt. Col. Mendy was at the Makeni reception centre, the Third Accused arrived with armed RUF combatants surrounding the centre, saying that he was objecting to the disarmament. After some harsh negotiations the witness held with the Third Accused, the RUF combatants finally withdrew.[3667]

1163. Major Ganase Jaganathan, a member of the Malaysian armed forces, served as MILOB from July 1999 to July 2000. He was based in Kenema and Makeni. His main role as MILOB was to carry out disarmament and demobilisation activities, as well as liaison duties, patrolling and escorting NGOs.[3668] He testified how on 17 April 2000, the first day of demobilisation in Makeni, a group of 25 to 30 RUF combatants arrived on truck led by the Third Accused, the RUF Overall Security Commander. They jumped out and lined up in front of the DDR camp. The Third Accused, with a few armed combatants, stormed into the camp, threatening to dismantle all the tents, or otherwise to burn them with the people inside.[3669]

[3665] Leonard Ngondi, Transcript 29 March 2006, pp. 16-19.
[3666] Joseph Mendy, Transcript 26 June 2006, pp. 78-85.
[3667] Joseph Mendy, Transcript 26 June 2006, pp. 85-87.
[3668] Ganase Jaganathan, Transcript 20 June 2006, pp. 5-7.
[3669] Ganase Jaganathan, Transcript 20 June 2006, pp. 16-17.

1164. In a meeting on 20 April 2000 at the Teko Barracks in Makeni, Brigadier Ngondi discussed with the First Accused a public media event to take place on 28 April 2000 in Makeni, to allow the RUF to voice their concerns. During the meeting, the first Accused ordered a stop to the ongoing disarmament process in Sanguema.[3670]

1165. The information about the intensifying level of tension was confirmed by Defence Witness DIS-310.[3671] This tension rose further, when on 27 and 28 April 2000 a total of 10 RUF combatants came forward to disarm at the Makeni DDR camp, where disarmament took place on 1 May 2000.[3672]

b) Evidence about Hostage-takings and Attacks

i) Planning of the Attacks, Overview

1166. [redacted] which had begun in Lunsar, then under the control of Superman. After they had set up camps at Makump, on the highway between Magburaka and Makeni, some RUF combatants went there to beg and they got food. The witness was at the RUF office in Makeni, when he heard the Third Accused say that RUF ex-combatants were taken to an unknown location by the UN. The Second Accused, coming from Magburaka went to Makump and told the UN officers that the place they were building was only fit for pigs, not humans, and if they were not careful, the RUF would launch an attack within 72 hours. The next day the Second and Third Accused went to the UN camp with some bodyguards and RUF combatants. Shortly after, TF1-360 heard some civilians saying that the RUF bosses had attacked UNAMSIL.[3673]

1167. Then, the Second Accused sent a message to the First Accused in Kono, claiming UNAMSIL had blocked the road. [redacted]

[3670] Leonard Ngondi, Transcript 29 March 2006, pp. 20-22.

[3671] [redacted]

[3672] Exhibit 190, BOI Report NO. 00/19, p. 4; Exhibit 381, Fourth Report of the Secretary-General on UNAMSIL, para. 56.

[3673] TF1-360, Transcript 22 July 2005, Closed Session, pp. 2-5.

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[redacted] The fighting started at Makump, extended to Makeni and Magburaka, and they all started within 2 to 3 hours. The witness said the Third and the Second Accused lied to justify the attacks on UNAMSIL.[3675]

1168. TF1-366, a former RUF combatant, was told by the First Accused that the RUF should attack UNAMSIL in Magburaka while he was at his house at Five-Five, near Koidu. The First Accused had been informed by the Second Accused that UNAMSIL was threatening to disarm the boys. The witness was told to [redacted].[3676]

ii) Attacks and Hostagetaking in Makeni

1169. As soon as the information about the disarmament reached the RUF command, the tension rose to a level that finally led to hostilities at Makeni DDR camp, which ended in a massive attack and the destruction and looting of the camp and the hostage-taking of a total of 17 members of KENBATT V and military observers between the 1 and 3 May 2000.[3677] Brigadier Ngondi, as commander in charge of KENBATT V monitored the course of events from his base in Makeni as follows: On 1 May 2000 he was informed by radio about the arrival of RUF combatants at the reception centre to be demobilized and about their transfer to the DDR Camp at Makump (near Makeni), where they were paid dues by NCDDR officials. They were released after this as they opted not to stay in the camp. The witness was then informed, by the commanding UNAMSIL officer at Makump, Major Maroa, that an RUF combatant had informed the RUF High Command in Makeni[3678] and that subsequently the Third Accused had arrived at the Reception Centre with RUF

[3674] TF1-360, Transcript 22 July 2005, Closed Session, pp. 6-7.
[3675] TF1-360, Transcript 26 July 2005, Closed Session, pp. 90-91.
[3676] TF1-366, Transcript 10 November 2005, pp. 35-36.
[3677] Exhibit 381, Fourth Secretary-General Report on UNAMSIL, paras 57-59.
[3678] Leonard Ngondi, Transcript 29 March 2006, pp. 22-27.

combatants, requesting that the demobilized men and their rifles be handed over to him. More RUF combatants were assembled within the DDR Camp and the Second Accused arrived, firing from the window of his car. He slapped and grabbed Major Jaganathan, and at gunpoint, pulled him and bundled him away in his vehicle heading for Makeni.[3679] Maroa followed them to Makeni and Ngondi then lost contact with him, suspecting he had been held hostage as well. While Maroa and Jaganathan were held hostage, RUF combatants were amassing around the DDR camp demanding that Major Salahudin, another MILOB officer, be handed over to them. They remained there until the morning of 2 May. Brigadier Ngondi sent two other officers, Major Odhiambo and Captain Gula, with an operator and a driver to negotiate a peaceful resolution at Teko Barracks, but they were taken hostages as well.[3680] This information was corroborated by the testimonies of the victims who were taken hostage.

1170. Major Jaganathan testified that six out of the ten RUF combatants who had come to disarm on 27 and 28 April 2000 were told to return on 1 May 2000 to complete the DDR process. When they were brought there from the reception centre, about 30 to 40 armed RUF combatants led by the Third Accused approached the DDR camp. The witness tried to talk to the Third Accused, who told him that he wanted his five men and their weapons back, otherwise he would not move. The situation was tense since the RUF combatants were armed.[3681] The Second Accused arrived and entered the DDR camp. Shots were fired from his vehicle. The Second Accused punched Major Salahuedin twice in the face and tried to stab him with a bayonet affixed to his rifle. Later he ordered his men to detain Major Jaganathan. They hit him and eventually one RUF combatant pulled out a pistol and put it to his head threatening to shoot him. They dragged him out of the camp to the vehicle of the Second Accused, without letting him explain his functions and intentions. He was taken away by the Second Accused who harassed him and threatened to kill him. The witness was subsequently taken to Makump, where the Second Accused ordered him to get out, threatened and harassed him and blamed him and UNAMSIL for everything that had happened. When a Land Rover with UN peacekeepers passed, the Second Accused ordered his men to open fire at the vehicle. The Land Rover was shot at, stopped and the four UN

[3679] Leonard Ngondi, Transcript 29 March 2006, pp. 28-29.
[3680] Leonard Ngondi, Transcript 29 March 2006, pp. 30-36.
[3681] Ganase Jaganathan, Transcript 20 June 2006, pp. 18-21.

peacekeepers were disarmed and ordered to step out. They were the OC of the KENBATT V, 'A' Company, Major Maroa, his driver and two other military personnel of KENBATT V. The Second Accused captured and harassed them.[3682] DAG-111 testified that there were senior RUF commanders present at Makump on 1st May 2000. Among them were the Third Accused, the Second Accused[3683] and CO Kailondo. All the senior RUF commanders present at the incident were firing shots.[3684]

1171. Major Jaganathan was then brought away by the Second Accused leaving behind the four other peacekeepers with some RUF combatants. The Second Accused gave orders to his men at two RUF checkpoints to stop all UN vehicles and again threatened to kill Major Jaganathan, an unarmed MILOB. The witness was taken to the Teko Barracks in Makeni. There he heard the Second Accused's radio communication in which he said: "The UN have seriously attacked our position and taken five of our men and their weapons, but I have one." He also said, "All stations, red alert, red alert, red alert."[3685] At that stage, the Third Accused brought Major Maroa, who was bleeding from his mouth, and the other three peacekeepers, who were limping.[3686]

1172. This information was confirmed by the testimony of Lt. Col. Mendy, who testified, how on 28 April 2000, while he was at the DDR camp, the Second Accused gave orders to Kenyan peacekeepers to pull down the tents, which were being set up to host the ex-combatants, within 72 hours. On 1 May 2000 the transfer and the registration in the DDR camp went well and they went to their base in Makeni at around noon.[3687] Later in the afternoon, the witness was ordered by UNAMSIL headquarters to check what happened to Major Jaganathan and Major Salahuedin, because there was shooting at the DDR camp and both of them had not returned from there. While the witness tried to find the Third Accused for assistance, he met the Second Accused in town, surrounded by more than 50 armed RUF combatants. One of them snatched the walkie-talkie of Major Gjellesdad, the officer who accompanied the witness, while the Second Accused demanded the vehicle keys.

[3682] Ganase Jaganathan, Transcript 20 June 2006, pp. 25-30.
[3683] DAG-111, Transcript 19 June 2008, p 30.
[3684] DAG-111, Transcript 19 June 2008, pp. 29-30.
[3685] Ganase Jaganathan, Transcript 20 June 2006, p. 31 (line 12).
[3686] The witness was later told by Major Maroa that they had been disarmed and assaulted by a group of 60 to 70 armed RUF combatants. Ganase Jaganathan, Transcript 20 June 2006, pp. 31-32.
[3687] Joseph Mendy, Transcript 26 June 2006, pp. 94-98; Exhibit 109, Report by Lt. Col. Joseph Mendy dated 27 November 2000, **("Mendy Incident Report")**, paras 1-2.

When Col. Mendy asked of the whereabouts of Major Jaganathan and Major Salahuedin, the Second Accused said, he did not know and asked why the UNAMSIL peacekeepers had opened fire against the RUF and why they were disarming the RUF combatants. The witness explained that disarmament was voluntary and that the MILOBS were unarmed and could thus not have opened fire on anybody. Subsequently, the witness and Major Gjellesdad were taken hostage and brought to Teko Barracks by the Second Accused and armed RUF men.[3688] Major Jaganathan corroborated this information and further testified how later on all the hostages were put into a very small room measuring about two to three metres. They were not given any food or water and were harassed by the RUF combatants. The next morning, four more persons, Major Bosco Odhiambo and three other peacekeepers, who came to inquire about the hostages, were also locked up.[3689]

1173. Both, Col. Mendy and Major Jaganathan testified that on 2 May 2000 an RUF Colonel Jimmy took them and Major Gjellesdad outside to show them two dead bodies of RUF combatants, telling them they had been killed by UNAMSIL. He made them stand beside the corpses and they were photographed and then taken back to room they were held captive. Later the same day at about 11 p.m. RUF combatants started to interrogate the hostages one by one in the next room. The hostages were stripped of their uniforms, had their arms tied together with electric wires behind the back, and put down on the floor. Some were tied so tight that they were screaming and crying of pain. Some suffered severe wounds, especially Major Gjellesdad, who had deep cuts caused by the wire. The RUF combatants left them like this in the second room. Major Jaganathan was in addition told by another hostage that the DDR camp and their company locations were already encircled by the RUF combatants, and that they were prevented from moving out of the camp area. At that stage, a large group of armed RUF combatants boarded trucks and left. After some time, six loud explosions were heard and the hostages assumed, that the DDR was attacked.[3690]

[3688] Joseph Mendy, Transcript 27 June 2006, pp. 4-7; Exhibit 109, Mendy Incident Report, paras 3-4.
[3689] Ganase Jaganathan, Transcript 20 June 2006, pp. 32-33; This information was corroborated by Lt. Col. Mendy who further gave evidence that in the end they were 17 hostages (3 MILOBs and 14 KENBATT members). Joseph Mendy, Transcript 27 June 2006, pp. 10-12; Exhibit 109, Mendy Incident Report, para. 7.
[3690] Joseph Mendy, Transcript 27 June 2006, pp. 12-15; Ganase Jaganathan, Transcript 20 June 2006, pp. 34-35; Mendy Report para. 6.

1174. Finally, they were all put in a UN MILOBS vehicle which had been driven to the DDR camp one day earlier. It was driven by RUF combatants with two armed escorts. When passing by the location of the DDR, Major Jaganathan did not see the camp or any UNAMSIL peacekeepers guarding it. The witness learned later that it had been ransacked and burned down.[3691]

1175. The RUF attacked the Makump (Makeni) DDR Camp in the morning of 2 May 2000, and shot two soldiers. One, Private Yunis died immediately – his body was exhumed, identified and repatriated in 2001.[3692] Corporal Wanyama was seriously wounded. The peacekeepers had broken out of the RUF encirclement, headed in various directions and later turned up in small groups at different places.[3693] KENBATT had to leave Corp. Wanyama behind; he never turned up again and was determined to have died from his wounds.[3694] The information about those killings was confirmed and detailed by Defence witness, Lieutenant General Daniel Ishmael Opande, who visited Sierra Leone in May 2000, during the hostage crisis, as a member of a Kenyan fact finding mission, led by the Kenyan Minister for Defence,[3695] and later, from November 2000 until late 2003, as UNAMSIL Force Commander.[3696] He confirmed that Corporal Robert Wanyama died of gunshot wounds. He was shot within the DDR compound in a village near Makeni, was subsequently protected by some civilians who brought him to an RUF facility when his condition got worse. Daniel Ishmael Opande testified that the village where they eventually went and identified his grave was Makump. The Witness was told that Private Yunis was also shot within a DDR Camp.[3697]

1176. A number of other witnesses testified similarly. Witness TF1-041, a former RUF combatant, who was in Makeni at the time when disarmament started in May 2000, and accompanied the Second Accused to the demobilization camp located across the bridge after Makump, where they found carpenters making beds. The Second Accused told the

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[3691] Ganase Jaganathan, Transcript 20 June 2006, pp. 35-38 and p. 55; Joseph Mendy, Transcript 27 June 2006, pp. 15-17; Exhibit 109, Mendy Incident Report, para. 8.
[3692] DMK-159, Transcript 12 May 2008, Closed Session, p. 52.
[3693] Leonard Ngondi, Transcript 30 March 2006, p. 5; Exhibit 173, Fourth Secretary General Report on UNAMSIL, paras 59.
[3694] Leonard Ngondi, Transcript 29 March 2006, p. 43.
[3695] Daniel Ishmael Opande, Transcript, 10 March 2008, p. 90.
[3696] Daniel Ishmael Opande, Transcript, 10 March 2008, pp. 97, 81-84.
[3697] Daniel Ishmael Opande, Transcript 11 March 2008, pp. 101-104.

commander of the DDR camp to leave the place or they would force them to leave. He also told the women who were there to cook for the ex-combatants to leave the camp. He went to the KENBATT commander and told him the RUF will not disarm, telling him that KENBATT had 48 hours to leave the place. The following day TF1-041 and the Second Accused met the Third Accused standing at the Independence Square in Makeni, shouting that disarmament will not be forced, since he had heard that three RUF combatants had been disarmed. The Third Accused assembled fighters and seized a car and persuaded young boys, telling them the Zambians had come to fight them and that once disarmed the RUF would be captured and sent to Banana Island. The Third Accused then arrested a military observer, seized his vehicle and sent him to the barracks.[3698]

1177. [redacted] He was told that the Third Accused ordered the RUF combatants to capture any UNAMSIL they met in Makeni. Some of the children from [redacted] who went to Teko Barracks to find out more, confirmed that there was fighting between RUF and KENBATT V at Magburaka camp, because the RUF high command disapproved the disarmament of eleven RUF combatants. During the night, there was rampant shooting in Makeni. The fighting lasted until 3 May 2000. During the night of 29 April a group of KENBATT V peacekeepers came to ask the witness for help since they wanted to join their Unit at Mabanta and one of their colleagues had been killed. Around 3 May the witness saw RUF combatants in UN vehicles all over Makeni saying they had captured the UNAMSIL. They were heading for the Teko Barracks to meet with the High Command, headed by the First Accused.[3700]

1178. TF1-117, a former child solder who had been abducted by the RUF in Gboajibu, Kono District, in 1992, and subsequently used as a child soldier until Caritas Makeni took care of him[3701] testified how the Second and Third Accused came to the school run by Caritas once during the period when disarmament was supposed to begin. [redacted]

[3698] TF1-041, Transcript 10 July 2006, Closed Session, pp. 69-72.
[3699] TF1-174, Transcript 20 March 2006, Closed Session, p. 85 and 21 March 2006, Closed Session, p. 28.
[3700] TF1-174, Transcript 27 March 2006, Closed Session, pp. 61-68.
[3701] TF1-117, Transcript 29 June 2006, pp. 86-88 and 22-23.

[redacted] The boys then took their arms and started looting the UNAMSIL peacekeepers and attacking their camps at Mabanta and Mankneh.[3702]

1179. TF1-263, another former child soldier abducted by the RUF, testified that he was at Waterworks near Makeni and that the First Accused and his bodyguards came and arrested UNAMSIL peacekeepers. The UNAMSIL peacekeepers were put in trucks and taken to Tekko Barracks. The witness saw the First Accused there and "He was giving the order to other rebels that they should take the belongings of these soldiers and they were taken to Tekko Barracks."[3703] TF1-263 saw the First Accused's group attack the peacekeepers, the vehicle belonging to Sesay was used. "I saw Issa's men moving towards the direction of the peacekeepers and gun fire took place as they entered the compound of UNAMSIL."[3704] Further, the First Accused was there with his bodyguards.[3705]

1180. TF1-314, a former girl soldier who had been abducted by the RUF in 1994[3706] and was based in Makeni during the period of the abductions, was informed by RUF boys who lived in the same house about a meeting regarding the attacks on UNAMSIL held by the Second Accused and Third Accused. They met the UNAMSIL personnel in Makump. About an hour later the witness saw the Second and the Third Accused, and even some of the SBUs driving around with UNAMSIL vehicles in Makeni. She saw them boarding the peacekeepers onto vehicles and was told that the captured peacekeepers would be brought to Kono.[3707] All 17 hostages were later in the night of 2 May 2000 taken out of the room and pushed into a UN Nissan truck, still tied. They had to sit on each other, some even in the boot of the car.[3708]

[redacted] Several Defence witnesses corroborated this evidence. DMK-444, for instance said he knew from reports during Board of Inquiry that on 1 May the Second Accused punched

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[3702] TF1-117, Transcript 30 June 2006, pp. 23-31.
[3703] TF1-263, Transcript 7 April 2005, pp. 36-41.
[3704] TF1-263, Transcript 8 April 2005, pp. 75-77.
[3705] TF1-263, Transcript 8 April 2005, p. 77.
[3706] TF1-314, Transcript 2 November 2005, p. 24.
[3707] TF1-314, Transcript 2 November 2005, pp. 47-50.
[3708] Joseph Mendy, Transcript 27 June 2006, pp. 15-18; Exhibit 109, Mendy Incident Report, para. 8. Information was corroborated by TF1-366, Transcript 10 November 2005, pp. 42-46, who testified also that the second Accused kept all the belongings taken from the peacekeepers.

Major Salahuedin, that Major Salahuedin, Major Ganase Jaganathan, Lieutenant-Colonel Mendy, Major Gjellesdad were taken captive by the Second Accused and taken to Teko Barracks and that Mendy, Gjellestadt and Salahuedin were kept captive together with some Kenyan peacekeepers. He had heard during the events, that they were held hostage but had not been killed at that time.[3709] DMK-145 testified that the MILOBS that he knew to be abducted were Major Ganese, Lieutenant-Colonel Mendy, and Major Knut [Gjellestadt] and that he was also aware that KENBATT members were abducted by the RUF.[3710] [redacted]

1182. DMK 161, a former RUF member in Makeni, testified that there was an order given by Foday Sankoh that the 500 UNAMSIL troops that were approaching Makeni should not be allowed to enter Makeni, be arrested and taken hostage by the RUF.[3712] Commenting on the events of 1 May 2000 and the abduction of UNAMSIL personnel by the RUF the witness insisted that the Third Accused should be blamed for the events. He further stated that all the RUF senior officers in Makeni at the time including him should be blamed for the abduction of the UNAMSIL personnel.[3713]

iii) Attacks and Hostagetaking in Magburaka

1183. While the hostage-taking in Makeni went on, the situation at Magburaka deteriorated rapidly, when RUF combatants surrounded the DDR camp and KENBATT V positions there on 1 May 2000. On 2 May, when RUF combatants tried to disarm KENBATT peacekeepers and storm the camp and shot at the peacekeepers, the situation escalated and fighting ensued. Three UNAMSIL soldiers were wounded, and four were abducted by the RUF when the platoons tried to dismantle and leave the DDR Camp in

[3709] DMK-444, Transcript 19 May 2008, pp. 123-126.
[3710] DMK-145, Transcript 8 May 2008, pp. 82-83.
[3711] DIS-310 (DMK-147), Transcript 6 March 2008, Closed Session, pp. 115-116.
[3712] DMK-161, Transcript 22 April 2008, pp. 28-29.
[3713] DMK-161, Transcript 22 April 2008, pp. 46-47.

Mabai. Major Rono and three soldiers had allegedly been abducted earlier by the Third Accused who was at that time in charge of the situation at Magburaka at the time.[3714]

1184. The rest of the KENBATT V platoons managed to reach the KENBATT V headquarter at the Islamic College in Magburaka where the fighting continued until UNAMSIL reinforcement arrived in Magburaka in the form of an Indian Quick Reaction Company (QRC) on 3 May 2000 and managed to stabilize the situation there.[3715] Sporadic skirmishes continued and several KENBATT V positions remained encircled with inadequate food and water supply. On 7 May 2000 a UN helicopter that intended to evacuate the wounded peacekeepers was shot at and had to make an emergency landing.[3716] When the Indian QRC left Magburaka together with the KENBATT V's B Company they were followed by RUF troops. KENBATT C Company, left alone at Magburaka, came under severe threat by the RUF. Therefore, Brigadier Ngondi withdrew all his troops: C Company from Magburaka moved northwards to Bumbuna, and all the troops in Makeni (A and D Company, headquarter company, battalion headquarters) moved to Kabala. On the way UNAMSIL units met several RUF ambushes and were forced to fight, KENBATT V suffered several casualties: eight soldiers of the Makeni group were injured. An armoured personnel carrier (APC) with ten soldiers of the C Company plunged into a river: two soldiers died and several suffered severe injuries. After that break-out the troops were airlifted from Kabala and Bumbuna to Lungi.[3717]

1185. This information was corroborated by TF1-366, who testified that the RUF units that had been deployed from different places met at the junction going towards Mabonto, near Magburaka with the three Accused. Each of them lead one group, witness TF1-366 lead another and Alpha Momoh another one. They were ordered by the First Accused to attack UNAMSIL peacekeepers, kill them and capture some. The First Accused ordered TF1-366 to attack UNAMSIL at the Pampana Bridge, while he himself went to the Arab College in Magburaka, the Second Accused together with Komba Gbundema and Bai Bureh was sent to the Lunsar highway, the Third Accused to Makump, Alpha Momoh to

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[3714] Exhibit 381, Fourth Secretary-General Report on UNAMSIL, paras 57-59; Leonard Ngondi, Transcript 29 March 2006, pp. 36-40.
[3715] Leonard Ngondi, Transcript 29 March 2006, pp. 41-44; Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 62.
[3716] Leonard Ngondi, Transcript 30 March 2006, pp. 2-4.
[3717] Leonard Ngondi, Transcript 30 March 2006, pp. 6-11.

Waterworks. [redacted] The three groups were fighting all day long against UNAMSIL contingents and later the First Accused sent a message to the Third Accused ordering his reinforcement.[3718]

1186. While still fighting, a UNAMSIL convoy of around 80 vehicles moved from the UNAMSIL headquarters towards the Kono tarmac road. The First Accused ordered them to attack and chase them up to Magbas. The witness saw upon return the corpse of a peacekeeper. After packing all the abandoned equipment the First Accused ordered them to join the Second Accused in Makeni. In Makump they met the group of the Third Accused that was still fighting. One RUF child soldier and one peacekeeper died there. The UNAMSIL contingent withdrew into the bush. All RUF groups finally joined the Second Accused in Makeni.[3719]

1187. Daniel Ishmael Opande testified that two KENBATT members, Corporal Evans Kamande and Corporal Ombuya, died when an APC that they were in, was attacked by an RPG and as a result plunged into the Rokel River. The witness saw the APC himself and as UNAMSIL Force commander he went to the scene, found the grave of the two soldiers and ordered that their bodies be exhumed and sent back to Kenya.[3720]

1188. Witness TF1-117 testified how when his group came to Makump it had already been destroyed and all ammunition had been taken by the First and the Third Accused. At Mabanta, the group looted ammunition, uniforms and cars, and then opened fire at a chopper which had come to evacuate the Kenyan peacekeepers.[3721] The captured UNAMSIL vehicles were gathered at the Task Force Office. At the Task Force Office all three Accused assembled with Gibril Massaquoi, General Bropleh and Colonel Digba.

[3718] TF1-366, Transcript 10 November 2005, pp. 35-42 and 18 November 2005, pp. 14-16.
[3719] TF1-366, Transcript 10 November 2005, pp. 42-46.
[3720] Daniel Ishmael Opande, Transcript 11 March 2008, pp. 101-104.
[3721] TF1-117, Transcript 30 June 2006, pp. 31-32.

They wanted to kill the hostages, but finally the First Accused ordered their transfer to Kailahun. RUF combatants were using seized UN vehicles and uniforms.[3722]

1189. This evidence was corroborated by DMK-444 who testified that on 2 May the RUF attacked KENBATT peacekeepers at Magburaka. DMK-444 testified that he learned of the incident from situation report at headquarters. DMK-444 testified that he learned about an attack taking place at Makeni and on the following day of another one at Magburaka, where the RUF stormed that camp and were shooting at the peacekeepers. DMK-444 testified that he learned that peacekeepers were killed that day.[3723]

iv) Attacks and Hostage Taking on Lunsar Highway

1190. The UNAMSIL Force Commander on 2 May 2000, instructed the Zambian Battalion I (ZANBATT)(minus one company) under the command of Lieutenant-Colonel (Lt. Col.) Edwin Kasoma, [redacted] The convoy spent the night of 2 May 2000 at Lunsar, and on 3 May 2000 they set off from Lunsar towards Makeni. The convoy was stopped at an RUF roadblock and were told that a RUF commander wanted to talk to them first. Lt. Col. Kasoma moved ahead with about 10 men and fell into an RUF ambush at Moria. The RUF combatants numbered over 100, carried light weapons, rocket launchers and grenades and immediately disarmed the peacekeepers. Lt. Col. Kasoma was taken to the Second Accused who ordered him, at gunpoint, to order his men to bring at least five Land Rovers and three armoured fighting vehicles. The Second Accused wrote a note to Kasoma's second in command and forced Kasoma to sign it.[3725] The Second Accused then ordered two armed RUF men to take Lt. Col. Kasoma to the bush where he spent three hours, fearing they would kill him. Later, the witness was driven to Makeni by RUF combatants, some of them in Zambian combat uniforms, the Second Accused sitting in the passenger seat. Upon arrival in Makeni Lt. Col. Kasoma met others of his contingent that had stayed back at the first roadblock. Most of them disarmed and undressed.[3726]

[3722] TF1-117, Transcript 30 June 2006, pp. 31-34, Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 62.
[3723] DMK-444, Transcript. 5 June 2008, pp. 114-116, 129.
[3724] Edwin Kasoma, Transcript 22 March 2006, pp. 8-10; [redacted]
[3725] Edwin Kasoma, Transcript 22 March 2006, pp. 19-21.
[3726] Edwin Kasoma, Transcript 22 March 2006, pp. 22-23.

[redacted] By the evening of 3 May 2000 they received the handwritten note from Kasoma, instructing Kasoma's second in command to move forward. After a few kilometres the convoy was stopped and broken up. The remaining part was surrounded by RUF and the entire group was disarmed, put in different vehicles that proceeded in different directions one-by-one in the dark.[3727]

1191. These testimonies are corroborated by several other witnesses: [redacted] Commander Gume who was in charge of the Freetown-Makeni Highway, reported a UNAMSIL contingent going to Port Loko and another one on the way to Makeni. All Three Accused assembled in the office where TF1-360 was located. The First Accused had just arrived in the late afternoon from Kono. There were over thousand armed RUF combatants in the streets of Makeni. The Second Accused delivered the message to all of the combatants that UNAMSIL was about to arrest them all, and transfer them to Banana Island. Komba Gbundema stopped the UNAMSIL convoy around 12 miles from Makeni in a village called Makoth. Although most of them surrendered, some fighting erupted. Finally most UNAMSIL peacekeepers were arrested, stripped naked and brought to Makeni. Later he saw many naked UNAMSIL, loaded in different vehicles when he passed Makali. Only the senior UNAMSIL officers still had their trousers on.[3728] [redacted] From the Teko Barracks they were to be taken to Kailahun and the witness was informed that the First Accused was in Makeni at the time of the UNAMSIL abductions.[3729] TF1-199, [redacted] heard about the kidnapping of the UNAMSIL peacekeepers and that the RUF was using their weapons, even their uniforms and vehicles. While the Caritas Child Care Centre had to be evacuated and while fleeing with Caritas staff and other children, the witness saw, somewhere shortly after Lunsar, a caravan of about 30 lorries, UN and combat lorries that were driven by rebels. There were armed rebels on the

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[3728] TF1-360, Transcript 22 July 2005, pp. 8-11, pp. 58-59, pp. 62-64 and pp. 74-77.
[3729] TF1-174, Transcript 27 March 2006, pp. 68-69.

trucks, wearing UNAMSIL uniforms, and naked white men with their heads bowed down.[3730]

1192. A total of 427 Zambian and 8 Kenyan peacekeepers were taken hostage and transferred to different locations in Kono District in this RUF attack.[3731]

v) Transfer to and Detention in Kono District

1193. All the UNAMSIL staff that were taken hostage in the different locations were taken to locations in Kono district.

1194. The first group of 17 hostages, initially detained at Teko Barracks in Makeni with Major Jaganathan and Major Mendy were driven from Makeni to Matotoka. After a while, they heard a gunshot and stopped along some bushes where the First Accused threatened to kill them all and then ordered that some of the hostages be untied. He assaulted Major Gjellesdad, claiming the white people were responsible for the conflict. Another three kidnapped peacekeepers all tied and in underwear, were brought and all 20 hostages were put into another UN vehicle and proceeded eastwards.[3732] Shortly after Masingbi they were put on a truck, which was driven recklessly and went off the road. The passengers were thrown out of the vehicle, and fell into a river. One UN peacekeeper had a fractured collarbone, Major Gjellesdad a very severe back injury and Lt. Col. Mendy had an open fracture of one leg and survived only because he managed to swim and was rescued by his colleagues. About an hour later another truck came and took them to Camp 11, Small Sefadu.[3733] Lt. Col. Mendy's fracture was bleeding seriously for a long time until he was finally treated by a local doctor and then reunified with the other hostages. Since the hygienic conditions were very bad, and the bandages were not changed for several days, the open wound started to decompose and worms would come out. The witness was very sick and could not eat for several days.[3734]

[3730] TF1-199, Transcript 20 July 2004, pp. 35-37 and p. 66.
[3731] Edwin Kasoma, Transcript 22 March 2006, pp. 25 and 47; Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 62.
[3732] Ganase Jaganathan, Transcript 20 June 2006, pp. 38-39, p. 44; Joseph Mendy, Transcript 27 June 2006, pp. 15-18; Exhibit 109, Mendy Incident Report, para. 8.
[3733] Ganase Jaganathan, Transcript 20 June 2006, pp. 41-42.
[3734] Joseph Mendy, Transcript 27 June 2006, pp. 25-28; Exhibit 109, Mendy Incident Report, para. 9-10.

1195. The UN peacekeepers were detained in Small Sefadu, Camp 11, a place near Penduma, in the proximity of Koidu, Kono District, where they were guarded permanently by armed guards, hardly got any food and were allowed to take a bath only once every two or three days. They were constantly harassed by armed RUF combatants, who threatened them, pointing their weapons at them and Lt. Col. Mendy once heard, some child soldiers saying in Krio that they would kill them all. The first 15 Kenyan peacekeepers were released on 12 May 2000, others subsequently, until the last group to which the witness belonged was freed on 20 May 2000 together with a group of 52 Zambian peacekeepers, who had been brought in shortly before the transfer. They were barefoot, poorly clothed, and looked very thin, were sweating and smelling badly. They told the witness that they had been held captive for about 18 days. The RUF commander who brought them told the hostages "You are all fortunate to still be alive because of Charles Taylor, otherwise you all are dead meat."[3735] Since Lt. Col. Mendy's condition deteriorated and he was between life and death he was finally evacuated, first to Monrovia, then to Freetown, where he finally arrived on 28 May 2000.[3736]

1196. Meanwhile, a second group, containing parts of the ZAMBATT and KENBATT peacekeepers that were abducted on Lunsar Highway, was driven to Yengema, passing through Makeni and Magburaka, after all other belongings were taken from them and they were stripped naked. [redacted] It was the First Accused that ordered that the ZAMBATT members be moved to different destination.[3737]

[redacted]Upon arrival in Yengema in the morning of the 4 May 2000, the ZAMBATT soldiers were taken to a school block, while [redacted] Lt. Col. Kasoma and two other officers stayed [redacted] They were detained there for 23 days. While at Yengema, which was controlled by RUF combatants, the witnesses saw the First and Second Accused about four times visiting and

[3735] Ganase Jaganathan, Transcript 20 June 2006, pp. 45-51; Joseph Mendy, Transcript 27 June 2006, pp. 29-32.
[3736] Joseph Mendy, Transcript 27 June 2006, pp. 32-35; Exhibit 109, Mendy Incident Report, para. 10-11.
[3737] Edwin Kasoma, Transcript 22 March 2006, pp. 23-24; [redacted]

[redacted].[3738] The ZAMBATT soldiers told the witnesses that they were mistreated, did not get food, nor bedding and were cold at nights since they were stripped of their uniforms. They were at times beaten, were not allowed to take a bath, nor communicate and could not listen to radio. Kasoma testified that he was treated similarly. He was told by the RUF combatants that this treatment had been ordered by the RUF superior commanders and TF1-362 indicated to Lt. Col. Kasoma that there were strict instructions from the First Accused, who was the Supreme Commander, to treat them that way. On one occasion the First Accused ordered that the hostages be locked inside and his bodyguards chased them inside the school building, pushing and beating them.[3739] When Foday Sankoh was arrested in Freetown the RUF combatants became more aggressive and at times threats were made by RUF commanders to the captives to the effect that if anything happens to the chairman then certainly they would be executed. [redacted] Nobody would try to escape, since the armed RUF guards would have killed them. Yengema was a garrison town and RUF combatants were all over. When the peacekeepers were released they were put into land rovers and did not know where they would go. When they asked, the RUF escorts would lose their calm and issue threats. At one point the convoy was stopped, and the senior RUF commander who was in charge of that movement jumped out and drew a pistol and threatened to shoot the personnel. He didn't, but then questions ceased.[3741] [redacted]

1198. These testimonies were corroborated by TF1-362 [redacted] in Yengema camp, where some of the peacekeepers were brought during the hostage-taking. [redacted] the UNAMSIL officers from the battalion commander at Magburaka, Base Marine, who said that the First Accused had ordered [redacted] the hostages "intact". The First Accused ordered that they should be kept in strict detainment,

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[3738] Edwin Kasoma, Transcript 22 March 2006, pp. 25-27.
[3739] Edwin Kasoma, Transcript 22 March 2006, pp. 38-44; [redacted]

be undressed and not be given sufficient food. Once the First Accused saw TF1-362 with one of the UNAMSIL officers and he slapped both of them. The UNAMSIL people were prisoners, they were kept indoors except if they got their food.[3743]

1199. TF1-304, a civilian living in Tombodu, Kono District testified that he saw how 190 Zambian peacekeepers were brought to Tombodu in UNAMSIL trucks. They were stripped of their clothes and boots and locked into the Mosque in Bendo, Tombodu. Since they did not get enough food, the civilians brought them food, although the rebels shouted at them not to do so. The peacekeepers were in Tombodu for over a month. Then Colonel Gassimu brought trucks and boarded the peacekeepers. Some were beaten and kicked by Colonel Gassimu and RUF combatants when climbing on the trucks.[3744] This information was corroborated by TF1-012, a farmer from Tombodu, Kamara Chiefdom, in Kono District,[3745] who testified that he saw, how the Zambian peacekeepers were brought to Tombodu, where they were undressed and beaten. When they took them away, the civilians who were suffering RUF attrocities, gave the hostages a letter for the UNAMSIL hostages to remember them. But the letter was discovered and taken from the peacekeepers and they were hit again. The RUF combatants put them on a truck and said they would bring them to Liberia.[3746]

1200. TF1-071, a former RUF combatant, was in Kono District in 2000 when he saw captured UNAMSIL peacekeepers taken to Koidu. He heard that the peacekeepers were abducted and some taken to Tombodu, others to Yengema training base in the rainy season 2000. From reliable sources he got the information that the Second Accused and the Third Accused as well as Kailondo were the principal commanders involved. He got to know that the Third Accused threatened that if any combatant disarmed he would be executed.[3747]

vi) Other Attacks by the RUF Against Peacekeepers

1201. DMK-444, testified of other attacks carried out by the RUF. He also confirmed that Lt. Col. Mendy was one of the MILOBS captured by the RUF[3748] and that MILOBS do not

[3743] TF1-362, Transcript 21 April 2005, pp. 29-39.
[3744] TF1-304, Transcript 13 January 2005, pp. 51-55.
[3745] TF1-012, Transcript 2 February 2005, pp. 1-2.
[3746] TF1-012, Transcript 4 February 2005, p. 31.
[3747] TF1-071, Transcript 24 January 2005, pp. 2-13.
[3748] DMK-444, Transcript 19 May 2008, Closed Session, p. 120.

carry arms [redacted] of the RUF mounting an attack on Freetown in May 2000, and that the RUF attacked peacekeepers at a location between Lunsar and Rogberi Junction and that about 3 of the Nigerian soldiers serving as peacekeepers were killed in the RUF attack (the killings of the peacekeepers took place close to Lunsar).[3750] This attack occurred between 3 and 10 May 2000, and two of the killed peacekeepers were exhumed while the third body was not located and the person was presumed killed in action.[3751] This attack by the RUF was carried out at night and DMK-444 re-iterated that peacekeepers are always entitled to act in self-defence.[3752] The RUF also carried out attacks on peacekeepers at Kambia, near the Guinea border, and at Port Loko town.[3753] The attacks at Kambia and Port Loko town in May 2000 were on Nigerian peacekeepers who were carrying out a peacekeeping mission.[3754] The Port Loko town attack by the RUF on the peacekeepers was a dawn attack and two or three of the peacekeepers were killed by the RUF.[3755] DMK-444 also testified of the RUF taking peacekeepers, members of the Indian Battalion, hostages in Kailahun District in May 2000.[3756]

vii) Transfer to Liberia and Release

1202. Subsequently, all the surviving UNAMSIL peacekeepers and military observers were released in groups at different dates. Most of them were airlifted by helicopter to Monrovia by members of a Liberian Anti-Terrorist Unit (ATU). From there they were brought the same day to Freetown.[3757] Major Jaganathan testified that, while waiting for the helicopter, he saw the First Accused driving a looted UN gypsy vehicle, which belonged to the Indian UNAMSIL battalion. He was later told that two companies of this Indian

[3749] DMK-444, Transcript 19 May 2008, Closed Session, p. 121.
[3750] DMK-444, Transcript 19 May 2008, Closed Session, 138-139.
[3751] DMK-444, Transcript 5 June 2008, Closed Session, p. 41-43.
[3752] DMK-444, Transcript 19 May 2008, Closed Session, p. 139-140; and 5 June 2008, p. 44.
[3753] DMK-444, Transcript 19 May 2008, Closed Session, p. 140
[3754] DMK-444, Transcript 5 June 2008, Closed Session, pp. 49-51.
[3755] DMK-444, Transcript 5 June 2008, Closed Session, pp. 51-52.
[3756] DMK-444, Transcript 5 June 2008, Closed Session, pp. 54-55.
[3757] Ganase Jaganathan, Transcript 20 June 2006, pp. 48-55; Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 67, DIS-310 (DMK-147), Transcript 6 March 2008, Closed Session, pp. 36- 49

battalion had been encircled in Kailahun and were being held for about 75 days, before they managed to break out. Thereby one Indian soldier was killed.[3758]

1203. After his release, Lt. Col. Kasoma was reunited with his contingent at Lungi. The soldiers he had left behind in Lunsar told him that the RUF had attacked them after they had disarmed Kasoma and the small group who had gone ahead, and how they had to retreat to the Nigerian Company's position and fought side by side with the Nigerians. The RUF were by this time armed with the weapons they had captured from ZAMBATT members. Three Zambian peacekeepers went missing during the fighting. One reappeared after about a month, but the other two were never seen again and declared dead.[3759]

1204. The testimonies about the release of the UNAMSIL personnel were confirmed by General John Tarnue, former Commander General of the Armed Forces of Liberia, who testified, that Taylor sent a radio message to Benjamin Yeaten following the abduction of the UN peacekeepers, ordering him to get in touch with the First Accused to try to release the peacekeepers. Taylor called a conference where the heads of state of Togo, Mali, Nigeria and the RUF high command met at Roberts International Airport in Monrovia. The First and Third Accused attended, although Tarnue was not sure if the Second Accused was there.[3760] One day after the meeting General Tarnue was told that the UN abductees would be arriving at Springfield Airport.[3761]

D) Liability of the Accused

1205. The evidence establishes that the RUF as an armed group committed the crimes listed in Counts 15 to 18. Additionally, the evidence demonstrates beyond reasonable doubt that the three Accused did plan, organize and ordered the ambushes and attacks on UNAMSIL in the Makeni, Lunsar and Magburaka area and, in addition, participated directly in and incited others to participate in the criminal acts charged under Count 15 to 18 of the Indictment.

[3758] Ganase Jaganathan, Transcript 20 June 2006, pp. 51-55. See also: Secretary-General Report on UNAMSIL, para. 68.
[3759] Edwin Kasoma, Transcript 22 March 2006, pp. 48-49.
[3760] John Tarnue, Transcript 5 October 2004, pp. 117-119, pp. 126-129 and p. 130.
[3761] John Tarnue, Transcript 5 October 2004, pp. 136-139.

a) Liability under Article 6(1) of the Statute

1206. All three Accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime charged under Count 15 to 18 of the Indictment. "Committing" generally means the direct and physical perpetration of the crime by the offender himself.[3762] The evidence shows that all three Accused directly committed crimes falling under Counts 15 to 18 and that all three Accused took part in the attacks on UNAMSIL forces in different locations. TF1-366 testified in detail, how the three Accused met prior to the attacks at the junction going towards Mabonto and how each of the three Accused lead one group who then fought at different locations during the.[3763]

i) The First Accused

1207. The First Accused personally harassed and threatened at least one of the hostages. He assaulted one of the military observers, Major Gjellesdad, during the transfer of the hostages.[3764] The Fist Accused reportedly slapped one of the hostages in Yengema.[3765]

1208. More importantly, the First Accused ordered the attacks, the abduction and the hostage-taking. As the superior commander of the RUF in the field at the time of the charged acts,[3766] the First Accused ordered the attacks on UNAMSIL. The evidence shows, that the First Accused was informed by the Second Accused through radio communication about the tension between UNAMSIL deployments, in particular KENBATT V and the RUF commandment based in Makeni. He was told by the Second Accused, that UNAMSIL was blocking roads.[3767] Sankoh asked the First Accused to check on the place of the events, the accuracy of this information. The First Accused did not go to the Makeni and

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[3762] *Kayishema et al* Appeal Judgement, para. 187; *Tadić* Appeal Judgement, para. 188; *Kunarac* Trial Judgement, para. 390; *Semanza* Trial Judgement, para. 383.
[3763] TF1-366, Transcript 10 November 2005, pp. 35-42 and Transcript 18 November 2005, pp. 14-16.
[3764] Joseph Mendy, Transcript 27 June 2006, pp. 18.
[3765] TF1-362, Transcript 21 April 2005, pp. 36-39.
[3766] A radio logbook entry, dated 03.05.2000, the Second Accused informed the "Leader", that: "[w]hen our men were on patrol around the town, the UNAMSIL attacked them and forcefully disarmed them with remark that they are to be in the camp. Sir, when the news reached us, Col. Gbao proceeded to the scene to know the cause. And on reaching the point, they wanted to arrest him. I went there by myself for them to hand over the men and the weapons; they opened fire on us without reason. Sir, when left satellite point to my point, they blocked the highway. When Col. Bal Bureh went to the scene, they also used the same violence. Even the youth and civilians can testify to that. [signed] P.T.O.", Exhibit 34, p. 00008097. A similar, but not identical radio message appears in the Radio Logbook containing instructions given by Issa Sesay, tendered during the examination in chief of Issa Sesay, Exhibit 212, pp. 00018644-5, See Issa Hassan Sesay, Transcript 25 May 2007, p. 41.
[3767] TF1-360, Transcript 22 July 2005, p. 6 and Transcript 25 July 2005, p. 70.

Magburaka area straight away but stayed in Kono and instead, he sent radio messages to Kamakwie (Bombali District) to commander Komba Gbundema and to Tongo (Kenema District), ordering reinforcement to Makeni. As a consequence, RUF deployments attacked UNAMSIL at Makump, then in Makeni and Magburaka, within 2 to 3 hours. The First Accused ordered his men to kill UNAMSIL personnel and to capture some.[3768] The First Accused also ordered his men to chase the UNAMSIL troops, after they had managed to break out of the RUF encirclements from Magburaka, up to Magbas.[3769]

1209. The First Accused also planned and ordered the hostage-taking of UNAMSIL peacekeepers and military observers in Makeni and Lunsar[3770] and was directly involved in the hostage-taking of UNAMSIL personnel in Magburaka.[3771] The transfer of the hostages from Makeni and Magburaka to different locations in the Kono District, mostly in seized UN vehicles, were ordered and supervised by the First Accused.[3772]

1210. The First Accused had ordered the seizure and apprehension of UN vehicles, weapons and other UNAMSIL property and he was seen driving a UN gypsy vehicle that belonged to the Indian UNAMSIL battalion in Kailahun.[3773]

1211. It was also the First Accused who was in charge of the detention of the hostages in different places in Kono District. He for instance gave strict instructions to witness TF1-362 how to treat the hostages.[3774] He came several times to Yengema, where a large number of hostages of the ZAMBATT were held.[3775] It was the First Accused who ordered that the hostages should be under strict detainment that they should be undressed and not be given sufficient food.[3776]

[3768] Issa Hassan Sesay, Transcript 25 May 2007, p. 45, TF1-360, Transcript 22 July 2005, pp. 6-7; TF1-366, Transcript 10 November 2005, pp. 35-42 and 18 November 2005, pp. 14-16

[3769] TF1-366, Transcript 10 November 2005, pp. 42-46.

[redacted]

[3771] Leonard Ngondi, Transcript 29 March 2006, pp. 36-38.

[3772] Edwin Kasoma, Transcript 22 March 2006, pp. 23-24; TF1-360, Transcript 22 July 2005, pp. 8-11, pp. 58-59, pp. 62-64 and pp. 74-77; Ganase Jaganathan, Transcript 20 June 2006, pp. 38-39, p. 44.

[3773] Ganase Jaganathan, Transcript 20 June 2006, pp. 51-55.

[3774] Edwin Kasoma, Transcript 22 March 2006, pp. 40-44.

[redacted]

[3776] TF1-362, Transcript 21 April 2005, pp. 29-36.

ii) The Second Accused

1212. The Second Accused was the most senior RUF commander in the area where the events took place during the period of the charged acts.[3777] The evidence shows, that the Second Accused not only personally and directly committed some of the charged acts, but also planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of such crimes.

1213. The Second Accused threatened or otherwise mistreated some of the hostages on several occasions. Towards the end of April, beginning of May 2000, when around 10 RUF combatants had voluntarily disarmed in the Makump DDR camp, the Second Accused had threatened UNAMSIL personnel at the Makump DDR camp by telling them that the place they were building was for pigs, that the RUF would not disarm and would launch an attack within few hours, if the camp was not dislodged.[3778] On 1 May 2000 the Second Accused entered the Makeni DDR and without warning, a burst of automatic fire rang out from his vehicle. He then punched one of the military observers, Major Salahuedin, twice in the face and tried to stab him with a bayonet affixed to his rifle. Later he ordered his men to grab the other military observer, Major Jaganathan, who was subsequently hit by one of the RUF combatants who threatened to shoot him. Major Jaganathan was then dragged out of the camp at gunpoint, bundled into the Second Accused's vehicle and abducted. Both military observers were unarmed.[3779]

1214. In the car the Second Accused continued to threaten Major Jaganathan with a knife and the words: "I'm going to kill you today, bury your body in Sierra Leone, and you will not have time to say goodbye to your family."[3780] In Makump the Second Accused ordered his men to open fire at a UNAMSIL Land Rover that was passing by. The vehicle stopped and the four KENBATT V peacekeepers, were disarmed, harassed by the Second Accused and subsequently taken hostage.[3781] The same day, the Second Accused abducted two more military observers, Major Gjellesdad and Lieutenant-Colonel Joseph Mendy.[3782] The

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[3777] Leonard Ngondi, Transcript 29 March 2006, p. 10; Ganase Jaganathan, Transcript 20 June 2006, p. 24.
[3778] TF1-360, Transcript 22 July 2005, pp. 2-5 and TF1-041, Transcript 10 July 2006, pp. 50-51;
[3779] Ganase Jaganathan, Transcript 20 June 2006, pp. 25-26; Leonard Ngondi, Transcript 29 March 2006, pp. 28-29; Joseph Mendy, Transcript 27 June 2006, pp. 10-12; DMK-444, Transcript 19 May 2008, p. 123-126.
[3780] Ganase Jaganathan, Transcript 20 June 2006, p. 27.
[3781] Ganase Jaganathan, Transcript 20 June 2006, pp. 27-30.
[3782] Joseph Mendy, Transcript 27 June 2006, pp. 6-7.

Second Accused planned, ordered and directly participated in the hostage-taking of around 297 ZAMBATT peacekeepers and eight members of the KENBATT Headquarter staff on 3 May 2000 between Lunsar and Makeni.[3783] He threatened to kill at least one of them and ordered such death treats to be carried out.[3784] The peacekeepers were stripped naked and taken to different locations.[3785]

1215. Further, the Second Accused sent a message to the First Accused,[3786] claiming UNAMSIL had blocked the road and was forcefully disarming RUF combatants and detaining the Third Accused. Hereafter, the First Accused ordered the attacks on UNAMSIL.[3787] In addition, the Second Accused gave his men at two RUF checkpoints the order to stop all UN vehicles. In a radio communication he said: "The UN have seriously attacked our position and taken five of our men and their weapons, but I have one." He also said, "All stations, red alert, red alert, red alert."[3788] He instigated RUF combatants to attack and detain UNAMSIL by telling them that they would all be arrested and brought to Banana Island by UNAMSIL.[3789]

1216. The Second Accused seized UNAMSIL property himself[3790] and ordered RUF combatants to do so.[3791] The peacekeepers that had been brought to the Teko Barracks from different locations were stripped naked, refused food, they were beaten and locked in armoured cars in large numbers, their documents and all the money they had were taken from them and the Second Accused kept all of it.[3792] He also seized property of the ZAMBATT when he took them hostage between Lunsar and Makeni.[3793] DMK-444

[3783] Exhibit 381,Fourth Report of the Secretary-General on UNAMSIL, S/2000/455, 19 May 2000, Exhibit 173, para. 62 and Annex E to Exhibit 190,BOI Report NO. 00/19, p. 1.
[3784] Edwin Kasoma, Transcript 22 March 2006, pp. 19-22.
[3785] Edwin Kasoma, Transcript 22 March 2006, p. 23; TF1-360, Transcript 22 July 2005, pp. 8-11, pp. 58-59, pp. 62-64 and pp. 74-77.
[3786] TF1-360, Transcript 26 July 2005, p. 91.
[3787] TF1-360, Transcript 22 July 2005, pp. 6-7 and p. 70. TF1-361, Transcript 19 July 2005, pp. 82-83. See also: Exhibit 34, Radio Logbook # 4, p. 00008097, cited in footnote 3766 and Exhibit 212, pp. 00018644-5, Issa Hassan Sesay, Transcript 25 May 2007, p. 41.
[3788] Ganase Jaganathan, Transcript 20 June 2006, p. 31 (lines 9-12).
[3789] TF1-360, Transcript 22 July 2005, p. 8.
[3790] Joseph Mendy, Transcript 27 June 2006, pp. 4-6; TF1-314, Transcript 2 November 2005, pp. 47-55.
[3791] TF1-366, Transcript 10 November 2005, pp. 35-42 and 18 November 2005, pp. 14-16.
[3792] TF1-366, Transcript 10 November 2005, pp. 42-46.
[3793] Edwin Kasoma, Transcript 22 March 2006, pp. 19-22.

testified that he was later informed that it was the Second Accused who led that attack on the peacekeepers on the 1 May 2000.[3794]

1217. The Second Accused was also directly taking part in the attacks on UNAMSIL KENBATT V personnel and facilities in Magburaka and Makeni on 2 and 3 May 2000, leading one of the RUF units together with Komba Gbundema and Bai Bureh at Lunsar highway and later on in Makeni. Since KENBATT V resisted an exchange of fire ensued that lasted more than a day. As a result of the fighting several peacekeepers were wounded and at least four died in the attacks.[3795]

iii) Alibi of the Second Accused

1218. The Second Accused waited until 28 March 2007, almost 3 years after the trial commenced to give notice that he would rely on an alibi with regard to the May 2000 events. Previously, on 20 March 2007 the Second Accused said that he would not rely on an alibi.[3796] The Trial Chamber held that the Second Accused failed to comply with Rule 67(A)(ii) and ordered that notice of the alibi, and related information, be disclosed.[3797] The Second Accused filed a Notification of Alibi, which listed DMK-047, DMK-100 and DMK-133 as witnesses who would give alibi evidence with respect to Counts 15 to 18.[3798] In addition, the notice of alibi is limited to an attack at Makuth on 3 May 2000, notice is not given of an alibi for other dates or other locations. Of the three alibi witnesses only DMK-047 gave evidence. The Second Accused called DMK-082 to give evidence and alibi evidence was disclosed in supplementary proofing notes. Objection was taken to this alibi evidence because DMK-082 was not named as an alibi witness and the alibi evidence related to events in addition to those set out in the Notification of Alibi; the objection was overruled and the Second Accused was permitted to lead the evidence.[3799]

[3794] DMK-444, Transcript 19 May 2008, pp. 119-120.
[3795] DIS-310 (DMK-147), Transcript 6 March 2008, pp. 111- 118; Leonard Ngondi, Transcript 29 March 2006, pp. 43-44 and p. 39; and Transcript 30 March 2006, pp. 2-5.
[3796] Pre-Defence Conference, Transcript 20 March 2007, p. 84.
[3797] *Prosecutor v. Sesay et al,* SCSL-04-15-T-770, "Decision on the Prosecution Motion that the Second Accused Comply with Rule 67," 1 May 2007, p. 7.
[3798] *Prosecutor v. Sesay et al,* SCSL-04-15-T-785, "Defence for Morris Kallon's Notification of Alibi," 8 May 2007, p. 4.
[3799] Transcript 12 May 2008, pp. 127-135.

1219. The purported alibi evidence should be disregarded in its entirety. First, DMK-082 admitted to fabricating evidence in court.[3800] He has no credibility whatsoever. Second, failure to comply with Rule 67(A)(ii) entitles the Trial Chamber to take that failure to give notice of alibi evidence when weighing the credibility of the alibi evidence.[3801] Third, the notice of alibi was given long after the Prosecution case closed, contrary to the Rules. Fourth, DMK-082 was not listed as an alibi witness in the notification. And fifth, the dates and events for which DMK-082 gave evidence were not listed in the notification. The Second Accused's purported alibi evidence is entirely without merit.

iv) The Third Accused

1220. The Third Accused occupied the position of the RUF Overall Security Commander at the time of the hostage-taking. He was the one who was mostly in contact with the UNAMSIL commander in charge in Makeni, Brigadier Ngondi, the Commanding Officer of KENBATT V.[3802] He was the one who first raised the issue of the RUF refusal to disarm with Brigadier Ngondi and the MILOBs in the Makeni reception centre.[3803] Together with the First and Second Accused he planned, organized, ordered and carried out the attacks on UNAMSIL and the hostage-taking of peacekeepers and military observers.[3804]

1221. The Third Accused directly committed some of the crimes charged in Counts 15 to 18. He was the commanding RUF officer in charge, when the RUF encircled the DDR camp in Makump (Makeni) on the first day of the planned DDR process, on 17 April 2000, when he stormed the camp with a group of 25 to 30 RUF combatants, threatened to dismantle the camp or otherwise to burn it with the people inside.[3805] The Third Accused was the RUF commander in charge when the attacks on the Makump (Makeni) DDR camp started.[3806] He went there on 1 May 2000 with a group of armed RUF combatants requesting that the demobilized men and their rifles be handed over to him. He was present

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[3800] DMK-082, Transcript 13 May 2008, pp. 75, 67-72.
[3801] See *Prosecutor v. Brima et al,* SCSL-04-16-T-521, "Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67," 26 July 2006, para. 18: "...failure by the defence to observe its obligations under Rule 67(A)(ii)(a) will entitle the Trial Chamber to take such failure into account when weighing the credibility of the defence of alibi."
[3802] Leonard Ngondi, Transcript 29 March 2006, pp. 6-10.
[3803] Leonard Ngondi, Transcript 29 March 2006, pp. 16-19; Joseph Mendy, Transcript 26 June 2006, pp. 85-87.
[3804] TF1-071, Transcript 24 January 2005, pp. 2-13.
[3805] Ganase Jaganathan, Transcript 20 June 2006, pp. 16-17.
[3806] DAG-111, Transcript 19 June 2008, pp. 29-30.

when one of the MILOBs who tried to mediate and explain the UNAMSIL mandate was brutally abducted and when RUF combatants attacked the DDR camp.[3807] The Third Accused directly committed and/or ordered physical attacks on UNAMSIL peacekeepers both during the abductions[3808] and the attacks on KENBATT positions and the Makeni DDR camp in Makump, which was in the end completely destroyed and looted.[3809] Two KENBATT peacekeepers were killed during the attacks on Makump camp, several wounded and KENBATT equipment, including six vehicles, was seized or destroyed.[3810] The Third Accused seized UNAMSIL properties and abducted some of the UNAMSIL peacekeepers.[3811] Even if the Trial Chamber would find that he was not directly committing crimes, by his mere presence on the crime scene[3812] as a senior commander and his behaviour he was instigating the criminal acts committed by his subordinates,[3813] alternatively he was aiding and abetting. Further, the Third Accused had a key role in instigating RUF combatants to commit some of the crimes charged in Counts 15 to 18, by telling them publicly that UNAMSIL forcefully disarmed and intended to arrest RUF combatants once they had disarmed.[3814] He assembled and organised RUF combatants in Makeni for the attacks on the DDR camps and the KENBATT positions, including child soldiers who had been demobilized and were in the care of Caritas Makeni.[3815] DMK-161

[3807] Exhibit 190,BOI Report NO. 00/19, pp. 4-5; Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 57; Leonard Ngondi, Transcript 29 March 2006, pp. 28-29; Ganase Jaganathan, Transcript 20 June 2006, pp. 18-21; TF1-360, Transcript 22 July 2005, Closed Session, pp. 2-5.

[3808] The witness was later told by Major Maroa that they had been disarmed and assaulted by a group of 60 to 70 armed RUF combatants. Ganase Jaganathan, Transcript 20 June 2006, pp. 31-32.

[3809] TF1-366, Transcript 10 November 2005, pp. 35-42 and 18 November 2005, pp. 14-16; TF1-174, Transcript 27 March 2006, Closed Session, pp. 61-68, TF1-117, Transcript 30 June 2006, pp. 31-32, Exhibit 190, BOI Report NO. 00/19, p. 6; Exhibit 318, Fourth Secretary-General Report on UNAMSIL, para. 59; Leonard Ngondi, Transcript 29 March 2006, pp. 36-40.

[3810] Exhibit 190, BOI Report NO. 00/19, pp. 6 and 11; Annex E to Exhibit 190, BOI Report NO. 00/19, p. 1; Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 59; Leonard Ngondi, Transcript 29 March 2006, pp. 36-40.

[3811] TF1-041, Transcript 10 July 2006, Closed Session, pp. 69-72; Leonard Ngondi, Transcript 29 March 2006, pp. 36-40; TF1-071, Transcript 24 January 2005, pp. 2-13.

[3812] DAG-111 said that the Third Accused was present when the attacks in Makump occurred and that all RUF commanders were shooting. Transcript 19 June 2008, p 30.

[3813] *Brđanin* Appeal Judgement, para. 273. "An accused can be convicted of aiding and abetting a crime when it is established that his[/her] conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the commission of the crime."

[3814] TF1-360, Transcript 22 July 2005, Closed Session, p. 4; TF1-041, Transcript 10 July 2006, Closed Session, pp. 69-72

[3815] TF1-117, Transcript 30 June 2006, pp. 23-31; TF1-314, Transcript 2 November 2005, pp. 47-55.

testified that First Accused blamed the Third Accused for what had happened on the 1 May 2000 at Makump.[3816]

b) Liability under Article 6 para. 3 of the Statute

1222. The evidence adduced shows that the general legal requirements to be fulfilled for a superior to be criminally responsible for the acts of his subordinates as set out in Article 6 para. 3 of the Statute as discussed earlier in Section V B. on Superior Responsibility. There is abundant evidence, by Defence and Prosecution witnesses that the three Accused held senior positions in the RUF at the time of the events. The Prosecution further submits that the three Accused, as superiors, had effective control over subordinates, to the extent that they would have been able to prevent them from committing crimes or punish them after they committed the crimes.[3817]

1223. The First Accused was the most senior commander in the RUF at the time of the acts charged in Counts 15 to 18.[3818]

1224. After the First Accused, the Second Accused was the second-most senior person in the RUF.[3819] He had become Battle Field Commander when Bockarie left Sierra Leone for Liberia in December 1999.[3820] The Second Accused was based in Makeni during the charged acts and the commander of the Fifth Brigade of RUF based in Magburaka the most senior RUF commander in the area where the events took place during the period of the charged acts.[3821]

1225. The Third Accused was the RUF Overall Security Commander at the time of the hostage-taking[3822] until 2002.[3823] He reported to Battle Group Commander and the Battle Field Commander.[3824] Subsequent to the RUF attack and capture of Makeni in late

[3816] DMK-161, Transcript 22 April 2008, pp. 46-47.
[3817] *Delalić et al* Appeal Judgement, para. 198.
[3818] Leonard Ngondi, Transcript 29 March 2006, pp. 6-10; DMK-082, Transcript 13 May 2008, p. 80; DIS-015, Transcript 15 February 2008, p. 48; TF1-036, Transcript 28 July 2005, pp. 25-26; TF1-360, Transcript 21 July 2005, pp.50-51; General Tarnue, Transcript 11 October 2004, pp. 63-64.
[3819] General Tarnue, Transcript 11 October 2004, p. 54; DMK-082, Transcript 13 May 2008, p. 80; TF1-036, Transcript 28 July 2005, pp. 25-26.
[3820] TF1-360, Transcript 21 July 2005, pp.50-51; TF1-036, Transcript 28 July 2005, pp. 23-26.
[3821] Leonard Ngondi, Transcript 29 March 2006, p. 10; Ganase Jaganathan, Transcript 20 June 2006, p. 24.
[3822] Leonard Ngondi, Transcript 29 March 2006, pp. 6-10.
[3823] TF1-371, Transcript 20 July 2006, p. 30.
[3824] TF1-036, Transcript 27 July 2005, p. 27 and Transcript 3 August 2005, p. 79.

December 1998 early January 1999, the Third Accused came to Makeni and he was third in command for RUF and remained in this position.[3825] The evidence shows, that he had effective control over his subordinates. He was one of the principle commanders in charge of the attacks and hostage taking of the UNAMSIL and publicly threatened RUF combatants that if anyone disarmed he would be executed.[3826] Further, he "had the right to pass military orders. In the absence of the commander who was above him he had the right to pass direct order."[3827] As the Trial Chamber had found in the AFRC case, the capacity of an Accused to exercise effective control can be derived at least in part by virtue of their positions within the RUF as a military organisation with a clear hierarchy and chain of command, as described above.[3828] However, there is extensive proof of effective control of the three Accused over their subordinates. The evidence shows that the orders given by any of the three Accused were executed this goes for the First Accused[3829], the Second Accused[3830] and the third Accused.[3831] Since there were clear orders given and since all three Accused participated also directly in the commission of the crimes, as shown above, there is no need to discuss in detail, whether, during the relevant time period the three Accused knew or had reason to know that subordinates were about to commit such acts or had done so and the superior had failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, in relation to the specific crimes of Counts 15 to 18. One witness even said that the Third and the Second Accused lied to justify the attacks on UNAMSIL.[3832] They were present on the crime scenes and did not prevent the crimes.[3833] DMK-161 went so far to say that all the RUF senior officers in Makeni at the time should be blamed for the abduction of the UNAMSIL personnel.[3834]

[3825] TF1-366, Transcript 18 November 2005, pp.28-29. TF1-045 stated that
[3826] TF1-071, Transcript 24 January 2005, pp. 2-13.
[3827] TF1-360, Transcript 26 July 2005, pp. 111-112.
[3828] *Brima et al* Trial Judgement, paras 538-539.
[3829] TF1-263, Transcript 7 April 2005, pp. 36-41; TF1-366, Transcript 10 November 2005, pp. 35-42 and 18 November 2005, pp. 14-16.
[3830] Ganase Jaganathan, Transcript 20 June 2006, pp. 25-30.

[3832] TF1-360, Transcript 26 July 2005, Closed Session, p. 90; Ganase Jaganathan, Transcript 20 June 2006, p. 31 (line 12).
[3833] TF1-263, Transcript 8 April 2005, p. 77; TF1-314, Transcript 2 November 2005, pp. 47-50.
[3834] DMK-161, Transcript 22 April 2008 pp. 46-47.

[redacted]Further, the attacks on UNAMSIL and the massive hostage-taking of around 500 UNAMSIL peacekeepers and military observers between May and June 2000 clearly required a strict military structure with a chain of command and a functioning hierarchy. [redacted] Even if the attacks were directed against UN peacekeepers which were obviously not even able to act in self-defence, it nevertheless afforded a considerable amount of military planning and logistics. Witness TF1-366 indicated that one of the aims of the orchestrated attacks on UNAMSIL was also to seize weapons from the peacekeepers in order to free Foday Sankoh in Freetown.[3837] [redacted]

1227. In the light of the above, all three Accused are criminally responsible as superiors under Article 6(3) of the Statute for the crimes committed by their subordinates for the criminal acts charged under Count 15 to 18 of the Indictment.

[3835] TF1-366, Transcript 10 November 2005, pp. 35-36.
[3836] TF1-366, Transcript 10 November 2005, pp. 35-42 and 18 November 2005, pp. 14-16.
[3837] TF1-366 testified that in a meeting that took place after the attacks on UNAMSIL in Makeni where the tree Accused assembled with other RUF commanders, the second Accused allegedly told the witness and the first Accused that "all the weapons were seized from UN. We said we would march with them to Freetown and receive Pa Sankoh and then take him to Makeni."; Transcript 10 November 2005, p. 45 (lines 1-10).
[3838] DIS-310 (DMK-147), Transcript 6 March 2008, pp. 84-87.
[3839] DMK-444, Transcript 19 May 2008, Closed Session, pp. 131-133.

XIV. CONCLUSION

1228. The Trial Chamber can be satisfied beyond a reasonable doubt that all the offences charged in the Indictment were committed as charged.

1229. The Defence cases called several witnesses who were unable or unwilling to materially assist the Trial Chamber. The witness Hederstedt was limited in the information provided to him,[3840] whereas witnesses such as DMK-162 sought to mislead the court.[3841] Other Defence witnesses demonstrated their loyalty to the Accused and the RUF. The Defence evidence did not call into question the evidence of Prosecution witnesses. Several Defence witnesses on the contrary For instance, in the case of DIS-188, who made clear that what the RUF called "government property" was in fact the crime of pillage. The testimony of the First and Accused, where it contradicts with Prosecution evidence, should be rejected. Some of what was said by the First Accused supports the evidence of a joint criminal enterprise, however, the tenor of the evidence given by the First and Second Accused, entirely lacks credibility.

1230. The victims of the crimes were compelling and forthright in their testimony; their evidence forms the basis of the Prosecution case. Attempts were made to attack the evidence of certain Prosecution insider witnesses, but those witnesses' were corroborated by others.

1231. The three Accused were members of a joint criminal enterprise that perpetrated each of the crimes charged in the Indictment. In addition, the three Accused were amongst the most senior commanders of the RUF, and in addition to being liable for the crimes alleged by being members of a joint criminal enterprise, they should also be found guilty pursuant to the other forms of liability stated in Article 6(1) of the Statute, and as persons bearing command responsibility pursuant to Article 6(3). The crimes of enslavement, pillage, conscripting or using children under the age of 15 in hostilities, terror, collective punishments, mutilations, murder and crimes of sexual violence were all committed systematically and throughout Sierra Leone. It defies credulity to suppose that the three Accused were not willing participants in these crimes, and willing participants in the joint

[3840] Consisting of summaries of evidence prepared by the First Accused and conversations with Francis Musa, the investigator for the Third Accused, and Lawrence Womandia. Neither of those witnesses testified.
[3841] The Prosecution says that DMK-162 fabricated a document: see DMK-162, Transcript 6 and 8 May 2008.

criminal enterprise to exercise political power and control over the territory of Sierra Leone. The direct involvement of the Accused, by planning, ordering, committing, instigating, or aiding and abetting, the crimes alleged in Counts 15 to 18 is proven beyond a reasonable doubt, as is their liability pursuant to the law of command responsibility under Article 6(3).

1232. On the basis of all the evidence presented during the Prosecution case, the Trial Chamber can be satisfied, beyond reasonable doubt, of the guilt of each the Accused under all counts of the Indictment.

1233. The three Accused can be found liable under various modes of liability set out in Article 6 (1), as well as under Article 6(3) in respect of a single count. The Trial Chamber should make findings on all modes of liability in respect of which evidence has been led for each count, even if more than one mode of liability describes the extent of an Accused's participation under a particular count. For example, an Accused may be found to have instigated a series of crimes falling under one Count, and also to have committed some of those crimes. Similarly, an Accused may be found liable as a superior as well as directly responsible under Article 6(1). Findings of multiple modes of liability will be taken into account at the sentencing stage, such that if an accused is found liable under both Articles 6(1) and 6(3) in respect of the same act, the superior responsibility should be considered as an aggravating factor.[3842]

1234. Multiple convictions must be entered when they are admissible. Indeed, "[m]ultiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[3843] The intention of the lawmakers of the Statute was to allow that convictions for the same conduct constituting distinct offences under

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[3842] As is well known, when more than one form of individual criminal responsibility is found to have been proven by the Prosecutor, the Trial Chamber will weigh these various forms and the other relevant factors to decide on the appropriate sentencing. See for example *Prosecutor v. Dragan Obrenovic*, IT-02-60/2-S, "Sentencing Judgement," 10 December 2003, para. 88 and 90: "Weighing Dragan Obrenovic's different forms of individual criminal responsibility, the Trial Chamber finds that Dragan Obrenovic's liability stems primarily from his responsibilities as a commander. (...) Considering these facts the Trial Chamber finds a sentence in the range of 20 years to 40 years imprisonment to be appropriate based on the gravity of the crime committed by Dragan Obrenovic, and particularly his role and participation in the commission of that crime, and having taken into consideration the sentencing practices in the former Yugoslavia as well as the sentencing practices of this Tribunal."

[3843] *Kunarac et al* Appeal Judgement, para. 169 (footnote omitted).

several of the Articles of the Statute be entered, as it was the case for the Security Council regarding the ICTY and ICTR Statutes.[3844]

1235. 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.[3845] An element is materially distinct from another if it requires proof of a fact not required by the other.[3846] Where this test is not met, the Chamber "must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld."[3847]

1236. Multiple convictions entered under an offence set out in Article 2 (crime against humanity) and a crime set out in Articles 3 or 4 (violations of Common Article 3 to the Geneva Conventions and Additional Protocol II, and Other Serious Violations of International Humanitarian Law) are permissible. Indeed, the jurisprudence has settled that Articles 3 or 4 require a close link between the acts of the accused and the armed conflict, while this element is not required by the Article 2.[3848] On the other hand, Article 2 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Articles 3 or 4. Thus, Article 2 and Article 3 or 4 have an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Article 2 and 3 or 4 are permissible. War crimes contained under Articles 3 or 4 do not constitute 'lesser included offences' of crimes against humanity.[3849]

1237. Similarly, it is now settled that cumulative convictions on the basis of the same acts under one Article of the Statute (for example under more than one paragraph of Article 3

[3844] *Kunarac et al* Appeal Judgement, para. 178.
[3845] *Kunarac et al* Appeal Judgement, para. 196.
[3846] *Kunarac et al* Appeal Judgement, para. 196.
[3847] *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.
[3848] *Jelisić* Appeal Judgement, para. 82.
[3849] *Jelisić* Appeal Judgement, para. 82.

when conduct violates at the same time the prohibition of Pillage, Acts of Terrorism and Collective Punishment) are permissible provided that the test above is met.[3850]

1238. The Trial Chamber must make a finding on the Indictment that each Accused is either guilty or not guilty of the Count.[3851] Where an Accused is found not guilty for the sole reason that to find otherwise would produce an impermissible cumulative conviction, the disposition should be in terms such as "Not guilty on the basis that a conviction on this charge would be impermissibly cumulative."[3852]

1239. The consequence of concurrence should be dealt with at the sentencing stage, by sentencing the accused concurrently for cumulative charges.

Filed in Freetown, 7 August 2008
For the Prosecution,

P. H. Harrison

Pete Harrison

[3850] *Kordić and Čerkez,* Trial Judgement, para. 40; *Krnojelac* Appeal Judgment, para. 188; *Vasiljević* Appeal Judgement, para. 146; *Krstić* Trial Judgment, para. 231.
[3851] *Čelebići* Appeal Judgement, Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna, para. 59.
[3852] *Čelebići* Appeal Judgement, Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna, para. 59.

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ANNEX A: GLOSSARY

List of Abbreviations, Acronyms and Short References

AA gun	Anti-Aircraft Gun
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977
aka	Also known as
AFRC	Armed Forces Revolutionary Council
CAW Programme	Children Associated With War Programme
CIC	Commander in Chief
CID	Criminal Investigation Department
CDF	Civil Defence Forces
CDS	Chief of Defence Staff
Common Article 3	Article 3 common to the four Geneva Conventions of 1949
CPO	Chief Police Officer
DDR	Disarmament Demobilization and Reintegration
ECOWAS	Economic Community of West African States
ECOMOG	Economic Community of West African States Monitoring Group
Hors de combat	Not taking active part in the hostilities

HQ	Headquarter
HRW	Human Rights Watch
ICC	International Criminal Court
ICC	Interim Care Centre
ICRC	International Committee of the Red Cross
IDU	Internal Defence Unit
IDP Camp	Internally Displaced Peoples' Camp
IO	Intelligence Officer
JCE	Joint Criminal enterprise
KENBATT	UNAMSIL Kenyan Battalion
MILOBS	UN Military Observers
MP	Military Police
NCDDR	National Committee for Disarmament Demobilization and Reintegration
NGO	Non Government Organisation
NPFL	National Patriotic Front of Liberia
p.	Page
pp.	Pages
para.	Paragraph
Paras	Paragraphs
PWD	Public Works Department
RUF	Revolutionary United Front
Rules	Rules of Procedure and Evidence of the Special Court for Sierra Leone

Rules of Engagement	The rules of Engagement for UNAMSIL Troops
SBU	Small Boys Unit
SGU	Small Girls Unit
SLA	Sierra Leone Army
SOS	Secretary of State
Special Court	Special Court for Sierra Leone, established on 16 January 2002
Statute	Statute of the Special Court for Sierra Leone, 16 January 2002.
STF	Special Task Force
ULIMO	United Liberation Movement of Liberia for Democracy
ULIMO-J	United Liberation Movement of Liberia for Democracy - Roosevelt Johnson's group
ULIMO-K	United Liberation Movement of Liberia for Democracy - Alhaji Kromah's group
UNAMSIL	United Nations Mission in Sierra Leone
UNICEF	United Nations Children's Fund
UNOMSIL	United Nations Observer Mission in Sierra Leone
WACs	Women Auxiliary Corps
ZAMBATT	UNAMSIL Zambian Battalion

APPENDIX B

LIST OF CITED AUTHORITIES AND DOCUMENTS

Authorities and documents for which abbreviated citations are used

1. Documents in this Case

(i)Decisions, Orders and Judgement

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***Sesay et al* Request to Call Additional Witnesses and Disclose Additional Statement**	*Prosecutor v. Sesay, Kallon, Gbao,* SCSL-2004-15-T 191 "Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Statement", 12 July 2004
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***Fofana* Appeal Decision on Bail**	*Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-371, "Fofana - Appeal against Decision Refusing Bail", Appeals Chamber, 11 March 2005
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***Fofana et al* Appeal Judgement**	*Prosecutor v. Fofana, Kondewa*, SCSL-04-14-A-829, "Judgment", Appeals Chamber, 28 May 2008
***Brima et al* Appeal Judgement**	*Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-A-475, "Judgment", Appeals Chamber, 22 February 2008
***Brima et al* Justice Sebutinde Separate Concurring Opinion**	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-A-475, "Justice Sebutinde Separate Concurring Opinion to Appeals Chamber Judgement", Appeals Chamber, 22 February 2008
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ANNEX A: GLOSSARY

ANNEX B: INTERNATIONAL JURISPRUDENCE

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations ofInternational Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No: IT-95-14-T

Date: 21 January 1998
English
Original: French

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Fouad Riad
Judge Mohamed Shahabuddeen

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **21 January 1998**

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

DECISION ON THE STANDING OBJECTION OF THE DEFENCE TO THE ADMISSION OF HEARSAY WITH NO INQUIRY AS TO ITS RELIABILITY

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Counsel for the Accused

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 30 September 1997, Defence Counsel for Tihomir Blaškić (hereinafter "the Defence") submitted a Motion objecting in principle to the admission of hearsay evidence with no inquiry as to its reliability (hereinafter "the Motion"). The Prosecutor presented her arguments in her Response of 30 October 1997 (hereinafter "the Response"). On 19 November 1997, the Defence filed a Reply (hereinafter "the Reply"). Lastly, the parties debated the question during a public hearing on 28 November 1997 (hereinafter "the hearing").

The Trial Chamber will first analyse the claims of the parties and then discuss all the disputed points.

I. CLAIMS OF THE PARTIES

2. In its Motion, the Defence raises an objection in principle to the admission of hearsay evidence, with no inquiry as to its reliability, in particular, following the depositions of two witnesses who testified before the Trial Chamber on 26 and 29 September 1997.

The Defence invokes the accused's fundamental right to cross-examine the Prosecution witnesses, as provided in article 21(4)(e) of the Statute of the Tribunal (hereinafter "the Statute"). Basing itself *inter alia* on the case-law of the European Court of Human Rights, the Defence recalled that what is at stake is "a basic tenet of both national and international judicial systems". The Defence, therefore, considers that hearsay evidence should be admissible only if it is based on a proper foundation and only if found to be reliable following a detailed investigation by the Trial Chamber. In support of its Motion, the Defence refers both to the common law legal systems and Sub-rule 89(B) and Rule 95 of the Rules of Procedure and Evidence (hereinafter "the Rules") as well as to the Decision of Trial Chamber II of 5 August 1996 in respect of the Defence Motion on hearsay, *The Prosecutor v. Tadić, IT-94-1-T, CPI 2* (hereinafter "Decision on Hearsay").

3. In her Response, the Prosecutor first maintains that the common law rule against the admissibility of hearsay evidence is not directly applicable to proceedings before the International Tribunal and that the recent developments in common law jurisdiction tend to demonstrate that whether the evidence is direct or hearsay is a matter which is relevant to its weight and not its admissibility. The Prosecutor then asserts that the case-law of the European

Court of Human Rights cited by the Defence is not relevant to the matter at hand. Lastly, the Prosecutor recalls that the admissibility of hearsay evidence before the Tribunal has been well established, pursuant to Rule 89 of the Rules and the Decision on Hearsay.

II. DISCUSSION

4. The Trial Chamber must review the conditions under which hearsay evidence is admissible and *inter alia* concentrate on the question of its reliability and compatibility with a fair trial. In so doing, the Trial Chamber notes that for reasons inherent to the armed conflict which concerns us here, thousands of people were displaced, detained or even killed. Under such conditions, it can be expected that the witnesses will refer to events which others, and not they themselves, experienced. This, however, may be considered only on the basis of parity between the Parties and on respect for the rights of the accused as expressed in internationally recognised standards.

5. The Trial Chamber would first recall the rules most relevant to this case. Firstly, Sub-rule 89(A) of the Rules states explicitly that the "Chambers shall not be bound by national rules of evidence". For that reason, neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system.

A. Hearsay evidence is admissible

6. At the hearing, the Defence specified that it was not contesting the principle of the admissibility of hearsay evidence but the limits to such admissibility. Nevertheless, the contents of the initial Motion largely deal with the principle of the admissibility of hearsay evidence. The Trial Chamber would wish to recall its agreement in principle to the admissibility of such evidence.

Judge Stephen, in particular, affirmed:

> "The fact that evidence is hearsay does not, of course, affect its relevance nor will it necessarily deprive it of probative value". *(Separate Opinion of Judge Stephen on the Defence Motion on Hearsay,* p.2*).*

10. This Trial Chamber agrees with those conclusions and emphasises that the two criteria for admissibility - relevance and probative value - pursuant to Sub-rule 89(C) of the Rules, apply whether the testimony is direct or hearsay. In fact, direct testimony may also not be relevant or have the required probative value and thus be declared inadmissible. The direct or hearsay nature of the testimony is but one of the many factors which the Trial Chamber will consider when evaluating the relevance and probative value of such testimony. The Trial Chamber therefore considers that the admissibility of hearsay evidence may not be subject to any prohibition in principle since the proceedings are conducted before professional Judges who possess the necessary ability to begin by hearing hearsay evidence and then to evaluate it so that they may make a ruling as to its relevance and probative value. The Trial Chamber notes, finally, that the principle of the inadmissibility of hearsay evidence, as enshrined in the common law countries, has, in those very countries today, become "riddled with judicial and even legal exceptions" (Jean Pradel, *Droit pénal comparé,* Précis Dalloz, 1995, p. 406).

B. <u>The question of the limits to the admissibility of hearsay evidence</u>

11. As regards the limits to the admissibility of hearsay evidence, the Defence is seeking both that a general limit be placed on recourse to hearsay evidence and that the evidence be identified so that the Judges may evaluate its reliability. The principal argument in support of such limits is the absence of any cross-examination of the initial declarant. However, since the principle making hearsay evidence admissible has been accepted, the objection in respect of the absence of cross-examination is not related to admissibility but to the weight given to the evidence.

12. The right to cross-examination guaranteed by Article 21(4)(e) of the Statute applies to the witness testifying before the Trial Chamber and not to the initial declarant whose statement has been transmitted to this Trial Chamber by the witness.

The Trial Chamber does, however, note that the right to cross-examine the witness in court may be used to challenge the importance to be given to the hearsay testimony, for example, by clearly indicating the number of intermediaries who transmitted the testimony and by seeking to learn the identity and other characteristics of the initial declarant as well as the possibilities for that declarant to have learned the relevant elements or even by bringing out the other facts or circumstances which might assist the Trial Chamber in its evaluation of such evidence.

13. In the opinion of the Trial Chamber, the Judges are the ones who will, in due course and in each case, determine the reliability to be accorded to a testimony, according to the circumstances in which it was obtained and to its content. For this purpose, the Judges, if necessary, will not hesitate to ask the witness questions relating to the hearsay evidence. The proceedings of the International Tribunal are not conducted before a jury, but before professional Judges who rule on both fact and law. Thanks to their training and experience, the Judges can give the appropriate weight to testimony declared admissible in light of its reliability. Such an evaluation can logically be made only *a posteriori* once the Parties have presented all their claims.

C. The need to ensure a fair trial

14. The Trial Chamber would recall that testimony initially admitted because it satisfies the two-fold criteria of relevance and probative value may subsequently be rejected, pursuant to Sub-rule 89(D) of the Rules should the Judges deem that, within the context of the trial, such testimony no longer meets the need to ensure a fair trial. Sub-rule 89(D), in fact, states that

> "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a faire trial".

In its Decision on hearsay, Trial Chamber II already considered the real guarantee for the Defence in respect of the unconditional admission of evidence. It noted that

> "Moreover, Sub-rule 89(D) provides further protection against prejudice to the Defence, for if evidence has been admitted as relevant and having probative value, it may later be excluded" (para. 18).

UNITED
NATIONS

IT-98-30/1-T
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11 JANUARY 2001

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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of The Former Yugoslavia since 1991

Case No. IT-98-30/1-T

Date 11 January 2001

Original: ENGLISH
FRENCH

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

Decision of: **11 January 2001**

THE PROSECUTOR

v.

MIROSLAV KVOČKA
MILOJICA KOS
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

DECISION ON THE "REQUEST TO THE TRIAL CHAMBER TO ISSUE A DECISION ON USE OF RULE 90H"

The Office of the Prosecutor:
Ms. Brenda Hollis
Ms. Susan Somers
Mr. Kapila Waidyaratne

Defence Counsel:
Mr. Krstan Simić for Miroslav Kvočka
Mr. Zarko Nikolić for Milojica Kos
Mr. Toma Fila for Mlađo Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Jovan Simić for Dragoljub Prcać

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TRIAL CHAMBER I ("the Trial Chamber") 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 ("the Tribunal");

BEING SEISED of the "Request to the Trial Chamber to issue a decision on use of Rule 90H" filed by the Defence of Miroslav Kvočka on 1 December 2000 ("the Motion"), asking the Trial Chamber to limit Prosecution cross-examination of defence witnesses to questions relating to the accused who has called the witness, and to prohibit cross-examination by the co-accused;

NOTING the "Response by Milojica Kos to the Request to the Trial Chamber to issue a decision on use of Rule 90H filed on behalf of Miroslav Kvočka on 1 December 2000", filed on 8 December 2000, opposing the Motion insamuch as it concerns cross-examination by co-accused and requesting the Trial Chamber to allow each accused to cross-examine all defence witnesses, and the "Prosecution's Response to accused Kvočka's 'Request to the Trial Chamber to issue a decision on use of Rule 90H'", filed on 19 December 2000 which opposes the Motion in full;

CONSIDERING that the Trial Chamber may admit any relevant evidence which it deems to have probative value pursuant to Rule 89 (C) of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

CONSIDERING that, pursuant to Rule 90 (H) of the Rules, cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of that case, although the Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters;

CONSIDERING that it goes against the plain wording of Rule 90 (H) to limit the scope of Prosecution cross-examination further as requested in the Motion, particularly in context of the current matter, in which the case against each accused may affect the others since crimes of multiple participation, joint liability and superior responsibility are alleged;

CONSIDERING the right of each accused to examine or have examined the witnesses against him as enshrined in Article 21 of the Statute of the Tribunal;

CONSIDERING that a witness presented by an accused may give evidence against one of his co-accused, so that the co-accused has a right to cross-examine that witness, and further that to prohibit all cross-examination by a co-accused as requested in the Motion could exclude relevant evidence;

CONSIDERING that the Trial Chamber has a duty to exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth and to avoid needless consumption of time, pursuant to Rule 90 (G) of the Rules;

HEREBY DENIES the Motion and **ORDERS** as follows:

1) Defence witnesses shall be questioned in the following sequence:
   a) Examination in chief;
   b) Cross-examination by the defence of the co-accused, if relevant, in accordance with paragraph (2) below;
   c) Cross-examination by the Prosecutor;
   d) Re-examination;
   e) Questions from the judges.

2) When a witness presented by the defence of one accused mentions another accused, the defence of that co-accused shall be entitled to cross-examine the witness. In other circumstances, co-accused wishing to cross-examine the witness shall make an application to the bench explaining the relevance of the proposed questioning.

Done in English and French.

Almiro Rodrigues
Presiding Judge

Dated this eleventh day of January 2001,
At The Hague
The Netherlands.

[Seal of the Tribunal]

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D 11597 - D 11588 mej.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-94-1-T

Date: 5 August 1996

Original: English & French

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Ninian Stephen
Judge Lal C. Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **5 August 1996**

PROSECUTOR

v.

DUŠKO TADIĆ a/k/a"DULE"

DECISION ON DEFENCE MOTION ON HEARSAY

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis

Mr. Alan Tieger
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie

Mr. Steven Kay
Ms. Sylvia De Bertodano

I. INTRODUCTION

Pending before the Trial Chamber is the Motion on Hearsay ("Motion") filed by the Defence on 26 June 1996 pursuant to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Prosecution filed its response on 10 July 1996. Oral argument was heard on 16 July 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. The Pleadings

1. This Motion raises the issue of the admissibility of hearsay evidence during trial before 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 ("International Tribunal"). In bringing this Motion, the Defence contends that the admission of hearsay evidence would violate the right of the accused to examine the witnesses against him provided by in Article 21(4)(e) of the Statute of the International Tribunal ("Statute"). On this basis, the Defence avers that the International Tribunal should refuse to admit evidence directly implicating the accused in the crimes charged unless it first finds that the probative value of this evidence substantially outweighs its prejudicial effect. Further, the Defence asserts that the Trial Chamber should rule on the admissibility of such statements without hearing its content. Instead, the Defence requests that the Trial Chamber make such a ruling only after a review of the circumstances under which the evidence was received.

2. While acknowledging that the International Tribunal is not bound by any national rules of evidence, the Defence asserts that the Rules are more akin to the adversarial common law system and that most such systems contain a general exclusionary rule against hearsay. Even accepting that there are exceptions to this general rule because some types of hearsay may have sufficient probative value to be admissible - for example, instances of excited utterances and dying declarations - the Defence argues that the Trial Chamber should not admit any hearsay evidence unless the Prosecution first demonstrates that the evidence has substantial probative value that outweighs any prejudicial effect on the accused.

3. In opposition to the Defence, the Prosecution argues that the International Tribunal's omission of a Rule excluding hearsay evidence was clearly deliberate and is consistent with both the International Tribunal's procedure of trials in which judges are the finders of fact, and with the civil law system in which the basic rule is that all relevant evidence is admitted. The Prosecution contends that the Judges of the International Tribunal are fully capable of determining the weight that should be afforded to such evidence. In the Prosecution's view, the

position of the Defence extends beyond even most common law systems in that these systems allow the admission of hearsay evidence that meets certain exceptions without requiring a further showing. Finally, the Prosecution maintains that the Defence's arguments run contrary to the spirit and intent of the Rules and that adoption of its requests would necessitate a formal amendment requiring approval of the Judges of the International Tribunal.

B. Analysis

4. The power of the Trial Chamber to regulate the conduct of the parties and the presentation of evidence during trial arises from the provisions of the Statute and the Rules. Relevant to the Motion under review is Article 21 of the Statute, which provides for the rights of the accused. The relevant portion states:

> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
> . . .
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> . . .

5. The International Tribunal's Rules, originally adopted in February 1994, govern the admission of evidence. *See generally* Rules 89-98. Despite the adoption of several amendments to the Rules since their creation, there is no Rule that calls for the exclusion of out-of-court, or hearsay, statements.

6. Rule 89, entitled *General Provisions*, reads as follows:

> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
>
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

Rule 95 provides additional guidance regarding the admissibility of evidence. This Rule, entitled *Evidence Obtained by Means Contrary to Internationally Protected Human Rights,* declares:

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

7. It is clear from these provisions that there is no blanket prohibition on the admission of hearsay evidence. Under our Rules, specifically Sub-rule 89(C), out-of-court statements that are relevant and found to have probative value are admissible. Although Sub-rule 89(A) clearly provides that the Trial Chamber is not bound by national rules of evidence, in determining the validity of the Defence Motion, it is instructive to review the practice regarding admissibility of evidence in civil and common law systems.

8. In common law systems, evidence that has probative value is generally defined as "evidence that tends to prove an issue." Henry C. Black, *Black's Law Dictionary* 1203 (6th ed. 1991). Relevancy is often said to require implicitly some component of probative value. For example, the Supreme Court of Canada, in *R. v. Cloutier,* relied on the following statement of Sir Rupert Cross:

> "For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."

R. v. Cloutier, 2 S.C.R. 709, 731 (Canada Sup. Ct. 1979) (*quoting* Sir Rupert Cross, *Cross on Evidence* 16 (4th ed. 1974)). Another commentator, in a discussion of United States law, expressed a similar opinion:

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. . . . The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.

Charles T. McCormick, *McCormick on Evidence* 339-40 (4th ed. 1992).

9. Thus, it appears that relevant evidence "tending to prove an issue", must have some component of reliability. In some common law systems, the general exclusion of hearsay evidence is based upon its presumed lack of reliability. However, this is not an absolute rule. For example, the United States Federal Rules of Evidence provides for twenty-seven specific situations in which hearsay evidence is admissible. *See* U.S. FED. R. EVID. 803-04. In addition to the circumstances explicitly provided for, the United States rules allow for the admission of statements

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

U.S. FED. R. EVID. 803(24); *see also* U.S. FED. R. EVID. 804(b)(5). The Evidence Act of the Laws of Malaysia, while not explicitly defining hearsay, also stipulates the circumstances in which statements by persons who are unavailable to be called as witnesses are declared relevant and thus admissible. *See* Malay. EVID. ACT, 1950 § 32 (rev. 1971).

10. Despite these relatively strict limitations on the admission of hearsay, judges in non-jury common law cases often take a slightly different approach:

> Where the admissibility of evidence is . . . debatable, the contrasting attitudes of the appellate courts towards errors in receiving and those excluding evidence seem to support the wisdom of the practice adopted by many experienced trial judges in non-

> jury cases of provisionally admitting debatably admissible evidence if objected to with the announcement that all questions of admissibility will be reserved until the evidence is all in.

McCormick on Evidence 86-87.

11. In civil law systems, however, there exists no general rule against the admissibility of hearsay evidence. Out-of-court statements are included in a case file of all evidence, prepared by the investigating magistrate, which is considered fully by the judges during the trial proceeding. This difference in criminal procedure between the civil and common law systems is explained primarily by the inquisitorial nature of the civil system, especially in the pre-trial phase, and the absence of a jury. Procedure in these systems, as one commentator noted when discussing the French legal system, is guided by the principle that "[a]ll forms of evidence are admissible as long as they do not conflict with the ethics of [the] system of criminal procedure." *Criminal Procedure Systems in the European Community* 118 (Christine Van Den Wyngaert et al., eds. 1993). Similarly, in criminal matters in Belgium, "the facts may be proven by all possible means" and the trial judge need only rely on his "intimate conviction" regarding whether a fact has been proven after assessing the weight of the evidence presented. *Id.* at 20-22.

12. Article 6(3)(d) of the European Convention on Human Rights provides for the right of the accused to examine witnesses against him. In interpreting this provision, the European Court of Human Rights has held that while the use of witness statements made out of court does not, in and of itself, violate this provision, "[a]s a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him." *Delta v. France*, 191-A Eur. Ct. H.R. (ser. A) 15 (1990). However, the European Court of Human Rights has not directly addressed hearsay as such, and indeed, has clearly stated that the admissibility of evidence is primarily a matter of regulation under national law. *Schenk v. Switzerland*, 145 Eur. Ct. H.R. (ser. A) 29 (1988).

13. In sum, the prohibition on the admissibility of hearsay that fails to meet a recognised exception is a feature of criminal procedure primarily limited to common law systems. In the

civil law system, the judge is responsible for determining the evidence that may be presented during the trial, guided primarily by its relevance and its revelation of the truth.

14. The International Tribunal, with its unique amalgam of civil and common law features, does not strictly follow the procedure of civil law or common law jurisdictions. In view of this, the Trial Chamber recognizes the value to the parties of knowing the standards it will apply in determining whether hearsay evidence is admissible. Moreover, in this first trial before the International Tribunal, an analysis of the Rules will further the ever-present goal of transparency of the proceedings.

15. The Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. That is, if evidence offered is unreliable, it certainly would not have probative value and would be excluded under Sub-rule 89(C). Therefore, even without a specific Rule precluding the admission of hearsay, the Trial Chamber may exclude evidence that lacks probative value because it is unreliable. Thus, the focus in determining whether evidence is probative within the meaning of Sub-rule 89(C) should be at a minimum that the evidence is reliable[1].

16. In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, truthful, and trustworthy, as appropriate.

17. The Defence, however, argues that the Trial Chamber should exclude hearsay evidence implicating the accused in one of the crimes charged unless it finds that its probative value substantially outweighs its prejudicial effect. The Trial Chamber is asked to balance hearsay evidence with the possible prejudicial effect on the Defence before ruling on its admissibility. Further, the Defence would require that the Trial Chamber rule on the admission of such evidence without actually hearing its content. This procedure, while possibly appropriate if trials before the International Tribunal were conducted before a jury, is not warranted for the

[1] Rule 95, while concerned with the methods by which evidence is obtained, also allows for its exclusion if it is unreliable.

trials are conducted by Judges who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevancy and the probative value of the evidence.

18. Moreover, Sub-rule 89(D) provides further protection against prejudice to the Defence, for if evidence has been admitted as relevant and having probative value, it may later be excluded. Pursuant to this Sub-rule, the trial Judges have the opportunity to consider the evidence, place it in the context of the trial, and then exclude it if it is substantially outweighed by the need to ensure a fair trial.

19. Accordingly, in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability. In doing so, the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In bench trials before the International Tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence and

PURSUANT TO RULE 54,

BY MAJORITY DECISION HEREBY DENIES THE MOTION.

Done in English and French, the English text being authoritative.

Gabrielle Kirk McDonald
Presiding Judge

Judge Stephen appends a Separate Opinion to this Decision.

Dated this fifth of August 1996
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX C: NATIONAL CASES

31282

DOSSI CASE

(1919) 13 Cr. App. R. 158
1919 WL 16579 (CCA), (1919) 13 Cr. App. R. 158
(Cite as: (1919) 13 Cr. App. R. 158)

C

*158 Severo Dossi

Court of Criminal Appeal

CCA

Darling J. Atkin J. Shearman J.

June 17, 1918

On an indictment alleging an offence on a specific date the jury is entitled to find Not Guilty on that date, and "if the indictment covers other dates Guilty," and the Court is thereupon entitled to amend the date in the indictment to "some day in" the month in question. The Court does not take the view that it is "safer to accept the uncorroborated evidence of a young child than that of an adult."

Appeal against conviction on law.

The appellant was convicted, on May 9th, 1918, before the Deputy-Chairman, at the London Sessions, of indecent assault, and was sentenced on May 10th to nine months' imprisonment with hard labour, and was recommended for deportation.

Sir Ernest Wild, K.C. (*J. A. C. Keeves* with him), for the appellant, who was present. The indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, "on March 19th, 1918," and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy-Chairman's summing up the jury retired, and on their return said that they found the appellant "with regard to the date March 19th, *Not Guilty* . If the indictment covers other dates, *Guilty* ." They also found him *Not Guilty* of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy-Chairman amended the indictment by substituting "on some day in March" for the words "on March 19th, 1918," and the jury then found the appellant *Guilty* on the amended indictment.

It is submitted that if a man is put on his trial on an indictment which charges him with committing an offence on a specific date and no amendment is made before or during the trial and the jury find that he has not committed the offence on that day they have returned a verdict of Not Guilty, which must be allowed *159 to stand. This is especially so where the defence is an *alibi* or, as in this case, a kindred plea. The time at which the amendment was allowed in this case was not "before trial, or at any stage of the trial," as is permitted by s of the Indictments Act, 1915 . A trial is at an end when a verdict of Not Guilty is given (Archbold, 5th ed., p. 220). It is further submitted that the Deputy-Chairman misdirected the jury with regard to the corroboration of the evidence of the child White. That evidence was entirely uncorroborated, and the Deputy-Chairman perfectly properly warned the jury that they must act on it only with the greatest caution. He went on, however, to tell them that it was safer to accept the uncorroborated evidence of a young child than that of an adult. It is submitted that that negatived the whole value of the warning that he had previously given and was a very improper direction.

Percival Clarke for the respondents (upon want of corroboration only). The evidence of Nora White required, in law, no corroboration. The jury were entitled to act upon it if they thought fit, after the warning of the learned Deputy-Chairman--but it was in fact corroborated by the evidence of the defendant himself, and the evidence of Rebecca

Barnett tended to shew that the assault was not accidentally but intentionally indecent. The statement on the value of the evidence of a young child was one which the learned Deputy-Chairman in his experience was entitled to make, and in no sense detracted from the warning he had given to the jury.

Atkin J.:

The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him *Not Guilty* and that that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And althouth the day be alleged, yet if the jury finds him guilty on another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the ***160** same law is in the case of an indictment," 1 *Inst.* 318. " *Syer* was indicted of burglary 1 *Augusti* , 31 Eliz ... it fell out in evidence that the burglary was done 1 *die Septembris* ... so as *primo Augusti* there was no burglary done, and thereupon he was found *Not Guilty* , and afterwards he was indicted againe 1 *Septembris* , &c., and it was resolved by Wray and Periam, justices of assise, and by the greatest part of the judges that he ought not to be tried again, for he mought have been found *Guilty* upon the first indictment, for the day is not materiall; but it is necessary for the jury in that case to set down the day." *Ib.* , and 3 *Inst.* 230: Syer was discharged. Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. It is, therefore, unnecessary to consider whether there was power to amend the indictment, but we must not be taken to express any doubt that the wide words in s. 5 (1) of the Indictments Act, 1915 , which give the Court power to amend an indictment "at any stage of a trial" might, in a proper case, permit of an amendment in circumstances similar to those which exist here.

The substantial point made by Sir Ernest Wild was with regard to the direction by the Chairman to the jury on the question of corroboration. There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care. (See R. v. Graham, 4 Cr. App. R. 218, 1910 ; R. v. Pitts, 174 E.R. 509 ; and R. v. Cratchley, 9 Cr. App. R. 232, 1913 .) Those cases sufficiently shew what kind of direction should be given to the jury in cases of this kind, and the question arises whether or not the summing up of the Deputy-Chairman offended against the rules which are there laid down. He told the jury that "The law does not require corroboration. ... What the law does require is that it must be most carefully pointed out to a jury that they ought to act with great caution and with the greatest deliberation, if there ***161** is no corroboration of the story in such a case as this ... It is for you to say whether or not you are satisfied that that little girl was trying to tell you the truth. I say that you must be very careful before you act without corroboration, but that you are entitled, if you are convinced beyond all reasonable doubt that the little girl is telling the truth, to act on her story even without corroboration." If the summing up had stopped there it could not have been contended that it was open to any objection. The law is stated as the authorities which I have cited laid it down, and the caution to the jury is framed in careful words.

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But the Deputy-Chairman went on to say in reference to the question of corroboration: "It does seem to me that it is infinitely less dangerous to act on the uncorroborated testimony of little children who allege that they have been indecently assaulted than to act on the uncorroborated testimony of older people who allege that they have been assaulted, and I will tell you why. I should always practically tell a jury that they must not convict on the uncorroborated testimony of a woman of full years, because it is so easy to make a charge, for purposes that you can well imagine, either against the wrong man when there is a right man, or against a person who has had no dealings with her at all, or for the purposes of blackmail. But with regard to small children there is less incentive for them to make up a false story about a particular man in a matter of this sort than there often is in the case of an older woman. Children are less likely to suggest a wrong man when there is a right man, and they are less likely to be open to the purposes of blackmail than older people." We think that those were dangerous remarks to make to the jury. No doubt, the considerations which the Deputy-Chairman had in his mind were perfectly sensible. But, on the other hand, small children are possibly more under the influence of third persons--sometimes their parents--than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories. There seems to us no reason to distinguish between the amount of corroboration required in the one case and that required in the other. But doubtless the jury looked on this summing up as advice on a matter on which they were quite able to form an opinion. They had heard the beginning of the summing up where they were directed quite accurately, and immediately after the passage I last read the Deputy-Chairman ***162** said: "You must act with great care in the case of the little girl White. You must act with great care also in the case of Rebecca Barnett." In our view, the repetition of that caution prevented the other parts of the summing up from having the serious effect on the jury they might have had. White's story had very slight corroboration and, indeed, it might be said that, at the end of the case for the prosecution, there was none. But the question of corroboration often assumes an entirely different aspect after the accused person has gone into the witness-box and has been cross-examined. The appellant in this case stated in evidence that he was in the habit of fondling the little girls and described how he took them up, and the jury might well have refused to accept his story that these things were done innocently. There was evidence to support the verdict, there was no substantial misdirection on the facts or on the law, and the appeal must, therefore, be dismissed. The Court does not see its way to interfere with the sentence which was passed on the appellant.

Appeal dismissed

Representation

Solicitors: S. Fraulo for the Appellant; Wontner & Sons for the Respondents.

G. B. ***163**

END OF DOCUMENT

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BOWEN CASE

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REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN APPELLANT

AND

THE STATE RESPONDENT

PANEL:

R. Hamel-Smith, J.A.
L. Jones, J.A.
S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant
Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 12th January, 2005

JUDGMENT

Delivered by S. John, J.A.

1. On February 18, 2004 before a jury the appellant was found guilty of four counts of unlawful sexual intercourse and four counts of serious indecency. On March 24, 2004 he was sentenced to seven years imprisonment on each count of unlawful sexual intercourse and five years imprisonment on each count of serious indecency. All the sentences were to run concurrently.

2. In this case the appellant and the victim are cousins. At the time of the alleged offences the victim who we shall refer to as 'K'was three years old. The appellant was sixteen years of age. The offences to which the eight counts in the indictment related were alleged to have been committed during the period August 31, 1997 and May 01, 1998. The prosecution case against the appellant at trial depended effectively on the uncorroborated evidence of 'K' who was then nine years old.

3. A number of grounds of appeal were filed but the one ground upon which heavy reliance was placed was that the trial judge erred in law when she rejected the submission of no case to answer.

4. Several witnesses testified on behalf of the prosecution, however, only two of them really gave evidence material to the counts on the indictment, namely 'K' and Cheryl Pierre-Brooks a medical practitioner. For the purpose of the judgment it is necessary to allude to the evidence of those two witnesses.

The evidence of 'K'

5. After stating her name, address and the school she attended and acknowledging that the appellant was her cousin, she said:

> *"Jomaine put his penis in my vagina and my mouth. He did that eight times to me. He put his penis in my vagina four times and in my mouth four times. He did that in his bedroom on top the bed and on the ground on the carpet. He did this on several days at different times."*

6. Under cross-examination by attorney for the appellant she said that her aunt Charmaine (her mother's sister) had taken her to Dr. Michael Telemaque on one occasion because she was itching inside and outside of her vagina. She further said that her mother had taken her on two occasions to another doctor in St. James but she could not then recall the name of the doctor. That doctor never testified either at the preliminary inquiry or the trial. In answer to a question from attorney for the appellant 'K' agreed that in her evidence-in-chief she said that the appellant had done something to her eight times. She then said:

> *"I recall telling the Woman Police Constable three times. She read back what I said before I signed it. I did not tell her it was true. I remember the lady police writing what I told her and I wrote my name to it. She read it to me for me to hear what I said. She asked me if that was true and I did say that was true. I can't remember what I told her. I saw where I signed my name. Yesterday, someone read it over for me. My mummy when she read it over I heard her say three times. I talked about that three times with mummy. After talking with mummy I realized it supposed to be eight times. When I spoke to the lady police, mummy and daddy were present."*

In response to a question, no doubt with reference to her evidence given at the preliminary inquiry, she said:

> *"I remember going to the police station. I remember telling the lawyer that I did not tell the police anything about Jomaine before I signed the paper. I was not speaking the truth."*

Testimony of Dr. Brooks

7. She said that on January 04, 1999, some eight (8) months after the event she examined 'K' and made notes contemporaneous with the examination. She sought and was granted leave of the court to refresh her memory from her notes. Her testimony then continued:

> *"My findings were: hymen not intact, probably inflicted by sexual interference. I came to findings by examining vaginal area of K.C. By sexual interference, I mean having made a differential diagnosis. I came to conclusion more probable because of what I saw was due to sexual act. In making my conclusion I would have examined the vaginal area thoroughly. On examination of vaginal area I examined the anterior and posterior areas especially looking for tear. There were none – There were no abrasions. I examined the vaginal orifice looking for elasticity – absence or presence of hymen. The elasticity of vaginal orifice at that tender age, I did not insert my hand. I inserted my little finger around the orifice to make sure that hymen was not in tact. I noted that the orifice was not irregular. It was smooth and pliable in texture. It should be noted that a four-year-old child would not have pliable orifice. It would be tightened. Because of all circumstances noted I put down sexual interference as opposed to blunt instrument which I would put sometimes."*

8. During Dr. Pierre-Brooks' cross-examination, Mr. Peterson for the appellant made an application to inspect her notes. Dr. Pierre-Brooks had no notes. In fact, she said that all the details she had given about elasticity, orifice and other details were from memory. The document from which Dr. Pierre-Brooks had refreshed her memory was the medical certificate, which she had issued upon her examination of 'K' on January 04, 1999. All that was written on that medical was – hymen not intact – probably inflicted by sexual interference.

Submission of No-Case

9. At the end of the prosecution case it was submitted for the appellant that there was no case to answer. It was put on two bases. First, that the evidence of the prosecution was so discredited as a result of cross-examination that it was unsafe for the case to go to the jury. The second basis of the submission was that having regard to the wide span in the indictment it was difficult for the appellant to properly answer the charges.

10. The judge in rejecting the submission acknowledged that there were inconsistencies in the evidence but said that it was the function of the jury to decide what they made of the inconsistencies. *"It was not the court's function,"* she said *"to weigh the evidence and to find where the truth lay, to do so she said would amount to a usurpation by the court of the function of the jury."* As to the indictment she said that it clearly outlined the conduct complained about, the place where it was alleged to have taken place and the period during which it took place. That, she said was sufficient.

11. Following the rejection of the submission the appellant gave evidence and called his uncle, his mother and Dr. Michael Telemaque, a General Practitioner to give evidence on his behalf. The appellant denied the allegations. He admitted that during the period ***August 1997 – May 1998 he had seen the victim 'off and on' at his home and had taken care of her***. He said she was his favourite cousin. He also gave evidence of his previous good character.

12. Dr. Telemaque testified that he had seen 'K' on three occasions at his office on Long Circular Road, St. James. He made notes on each occasion and with the leave of the court he was allowed to refresh his memory. According to his notes, the first visit was July 04, 1997 when 'K' was brought in with a complaint of high fever and vomiting. His diagnosis then was Acute Bacterial Tonsillitis. The second visit was on November 22, 1997, with a complaint of fever and an external vaginal itch that was present for three months. He said that he formed the opinion that the itch was due to fungal infection in the vagina. He examined her by looking at the external genitalia. On the final visit on December 08, 1997 he was told that things had very much improved. Apart from giving her some more medication he said that he did not examine her. He said that during his examination of the victim in November he saw no break of the hymen.

The Grounds of Appeal

13. In submitting that the judge erred in rejecting the no-case submission Mr. Stuart Brook for the appellant referred to several authorities but placed strong reliance on ***Sangit Chaitlal v The State (1985) 39WIR at 295.***

The Law

14. The current view in the United Kingdom today is stated in ***R v Galbraith (1981) 1 WLR 1039 124*** in these terms:

> *" (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or*

other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

15. As Lord Lane pointed out the first limb of the ***Galbraith*** test does not cause any conceptual problems. The second limb of the test must be understood, he said, in the context of a practice that developed after the passing of the Criminal Appeal Act 1966 and s. 2 (1) of the Criminal Appeal Act 1968, (which has since been repealed and replaced with some modification by the Criminal Appeal Act 1995), of inviting the judge to hold that there was no case to answer because a conviction on the prosecution evidence would be unsafe. The principles stated in ***Galbraith*** have been consistently applied in Jamaica although the 1968 Act is not part of the law in Jamaica. (See ***Daley v R [1993] 4 All E.R. 87.***

16. In ***R v Barker, (1977) 65 Crim. Rep.*** a case decided before ***Galbraith***, and which involved a conviction for driving a motor vehicle with a blood alcohol concentration above the prescribed limit the appellant was convicted and sentenced to six months imprisonment and suspended for two years. A submission of no-case to answer was made and it was rejected. The matter went to the Court of Appeal where counsel asked the court to find that the conviction was unsafe or unsatisfactory. He based his argument principally on the fact that at one point in his summing-up the judge seemed to be telling the jury that the inconsistencies were such that they could not convict. That was one possible conclusion to apply to one passage of the summing-up. The court went on to say:

"But even if he is right and even if the judge has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case. The judge, whatever his personal views, must put the issue before the jury fairly."

17. In the Belize case of ***Taibo v R [1996] 48 W.I.R. 74*** the Privy Council stated that the criterion to be applied by a trial judge in dealing with a submission of no-case to answer is whether there is material on which a reasonable jury could be satisfied of the guilt of the defendant. There, the Board applied ***Galbraith*** in maintaining that once there is credible material, even if the prosecution case was 'very thin' the trial should proceed.

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18. On the other hand in ***R v Colin Shippey and others, [1988] Crim. L.R.*** 767 Turner J considered the scope of ***R v Galbraith***. 'S' was charged alone with rape and with two other defendants with a further rape on a different day of the same girl. The prosecution case depended entirely upon the evidence of the complainant and there was effectively little or no corroboration. After the close of the prosecution case submissions of no case to answer were made on behalf of all three accused on the basis of ***Galbraith*** *(supra)* namely that the evidence was so inherently weak and inconsistent that no jury properly directed could properly convict. The prosecution opposed the application. After reviewing ***Galbraith*** in great detail the judge said that he did not interpret the judgment in either ***Galbraith*** or ***Barker*** as intending to say that if there are parts of the evidence which go to support the charge then no matter what the state of the rest of the evidence that is enough to leave the matter to the jury. He felt it was the duty of the court to make an assessment of the evidence as a whole.

19. He said that it was not simply a matter of the credibility of individual witnesses or simply a matter of evidential inconsistencies between witnesses, although those matters may play a subordinate role. He found that there were within the complainant's own evidence inconsistencies of such a substantial kind that he would have to point out to the jury their effect and to indicate to the jury how difficult and dangerous it would be to act upon the plums and not the duff. (Emphasis mine). He accordingly upheld the submission.

20. In Australia the law has been settled since ***Doney v R [1990] 171 Crim. Law Rep. 214*** a decision of a five-member court. There, the court expressed the principle thus:

> *"If there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."*

The High Court went on to point out that the power reserved to a court of criminal appeal to set aside a verdict on the grounds that it is unsafe or unsatisfactory, does not involve an interference with the traditional division of functions between judge and jury in a criminal trial; and that there are no grounds for adding that power to the armoury of a trial judge.

21. In ***Sangit Chaitlal v State*** Bernard J.A. (as he then was) in delivering the judgment of the court expressed the view that the test as laid down in ***Galbraith*** was too restricted a view for while it may cover the case where the verdict is unsafe or unsatisfactory, it did not seem to meet the situation where the verdict was unreasonable or could not be supported having regard to the evidence (which is the language used by our statute giving a judge a somewhat wider discretion.) He opined, that in the ultimate the matter should be left to the good sense of the trial judge who must be depended upon to see that there has been no miscarriage of justice.

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22. More recently in the case of ***Bethel v The State (No. 2) [2000] 59 W.I.R. 456*** de la Bastide, C.J. referred to the approach taken by the English Court of Appeal in ***R v Clinton [1993] 1 All E.R. 998*** which was based on section 2(1)(a) of the Criminal Appeal Act 1968 (which has since been repealed and replaced with some modification by the Criminal Appeal Act, 1999). The English sub-section, he said, provided that an appeal against conviction should be allowed if the conviction was considered unsafe and unsatisfactory. The corresponding provision in the Trinidad and Tobago Judicature Act is section 44(1) which prescribes that an appeal should succeed if the Court of Appeal thinks that on any ground there was a miscarriage of justice. The matter he said was considered previously in ***Solomon v The State [1999] 57 WIR 324***, where the court considered the difference in the language of the English provision as compared with ours and came to the conclusion that there was no substantial difference in the effect of both provisions.

23. In the instant case whilst there were several inconsistencies and weaknesses in the evidence of 'K' they were not necessarily fatal. It must be remembered that the unfortunate incident occurred when 'K' was three years old. We agree that at the time of the trial she was nine years of age but it was important for the jury not to lose track of those important aspects of the case. Furthermore, within recent times there seems to be a practice where some judges have come to think it right that when their own assessment of the credibility and consistency of the evidence led by the prosecution is such that a conviction on the evidence would be unsafe, they should withdraw the case from the jury so as to make sure that the accused is not the victim of a miscarriage of justice. The court deprecates that practice. As Lord Widgery C.J. said in ***R v Barker*** (supra) "*.....It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying.*" See too the dicta of Ibrahim J.A. in the ***State v Rick Gomes*** and ***Luis Blanco Gomez Cr. A 98/99 (unreported) at page 17*** where he said:

> *"A judge sitting with a jury, however, must be careful not to be too anxious to save a jury from themselves by relieving them of the responsibility and the right to make their own assessment of the perceived weaknesses in the prosecution's case."*

24. We are therefore of the opinion that the judge was correct in rejecting the submission of no case to answer.

25. Another very important feature of the prosecution case was the failure of 'K' to give any evidence that would link the appellant with the dates in the indictment, that is to say, August 31st 1997 – May 01,1998.

26. In the case of ***R v Dossi (1919) 13 Cr. App. R. 158*** the indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, "*on March 19th 1918,*" and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy Chairman's summing up the jury retired, and on their return said that they found the appellant "*with regard to the date March 19th, Not Guilty. If the indictment covers other dates, Guilty.*" They also found him Not Guilty of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy Chairman amended the indictment by substituting "*on some day in March*" for the words "*On March 19th, 1918,*" and the jury then found the appellant Guilty on the amended indictment.

27. It was submitted on behalf of the appellant that if a man is put on trial on an indictment which charged him with committing an offence on a specific date and no amendment was made before or during the trial and the jury found that he did not commit the offence on that date they should return a verdict of Not guilty. That, it was further submitted, was especially so where the defence was one of alibi. The judgment of the Court of Criminal Appeal was delivered by Atkin J who, in relation to the submission that there was no power in the court to amend the indictment and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days, they ought to have found him Not Guilty. He then stated:

> "*It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.*"

28. Later on in the same judgment he said at page 160:

> "*Though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.*"

29. In the instant case two situations arose:

i *Time was not an essential part of the alleged offence; and*

ii. *Whilst there was no evidence on the prosecution case to link the appellant with the dates in the indictment when the appellant gave*

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evidence he provided the necessary evidence thereby filling the lacuna in the state's case. He said:

> *"When mother operated these bars in functions and fetes – when she come she would bring 'K' and I used to take care of 'K' during the period.....That period included August 31 1997 – May 01 1998.*

30. Other grounds of appeal were filed but as we indicated at the beginning of this judgment counsel relied on the no-case submission. Out of deference to Counsel we have considered the other grounds but have found no merit in any of them.

31. Having regard to all these reasons we would dismiss the appeal. The question of sentence has been adjourned to January 25, 2005 for consideration.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal

SUPPLEMENTAL

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

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Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN **APPELLANT**

AND

THE STATE **RESPONDENT**

PANEL:

R. Hamel-Smith, J.A.

L. Jones, J.A.

S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant

Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 28th January 2005

SENTENCE

Delivered by S. John, J.A.

This judgment is a supplemental to the judgment delivered on January 12, 2005.

2. On January 12, 2005 we dismissed this appeal and deferred the question of sentence. On January 25, 2005 we heard submissions from both Counsel on the issue and reserved our decision.

3. Mr. Stuart Brook for the appellant submitted to the court that he was relying on the mitigation plea made by senior counsel for the appellant at the trial. In addition, he submitted, he was relying on the following documents also submitted at the trial namely:

(i) The probation officer's report;

(ii) A petition signed by more than 250 persons who all spoke about the appellant's glowing performance at his workplace; and

(iii) A letter written by a minor cousin living abroad who spoke of the love she had for the appellant and the high esteem in which she held him.

4. The appellant was fifteen years of age at the time of the commission of the offences. They were committed during the period August 31 1997 to March 1998. At the conclusion of the preliminary inquiry on November 23 1999 he was committed to stand trial, which did not begin until February 04 2004. The trial judge no doubt took into account the fact that he was fifteen years of age at the time of the commission of the offences but in a general way. We say general because she then proceeded to relate that a certain degree of trust had been reposed in him and that he had breached that trust. In the course of passing sentence she commented: *"You were about 3 times older than Crystal. She was entrusted in your care, and you betrayed that trust by committing these acts upon her."*

5. We have some difficulty in such a proposition. One can readily understand the reposing of trust in a male adult to baby-sit a young girl child but we do not think that the same can be said of a fifteen year old male. It may be leaving things to chance when one entrusts a fifteen year-old male with a young girl. This is not to countenance the commission of the offence in any way but in today's world to repose such a high degree of trust in such a young person may be placing the bar somewhat on the high side.

6. In Cr App 62/2000 ***Latchman v The State***, Lucky JA stated that a court is always concerned about sending young first offenders to an extended term of imprisonment. Of

course, it all depends on the circumstances of the case but nonetheless we share that reluctance if only because of the adverse consequences on the accused in such an environment.

7. It cannot be doubted that in the instant appeal the question of sentence must have been a difficult one for the trial judge, given that she had standing before her a 21-22 year old young man and was attempting to go back in time to the date of commission of the crime. Nevertheless, we express concern whether the judge took all that was required into consideration.

8. In ***R v Secretary of State ex parte Uttley*** [2004] UKHL 38 the House of Lords recognized that in circumstances such as these where the accused at the time of the offence would have been liable to a certain term of imprisonment as a young offender had he been tried within a reasonable time, that term must be taken into account when determining the sentence after a delay of a number of years. Regrettably, this was a recent decision so it could not have been brought to the attention of the trial judge.

9. In this case, the delay between committal and trial was in no way attributable to the appellant. The maximum term which could have been imposed upon him was not less than three years nor more than four years had he been sentenced pursuant to the provisions of the Young Offenders Detention Act Chap13:05. The trial judge did not take into account the maximum sentence available under the Young Offenders Detention Act at the time of sentencing. Section 7 of that Act provides as follows:

> *(1) Where a person is convicted before the High Court on indictment of any offence other than murder, or before a Court of Summary Jurisdiction of any offence for which he is liable to be sentenced to imprisonment, and it appears to such Court-*
>
> *(a) that the person is not less than sixteen nor more than eighteen years of age, and*

(b) *that by reason of his antecedents or mode of life it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime,*

the Court may, in lieu of sentencing him to the punishment provided by law for the offence for which he was convicted, pass a sentence of detention under penal discipline in the Institution for a term not less than three years nor more than four years.

(2) *Before passing such a sentence the Court shall be satisfied that the character, state of health, and mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid.*

10. It is therefore quite clear that had he been convicted at a time when he was not less than sixteen nor more than eighteen, he could not have received a sentence of more than four years. Through no fault of his own he was deprived of that sentencing option and also deprived of the opportunity to receive such instruction and discipline afforded young offenders at the institution.

11. We have carefully read the probationer officer's report and the many recommendations that counsel has provided. They all demonstrate that the appellant is a young man of good character with many good qualities and who has never had a brush with the law. In fact, the final sentence of the probation officer's report states: "*Jomaine's personality stands in sharp contrast to the deviant acts committed.*" The judge in passing sentence acknowledged that the appellant was not a person in need of rehabilitation.

12. We, in no way wish to diminish the seriousness of the offences and do not for a moment lose sight of the fact that the victim was just three years old. However, there

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must be a balancing exercise that takes into account on the one side the harm done to the victim and the need for retribution and the need to protect society from persons who commit such crimes on the other.

13. In the circumstances of this case, primarily because of the age of the appellant at the time of the offence and the fact that the trial judge, through no fault of her own, did not have the benefit of the authority referred to earlier, we think that the sentences were unduly severe.

14. Accordingly, we reduce it to a term of three years imprisonment. The sentence on each count will run concurrently from the date of his conviction.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal

C

R. v Radcliffe

(CA (Crim Div)) Court of Appeal (Criminal Division)

2 February **1990**

Summary

Case Comments

Summary

Subject: Criminal procedure

Keywords: Child abuse; Indecent assault; Jury directions

Catchphrases: Direction to jury; indecency; gross indecency with a child under 14; whether dates on indictment material

Summary: Held, that it must be made perfectly plain to the jury on charges of gross indecency with a child under the age of 14 that that child must have been under that age when the indecency took place in order for them to convict the accused. A direction that "the dates which are set out in the indictment...are immaterial. The prosecution does not have to prove that any particular act happened between those dates. What you have to prove is that it happened... " was therefore a misdirection.

Case Comments

Children; Indictments; Jury directions; Sexual offences. Gross indecency with child under 14. Crim. L.R. **1990,** Jul, 524

END OF DOCUMENT

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ANNEX D: BOOKS, ARTICLES AND COMMENTARIES

ARCHBOLD

CRIMINAL PLEADING, EVIDENCE AND PRACTICE

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(3) Description of persons

1–124 The accused should be described in the indictment by his forename and surname: see 2 Hale 175. But these need not necessarily be stated correctly, provided that he is described in a manner which is reasonably sufficient to identify him.

The surname may be such as the accused has usually been known by or acknowledged; and if there be a doubt as to which one of two names is his real surname, the second may be added in the indictment, thus: "Richard Wilson, otherwise called Richard Layer".

In indictments for offences against the person or property of individuals, the forename and surname of the person injured should be stated, if known: 2 Hawk. c. 25, ss.71, 72. A new-born child may be sufficiently described as "... a child then recently born to A.B. and not named".

Where the person injured has a name of dignity as a peer, baronet, or knight, he should be described by it. "His Royal Highness the Duke of Cambridge" has been considered sufficient without setting forth any of his forenames: *R. v. Frost* (1855) Dears. 474.

Indictment Rules 1971, r. 8

1–124a **8.** It shall be sufficient to describe a person whose name is not known as a person unknown.

(4) Certainty as to age of person injured

1–124b Where it is essential to constitute the offence that the person injured should have been under a certain age, the person should be stated in *every* relevant count of the indictment to be under that age: *R. v. Martin* (1843) 9 C. & P. 213, and *R. v. Sarah Waters* (1848) 1 Den. 356.

(5) Statement as to date and place

1–125 In the *Indictment Rules* 1971 there is no specific requirement for the place where an offence is said to have occurred to be identified. Nor is there any specific requirement therein to state the date of the offence.

In *R. v. Wallwork*, 42 Cr.App.R. 153, CCA, it was held that there is no necessity to identify in the indictment the place where an offence is alleged to have taken place unless it is material to the charge. As to date, there is old authority for the proposition that the proper practice is to state in the indictment the date on which the offence is alleged to have been committed: *R. v. Hollond* (1841) 5 T.R. 607; *R. v. Aylett* (1785) 1 T.R. 63 at 69; *R. v. Haynes* (1815) 4 M. & Sel. 214. Quite apart from these authorities, however, it will usually be necessary to identify in the indictment the date when the offence charged is said to have occurred in order to satisfy at least the spirit of rules 5 and 6 of the 1971 Rules (*ante*, §§ 1–116, 1–119) and, for the same reason, it will sometimes be necessary to particularise the place where the offence is alleged to have taken place. It is in fact the invariable practice to have some reference to the date in an indictment.

1–126 The date specified should be the day of the month, the month and year when the offence is alleged to have been committed.

When an offence of unlawful killing is charged in a case where the fatal injury was caused on a date earlier than the death, it is the date of the death that should be shown on the indictment because the offence is not complete until the death occurs.

Where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited (see *R. v. Brown* (1828) M. & M. 163) and in such a case, despite the general rule in *R. v. Dossi*, 13 Cr.App.R. 158, CCA (*post*,

§ 1–127), the prosecution should not be entitled to rely on any earlier date that may appear from the evidence if that date is not within the relevant time limit.

Where the exact date of the offence is not known the date should be stated as being on or about a particular date, or on a day unknown between two stated dates, so as to isolate the date of the offence alleged as accurately as possible. Unless the offence is a "continuous" one (*post*, § 1–133), the date of the offence should not be given merely as between two stated dates because this may give rise to problems of duplicity, *post*, §§ 1–135 *et seq.*

See also the *Children and Young Persons Act* 1933, s.14(4), *post*, § 19–323 (continuous offences against children).

Materiality of averment as to date and place

1–127 In *R. v. Wallwork, ante*, it was held that the lack of precision as to place in the particulars did not invalidate the indictment because the place of commission of the offence was not material to the charge.

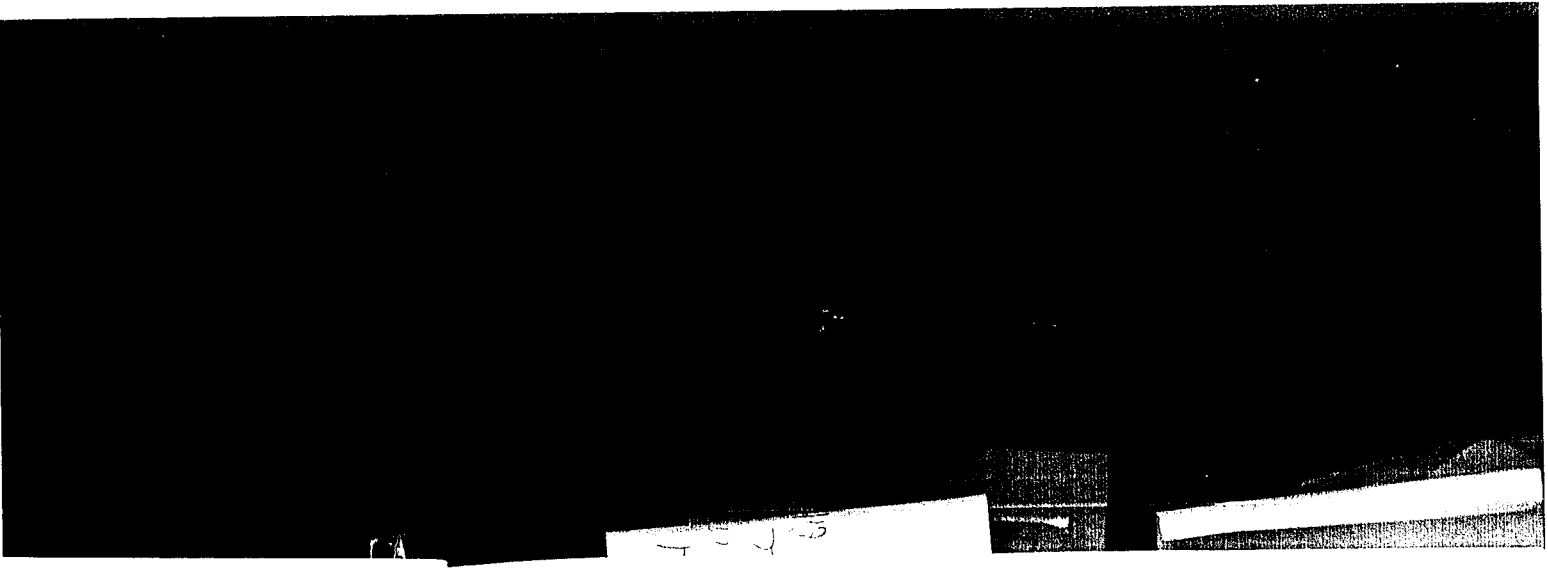
Despite the old authorities to the effect that the date of the offence must be shown in the indictment it never seems to have been necessary for the date shown to be proved by the evidence unless time is of the essence of the offence.

In other cases, if the time stated were prior to the finding of the indictment, a variance between the indictment and evidence of the time when the offence was committed was not material: 2 Co. Inst. 318; 3 Co. Inst. 230; *Sir H. Vane's Case* (1662) Kel.(J.) 16; *R. v. Aylett, ante*; *R. v. Dossi, ante*. In *Dossi* it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided there is no prejudice, *post*) where it is clear on the evidence that if the offence was committed at all it was committed on a day other than that specified.

1–128 The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in *Dossi* if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation: see *Wright v. Nicholson*, 54 Cr.App.R. 38, DC; *R. v. Robson* [1992] Crim.L.R. 655, CA.

1–129 In *R. v. Hartley* [1972] 2 Q.B. 1, 56 Cr.App.R. 189, CA, the court observed that where the words "on or about [the date]" are used, the offence must be shown to have been committed "within some period which has reasonable approximation to the date mentioned in the indictment". However this dictum was *obiter* and should not be taken as more than an indication of the desirability of identifying the relevant date as accurately as possible so that the defendant is not misled as to the case which he has to meet.

1–130 For further examples of circumstances in which it has been held that a variance between the evidence and the particulars was immaterial, see *R. v. Bonner* [1974] Crim.L.R. 479, CA; *R. v. Browning* [1974] Crim.L.R. 714, CA; *R. v. Fernandes* [1996] 1 Cr.App.R. 175, CA; and *Kay v. Biggs and another, The Independent (C.S.)*, November 23, 1998, DC. For examples of allegations as to time, or time and place, being held to be material, see *R. v. Radcliffe* [1990] Crim.L.R. 524, CA (allegation of indecency with child contrary to s.1 of the *Indecency with Children Act* 1960, *post*, § 20–272, an essential ingredient of which is that the child is under 14 at the time of the act of indecency); *R. v. Allamby and Medford*, 59 Cr.App.R. 189, CA (having an offensive weapon in a public place, *post*, § 24–107); *R. v. Pickford* [1995] 1 Cr.App.R. 420, CA (inciting incest where boy incited was under age of capacity for part of period particularised); and *R. v. Macer, The Times*, February 17, 1995, CA (convictions quashed where based on general allegations rather than on specific evidence relating to the particular occasions charged).



Elements of War Crimes under the Rome Statute of the International Criminal Court

Sources and Commentary

KNUT DÖRMANN

with contributions by
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and
ROBERT KOLB

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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.

because it merely repeated statutory language stemming from the definition of enslavement. The first sentence was agreed upon because of its reference to developments reflected in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, to which a considerable number of States have adhered. This would help to describe the limits of an acceptable interpretation of the term 'servile status', which was considered by several delegations as being too broad without further clarification.

As clarified by footnote 52, the crime may well be committed by several persons, e.g., the deprivation of liberty could be committed by one person and the sexual acts by another person. Attempts to spell these variations out in the elements were rejected. It was argued that this result would be achieved by applying Art. 25(3) ICC Statute, which includes the commission of a crime jointly with or through another person as well as several forms of participation in the commission of a crime. The footnote is a reminder of this because the existence of multiple perpetrators is most likely to be the case in this crime, although it could also be the case with others.

(3) Enforced prostitution

The PrepCom recognised that this crime can be committed by the use of force or coercion. The different forms of coercion included in Element 1 are inspired by Element 2 of the war crime of rape and defined accordingly.

A major point of controversy was how to distinguish enforced prostitution from sexual slavery, on the one hand, and other forms of sexual violence, on the other. In particular, it was ardently debated whether the fact that 'the perpetrator or another person obtained or expected to obtain pecuniary advantage in exchange for or in connection with the acts of a sexual nature' was an element of enforced prostitution or not. After long debates the PrepCom eventually answered in the affirmative. It added, however, the words 'or other advantage'. This was made in order to achieve a compromise between the group of delegations that objected to the requirement of pecuniary advantage and the group that insisted on it.[2] Findings from the *Awochi* case after the Second World War influenced the compromise.[3]

(4) Forced pregnancy, as defined in Art. 7(2)(f)

The one specific element of this crime essentially reproduces the definition contained in Art. 7(2)(f) ICC Statute. Several delegations wanted to clarify

[2] They argued that obtaining a pecuniary benefit would be inherent in the definition of prostitution.

[3] *W. Awochi Case*, in UNWCC, *LRTWC*, vol. XIII, p. 125; 13 AD 254.

acts of participation are not covered? Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such.[8]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. Therefore, the mental element may be defined in accordance with Art. 30 of the ICC Statute.

With respect to the age of fifteen, a specific problem arises. It must be determined what level of knowledge the accused must have with regard to the age of the child. Must he/she know that the child is under fifteen years old? Could he/she remain unpunished if he/she does not enquire the age?

In the case *Regina* v. *Finta*, the Court held in general that

> for war crimes, the Crown would have *to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime.* That is to say the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right thinking people.
>
> *Alternatively,* the *mens rea* requirement of... war crimes would be met *if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.*[9]

NB: Although relating to a different context, a further indication may be derived from national case law on indecent assault on children or similar offences where the *actus reus* encompasses a certain age limit.

- UK: In *Regina* v. *Prince,*[10] the jury found that the accused believed the victim's statement that she was eighteen and his belief was reasonable, for she looked very much older than sixteen. In fact, she was under

[8] C. Pilloud and J. S. Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3187.
[9] 104 ILR 284 at 363. [10] Law Reports 2 Crown Cases Reserved 154 (1875).

sixteen and the accused therefore brought about the *actus reus* of the crime. He was not even negligent, let alone reckless or intentional as to the girl's age. In spite of his blameless inadvertence as to this important circumstance in the *actus reus*, the accused was convicted. Therefore, the reasonable belief that the victim is over a certain age limit is not a defence if he or she is in fact under it.[11]

- Switzerland: With respect to offences requiring *dolus directus* or *dolus eventualis* the reasonable belief that the victim is over a certain age limit excludes the mental element;[12] with regard to Art. 187(4) of the 'Code pénal' which explicitly criminalises negligent conduct: 'L'auteur doit faire preuve d'une prudence accrue lorsque la victime présente un âge apparent proche de l'âge limite de protection: ce n'est que si des faits précis lui ont fait admettre que la personne avait plus de 16 ans qu'il ne sera pas punissable.'[13]
- France: With respect to an error of the actual age of the victim the accused must be acquitted if he proves the error and the error appears to be 'suffisamment plausible'.[14]
- US: Loewy points out: 'Statutory rape is generally a strict liability offence ... Thus, even an honest and reasonable mistake as to age (or mental capacity) will not serve to exculpate the defendant. E.g. *S* v. *Superior Court of Pima County*, 104 Ariz. 440, 454 P.2d 982 (1969). There is, however, some authority to the contrary.'[15]

  With respect to the crime of statutory rape, in LaFave and Scott[16] it is stated that the majority of states 'impose[s] strict liability for sexual acts with underage complainants' (*Garnett* v. *State*, 332 Maryland 571, 632 A.2d 797 (1993)). Under such a provision, a conviction may be obtained 'even when the defendant's judgement as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age' (*Garnett* v. *State, ibid.*).
- Germany: At least *dolus eventualis* is required. The accused is criminally responsible if he/she did not know the age, but did not care about

[11] See J. C. Smith and B. Hogan, *Criminal Law* (7th edn, Butterworths, London, Dublin and Edinburgh, 1995), pp. 72, 471.
[12] G. Stratenwerth, *Schweizerisches Strafrecht*, BT I (4th edn, Stämpfli, Berne, 1993), p. 144.
[13] C. Favre, M. Pellet and P. Stoudmann, *Code pénal annoté* (Ed. Bis et Ter, Lausanne, 1997), p. 383; Stratenwerth, *Schweizerisches Strafrecht*, p. 144.
[14] J. Pradel and M. Danti-Juan, *Droit pénal spécial* (Ed. Cujas, Paris, 1995), p. 472. See also R. Merle and A. Vitu, *Traité de droit criminel, Droit pénal spécial* (Ed. Cujas, Paris, 1982), p. 1514; M. L. Rassat, *Droit pénal spécial* (4th edn, Dalloz, Paris, 1977), p. 474.
[15] A. H. Loewy, *Criminal Law* (2nd edn, West Publishing Co., St. Paul, MN, 1987), pp. 63 ff.
[16] W. R. LaFave and A. W. Scott, Jr, *Criminal Law* (Hornbook, Pocket Part, 1995), p. 29.

it. However, he/she must not have excluded the possibility that the victim was under the age limit. If he did not think at all about the age of the victim, there is no *dolus eventualis*. He/she must be acquitted.[17]

In sum, the picture painted by these examples is not uniform. Some countries accept a strict liability. Others require that the accused at least realised the possibility that the victim was under the age limit. However, the latter may be seen as the bottom line.

[17] A. Schönke and H. Schröder, *Strafgesetzbuch* (25th edn, Verlag C. H. Beck, Munich, 1997), para. 176, p. 1290.

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Art. 8(2)(e)(v) – 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.[61]
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[61] 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 PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xvi) ICC Statute).

Legal basis of the war crime

The instruments of international humanitarian law applicable to non-international armed conflicts explicitly prohibit only the pillaging of 'persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted' (Art. 4(2)(g) AP II).

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of 'pillaging a town or place, even when taken by assault' (Art. 8(2)(b)(xvi) ICC Statute) in the context of international armed conflicts also apply to a large extent to this offence when committed in the context of a non-international armed conflict. Since both offences are formulated in exactly the same manner, there are no indications in the ICC Statute that this offence has different special constituent elements in an international or

non-international armed conflict. However, it must be emphasised that there are no specific rules of international humanitarian law allowing requisitions, contributions, seizure or taking of war booty in a non-international armed conflict.

INTERNATIONAL COMMITTEE OF THE RED CROSS

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

VOLUME I

RULES

Jean-Marie Henckaerts and Louise Doswald-Beck
With contributions by Carolin Alvermann,
Knut Dörmann and Baptiste Rolle

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the distressing and dishonourable nature of making persons participate in military operations against their own country – whether or not they are remunerated.

Rule 96. The taking of hostages is prohibited.

Practice

Volume II, Chapter 32, Section I.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

Common Article 3 of the Geneva Conventions prohibits the taking of hostages.[209] It is also prohibited by the Fourth Geneva Convention and is considered a grave breach thereof.[210] These provisions were to some extent a departure from international law as it stood at that time, articulated in the *List (Hostages Trial) case* in 1948, in which the US Military Tribunal at Nuremberg did not rule out the possibility of an occupying power taking hostages as a measure of last resort and under certain strict conditions.[211] However, in addition to the provisions in the Geneva Conventions, practice since then shows that the prohibition of hostage-taking is now firmly entrenched in customary international law and is considered a war crime.

The prohibition of hostage-taking is recognised as a fundamental guarantee for civilians and persons *hors de combat* in Additional Protocols I and II.[212] Under the Statute of the International Criminal Court, the "taking of hostages" constitutes a war crime in both international and non-international armed conflicts.[213] Hostage-taking is also listed as a war crime under the Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.[214] Numerous military manuals prohibit

209 Geneva Conventions, common Article 3 (*ibid.*, § 2048).
210 Fourth Geneva Convention, Article 34 (*ibid.*, § 2049) and Article 147 (*ibid.*, § 2050).
211 United States, Military Tribunal at Nuremberg, *List (Hostages Trial) case* (*ibid.*, § 2197).
212 Additional Protocol I, Article 75(2)(c) (adopted by consensus) (*ibid.*, § 2052); Additional Protocol II, Article 4(2)(c) (adopted by consensus) (*ibid.*, § 2053).
213 ICC Statute, Article 8(2)(a)(viii) and (c)(iii) (*ibid.*, § 2056).
214 ICTY Statute, Article 2(h) (*ibid.*, § 2064); ICTR Statute, Article 4(c) (*ibid.*, § 2065); Statute of the Special Court for Sierra Leone, Article 3(c) (*ibid.*, § 2057).

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of the Fourth Ge
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civilians hostage

The ICRC has
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215 See, e.g., the mi
Belgium (*ibid.*,
(*ibid.*, §§ 2077–
Croatia (*ibid.*, §
France (*ibid.*, §§
§§ 2092–2093), K
(*ibid.*, § 2097), M
Nicaragua (*ibid.*
§ 2104), Russia (
§ 2108), Sweden
(*ibid.*, §§ 2112–2
216 See, e.g., the legi
217 See, e.g., the stat
§ 2200), Italy (*ib*
United States (ir
218 See, e.g., UN Sec
§ 2212) and Res.
§§ 2213–2214); U
Rights, Res. 199
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219 ICTY, *Karadžić*
§ 2233).
220 ICTY, *Blaškić c*
221 ICTY, *Kordić an*
222 See, e.g., ICRC,
§ 2238), Press R
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International human rights law does not specifically prohibit "hostage-taking", but the practice is prohibited by virtue of non-derogable human rights law because it amounts to an arbitrary deprivation of liberty (see Rule 99). The UN Commission on Human Rights has stated that hostage-taking, wherever and by whoever committed, is an illegal act aimed at the destruction of human rights and is never justifiable.[223] In its General Comment on Article 4 of the International Covenant on Civil and Political Rights (concerning states of emergency), the UN Human Rights Committee stated that States parties may "in no circumstances" invoke a state of emergency "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages".[224]

Definition of hostage-taking

The International Convention against the Taking of Hostages defines the offence as the seizure or detention of a person (the hostage), combined with threatening to kill, to injure or to continue to detain the hostage, in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage.[225] The Elements of Crimes for the International Criminal Court uses the same definition but adds that the required behaviour of the third party could be a condition not only for the release of the hostage but also for the safety of the hostage.[226] It is the specific intent that characterises hostage-taking and distinguishes it from the deprivation of someone's liberty as an administrative or judicial measure.

Although the prohibition of hostage-taking is specified in the Fourth Geneva Convention and is typically associated with the holding of civilians as hostages, there is no indication that the offence is limited to taking civilians hostage. Common Article 3 of the Geneva Conventions, the Statute of the International Criminal Court and the International Convention against the Taking of Hostages do not limit the offence to the taking of civilians, but apply it to the taking of any person. Indeed, in the Elements of Crimes for the International Criminal Court, the definition applies to the taking of any person protected by the Geneva Conventions.[227]

Press Release No. 1793 (*ibid.*, § 2245) and Communication to the Press of ICRC Moscow (*ibid.*, § 2246).

223 UN Commission on Human Rights, Res. 1998/73 (*ibid.*, § 2221) and Res. 2001/38 (*ibid.*, § 2222).

224 UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2236).

225 International Convention against the Taking of Hostages, Article 1 (*ibid.*, § 2054).

226 Elements of Crimes for the ICC, Definition of the taking of hostages as a war crime (ICC Statute, Article 8(2)(a)(viii) and (c)(iii)).

227 Elements of Crimes for the ICC, Definition of the taking of hostages as a war crime (ICC Statute, Article 8(2)(a)(viii)).

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Practice

Volume II, Chapter

Summary

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229 ICC Statute, Article

230 See, e.g., the militar
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Kenya (*ibid.*, § 2277)
§ 2280), Switzerland
(*ibid.*, §§ 2284 and 22

231 See, e.g., the legislatio
(*ibid.*, § 2290), Belarus
(*ibid.*, § 2294), Congo
(*ibid.*, § 2298), Lithua
Zealand (*ibid.*, § 230
Tajikistan (*ibid.*, § 23
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232 See, e.g., the military
(*ibid.*, § 2283) and U
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(iii) Mental element. International case-law has indicated that war crimes are violations that are committed wilfully, i.e., either intentionally (*dolus directus*) or recklessly (*dolus eventualis*).[32] The exact mental element varies depending on the crime concerned.[33]

List of war crimes

War crimes include the following serious violations of international humanitarian law:

(i) Grave breaches of the Geneva Conventions:

In the case of an international armed conflict, any of the following acts committed against persons or property protected under the provisions of the relevant Geneva Convention:

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial;
- unlawful deportation or transfer;
- unlawful confinement;
- taking of hostages.

Basis for the war crimes listed above

This list of grave breaches was included in the Geneva Conventions largely on the basis of crimes pursued after the Second World War by the International Military Tribunals at Nuremberg and at Tokyo and by national courts. The list is repeated in the Statutes of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Court.[34] It is also reflected in the legislation of many States.[35] The understanding that such violations are war crimes is uncontroversial.

[32] See, e.g., ICTY, *Delalić case*, Case No. IT-96-21-T, Judgement, Trial Chamber II, 16 November 1998, §§ 437 and 439.

[33] See the paper prepared by the ICRC relating to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law, circulated, at the request of several States, at the Preparatory Commission for the International Criminal Court, Doc. PCNICC/1999/WGEC/INF.2/Add.4, 15 December 1999, Annex; see also the Elements of Crimes for the International Criminal Court.

[34] ICTY Statute, Article 2; ICC Statute, Article 8(2)(a).

[35] With respect to wilful killing, see, e.g., the legislation referred to in the commentary to Rule 89. With respect to torture or inhuman treatment, see, e.g., the legislation referred to in the commentary to Rule 90. With respect to biological experiments, see, e.g., the legislation referred

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:

A COMMENTARY

VOLUME I

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ample, in *Tessmann et al.*[9] the Judge Advocate argued that the law allowed the killing of an aggressor as the 'last resort'. Determination that the killing had in fact been an act of 'last resort' had to be made on a case by case basis, taking into account factors such as whether the aggressor was armed or whether the accused could have retreated. In the trial against *Weiss and Mundo*,[10] a US Military Tribunal recognized self-defence as a ground for excluding criminal responsibility with regard to the killing of a US prisoner of war. The defendants had detained a wounded US paratrooper whom they shot believing that he wanted to draw his weapon. Thus, they acted in presumed or erroneous self-defence (*Putativnotwehr*). In another case, a right to self-defence was conceded to the inhabitants of an occupied territory.[11] In contrast, self-defence did not help an accused Japanese officer in a trial before a British Military Tribunal for the killing of a civilian.[12] The defendant had detained the victim attempting to steal some rice; he then killed him with a bayonet, in rage and fear for his life because of threats by a crowd. Although self-defence was clearly excluded since the threat did not emanate from the victim, the defendant could have invoked necessity if he were threatened with death. Most recently, the ICTY recognized self-defence within the meaning of Article 31(1)(c) ICC Statute as a general principle of law.[13]

2. Duress/Necessity

(a) Nuremberg Jurisprudence

The Nuremberg case law did not interpret the defence of necessity as requiring a general balancing of legal interests or goods; instead it considered the defence to be applicable in situations in which the actor's freedom of will and decision were limited to such an extent that the attribution (imputation) of certain criminal results appeared unjust. Further, it did not clearly distinguish necessity from coercion and duress,[14] as the main defences involving freedom of decision. From this it is apparent that the case law conflated the two concepts and that, in fact, the decisions were made on the basis of duress ('compulsion', 'coercion'), not necessity. For reasons of authenticity, however, the tribunals' terminology will be retained here.

Restriction of freedom of will and decision by external coercion has always been considered as an *objective* requirement of necessity. Defence counsel argued in

[9] Law Reports TWC XV, 177.
[10] Trial of Erich Weiss and Wilhelm Mundo (Fall 81), Law Reports TWC XIII, 149–150.
[11] Judgment of the Special Court at Arnhem, Law Reports TWC XIV, 129.
[12] Trial of Yamoto Chusaburo (case 20), Law Reports TWC III, 76–80, at 79–80.
[13] T.Ch. I, Judgment of 26 February 2001, *Kordić et al.*, IT-95-14/2-T, para. 448 *et seq.*
[14] See in particular *US v. Krupp et al.*, *supra* note 7, at 1436; also *US v. Ohlendorf et al.*, *supra* note 4, at 462 *et seq.*; *US v. Krauch et al.* (case 6), in TWC VIII, 1081–1210, at 1174 *et seq.* See also the criticism by C. Nill-Theobald, *'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA* (1998) at 179–180, 184 in note 48.

various cases that the defendants only committed the alleged crimes becau coercion or political pressure by the Nazi leadership or by security or Therefore, they claimed the defendants' conduct must have been justifie excused by the defences of superior order, necessity, or other related defence a result, the Tribunals, on the one hand, had to develop general criteria in ord determine when compulsion or coercion reaches such a degree as to exclude voluntary decision; on the other hand, they had to analyse on a case by case b whether and to what extent the defendants were exposed to coercion. Altho the criteria developed by the various decisions were far from uniform, a few c mon standards can be identified. The most concrete definition of duress/neces was suggested in *US v. von Leeb et al.*:

> To establish the defense of coercion or necessity in the face of danger there must b a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.[15]

Similarly, in *US v. Krauch et al.*[16] the Tribunal referred to the possibility of anoth choice in the sense of the 'moral choice' doctrine developed by the IMT wi regard to the defence of superior order.[17] Accordingly, the defence of necessi (duress) is only available if an order leaves the subordinate without any choice, i. if the order

> is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.[18]

The question of an active participation implying an agreement with an unlawful order and thereby excluding the defence of necessity has been treated differently in the 'Economic Trials':[19] real danger or coercion only exists if the defendant does not act voluntarily and in agreement with the superior who issued the illegal order. Further, the act of necessity must have been committed to prevent a serious and irreparable harm and must be proportional.[20] Thus, for the first time, a pondering

[15] *US v. von Leeb et al.* (case 12), in TWC XI, 462–697, at 509.
[16] *US v. Krauch et al.*, *supra* note 14, at 1174 *et seq.*
[17] See also *US v. Ohlendorf et al.*, *supra* note 5, at 471.
[18] *US v. Krauch et al.*, *supra* note 14, at 1179.
[19] *US v. Flick et al.* (case 5), in TWC VI, 1187–1223, at 1200 *et seq.*; *US v. Krupp et al.*, *supra* note 8, at 1436 *et seq.* Unlike in *Flick* (concerning the defendants Steinbrinck, Burkart, Kaletsch, and Terberger), in *Krupp* the Tribunal acknowledged an agreement between the defendants and the political leadership with regard to the programmes of slave labour (ibid., at 1439 *et seq.*). On the other hand, Flick's and co-defendant Weiss's active participation in the exploitation of the Russian prisoners of war excluded the defence of necessity (*US v. Flick et al.*, at 1202). Insofar one could speak of an 'Active steps' doctrine.
[20] *US v. Krupp et al.*, *supra* note 8, at 1443–1444.

of the legal interests involved can be identified. Under these circumstances, necessity may have the effect of providing a complete justification for the commission of the crime.[21]

There are also certain *absolute limits* of conduct, in particular with regard to the traditional defence of military necessity.[22] Accordingly, this defence does not justify the violation of concrete rules of law and is limited by the principle of proportionality. In *US v. Ohlendorf et al.* it was stated, for example, that mass killings of civilians are never permitted.[23] These limits can also be applied to the ordinary criminal law defences under examination.

On the *subjective* level (*mens rea*), the defendant must not only have acted with 'actual *bona fide* belief in danger',[24] but also may not have acted knowing—because of his position and capacity—that he was excluded from invoking necessity since his conduct was in violation of international law.[25] This reminds us of the *error iuris nocet* rule, according to which a mistake of law does not exclude criminal responsibility.

(b) Post-Nuremberg Jurisprudence

In other trials documented by the UNWCC, it was generally required for the defence of duress/necessity that, in objective terms, an immediate, serious, and irreparable threat to body and life existed. Everyone is entitled to bow to the pressure exercised by an order if he or she had no other possibility to avoid the danger; in addition, a balancing of the legal interests involved must result in a finding that the threat to the accused's interests would be disproportionally greater than the threat to the victim. Therefore, under normal circumstances only a life-threatening danger, not mere moral pressure,[26] permits the subordinate to invoke the defence of coercion.[27] Finally, based on the famous and, for the common law, decisive British *Mignonette* case,[28] life is considered to constitute an insurmountable obstacle to

[21] *US v. Flick et al.*, *supra* note 19, at 1200 (concerning the defendants Steinbrinck, Burkart, Kaletsch, and Terberger).

[22] See in particular *US v. List et al.* (*Hostages* case, case 7), in TWC XI, 1230–1319, at 1253, 1256 (no killing of innocent civilians); *US v. von Leeb et al.*, *supra* note 15, at 541 (no total war). For a summary, see Law Reports TWC XV, 175–176; see also M. Lippman, 'Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War', 15 *Dickinson Journal of International Law* (1996) 1–111, at 59 *et seq.*

[23] *US v. Ohlendorf et al.*, *supra* note 5, at 465.

[24] *US v. Krupp et al.*, *supra* note 8, at 1438.

[25] *US v. Altstoetter et al.* (case 3), in TWC III, 954–1201, at 1076.

[26] Trial of Max Wielen and 17 others (case 62), Law Reports TWC XI, 31–52, at 47.

[27] Cf. Trial of Jepsen and others (Law Reports TWC XV, 172–173); for a summary, see Law Reports TWC XV, 174.

[28] *The Queen v. Dudley and Stephens*, 14 QBD (1884–85) 273 *et seq.*, in particular 286 *et seq.* This case referred to 'necessity', while the other classical cases (*Regina v. Tyler*; *Arp v. State*, *US v. Holmes*) explicitly referred to 'duress'. Cf. H.-H. Jescheck and T. Weigend, *Strafrecht, Allgemeiner Teil* (5th edn., 1996) 195, 489; G. P. Fletcher, *Basic Concepts of Criminal Law* (1998) 132; J. Pradel,

invoking necessity or duress: 'You are not entitled, even if you wished to save your own life, to take the life of another.'[29]

The German Supreme Court for the British Zone (*Oberster Gerichtshof für die Britische Zone*—'OGHBrZ') rendered its first decision on the defence of duress in the context of a superior–subordinate relationship. In such a situation the defence of duress may be applicable if the accused was—in objective terms—in serious danger and acted—in subjective terms—with the intention of averting this danger.[30] Further, the extent to which the accused can be expected to resist the danger must be examined.[31] The defence of collision of duties—also known as supra-legal necessity (*übergesetzlicher Notstand),* since it is not codified—comes into play only if the perpetrator was confronted with a true conflict of interests and had to violate the lesser legal interest in order to protect the higher one.[32] This kind of conflict of interests has not been recognized in the case of the 'Euthanasia doctors' who argued that they had to sacrifice the lives of a few of their patients to save many others. According to the OGHBrZ, it was the defendants' duty as citizens and doctors to help all patients equally instead of taking part in the Nazi crimes.[33] A weighing of life against life is not acceptable.[34] Further, an invocation of supra-legal necessity must be excluded *a limine* in those cases where the State itself becomes criminal.[35] In general, the OGHBrZ argued that the gravity of crimes against humanity requires strict conditions for the admission of the defence of necessity or duress and pointed to the danger of an all too generous use of these defences.[36]

In *Eichmann,* the Supreme Court[37] of Israel used the moral choice criterion to decide on the relevance of the defence of 'constraint' and 'necessity'. The Court

Droit pénal comparé (1995) 288; Nill-Theobald, *supra* note 14, at 212; A. Reed, 'Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence', 6 *Journal of Transnational Law and Policy* (1996) 52, 59, 66; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn., 1999) 489–490.

[29] Trial of Valentin Fuerstein *et al.* (Law Reports TWC XV, S. 173); also Trial of Robert Holzer and 2 others (ibid.).

[30] Cf. OGHSt 1, 310 (313); 2, 393 (394); 3, 121 (129).

[31] OGHSt 3, 121 (129).

[32] OGHSt 1, 49 (52).

[33] OGHSt 1, 321 (331 *et seq.*, in particular 333). For further analysis, see in particular H. Welzel, 'Anmerkung OGH(BrZ) Monatsschrift des Deutschen Rechts (MDR) 1949, 370', in *MDR* 1949, 373–376, at 374–375 (in favour of *supra*-legal necessity); P. Bockelmann, 'Zur Schuldlehre des Obersten Gerichtshofs', 63 *ZStW* (1951) 13–46, at 42 *et seq.*; K.-A. Storz, *Die Rechtsprechung des OGH in Strafsachen* (1969) 29 *et seq.*; C. Roxin, *Strafrecht, Allgemeiner Teil I* (3rd edn., 1997) § 16 mn. 33 *et seq.*; 22 mn. 147 *et seq.*

[34] OGHSt 1, 333; OGHSt 2, 117 (121). Also against necessity as a *justification,* Welzel, *supra* note 33, at 374–375; Eb. Schmidt, 'Anmerkung zu OGHBrZ. Süddeutsche Juristenzeitung (SJZ) 1949, columns 347 et seq.', in *SJZ* 1949, columns 559–570, at 563 *et seq.*

[35] OGHSt 1, 321 (334). This view is shared by K. Peters, 'Zur Lehre von den persönlichen Strafausschließungsgründen', *Juristische Rundschau (JR)* (1949) 496–502, at 497.

[36] OGHSt 2, 393 (394 f.).

[37] See 36 ILR (1968), 14–17 (summary), 277–344. For the decision of the District Court, see 36 ILR 5–14 (summary), 18–276.

required, in objective terms, that there be an immediate danger to the life of the subordinate in case of non-compliance with an order and, in subjective terms, that the subordinate see no other possibility to save his life than to obey the order.[38] In fact, this latter requirement was negated with regard to Eichmann because he had, according to the Court, executed his tasks with great ambition and self-interest.[39] In contrast, in a recent decision, the Supreme Court allows for the invokation of the defence of necessity with regard to interrogation methods amounting to torture employed by the General Security Service in the fight against terrorism: 'the investigator may find refuge under the "necessity" defence's wings (so to speak), provided this defence's conditions are met by the circumstances of the case.'[40] Unfortunately, the Court does not develop these conditions.

In the trial against *Paul Touvier* the defendant argued before the *Cour d'Appel* of Paris that he only played a minor role in the killing of seven Jews imputed to him. He claimed that he had to bow to the 'unavoidable' and that because of his intervention the number of victims was reduced from 30 to 7 persons.[41] He added to his defence before the *Cour d'Appel* of Versailles and the *Cour de Cassation*, that he was exposed to the pressure of the German occupation power. Thus, he invoked the defence of duress.[42] The *Cour de Cassation* dismissed these arguments for various reasons. First, a balancing of life against life is not possible since all lives are of equal value and no life prevails over another. Second, in general, a member of the militia cannot be justified in invoking necessity since his or her membership in the militia was *voluntary* and it was known that it implied a submission to the wishes of the Nazi occupation power. Finally, the Court argued that Touvier played an *active* role in the commission of the crimes and in fact acted without any external pressure:

> aucun fait justificatif fondé sur la nécessité ou la légitime défense d'autrui ne peut être invoqué par un responsable de la Milice comme Touvier dont les fonctions le mettaient naturellement dans l'obligation de *satisfaire aux exigences des autorités nazies*; qu'ils relèvent, à cet égard, qu'il avait fait le *libre choix* d'appartenir à la Milice, dont un de mots d'ordre était de "lutter contre la lèpre juive', et d'exercer une

[38] Supreme Court, *supra* note 37, para. 15 (at 318 referring to *US v. Ohlendorf et al.*).

[39] See District Court, *supra* note 37, para. 216, 228, 231; Supreme Court, *supra* note 37, para. 15, at 313, 318–319.

[40] *Public Committee against Torture in Israel et al. versus the State of Israel et al.*, Judgment of 6 September 1999, <www.court.gov.il/mishpat/html/en/system/index.html>, para. 38, see also para. 35.

[41] Decision of the *Chambre d'Accusation* of the Paris Cour d'Appel of 13 April 1992, in part reprinted in 100 ILR (1995) 339–340, 341–358 (also in F. Bédarida, *Touvier* (1996) 314–321), here at 339, 344, 347. See also the review decision of 27 November 1992 (*Bulletin des Arrêts de la Cour de Cassation, chambre criminel = Bull. crim.* 1992, 1082–1116 = 100 ILR (1995) 341, 358–364) and the new decision of the Chambre d'Accusation of the Versailles Cour d'Appel of 2 June 1993 (Bédarida, *op. cit.*, 322–350), which was appealed by Touvier unsuccessfully (Cour de Cassation of 21 October 1993, in *Bull. crim.* (1993) 770–774).

[42] Cour de Cassation, 21 October 1993, *supra* note 41, at 773–774.

activité qui impliquait une coopération habituelle avec le Sicherheitsdienst ou la Gestapo; qu'ils en concluent que Paul Touvier aurait . . . prêté un *concours actif* à l'exécution des faits criminels . . .; . . . *hors de toute contrainte.*[43]

According to the Canadian Supreme Court in *Finta,* a person can be forced to obey orders either for natural reasons constituting a danger ('necessity') or for external pressure imposed on this person ('coercion'). In both cases we deal with a situation of *compulsion* which, as was stated in the *Einsatzgruppen* case, requires 'imminent, real, and inevitable threats'.[44] Thus, even the execution of a manifestly illegal order may lead to the exclusion of criminal responsibility on the basis of compulsion or duress provided that the accused had no other choice than to obey the order. In such a case, the accused lacks, according to the Supreme Court, the requisite 'culpable intent'. Duress operates as a kind of subsidiary defence. This applies particularly in a military hierarchy which in conceptual terms is always 'coercive' to a certain extent. This reasoning is also supported by the dissenting opinion.[45]

In the case of a former SS member, *Priebke,* a German, the defendant's claim that the existence of a superior order, with which he complied, entitled him to the defence of duress, was dismissed by an Italian Military Court,[46] since non-compliance would not have put Priebke in a life-threatening situation. As he would not have faced the death penalty, but only a transfer to the front or a similar measure, he was obliged to refuse to execute the order. On appeal, the Italian Supreme Court followed this view.[47]

(c) ICTY: The Erdemović *case*

The first judgment in the *Erdemović* case, decided on 29 November 1996,[48] was based on a guilty plea of the accused which, however, was equivocal. Erdemović

[43] Cour de Cassation, 21 October 1993, *supra* note 41, at 774 (emphasis added).

[44] Cf. *Supreme Court,* CCC (3d) 88 (1994) 417–544 (reprinted in 104 ILR (1997) 284 *et seq.*) at 514 *et seq.*

[45] Ibid., at 470.

[46] *Tribunale militare di Roma,* sentence of 1 August 1996, laid down 30 September 1996, at 79–81 (on file with the author).

[47] Corte suprema di cassazione, sentence of 16 November 1998, at 30–31. See also F. Martines, 'The Defences of Reprisals, Superior Orders, and Duress in the Priebke Case before the Italian Military Tribunal', 1 *YIHL* (1998) 355 *et seq.*

[48] ICTY Trial Chamber I, Sentencing Judgment, *Dražen Erdemović,* IT-96-22-T, 29 November 1996. Critically S. Yee, 'The Erdemović Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia', 26 *Georgia Journal of International and Comparative Law* (1997) 291 *et seq.*; K. Oellers-Frahm and B. Specht, 'Die Erdemović Rechtsprechung des Jugoslawientribunals: Probleme bei der Entwicklung eines internationalen Strafrechts, dargestellt am Beispiel des Notstands', 58 *ZaöRV* (1998) 392 *et seq.*; D. Turns, 'The International Criminal Tribunal for the Former Yugoslavia: The Erdemović Case', *ICLQ* (1998) 466–467. See also the interesting solution of the case according to US and German law by J. C. Nemitz and S. Wirth, 'Der aktuelle Fall: Legal Aspects of the Appeals Decision in the Erdemović-case: The Plea of Guilty and Duress in International Humanitarian Law', 11 *Humanitäres Völkerrecht* (1998) 43–53.

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admitted the charges but, at the same time, invoked the defence of duress, stating:

> Your honour—I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.[49]

Thus, the major substantive issue in the decision was whether the guilty plea of Erdemović could be considered unequivocal despite the invocation of duress. While obedience to superior orders is explicitly rejected as a defence by Article 7(4) of the ICTY Statute, the Statute is silent on duress. *Trial Chamber I*—relying heavily on the UNWCC case law—recognized duress as a defence if certain strict requirements are fulfilled.[50] In particular, there must be evidence of a superior order which puts extreme pressure on the accused and leaves him no moral choice other than to obey. On the other hand, it was argued that the lives at stake are never fully equivalent in the case of crimes against humanity, since the victims of the crime are representative of humanity as a whole. In the end, the Chamber held that circumstances which would fully exonerate the accused of responsibility had not been proven. Consequently, the guilty plea was considered valid.

The Trial Chamber's assessment of duress as a defence was rejected, however, by the Appeals Chamber by a 3 to 2 majority.[51] It stated, 'duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings'.[52] The reasoning for this decision can be found in the deliberations of Judges McDonald and Vohrah; the counter-arguments, which in the result follow the Trial Chamber, can be found in the dissenting opinions of Judge Cassese and Judge Stephen.[53] Both the majority and the dissenting opinions agreed that acting on superior orders must be distinguished from duress. Although an order can constitute a factual circumstance of

[49] Trial Chamber I, *supra* note 48, para. 10.

[50] Trial Chamber I, *supra* note 48, paras. 16–20.

[51] ICTY Appeals Chamber, *Prosecutor v. Dražen Erdemović*, Judgment, IT-96-22-A, 7 October 1997; see O. Swaak-Goldman, 'Prosecutor v. Erdemović, Judgement. Case No. IT-96-22-A', *AJIL* (1998) 282–287. Critically P. Rowe, 'Duress as a Defence to War Crimes after Erdemović: A Laboratory for a Permanent Court?', 1 *YIHL* (1998) 213, 215; Oellers-Frahm and Specht, *supra* note 48, at 399 *et seq.* (408, 412) who agree with the result but criticize the method of the finding, following insofar Cassese; in favour of Cassese also Turns, *supra* note 46, at 470 *et seq.* (472). For a methodical analysis, see Kress, *supra* note 2, who considers Cassese's argumentation as too formal (at 611) and examines the policy considerations of McDonald and Vohrah as alternative sources (615 *et seq.*) agreeing in substance, however, with Cassese (621–22).

[52] Appeals Chamber, *supra* note 51, para. 19 and disposition (4).

[53] See McDonald and Vohrah, *Appeals Chamber*, *supra* note 51, para. 59 *et seq.* (66–67, 72, 75, 78, 88); similar Li, op. cit., paras. 5, 8, 12. For the dissenting opinions, see Cassese, ibid., para. 11 *et seq.* (12, 16–17, 21 *et seq.*, 41 *et seq.*, 49–50); similar Stephen, ibid., para. 23 *et seq.* (66).

duress, its absence 'does not mean that duress as a defence must fail'.[54] The majority of the Appeals Chamber, however, did not share the Trial Chamber's conclusion that duress constitutes a complete defence. According to the Appeals Chamber, the UNWCC case law did not specifically address the question of whether duress is a defence in case of the killing of innocent persons.[55] There is no rule on this point in customary international law in this respect, in particular the jurisprudence of the post–World War II Military Tribunals did not establish such a rule.[56] The opposing positions of (traditional) common law on the one hand—against a complete defence—and 'civil law' on the other—in favour of a complete defence under certain conditions—cannot be reconciled.[57] As a general principle it can only be stated that a person acting under duress deserves less punishment since his or her behaviour is less blameworthy.[58]

The central conclusion of the majority opinion that current international criminal law does not contain a rule about duress in the specific case of the killing of innocent persons is shared by the dissenting opinions.[59] However, the consequences drawn from this conclusion are different. The majority seeks a solution looking at the 'broader normative purposes [of the law] in light of its social, political and economic role' and taking into account 'considerations of social and economic policy'.[60] Starting from the premiss that 'international humanitarian law should guide the conduct of combatants and their commanders', the majority opinion argues for 'legal limits as to the conduct of combatants and their commanders' and—in the concrete case—rejects duress as a defence for combatants who have killed innocent persons;[61] otherwise, humanitarian law would be undermined.[62] Judge Cassese considers such reflections 'extraneous to the task of our Tribunal' and—as policy considerations—contrary to the *nullum crimen* rule.[63] In this view, if there is no specific rule for a concrete case, the general rule established by the Trial Chamber on the basis of the case law has to be applied. As a result, duress must constitute a defence under four strict conditions:

(1) there must be an immediate threat of severe and irreparable harm to life or limb;
(2) there was no adequate means of averting such evil;
(3) the defence act was not disproportionate to the evil threatened (lesser of two evils);

54 McDonald and Vohrah, *supra* note 53, para. 35; Cassese, *supra* note 53, para. 15.
55 McDonald and Vohrah, *supra* note 53, para. 42.
56 Ibid., para. 55.
57 Ibid., para. 72.
58 Ibid., para. 66.
59 Cf. Cassese, *supra* note 53, paras. 11, 15, 41.
60 McDonald and Vohrah, *supra* note 53, paras. 75, 78.
61 Ibid., para. 80; similar Li, *supra* note 53, para. 8.
62 McDonald and Vohrah, *supra* note 53, para. 88.
63 Cassese, *supra* note 53, paras. 11, 49.

(4) the duress situation was not voluntarily brought about by the person coerced.[64]

Although it is difficult to meet the requirements of duress in the case of the *individual* killing of innocent human beings, in particular for the lack of proportionality of the defence act,[65] it is possible in a case of participation in a *collective* killing. In such a case, as in the *Erdemović* case, the crime would have been committed *no matter what*. In other words, the harm caused by the accused was not greater than the harm that would have been caused *in any case* by another person, if the accused had not obeyed the order.[66] Cassese's view is based on the idea of the purpose of punishment: he wants to punish only behaviour that is 'criminal, i.e. morally reprehensible or injurious to society, not . . . behaviour which is "the product of coercion that is truly irresistible" '.[67] If one follows this view, the final decision depends on the impact which the accused's conduct has or does not have on the fate of the victim. Since, in the present case, the accused's conduct did not change the fate of the victims, the defence of duress can be granted if the abovementioned conditions are met. There is no need to punish the behaviour of the accused which was not morally reprehensible or injurious to society and, which was the product of a truly irresistible coercion.

In a similar vein, Judge Stephen questions the common law duress rule with regard to murder on the basis of a thorough analysis of the case law and academic writings.[68] He shows that even the limited exception of duress as a defence in cases where an accused had to choose between his own life and the life of another is itself much criticized.[69] Still more importantly, this was not the situation in the *Erdemović* case since the choice presented to the accused 'was not that of one life or another but that of one life or both lives'.[70] In other words, even if Erdemović had refused to kill the innocent victims, they would have been killed by other soldiers and, in addition, Erdemović himself would also have been killed. Thus, the concept of equivalence which lies at the core of the common law exception and requires from a person acting under duress 'rather to die himself than kill an innocent'[71] is not applicable in the present case. Nor can the principle of proportionality be invoked since the accused had no choice between resisting the duress and saving innocent lives or complying with the order and taking them. Rather,

[64] Cassese, *supra* note 53, paras. 16–17, 41, 44, 50.

[65] Ibid., paras. 12, 43, 50.

[66] Ibid., para. 43. This argumentation, based on the Italian case *Masetti*, was explicitly rejected by McDonald and Vohrah (*supra* note 53, paras. 79–80) as an expression of utilitarian logic.

[67] See Cassese, *supra* note 53, paras. 47–48, citing the American Law Institute's Commentary on the Model Penal Code.

[68] Stephen, *supra* note 53, para. 23 *et seq.*

[69] Ibid., paras. 29 *et seq.*, 36 *et seq.* (36–37, 49), in particular referring to *Lynch v. D.P.P. for Northern Ireland* [1975] AC 653 at 704.

[70] Ibid., para. 33, see also paras. 52, 57, 62, 64.

[71] See ibid., paras. 31, 33 quoting Lord Hale.

'where resistance to the demand will not avert the evil but will only add to it', the person under duress also suffers that evil and proportionality does not enter into the equation.[72] Consequently, in the present case the principle which supports the exclusion of duress as a defence is absent and 'no violence is done to the fundamental concepts of common law by the recognition in international law of duress as a defence in such cases'.[73] The protection of innocent lives is not achieved 'by the denial of a just defence to one who is in no position to effect by his own will the protection of innocent life'.[74] The question whether duress is a defence in cases involving the taking of innocent lives 'is a matter for another day and another case'.[75] We will return to these important and cogent dissenting opinions when analysing Article 31(1)(d) of the Rome Statute.

It was recognized by all Chambers seized with the case that, in any event, duress must be taken into account in mitigation of punishment. Trial Chamber I considered mitigation possible if the accused acted against his or her will, since in such circumstances his or her degree of responsibility is reduced. This view is shared by the Appeals Chamber.[76] Trial Chamber I, however, did not concede a mitigation of punishment for *this* reason in the facts of the particular case, since evidence was not sufficient to prove a superior order or a situation of duress.[77] However, Trial Chamber II, seized with the case after the successful appeal, finally sentenced Erdemović to five years' imprisonment,[78] half the initial sentence handed down by Trial Chamber I (ten years). Unlike Trial Chamber I, it considered his situation as a subordinate receiving orders as a mitigating factor. In fact, it also confirmed the importance of the recognition of duress as a defence when it stated:

> The evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realized that he had no choice in the matter: he had to kill or had to be killed.[79]

[72] Ibid., para. 62.
[73] Ibid., para. 64.
[74] Ibid., para. 65.
[75] Ibid., para. 64.
[76] McDonald and Vohrah, *supra* note 53, paras. 66, 82 *et seq.*; Li, *supra* note 51, para. 12.
[77] McDonald and Vohrah, *supra* note 53, para. 89 *et seq.* A mitigation was granted for other reasons, *inter alia*, because of Erdemović's age at the time of commission (23 years), his inferior rank and his repentance (ibid., after para. 111).
[78] ICTY Trial Chamber II, *Prosecutor v. Dražen Erdemović*, Sentencing Judgment, IT-96-22-T*bis*, 5 March 1998, paras. 8, 23, reprinted in 37 *ILM* (1998) 1182 *et seq.*
[79] Trial Chamber II, *supra* note 78, para. 17 (p. 19). It must not be overlooked, however, that the reduction of the penalty was also due to the fact that Erdemović had changed his plea from guilty of crimes against humanity to guilty of war crimes.

requirement which relates to the 'choice of evils' criterion. Further, as already mentioned, in traditional common law, the distinction was made between a threat made by persons ('duress by threats') and a threat constituted by other circumstances ('duress of circumstances', i.e. necessity).[199] This distinction is reintroduced by the provision, although it seems to have been abandoned in modern common law, at least as it is interpreted in the United States. Accordingly, not the cause but the gravity of the danger is of particular importance.[200] Let us now take a closer look at the requirements of subparagraph (d).

2. Threat of Death or Serious Bodily Harm

Prima facie it appears that a threat may exist even if there has been no use of force within the meaning of subparagraph (c); yet, the qualifier referring to death of or harm to a person makes clear that a threat in the sense of subparagraph (c) is to be understood more narrowly than the use of force in the case of self-defence. While the latter encompasses psychological threats, subparagraph (d) only recognizes psychological threats which imply physical acts and/or consequences, i.e. 'imminent'[201] death or bodily harm. In a similar vein, Judge Cassese, in his dissenting opinion in *Erdemović*, argues that duress requires an immediate threat of severe and irreparable harm to life or limb.[202] The inclusion of property as a protected interested was discussed by the delegates but ultimately rejected.[203] In conclusion, only overwhelming pressure can trigger the defence of duress within the meaning of subparagraph (d).

The pressure itself must be directed against the person concerned or against *any* third person, i.e. the provision does not require a special relationship between the person threatened and the actor. Thus, it follows the broader common law approach as codified by § 2.09 MPC and § 42(3) DCCB.[204] However, not even the existence of overwhelming pressure constitutes duress if the actor him- or herself *caused* the danger. This requirement was discussed in Rome[205] and is implicitly contained in Article 31(1)(d)(ii) in the reference to 'circumstances beyond that person's control' (clearer in the French version: 'circonstances indépendantes

[199] Cf. A. Eser, ' "Defences" in War Crimes', 24 *IYHR* (1995) 213; Nill-Theobald, *supra* note 14, at 174, 208, 265. See also the Law Commission's DCCB, *supra* II.C.3, note 123 and accompanying text. See most recently Dinstein, *supra* note 197, S. 373.

[200] See *supra* note 118 and accompanying text.

[201] For the meaning of 'imminent', see *supra* note 167 and accompanying text. One may, however, distinguish between the imminence of an attack in the case of self-defence and of a threat in the case of necessity/duress by including in the latter a permanent threat that may at any moment bring about a violation of a protected legal interest (for this view of the German doctrine, see Roxin, *supra* note 33, § 16 mn. 17–18, § 22 mn. 15).

[202] See *supra*, II.B.2(c).

[203] See Saland, *supra* note 134, 208.

[204] See *supra*, II.C.3 and compare with § 35 StGB. See also Nill-Theobald, *supra* note 14, at 277.

[205] See also Kress, *supra* note 2, at 623.

de sa volonté'). In other words, circumstances within the person's control or even caused by him or her do not fulfil this requirement. It has, however, a solid basis in comparative law[206] and was recognized by Judge Cassese in *Erdemović*, albeit with a slightly different formulation, according to which the accused cannot avail himself of the defence of duress if the situation was voluntarily brought about by himself.[207] Similarly, in *Eichmann*, duress was rejected because of Eichmann's great ambition and self-interest in the crimes committed.[208]

Another limitation to the invocation of this defence can follow from the actor's *status*. Again, § 35 para. 1 sentence 2 StGB can serve as an example. It does not recognize the defence of necessity as an excuse—which includes duress[209]—if the perpetrator 'found himself in a special legal relationship'.[210] As to soldiers, § 6 WStG, quoted above,[211] imposes on them a special duty to assume the danger. However, this special duty does not mean that—because of the fact that they belong to a particular army[212]—soldiers can never qualify for the defence of duress. It only means that a soldier must face a higher risk than does the ordinary person with regard to *tasks typically related to the soldier's functions*. This higher expectation does not apply, however, to the case of a soldier who is compelled to comply with the illegal order to commit an international crime: the commission of such crimes does not belong to the tasks typically related to the soldier's functions.[213] Also, this special duty does not, as will be argued in detail below, create a blanket preclusion for soldiers from invoking duress as a defence in the case of the killing of innocent persons.[214]

In any case, the issue of status makes clear that the kind of threat required relates to the criterion of *Zumutbarkeit*, i.e. to the question of what can reasonably be expected from a person acting under duress. This question cannot be decided in abstract terms by means of a standard of reasonable firmness as in § 2.09 MPC, but only in light of the circumstances of the concrete case and above all the personal characteristics of the actor. The British Law Commission correctly states

[206] e.g. §§ 42(5), 43(3)(b)(iii) DCCB or § 35 StGB (*supra*, II.C.3). See also Pradel, *supra* note 28, at 300; Yee, *supra* note 48, at 298; Nemitz and Wirth, *supra* note 48, at 51; Nill-Theobald, *supra* note 14, at 254.

[207] *Supra* note 64 and text. See also Dinstein, *supra* note 197, at 374.

[208] See *supra* note 39 and text.

[209] For the German doctrine which interprets § 35 StGB as containing duress (*Nötigungsnotstand*) as one possible case of excusing necessity, see Nill-Theobald, *supra* note 14, at 253–254, 255–256, with further references.

[210] Soldiers, policemen, firemen and other professionals with a special duty belong to this group of persons (see Roxin, *supra* note 33, § 22 mn. 39; also Nemitz and Wirth, *supra* note 48, at 51; Yee, *supra* note 48, at 299).

[211] See *supra*, II.C.3.

[212] A different view is taken Nemitz and Wirth, *supra* note 48, at 51: 'he [Erdemović] caused this danger by entering the Bosnian Serb army.'

[213] See Nill-Theobald, *supra* note 14, at 260–261.

[214] Cf. ibid., at 191, 201, 222–223, 260.

that 'threats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person'.[215] Thus, the personal circumstances that affect the perceived gravity of the threat must be taken into account as in §§ 42(3)(b), 43(2)(b) DCCB.

3. Necessary and Reasonable Reaction

The reaction has to be 'necessary' and 'reasonable'. The difference from subparagraph (c) is that a 'proportionate' reaction is not explicitly required. Yet, this difference seems to be only of a terminological nature since the term 'reasonable' can be considered an umbrella term encompassing 'necessary', 'proportionate', etc. In this sense, it is clear that the means used have to be apt and efficient, that the harm should be limited to that absolutely necessary to avoid the threat and that, most importantly, the reaction should not cause greater harm than the one sought to be avoided.[216] Despite this substantive similarity, it is unfortunate that terms used in subparagraphs (c) and (d) were not harmonized.

In fact, the similarities between subparagraphs (c) and (d) blur the line between self-defence and duress/necessity. This situation is aggravated by the fact that subparagraph (d) mixes up duress and necessity. From a structural point of view, self-defence and necessity differ in that self-defence gives the attacked person a much stronger right to strike back than is admissible under the rather strict balancing of interests in the case of necessity. This is due to the different philosophical foundations of these defences, i.e. libertarian versus collective, utilitarian thinking,[217] which normally entail a clear-cut distinction in the wording of the corresponding provisions. The fact that subparagraph (d) attempts, in fact, to codify both duress and necessity makes it almost impossible to reach a workable delimitation between subparagraphs (c) and (d). Conceptually, the difference between self-defence and duress/necessity is twofold. First, self-defence requires an attack ('use of force') while duress/necessity require a 'threat'. Secondly, as to the admissible reaction, self-defence generally allows any reaction to defend the invaded good, while necessity—but not duress—only permits a reaction, based on the balancing of interests, which protects the greater legal interest involved. Yet, the wording of subparagraph (d) does not allow an interpretation according to which the protected interest must be 'significantly' greater.[218] Instead, the balancing of interests is 'subjectified' as will be seen in the next section.

[215] Law Commission, commentary (Vol. II), *supra* note 98, at 230.

[216] See also Eser, *supra* note 136, mn. 39; on the reasonable standard see also Reed, *supra* note 28, at 62.

[217] Fletcher, *supra* note 28, at 138, 143, 145.

[218] See § 35 StGB (excusing necessity/duress), *supra*, II.C(3).

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Chapter 11.3

War Crimes

Michael Bothe

Buildings dedicated to religion, education, art, science or charitable purposes, to the extent that they are not protected as cultural property, enjoy no special protected status. But they are, as a rule, protected as civilian objects (paragraph 2(b)(ii)). Thus, attacks directed against these buildings are war crimes if these buildings are not used for military purposes and have thereby become military objectives.

Thus, in addition to creating confusion as to buildings enjoying a special protected status, the present provision does not add anything to the general protection of those buildings as civilian objects.

(b) Medical Personnel Units and Transports (xxiv)

This provision, too, is a new development which was not contained in the ILC Draft Statute. It relates to the traditional duty to 'respect and protect' medical personnel, units and transports, which, of course, includes the prohibition of attacking them. The relevant primary norms are found in Articles 19, 24, 35 of the First Convention, Articles 22, 23, 25, 36, 39 of the Second Convention, and Articles 12, 15, 21 to 24 of Protocol I. It is a condition for the characterization of the attack as a crime that the protected personnel, units and transports is using the distinctive emblem as provided by the Geneva Conventions and Additional Protocol I. The relevant rules governing that use are Articles 38 to 44 of the First Convention, Articles 41 to 45 of the Second Convention, Articles 18 to 22 of the Fourth Convention, and Article 18 of Protocol I. Taken together, these provisions provide for comprehensive protection of both civilian and military medical and religious personnel, as well as medical units, from small treatment posts to hospitals, and medical transports on land, at sea, and in the air. As far as medical transports on water are concerned, Protocol I fills some of the gaps left by the Second Convention. The protection of medical aircraft is regulated in a differentiated way by Protocol I. These primary norms determine the scope of this war crime.[71]

(c) Attacks against Humanitarian Assistance or Peace-Keeping Missions (iii)

This provision is based on the Convention on the Safety of United Nations and Associated Personnel.[72] Under Article 9 of that Convention, the States Parties have a duty to make certain acts of violence against such personnel a crime under their respective national laws. Article 9 also uses the word 'attack' as the central concept to define the acts which have to be made punishable. It can therefore be said that the war crime defined in (iii) is co-extensive to the type of crime defined in Article 9 of the Convention. The restriction 'as long as they are entitled . . .' refers to the definition of its scope of application. The Convention does not apply

[71] See more generally above III.C.2.
[72] UN Doc. A/RES/49/59, 9 December 1994.

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thus restricting the possible reach of mistakes of law to something more special although without naming it.

(b) The restrictiveness of this course is intensified by allowing mistake of law to exclude responsibility only 'if it negates the mental element' of the crime (sentence 2). As seen with mistake of fact,[258] this has two implications: (i) the mistake has to have been capable of negating the mental element and (ii) this can be procured solely by the perpetrator's lack of knowledge of a material element of the crime. Whereas it was easier to conceive that the unawareness of a material fact affects the knowledge of this element, it is much harder to see a way in which the ignorance of a norm might eliminate the mental element with regard to a material element, the factual basis of which the perpetrator is aware of. As one should not assume that the drafters of sentence (2) wanted it to run idle, this 'cryptic' provision[259] was perhaps meant to open the door for mistakes with regard to normative elements and evaluations.

Thus, insofar as one does not wish to resort to mistake of fact as shown above,[260] with regard to normative references and elements of the crime,[261] evaluative misperceptions could be treated in the following manner: since his mental element can only be negated by mistake to the extent that the perpetrator must be aware of material elements, accordingly normative misjudgements are capable of ensuing from a mistake of law only to the extent that the mental element is open to (mis)judgements. As, in addition, the mental element does not require more than the perpetrator's awareness of the social significance of a definitional element, it presupposes neither positive knowledge of the underlying legal provisions nor of their jurisprudential interpretation. Consequently, normative ignorance or evaluative misperceptions would constitute a mistake of law negating the mental element only if the perpetrator did not even realize the social everyday meaning of the material element of the crime. This, for instance, might be the case if he had no idea that certain letters on a car were to indicate the protected status of this personnel, but not, however, if he related these letters to another organization which would have had a protected status as well.

(c) Even if the mental element is negated by a mistake of law in the way described before, this does not necessarily lead to the exclusion of criminal responsibility though; for, as according to sentence (2) this '*may*' merely be the case, it seems as if the ICC Statute wants to leave some *discretion* to the Court to either accept or ignore the mistake. Although the use of 'may' could perhaps simply mean that not every mistake of law negates the mental element,[262] the other interpretation

[258] See *supra*, V.C.1.
[259] As described by Kress, *supra* note 119, 7.
[260] *Supra*, V.C.1(b).
[261] As to their variety and types cf. *supra*, IV.F.2 and 3.
[262] As suggested by Weigend, *supra* note 231, 1391.

This particularly high threshold,[223] coming on top of the requirement to adopt amendments by a two-thirds majority[224] is a likely pointer to almost total paralysis of the amendment procedure, which, subject to the provisions of Article 121(5),[225] 'wedges' the Statute into a low-grade voluntarism. It does not, however, seem to have constituted sufficient precaution in the eyes of certain participants in the Rome Conference who, failing to secure entry into force of amendments only if they received approval unanimously by States Parties, further required that recalcitrant States withdraw during the year following into force with immediate effect, i.e. without having to comply with the delay conditions in Article 127(1).[226]

To do so, Article 121(6) only demands that notification[227] be given 'no later than one year after the entry into force' of the amendment. Since this possibility is open '[i]f an amendment has been *accepted* by seven-eighths of States Parties'[228] and since the amendment enters into force only one year after receipt by the depositary of its last instrument of ratification, '[e]ffectively this gives a non-accepting State a two-year window to withdraw'.[229]

C. *Procedures for Amending Articles 5 to 8*

Independently of the special procedures of limited scope in Articles 36(2)[230] and 122,[231] the general provisions for amendments to the Statute still contain an exception. By Article 121(5) '[a]ny amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance', with the Court's competence remaining unchanged in relation to States that have not accepted the amendment.

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[223] The Draft Statute annexed to the Report of the Preparatory Committee (*supra* note 25) proposed, in square brackets, to subject entry into force of the amendments to ratification by two-thirds or three-quarters of States Parties; the final Report of the Coordinator on the Final Clauses to the Committee of the Whole (A/CONF.183/C.1/L.61) raised the alternative to five-sixths or seven-eighths; it was this maximum that the Bureau of the Committee finally adopted.

[224] Regarding which it has been noted that the upshot is that '[o]ne third plus one of the States Parties can effectively block adoption of an amendment by voting no, by abstaining, by not participating in the vote, or even by failing to provide a quorum' (Clark, *supra* note 195, at 1268).

[225] See C. below.

[226] See *supra* note 122. By contrast, withdrawal of a State pursuant to Art. 121(6) is 'subject to article 127, paragraph 2'.

[227] Art. 121(6) does not state to whom this notification is to be addressed; in accordance with the habitual practice codified by Art. 78(a) of the 1969 Vienna Convention on the Law of Treaties, it should be the depositary: in this case the Secretary-General of the United Nations.

[228] Emphasis added. Those would have been still clearer had para. 6 specified: '*when* an amendment has been accepted . . .'. The proposed interpretation seems, moreover, to conform to the drafters' intentions (cf. Slade and Clark, in Lee (ed.), *supra* note 15, at 437).

[229] Clark, *supra* note 195, at 1270. Of course, a State may also notify its withdrawal immediately on adoption of the amendment; but in this case it is bound to comply with all the conditions set out in Art. 127.

[230] See *supra* note 200.

[231] See A. above.

government of the Republic of Germany, however, never endorsed this candidature.

The question was formally raised for the first time in the announcement of the Minister for Foreign Affairs of the Netherlands in the General Assembly on 23 September 1997. On behalf of the government, he presented the candidacy of The Hague as seat of the Court. In his speech the Minister quoted the Secretary-General of the UN, Mr Boutros Boutros Ghali, who had referred to The Hague as the legal capital of the UN. The Secretary-General clearly had in mind that The Hague was already the seat of the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the Iran–US Claims Tribunal, and the Permanent Court of Arbitration. Other international legal institutions such as the Hague Conference on International Private Law and the Academy of International Law are also located in The Hague.

The location of these institutions in The Hague can be seen as proof that the above-mentioned general requirements for a seat of an international organization are met in The Hague. This is particularly true for the international judicial institutions. This concentration of legal institutions has other advantages. It facilitates contacts between staff members of the Secretariats of those institutions. Cooperation between different services becomes easier. The library of the Peace Palace is available for all organizations. Use of each other's facilities becomes possible as well as the exchange of personnel, such as interpreters, administrative personnel, etc. The possibility that the Court may become the successor of the ICTY in its premises and other facilities, when the ICTY has completed its tasks, was also mentioned in favour of The Hague.

This may explain why the decision to select The Hague as seat of the Court was among the first decisions taken at the Rome Conference.

In June 2001, the government of The Netherlands secured a location for the permanent premises of the Court. It will comprise some 30,000 square metres of office space, courtrooms, service areas, areas for the public and detention facilities. Its construction should be finished in 2007. The government, in cooperation with the municipal authorities of The Hague, is preparing an international architectural competition for the design of the permanent ICC buildings. This time frame made it imperative for the government to decide on interim arrangements. Temporary premises will be made available. The interim premises are an existing building located opposite the ICTY. It comprises 12,000 square metres, is spacious and flexible enough to serve the purposes of the Court from the date of establishment of the Court.[16] It will be financed by the government of The

[16] According to the Preparatory Commission (PCNICC/2001/L.3/Rev.1/Add.1, p. 2, II), during the start-up phase, the temporary premises should accommodate the following needs of the Court:

the Court and in consultation with its members.[33] Before serving full-time, it is contemplated that the judges will receive a salary or allowance as decided upon by the Assembly of States Parties.[34]

B. History of Provisions

1. Qualifications of Judges

The broad contours of Article 6 of the ILC Draft Statute ('Qualifications and election of judges') remain the same in Article 36 of the Rome Statute. Article 6 required judges to 'be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition: (a) criminal trial experience;[or] (b) recognised competence in international law.' These requirements have been elaborated in the Rome Statute, but the basic elements remain unchanged.

2. Nominations

Article 6(2) of the ILC Draft Statute dealt with the nomination of judges and proposed a straightforward nomination by States of at most two persons, of different nationality from each other, at each election. The indirect nomination system of the ICJ which found its way into Article 36(4)(a)(ii) was suggested during the PrepCom discussions.[35]

3. Elections

The election procedure outlined in ILC Draft Article 6(3)[36] has been made less rigid in Article 36(5) of the Rome Statute, which provides only that '*at least* nine judges shall be elected from list A [criminal lawyers] and *at least* five judges from list B [international lawyers]' (emphasis added), with '[s]ubsequent elections [being] so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists'. In other words, in subsequent elections, the

[33] Art. 35(3). This must be read to mean the members *of the Court* rather than the members *of the Presidency*. By definition, the Presidency must consult its members before it takes any decision *qua* Presidency (Art. 38(3)).

[34] Arts. 35(4) and 49.

[35] 1996 PrepCom Report/Proceedings, para. 37: 'In order to ensure that merit would be a paramount consideration in the election of judges, suggestions were made to the effect that candidates should be nominated either by a nominating committee or by national groups, as in the nomination of candidates for the International Court of Justice.' As pointed out below, however, the resulting Art. 36(4)(a) is incoherent in providing that *State Parties* can nominate a candidate through the PCA *National Groups*, while these are mutually exclusive nominating bodies.

[36] Art. 6(3) of the ILC Draft Statute reads, 'Eighteen judges shall be elected by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1(a) [criminal trial experience]. Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1(b) [recognized competence in international law].'

innocence. In practice, however, it is worth insisting upon. A defence advocate appearing before one of the international tribunals has been heard to complain that, *de facto*, 'every accused who walks in the door of the Tribunal is presumed guilty'. This may appear to be hyperbole; however to reply to this complaint that the accused is, in law, presumed innocent may be to state more than that the prosecution bears the burden of proof.[97] Certainly, the prosecution must prove the accused's guilt; the accused does not have to prove his innocence. But it is a fact that many lay triers of fact believe that the accused would not be in the dock unless he had done something: 'there is no smoke without fire'. Professional triers of fact, in this case ICC judges, must not make the same mistake. In short, they must be impartial as between prosecution and defence. Equally they must be impartial as between different nationalities, religions, ethnic groups, etc. Consequently, the backgrounds of those nominated for election as judges should be carefully scrutinized to ensure that the candidate is not tainted by any habitual intolerance or prejudice.

Judges must also refrain from 'any activity which is likely to interfere with their judicial functions or to affect confidence in their independence'.[98] In the context of what has been said in the previous paragraph, it is submitted that the words 'or impartiality' should be read into the end of this phrase. The phrase which refers to any activity which is likely 'to affect confidence in [the judges'] independence' is carefully worded. It is not necessary that a judge's independence be actually compromised; it is sufficient if *confidence* in the judge's independence is compromised. This accords with the adage that it is not enough for justice to be done, but it must also be seen to be done.[99] It is not enough, in other words, that the judge is in fact independent, the judge must also be seen to be independent.

A difficult issue, which is likely to come before the ICC as it has the ICTY,[100] arises when a defendant requests a judge's disqualification because of his or her prior links with a human rights or humanitarian law association. An accused might well argue that any such link casts doubt on the judge's impartiality. A similar issue arose, famously, in *Pinochet (No. 2)*,[101] in which a House of Lords Judgment was,

[97] Although there are other interpretations as to precisely what the presumption of innocence entails.

[98] Art. 40(2).

[99] '[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' Lord Chief Justice Hewart, *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259. See also the discussion of this issue, in the context of arbitrators' independence and impartiality, in *Laker Airways v. FLS Aerospace Limited*, Queen's Bench Division, 20 April 1999.

[100] See Decision of the Bureau on the post-trial application by Anto Furundzija to the Bureau for the disqualification of Presiding Judge Mumba, rendered in *Furundžija* on 11 March 1999.

[101] *R. v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [1999] 2 WLR 272. See, in this connection, *The Times Law Supplement*, 12 October 1999, p. 3 ('Why justice must be done and seen to be done').

J. Klinger, 'Stabilization Operations and Nation-Building: Lessons from United Nations Peacekeeping in the Congo, 1960-1964

Stabilization Operations and Nation-Building: Lessons from United Nations Peacekeeping in the Congo, 1960-1964

JANEEN KLINGER

President George W Bush initiated the war in Iraq on the basis of the optimistic notion that the United States would be able to build a stable democratic government there. In a novel resurrection of the domino theory, the administration assumed further that once an Iraqi democracy was established, democratic government would spread to other countries in the Middle East. When planning for the post-war occupation of Iraq, the U.S. drew upon the example of allied occupation of Germany after World War II for a model.' Yet a more appropriate example for what the U.S. was likely to encounter in its post-war occupation of Iraq-and one that foreshadows failure rather than success--can be found in the case of United Nations peacekeeping in the Congo from 1960-1964. This paper will analyze the relevance of the Congo operation for Iraq by providing a chronology of UN actions and a discussion of their consequences. By doing so we will highlight the difficulties of formulating policy for reconstruction in weak or failed states, as well as the difficulty of implementing that policy via nation-building or stabilization operations. However, before any discussion of the UN Congo operation, it is necessary to make some explicit comparisons with Iraq.

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IRAQ AND THE CONGO COMPARED

Similarities between Iraq and the Congo exist both at the broader diplomatic and foreign policy level and at the level of practical operations on the ground. From the standpoint of overall U.S. foreign policy, both the removal of a repugnant regime in Iraq and the UN operation in the Congo, despite being initiated at the behest of the Congolese government, brought up charges of illegitimate intervention. Both interventions created diplomatic problems within the camp of developed Western democracies. In Iraq, the division was over whether or not to intervene in the first place, while in the Congo, differences arose from disputes over the precise objectives of the UN mission. Both cases show that for policymakers, an absolute guarantee of sovereignty can conflict with other international goals of international security or human rights.

The two cases also featured tripartite cleavages and centrifugal forces in each country that created obstacles to the establishment of a centralized government. Thus, in the Congo, one had competing claims for power emanating from Stanleyville (now Kisangani), Leopoldville (now Kinshasa), and Elizabethville (now Lukumbashi). This produced a political dynamic much like the rival areas in Iraq variously dominated by Sunni and Shi'i Muslims and Kurds. Of course, the logical institutional response to such acute centrifugal tendencies is to either create three separate countries or forge some sort of loose federation to ensure a measure of autonomy and self-government for the three centers of power. In the case of the Congo, a unified state was thought to be preferable, because outside powers were viewed as the likely beneficiaries of the creation of three weaker states. UN officials feared that Belgium would retain control over the mineral resources in Katanga, while it was assumed the USSR would dominate any independent government formed in Orientale Province. Thus, for both anti-colonial and anti-communist reasons, a strong central government was the preferred outcome from the standpoint of the UN.2 In Iraq, federation or division of the country into three separate states would likely be problematic for a variety of reasons, and forging a strong centralized state may seem to be more feasible.' However, if the Congo is any indication, the strength of centrifugal forces at work in Iraq may be such that any centralized state is likely to slip into a new dictatorship inclined to repress the demands of some of the country's factions. Such repression, at its worst, is more likely to lead to a predatory state than the idyllic democracy envisioned by the United States. Even in the best case, the United States is not likely to be able to establish a government that is legitimate in the eyes of the Iraqis. Catherine Hoskyns, history and politics professor at the Coventry Business School, similarly observed about the role of outsiders in shoring up the Mobutu coalition in the Congo:

STABILIZATION OPERATIONS AND NATION-BUILDING:
LESSONS FROM UNITED NATIONS PEACEKEEPING IN THE CONGO, 1960-1964

> The backing of the West was sufficient at this point to keep the alliance in power, it was not sufficient to make its rule effective or acceptable to the majority of the Congolese.4

Hoskyns' observation about the Congo is the crux of the problem for any stabilization force composed of outsiders.

Given the similarities between the Congo and Iraq at the policy level, the two cases are likely to share some features from the standpoint of practical occupation operations. Both cases inhabit a twilight zone that lies somewhere between peace and war. Consequently, it is difficult to develop rules of engagement (ROE) that can serve to win the support of the people while eliminating those who attack government representatives. In the case of the Congo, because the UN force was labeled a peacekeeping force (in an era before the term "peace enforcement" had been coined), the rules of engagement strictly prohibited the use of force, except in self-defense. All the factions vying for power in the Congo adopted the tactic of attacking UN troops in order to provoke an overreaction whose brutality might lead to the withdrawal of the UN force. Even clearly articulated ROE were sufficiently ambiguous such that it was hard not to break these rules in the heat of action. In addition to the ROE restricting the use of force to self-defense, UN troops in the Congo were also expected to uphold a UN mandate that included the guarantee of free movement for all UN troops. With the Congolese establishing roadblocks to prevent UN troop movements, the UN had to choose between whether to violate its strict ROE by engaging in offensive actions to remove the roadblocks or to leave part of the UN mandate unfulfilled. Within such a context, chain of command problems are likely to become severe because of differences between instructions from headquarters (whether UN or U.S.) and interpretations of commanders on the ground. Any stabilization operation that is pulled in several different directions will likely also accentuate problems in the

"Both cases inhabit a twilight zone that lies somewhere between peace and war ... it is difficult to develop rules of engagement ... to win the support of the people while eliminating those who attack government representatives"

chain of command.

Another similarity between the Congo in the 1960s and Iraq today revolves around the fact that each has porous borders, which complicate operations for intervening forces. In the case of the Congo, the newly independent country was surrounded by countries still under European colonial control-the Portuguese to the West (Angola), Belgium to the Northeast (Ruanda-Urundi), and Britain to the East (Uganda, Tanganyika) and to the South (Rhodesia). Even with official

authority to deport foreign mercenaries who were contributing to unrest in the country, the UN did not have de facto control of the borders necessary to prevent the mercenaries from returning. Iraq's borders today are similarly porous. Even assuming U.S. allies in Turkey, Jordan, and Saudi Arabia are willing and able to control their borders with Iraq, Syria and Iran also provide an avenue into the country for terrorists wishing to fight U.S. troops.

Despite the substantial resemblance between current Iraqi operations and the UN peacekeeping operation in the Congo, there are also notable differences worth mentioning. First, the Congo operation took place during the worst tensions of the Cold War, and superpower rivalry did have an impact on UN policies and choices. The Iraqi stabilization process happens in a more benign international environment, at least from the standpoint of great power tensions. Second, one could say that the Congo operation began as a stabilization effort that escalated to war. In contrast, U.S. policy in Iraq began with war and ended with a stabilization effort. Whether these differences might allow Iraq to succeed where the Congo failed remains to be seen. With these comparisons as a starting point, let us look more closely at the UN peacekeeping operation in the Congo.

HISTORICAL BACKGROUND ON THE INDEPENDENCE OF THE CONGO

Of all the countries that gained their independence as part of the broad wave of decolonization that took place in the post-World War II era,5 perhaps none was less prepared for independence than the Congo. As a colony, the Congo was unique because it had been held as the personal property of King Leopold II of Belgium, whose ownership was granted international recognition at the Berlin Conference of 1885. Although King Leopold sold the Congo to the Belgian state in 1908, it continued to be administered directly from Brussels, while the local colonial government remained undeveloped. The colonial administration was further weakened by decentralization. Some provinces, notably Katanga, had their own vice-governors and some degree of autonomy from the central colonial government in Leopoldville. Several facts highlight just how unprepared for independence the Congo was in 1960. Until 1957, virtually no political activity by Africans was permitted. At the time of independence, there were only a dozen or so Congolese who were college graduates, and there was not a single Congolese doctor, engineer, or officer in the Force Publique.6

The lack of preparation for independence was magnified by the inherent management problems posed by such a large and diverse country. The Congo was the second largest country in Africa; its 900,000 square miles made it larger in area than Western Europe. The population of 13 million was divided among several hundred different tribes such that when political parties began to form in the late 1950s, they naturally coalesced along tribal lines. By 1960, there were 120 official

political parties. The Congo relied on Belgian personnel for almost all important economic and administrative functions, and Belgian officers were in command of the 25,000 member Force Publique that combined the functions of army and police force. Given all these conditions, the Belgians fully expected to retain effective control of the country after independence. A Belgian officer addressing the Force Publique troops in Thysville exemplified this attitude by writing on a blackboard: "Before Independence=After Independence." This action undoubtedly fueled the frustration of the Congolese soldiers who already had the impression, in the words of one eyewitness, that "independence had passed them by," and caused something of a mutiny within the Force Publique.7 For the Belgians, retaining their grip on Katanga province was especially important because Katanga accounted for one-half of the revenue generated by the entire colony, and Belgian companies operating there generated significantly more profit than did companies in Belgium.

In the political arena preceding independence, three leading figures emerged: Joseph Kasavubu, the leader of the party called the Alliance des Bakongo (Abako); Moise Tshombe, leader of the Confederation des Associations Tribales du Katanga (Conakat); and Patrice Lumumba, leader of the Mouvement Nationale Congolaise (MNC). Both Kasavubu and Tshombe favored some sort of federal government structure with considerable autonomy for the provinces. Lumumba preferred a stronger central government, and his political party came the closest to reflecting a genuinely national constituency. In the election of May 1960, the MNC won more seats in the assembly than any other political party (35 of 137), and was the only party to win seats in five of the six provinces. The central government that was formed as a result of the election was an uneasy partnership of rivals: Joseph Kasavubu became President and Patrice Lumumba became his Prime Minister. Independence was scheduled for June 30, 1960.

CREATION AND EVOLUTION OF THE OPERATION DES NATIONS UNIES AU CONGO (ONUC)

On July 5, 1960, Congolese troops in the Force Publique from Thysville mutinied against their Belgian officers. The mutiny quickly spread throughout the country. Because of violence associated with the uprising, Belgian technicians and administrators fled the country, and essential services collapsed. Brussels' ambassador ordered Belgian troops to prevent the mutineers from entering the capital, Leopoldville. Belgium also announced (contrary to its treaty with the new government) that it would reinforce its troops already in the Congo. The Belgian intervention was substantial, and troops had intervened in 23 different locations between July 10 and July 18.' In Katanga, Provincial President Tshombe requested assistance from Belgium in putting down the mutiny. Shortly after the arrival of

800 Belgian paratroopers, Tshombe declared Katangan independence from the Congo.'o South Kasai quickly followed the Katangan example and declared its independence as well. Because of the spreading disorder, Prime Minister Lumumba submitted two separate requests to the UN for assistance, on July 10 and July 12. The UN Secretary-General, Dag Hammarskj6ld, invoked (for the first time) his authority to bring issues of peace and security to the attention of the Security Council. The Security Council passed its first resolution on the Congo on July 14, 1960, requesting that Belgium withdraw its troops from the Congo and authorizing the Secretary-General to render assistance to the new government.

Hammarskj61d drew on the experience of the UN Emergency Force (UNEF) in the Sinai as a model for the Operation des Nations Unies au Congo (ONUC). Within 48 hours of the passage of the first Security Council Resolution, troops began arriving in the Congo. By July 26, 1960, ONUC had 8,000 troops in the Congo, making the operation one of the fastest deployments in UN history. To be sure, there were delays in deploying troops throughout the entire country. Tshombe threatened to resist if UN troops entered Katanga, which ultimately occurred on August 12, after the personal intervention of the Secretary-General. The first troops deployed to the Congo under UN auspices were transported by the United States, but the force was composed primarily of troops from neutral countries in Asia and Africa. Ethiopia, Ghana, Guinea, Morocco, and Tunisia all made important contributions to the initial deployment. In addition, one Swedish battalion was sent from UNEF and a small assortment of other white troops was sent to reassure Belgian civilians remaining in the Congo. One of Hammarskjdld's greatest concerns was to keep the crisis from drawing in the two superpowers and introducing the Cold War into Africa. At its peak, ONUC had 20,000 troops deployed, and for 30 years it stood as one of the largest UN operations.

Although ONUC was intended to facilitate the reestablishment of order by reigning in the rogue Force Publique, which was hastily renamed Arm&e Nationale Congolaise (ANC), the UN was invariably drawn into the domestic political struggles among leaders representing four distinct power centers. Prime Minister Lumumba became impatient with the slow withdrawal of the Belgians, as well as with the fact that the UN troops were not placed at the disposal of the central government for putting down secessionist movements in Katanga and Kasai. Because the central government did not have control of the ANC, it was unable to put an end to Katanga's secession without outside military assistance. In fact, the politicians were so unsure of their own security force that on July 20 Lumumba requested that UN troops replace Congolese guards at the Parliament. Lumumba then did several things that disturbed President Kasavubu. First, he issued an ultimatum to the UN that if the Belgians did not depart by August 19, he would ask for Soviet military assistance. While Lumumba's threat did speed

the departure of the Belgians, it antagonized high-ranking UN officials, who had come to view him as the greatest obstacle to the peace. More disturbing to the West, on August 15 Lumumba wrote a letter to the USSR requesting their military aid to end the Katangan secession. From that moment on, other factions in the Congo could portray UN actions as pro-communist to the extent they protected Lumumba or sought his inclusion in the central government. Then, on August 23, Lumumba ordered an airlift of troops into Kasai as preparation for an attack against Katanga, which culminated in the massacre of Baluba tribesmen."

On September 5, President Kasavubu responded to Lumumba's hasty actions by dismissing him as Prime Minister. In turn, Lumumba fired Kasavubu, and the Congo slid into a yearlong constitutional crisis. In the wake of the mutual dismissals by leaders in the central government, the interim head of the ONUC, Andrew Cordier, ordered the closure of all airports to any but UN aircraft and closed radio stations to use by either Kasavubu or Lumumba. At the time, Cordier's actions were controversial because they were taken without explicit permission of the Secretary-General. Cordier justified his actions by the rapid change of circumstances on the ground. Although the Secretary-General subsequently supported the actions as consistent with the UN policy of political neutrality and nonintervention, the actions, in fact, worked to the detriment of Lumumba. Closure of airports ensured that Lumumba could not bring reinforcements into the capital from his supporters located in Stanleyville; meanwhile President Kasavubu, through his ties to the French Congo was able to broadcast from across the river in Brazzaville. The UN closures lasted only one week, but that was sufficiently long enough to poison the views of many in the Congo against the UN presence.

Even though Parliament decided on September 7, 1960, to annul the dismissals of both Kasavubu and Lumumba, the political chaos continued. To summarize, in the autumn of 1960, Congolese administration and the ANC was split among four factions, two of which claimed leadership of the central government: Kasavubu's faction, centered on Leopoldville, and Lumumba's (with his deputy Antoine Gizenga), centered around Stanleyville. Both factions sent a delegation to the UN to claim the UN General Assembly seat for the Congo. In addition, there were two different secessionist movements-one led by Albert Kalonji in South Kasai, the other by Moise Tshombe in Katanga-which meant the divided central government was only in control of about one-third of the country. Tshombe was able to undermine reconciliation between Lumumba and Kasavubu by stating that he would not negotiate with the central government if Lumumba was a member. Kasavubu preferred to reintegrate Katanga by negotiation rather than by military force, and Tshombe's statement provided Kasavubu with the incentive to ally ultimately with the military and the army chief of staff, Joseph Mobutu, against Lumumba."[2]

When Kasavubu and Lumumba dismissed each other, both asked Mobutu to arrest the other leader. Mobutu declined and remained neutral during the first couple of weeks of the crisis. Impatient with the failure of Lumumba and Kasavubu to reach an accommodation, Mobutu staged a coup on September 14. Mobutu intended army intervention to be a temporary expedient until a single central government of national reconciliation could be formed. Until that time, Mobutu installed a Council of Commissioners to act as a governing council. Mobutu abandoned his neutrality however, when he learned of an assassination plot against him by Lumumba. Mobutu then ordered the arrest of Lumumba on September 18. Lumumba was released under UN protection, where he remained safe, but cut-off from contact with his supporters. Meanwhile in New York, the UN General Assembly (after excessive pressure from the United States) voted to seat Kasavubu's delegation on November 22. The UN's decision convinced Lumumba that he had no chance of returning as part of a new central government, and he left the security of his house under UN protection to meet his supporters in Stanleyville. Antoine Gizenga then proclaimed Stanleyville independent on December 12, 1960. Lumumba was captured by Mobutu a second time and held in Leopoldville. A pro-Lumumbist mutiny convinced Mobutu to offer Lumumba a ministerial post, which he declined. Mobutu then sent Lumumba to Katanga, reasoning that if Lumumba was in Tshombe's custody, Tshombe might abandon secession. Lumumba was murdered in Katanga on January 17, 1961, although his death ("while trying to escape") was not announced until February 13.

Naturally, these internal political divisions complicated the day-to-day work of ONUC, forcing it to deal with ministries whose political authority was disputed. Once Rajeshwar Dayal arrived as the Special Representative of the Secretary-General, he worked to restore Parliament as the first step to creating a legal government. Neither Kasavubu nor his Western supporters were too eager to reconvene Parliament, however, because that was where Lumumba was powerful.

Following Lumumba's death, waves of unrest spread across the Congo and the country was poised on the edge of civil war. In addition, Afro-Asian contingents in the UN force were being withdrawn by their governments, who were unhappy about the UN's inability to stop Lumumba's murder. Internal chaos was compounded by the fact that all sides began attacking the UN presence, even at a time when many leaders relied on UN protection against their own soldiers in the ANC. Mobutu and Kasavubu, who by this time jointly controlled the central government, started threatening the UN with a state of war unless Special Representative Rajeshwar Dayal was recalled. Their hostility to Dayal stemmed from a report Dayal sent to UN headquarters in which he blamed the chaos in the Congo directly on the ANC and Mobutu." Mobutu and Kasavubu also saw Dayal as pro-Lumumba because of his commitment to the reconvening of

Parliament and the re-establishment of a constitutional government. Against the backdrop of deteriorating conditions in the Congo, evident in the murder of Lumumba and the withdrawal of contingents from the ONUC, the UN Security Council passed a stronger resolution on February 21, 1961.14 This more forceful resolution demanded that all foreign advisors and mercenaries be expelled, and it authorized the UN Secretary-General to take action to implement it.

Rather than alleviating chaos, the new Security Council resolution incited authorities in both Kasavubu's stronghold of Leopoldville and Tshombe's capital of Elisabethville to new attacks on the UN. Congolese hostility towards the UN grew out of a misunderstanding of the new resolution. Both Leopoldville and Elisabethville assumed that ONUC was now authorized to use force to disarm the ANC and to reopen Parliament-a move likely to enhance the power of the Lumumbist faction. This mistaken assumption provided the impetus for leaders in the central government and Katanga to conclude the Tananarive Agreement to pool military resources in order to prevent "communist tyranny." In fact, the agreement was primarily directed at the UN and only secondarily addressed to the Lumumbists who controlled Stanleyville.15

'At the heart of UN difficulties was the problem of identijfing the source of chaos in the Congo. Was chaos the result of internal disputes among rival politicalfactions or was it the consequence of colonial interference?"

In any case, the UN resolution of February 21 remained a dead letter until late summer of 1961. In July, a new central government was cobbled together that reconciled various factions. Cyrille Adoula, serving as premier, headed the government and had two vice-presidents to assist him. Antoine Ginzenga represented the Lumumbist faction and abandoned his bid for an independent government in Stanleyville because the stronger UN resolution suggested the central government's willingness to reintegrate Katanga. The second vice-presidency was appointed to the leader of the Association of the Luba People of Katanga (Balubakat), Jason Sendwe. (Incidentally, Sendwe was also a known enemy of Tshombe.)

On August 24, the central government passed an ordinance to expel from

the Congo all non-Congolese officers and mercenaries, and granted legal authority for ONUC to use force to achieve this purpose. The ordinance was directed at Katanga, where Tshombe had built up his military strength with an active recruiting campaign of foreign mercenaries that included, among others, French officers from Algeria. The expulsion of foreign mercenaries from Katanga was accomplished by two successive operations. The first, "Operation Rumpunch,"

achieved some success in rounding up mercenaries. However, given the fact that European Consuls protected some mercenaries and that others were able to blend in with European communities resident in the Congo, ONUC lacked intelligence to confirm the extent of its success. In fact, one unintended consequence of "Operation Rumpunch" was that it tended to remove the more moderate elements among the mercenaries-those that were willing to abide by requests from their Consuls-while leaving the extremist mercenaries free to continue to fight.'6 Moreover, Katanga's Minister of Information, Godefroid Munongo, increased the oppression and terrorism against those in the province who opposed secession. This caused the UN compound to be flooded with refugees seeking protection, thus increasing the demands on an already over-burdened force. From August 24, when the first refugees appeared in the UN compound, to two weeks following "Operation Rumpunch," 45,000 refugees sought UN protection."

The second and more controversial operation, called "Operation Morthor," broadened the campaign to end the secession by including the arrest of provincial politicians (Tshombe and Munongo), as well as a round-up of foreigners. The second operation led to eight days of shooting between so-called UN peacekeepers and the mercenaries leading Tshombe's troops. "Operation Morthor" failed to arrest Tshombe, who escaped into British-controlled Rhodesia. The Secretary-General, appalled by the casualties caused by the operation, ordered a halt and flew to Ndola, Rhodesia, to negotiate a cease-fire with Tshombe. Dag Hammarskj6ld's plane crashed enroute to the meeting. In spite of the accident, a ceasefire was signed by the head of ONUC's Civilian Operation, Mahmoud Khiary.'8 After signing the ceasefire agreement, Tshombe and Munongo returned to Elisabethville and continued to fight for the secession of Katanga.

ONUC then began strengthening the forces it had in Katanga, and the larger UN presence finally convinced Tshombe to, sign the Kitona Accord with the central government on December 21, 1961, leading to a yearlong truce between the central government and Katangan politicians. However, by July 1962, Tshombe began to organize violent demonstrations against the UN, whose troops continued to be attacked. By November 1962, it was clear that Tshombe was not serious about reaching a genuine agreement with the central government, and the United States began to supply transport to assist the UN in its military build-up for a final operation. "Operation Grandslam" began in December 1962 and aimed to neutralize the Katangan air force so that UN troops could regain freedom of movement in the whole of Katanga. In January 1963, UN troops took Tshombe's last stronghold in Jadotville. Tshombe announced the end of the secession on January 15, and left the country for exile in Switzerland. The UN presence continued in the Congo until the summer of 1964. Adoula resigned as premier nine days after the UN force was withdrawn.

Although the UN operation ended in 1964, its conclusion did not bring

governmental stability. Insurrections occurred in Kwilu in January 1964 and were followed by an uprising in Kivu province in August. Another uprising in Stanleyville in the summer of 1964, launched by rebels claiming to be the heirs of Lumumba, included an attack against the U.S. consulate and the seizure of American hostages. By this time, Tshombe had returned from exile and joined the central government, where he again requested assistance from the Belgian military and mercenary forces. Once the latest Stanleyville insurgency was suppressed and the hostages freed, Tshombe became something of a national hero. His victory in the elections in 1965 appeared to threaten Kasavubu's power, and so Kasavubu dismissed Tshombe in October 1965. The ensuing political turmoil prompted another coup by Mobutu. This coup turned out to be permanent and marked the beginning of his 30-year rule.'9

ANALYSIS

The UN operation in the Congo provides an interesting case study of peacekeeping (more accurately, peace enforcement) because it foreshadows problems that peacekeeping operations, and indeed stabilization efforts, continue to encounter to the present day. First, the Congo shows how complex such operations can be. Even defining the mission or the objective can be highly problematic. The Congo's initial request to the UN was for technical assistance to restore internal order. Lumumba's second request was for military assistance to halt Belgian aggression. At the heart of UN difficulties was the problem of identifying the source of chaos in the Congo. Was chaos the result of internal disputes among rival political factions or was it the consequence of colonial interference on the part of Belgium? The UN faced a similar dilemma when defining the problem of Katangan secession: was the secession an internal matter to be resolved by the Congolese themselves or was it a product of aggressive foreign intervention?

Answers to both questions are complicated, but an early post-mortem of the operation by Catherine Hoskyns suggests that the Katanga secession was made possible by the initial mutiny of the Force Publique. She reasons that two days before independence, Belgian authorities in Brussels and in Elisabethville were unwilling to support Katanga's independence from the Congo. Belgian views changed after the mutiny, which convinced the Belgians that secession of the province was the only way to restore law and order and therefore safeguard Belgian investments. Once convinced that secession of Katanga was in its best interest, the Belgian government issued very different orders to its troops in Katanga than to those in other areas of the Congo. In Katanga, Belgian troops were ordered to occupy "all centers of importance," but in the rest of the Congo, they were to intervene only when Belgian lives were threatened.2" In addition, Belgian troops in

Katanga systematically rounded up any ANC units that supported the central government and deported them out of the province in order to ensure the loyalty of the ANC units remaining. In this way, Tshombe was able to build a gendarmerie loyal to him, and the constitutional struggle between Kasavubu and Lumumba simply afforded him the opportunity to consolidate his power.21

The fact that the definition of the problem was a matter for subjective judgment meant that the UN and members of Congo's central government, particularly Patrice Lumumba, made quite different interpretations of the UN mandate. Lumumba believed that UN troops should be under the command of the central government and be used to end the Katanga secession. UN officials, on the other hand, saw the role of UN troops as being to restore order and discipline to the ANC. To be sure, Hammarskj6ld did assume that the very presence of the UN would demonstrate a show of force that would lead Tshombe to end his secession voluntarily. Even though politicians of all stripes in the Congo came to oppose the UN presence, they did not avail themselves of the easy out left to them by the wording of the first Security Council Resolution. That resolution had asked the Secretary-General to provide "such military assistance as may be necessary until, through the efforts of the Congolese Government with technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government to meet fully their tasks." (Emphasis added.)22 All the central government had to do was to declare the ANC capable of meeting its tasks, and the UN presence would have ended. Of course, as noted above, none of the politicians wanted the UN to leave, because no leader had confidence in the national army. Even Mobutu, as Army Chief of Staff, moved into the UN compound for safety in the week following his 1960 coup to neutralize the civilian politicians.

UN officials insisted that their presence in the Congo was politically neutral, and that the UN held to a commitment of non-intervention in the domestic political contest. Yet various segments in the Congo did not view the UN presence as benignly impartial. After all, was not the seating of the delegation representing Kasavubu's faction at the UN General Assembly in the fall of 1960 an explicit recognition that the UN had taken sides in the internal political contest? And if the UN recognized Kasavubu, could it genuinely play the role of honest broker among all factions? Furthermore, with Kasavubu's delegation recognized by the UN, why not do as the government asked regarding the Katangan secession? The UN insisted that political neutrality allowed it to protect Europeans in Stanleyville, but that neutrality would be violated if the UN intervened to protect Lumumba after his second arrest.

Congolese leaders were at times as inconsistent as the UN itself, denouncing the UN presence as an infringement on their sovereignty but secretly pleased when UN policies favored their own faction. For example, the Lumumbist fac-

tion assumed that the UN supported Mobutu's coup, because Cordier had used UN funds to provide back-pay to the troops garrisoned at Leopoldville in order to stave off troop dissatisfaction that might lead to violence. Even though such funding benefited Mobutu by solidifying support for him in the ANC, he too attacked the UN presence and saw Dayal, in particular, as supporting Lumumba.

Complicating the UN actions further were the broader diplomatic issues at stake. The Cold War setting meant that the Secretary-General had to walk a political tightrope between the permanent members of the Security Council, sat-

isfying the expectations of a number of constituents with largely incompatible interests and preferences. The Soviets were pro-Lumumba and angry at the UN's failure to protect him.23 France and Britain, as colonial powers, were anti-Lumumba and willing to accept-and even facilitate-the independence of Katanga. The United States did want to support the interests of its NATO partners (France, Britain, and Belgium) but recognized that the secession of Katanga had the potential to legitimate other secessionist movements and feared that

"UN officials insisted that their presence in the Congo was politically neutral... Yet various segments in the Congo did not view the UN presence as benignly impartial"

the Stanleyville faction might also

secede. Given Soviet influence with Stanleyville politicians, the fear in Washington was that an independent country based around the Stanleyville area would create a Soviet foothold. Finally, the Secretary-General had to placate the Afro-Asian bloc that provided the bulk of the troops for ONUC without alienating the West, who financed the operation. Given such contradictory interests, it is no surprise that UN policy would appear inconsistent and confused.

Although many aspects of the operation were negatively affected by the broader diplomatic setting and the ambiguity in defining the problem, three stand out as most important. The three problems include a muddled chain of command; confusion over the mandate and the rules of engagement required to implement it; and the difficulties of evaluating the final outcome of the operation. All three problems can be found in more contemporary examples of intervention aimed at stabilization or nation-building. Two examples provide good

illustrations of the problems with the chain of command in the Congo. The ultimate authority for all Congo actions lay with the Office of the Secretary-General, and Hammarskjbld preferred Security Council guidance to be ambiguous because such guidance allowed him greater latitude in implementation. The Special Representative of the Secretary-General was the individual in theater who was to execute actions consistent with the Secretary-General's instructions. Andrew Cordier, as interim head of ONUC, was acting in this capacity when he

ordered the closure of airports and radio stations without explicit authorization from Hammarskj6ld. Dayal, who replaced Cordier, notes in his memoirs that although Hammarskj6ld did not approve of the actions, he did support them after the fact. Cordier's actions were taken in a crisis situation so fluid that one could hardly expect him to wait for cabled instructions from New York. Yet Cordier's actions, because they favored Kasavubu over Lumumba, aroused suspicions of the UN among his foreign and domestic supporters. Likewise, Dayal's repeated calls for reconvening Parliament, where Lumumba had a strong base of support, was construed by Kasavubu and Mobutu as indicative of the UN's pro-Lumumba bias, and by extension its pro-communist sympathy.

An even more important instance of problems in the chain of command revolved around actions taken by the UN's representative to Katanga, Conor Cruise O'Brien. Cruise O'Brien was sent to Katanga in the summer of 1961 to implement the stronger Security Council Resolution passed in February of that year, demanding the expulsion of foreign advisors and mercenaries that were thought to be the major prop for Tshombe's secessionist program. Indeed, in his memoirs, Cruise O'Brien suggests that he was specifically selected for this task because Hammarskjold was aware of his views as a neutralist (not pro-NATO) and a staunch anti-colonialist. He was the official responsible for orchestrating "Operation Rumpunch," the first operation to round up mercenaries, which was considered a success. However, the follow-up "Operation Morthor" shows where the chain of command broke down. "Operation Morthor" broadened the targets for UN action and included the arrest of key politicians in Katanga.

The controversy surrounding "Operation Morthor" involved the question of whether the operation had been properly authorized. In retrospect, various participants expressed different views over whether the Secretary-General authorized the expanded operation. Dayal says in his memoirs that Cruise O'Brien clearly overstepped the explicit instructions of the Secretary-General, and that ONUC did not have the right to arrest Congolese politicians-a task it had repeatedly declined to perform earlier when Kasavubu wanted Lumumba turned over.24 Cruise O'Brien asserts that he was given permission to launch "Operation Morthor" by Khiary, the head of the ONUC Civilian Operation, and Cruise O'Brien presumed Khiary's permission came explicitly from Hammarskjold, via the officer in charge in Leopoldville, Sture Linnar.25 However, Cruise O'Brien's memoirs do detail the immense frustration of dealing with Katangan politicians who were inciting the local population against the UN, plotting the assassination of UN officials, and conducting terrorist campaigns against political opponents in order to send refugees fleeing to UN areas for protection, thereby negating the UN's ability to conduct other operations. Under these circumstances, one can see how a local commander might be tempted to push an extreme interpretation of the mandate. UN officials on the ground dealing with Tshombe on a day-to-day

basis could easily conclude that, given Tshombe's delaying tactics, diplomacy without force was futile, and that it was a logical next step to escalate from "Operation Rumpunch" to "Operation Morthor." Trevor Findlay extrapolates a lesson from "Operation Morthor" applicable to other UN operations as well as unilateral U.S. stabilization operations:

> It is probably more accurately described as a case of mutually reinforcing misperceptions combined with hubris and bravado, which produced, seen in the best light, over-enthusiasm and poor judgment, and, at worst, a conspiracy to force the UN's hand in overturning the Katangan regime. The lesson is that the UN should not use force without proper command and control arrangements, military capability, legal authority and political support.26

The Katanga secession and the circumstances surrounding "Operation Morthor" also illustrate how the chain of command problems inherent in a multinational operation detract from the ability to forge a unified purpose. The need for the UN to retain various national contingents meant that unity of purpose was necessarily diluted, with some contingents taking direction from their national governments rather than UN commanders. In addition, Cruise O'Brien notes that Belgian business interests in Katanga were united in hatred and hostility towards the UN presence. This contrasts with his observation that, "the complex coalition which [he] represented had no motivation of equivalent clarity and power."27 The conditions identified by Cruise O'Brien seem likely to apply wherever outside interventions require support from diverse constituencies and locals need only maintain their own unity of purpose to expel foreigners.

The second operational issue highlighted by the Congo case is related to the chain of command difficulties but centers primarily on the interpretation of the UN mandate, which in turn had an impact on the rules of engagement. The Security Council Resolution of February 1961 authorized the UN to "take immediately all appropriate measures to prevent the occurrence of civil war in the Congo," and permitted "the use of force, if necessary, in the last resort."28 This mandate was subject to two quite different interpretations. The British delegate to the UN, Sir Patrick Dean, emphasized that his government understood that force would be used only to prevent armed clashes between Congolese troops, and not to impose a political settlement, by ending the secession of Katanga. Yet in 1961, the threat of civil war in the Congo grew out of the secession of Katanga, and it was not unreasonable for UN officials in Katanga to pursue the goal of bringing peace by using force in a way that would eliminate the secession. The latter interpretation of the mandate was undoubtedly held by Mahmoud Khiary and Conor Cruise O'Brien.

Even before the use of force for operations "Rumpunch" and "Morthor" there were problems with the ROE. In the Congo, UN troops were generally expected to adhere strictly to the use of force for self-defense only. Dag

Hammarskj6ld held to the most stringent interpretation of the self-defense rule and was not prepared to engage a peace force in offensive tactics, even if necessary to extricate itself from danger. UN officials in the Congo, such as Dayal, thought the ROE were too weak and prevented the UN from arresting criminals as part of the mandate to ensure law and order. Opponents of the UN presence naturally turned the strict ROE to their own advantage. Tshombe incited crowds of women and children against the UN troops with the aim of getting UN troops to overreact in a fashion that would undermine international support for the UN effort.9 Along similar lines, in Katanga, the ANC used fake Red Cross vehicles to carry troops, munitions, and mercenaries. When the Red Cross representative complained to Katangan authorities, he was kidnapped and murdered.°

The Congo operation illustrates that between UN mandates (or any other form of mission statement) and ROE, there may be an inherent ambiguity or tension, and reasonable people can be expected to disagree concerning their interpretation. That disagreement is likely to be most acute between headquarters elements in New York and officials on the ground-that is, between the authorities responsible for broader foreign policy and those executing that policy in detail.3" Although the UN troops were to adhere to a strict interpretation of the use of force for self-defense only, they did have the mandate to ensure freedom of movement in the country. Once the ANC initiated a policy of placing road blocks in the way of UN troops and limiting their freedom of movement, offensive operations were implicitly called for, while self-defense remained the explicit ROE. Even under the stronger Security Council Resolution of February 1961 that allowed for measures to prevent civil war, those measures were still assumed to be more defensive than offensive in character, requiring UN troops to intervene between warring Congolese troops.

The last operational problem that the Congo illustrates is the near-impossibility of developing concrete criteria for measuring and defining success. The fact that we can look back 40 years later with knowledge of the consequences of the intervention makes this case study more useful than some of the more contemporary operations where the long-term outcome is not yet clear. Some participants in the Congo who wrote about the operation afterwards saw it as a success because it enabled the Congo to survive as a unified state, and one that in the 1970s appeared reasonably stable and prosperous. Given the atmosphere at the time of anti-colonialism, the creation of several states out of the Belgian Congo that left Europeans in control of the bulk of the mineral wealth in Katanga would have been undesirable. However, the long-term consequences of shoring up a centralized state have proved to be less positive. Mobutu's second coup in 1965 consolidated his rule of 30 years, and his regime pioneered what came to be known as a "kleptocracy" because of the extent to which it was awash with corruption. In addition to enriching himself at his country's expense,

Mobutu also maintained unity against the centrifugal tendencies within the Congo by buying off opposition leaders, further looting the wealth of the Congo in a manner that did not contribute to the country's economic development. The ANC continued under Mobutu's regime to develop in the rogue tradition begun during the early years of independence. Officers were so corrupt that they routinely stole the pay from their own troops, who in turn resorted to stealing and terrorizing the population at large. Citizens in the Congo became, as one journalist noted, accustomed to the notion of the state as "a ravaging predator."32

Evidence of the pervasive corruption and incompetence of the ANC can be found in the ease with which Laurent Kabila was able to oust Mobutu in 1997- for the army was not skilled at fighting wars or defending the country from guerrillas, but only in extorting resources from the terrorized population. In the wake of the chaos that engulfed the Congo after Mobutu, some 3.3 million Congolese may have died of fighting, famine, and disease.3 Six neighboring countries were drawn into the con-

"[An additional] operational problem that the Congo illustrates is the near-impossibility of developing concrete criteria for measuring and defining success

flict, and some observers described the scale of the catastrophe as equivalent to Africa's version of the First World War. The long-term result was hardly what Dag Hammarskj61d had in mind in the summer of 1960. Ultimately, the story of ONUC and Mobutu shows how problematic creating decent political rule can be for outsiders and the devastating consequences of being wrong. m

NOTES

1 Some press accounts suggest that the U.S. reliance on the occupation of Germany was so strong that Paul L. Bremmer's briefing book that outlined the milestones for occupation of Iraq contained passages lifted wholesale from Marshall Plan era documents. At one point in the book, when discussing the issue of currency, the document had not been corrected to change the word "Reichsmark" to dinar. See Michael Hirsh, "How Will We Know When We Can Finally Leave?" the Washington Post, September 26, 2004, 1B.

2 In fact, participants in the Congo operation who evaluated the UN mission as a success did

so on the basis that
the operation prevented the Congo from splintering into three separate countries. See Rajeshwar Dayal,
Missionfbr Hammarskjild: The Congo Crisis (Princeton: Princeton University Press, 1976); and Brian Urquhart,
A Life in Peace and War (New York: WW Norton and Company, 1987).,

3 Interestingly, in the aftermath of the first Gulf War, the Bush Administration opposed dividing Iraq into sep-
arate states. The reason for preferring a unified Iraq was, ostensibly, opposition to such division by Saudi
Arabia and Turkey. In fact, both countries favored division at that time. See Michael R. Gordon and Bernard
E. Trainor, The General's War (Boston: Little, Brown and Company, 1995), 455-456.

4 Catherine Hoskyns, The Congo Since Independence (January 1960-December 1961) (London: Oxford
University Press, 1965), 245-246.

5 The speed of decolonization in Africa is reflected in the change in UN membership: in 1958, only 10 African
states were represented in the General Assembly; by September 1961 there were 27.

6 The Force Publique combined the functions of army with that of police force.

7 Hoskyns, 87.

8 In his memoirs, Conor Cruise O'Brien cites specific data on this point. See Conor Cruise O'Brien, To Katanga and Back: A UN Case History (New York: Simon and Schuster, 1962), 173. For an analysis that suggests a psychological rather than material motive at work in Belgium see Hoskyns, 468-469.

9 Hoskyns, 124.

10 The importance of Katanga to the central government cannot be overstated: Katanga produced half the revenue for the country, and also contained the largest portion of Europeans in all of the Congo's provinces.

11 The death total was 1,000 Baluba massacred leaving a permanent resentment of Lumumba among the tribe. Madeleine G. Kalb, The Congo Cables: The Cold War in Africa from Eisenhower to Kennedy (New York: MacMillan Publishing Co., Inc., 1982), 70. The broader significance of the massacre was to strengthen Tshombe's determination to pursue secession. See also Cruise O'Brien, 93.

12 Hoskyns, 221.

13 Even though the UN seated Kasavubu's delegation, he remained suspicious of the UN's Special Representative Rajeshwa.r Dayal. Mobutu gave a press conference where he denounced "These Indians who run the United Nations..." Indar Jit Rikhye, Military Advisor to the Secretary-Generak UN Peacekeeping and the Congo Crisis, (New York: St. Martin's Press, 1993), 134.

14 UN problems were further compounded by a financial crisis. ONUC cost 10 million dollars a month in 1961, and countries that opposed various UN actions or policies refused to pay their share of the costs. The financial crisis was sufficiently severe that the UN would not fund another peacekeeping mission for a decade.

15 Hoskyns, 338, 342-343. Hoskyns goes on to note that the Tananarive Agreement was short-lived because it included a major concession to Tshombe about creating a federated Congo while not requiring any promises on the part of Katanga to share its earnings from its mineral wealth. Consequently, after some reflection the central government chose to ignore the agreement and sought to improve its relations with the UN instead.

16 Hoskyns, 408.

17 Rikhye, 258.

18 The circumstances surrounding the crash of Hammarskjold's plane are a continuing topic of controversy. In his memoirs, Conor Cruise O'Brien speculates that the plane was shot down-not by Congolese themselves, but by the mercenaries, many of whom had other axes to grind with the Secretary-General besides the Congo, namely that Hammarskj6ld was viewed as a sympathetic and driving force behind the UN

efforts to facilitate decolonization. Some recent scholarship suggests that O'Brien's speculation may indeed be accurate. See David N. Gibbs, "Dag Hammarskj6ld, the United Nations, and the Congo Crisis of 1960-1961, a Re-interpretation," The Journal of Modern African Studies 31 (1993): 163-174.

19 Despite the seriousness of the threat to American lives in Stanleyville, the Johnson administration dealt with the crisis in a low-key manner. At the time, Johnson was facing more pressing problems with the Tonkin Gulf crisis in the summer of 1964 and racial disturbances in U.S. cities. In such a domestic and international setting, any crisis in Africa would necessarily be subordinated to other concerns. For details concerning the operations that freed the hostages see: Fred. E. Wagoner, Dragon Rouge: The Rescue of Hostages in the Congo, (Washington, D.C.: National Defense University, 1980).

20 Hoskyns, 142.

21 Hoskyns, 140, 142.

22 Cruise O'Brien, 331.

23 In fact, Soviet disapproval of the Secretary-General led them to launch a personal campaign against Dag Hammarskj6ld and an initiative to replace his office with a triumvirate that would represent both sides in the Cold War. This campaign actually cost the Soviets in terms of their standing in the developing world because leaders in the former colonies, although unhappy about some UN actions in the Congo, saw Dag Hammarskj6ld as a genuine force for de-colonization and a champion of the rights of weaker states.

24 Dayal, 268. Dayal's account does neglect one difference between the UN refusal to arrest Lumumba and "Operation Morthor's" attempt to arrest Tshombe: Lumumba was at the time part of the central government, whereas the leaders in Katanga were not. Moreover, in the latter case, the legitimate head of the central government, Adoula, had issued arrest warrants for Tshombe and Munongo. Trevor Findlay says that the Secretary-General's authorization for the arrest of Katangan political leaders required consent of the provincial government as well. See Trevor Findlay, The Blue Helmet's First War? Use of Force by the UN in the Congo, 1960-1964 (Toronto: The Canadian Peacekeeping Press, 1999), 99.

25 See Hoskyns' discussion of the different understanding that each of the four key UN officials had for "Operation Morthor," 416-417.

26 Findlay, 109.

27 Cruise O'Brien, 172.

28 Cruise O'Brien, 336-337.
29 Tshombe received advice to adopt this tactic from Western supporters. For example, Madeleine G. Kalb in her comprehensive book on U.S. diplomacy in the Congo, The Congo Cables (New York: Macmillan Publishing Co., Inc. 1982), 346 cites a statement that Dean Rusk made to a New York rimes columnist that elements in the United States advised Tshombe that if he could get UN troops to shoot some women, "it was a sure thing the UN bond issue would be blocked in Congress."
30 Rikhye, 296.
31 Ambiguity and disputes over mandates and ROE are not unique to UN operations and are characteristic of strictly national operations. In the operations surrounding the rescue of American hostages seized in Stanleyville in 1964, the U.S. government proved as strict in regulating the use of force as the UN. In addition, U.S. Ambassador G. McMurtie Godley was frustrated with Washington's inaction in the hostage crisis and both he and General Paul Dewitt sought more aggressive action. General Dewitt was especially emphatic that "sound military principles" take precedence over political concerns. See Wagoner, 38-39 and 72-73.
32 Michela Wrong, In the Footsteps of Mr. Kurtz" Living on the Brink of Disaster in Mobutu's Congo, (New York: Harper Collins, 2001), 130.
33 Somini Sengupta, 'Hopes and Tears of Congo Flow in its Mythic River," The New York 7imes, April 21, 2004, 1A, 8A.

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The Importance of Observing UN Peacekeeping Norms

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The primary objective set forth in the Charter of the United Nations is the prevention and removal of threats to international peace and security through effective and collective measures. The Charter calls for the peaceful means to suppress acts of aggression and for the settlement of international disputes in conformity with the principles of justice and international law. The UN has made unremitting efforts to maintain international peace and security in order to achieve these goals.

This year marks the fiftieth anniversary of the founding of the UN. In this period of volatile and complex international changes, a review of the tortuous course of peacekeeping operations will greatly help future UN efforts to maintain international peace and security more effectively.

Peacekeeping operations are a product of history. There are no specific provisions in the UN Charter for peacekeeping operations; instead, they have evolved in the course of the UN's handling of international peace and security issues. In 1948, the "UN Truce Supervision Organization" was sent to Palestine to monitor and implement a truce agreement between Israel and its Arab neighbors. This was the first peacekeeping operation in UN history, after which the UN established peacekeeping operations in such places as Lebanon and Cyprus. These operations have since become an important means by which the UN and the international community have promoted the settlement of regional conflicts and disputes.

Between 1945 and 1988, the UN established a total of thirteen peacekeeping operations. All operations, with the exception of the UN Commission on Korea and the UN Operations in the Congo, contributed to the promotion of the peaceful settlement of relevant disputes and have gained recognition from the international community.

The latter part of the 1980s witnessed significant changes in international relations and strategic configuration. The international situation moved towards lassitude, and regional conflicts and hot spots that had long plagued the international community, such as Cambodia, southern Africa, and Central America, showed signs of peaceful settlement. At the same time, though, religious and ethnic feuds and territorial disputes that had been submerged during the Cold War broke out one after the other, triggering violent conflicts and regional wars.

The turbulent international situation calls for a greater UN role in international affairs. In January 1992, during the first summit of the Security Council, extensive and in-depth discussions were conducted on how to further enhance the role of the UN in maintaining international peace and security. In June of the same year, at the request of the summit, the UN secretary-general proposed *An Agenda for Peace*; Blue Helmets were stationed instantaneously in hot spots throughout the world.

Twenty-one peacekeeping operations were established between 1989 and 1994, far exceeding the record of the previous forty years. The UN secretary-general's 1995 report states that by the end of July 1995, approximately 65,000 troops, 17,000 police, and 6,000 civilian personnel had been deployed in sixteen peacekeeping operations. The total annual budget amounted to $2.6 billion, the largest in UN history.

Since the end of the Cold War, peacekeeping operations have succeeded in their tests as well as learned profound lessons from them. The experience of peacekeeping in Bosnia-Herzegovina should be used to bring about the healthy development of future operations. History has demonstrated that observing the norms proven effective in the history of UN peacekeeping operations can help ensure success.

The first relevant norm dictates that peacekeeping operations observe the purposes and principles of the UN Charter, particularly respect for state sovereignty and noninterference in the internal affairs of other states. At present, the UN mandate and the terms of reference for peacekeeping operations have expanded, reflecting an increasing involvement in countries' internal affairs. Operations have even been used as instruments for intervention in the internal affairs of other countries, imposing specific social systems and values.

The end of the Cold War has brought greater expectations of the UN. Countries often turn to UN intervention when they cannot resolve disputes by themselves; the scope of peacekeeping operations has therefore expanded from monitoring ceasefires and establishing buffer zones to new domains: observing, monitoring, and organizing elections and referenda; providing and protecting humanitarian relief; disarming conflicting parties; monitoring human rights; and even establishing interim authorities. An overwhelming majority of peacekeeping operations established after 1992 involve a country's internal conflict; their functions thus tend to be more diverse.

Recent operations in which peacekeeping was used as a pretext to interfere in a state's internal affairs have suffered crushing defeats.

Changes in the international situation call for adjustments in the mandate and scope of peacekeeping operations. However, such changes are no excuse to interfere in another country's internal affairs or to force upon it foreign social and value systems. Recent operations in which peacekeeping was used as a pretext to interfere in a state's internal affairs have suffered crushing defeats.

A second standard is the settlement of disputes through the peaceful means of good offices, mediation, and negotiations instead of resorting to frequent mandatory actions. Humanitarian operations should not resort to military means, and peacekeeping operations should obtain prior consent from the parties concerned, observe strict neutrality, and refrain from the use of force except in self-defense. Peacekeeping must not involve imposing peace by mandatory military actions; its fundamental role lies in creating conditions for the final settlement of disputes through political and diplomatic channels when the conflicting parties desire peace. The prerequisite for all peacekeeping operations is prior consent from the parties concerned. Traditional peacekeeping operations differ from both the mediation of disputes as set forth in Chapter VI of the Charter and such mandatory means as sanctions and military action as prescribed in Chapter VII. Rather, they are actions to employ military personnel without resorting to force—"Chapter-VI-and-a-half" actions, as described by UN members.

However, peacekeeping operations established in recent years have gradually gone beyond the above-mentioned principles. Due to the decreasing safety of peacekeeping, it is increasingly difficult to implement the principle of the non-use of force except in self-defense. Increasingly wider and more robust interpretations and definitions for rules of engagement exist for self-defense. There are also frequent cases in which relevant opera-

tions are authorized to use mandatory measures by invoking Chapter VII of the Charter. Some operations locked in stalemate or ended in failure because of the lack of cooperation among the parties concerned or their direct involvement in the conflict. The UN Operation in Somalia failed and had to withdraw before the end of March 1995, due to the indiscriminate use of force and an involvement in the Somali civil war. UN peacekeeping forces in the former Yugoslavia landed in a similar predicament.

Complicated historical and practical causes of conflicts and disputes in the world today involve political and economic elements as well as those of religion, ethnicity, culture, and territory. Only through patient and peaceful negotiations can a lasting solution be found. Invoking Chapter VII of the Charter on flimsy grounds, establishing multinational forces, turning peacekeeping operations into enforcement actions, or confusing one with the other will only end up aggravating problems and blocking the settlement of disputes. Although they may appear to be resolved, they will generate serious consequences and hidden perils. It should also be pointed out that enforcement actions, as set forth in Chapter VII of the Charter, can only be used against acts of aggression that endanger and undermine peace, and should never be used indiscriminately.

Double standards and the imposition of the policies of one or several countries on the Security Council should be opposed in peacekeeping operations. This is another crucial rule to be followed. The establishment of peacekeeping operations by the Security Council should not be based upon any one nation's own interests and needs. UNPROFOR, for example, had as many as 39,000 troops in addition to more than 700 military observers, 1,800 international civilian personnel, and 2,000 local personnel. It was the largest UN peacekeeping operation ever, and the subject of several dozen Security Council resolutions. The operation had claimed 129 lives by 1994, and total costs amounted to $1.6 billion. However, peacekeeping operations in other regions, particularly Africa, were nitpicked, delayed, and blocked in every possible way, even though they were relatively insignificant in terms of both personnel and funds compared to UNPROFOR and other peacekeeping operations. If not redressed, such self-interest-based double standards will inevitably undermine the support of many developing countries for Security Council–approved peacekeeping operations and even the formulation of other policies. They will also impair the Council's authority and weaken its ability to maintain international peace and security.

A fourth standard for peacekeeping is that operations should be subject to the decisions and political guidance of the Security Council. Peace-

keeping should be organized and commanded by the UN such that regional organizations can play a proper role in accordance with the provisions of the UN Charter. In several peacekeeping operations the Security Council was cast aside, and the role of the UN was marginalized and replaced by specific countries or regional organizations. Under such circumstances, UN peacekeeping operations may lose their neutrality and become a party to the conflict or war. Naturally, they would lose the trust, support, and cooperation of the conflicting parties, and the safety of peacekeeping personnel would be seriously endangered. Rather than address the settlement of relevant questions, then, they would produce confusion and other negative implications.

The shortage of human and material resources will be even more severe when there is an increased risk in undertaking peacekeeping missions.

The aim of UN peacekeeping operations is to maintain international peace and security on behalf of the entire UN membership. These operations must fully reflect the will of the entire membership and be carried out under the political guidance of the Council and the UN military command. As many member states as possible should participate in peacekeeping: this is essential to ensure the full exercise of the UN's role and the success of peacekeeping operations.

Finally, peacekeeping operations should be established realistically within the means of the UN and should not be established when conditions are not ripe. The UN can hardly cope with the unlimited expansion of peacekeeping operations and the increase of their scope in both financial and human resources. The UN cannot and should not take on all international responsibilities, much less try to act as a "world cop." The Security Council should authorize the establishment of each peacekeeping operation and its mandate prudently, taking into account the attitude of the parties concerned as well as the actual capability of the UN. "Biting off more than one can chew," as the saying goes, will only lead to failure.

The UN is an international organization comprised of 185 member states from which it obtains its personnel and funds; it currently lacks an army and equipment. It is therefore a very difficult task for the secretary-general to mobilize resources after a peacekeeping operation has been authorized by the Security Council. There are now more than seventy troop-contributing countries. Overall, these nations have a positive attitude towards peacekeeping operations; some, however, harbor misgivings about contributing resources. The shortage of human and material resources will

be even more severe when there is an increased risk in undertaking peacekeeping operations. Funding peacekeeping operations becomes increasingly difficult when major contributors withhold payment of huge amounts of assessed contributions. According to the 1995 report of the secretary-general on the work of the UN, the arrears of peacekeeping funds as of the end of August 1995, were as high as $3 billion. Inadequate funds have made it difficult for many peacekeeping operations to carry out their mandates.

Peacekeeping operations are comprehensive projects, involving political, legal, military, financial, and managerial elements. The UN is confronted with financial and administrative difficulties and restricted by human and financial resources. However, comparatively speaking, these difficulties are not the fundamental problems affecting operations.

Peacekeeping operations are collective actions taken by the UN in the name of its member states. The key to success lies in truly representing the will and interests of the general membership, and gaining a solid political and legal basis. This is not the only foundation for the existence of peacekeeping operations, but it is also the prerequisite for their further development. Starting from this fundamental premise, the confidence of member states in the UN can be restored if the organization establishes a sound reputation and image of peacekeeping operations, and fulfills its responsibilities and obligations according to the purposes and principles of the Charter. Only in this way can the concrete problems that plague peacekeeping be resolved and conditions created for the sustained development of peacekeeping operations.

UN Peacekeeping: An Introduction

BOUTROS BOUTROS-GHALI

Secretary-General of the United Nations

Understanding our position in the long struggle to deal with war and violent conflict is of the utmost importance. For some three centuries, and especially in the first half of the twentieth century, an unprecedented project of international cooperation moved forward to create systems, institutions, doctrines, and agreements to prevent, contain, and resolve conflict and make the resort to warfare less likely over the long term. The record of achievement over the decades is impressively long: arbitration treaties; the concept of collective security; disarmament conventions; the growth of international law, the International Labor Organization, the League of Nations; the United Nations; the Geneva and Genocide conventions; alliances and coalitions against aggression; the recognition of the role of economic and social development and the protection of human rights; the global drive for democratization; and the recent continuum of global conferences designed to address the causes of deprivation and confrontation. History is bound to regard this record as an epic effort to deal with the age-old scourge of war.

The project for peace was largely eclipsed by the long and dangerous decades of the Cold War. When the world emerged from that contest at the opening of the 1990s, a new opportunity existed to resume progress toward a truly effective system for maintaining international peace and security. The United Nations was at the center of these revived hopes. Mas-

sive responsibilities were given to the UN, and an unprecedentedly wide range of peace operations were undertaken at the request of the organization's member states.

Unavoidably, this effort to build a workable international system must be prolonged and often painful. At turning points in history, after a major conflict would end, years were required before a new and durable cooperative international approach could be achieved. In the past few years of trial and error, a great deal has been learned about conflict and its control in our time. We have seen setbacks and successes alike. There is much more to learn, and more years of effort lie ahead.

But this effort has faltered. Resources have not kept up with mandated responsibilities. Hard choices have been avoided until the window of opportunity for peace has shut. Perfectly rational concepts have been turned on their heads, as in Bosnia, where UN peacekeepers were sent in to deal with an ongoing war, to be followed by NATO combat troops sent as peacekeepers in the wake of a negotiated peace agreement. As a result of the disillusionment created by the manifest difficulties of this effort, we now see an emerging pattern of unwillingness to prevent, contain, or stop a wide range of conflicts, followed by a readiness to step in after the killing is over and the carnage has subsided. The oft-stated conviction that neither the UN nor any one power or group of powers can be the world's policeman seems to be giving way to a practice under which the policeman will only agree to respond after a crime has been committed and the victims have died, fled, or had their lives already devastated.

We now see an emerging pattern of unwillingness to prevent, contain, or stop a wide range of conflicts, followed by a readiness to step in after killing is over and the carnage has subsided.

Thus, we may have come to a threshold. A major choice is before us: Will this disturbing pattern be resolutely resisted? Will the project of peace go forward, or will international stability be returned to the old volatile methods of big-power calculation of balance-of-power politics?

Balance-of-power politics, its volatility aside, may not be much of an option, considering the new face of conflict in this post–Cold War era. Most of the conflicts confronting the world, now and in the future, are unlikely to motivate states to create, in response, a force like that which NATO and its partners have deployed in Bosnia. In any one case, the national interest of any one state or any group of states may not seem directly

affected. All states, however, have a strong interest in preventing a global pattern of violence, in checking the disease of conflict, and in deterring would-be aggressors. The United Nations, unlike any other organization in existence, offers a framework for global burden-sharing for peace. It simply is too valuable to be discarded in the face of difficulty.

A sober and comprehensive assessment of UN peacekeeping as it stands today is urgently needed. The future viability of the United Nations as the world's primary vehicle for advancing the project of peace may be at stake.

Traditional peacekeeping, as developed and practiced between 1948 and 1989, has proved largely effective in stabilizing conflict situations between states to facilitate their search for a political settlement. Its practice rested upon three fundamental principles: the consent and cooperation of parties; impartiality of the peacekeeping forces; and non-use of force except in self-defense. Today, in places from Asia to the Middle East to the Mediterranean, traditional UN peacekeeping continues, and it continues to work well.

Since the end of the Cold War, the United Nations has worked to adapt peacekeeping to situations in which internal (i.e., intrastate) conflicts are being resolved through negotiation processes. This "second generation" of peacekeeping is multifunctional: UN Blue Helmets, who play a central role in the implementation of the military aspects of peacekeeping, are joined by civilian experts who provide international assistance on political, social, economic, humanitarian, and human-rights aspects. The aim is to help societies move from violent conflict toward national reconciliation, reconstruction, and democratic consolidation. This approach shows much promise; remarkable transformations are underway, with UN assistance, in El Salvador, Cambodia, Angola, and Mozambique. It is an approach more far-reaching and expensive than traditional peacekeeping, but, if the need arises, and if the international community is willing to commit its energy and resources, there is no apparent reason why "second-generation" peacekeeping should not prove effective in the future.

The setbacks—and the source of today's confusion—have occurred in cases where peacekeeping operations have been deployed in their traditional form to deal with what were in essence war situations. Cease-fires were not being respected; cooperation of the parties was both limited and sporadic; and perception of impartiality was difficult to maintain as peacekeepers found themselves called to take on limited enforcement tasks for their own and others' protection. In Somalia and Bosnia, the world has seen the dangers of using peacekeeping in such a context and, in particular,

of giving peacekeepers enforcement tasks. Peacekeeping in war situations was seen to actually create more problems, even as it served pressing humanitarian needs and, in the case of Bosnia, helped to contain the conflict.

This suggests that the future of UN peacekeeping—and of our system of collective security as a whole—hinges upon the restoration of its logic and realignment of its concepts. Where a cease-fire is in place, and where the consent and cooperation of the parties is reliable, peacekeepers should be deployed. In a war situation calling for international action, the international community should authorize by Security Council mandate the combat forces needed to deal with it; the United Nations at present has no capacity to undertake enforcement operations, except on a very limited scale. The peace-enforcement action could then, if necessary, be followed by peacekeeping. This was the course of the international involvement in Haiti, which has so far been successful. The course followed by the international community in Bosnia was precisely the opposite.

In Somalia and Bosnia, the world has seen the dangers of using peacekeeping and, in particular, of giving peacekeepers enforcement tasks.

What if there is no will on the part of the international community to intervene militarily even when enforcement is clearly required? When no state or group of states is willing to send combat troops, they may nonetheless wish to do something—so they may offer humanitarian assistance. But in hostile situations, such assistance may need to be secured, and operations to secure humanitarian assistance may open the door to escalation and deeper involvement in the crisis.

There should be a strong presumption that, when faced with a war situation that calls for international action, the international community should either send combat troops or no troops at all. Peacekeeping in such a case is not a workable alternative. It is buying time at a cost the world cannot afford to pay. The conflict will not be addressed effectively at the earliest stage, before it takes a greater toll and becomes more difficult, dangerous, and costly to stop. Peacekeepers and UN personnel will be exposed to the risks that half-measures entail. And peacekeeping itself will suffer from its inappropriate application—an instrument abused, it may itself become unusable.

The intellectual and moral task before us, therefore, is to address the question of what to do in order to deal with those cases that lie between an

agreed cease-fire and the kind of wars that will lead major powers to step in quickly and effectively. The choice may lie between doing nothing as the conflict rages on the one hand, or on the other, supporting some form of limited UN or UN-authorized rapid deployment force capable of being called into action when no single nation or group would consider it a matter of national interest—though it would clearly be in the international interest to deal with the violence.

This difficult choice underscores the need for enhanced efforts at preventive diplomacy. It is evidently better to prevent conflicts through early warning, quiet diplomacy, and, in some cases, preventive deployment than to have to undertake major politico-military efforts to resolve them after they have broken out. The United Nations Preventive Deployment Force in the former Yugoslav Republic of Macedonia, the first of its kind in UN history, has shown that where there is political will, a clear mandate and purpose, and the necessary commitment on the part of all parties concerned, preventive deployment can be efficient and effective.

Taken together, these issues prove that we have reached a turning point in world affairs. In the United Nations, the world has the structures and mechanisms necessary for the maintenance of international peace and security. What is needed is renewed intellectual energy and political support to put this machinery to effective use in the new world environment that all states and peoples have entered. I therefore welcome this collection of essays on UN peacekeeping, with the hope that its wide dissemination will generate new momentum for this most essential human project—the project for peace.

J. Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of Ecowas in Liberia and Sierra Leone'

HUMANITARIAN INTERVENTION BY REGIONAL ACTORS IN INTERNAL CONFLICTS: THE CASES OF ECOWAS IN LIBERIA AND SIERRA LEONE

Jeremy Levitt*

INTRODUCTION

Since the end of the cold war it appears that customary international law1 has taken a normative legal shift from traditional prohibitions against forcible intervention in the internal affairs of states, toward the recognition of a right to humanitarian intervention2 by groups of states and regional actors3 in internal conflicts.4 Although a role for regional organizations in hu-

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1. Customary international law can be defined as: "[a] general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (2) (1987); Moreover, to ascertain customary international law, judges resort to "the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators ...." The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900).

2. Humanitarian intervention has been defined as: "[T]he justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrarily and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice." ELLERY C. STOWELL, INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE 349 (1931); For an admirable delineation of the history of humanitarian intervention, see generally FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1996).

3. A regional actor may be defined as any regional organization, agency, entity or arrangement made up of and empowered by states to represent their interests, whether economic, political, military, social, cultural or religious.

4. For an exemplary article discussing U.N. action in Iraq, Somalia, Haiti, Rwanda and Bosnia, arguing that "international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention - of military measures authorized by the Security Council for the purpose of remedying serious human rights viola-

manitarian intervention has been established, until the advent of the Economic Community of West African States (ECOWAS) missions in Liberia and Sierra Leone,5 states' practices suggested that prior approval by the Security Council was a prerequisite to any humanitarian intervention.6 However, for the first time the ECOWAS Cease-fire Monitoring Group (ECOMOG) missions in Liberia and Sierra Leone provide two clear examples of unilateral humanitarian intervention by a regional actor that enjoyed support from the whole of the international community.7 Likewise, for the first time there exists contemporary examples of popular humanitarian interventions that have derived their legal basis from customary international

tions," see Fernando R. Tes6n, Collective Humanitarian Intervention, 17 MICH. J. INT'L. L. 323, 324 (1996). See also Captain Davis L. Brown II, USAF, The Role Of Regional Organizations In Stopping Civil Wars, 41 A.F.L. REV. 235, (1997) (citing David Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 191, 157-207 (Lori Fisler Damrosch, ed., 1993) ("as regional conflicts proliferate, pressure is likely to build on regional

organizations to assist or even to supplant the United Nations in handling at least some of these crisis.")); W. Michael Reisman, Humanitarian Intervention and Fledgling Democracies, 18 FORDHAM INT'L. L.J. 794 (1995); Richard Falk, The Complexities of Humanitarian Intervention: A New World Order Challenge, 17 MICH. J. INT'L L. 491,503-04 (1996).

5. ECOWAS was established under the Treaty of Lagos in 1975. ECOWAS Executive Secretariat, Abuja, Nigeria, Treaty of the Economic Community of West African States (ECOWAS), 28 May 1975. See Wippman, supra note 4, at 154. ECOWAS has taken enforcement action in both Liberia and Sierra Leone through its "Cease-firing Monitoring Group," commonly referred to as ECOMOG. See id. at 177. For those who are skeptical as to whether ECOWAS is a regional actor (agency or arrangement) as enumerated under Chapter VIII Article 53 of the U.N. Charter, see S.C. Res. 1132, U.N. SCOR, 3822th mtg., U.N.Doc. S/RES/1132 (1997), which calls for a petroleum and arms embargo against Sierra Leone, and states, "[aicting also under Chapter VIII of the Charter of the United Nations, authorizes ECOWAS ... to ensure strict implementation of the provisions of this resolution ... by halting inward maritime shipping in order to inspect and verify cargoes and destinations ...." Id. If ECOWAS were not recognized as a "regional agency or arrangement," the U.N. would not have authorized it to take enforcement action in Liberia and Sierra Leone under Chapter VIII of the U.N. Charter. Hence, if the U.N. recognizes ECOWAS as a "regional actor," arguments to the contrary would appear moot. See Michael Akehurst, Enforcement Action Regional Agencies, with Special Reference to the Organization of American States. 42 BRIT. Y.B. INT'L. L. 175, 177-83 (1967) (discussing what constitutes a regional agency). Akehurst reports that "[tihe relationship between the United Nations and regional arrangements was second only to the question of voting procedure in the Security Council as a source of bitter argument at the San Francisco Conference, which indeed at one time came close to breaking up over regional arrangements." Id. at 175.

6. See Brown, supra note 4, at 275.

7. The U.N. Security Council legitimized the legality of both ECOWAS interventions by adopting resolutions under Chapter VII of the U.N. Charter that made mandatory previous ECOWAS embargoes - the Security Council sanctioned petroleum and arms embargoes against both Liberia (see S.C. Res. 788, U.N. SCOR, 3138th mtg., U.N.Doc. S/RES/788 (1992)) and Sierra Leone (see S.C. Res. 1132, U.N. SCOR, 3822th mtg.,

U.N.Doc. S/RES/1132 (1997)). Further, under S.C. Res. 866, for the first time the U.N. co-deployed forces with an organization (ECOMOG-Liberia) that was already operational. See S.C. Res. 866, U.N. SCOR, 3281st mtg., U.N.Doc. S/RES/866 (1993).

law, rather than the U.N. Charter.8 The ECOWAS interventions in Liberia and Sierra Leone, and the Inter-African Mission to Monitor the Implementation of the Bangui Agreements (MISAB) in the Central African Republic (CAR) are cases in point.9 As a result, the customary international law doctrine of humanitarian intervention seems to have been "revived."[10].

For purposes of this article, "humanitarian intervention" can be taken to mean: Intervention in a state involving the use of force (U.N. action in Iraq and Somalia or ECOWAS action in Liberia and Sierra Leone) or threat of force (U.N. action in Haiti), where the intervenor deploys armed forces and, at the least, makes clear that it is willing to use force if its operation is resisted - as it attempts to alleviate conditions in which a substantial part of the population of a state is threatened with death or suffering on a grand scale."

Presently, customary international law appears to recognize four exceptions to the principle of non-intervention in the domestic or internal affairs of states: (1) when a de jure government requests or consents to intervention; (2) when a group of states or a regional actor invokes a right to humanitarian intervention; (3) when a state acts in self-defense; and (4) counter-intervention by a state to offset an illegal prior intervention by another state .

Moreover, in consonance with the above exceptions, international law

8. See Report of the Secretary General Pursuant To Resolution 1136 (1997) Concerning The Situation In the Central African Republic, 53rd. sess., U.N. SCOR, U.N. Doc. S/1998/61 (1998).

9. See id. On January 31, 1997, the Heads of State of Gabon, Burkina Faso, Chad and Mali established MISAB to restore "peace and security in the Central African Republic by monitoring the implementation of the Bangui Agreements and conducting operations to disarm the former rebels, the militia and all other unlawfully armed persons." Id. According to the United Nations, on February 8, 1997, "MISAB was deployed in Bangui, comprising a total of some 800 troops from Burkina Faso, Chad, Gabon and Mali; and later from Senegal and Togo, under the military command of Gabon and with logistical and financial support of France." Id.

10. Yet, many commentators remain steadfast in their non-interventionist trenches, maintaining that international law does not recognize any right to humanitarian intervention. See L. OPPENHEIM, INTERNATIONAL LAW § 134, at 305 (Lauterpacht ed. 8th ed. 1955); see also Ulrich Beyerlin, Humanitarian Intervention, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 211, 212 (Rudolf Dolzer et al., eds. 1982). Other commentators argue that at the very most, enforcement action may only be taken under the authority of the United Nations. See generally, R. Higgins, Peace and Security Achievements and Failures, 6 EUR. J. INT'L L. 445 (1995); John Quigley, The "Privatization" of Security Council Enforcement Action: Threat to Multilateralism, 17 MICH. J. INT'L. L. 249, 249-50 (1995-96).

11. See Christopher Greenwood, Is there a right to humanitarian intervention?, 49 THE WORLD TODAY 34 (1993).

12. See David Wippman, Change Continuity in Legal Justifications for Military Intervention in Internal Conflicts, 27 COLUM. HUM. RTS. L. REv. 425,446 (1995-96). However, Wippman states that some of these justifications, at least in particular applications, are not without controversy. See id.

seems to recognize the following four types of intervention: (1) unilateral intervention by a state or group of states acting on their own initiative (United States and allies in Iraq, MISAB in the CAR and Nigeria in Sierra Leone); (2) unilateral intervention by a regional actor acting on its own initiative (ECOWAS in Liberia and Sierra Leone); (3) intervention authorized by the United Nations but not taken by it (United States in Somalia and Haiti, and France and Senegal in Rwanda); and (4) intervention taken by the United Nations (Liberia, Yugoslavia and the CAR). The foregoing article is primarily concerned with unilateral intervention as described in (2) above. But, in an attempt to determine when the international community condones humanitarian intervention, reference will be made to the other types of intervention.

The legal basis for unilateral intervention is different from an intervention taken under the authority of the United Nations. On this point Christopher Greenwood comments:

> Intervention might be the unilateral action of a state or group of allies or an operation conducted under the authority of the United Nations. But the legal issues would be different. United Nations intervention would have to be based on powers conferred by the U.N. Charter, whereas any right of unilateral intervention could only be derived from customary international law.13

Specifically, it may be said that an intervention which falls under either (1) or (2) above derives its legal basis from customary international law, whereas an intervention under (3) and (4) derives its basis from Chapter VII of the U.N. Charter.

This article concludes that today customary international law seems to provide for an exception to the international law prohibition against unilateral intervention in the domestic or internal affairs of states."' The international community seems to be witnessing the initial stages of a shift in the law de lege ferenda, and sanctioning unilateral humanitarian intervention by groups of states or regional actors in internal conflicts.'5 The law de lege lata appears to permit unilateral humanitarian intervention by groups of states or regional actors in three instances: (1) when there are human rights abuses within a state that are so egregious as to violate the jus cogens norms of international law;16 (2) when a state has collapsed and is withering into a state

13. Greenwood, supra note 11, at 34.

14. See Report on U.N. Decade of International Law, G.A. Res. 50, U.N. GAOR, 15th Sess., U.N. Doc. A/368 (1995). The resolution calls on member states to promote acceptance of and respect for the principles of international law, and encourage its progressive development.

15. Unilateral humanitarian intervention can be taken to mean humanitarian intervention by a group of states or regional actor which has its legal basis in customary international law rather than the U.N. Charter. The term de lege ferenda is "the law as it may be, or should be, in the future" and the term de lege lata is "the law as it currently stands."

16. A jus cogens norm, also known as a "peremptory norm" of international law "is a norm accepted and recognized by the international community of states as a whole as a

of anarchy;17 and (3) to safeguard democracy when a democratic government has been violently and illegally dislodged against the will of its domestic population."8 The above should be viewed as the normative criteria on which humanitarian intervention should be based.'9 Within this context, it is impor-

norm from which no derogation is permitted and from which can be modified only by a subsequent norm of general character." Vienna Convention of the Law of Treaties, May 23, 1969, Art. 53, 1155 U.N.T.S, 332, 344; Klock v. Cain, 813 F. Supp. 1430, 1433 n.8 (C.D. Cal. 1993) (adopting Vienna Convention's definition of jus cogens). Further, "sitting atop the hierarchy of international law, jus cogens norms enjoy the greatest clout, preempting both conflicting treaties and customary international law." W. D. Verwey, Humanitarian Intervention under International Law, 32 NETH. INT'L L. REV. 357, 418 (1985); see Ved P. Nanda, Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti-Revisiting the Validity of Humanitarian Intervention Under International Law, 20 DENV. J. INT'L L. & POL'Y 305, 310 (1992); Prinz v. Federal Republic of Germany, 26 F. 3d 1166, 1179 (D.C. Cir. 1994); United States v. Alfried Krupp, reprinted in 10 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW 1395 (1950). In this context, the Nuremberg Trials made clear that "'to prepare, incite, or wage war of aggression ... to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such war, or to exterminate, enslave, or deport civilian populations, is an international crime."' Prinz, 26 F. 3d at 1174 (quoting R. Jackson, Final Report to the President on the Nuremberg Trials (Oct. 7, 1946), cited in R. JACKSON, THE NUREMBERG CASE XIV-XV (1971) (emphasis added)). Thus, with regard to the criteria mentioned above, humanitarian intervention should be legally justified when groups of states or regional actors attempt to stop or prevent a state from violating the jus cogens norms as proscribed by Nuremberg. In such cases, states should be expected to fulfill their obligations erga omnes and intervene. See id.

17. Anarchy has been defined as "having no ruler ... absence of government ... a state of lawlessness or political disorder due to the absence of governmental authority." WEBSTER'S NEW COLLEGIATE DICTIONARY 83 (9th ed.1988). Accordingly, the character of the state during the conflicts in Rwanda, Somalia and Liberia epitomize this definition. Although some commentators have referred to such states as failed states, the author believes that collapsed states is the more accurate term. The former signifies a permanent state of being whereas the latter signals a temporary state. See Brown, supra note 4, at 272-73.

18. See generally, Lois Fielding, Taking the next Step in the Development of the New Human Rights: The Emerging Right of Humanitarian Intervention Assistance to Restore Democracy, 5 DUKE J. COMP. & INT'L L. 329 (1995). In this instance, collective forcible intervention may be meant to avert deadly conflict (Haiti and Sierra Leone), or restore democracy in a "collapsed state" (Somalia). The United Nations' threat of force against the junta in Haiti may have prevented violent conflict between pro-Aristide supporters and the military junta. Similarly, ECOMOG action in Sierra Leone appears to have prevented internal deadly conflict between the civilian population and military junta. Nevertheless, it can be argued that this criterion falls outside the scope of humanitarian intervention, and may be better associated with the doctrine of self-determination. However, the humanitarian crises that stem from such circumstances propels it into the humanitarian intervention theatre. See Reisman, supra note 4, at 794.

19. These criteria are only concerned with the "substantive basis" justifying "entry" into a sovereign state. For other sources enumerating substantive and "procedural" criteria, see Richard B. Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in LAW AND CIVIL WAR IN THE MODERN WORLD 229, 248

(John Norton Moore ed. 1974); Richard B. Lillich, Forcible Self-Help by States to Protect Human Rights, 53 IOWA L. REV. 325, 346-51 (1967); Richard B. Lillich Intervention to Protect Human Rights, 15 MCGILL L.J. 204, 218 (1969); John Norton Moore, The Control

tant to note that these criteria should be seen as specific guidelines rather than rigid rules and, as the cases of Sierra Leone and the CAR demonstrate, current trends in international law and U.N. practice would seem to allow for some flexibility.

This notion is supported by: (1) the United Nations' and states' unprecedented action20 and support for the ECOWAS "peace enforcement activities" in Liberia and presently Sierra Leone;21 and (2) recent and bold Chapter VII action taken by the Security Council with regard to Iraq, 3 Somalia,' Yugoslavia,2n Rwanda,26 Haiti,27 and the CAR.' In order to demon-

of Foreign Intervention in Internal Conflict, 9 VA. J. INT'L L. 205, 264 (1969); Hungdah Chiu, Communist China's Attitude toward the United Nation: A Legal Analysis, 62 AM. J. INT'L L. 20,39-40 (1968).

20. U.N. support for ECOWAS' peace enforcement activities in Liberia is best illustrated in Security Council Resolution 866, which states "that this would be the first peacekeeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization, in this case" (emphasis added). S.C. Res. 866, U.N. SCOR, 3281st mtg., U.N.Doc. S/RES/866 (1993). The resolution established the United Nations Observer Mission in Liberia (UNOMIL), which co-deployed with ECOMOG.

21. According to Akehurst:

> The distinction between U.N. 'enforcement action' and 'peacekeeping' has increasingly become blurred, due to new kinds of operations (often labeled 'second generation peacekeeping' or 'mixed peacekeeping' which may include some enforcement elements). Indeed, the terminology concerning U.N. peacekeeping has recently become rather confusing.

AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 416, (Peter Malanczuk ed., 1997).

Henceforth, for purposes of this article, "peace enforcement" means proportionate forcible military action, through deployment of forces, to threaten or engage an individual, group, entity or government, to comply with lawful directives as proscribed by international law.

22. Chapter VII Article 39 action refers to "[a]ction with respect to threats to the peace, breaches of the peace, and acts of aggression." U.N. CHARTER art. 39. para. 1. Arguably, the Security Council authorized Chapter VII Article 42 action to varying degrees in each case mentioned below. See infra notes 22-27.

23. See S.C. Res. 678., U.N. SCOR, 2963rd. mtg., U.N.Doc. S/RES/678 (1990) (authorizing collective forcible military intervention to propel Iraqi forces from Kuwait); See also S.C. Res. 688, U.N. SCOR, 2982nd mtg., U.N.Doc. S/RES/688 (1991) (calling for an end to Iraqi repression, and insisting that Iraq "allow immediate access by international humanitarian organizations" to provide relief.).

24. See S.C. Res. 767, U.N. SCOR, 3101st. mtg., U.N.Doc. S/RES/767 (1992) (deciding that "the situation in Somalia constitutes a threat to international peace and security."); See also S.C. Res. 794, U.N. SCOR, 3145th mtg., U.N.Doc. S/RES/794 (1992) (authorizing a U.S.-led military force to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.").

25. See S.C. Res. 770, U.N. SCOR, 3106th mtg., U.N.Doc. S/RES/770 (1992) (empowering states "to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the U.N. the delivery.. .of humanitarian assistance ... in ... Bosnia-Herzegovina."); see also S.C.Res 816, U.N. SCOR,

3191st. mtg., U.N.Doc. S/RES/816 (1993) (authorizing member states to take "all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of

strate when the international community appears to support unilateral humanitarian intervention, the above cases will be discussed; the ECOWAS-Liberian intervention will be discussed in Part II, the United Nations and MISAB interventions in Part III, and the Nigeria and ECOWAS interventions in Sierra Leone in Part IV.

Since ECOWAS is comprised of sixteen sovereign states, and the ECOMOG operations in Liberia and Sierra Leone were supported by the majority of independent states,29 it can be said that the interventions were supported by the opinio juris and practice of states. It is the practice of states that create international law. While international organizations such as the United Nations may influence international law, only states may bring it into being. States' practice only exists when there is a consistent pattern of commonality in action among them. For example, both Togo's contribution of forces, and the United States' and Britain's moral and financial support for ECOMOG may demonstrate such a pattern.

I. INTERNATIONAL LEGAL ASPECTS OF HUMANITARIAN INTERVENTION

There is a general consensus among scholars that "international law has

further violation to ensure compliance with the ban on flights.") This resolution authorized the North Atlantic Treaty Organization (NATO) to commence air strikes against Bosnian Serb positions. See id.

26. See S.C. Res. 929, U.N. SCOR, 3392nd. mtg., U.N.Doc. S/RES/929 (1994) (authorizing France to "use all necessary means" to protect and provide humanitarian relief to Rwandan civilians).

27. See S.C Res. 875, U.N. SCOR, 3293rd mtg., U.N.Doc. S/RES/875 (1993) (authorizing member states to take military action to enforce sanctions.); see also S.C. Res. 940, U.N. SCOR, 3413th mtg., U.N.Doc.S/RES/940 (1994) (empowering member states "to form a multinational force ... [and] ... use all necessary means to facilitate the departure from Haiti of the military leadership.").

28. See S.C. Res. 1125, U.N. SCOR, 3808th mtg., U.N.Doc. S/RES/1125 (1997) (authorizing member states participating in MISAB to "ensure the security and freedom of movement of their personnel."); see also S.C. Res. 1159, U.N. SCOR, 3867th mtg., U.N.Doc.S/RES/1159 (1998) (establishing a United Nations Mission in the Central African Republic (MINURCA) to primarily assist in maintaining peace, security, stability, law and order, and protecting key installations in Bangui. This marks the second time that the U.N. has co-deployed a peace-keeping force with an operation already underway, Liberia being the first.).

29. Support for ECOWAS was and is evidenced by the actions of independent states, and states action through the United Nations. Interview with Dr. Simon D. Harkin, Head of Pan-African Policy and Resources Staff - British Foreign and Commonwealth Office (June 1998); see also U.S. Department of State Office of the Spokesman Press Statement, Press Statement by James Foley, Deputy Spokesman, July 24, 1997; see generally, Regina C. Brown, Deputy Assistant Secretary of State for African Affairs, Is There Still a Foreign Policy of the U.S. Toward Africa?, at the 39th International Seminar for Diplomats, Salzburg, Austria (Aug. 2, 1996).

long treated internal conflict as a matter of domestic jurisdiction, to be decided solely by the people of the affected state in keeping with their right to order their own affairs as they see fit."'30 Thus, international law does not prohibit revolution, civil war or civil strife, i.e. rebellion,31 nor does it authorize them, as there is no legal right of rebellion. It is simply a liberty. Stated differently, international law is neutral on the issue.

"Foreign intervention in internal conflicts is more the rule than the exception.",32 The ECOWAS, U.N., MISAB and Nigerian interventions referred to above evidence this position, demarcating a normative legal shift toward international recognition of a right to unilateral humanitarian intervention by regional actors in internal conflicts.

A. Humanitarian Intervention

The international community seems to agree that states should not be allowed to hide behind the cloak of "sovereignty" or "domestic jurisdiction" when committing grave human rights violations. Further, it seems to condone intervention to avert anarchy when a state has collapsed, or safeguard democracy when a de jure government has been violently and illegally dislodged against the volition of its domestic population. In these circumstances, the international community appears to support humanitarian intervention. Certainly, U.N. action since 1990 supports this notion. For example, the United Nations Security Council "has authorized military intervention to end repression of the Kurds in Iraq, famine in Somalia, ethnic cleansing in Bosnia, and genocide in Rwanda. Even the overthrow of the democratic government of Haiti sufficed to prompt the Security Council to authorize military intervention.",33 In light of the above, Tes6n argues:

> [I]international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention of military measures authorized by the Security Council for the purpose of remedying serious human rights violations. While traditionally the only ground for collective military action has been the need to respond to breaches of the peace, especially aggression, the international community now has accepted a norm that allows collective humanitarian intervention to respond to serious human rights abuses.'4

It is debatable whether the international community has accepted a "[norm] that allows for collective humanitarian intervention to alleviate seri-

30. Wippman, supra note 12, at 435. See U.N. CHARTER, art. 2(4).

31. See Wippman, supra note 12, at 435; see also Oscar Schachter, International Law: The Right of States to Use Armed Force, 82 MICH. L. REv. 1620, 1641 (1984).

32. Wippman, supra note 12, at 436.

33. Id. at 462-63 (emphasis added).

34. Tes6n, supra note 4, at 324.

ous human rights abuses.",31 What one country views as "serious" another may not; thus in the legal sense, such a standard is far too ambiguous. In this context, humanitarian intervention should only be justified when responding to human rights abuses that are so grave that they violate the jus cogens norms of international law (to persecute, oppress, exterminate, enslave or deport civilian populations).

In the Barcelona Traction case in 1970, the International Court of Justice stated that certain basic human rights, such as the protection from genocide, slavery and racial discrimination, are obligations erga omnes.36 In addition, referring to Article 19 of the International Law Commission's U.N. Draft Articles on State Responsibility, "a serious breach on a widespread scale of the international obligations of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid," is an "international crime."37 Likewise, the works of the Nuremberg, Yugoslavian and Rwandan Tribunals evidence that these criteria have been accepted as non-derogable norms of international law.

Further, consistent with ECOWAS action in Liberia and Sierra Leone, MISAB action in the CAR, and U.N. action in Liberia, Somalia, Yugoslavia, Rwanda, Haiti and the CAR, today, when a government collapses or has been violently and illegally dislodged against the will of its domestic population, the international community seems to have accepted a norm that permits unilateral humanitarian intervention to forestall grave human rights abuses, to avert a state's descent into anarchy, and to safeguard democracy.

II. ECOWAS AND HUMANITARIAN INTERVENTION: THE CASE OF LIBERIA

Any contemporary discussion regarding the validity or existence of the customary international law doctrine of humanitarian intervention requires a discussion of the quintessential case of Liberia. The ECOMOG mission in Liberia marks the first time the international community as a whole has supported unilateral humanitarian intervention by a group of states (regional actors) in a purely domestic conflict.

The following sections will provide the historical events which led to the ECOWAS-ECOMOG intervention in 1991; discuss the legality of intervention by ECOWAS-ECOMOG under international law; and determine whether ECOWAS was entitled to invoke a right to humanitarian intervention.

35. Id. (emphasis added).

36. See Barcelona Traction Case (Belgium v. Spain), 1970 I.C.J. Rep. 3 para. 33-34 (Second Phase).

37. AKEHURST, supra note 20, at 59-60.

A. Background

In 1980, Master Sergeant Samuel Kanyon Doe led a successful coup d'etat38 that ended over 153 years of Americo-Liberian rule. Initially, Doe appeared to have the support of the majority of Liberia's domestic population, who saw him as an agent for progressive change. After taking power, he promised Liberians that a new constitution would be implemented in 1986, ending rule by martial law.39 However, Doe failed to keep his promise, resulting in mass political unrest.

Like most military dictators, Doe was ill-equipped to be head of state. He was an army staff sergeant, not a politician. Not surprisingly, during Doe's reign, the political and economic infrastructure of Liberia rapidly decayed. By 1989, political unrest matured into civil insurrection, leading to an eight-year civil war.'

The Liberian Civil War began in 1989, when Charles Taylor,4" Liberia's current President,42 and a group of so-called "dissidents" launched a small scale attack on security personnel in Nimba County (located on the Liberian-C6te d'Ivoire border), and advanced toward the capital city of Monrovia.4'3 The group led by Taylor came to be known as the National Patriotic Front of Liberia (NPLF). The NPLF grew quickly, as politically disillusioned members of the Mano and Gio ethnic groups joined." Doe's American-backed regime, known for its violent and repressive military tactics, was crushed by NPLF fighters. As a result, by May 1990, Taylor's NPLF controlled more territory in Liberia than Doe's regime, with the exception of

38. Doe belonged to the Khran ethnic group.

39. Doe relied heavily on Khran support to keep himself in power. He noticeably favored his group, giving them the majority of government posts.

40. By 1996, it is estimated that over 200,000 people perished during the war, leaving 1.2 million people internally displaced. Moreover, it is estimated that over 750,000 people fled the country. Given that Liberia's prewar population was approximately 2.8 million, 14% perished. Comparatively, this would be similar to 37 million American citizens dying. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Country Report on Human Rights Practices for 1996 (1997).

41. Former Liberian Director-General of the General Services Agency (GSA) under Doe's regime who, after having been charged with embezzlement in Liberia, fled to the U.S., only to be arrested in Massachusetts. While awaiting extradition to Liberia, he escaped from jail. See Interview by Baffour Ankomah, Chief Editor of New African; see also Interview with Charles Taylor, President of Liberia, in Gbarnga, Liberia, 1-17 (July 30, 1992).

42. President Charles Taylor was inaugurated on August 2, 1997. See Final Report of the Secretary-General On The United Nations Observer Mission In Liberia, 52nd sess., U.N. SCOR, S/1997/712 (1997).

43. See BBC Monitoring Report, 4 January 1990, Liberia: Curfew in Nimba County Following Alleged Coup, 2 January 1990, reprinted in 6 REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 32-33 (M. Weller, ed.) (1994). [hereinafter THE LIBERIAN CRISIS].

44. See THE LIBERIAN CRISIS, supra note 43, at xix. Taylor's NPLF included members from the majority of Liberia's ethnic groups.

Monrovia.45 Around this time, one of Taylor's senior commanders, Prince Yormie Johnson, broke from the NPLF and formed his own group, the Independent National Patriotic Front of Liberia (INPFL). The INPFL seemingly had no concrete objective other than to wage war against the NPLF and the Government of Liberia. Johnson's split from Taylor was only a minor setback for the NPLF, which continued its campaign.

Doe's American-backed army suffered large losses, as it was defeated in nearly every engagement. Doe, facing certain defeat, made unsuccessful appeals for assistance to the people of Liberia and the U.S. Government. Disgruntled and impaired by the collapse of his government, Doe appealed to ECOWAS to introduce a "[p]eace-keeping force into Liberia to forestall increasing terror and tension ...."46

Since ECOWAS and the Organization of African Unity (OAU) were not able to mediate a peaceful end to the conflict,47 on August 7, 1990, the ECOWAS Standing Mediation Committee decided to establish an ECOWAS Cease-fire Monitoring Group (ECOMOG) for Liberia.48 ECOWAS created ECOMOG to halt the "wanton destruction of human life and property ... [and] ... massive damage ... being caused by the armed conflict to the stability and survival of the entire Liberian nation."'9 ECOMOG was mandated to "restor[e] law and order to create the necessary conditions for free and fair elections ...."'o On August 27, 1990, ECOMOG forces landed in Liberia and immediately came under attack by NPLF forces." In response, ECOMOG forces "fought back with mortars, artillery and automatic weapons."52

On August 29, 1990, in an attempt to end pandemonium in Liberia, participants at the National Conference of All Liberian Political Parties, Patriotic Fronts, Interest Groups and Concerned Citizens in Banjul, Gambia created an Interim Government of Liberia and elected Dr. Amos Sawyer as

45. Monrovia is the capital of Liberia. It was named after U.S. President James Monroe.

46. Letter addressed by President Samuel K. Doe to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee, 14 July 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 60.

47. See THE LIBERIAN CRISIS, supra note 43, at 38-39, 57-59, 63, 65 (providing examples of these failed efforts).

48. See ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90, on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, Banjul, Republic of Gambia, 7 August 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 67, 71. The ECOWAS Standing Mediation Committee included representatives from the Gambia, Ghana, Guinea, Nigeria, Sierra Leone, Mali and Togo.

49. Id. at 67.

50. Id. at 68.

51. See BBC Monitoring Report, 27 August 1990, Report: ECOMOG Force Lands; Met by Prince Johnson; Clash with NPLF, 24 August 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 87.

52. Id.

Interim President." Participants at the conference stated that they created the new government because of the "total breakdown of law and order, the prevailing state of war, the massive loss of life, the displacement of the citizens, and the collapse of the government of President Samuel K. Doe."'5

Charles Taylor's NPLF refused to attend the Banjul Conference, and did not recognize the Interim Government." On September 9, 1990, approximately one week after the "Peace Conference," Prince Johnson's guerrillas ambushed and kidnapped Doe at the ECOWAS headquarters in Monrovia, and murdered him at the NPLF's Caldwell Base in the Barclay center. .56

B. ECOWAS-ECOMOG and the Legality of Intervention

This section will discuss the legality of the ECOWAS intervention in Liberia. Specifically, it will concentrate on the validity of the intervention under customary international law and the post de jure authentication of the operation by the United Nations Security Council.

If it can be shown that ECOWAS' "purpose" for intervention was to support Doe's regime, the intervention would be deemed illegal under cus-

53. See Interim Government of National Unity of Liberia, Final Communiqug of the National Conference of All Liberian Parties, Patriotic Fronts, Interest Groups and Concerned Citizens, Banjul, Republic of Gambia, 29 August 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 89. However, it cannot be said that the "interim government" was the de jure government of Liberia because the "de facto" ruler of Liberia (Charles Taylor) did not recognize the "new government," and at this juncture, nor did the international community. Moreover, Taylor did not allow the interim government to function as a central authority. See United States State Department, Regular Briefing by Richard Boucher, 11 September, 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 95; Report: Taylor Condemns "Foreign Mercenaries"; Banjul Decision on Interim Rule, 2 September, 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 94.

54. Interim Government of National Unity of Liberia, Final Communiqug of the National Conference of All Liberian Parties, Patriotic Fronts, Interest Groups and Concerned Citizens, Banjul, Republic of Gambia, 29 August 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 89. The Conference participants were as follows: the Liberia Action Party, Liberian People's Party, Unity Party, United Peoples Party, Liberia Unification Party, National Democratic Party of Liberia, Independent National Patriotic Front of Liberia, Liberian Professional Business Association, Press Union of Liberia, Bong County Associations in the Americas, Union of Liberian Artists and Concerned Women of Liberia, Higher Education Association, United Nimba Citizens Council, Association for Constitutional Democracy in Liberia, Concerned Citizens, Front for Popular Democracy and Inter-Faith Mediation Committee of Liberia. See id.

55. See BBC Monitoring Report, 31 August 1990, Taylor Refuses to Attend Banjul Meeting; Johnson Delegation, 29 August 1990, reprinted in THE LIBERIAN CRISIS supra note, 43 at 88, 95.

56. See BBC Monitoring Report, 11 September 1990, Report: President Samuel Doe Wounded and Captured by Prince Johnson's Forces 9 September 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 97; BBC Monitoring Report, 13 September 1990, Report: Reaction to Reported Death of President Doe, 11 September 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 98.

tomary international law." Under international law, regional actors are limited, as they may not possess any powers beyond those of their member states. Hence, a regional actor may not intervene in any conflict that its member states would be forbidden to enter. On this point Oscar Schachter remarks,

> [n]o state today would deny the basic principle that the people of a nation have the right, under international law, to decide for themselves what kind of government they want, and that this includes the right to revolt and to carry on armed conflict between competing groups. For a foreign state [or regional actor] to support, with Force one side or the other in an internal conflict, is to deprive the people in some measure of the right to decide the issue by themselves. It is, in terms of article 2(4), a use of force against the political independence of the state engaged in civil war.58

Presently, there is little evidence to show that ECOWAS "intended" to militarily support Doe's "regime."59 Had the ECOWAS leadership wanted to kill Taylor, there was ample opportunity. Unlike Western advisors in the Congo, ECOMOG activities in Liberia seemed legitimate.60 Perhaps, the fact that Charles Taylor is currently President of Liberia best evidences this assertion. Hence, arguing that the ECOWAS intervention was credible and objective, Wippman states:

> Nigeria did not simply impose its will on Liberia. It did not intervene unilaterally, or at a point when Doe's regime might still have been salvageable. More importantly, Nigeria has frequently had to compromise on ECOMOG's goals and tactics in order to maintain a consensus within ECOWAS for continued involvement within Liberia. But for this need to compromise, ECOMOG might well have overrun Taylor's forces in August 1990. Indeed, many of the fits and starts of the ECOWAS approach to Liberia - the on again, off again economic sanctions and the repeated efforts to accommodate Taylor despite his string of broken promises - demonstrate that ECOMOG had indeed been a Community enterprise.61

Once the situation in Liberia deteriorated to a point where mediation efforts were fruitless, "[s]enior Liberian politicians and interests groups ... openly called for U.S. marines to stop the fighting,",62 however, it was to no

57. See Richard A. Falk, International law and the United States Role in the Vietnam War, 75 YALE L. J. 1122, 1127 (1966).

58. Schachter, supra note 31, at 1641.

59. See Wippman, supra note 4, at 192. However, it is true that between 1989-90, "Nigeria" (not ECOWAS) provided political, economic and military supplies to Doe's regime.

60. See id.

61. Id. (emphasis added). Perchance, Nigeria's commitment to consensus can serve as an example for other countries, specifically the United States, who over time have demonstrated an uncanny ability to repudiate the will of the international community by taking unilateral enforcement action.

62. Id. at 164-65.

avail.63 The United States viewed the Liberian conflict as an internal affair, to be solved by Liberians themselves.' Certainly, the United States did not use an internal affairs test when it intervened in the internal conflicts in the Philippines, Nicaragua, Panama, Iraq, Yugoslavia, Somalia and Haiti, albeit the latter two with U.N. authorization. Apparently, Liberia's foreign policy stock devalued in the post-Cold War era. Yet, according to Herman J. Cohen, former U.S. Assistant Secretary of State for African Affairs, between 1980 and 1990, Doe's regime received $67 million in military assistance from the U.S. government, not including an estimated $1.5 million for the fiscal year 1991.6'

Initially, like the United States, the United Nations did not intervene in the Liberian conflict. Wippman states that this was partly due to opposition by C6te d'Ivoire, which was sympathetic to Taylor, and Ethiopia and Zaire, which did not want to set an "intrusive" precedent.6 As history has shown, had the West favored intervention, those in opposition would have submitted. Only after the United States denied assistance and the United Nations failed to respond in a timely fashion did ECOWAS take it upon itself to intervene.67

Humanitarian justifications aside, nowhere in the U.N. Charter does it state that a regional agency may forcibly intervene in an internal conflict if the United Nations does not. 6' According to Chapter VIII Article 53 of the U.N. Charter, "no enforcement action shall be taken under regional arrangements or by regional agencies without authorization of the Security Council ...., Clearly, ECOWAS did not obtain authorization from the United Nations before it intervened in Liberia.70 Therefore, unless ECOWAS could justify intervention on some other legal basis, the intervention would appear to have been unlawful.

In order for a regional actor to take military enforcement action, it must be empowered to do so by its organizing instrument or subsequent protocol or treaty.71 The ECOWAS Treaty of 1975 did not provide for a regional security mechanism to deal with "purely" internal conflicts.72 Moreover, nei-

63. However, the U.S. did evacuate American and foreign personnel from Liberia. See BBC Monitoring Report, 31 July 1990, reprinted in THE LIBERIAN CRISIS, supra note 43, at 63; BBC Monitoring Report, 5 August 1990 reprinted in THE LIBERIAN CRISIS, supra note 43, at 65; BBC Monitoring Report, 20 August 1990 reprinted in THE LIBERIAN CRISIS, supra note 43, at 85.

64. See Statement of Hon. Herman J. Cohen, Assistant Secretary of State, Bureau of African Affairs, reprinted in THE LIBERIAN CRISIS, supra note 43, at 46.

65. See id. at 48-49.

66. See Wippman, supra note 4, at 165.

67. See id. at 165.

68. See U.N. CHARTER, supra note 22.

69. Id. art. 53, para. 1, at 26.

70. See id.

71. See id.

72. See generally THE LIBERIAN CRISIS, supra note 43.

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THE NEW COLLECTIVE SECURITY MECHANISM OF ECOWAS: INNOVATIONS AND PROBLEMS

Ademola Abass*

1 INTRODUCTION

On 10 December 1999, member states of the Economic Community of West African States, ECOWAS, adopted the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (the Mechanism) at Lome, Togo.1 In many regards the Mechanism can be regarded as the Organization's constitution on collective security in the West African sub-region. As the main legal framework within which the sub-regional Organization's involvement in collective security must henceforth be regulated, the Mechanism embodies detailed and comprehensive provisions and structures.2 It introduces many innovative ideas into the collective security of the sub-region. It is, perhaps, the first time that an international organization has formally codified the rather problematic doctrine of humanitarian intervention as well as legalizing the use of force to restore or prevent an overthrow of a democratically elected government.

Furthermore, in a clear departure from the traditional principle of non-intervention, the Mechanism empowers ECOWAS to intervene in internal conflicts of member states, an action that can be triggered, not only by massive violation of human rights, but also by the breakdown of the rule of law.3 It is noteworthy that this Mechanism has emerged in the aftermath of ECOWAS' interventions in Liberia and Sierra Leone, but more crucially, it has emerged after the highly controversial intervention by the member states of the North Atlantic Treaty

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1 This document is yet to be published in any reference material. The author obtained a copy directly from ECOWAS. Though yet to be ratified, the Protocol has been provisionally adopted pursuant to art.57(1) upon signature by all Heads of State and Governments of ECOWAS.

2 The legal basis for the eventual evolution of a detailed framework for ECOWAS' collective security is art.58 of the Revised Treaty 24 July 1993, see n.20 below. See Meetings of the Ministers of Foreign Affairs, Final Report, Lome, Togo, 6-7 December 1999, 18, para.63 on file with the author.

3 Art.25. This provision contrasts to art.18(2) of the Protocol Relating to Mutual Assistance on Defence, (PMAD), which states that 'Community forces shall not intervene if the conflict remains purely internal'. See UN doc.A/SP3/5/81; (1990) 4 Nigeria's Treaties in Force 898.

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Organization in the Kosovo crisis. It can thus be viewed as crystalizing the practice of ECOWAS in these two crises as well as catering for future scenarios that resemble NATO's role in the Kosovo crisis. To the extent that it incorporates the doctrine of humanitarian intervention and provides extensively for an early warning system, the Mechanism probably is the most ambitious instrument on the regulation of collective security ever attempted to date, not only by ECOWAS but by any regional organization for that matter. Thus, in a sense, it can be described as groundbreaking legislation on collective security within the West African sub-region.

However, several question marks can be raised against certain provisions of the Mechanism. While ECOWAS' decision to establish firm control over the security of its region is commendable, especially in the light of the noted inaction of the Security Council in desperate situations and the somewhat inconsistent nature of its response to crises in Africa, the attempt to sidetrack the UN raises fundamental issues in international law. This paper examines the salient provisions of the Mechanism as they relate to the issue of collective security in the West African sub-region. It studies the areas of potential conflicts between the UN Charter and the ECOWAS Mechanism with specific focus on the regulation of the enforcement action by regional organizations. It argues that if carried to its logical conclusions, the Mechanism will allow the sub-regional organization to operate without the supervision and control of the UN Security Council.4 In definitive terms, the Mechanism can be regarded as perhaps the first attempt by a regional arrangement to pursue a course of completely decentralized collective security. This, it must be noted, is in contradistinction from the decentralized military option within the UN that has come to replace the original Charter's collective security system.5

The author notes that as yet no definitive implementation policies on the Mechanism have been finalized by ECOWAS; this paper was, in fact, written in the expectation of the first of such meetings by the executives of the organization in April 2000. Most of the materials referred to in this paper still remain in the files of the ECOWAS legal department in the organization's headquarters in Abuja, Nigeria. Apart from these materials, there were formal and informal discussions between the author and the officials of the legal department of ECOWAS, being the body responsible for the drafting of the Mechanism.6 Though the Mechanism has been signed by all member states of ECOWAS, it is yet to be ratified by the requisite 9 member states.7 It has however been provisionally adopted.8

4 The fear that an application of the Mechanism will impact the United Nations Charter has also been expressed by Professor Margaret Vogt of the UN Secretariat, New York, who worked on the Mechanism as a resource person. See Meeting of Expert on the Draft Protocol Relating to the Mechanism on Conflict Prevention, Management, Resolution, Peace-Keeping and Security, 17-19 November 1999, Lome, Togo, page 6, on file with the author.

5 See N.D. White and 0. Ulgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function', (1997) XLIV NILR 378.

6 The author consulted directly with the Director and the Deputy Director of Legal Affairs at ECOWAS Secretariat Abuja, Nigeria.

7 Art.57(2).

8 Art.57(1).

2 THE LEGAL FRAMEWORK OF THE MECHANISM

The substantive regulation of peace and security of the West African sub-region by ECOWAS is to be found in various sections of the Mechanism. Chapter I, which provides for the establishment of the Mechanism, introduces the Protocol in clear terms: 'There is hereby established within the Economic Community of West African States (ECOWAS), a mechanism for collective security and peace to be known as "Mechanism for conflict prevention, Management, resolution, peace-keeping and security" '.9

The appearance of the term 'collective security' in the above provision is indicative of ECOWAS's determination to define, at the outset, the operational ambit of the Mechanism. This interpretation is borne out by the fact that the Draft Mechanism did not use similar wording.10 This, though, accords with the overall pattern of the draft Mechanism, which initially designated the organization's interventionist role in terms of peacekeeping simpliciter. Not only did this earlier mode entirely disappear from the final version, but the phrase, 'collective security', absent in the draft, was added to the word 'peace'. Indeed, the Mechanism, whose draft provisions were a virtual replication of the PMAD,11 totally jettisoned its classical peacekeeping theme in favour of more pro-active engagement.12 Thus the Mechanism will apply not only to securing peace by traditional peacekeeping exercises but also by using force to guarantee such.'13

The term collective security has been defined elsewhere as 'the combined usage of the coercive capacity of the international community to combat illegal uses of armed force and situations that threaten international peace.'14 In the future therefore, ECOWAS' interventions in the sub-regional conflicts will no longer be confined to peacekeeping, the main purpose for which its Monitoring Group, ECOMOG, was established in 1990.15

The above conclusion is warranted by a comparison of the provisions of the Mechanism with similar ones under the PMAD - unarguably the most detailed framework by ECOWAS regarding security matters before the 1999 enactment of the new Mechanism. Article 16 of PMAD provides for intervention by ECOWAS

9 Art.1.
10 On file with the author.
11 See n. 3.
12 Art.51 of the Draft Protocol defined peacekeeping as 'all forms of Military Intervention to be undertaken by ECOWAS.' See Meeting of the Ministers of Defence, Internal Affairs and Security, Banjul, 1998, on file with the author. This suggests a wide definition to include enforcement actions.
13 Already in the renewed conflict in Sierra Leone, ECOWAS member states have agreed 'to change military initiative in Sierra Leone from peacekeeping to enforcement.' See M. Onuorah and S. Ayeoyenikan, 'ECOWAS to Deploy 3,000 Troops to Sierra Leone', The Guardian (Nigeria), 19 May 2000, <http://www.ngrguardiannews.com> 1 of 2.
14 N.D.White, 'The Legality of Bombing in the Name of Humanity', (2000) 5 (1) JCSL 28, citing K.P. Saksena, The United Nations and Collective Security (1974) 4-5.
15 ECOMOG was established at the First Session of the Community Standing Committee between 6 and 7 August in Banjul, The Gambia. See Decision AIDEC.1/8/90 (art.It).

in situations of 'armed threat or aggression' directed against a Member State. This however must be at the request of the transgressed state.16 Thus this provision limits ECOWAS's interventionist capacity to the scope of a defensive alliance in the mode of organizations like the North Atlantic Treaty Organization where an attack on one of the members is usually regarded as an attack on all.17

Aside from the collective self-defence of its members against aggression or armed threats, ECOWAS, prior to the Mechanism, could only undertake peace-keeping missions, which, it is generally acknowledged, are not explicitly recognized by the UN Charter but have been accepted by necessary implication.18 This is because the PMAD only allows for the deployment of interpository troops by ECOWAS in situations of conflict between two or more of its members.19 Thus, the textual difference between the provisions of the PMAD and the Mechanism, it is submitted, is aimed at recasting the role of ECOWAS in the security of its region from one previously based on collective self-defence mode and classical peace-keeping - though arguably it never undertook either - to chapter VIII of the UN Charter. It will be recalled that one of the main criticisms against the application of PMAD to the Liberia and Sierra Leone crises was that the Protocol did not empower ECOWAS to apply force against its own members. It only allowed force against external aggression or an internal crisis that was, according to article 18 (1), externally maintained and sustained.

However, by virtue of article 3, which details the various objectives of the Mechanism, it must be noted that, ECOWAS decisively incorporates the previous Protocols and covers new ground. While article 3 (a) provides that the Mechanism shall 'prevent, manage and resolve internal and interstate conflicts' article 3 (c) empowers it to 'implement the relevant provisions of the Protocols on Non-Aggression, Mutual Assistance in Defence, Free Movement of Persons, the Right of Residence and Establishment.' There is no doubt that the inclusion of only selected parts of the earlier Protocols on defence matters is to enable the new Mechanism to take precedence and extend to areas not previously covered by its predecessors.

3 ORGANS OF THE MECHANISM

Chapter II (Institutions of the Mechanism) deals with the various organs of the Mechanism that have authority to implement relevant provisions of the Protocol. Article 4 sets out the organs in a hierarchy. Under the Revised Treaty of ECOWAS the Authority,20 comprising the Heads of State and Government of Member States,

16 See similar provision in the Draft Protocol, see n.12, articles 43-46.
17 Art.5 of the North Atlantic Treaty, 1949. 34 UNTS 541. See PMAD, n.3 above, art.2.
18 See B. Urquhart, 'The United Nations, Collective Security, and International Peacekeeping', in A. K. Henrikson (ed.) Negotiating World Order: The Artisanship and Architecture of Global Diplomacy (1986) 59, 62.
19 Art.17 PMAD, see n.3.
20 See the definition of 'Authority' in art.1, ECOWAS Revised Treaty, 24 July 1993. See Text in ILM (1961) 660. The Authority was established by art.7(1).

is the primary organ responsible for the 'general direction and control of the Community.'21 Although article 6 (1) of the Mechanism designates the Authority as the highest decision making body, this is not necessarily so in reality. This provision does not accord with subsequent provisions, which confer on the Mediation and Security Council (MSC) greater powers than the Authority.22 Moreover, under the Mechanism the Authority has delegated all its powers23 to the MSC:

> Without prejudice to its wide-ranging powers under Article 9 of the Treaty and Article 6 above, the Authority hereby mandates the Mediation and Security Council to take, on its behalf, appropriate decisions for the implementation of the provisions of this Mechanism.24

In practical terms, there appears to be little or no significant value in this purported delegation of power by the Authority to the MSC.25 Already, the MSC could, on its own, initiate actions under the Mechanism without restraints.26 In fact, it is doubtful whether there was any need for such delegation at all. Apart from its collective security role under the Mechanism, the MSC is also responsible for deciding and implementing 'all policies for conflict prevention, management and resolution, peace-keeping and security'.27 Thus, unlike the relationship between the Security Council and the General Assembly under the UN Charter,28 there is no distinction between actions, which the Authority may take and those that the MSC could ordinarily take under the Mechanism. In the absence of such distinction therefore, the purported delegation of power is at best a redundancy, as the MSC does not need to have such delegated power for it to initiate any actions whatsoever under the Mechanism.

In reality, the MSC possesses greater power under the Mechanism than the Authority.29 Its functions include: authorization of all forms of intervention and deciding particularly on the deployment of political and military solutions; 30 approving all mandates and terms of reference periodically, on the basis of evolving

21 Art.7(2) of the Revised Treaty 1993.
22 Art.10 for instance.
23 The two most important powers of the Authority under the Mechanism are: art.6(2) which empowers it 'to act on all matters concerning conflict prevention, management and resolution, peacekeeping, security, humanitarian support, peacebuilding, control of cross-border crime, proliferation of small arms, as well as all other matters covered by the provisions of this Mechanism', and art.26, empowering it to initiate any action under the Mechanism.
24 Art.7.
25 The Protocol specifically labels the section under which art.7 appears as 'Delegation of Powers'.
26 Art.26(b).
27 Art.10(b).
28 Articles 10, 11, 12 and 14.
29 This makes the purported 'delegation' from the Authority to the MSC legally irrelevant. See H.G. Schermers and N.M. Blokker, International Institutional Law (Third Rev. ed., 1995) 225.
30 Art.10(c).

solution; 31 reviewing the mandates and terms of reference periodically, on the basis of evolving situations; 32 and, lastly, appointing the Special Representative of the executive Secretary and the Force Commander.33 These functions weigh heavier than the two powers of the Authority under article 6, one of which has been permanently delegated.34

In the light of these provisions, it is very unlikely that in a situation warranting the authorization of an action, the Authority will overrule the decision of the MSC.35 Under Rule 6 (3) of the Draft Rules of Procedure of the Mediation and Security Council, the 'Heads of State and Government of the Security Council shall inform the Authority of all actions taken in pursuance of the mandate given to them by the Authority.' But there is no provision under the Mechanism empowering the Authority to overrule any action taken by the MSC. The prospect of such power is indeed bleak. The MSC comprises 9 member states at any given time,36 all of which are heads of states and, of course, members of the Authority at the same time.37 The quorum under the ECOWAS Treaty is two thirds of the membership.38 Therefore, a decision favoured by the MSC may indeed become afait accompli before the session of the Authority.

Although the delegation of the Authority's powers under article 7 is effected 'without prejudice to its wide-ranging powers under Article 9 of the Revised Treaty' this proviso is useless because it does not, as it should have done,39 subject the delegated power to the controls of the Authority.4° Though article 9(4) of the Revised treaty to which article 7 refers invests the Authority with overreaching powers, this is subject to contrary provisions in the Treaty or other Protocols. Finally there is no provision, under the Mechanism, that corresponds to article 54 of the UN Charter by means of which the Authority could monitor the exercise of the power it delegated to the MSC.41

31 Art.10(d).
32 Art.10(e).
33 Art.lO(f).
34 Art.6(2), see n.23
35 See articles 11-14. See also Rules 6 and 7 of the Draft Rules of Procedure of the Mediation and Security Council on file with the author.
36 Art.8.
37 Art.12 of the Mechanism. This could be composed at the Ministerial and Ambassadorial levels as well. Art.11(1). ECOWAS consists of sixteen West African States, viz, Republics of Benin, Burkina Faso, Cape Verde, Cote D' Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. See Preamble to the Revised Treaty, n.20.
38 Art.9(2) ECOWAS Treaty, see n.19. See similar provision in art.9(1) of the Mechanism regarding the MSC.
39 It is a general principle of delegation of power that the beneficiary of a delegated power must be accountable to the benefactor. Hence, there must be some regulatory mechanism in place. See D. Sarooshi, The United Nations and the Development of Collective Security: the delegation by the UN Security Council of its Chapter VII Powers (1999) 25.
40 See generally Sarooshi, op.cit., on the issue of delegation of the Security Council's collective security powers. Though the focus of Sarooshi is the Security Council, his general treatment of the application of the concept of delegation of power to international law is quite useful in appreciating the present concern.

41 Art.27(e) obligates the Mediation and Security Council to submit a report on the situation to the Organization of African Unity and the United Nations.

Thus, it is contended that the delegation of power by the Authority to the Mediation and Security Council is an open one, which, without effective constitutional mechanisms to subject it to periodic control, is capable of being misused. It is submitted here that the rather curious relationship between the Authority and the MSC regarding the implementation of the provisions of the Mechanism is occasioned by the overlap between the primary function of the Authority under the Treaty and its secondary collective security roles under the Mechanism.

The Mechanism also provides for supporting organs of the institutions of the Mechanism. Article 17 establishes the following arrangements to assist the MSC: (a) The Defence and Security Commission (DSC), (b) The Council of Elders, and (c) the ECOWAS Cease-fire Monitoring Group (ECOMOG). While the Council of Elders and ECOMOG will be discussed under a more appropriate heading, this section deals with the DSC. It must be noted that the DSC is not an original creation of the Mechanism. It existed under the PMAD, though under the name the Defence Commission (DC).42 There are major differences between the composition and functions of the DSC and the DC. Whereas under the PMAD the DC consisted of only Chiefs of Staff from all member states, the DSC comprises Chiefs of Defence Staff or their equivalent, officers responsible for internal affairs and security, experts of the Ministry of Foreign affairs, and, depending on the preferences of individual member states, heads of Immigration, Customs, Drugs and Narcotic Agencies, Border Guards, and Civil protection.43 Under the Mechanism, the DSC possesses wider powers than its predecessor under PMAD. By article 19, the DSC shall 'examine all technical and administrative issues and assess logistical requirements for peace-keeping operations.'44 Apart from this, it formulates mandates for peacekeeping forces,45 presumably for the consideration of the MSC, defines terms of reference for the Force,46 appoints the Force Commander,47 and determines the composition of the Contingents.48

4 IMPLEMENTATION OF THE MECHANISM

4.1 Standing Force, Command Structure and Funding

One of the weaknesses of the collective security system envisaged by the UN Charter is the non-materialization of the provision of troops under pre-existing arrangements for the use of the Security Council.49 One disastrous consequence of this is that rather than having a centralized collective security system, what has

42 Art.11 of PMAD.
43 Art.18.
- Art.19(1).
45 Art.19(1)(a).
46 Art.19(1)(b).
41 Art.19(1)(c).
4- Art.19(1)(d).
49 Art.43 UN Charter.

emerged in practice is a decentralization of military action in which states acting in concert resort to self-help, and sometimes operate under the auspices of the Security Council.50 Under Chapter VI of the Mechanism, 'Member States ... agree to make available to ECOMOG units adequate resources for the army, navy, gendarme, police and all other military, paramilitary or civil formation necessary for the accomplishment of the mission'.51 This is perhaps the most significant provision of the Mechanism - not because it establishes a standing force, which the PMAD also featured,52 but for placing the force under the direct control of the MSC. Under the old regime, the contribution of troops and materials to a mission undertaken by the Organization had always been on 'an able and willing' basis.53 One major consequence of this is that the resultant mission always looked like what Lori Fisler Damrosch once described as a unilateral action with multilateral imprimatur.54 Apart from this characteristic, such missions composed mostly by a handful of member states had always elicited bitter criticisms and deep suspicions from non-contributing states and commentators as well.55 The overall impact of this on the security role of ECOWAS in the past was that little was achieved and there was less political will amongst member states.

Not only does the new Protocol establish ECOMOG as a standing force,56 it goes further to spell out its role under the new dispensation. It is charged, among other things, with the task of observing and monitoring,57 peacekeeping and restoration of peace,58 enforcement of sanctions, including embargo,59 preventive deployment,6° peace-building, disarmament and demobilization,61 policing activities including the control of organized fraud and crime,62 and any other operations as may be mandated by the Mediation and Security Council.63 It is particularly interesting to note that this article also empowers ECOMOG to undertake

50 See C. Schreuer, 'Regionalism and Universalism', (1995) 6 EJIL 477-499; R. Higgins, 'Peace and Security: Achievement and Failures', (1995) 6 EJIL 445-460 at 446.
51 Art.28.
52 Art.13(1).
53 Meeting of Experts, see n.4 above, 5, para. 24.
54 L.F. Damrosch, 'The Role of the Great Powers in United Nations Peace-Keeping', (1993) 18 Yale Journal of International Law 429.
55 K.O. Kufor, 'The Legality of the Intervention in the Liberian Civil War By the Economic Community of West African States', (1993) 5 African Journal of International Law 525; H. French, 'Nigerians Take Capital of Sierra Leone as Junta Flees', N.Y Times, 13 Feb. 1998, A3.
56 Compare art.13(1) of PMAD, which provides that 'All Member States agreed to place at the disposal of the Community, earmarked units from the existing National armed Forces in case of any armed intervention.' Emphasis added.
57 Art.22(a).
58 Art.22(b).
59 Art.22(d).
60 Art.22(e).
61 Art.22(f).
62 Art.22(g).
63 Art.22(h).

'humanitarian intervention in support of [sic] humanitarian disaster'.64 Article 22 raises several issues. Certainly, the Mechanism departed from the previous Protocol in that it authorizes intervention in the internal conflicts of Member States and provides a list of other permissible interventions. It is noted that this scrupulous delineation of the precincts of ECOMOG intervention was informed by the complications that resulted from its mission to Liberia, in which a cease-fire-monitoring mandate quickly transformed into a fully-fledged robust peacekeeping operation.

Notwithstanding the objectives of article 22, a proper regulation of ECOMOG actions can only be achieved within a framework imbued with effective mechanisms for control. Past experience, as in Liberia between 1990 and 1997, has shown that this is not easily so with ECOWAS. Yet the Mechanism has not made any remarkable improvement in this regard, if, indeed, it has made any at all. While it is too early to offer definitive comments about how this problem will be tackled in the future, the total absence of any credible control mechanism in the execution of ECOMOG's role is a major weakness of the Protocol.

Nevertheless, there is a concerted effort by ECOWAS to ensure smooth running of the Standing Force and eliminate the old problems of suspicion and absence of political will. In this regard, the Mechanism has devised several strategies. There is established a chain of command spanning from the Chief of Mission,65 through the ECOMOG Commander,66 the Special Representative,67 the Force Commander,68 to the Contingent Commanders.69 Not only does this strategy involve all member states in the scheme of things, it also allocates to each member state certain roles to play which directly engage them during the entire period of the mission.70 This is a remarkable departure from the old system under which most salient decisions were taken by only a handful of states, mainly the contributing members.

One further unique provision of the Mechanism regards the funding of a mission decided upon by the Organization. While previously the costs of missions were borne by the contributing states with no burden on their non-contributing counterpart, the strategy has now changed. Presently, the Executive Secretariat of ECOWAS 'shall make provision in its annual budget for funds to finance activities of the Mechanism.'71 However, this provision is temporary.

There is in the pipeline a Protocol establishing a Community Levy. The projection is that a percentage of this levy (0.5%)72 will be earmarked for the purpose of

64 Art.22(c). Emphasis added. It is reasonable to read the italicized phrase 'in support of' to mean 'to prevent' humanitarian disaster.

65 Art.32(2).

66 Art.33.

67 Art.34(1).

68 Art.34(2).

69 Art.34(3).

70 Art.35.

71 Art.36(1).

72 This figure, which is not contained in any of the written materials available to this author, was disclosed to me by the Director of Legal Affairs at ECOWAS Headquarters.

funding the Mechanism.73 Though it appears that this percentage is grossly inadequate in the light of the expensive nature of past missions, article 36 enjoins the Mechanism to make 'request for special funds.., to the United Nations and other international agencies.'

5 ECOWAS AND FUTURE ENFORCEMENT ACTION

It is worthwhile, at this juncture, to consider the implication of article 10(2) (c) of the Mechanism, which empowers the MSC to 'authorise all forms of intervention and decide particularly on the deployment of political and military missions'.74 The problems with this provision are numerous. To begin with, it lumps various forms of action into one that the MSC could solely regulate. By using the phrase 'all forms of intervention' the Mechanism does not seem to appreciate the distinction between classical peacekeeping and enforcement actions for the purpose of regulatory authorities. Whereas regional arrangements or agencies are not precluded from undertaking peacekeeping actions within their regions, they are prohibited from initiating enforcement actions without the prior authorization of the Security Council.75 No doubt, regional arrangements have in the past circumvented the requirement of article 53 (1) by acting first and seeking the Security Council's legitimization later.76 This practice, however, does not replace the requirement that still formally exists in the Charter. Article 10 (2) (c) raises further concerns when it is recalled that article 22 (c) includes humanitarian intervention in the list of actions that ECOMOG may regulate under the Mechanism. While there may be genuine grounds for resorting to force to prevent humanitarian disasters, the competence of regional arrangements to so do without the authorization of the Security Council is fraught with serious dangers. The possibility of abuse is as high as the problem of characterizing conflicts.

The provisions of article 52 of the Mechanism, which could have solved the problem of supervision and control, fall short of having any meaningful impact. According to article 52 (3), ECOWAS shall, in 'accordance with Chapters VII and VIII of the United Nations Charter, inform the United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism'.77 It is true that ECOWAS complied with a similar provision of PMAD during the Liberian

73 Art.36.

74 The phrase 'all forms of military intervention' appeared in the Final Communiqug of the Meeting of ECOWAS Ministers of Defence, Internal Affairs and Security held at Banjul, The Gambia between 23-24 July 1998, 2. This Meeting considered the Draft Mechanism.

75 Art.53(1) UN Charter second clause.

76 See claims that the Security Council ratified ECOWAS's intervention in Liberia ex post facto by 'commending' the Organization (UN doc.S/22133, 22 January 1991) in J.A. Frowein, 'Legal Consequences of International Law Enforcement in the case of Security Council Inaction', in: J. Delbruck (ed.), The Future of International Law Enforcement: New Scenarios-New Land? (1992) 122.

77 Compare art.54 of the UN Charter.

crisis but kept feeding the UN with reports of peacekeeping while it was, in fact, engaged in full military action against the rebel forces led by Charles Taylor.78 Interestingly, article 54 of the UN Charter obligates regional arrangements to keep the Security Council fully informed of, not only activities already undertaken by them, but also contemplated for the maintenance of international peace and security.79 It is contended here that the word contemplated was inserted to enable the Security Council to exercise some control on the means (to be) adopted by the concerned regional arrangement before it crossed the Rubicon. Unfortunately, this is not so under the Mechanism since ECOWAS's obligation now is just to inform the UN of only military action already undertaken and nothing more.80 It would not matter whether the concerned mission is in response to an external aggression or one taken to stop humanitarian disasters, that is, an essentially internal conflict. The reference to both Chapters VII and VIII seems to have been tailored to holding out ECOMOG as a collective defence alliance under article 51 and regional collective security under article 53 (1) of the UN Charter at one and the same time. The question that may be asked at this point is what becomes of the provision of article 53(1) of the UN Charter in the light of articles 10(2)(c), 22(c)(h), and 52(3) of the ECOWAS Mechanism?

Proffering definitive answers to this question at this stage is rather difficult. ECOWAS is yet to consider the final implementation of the Protocol, although it has commenced provisional implementation in accordance with article 57 of the Mechanism. Furthermore, there is no archetypal crisis situation to which its provisions have been applied. The decision of the Heads of States of ECOWAS, which established the framework for the Mechanism, does not disclose any information regarding the intention of member states as per this particular provision.81 However, whatever may be the outcome of future deliberations on the modalities for implementing the Mechanism, it is safe to assume that this will not affect the substantive provisions of the Mechanism.

Within the confines of international law, any obligations of the ECOWAS members that are members of the UN that conflict with the obligations imposed by the UN Charter are void.82 Furthermore, since this Protocol purports to empower ECOWAS states to use force without the authorization of the Security Council, it contravenes article 53 of the Vienna Convention on the Law of Treaties because it conflicts with a peremptory norm of general international law

78 Sierra Leone News Headline, <http//www.Sierra-Leone.org./slnews.html> 11 February 1998.

79 Emphasis added.

I Is the insertion of military deliberate to enable ECOWAS to apply non-military pressures, but which could constitute enforcement action in particular circumstances, and avoid reportorial obligation?

S1 See Decision A/DEC. 11/10/98 of 31 October 1998 at the secretariat of ECOWAS, Abuja, Nigeria and on file with the author.

82 Art.103 of the UN Charter.

codified by article 2 (4) of the UN Charter.83 Therefore, since states have surrendered their right to use force against other states, except in self-defence, to the Security Council,84 and may not undertake forcible actions without the latter's authorization,85 the provision of article 10 (c) of the Mechanism is, prima facie, at variance with the obligation imposed on ECOWAS member states by the UN Charter. Such forcible actions, whenever they are authorized by regional arrangements without the authorization of the Council, are normally regarded as unilateral.86

The above submission that forcible actions not authorized by the Security Council are contrary to Charter obligations is premised on three arguable bases. The first, that it is only the Security Council that can realize enforcement actions save in the specific circumstances recognized by the Charter.87 The second, that states in fact contracted out the totality of their power to act to the Security Council in 1945 when the UN Charter was drafted and as such could not have residual power to act in any circumstances except self-defence. 88 Also that the word 'collective security' connotes an action taken by a collection of states acting in conjunction with and/or under the authorization of the Security Council.

The position of collective security vis-d-vis states before the inception of the UN Charter is a very controversial issue. It is however not the concern of this paper to delve substantially into the various debates which have been sufficiently dealt with by numerous literatures.89 Suffice it to mention that the preponderance of legal opinion comes down in favour of states having a customary right to use force against delinquent states before the inception of the UN Charter. This right Fawcett termed 'hegemonial intervention'9" and Sir Hersch Lauterpacht asserted

83 Art.2(4) prohibits the threat or use of force by states in their international relations. This provision is regarded as a jus cogens. Whether the provisions of this article should be construed in a narrow or wide sense, for the purpose of understanding its impact on the peremptory norm of international law forbidding the use of force is outside the scope of this paper, and it is not the intention here to join issue in this debate. For a comprehensive exposition of the concept of jus cogens, see C.L. Rozakis The Concept of Jus Cogens in the Law of Treaties (1976).

84 Art.24(1) of the UN Charter.

85 Art.53(1) second clause.

86 See N. Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', (1999) 3 Max Planck Yearbook of United Nations Law 59.

87 The Charter recognizes three instances in which states may use force without the authorization of the Security Council. Firstly, when force is used in self-defence (art.51), secondly, when force in used by the Security Council pursuant to Chapter VII, thirdly, when force is used under the provision of art.107 of the Charter - the so-called enemy clause. But see 0. Schachter, 'The Lawful Resort to Unilateral Use of Force', (1985) 10 Yale Journal of International Law, 291.

88 For a detailed analysis of art.24(1) of the UN Charter and the problem of residual power and accountability, see Sarooshi, op.cit., 20-32.

89 Ibid. See also B. Simma (ed.), The Charter of the United Nations: A Commentary (1994) 404.

90 J. Fawcett, 'Intervention in International Law', (1961-11) 103 Hague Recueil des Cours 351.

was 'universally recognised by customs or ... laid down by law-making treaties'.91 Furthermore, K.P. Saksena reasoned that the idea of collective security was an old one. In support of this proposition, he referred to a provision in the Treaty of Westphalia of 1648. This treaty enjoined all its signatories to 'defend and protect all and every article of the peace against anyone.. .and to join the injured party, and assist him with counsel and force to repel the injury'.92

There is no doubt that the true position of states' power in the pre-Charter period regarding the regulation of collective security remains unsettled. Regardless of what may be the correct position, however, it suffices for the purpose of this article that article 24(1) of the UN Charter does not endure in perpetuity, but rather it is contingent on two conditions precedent. First, the ability of the Security Council to act on behalf of states is '[i]n order to ensure prompt and effective action', and, second, the Security Council, in discharging these duties, 'shall act in accordance with the Purposes and Principles of the United Nations'.93 The particular powers granted the Security Council, through this article, are the duties laid down in Chapters VI, VII, VIII and XII.

What can be deduced from the above-quoted provisions is that the position of collective security in the period before the Charter is of secondary importance in appreciating the nature of the specific transaction that took place under article 24. The capacity of the Security Council to act on behalf of member states of the UN remains valid only insofar as it meets the two conditions of its existence. Where the Security Council, for instance, fails to take action under any of the provisions listed in Chapters VI, VII, VIII and XI in a situation where the Purposes and Principles of the UN require such action to be taken, it is contended here that the primary responsibility of the Security Council conferred by article 24 ceases. The ability of states to reclaim the transferred collective security responsibility in this circumstance derives from two sources. The first is the lack of the fulfillment of the conditions upon which the Security Council was entrusted with the responsibility. In this regard, it is instructive to defer to the official justification given by ECOWAS in support of article 10(2)(c), which removes the requirement of the Security Council's authorization as a condition precedent for the regulation of enforcement action.

Anticipating international concern with the provision, Professor Margaret Vogt observed that the Mechanism failed to 'recognise or adhere to the underlying principles of Article 53 of the Charter on enforcement action'.94 In his response on behalf of ECOWAS, the Director of Legal Affairs of the Organization, Mr. Roger Laloupo, emphatically stated that:

> The meeting (of experts) considered these observations made by Prof. (Mrs.) Vogt and was of the view that whilst the subregion appreciates the

91 L. Oppenheim, International Law: A Treatise (7th ed., 1948, H. Lauterpacht ed.) cited in Sarooshi, op.cit., 29.
92 Saksena, op.cit., 5 citing F.L. Schuman, The Commonwealth of Man (1952) 353.
93 Art.24(2).
94 Meeting of Experts, see n.4, 6.

importance of its obligation under the United Nations Charter, its recentexperience has shown that the cost of waiting for the United Nations authorisation could be very high in terms of life and resources.95

Secondly, if indeed states did not possess collective security power before the Charter, they acquired responsibility to collectively police the world upon their ratification of the Charter. This responsibility they simultaneously contracted out to the Security Council, on certain conditions, for the purpose of coherence and survival of the new Organization. Therefore, if it becomes obvious that the non-performance of the Security Council in a particular circumstance may jeopardize the main reason for entrusting it with that power - peace and security - nothing seems to prevent states from acting in its place. This is even more so if such states are acting as a regional arrangement as that should normally indicate some element of acting in broader rather than selfish or national interest. An enforcement action undertaken by a regional arrangement in these circumstances, without Security Council authorization, cannot be regarded as a breach of article 53(1). This is because it is one taken, not in pursuance of the classical collective security system under the UN Charter, but in the standards of decentralized collective security given effect by state practice and by treaties such as ECOWAS's new Protocol. The main conclusion to be drawn from this brief tour de horizon therefore is that the responsibility of the Security Council to act on behalf of the international community is not self-contained, but one based on its ability to meet certain obligations.

Furthermore, the notion that only the Security Council can regulate enforcement action is true only in the light of particularized context. In a centralized collective security mode, which was envisaged in 1945, it was expected that the Security Council would be provisioned with its own forces, which it could deploy in a conflict.96 This was the projected means by which the responsibility conferred on the Security Council by article 24 was to be achieved. It is common knowledge that, presently, a decentralized military option has come to replace the contemplated structure. In the nascent decentralized system, interventions would have to be appreciated in the context of their situations. Thus as it has been argued, the mere fact that a genre of collective security does not conform to the supposed ideal type does not detract from its collective security character. In fact, there is more than one expressed position on what the classic type really is.97 To this end, the submission that any use of force unauthorized by the Security Council is a unilateral action even if undertaken by a collectivity of states is erroneous.98

It is often argued that only when enforcement action is taken by the Security Council or the General Assembly can it be described as being taken by the

95 Ibid. During formal discussions of this provision between the author and the Director of Legal Affairs of ECOWAS, (April 2-3 2000) the latter referred to the genocidal crisis of Rwanda as a classical example of 'the cost for waiting' for a UN authorization.

96 Art.43 of the UN Charter.

97 I.L. Claude, Power and International Relations (1962) at 110-68; I.L. Claude, Swords Into Plowshares (1965) 238-9, 258-9.

98 But see Krisch, loc.cit.

international community.99 Undoubtedly the fulcrum of such argument consists largely in the perception of the Security Council as the sole and true representative of the global community. In this regard, it follows that an enforcement action by ECOWAS, sanctioned by its MSC although without Security Council authorization, does not qualify to be one taken on behalf of the international community. But an action taken or authorized by the permanent five (P5) of the Security Council, even in the face of disagreement by the largest number of the UN members is one so certified. Apart from recurrent argument against the democratic capacity of the P5 in the modern day context, there are several other shortcomings associated with such a view. The position itself admits a self-contradictory exception in that its proponents are ready to concede some measure of genuineness to the 'international' character of actions which take place without the Security Council's authorization but preceded by a Security Council resolution recognizing the gravity of the human rights abuses in those countries.1°° One could fault this practice on several grounds. An interpretation of the phrase 'international community' in such a precarious manner is both self-serving and dangerous.

It is the opinion of this writer that an action does not lack 'collective' character just because it does not enjoy the support of Security Council ab initio just as it is plausible to contend that an action may not be one taken by the international community if passed by the P5 with overwhelming rejection by the greatest number of states. It is submitted therefore that a distinction needs to be made between an action embarked upon by a collection of states, after the Security Council has determined under article 39 of the UN Charter without being able to proceed any further, and one taken without such determination. But a prior determination under article 39 need not fetter the ability of regional Organizations to undertake enforcement actions provided certain conditions have been met. First, the concerned regional Organization must satisfy itself that the Security Council has failed to make an article 39 determination purely for political rather than factual reasons. Second, that there exists within the affected region an overwhelming need to act forcefully in order to avert further catastrophes. Third, that the Security Council cannot be expected to rise to the occasion. Where the Security Council has made an article 39 determination, on the other hand, the concerned Organization must still show that it will be practically impossible that the Security Council will authorize an enforcement action.101 One way of satisfying this particular condition is for the concerned Organization to refer to instances during which in correspondences and speeches top officials of the UN agree that there exists ground for forcible actions.

In the light of the above postulations, it is submitted that the expected impact of the ECOWAS Mechanism on the UN collective security system should be measured by the parameters of its compliance, or lack of it, with the suggested conditions and not by the seeming incongruence of some of its provisions with the UN

99 White, loc.cit., 6-8. Emphasis added.
100 UN doc.S/RES/1199 adopted by the Council at its 3930th meeting, 23 September 1998.
101 The continuous threat of veto by Russia during the Kosovo crisis could have met this criterion.

Charter. It seems inevitable that an optimal collective security system in the present anarchical world would have to accommodate radical departures from well established classical, but irredeemably weakened standards. The strength, viability and coherence of a future collective security system now appears to lie in the world's ability to harmonize, weave and process into a workable whole multiple fragments left by a thoroughly dysfunctional scheme from which much can no longer be expected.

6 PREVENTION AND EARLY WARNING SYSTEM

Another unique provision of ECOWAS's new Mechanism worth attention is the Sub-regional Peace and Security Observation system, contained in Chapter IV.1°2 This early-warning provision is aimed at stemming the spate of crises in West Africa sub-region by forestalling their explosion through preventive devices. The early-warning system consists of (a) an Observation and Monitoring Centre located at the Secretariat and (b) Observation and Monitoring Zones within the sub-region. Some of the functions of the Observation Centre include: collection and analysis of data and preparation of reports for the use of the Executive Secretariat, collaborating with the UN, the OAU, research centres and all other relevant international regional and sub-regional organizations.103 The Mechanism further breaks up member states of ECOWAS into Observation and Monitoring Zones.1°4 Each zone contains between 3 to 5 member states with Zonal capitals in Banjul (Zone 1), Ouagadougou (Zone 2), Monrovia (Zone 3) and Cotonou (Zone 4).105 There is no substantial difference between the functions of the Centres and the Zones. The only notable difference between the two seems to be that, while the Observation Centre collects data and information generally, the Zonal Bureaux shall, 'on a state by state basis and day-to-day basis, collect data on indicators that impact on the peace and security of the Zone and the sub-region.'16

Two observations may be made in connection with the early-warning system. Though preventive devices of this nature may not be an ingenious discovery by ECOWAS, its nature and elaborate structure make it significantly distinguishable from previous experience. For instance, Chapter VI of the UN Charter provides for pacific resolution of disputes amongst states. The application of the provision under this Chapter is contingent on the outbreak of a dispute though not generally involving use of arms.107 The implication of the ECOWAS early-warning system is much more comprehensive, and if faithfully implemented, may yield better results. It is geared towards locating potential causes of conflicts and constituting appropriate

102 Articles 23-24.
103 Art.23.
104 Art.24(1).
105 This arrangement may be altered by the Authority of Heads of State and Government. See art.24 (2).
106 Art.24(6).
107 Art.33(1) UN Charter.

organs to deal with such. To this end, the Mechanism also provides for the Council of Elders'08 which is mandated to deal with a given conflict situation whenever the need arises.109 Thus there is a great interaction between the institution of the Monitoring Centres and Monitoring Zones and the Council of Elders. While the activities of the Centres and Zones are particularly tailored towards avoidance of conflicts, the Council of Elders undertakes the responsibility of pacific resolution of eventual disputes. In addition, the zonal focus of the early-warning system allows for the maximization of resources with guaranteed optimal results. The narrowing of preventive activities of the Centres and Zones will undoubtedly go a long way in avoiding a dissipation of energy and strategy.

In further efforts to achieve the concrete results expected from the Early-Warning System, the Mechanism provides for the establishment of a 'framework for the rational and equitable management of natural resources shared by neighboring Member States which may be causes of frequent inter-State conflicts.'110

7 PEACE BUILDING AND SUBREGIONAL SECURITY

The final provisions of the Mechanism worthy of commentary are those that relate to the task of peace building in the aftermath of a conflict.'1' These are contained under Chapter IX of the Mechanism:

> To stem social and political upheavals, ECOWAS shall be involved in the preparation, organisation and supervision of elections in Member States. ECOWAS shall also monitor and actively support the development of democratic institutions of Member States.112

While this provision does not categorically state at what point ECOWAS will be involved in the electoral processes of a Member State, it seems reasonable to expect that such will apply to a Member State emerging from a conflict."13 In the same vein, it is expected that the peace building capacity of ECOWAS will not only materialize after a country has fully experienced a conflict. There is provision for peace

108 Art.20(1).
109 Art.20(2).
110 Art.3(i). The Deputy Director of Legal Affairs of ECOWAS, Mrs Halima Ahmed, informed this author that there was already a committee constituted to look into the sharing of diamonds by Sierra Leone and Liberia. Formal discussions between the author and the deputy director took place between March 28 and April 4 2000.
"' It will be recalled that the need to develop a more comprehensive approach to collective security has been underscored by the UN in the Agenda for Peace, A/47/2777-S/24111, June 1992. In the Agenda, the days Secretary-General of the UN, Boutros Boutros Ghali envisioned the concept of peace-making and peace-building in the aftermath of a conflict. For a modification of certain ideas contained in the Agenda for Peace see the Supplement to an Agenda for Peace A/50/60, S.1995/1, 3 January 1995.
112 Art.42(1).
113 Art.42(2).

building activities during the continuation of hostilities, which are designed to 'reduce degradation of social and economic conditions arising from conflicts.'114 Once hostilities have ended however, efforts will be concentrated on peace consolidation,115 establishment of political conditions,"6 implementation of disarmament,117 resettlement and reintegration of refugees and internally displaced persons, 118 and assistance to vulnerable persons.'19

By virtue of article 46, it is now imperative that Member States cooperate in the areas of control of trans-border crimes, apprehension of criminals, a coherent criminal justice system, restitution procedures for stolen items which are being relocated to other Member States and so on. Article 51 regulates the circulation of illegal arms within ECOWAS while article 52 obligates the Organization to cooperate with the OAU, UN and other international Organizations in the pursuit of its objectives. The thrust of article 46 in particular consists in the expectation that it will help minimize the incident of arms proliferation among several other problems plaguing Africa as a whole. These provisions are necessary elements of the superstructure of the collective security system created by the Mechanism. Even though the UN now covers similar ground, such efforts by ECOWAS may be justified by reference to the UN's seeming lack of interest in committing itself to African conflicts with the same vigour as it does to Western ones.

8 CONCLUSION

The new Protocol from ECOWAS will undoubtedly be received as a major contribution to the corpus of enactment on the regulation of collective security. In substance and size, it is a remarkable improvement on the previous Protocols of the Organization. It takes several bold steps and breaks new ground on many frontiers. From the incorporation of the thorny doctrine of humanitarian intervention to the inclusion of early warning, trans-border regulation of crime, the institution of a stand-by force to implement its commitments, the Mechanism presents us with a fresh vision of collective security. Rather than limit its vision to the classical notion of collective security - the use of collective force to repel an aggression - ECOWAS reinterpreted this concept using a more holistic paradigm. Not only does this Mechanism afford us the highly needed opportunity to reappraise the practice of collective security by regional Organizations, it candidly helps us to reevaluate the place of the United Nations system in the crucial task of maintaining international peace and security.

This being so, the Mechanism must not be treated as an article of faith. There are obvious pitfalls in some of the provisions of the Mechanism that should be of

114 Art.43.
115 Art.44(a).
116 Art.44(b).
117 Art.44(c).
118 Art.44(d).
119 Art.44(e).

concern to the international community. Although how well the Mechanism will fare upon implementation must at this point remain conjectural, it is possible to make some projections. ECOWAS will undoubtedly experience difficulties, both of a legal nature and otherwise, if and when the Mechanism is fully implemented. Implementing provisions regulating natural resources shared by neighbouring states, unsolicited restructuring of democratic and governmental structures of a Member State, may soon prove a step too far into the sovereignty of Member States. Other practical problems that should be expected will include circumstances in which there are military takeovers of the governments of the most powerful and wealthy members of the organizations. It remains doubtful whether ECOWAS would have the capacity to authorize enforcement action entirely on its own against a military junta in Nigeria for instance. This country contributes the lion's share in terms of men and materials to ECOWAS missions.

What this signifies is that notwithstanding its lofty ambitions, ECOWAS must perceive and operate the Protocol as a component part of a larger scheme of collective security system. Although there may be some justification in the view that the cost of waiting for UN authorization may be too high, this does not automatically add up to justification for going it alone by individual organizations. There must still be some room for effective co-ordination and cooperation. Gradual establishment of autonomy by regional Organizations could indeed be all that is needed for the Security Council to correct its behaviour - by stemming the pervasive abuse of the veto and placing collective will above sectional or national interest. The revivification of the armed conflict in Sierra Leone may be a vindication of the underlying philosophy of the Mechanism. While Britain consistently maintains that her involvement in the crisis will not extend beyond rescuing her nationals from the country, countries of West Africa - especially Nigeria - are being called upon to do the 'dirty job', to quote a televised interview of a British government official. Such sectionalization of crises and regionalization of their management can only widen the gulf of suspicion between the UN Security Council dominated by the western super powers and the impoverished countries of the Africa continent. The major consequence of this can only be one thing: the crystalization of global disillusionment in the idea of a centralized collective security system.

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H.J. Richardson, 'Peacemaking Practices 'from the South': Africa's Influence to the Law of Peacekeeping', American Society of International Law Proceedings, Vol. 96, 2002

PEACEMAKING PRACTICES "FROM THE SOUTH": AFRICA'S INFLUENCE

AFRICAN CONTRIBUTIONS TO THE LAW OF PEACEKEEPING

by HenmyJ Richardson

Since the inception of UN peacekeeping through the Security Council under the Charter, peacekeeping operations have always unfolded amidst tension between legal doctrine and the on-the-ground challenges. The tension is between the formal safeguards against UN peacekeeping forces interfering in the internal affairs of sovereign states, and mandates authorizing, for example, monitoring in border zones. Inevitably, the internal affairs of states are affected by the very presence and necessary actions of any coherent operation addressing a crisis that required peacekeeping in the first place. The tension has been especially clear in African states owing to their vulnerabilities and long histories as targets of European interventions. To confirm this observation we need only mention the UN Congo operation of 1964 during the Cold War.

But since the end of the Cold War in 1990, most of the world's military conflict is occurring within the boundaries of national states rather than across borders. UN peacekeeping and its enabling legal doctrines have been forced to adapt to this march of history. Adaptation has come as original peacekeeping doctrines are applied to internal conflicts and modified by the pressures of particular situations. The need to adapt, in turn, puts a premium on the sensitive wisdom of Security Council decisions, including the decisions of its permanent members, and on the skills and creativity of UN peacekeeping commanders in their operations on the ground.

New tensions havejoined the traditional tension between the objectives of UN peacekeeping forces and sovereign prerogatives of the states immediately involved. Demands to expand peacekeeping to "peace enforcement," "peace building," and "peace creation" were opposed by those doubting the capacity under the best of circumstances of UN forces to accomplish larger objectives; nor was it clear that influential states wanted the UN to have the capacity to accomplish larger objectives. Nowhere more than on the African continent have both old and new tensions been manifest in UN peacekeeping operations, which have seen varying degrees of success. The 1994 debacle involving U.S. forces in the Somalia UN peacekeeping operation still sears American policymakers almost a decade later. It influenced a negative shift in American commitment of its military forces to peacekeeping and similar operations, at least until September 11, 2001, and the U.S. war on terrorism.

Political leaders and policymakers on the African continent have actively sought solutions to individual crises in their region. They have also responded to trends of crisis-creating activities and governance, such as the occurrence of military coups d'etat in a number of countries, the difficulties of terminating coups, and the negative impact of coups on democratic governance in states where they occur. African leaders have responded in imaginative ways through existing organizations for continental governance, such as the Organization ofAfrican Unity (as of 2002, with added authority on such issues, the African Constitutive Union), as well as through organizations of subregional governance and sovereign coordination such as the Economic Community of West African States (ECOWAS) and the South African Development Coordination Conference (SADCC).

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This response has taken place in the context of two decades of continental movement toward economic coordination, creation of free trade zones and increased intra-African trade, increased receptivity to foreign investment, and the return of a number of states to democratic governance, including South Africa, Namibia and Nigeria. It has occurred in the context of coordination with UN agencies, new patterns of claims under international law about customary law, humanitarian intervention, pro-democratic intervention, regional and subregional assistance in upholding the freedom of African peoples to determine and protect their choices about governance, and generally much inquiry about the mostjust and effective strategies for crisis intervention within African states.

The larger international community has noticed. Some states and commentators have continued to try to give Africa lessons in how to govern itself, a trend stretching back some five centuries through European colonialism into the slave trade and slavery. They have denied that Africans could make any positive contributions here at all. But other states and organizations have drawn lessons and examples of new legal doctrine and interpretations, subregional coordination, institution-building, and governance, and have begun adapting them to crises in other regions where new thinking about peace building is needed. Thus we now seem to be in a second phase of African contributions to international law within the last half century. The first phase was produced by the process of decolonization from the late 1950s to the early 1970s, and the interpretations of international law that it produced. Then African interpretations were contentious because they tended to challenge the continued use of international law to support European dominance. They were contentious, further, because historically peoples of African heritage have generally not been perceived as either capable or authorized to invoke or prescribe international law. Time will tell whether the second-phase African contributions will prove as contentious.

Our panel this afternoon features a group of experienced and notable scholars. We convene to explore the African contributions to the international law of peacekeeping that are emerging.

THE EVOLVING INTERVENTION REGIME IN AFRICA: FROM BASKET CASE TO MARKET PLACE?

by Jeremy Levitt

INTRODUCTION

Our topic, "Peacemaking Practices from the South: African Contributions to the Law of Peackeeping," is both unique and dynamic. The title was chosen to qualify and quantify in legal terms in a public forum the evolving intervention regime in Africa. In authoring this evolving intervention regime, African states have proffered the most legally and politically coherent peacemaking frameworks in the world, frameworks that clearly elucidate when groups of states and regional organizations may use force in states for humanitarian purposes.

Historically among the most conservative subscribers to the international law principles of state sovereignty, nonintervention, and territorial integrity, today, only twelve years into the post-Cold War era, African states and regional organizations have adopted, established, and put into action norm-creating mechanisms that are chiseling away at

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traditional prohibitions against uses of force outside the authority of the United Nations Security Council (UNSC).

The analysis that follows aims to present dynamic new information about pressing law of the use of force and peacemaking developments in Africa. It is meant to be more descriptive than analytic. It will discuss, among other things, the evolution of the international law of the use of force by assessing state practice and treaty law developments in Africa since the end of the Cold War-developments that undoubtedly form an important part of the evolution of the corpus of general international law.

Space constraints will not permit me to examine the legality of the various African interventions that have taken place since the end of the Cold War (the majority of which took place without UNSC authorization). These include the Economic Community of West African States (ECOWAS) interventions in Liberia, Sierra Leone, Guinea-Bissau, and now Guinea; the Mission for the Implementation of the Bangui Agreement (MISAB) in the Central African Republic (CAR); and the Southern African Development Community (SADC) operation in Lesotho. I will nonetheless discuss the efficacy of the regional frameworks that gave them impetus.1 I will also refer to the intervention provisions in the new Constitutive Act of the African Union (AU), which in late 2002 will replace the Organization of African Unity as the premier continental organization in Africa.

Not only is Africa the first region to advance comprehensive intervention regimes, but the ones it advances are leagues ahead of the other regions of the world. African state practice and treaty law developments since the end of the Cold War illustrate that, with some exceptions, African nations have been among the most committed to creating peace both within and outside of Africa.

BIASES IN THE LAW OF THE USE OF FORCE

In international studies Africa is viewed as a pariah-a basket case, not a market place. In law schools most academic consider African states to be objects rather than subjects of international law. This explains why a significant portion of the wide-body of literature on the law of use of force, and more generally peacekeeping and humanitarian intervention, is heavily biased and flawed. The geopolitical, Eurocentric, and linear bias in Western legal academia is astounding when it is applied to Africa. This is in part due to a lack of Western intellectual interest in the continent; however, international lawyers also typically lack multidisciplinary training and regional expertise, particularly on the developing world.

As a result, topical discussions on, for example, peacekeeping, peace enforcement, humanitarian intervention, and other peacemaking developments in Africa are either uninformed or inadequately analyzed. More often than not, when analysts assess African security issues, they do so with a voice reminiscent of agents of the British Colonial Office in the eighteenth century18th century, paternalistic and unaware. This phenomenon is unfortunate. It creates an environment enabling production of analytically weak scholarship on Africa. The academy can do better. It is time to pay closer attention to international law influences from the world's second largest continent, the one with the highest density of states: Africa.

' For an analysis of the legality of these interventions see, JeremyLevitt, African Interventionist States and InternationalLaw, in Oliver Furley and Roy May (eds.) AFRiCAN INTERVENTIONIST STATES (Aldershot: Ashgate Publishing, 2001). Since the MISAB intervention took place under the auspices of an ad hoc

group of states
rather than a regional organization, it will be referred to only casually in the analysis that follows.

THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES

In 1975, the ECOWAS was founded by treaty.2 Its main aim at the time was to spur economic integration and development in West Africa; regional security was an important but not vital concern. It later adopted the 1978 Protocol on Non-Aggression, and the 1981 Protocol Relating to Mutual Assistance and Defense.3 Neither the treaty nor the protocols empowered ECOWAS to launch peacekeeping missions (although the 1981 Protocol did empower it to intervene in conflicts that were "externally engineered").

Liberia

In 1989, ECOWAS was tested with the Liberian Civil War (1989-1997). International disinterest and inaction by the United Nations and United States forced ECOWAS to intervene in Liberai to halt the war and protect human life.

In November 1992, two full years after ECOWAS intervened in Liberia, the UNSC adopted Resolution 788, which placed an arms and petroleum embargo against Liberia and empowered ECOWAS to enforce its terms. The following year, in September 1993, it adopted Resolution 866, which established the UN Observer Group in Liberia (UNOMIL), where, for the first time in UN history, the UN codeployed forces with another mission (the ECOWAS Cease-fire Monitoring Group (ECOMOG)) already underway. Needless to say, the ECOMOG continued to serve as primary keeper of the peace.

Moreover, betweenJanuary 1991 and November 1996, the UNSC adopted fifteen resolutions and the president of the UNSC issued nine presidential statements, all relating to the situation in Liberia. Almost every resolution and statement commended ECOWAS for its efforts; asked UN member states to support it financially; encouraged African states to contribute troops to it; and condemned attacks against it by rebel factions. Not once was ECOWAS condemned for inappropriate conduct.

UNSC action thus placed a retroactive de jure seal of approval on ECOWAS intervention; I consider this concrete evidence that a broad right of humanitarian intervention exists. At the least, UNSC action in this case confirmed that an intervention taken outside of the authority of the UN Charter could indeed be legal.

Article 58 of the ECOWAS Revised Treaty

In July 1993, three years into its "peace creation" mission in Liberia ECOWAS adopted its Revised Treaty of 1993 (Treaty),' in part to provide a basis for future peacekeeping. Article 4(e) of the Treaty states that the contracting parties of the ECOWAS affirm their adherence to the "maintenance of regional peace, stability, and security through the promotion and strengthening of good neighborliness." Article 58 dealing with regional security maintains that peace and security is a key objective of ECOWAS and in pursuit of this objective empowers the organization to "establish a regional peace and security observation system and peace-keeping forces where appropriate." Section 3 of Article 58 also provides for the adoption of protocols on political cooperation and regional peace and stability.

2 Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975) (on file with author).

' ECOWAS Protocal on Non-Aggression, April 22, 1978, reprinted in 6 REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISES 18-19 (M. Weller ed., 1994) [hereinafter REGIONAL PEACE-KEEPING]; ECOWAS Protocol Relating to Mutual Assistance on Defence, May 29, 1981,

reprinted in
REGIONAL PEACE-KEEPING, at 19-24.
a Economic Community of West African States Revised Treaty, Article 58 Regional Security,July 24, 1993
(on file with author).

Sierra Leone

In an attempt to avert the toppling of the democratically elected government of Sierra Leone by both military and insurgent elements and to forestall intense civil conflict, the head of state of Nigeria and the authority of the heads of state and government of ECOWAS (AHSGECO) relied on Article 58 tojustify their interventions in Sierra Leone in May and August of 1997, although there were other legal bases for these interventions.5 In October 1997, the UNSC supported the ECOWAS intervention in Sierra Leone by adopting Resolution 1132, which imposed an arms and petroleum embargo and travel restrictions against the junta. It also empowered ECOWAS to enforce its terms.

The ECOWAS Framework

In October 1998, some fourteen months after the interventions in Liberia and Sierra Leone and in an effort to consolidate its capacity for preventing, managing, and resolving conflict, the AHSGECO adopted a binding mechanism to allow for interstate collaboration in the collective management of regional security: the Framework for the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security6 (Framework). The Framework sets out an elaborate scheme for ECOWAS-ECOMOG enforcement operations, including a coherent command and control structure. It calls for the creation of an ECOWAS Mediation and Security Council to, among other things, authorize all forms of intervention, including military. It also draws an interesting distinction between interstate and intrastate conflict.

In internal conflict situations that are sustained and maintained from within, Paragraph 46 of the Framework provides for military intervention by ECOWAS when situations: (1) threaten to trigger a humanitarian disaster; (2) pose a serious threat to peace and security in the subregion; and (3) follow the overthrow or attempted overthrow of a democratically elected government. Except for the SADC and the new AU, no other regional organization has laid down a normative framework for unilateral military intervention in interstate or intrastate conflict. Furthermore, Paragraph 52 of the Framework provides, among other things, that the ECOMOG may undertake military operations for peacekeeping; humanitarian intervention in support of humanitarian actions; and the enforcement of sanctions and embargos. ECOWAS is thus the first regional arrangement to codify both humanitarian and pro-democratic rights of intervention.

Guinea-Bissau

Ironically, the Framework, which had been in ECOWAS bureaucratic pipeline for quite some time, was adoptedjust over a month before ECOWAS dispatched ECOMOG to Guinea-Bissau in December 1998. ECOMOG replaced Senegalese and Guinean troops who had intervened inJune 1998 to save the sitting government from a mutiny by high-ranking officers of its armed forces and to avert mass civil conflict between loyalist and opposition forces. It deployed ECOMOG for the following reasons: (1) to monitor the peace and imposition of a Government of National Unity; (2) to guarantee security along the Senegalese/Guinean border; (3) to keep the warring parties apart;

' SeeJeremy Levitt, Humanitarian Intervention by RegionalActors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone, 12 TEMPLE INT'L & COMP. L.J. 363 (1998).

6Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management, and Resolution, Peace-keeping, and Security, meeting of Ministers of Defence, Internal Affairs and Security, Banjul,July

23-24,1998, adopted, Heads of State meeting, Abuja, October 30-31,1998, inAFRicAN LEGALMATERIALsAFR.
J. INT'L & COMP. L. 148 (Mar. 1999).

and (4) to guarantee free access to humanitarian entities. What is interesting here is that on December 26, 1998, less than one week before ECOMOG deployed in Guinea-Bissau, the UNSC adopted Resolution 1216, which approved of the ECOMOG mission and recognized that it might need to employ force to effectuate its mandate.

The ECOWAS Protocol

In December 1999, approximately one year after the Framework was adopted and the ECOWAS authorized the Guinea-Bissau operation, it adopted the Protocol Establishing the Mechanism for Conflict Prevention, Management, Resolution, PeaceKeeping and Security7 (Protocol), which aims to further implement Article 58 of the Revised Treaty. A key objective of the Protocol is to prevent, manage, and resolve internal and inter-state conflict-and here it states that Paragraph 46 of the Framework is controlling on these matters. Like the Framework, Article 22 of the Protocol states that peacekeeping and the restoration of peace; humanitarian intervention in support of humanitarian disaster; and enforcement of sanctions including embargoes are key responsibilities of ECOMOG. Article 22 does not recognize the authority of the UNSC in either adjudicating nor maintaining international peace and security matters. Perhaps this is a positive development, given the UN's dismal record in Liberia, Somalia, Rwanda, the Central African Republic (CAR), Guinea-Bissau, and Sierra Leone-just to mention a few UN operations.

Article 25 of the Protocol complements Paragraph 46 of the Framework, stating that the mechanism may take enforcement action in internal conflicts in situations: (1) where there is a threat of a humanitarian disaster or a serious threat to peace and security in the subregion; (2) where there has been a serious and massive violation of human rights and the rule of law; and (3) where there has been an overthrow or attempted overthrow of a democratically elected government. For these very reasons ECOWAS sought to establish an ECOMOG force along the borders of Guinea and Liberia in December 2000, to prevent border skirmishes between the two countries from escalating into full-blown conflict.

This is the background for the development of ECOWAS law, which has evolved progressively over the past twelve years to meet the growing security challenges in West Africa. ECOWAS law not only lays down an unambiguous framework for the protection of human rights, democracy, and the rule of law, it also codifies both humanitarian and pro-democratic rights of intervention. The revolutionary evolution of ECOWAS law comes at the behest of West African nations, who have time after time demonstrated their willingness to forfeit sovereignty for peace and security.

Notwithstanding the ECOWAS is not wholly unique in this respect. The SADC has proffered similar regional security structures.

THE SOUTH AFRICAN DEVELOPMENT COMMUNITY

The SADC Treaty and Organ

In January 1992 the Council of Ministers of the Southern African Development Coordination Conference (SADCC), decided to convert SADCC, which had been founded by the then-front line states and was preoccupied with reducing regional dependence on apartheid South Africa, into SADC-the Southern African Development Community. This move appears to have been in part inspired by the changing

'Protocol Establishing the ECOWAS Mechanism for Conflict Prevention, Management, and Resolution,
and Peace-keeping, and Security, UN Doc. A/DEC.12/10/99, Lome, Togo, Dec. 10, 1999 (on file

with
author).

political environment in South Africa in the wake of Nelson Mandela's release from prison in 1990 and the ongoing efforts to fully dismantle the country's apartheid system. In October 1993 the new SADC Treaty entered into force.8 One of its primary objectives is to "promote and defend peace and security" in the Southern African region.9

InJune 1996 the Authority of the Heads of State and Government of SADC (AHSG) adopted the SADC Organ for Politics, Defense and Security (Organ)." Key aims of the Organ are to protect the people and development of the region against the breakdown of law and order and against interstate and intrastate conflict. The Organ supports cooperation in regional security through conflict management and by coordinating the participation of member states in international and regional peacekeeping.

Objective (g) of the Organ states that where diplomatic efforts fail the Organ is responsible for recommending punitive measures to the Summit of the Heads of State of SADC. It also states that measures to be taken in this regard would be further elaborated in a Protocol on Peace, Security and Conflict Resolution.

The SADC Protocol

In 1997, the SADC Summit adopted the Protocol on Politics, Defense and Security in the SADC Region." Under the SADC Protocol, protection people from instability arising from the breakdown of law and order; engaging in conflict prevention, management, and resolution; and promoting peacemaking and peacekeeping to achieve sustainable peace and security are all core functions. Furthermore, like Paragraph 46 of the ECOWAS Framework, Article 5(2) of the Protocol sets out an elaborate criteria for when regional intervention in internal conflicts is justified: when there is (1) large-scale conflict violence between sections of the population of a state, or between the state or its armed or paramilitary forces and sections of the population; (2) a threat to the legitimate authority of the government (such as a military coup by armed or paramilitary forces); (3) a condition of civil war or insurgency; (4) or any crisis that could threaten the peace and security of other member states. The SADC Protocol states that in cases of internal conflict the Organ "shall respond to an invitation by a member country to become involved in mediating a conflict within its borders."

Hence, one key distinction between the law of ECOWAS and SADC is that the latter appears to be more conservative; it seems to require that a country consent to an intervention, while ECOWAS law clearly does not. Moreover, Article 2 (g) seems to recognize an ambiguous role for the OAU and the United Nations in "endorsing" SADC operations that entail the use of force. The ECOWAS Framework and Protocol do not make such an acknowledgment. Yet the SADC did not seek any such endorsement before launching its operation in Lesotho in 1998. Moreover, both the SADC and ECOWAS treaty regimes have similar criteria for intervention, and both seem to provide for a pro-democratic right of intervention.

Lesotho

In 1998, when segments of the civilian population in Lesotho, including opposition party supporters and rogue elements in the sitting government, supported a mutiny by

" CONTEMPORARY INTERNATIONAL ORGANISATIONS AND TREATIES: SELECTED DOCUMENTS, INSITrUTE FORSTRA-
TEGIC STUDIES UNIvEPSrrV OF PRETORIA (Ad hoc Pub. No. 34) 91-93 (M. Hough & A Du Plessis eds., Oct. 1997).

Id. at 95, Art. 5, Objective (c).

1" The Southern African Development Community (SADC) Organ for Politics, Defence and Security,
Gaborone, Botswana, June 28, 1996, in AFRICA: SELECTED DOCUMENTS ON POLITICAL, SECURITY,

HUMANI-
TARIAN AND ECONOMIC ISSUES, INSTITUTE FOR STRATEGIC STUDIES UNIVERSITY OF PRETORIA (Ad hoc Pub. No.
33) 32-35 (M. Hough & A Du Plessis eds., Nov., 1999).

" Protocol on Politics, Defence and Security in the Southern African Development Community (SADC)
Region, in AFRICAN LEGAL MATERIALS, AFR.J. INT'L & COMP. L. 197 (Mar. 1999).

junior military officers, the small landlocked country plummeted into mass chaos. The situation quickly intensified as loyalist and opposition forces composed of divided segments of the army, police, and the civilian population clashed violently on the streets of Maseru, the capitol. When the situation became intolerable, and at the request of the lawful government, South Africa and Botswana, acting under the veil of SADC, launched a robust intervention to thwart any attempt at a coup d'etat and to restore law and order to the country in accordance with SADC agreements, namely the Protocol. And unlike ECOWAS entering into Liberia, Sierra Leone, and Guinea-Bissau, when SADC (South Africa and Botswana) launched its operation in Lesotho, the complete legal framework for the intervention was already in place.

THE NEW AFRICAN UNION

The Constitutive Act of the African Union (Union) came into force in March 2001.12 The Act lays out a completely new governance framework for the African continent-its EU-like structure varies considerably from that of the OAU.

Article 4 of the Union entitled Principles of the Union, includes three very important provisions on the regional security or peacekeeping front; Provision (h) accords the Union the right to "intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." Provision (J) accords member states the "right... to request intervention from the Union in order to restore peace and security." Provision (p) "condemns and rejects unconstitutional changes of government" (think of the OAU Sierra Leone example). These provisions complement and "continentalize" those enumerated in the ECOWAS Framework and Protocol and SADC Protocol.

The willingness ofAfrican states to codify criteria for military intervention and openly condemn undemocratic seizures of power in the instrument constituting the continent's foremost political body is astounding. Even more surprising is the fact that African nations have given the AU the authority to invoke a right of humanitarian intervention-the best evidence of their commitment to achieve peace, security, and stability on the continent.

CONCLUSION

This seemingly new African liberalism about regional security is chiseling away at the absolutist/positivist structure of state sovereignty and nonintervention, which is giving way to the logic responding to the harsh realities of a continent marred by deadly conflict. While political elites often have mixed motives for supporting particular policy prescriptions, both democrats and autocrats alike recognize that intrastate, interstate, and regional peace and security are precursors to an environment enabling authentic political and economic development. Both reformers and thieves recognize that stability is necessary, whether to effect positive change or to pilfer the state's wealth; hence, there are incentives for both democrats and autocrats to secure a conflict-free environment. This may explain the general consensus among political elites in Africa to endow regional bodies with the authority to use force in states under limited circumstances.

12 Constitutive Act of the African Union, Adopted by the Thirty-Sixth Ordinary Session of the Assembly
of Heads of State and Government, I Ijuly 2000-Lome, Togo. The Act came into force eight months later

(Mar. 2001) after receiving ratification by two-thirds of the member states of the OAU.

Whatever the case may be, it is unambiguously clear that African states and their organizations have proffered the world's most advanced legal and sociopolitical frameworks to combat conflict and regional insecurity. No other nations or regions have offered comparable structures-nor have they demonstrated a similar willingness to sacrifice human and tangible resources and sovereignty for peace and security. The new African interventionism has influenced state behavior both inside and outside Africa, and state practice and treaty law developments have added significant weight to the development of the corpus of international law and policy, particularly on peacekeeping, peace enforcement, humanitarian intervention, and pro-democratic intervention.

PRO-DEMOCRATIC INTERVENTION IN ARICA

by David Wippman*

When the United States invaded Panama in 1989, the international reaction was overwhelmingly hostile. The UN General Assembly and the Organization of American States (OAS) voted overwhelmingly to condemn the intervention, even though it was evident to everyone that the advent of democracy in Panama had been blocked only by General Noriega's refusal to seat the democratically elected government of Guillermo Endara, and even though Endara and most Panamanians welcomed the U.S. invasion. At the time, most states firmly adhered to the view that foreign states could not legitimately use armed force to seat a democratically elected government against the will of an indigenous political elite in effective control of the state.

The world has come a long way since 1989, and, rhetorically at least, Africa has perhaps come the furthest. The United Nations, the Organization on Cooperation and Security in Europe (OCSE), and the OAS, among others, have adopted treaties, declarations, and other instruments reaffirming democracy as the only legitimate form of governance; the OCSE and the OAS have pledged to take action to reverse any unconstitutional overthrow of a democratic government. Africa has joined the trend, and contributed to what Thomas Franck labeled the emerging democratic entitlement through a series of intra-African documents insisting on the promotion of democracy in the region.

Perhaps most notable is the Organization of African Unity's Declaration on a Framework for an OAU Response to Unconstitutional Changes in Government, adopted in July 2000 after a meeting in Lome.' The declaration, expressing grave concern at the phenomenon of coups d'etat, rejects the unconstitutional seizure of power as an unacceptable violation of the OAU's basic principles. The Declaration reaffirms OAU members' common commitment to democracy. It articulates a set of agreed principles of democratic governance, including constitutionalism, separation of powers, an independentjudiciary, political pluralism, respect for democratic change and space for political opposition, free and regular elections, and respect for human rights.

More important, the Declaration specifies a progressive OAU response to unconstitutional seizures of power or "the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections." At the request of any member, the OAU Central Organ will condemn the unconstitutional action and suspend the affected government's participation in the OAU. If democracy is not restored within six months, the Central Organ is to institute "a range of limited and targeted

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'AHG/Decl. 5 (XXXVI) (2000).

sanctions," including visa denials, trade restrictions, and restrictions on intergovernmental contacts.

This is an extraordinary declaration for an organization historically devoted to the sovereignty of its members. It was adopted in connection with the coup in C6te d'Ivoire, but it is not an isolated instrument. For example, the October 2001 New Partnership for Africa's Development, which constitutes the blueprint of African states for Africa's development and relationship with the West, declares democratic governance to be a key component of African's agenda for renewal. Similarly, the Constitutive Act of the African Union insists on respect for democratic principles.

In light of recent events in Zimbabwe, one might question the extent of Africa's commitment to the principles espoused in these instruments. African states have been slow to condemn President Mugabe's use of intimidation, ballot box stuffing, and related tactics to ensure a favorable electoral outcome despite an apparent opposition victory. As of March 2002, the OAU Central Organ had not initiated the responses called for in its Lome Declaration. The tepid response suggests that for most African states, the commitment to promotion of democracy is primarily about regional stability. For states confronting large-scale internal strife, democratic elections may offer a stabilizing exit strategy; but for states like Zimbabwe, insistence on democracy in the face of a government firmly in power and determined to stay may prove destabilizing.

The experience of the Economic Community of West African States (ECOWAS) is illustrative here. In many respects, ECOWAS has traveled the furthest and the fastest down the pro-democratic intervention road. In 1989, ECOWAS was a regional trade group. By 1998, it had transformed itself, at least on paper, into a regional collective security system with extraordinary authority to intervene militarily in the internal affairs of member states. The 1998 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, read together with related ECOWAS instruments, establishes a Mediation and Security Council that by a two-thirds vote may authorize "all forms of intervention," including military intervention, in a member state in order to respond to, among other things, "serious and massive violation of human rights," or, more important for present purposes, to "an overthrow or attempted overthrow of a democratically elected government. "2

This extraordinary assertion of regional authority emerges from ECOWAS experience with the conflicts in Liberia and Sierra Leone. In both cases, after unsuccessful attempts to persuade the Security Council to take effective action itself, ECOWAS member states, led by Nigeria, felt compelled to intervene militarily to end protracted internal conflicts and thereby preserve regional stability and limit regional refugee flows. In each case, ECOWAS intervened without Council authorization. In Liberia, ECOWAS attempted to restore order and to create conditions for establishing an elected government; in Sierra Leone, ECOWAS attempted to reinstate an ousted elected government. In both cases, the Security Council implicitly approved of ECOWAS action after the fact. From this experience, ECOWAS could reasonably conclude that the international community would tolerate and even support regional military interventions to restore order, save lives, or reinstate an ousted democratically elected leader in African states experiencing grave human rights emergencies.

The 1998 Protocol was designed to formalize decision-making procedures for similar future interventions and to authorize them in advance. Ordinarily, consent of a lawful government can validate an otherwise wrongful military intervention. By ratifying the Protocol, ECOWAS states may be viewed as consenting in advance to intervention under

2At <http://www.ecowas.int>.

the conditions specified in the Protocol. The more difficult questions are whether the target state has an absolute right to revoke that consent, and if so, who speaks for the state at the relevant time.

The issue comes to a head if the target state refuses consent at the moment of intervention. Ordinarily, states cannot unilaterally renounce agreements absent a provision in the agreement or special circumstances. But military intervention agreements differ from others; they go to the heart of the values associated with state sovereignty and implicate larger concerns about international order. Accordingly, such agreements are vulnerable to challenges that they violate jus cogens norms governing the use of force, as well as Article 103 of the UN Charter, which provides that obligations under the Charter prevail over any inconsistent treaty obligations.

I have argued elsewhere that military intervention pursuant to treaty may be lawful in particular circumstances.3 Pro-democratic intervention may be one such circumstance. In cases of coups or other unconstitutional seizures of power, arguably only the will of the ousted but democratically elected government should count, and the self-installed de facto authorities lack the right to revoke a prior grant of consent to intervention. In general, coup makers seize power because they lack the popular support necessary to attain power lawfully. The difficulty is that the correlation is not automatic; sometimes the de facto authorities may have significant popular support. Moreover, effective control, however achieved, is usually viewed as a key criterion of a government's power to represent the state. In extreme cases like Sierra Leone, though, the claim of the ousted democratic government to represent the state may be strong enough to override any competing claim by the de facto authorities.

Whether the 1998 Protocol is compatible with the UN Charter is a different matter. By arrogating to itself the right to decide on military intervention, ECOWAS seems to be displacing the UN Security Council on regional peace and security matters, something that is hard to reconcile with the UN Charter design. But ECOWAS is apparently less concerned with the legal basis for such interventions than with developing the institutional capacity to carry them out. Whether it can build that capacity is at best an open question. Like many other regional and subregional organizations, ECOWAS is short on staff, lacks financial and material resources, is plagued by divisions among member states, and has relatively little expertise in carrying out complex peace enforcement operations. As a result, ECOWAS struggled in Liberia and Sierra Leone. The Protocol and other ECOWAS instruments are designed in part to address these issues. ECOWAS deserves considerable credit for the attempt, but the problems it faces are formidable.

Overall, the ECOWAS Protocol reflects a trend toward the regionalization of peacekeeping and peace enforcement in Africa. Given the magnitude of the problems, other actors, including the United Nations, the African Union, and the United States, need to work with subregional actors like ECOWAS to improve what has been to date a dismal record on African peace and security issues, one for which responsibility must be shared by all the states and organizations involved.

s David Wippman, Treat-Based Intervention: Who Can Say No? 62 U. CHI. L. REv. 607 (1995).

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J. Sloan, The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom and Bust?, Hastings International and Comparative Law Review, vol. 30, no. 3

ignored. These missions were generally considered failures. In the period following these operations, a chastened United Nations placed a renewed emphasis on the importance of limiting the use of force in peacekeeping to circumstances of self-defense.

In the third part, this article considers the United Nations' current approach in returning to the practice of bestowing enforcement powers on peacekeeping operations in disregard of the self-defense principle. Since June 1999, new peacekeeping operations have been established by the U.N. Security Council in ten countries or regions;[9] in nine of these countries or regions, the operations have been specifically authorized under Chapter VII of the U.N. Charter to use considerable force to achieve at leas some of their goals.[10] Remarkably, several of these missions have been authorized to use "all necessary means" to achieve their objectives — language traditionally reserved for enforcement actions.[11]

The final section of this article considers the future of U.N. peacekeeping. Is the United Nations' current move away from the self-defense principle simply the next installment in a boom-bust historical cycle of peacekeeping? Will it lead, once again, to forceful peacekeeping missions ending in disaster, the foundations of peacekeeping being shaken, and the United Nations hastily calling for a return to the strict application of the self-defense principle? Or does it represent the future face of successful U.N. peacekeeping? I will argue that history suggests the former.

Terminology

No discussion of peacekeeping or related issues may be sensibly undertaken without dwelling to some extent on definitions. This is particularly so when considering the forcefulness of peacekeeping operations. A peacekeeping mission's limited use of force has long been considered by many to be an essential characteristic of an operation being classified as peacekeeping, rather than enforcement

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9. These countries or regions are as follows: Kosovo, Sierra Leone, East Timor, Democratic Republic of the Congo, Ethiopia and Eritrea, Liberia, Cote d'Ivoire, Haiti, Burundi, and Sudan.

10. With the tenth country, Ethiopia and Eritrea, the Security Council has recently indicated its intention to take action under Chapter VII if the conduct of the parties fails to improve. *See infra* note 242 for a discussion of the current status of the operation in Ethiopia and Eritrea.

11. *See* discussion of the language used by the Security Council in relation to "necessary measures" *infra* note 283.

or, more recently, "peace-enforcement." I will consider each of these terms — peacekeeping, enforcement, and peace-enforcement — in turn.

U.N. representatives, commentators, and others disagree about what type of activity may be classed as U.N. "peacekeeping." The term "peacekeeping" is not found in the U.N. Charter. There is no "correct" definition of the term.[12] Some scholars simply accept as "peacekeeping" whatever the U.N. Secretary-General or the U.N. Department of Peacekeeping Operations ("DPKO") says is peacekeeping. However, such an approach is problematic because the UN Secretariat and Secretary-General have been somewhat changeable regarding the essential aspects of peacekeeping.[13]

For the purposes of this discussion, I rely on the following definition of "peacekeeping": "U.N. peacekeeping is a Security Council-authorized force, composed of personnel voluntarily provided by member states and/or members of the U.N. Secretariat, operating under the authority of the United Nations and mandated to assist with the maintenance or restoration of peace through its activities *in situ*." Under this definition, the question of how much force an operation may use and still be characterized as peacekeeping is deliberately left open. Moreover, this definition deliberately leaves

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12. *See* 1 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 1946-1967: DOCUMENTS AND COMMENTARY, THE MIDDLE EAST ix (1969) for a valuable discussion on this point.

13. For example, after years of taking the position that a characteristic of peacekeeping operations was the non-use of force except in self-defense, in its December 2003 Peacekeeping Handbook, the U.N. Secretariat conceded that "sometimes the Security Council will authorize a peacekeeping operation to use armed force in situations *other than in self-defence*" (emphasis added). U.N. DEP'T OF PEACEKEEPING OPERATIONS, HANDBOOK ON U.N. MULTIDIMENSIONAL PEACEKEEPING OPERATIONS 57 (2003) available at <pbpu.unlb.org/pbpu/handbook/Handbook%20on%20UN%20PKOs.pdf>.

Similarly, the definition of peacekeeping posited by the Security Council in *An Agenda for Peace* contradicted the position long maintained by previous Secretaries-General and the Secretariat that consent is always an essential element in a peacekeeping operation. *See* discussion *infra* notes 102-105. Moreover, political considerations may be involved in a U.N. organ's decision as to whether or not to characterize a mission as peacekeeping. For example, the Security Council or Secretariat may favor deeming an operation "peacekeeping" — whether or not such a characterization is sustainable — because an operation so labeled is likely to be perceived as being a relatively non-violent endeavor, thereby making it more acceptable both to the forum state, which will be more likely to consent to the operation's presence, and to other states, which will be more likely to contribute troops. *See* discussion *supra* note 90 and corresponding text.

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to one side the related issues of whether host state consent or the impartiality of the mission are *sine qua nons* of an operation being classed as peacekeeping.

It is also necessary for the purposes of this discussion to set out what is meant by U.N. "enforcement."[14] The concept of enforcement *is* found in the U.N. Charter, though it is not defined therein.[15] The term refers to a situation where the will of the Security Council is enforced by means of its Chapter VII authority against an opposing state either by the imposition of sanctions under Article 41 or, where necessary, a forceful action under Article 42.[16] For the purposes of this discussion, I use the term "enforcement" to refer to an operation where the Security Council has authorized *force* to impose its will, rather than relying on non-forceful sanctions.[17] In particular, I use the term "enforcement" to refer to the type of activity where the Security Council has bestowed its authority to use force to secure its will to a coalition of the willing ("COTW") — either a grouping of states (including regional organizations such as NATO[18] or ECOWAS[19]) or an individual state.[20]

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14. To some, peacekeeping may be defined broadly enough to include enforcement. For the purposes of this discussion, I will continue to use both terms, while recognizing that a "peacekeeping" operation may be authorized to use "enforcement" or "enforcement-type" levels of force.

15. U.N. Charter art. 2, para. 5, 7; art. 5; art. 45; art. 53.

16. "Enforcement action is generally conceived as directed against a State and as designated to overcome [its] opposing will . . . ." Jochen Frowein & Nico Krisch, *Introduction to Chapter VII*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1, 706 (Bruno Simma ed. 2002).

17. Some use the term "enforcement action" to distinguish a forceful action under Art. 42 from non-forceful enforcement under Art. 41. "Enforcement action" is sometimes referred to as "collective security."

18. North Atlantic Treaty Organization.

19. Economic Community of West African States.

20. While largely beyond the scope of this discussion, it is important to note that this enforcement — sometimes referred to as "delegated enforcement" — is of a different nature than the enforcement envisaged under the U.N. Charter. Under the Charter, the Security Council's will was to be enforced by means of a standing force established under Art. 43 which would act under the command of the Security Council. As no such force has ever been agreed to, the Security Council has opted to proceed by delegating its enforcement powers to coalitions of the willing. Most scholars have accepted the legality of delegated enforcement operations, based either on implied power under the Charter or by reference to the Security Council's practice. *See* Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing,"* 11(3) EUR. J. INT'L. L. 541, 542 (2000); *see also* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 26

I consider enforcement operations in two categories. First, I consider operations where the Security Council has authorized a COTW to engage in an offensive campaign "*against* certain elements or governments."[21] Only been two examples of such enforcement — which I will refer to as "full-blown enforcement"[22] — exist in the U.N.'s history: the Security Council's authorization to use force in Korea[23] and its authorization for a U.S.-led COTW to expel Iraq from Kuwait in 1990 and 1991 ("Operation Desert Storm"). Second, I refer to the enforcement operations authorized by the United Nations since the end of the Cold War (with the exception of Operation Desert Storm) as "quasi-enforcement." Generally speaking, these operations are of a more limited nature, have fewer troops, and are not to be directed *against* one party or government. Instead, these operations tend to use their enforcement powers to undertake functions of a more domestic nature, such as facilitating the delivery of humanitarian aid or the forceful restoration of peace. Moreover, quasi-enforcement operations are frequently designed to impose peace in an area in advance of (or concurrently with) a peacekeeping operation. Examples of "quasi-enforcement" include the Security Council's 1992 authorization of a U.S.-led operation to use all necessary means to establish a secure environment for humanitarian relief in Somalia ("UNITAF" or "Operation Restore Hope") and its authorization of the U.S.-led operation in 1994 to assist in Haiti ("Multinational Force" or "MFN").

The main basis (along with the issue of consent) of the

(2002), which notes that "[t]extually, Article 42 can stand on its own feet and it now may be said to do so as a result of Council practice."

21. D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY OF UNITED NATIONS PRACTICE 267 (1964).

22. The terms "full-blown enforcement" and "quasi-enforcement" are borrowed from McCoubrey and White. *See* HILAIRE MCCOUBREY & NIGEL D. WHITE, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS 55 (1996). Although many commentators agree that the two examples (Korea and Iraq/Kuwait) are Art. 42 enforcement actions, not all accept such a characterization. Instead they would consider either or both of the operations to be self-defense under Art. 51 of the Charter.

23. The U.N. action in Korea was authorized by the United Nations, the U.N. flag was flown and contributing governments used the term "U.N. command" when communicating with it. However, "in military and operational terms, control was firmly in the hands of the United States." 2 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 1946-1967: DOCUMENTS AND COMMENTARY, ASIA 195-197 (1970) [hereinafter "HIGGINS, ASIA"].

distinction between U.N. peacekeeping operations and U.N. enforcement operations has traditionally been that the latter were far less constrained in their use of force. However, now that current peacekeeping operations are generally authorized to use considerable force, including, in some cases, "all necessary means" under Chapter VII, this basis to distinguish the two concepts becomes much harder to apply. Where a peacekeeping operation is authorized to use an "enforcement-type" level of force, it becomes necessary to focus on the question of command and control: A peacekeeping operation is led by the United Nations, whereas in an enforcement operation (whether "quasi-enforcement" or "full-blown enforcement"), the Security Council delegates control[24] to a COTW.[25] Another important distinction between enforcement and peacekeeping is that the latter features the consent of the host state — though, acknowledgedly, there may be issues (beyond the scope of this discussion) regarding whether true "consent" may be obtained from a state whose government has broken down, such as Somalia in the 1990s. However, if one accepts the current tendency of the Security Council to specifically rely on Chapter VII of the Charter and the "all necessary means" language in establishing some peacekeeping operations, it is not such a stretch to argue that consent to a peacekeeping operation may no longer be required. As we shall see, this was the approach of Boutros-Ghali in the early 1990s.

Finally, another frequently invoked term, "peace-enforcement," deserves mention. In its short existence, the term has come to mean different things to different people. Boutros-Ghali, thought by many to have coined the term, defined "peace-enforcement" as an action performed by member states who volunteered for service and were on-call to the United Nations. Peace-enforcement forces were to be more heavily armed and more extensively trained than peacekeeping forces. According to Boutros-Ghali, "[d]eployment and operation of such forces would be under the authorization of the Security Council and would, as in the case of peace-keeping forces, be under the command of the Secretary-General."[26] Boutros-Ghali's peace-

24. *See* DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS, at Chapters 4-6 (1999), on the delegation of U.N. Security Council powers to member states and regional arrangements.

25. Of course, enforcement as envisaged under Art. 43 of the U.N. Charter was to have been led by the Security Council. Blokker, *supra* note 20, at 542.

26. *Agenda for Peace*, *supra* note 8, at ¶ 44.

enforcement, however, is different from any forceful peacekeeping operation ever undertaken by the United Nations in that he envisaged peace-enforcement forces operating on-call.[27]

To others, peace-enforcement is a means "to bring about or ensure compliance with some aspect of a Security Council mandate or an agreement among the parties."[28] "Unlike peacekeeping, but like full-scale enforcement measures, peace enforcement operations do not necessarily require the consent of the parties involved"[29] and peace-enforcement operations may use force beyond self-defense. According to this view, whether an operation is led by the United Nations, or by a member state or group of member states, is irrelevant to its characterization as peace-enforcement: ONUC would be categorized as peace-enforcement; so would the French-led *Opération Turquoise* in Rwanda in 1994. In effect, the concept is similar to the term "quasi-enforcement" used herein, except that "quasi-enforcement" only refers to those operations led by states or COTWS.

Common to all definitions of "peace-enforcement" is that it involves a greater use of force than peacekeeping, and a presumption that peacekeeping features a limited use of force. Because almost all peacekeeping operations in the last eight years have been given the authority to use force of a nature which is equal to or greater than the force used by operations classified as "peace-enforcement," drawing a distinction between peacekeeping and peace-enforcement is no longer valuable, if indeed it ever was.[30]

In this discussion I will rely on the terms peacekeeping and

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27. Moreover, it is arguable that Boutros-Ghali intended peace-enforcement to be limited to the enforcement of Art. 40 provisional measures. Jane Boulden takes this view, though she concedes that this limitation "has long since fallen by the wayside." JANE BOULDEN, PEACE ENFORCEMENT: THE UNITED NATIONS EXPERIENCE IN CONGO, SOMALIA, AND BOSNIA 2 (2001). Whether Boutros-Ghali envisaged such a limitation is debatable; he is not explicit on this point. *See Agenda for Peace*, *supra* note 8, at ¶ 44.

28. BOULDEN, *supra* note 27, at 3; *see also* TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS (2002).

29. *Id.* at 3.

30. Even when it was rare for peacekeeping operations to be authorized to use enforcement-type levels of force, reliance on the term "peace-enforcement" to signal a more forceful endeavor than peacekeeping was of limited value as it was impossible to state with precision how much force beyond force in self-defense a peacekeeping operation must be authorized to use in order for it to transmogrify into "peace-enforcement." As such, what was classified as "peacekeeping" by one commentator was frequently classified as "peace-enforcement" by another.

enforcement and avoid the term peace-enforcement. The term peacekeeping carries no connotation of a limited use of force; however, as noted, it necessarily refers to an operation led by the United Nations. An enforcement operation, on the other hand, is one which is authorized to use considerable force and is not led by the United Nations. Where necessary, I specify whether the enforcement operation referred to is "quasi-enforcement" or "full-blown enforcement." As such, a peacekeeping operation may be authorized to use an "enforcement-type" level of force without becoming an "enforcement" operation.

II. The Cold War

Introduction

As noted, the self-defense principle meant that peacekeepers could not use force beyond self-defense in a peacekeeping operation. That peacekeepers possess the right to use force *in self-defense* has been assumed for reasons both practical and legal. Practically speaking, U.N. member states would not be likely to volunteer troops (and individuals would not likely be willing to serve) in circumstances where individuals were denuded of a right so essential to their survival.[31] Legally speaking, the right to self-defense has been assumed to be inherent.[32] Indeed, the right to self-defense exists in all endeavors national or international.

Because there is no established definition of the concept of self-defense – in peacekeeping or otherwise – the line between force *in* self-defense and force *beyond* self-defense can be very difficult to

31. As observed by Findlay, "From a political perspective, it has been clear since the advent of peacekeeping that states are unwilling to provide forces to the UN if they are not given the right of self-defence." Findlay, *supra* note 3, at 53.

32. In the words of Dag Hammarskjöld, in 1958, "It should be generally recognized that [a right of self-defense for U.N. peacekeepers] exists." The Secretary-General, *Report of the Secretary-General on the Summary Study of the Experience Derived from the Establishment and Operation of the Force*, ¶ 179, *delivered to the General Assembly*, U.N. Doc. A/3943 (Oct. 9, 1958) [hereinafter "*Summary Study*"]; *see also* The President of the Security Council, *Note [transmitting statement by the President of the Security Council concerning the item entitled "An agenda for peace: preventive diplomacy, peacemaking and peace-keeping]*, U.N. Doc. S/25859 (May 28, 1993) at 1, which refers to the "inherent right of United Nations forces to take appropriate measures for self-defence." *See also* Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT'L L. & POL'Y 239, 249 (1999).

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A. McGregor, 'Quagmire in West Africa - Nigerian Peacekeeping in Sierra Leone (1997-98)', International Journal, Vol. 54 (3), 1999

ANDREW MCGREGOR

Quagmire in west Africa

Nigerian peacekeeping in Sierra Leone (1997-98)

ELLOWING A LONG PERIOD OF MILITARY RULE, Ahmad Tejan Kabbah was elected president of Sierra Leone on 17 March 1996. Little more than one year later, on 25 May 1997, he and his democratically elected government were overthrown in a bloody coup led by dissident military officers and rebels from Sierra Leone's long-standing insurgency. In March 1998, a peacekeeping force under Nigerian leadership, with considerable help from a British/South African mercenary firm and a local paramilitary (the Kamajor), entered Freetown, the capital of Sierra Leone, and restored Kabbah and his government. The motives for Nigerian intervention were twofold: there was a natural desire for regional security; but General Sani Abacha also wanted international legitimacy for his discredited military regime. The initial success of the peacekeepers helped obscure some of the troubling aspects of the intervention - the lack of an international mandate, the use of mercenaries in peacekeeping operations, and the very undemocratic nature of the Nigerian regime. Peace has, however, eluded Sierra Leone: cities, towns, and rural areas remain insecure and a supposedly defeated rebel army remains at large, indulging in a vicious retributive campaign of terror against a defenceless civilian population. Even though the situation remains fluid, the initial Nigerian intervention is worth examining both for the precedents it set and for the parallels with the current crisis in Kosovo - a large military power leading a sometimes reluctant regional alliance in a military campaign designed to bring an as yet undefined resolution to a civil conflict.

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Quagmire in west Africa

The assault on Freetown was apparently orchestrated by the Nigerian military without consulting their allies in the Economic Community of West African States (ECOWAS) and its military arm - the ECOWAS Monitoring Group (ECOMOG) - and without a United Nations Security Council mandate for decisive military action. Even though the offensive seemed well-planned, the Nigerian command described it as a spontaneous reaction to an attack by forces of Sierra Leone's junta government, the Armed Forces Revolutionary Council (AFRC). While the United Nations, the Commonwealth, and the Organization of African Unity (OAU) all called for the restoration of Kabbah's legitimate government, the long-term intentions of the Nigerians remain uncertain. In the short term, their efforts to ease international opposition to the Abacha regime were at least partly successful, but still fell far short of expectations.

BACKGROUND

Sierra Leone is an example, unfortunately not unique, of a nation in which the collapse of political and social structures made external intervention appear the only humanitarian solution. It is a small ex-British colony in west Africa with dense forests, rich agriculture, and abundant natural resources that would normally allow for a prosperous lifestyle for its citizens. Instead, it is ranked by the United Nations as the world's most unliveable country. Since independence in 1961 successive regimes have failed to deal with the collapse of a patrimonial system of wealth redistribution and the inequitable exploitation of the country's natural resources. The resulting social tensions produced military governments and armed rebels (the Revolutionary United Front/Sierra Leone - RUF/SL) who shared a common origin in the ranks of disaffected and unemployed youths on the fringes of both urban and rural society. The military and the rebels have also shared a lack of vision regarding political reform or development in Sierra Leone, preferring to adhere to a programme of self-enrichment while passing through phases of confrontation and collaboration with each other.

The RUF rebellion was launched on 23 March 1991, 20 years to the day after the coup attempt for which its leader, Foday Sankoh, was jailed in 1972. Sankoh, once a corporal in the Sierra Leone Army (SLA), gained a thorough knowledge of the bush and forests of Sierra Leone during a stint as an itinerant photographer. Later training in Libya provided him with a background in the revolutionary arts. His movement

developed out of a strain of revolutionary populism current in student circles in Sierra Leone in the 1970s and early 1980s. Its intellectual roots can be found in a blend of borrowed pan-Africanism and ideas from Muammar Khadafy's Green Book.'These concepts would reappear as the slender ideological core of Sankoh's revolutionary movement.

The obscure ideology that drives the RUF is of little help in explaining some of the movement's questionable strategic decisions. The decision to join forces with the military junta in May 1997 provided the backbone for the junta's struggle to retain power but also gave Nigeria the opportunity to impose a political/military solution on the Sierra Leone crisis.

The RUF has also consistently failed to present a coherent political agenda to the international community. In its first real chance to address an international forum (the OAU-RUF meeting in Abidjan on 3-4 December 1995), the RUF delegation stressed that its target was not so much the ruling National Provisional Ruling Council (NPRC) as the prevailing ideology of corruption, which it viewed as a legacy of the All People's Congress that had ruled Sierra Leone from 1968 to 1992.2 The delegation favoured postponing elections and made the rather startling declaration that Foday Sankoh 'did not want to be the President of Sierra Leone and his only wish was to see Sierra Leone liberated.'3

The current troubles in Sierra Leone can be traced back to the 1990 ECOMOG intervention in Liberia. As Sankoh began organizing his movement, Charles Taylor, the Liberian guerrilla leader, began to arm the RUF in retaliation for two battalions of the SLA which Sierra Leone

1 A number of Liberians and Sierra Leonans, including Foday Sankoh, received military and ideological instruction in Libya in the 198os. Paul Richards has identified several aspects of the RUF movement which appear to derive from Khadafy's Green Book philosophy. (Fighting for the Rain Forest: War, Youth and Resources in Sierra Leone [Portsmouth NH: Heinemann 19961, 21). But I brahim Abdullah sees it differently: 'If the RUF had any ideology, it was definitely not shaped by the Green Book ... Richards' assumption that the Green Book was influential in shaping the views of student radicals led him to look for Green Book signs that were markedly absent in the RUF.' ('Bush path to destruction: the origin and character of the Revolutionary United Front/Sierra Leone,' Journal of Modern African Studies 36[June 1998], 225.)
2 The only document offering anything close to an RUF ideology is the slim volume, Footpaths to Democracy, published by the RUF in 1995. This 'manifesto' borrows heavily from earlier pan-African liberation documents, adding a mixture of quotes and ideas from Amilcar Cabral and Mao Zedong, with a handful of reflections by Foday Sankoh. See Abdullah, 'Bush path to destruction,' 217.
3 OAU Conflict Management Review, Echoesfrom Sierra Leone (OAU Political Department 1998).

provided to help the Nigerian-led ECOMOG forces in Liberia. The fighting strength of the early RUF depended heavily on Liberian and Burkinabe mercenaries, fighting mostly for plunder, with little sense of responsibility to the Sierra Leonans for whom they were putatively fighting. Charles Taylor, with some justification, saw ECOMOG as a Nigerian-inspired effort to rescue Samuel Doe, the Liberian president, whose authority at the time did not extend beyond the walls of the presidential compound in Monrovia.

The scant access of the rural-based RUF to communications to the outside world and Sankoh's inexplicable reluctance to take advantage of every opportunity to express his position at international forums (in December 1996, for example, he refused to meet with United Nations negotiators in Sierra Leone) left the international community in the dark over the motives behind the brutalization of the civilian population of Sierra Leone. Those foreign capitals that took the time to consider the RUF found it lacking in credibility as an opposition movement. They hoped that the democratic election of Kabbah in 1996 would put an end to the relentless devastation of the country by rebels and state security forces alike.

Sankoh eventually agreed to outside mediation in negotiations with the newly elected president. With assistance from the government of C6te d'Ivoire and the participation of the OAU, the United Nations, the Commonwealth, and the International Red Cross, the Yamoussoukro communiqu6 was issued in April 1996, and in December the Abidjan agreement called for a ceasefire and 'a framework to further the process of democratization and equitable social and economic development in Sierra Leone.'4

The military coup in Freetown in May 1997 brought to a halt the implementation of the Abidjan agreement. At the time, Foday Sankoh was in detention in a luxury hotel in Nigeria where he had been arrested in February. Educated but non-combatant members of the RUF leadership had expelled Sankoh from the movement two weeks before his arrest, but the expulsion carried no weight with the fighters and battle-commanders, who remained loyal to him. Those responsible for his expulsion were abducted from a reconciliation meeting in early 1997 and have not been seen since.

Likely under Sankoh's advice, the battle-commanders brought 500 rebels (many boys as young as 12) to Freetown at the invitation of the

4 Ibid, 6-8.

coup leaders, who believed they faced imminent foreign military intervention. The RUF decision to enter into a defined military alliance with the coup leaders brought the RUF out into the open where it could be crushed by conventional military force, a costly defiance of all traditional guerrilla strategy - RUF success had always been based on avoiding direct confrontation with government forces. The result was the elimination of much of the movement's leadership and a good portion of its arms.

THE JUNTA GOVERNMENT

The coup that precipitated the ECOMOG military intervention began with an assault on Pademba Road Prison in Freetown, from which Major Johnny Paul Koroma was released, together with 600 felons and veterans of unsuccessful coups. Koroma was a member of the politically powerful Limba tribe of Sierra Leone's Northern Province. His trial for participation in a September 1996 coup attempt was set to begin one day after he was released from prison. Although close to the leaders of the 1992 coup under Captain Valentine Strasser, Koroma's only significant field operation was looting the vehicles of the mining operation he was supposed to be guarding from RUF rebels.

Twenty members of the new Armed Forces Revolutionary Council (AFRC) were named on 1 June 1997. They included Foday Sankoh as (absentee) vice-chairman, RUF chief strategist Sam 'Mosquito' Bockarie, and two other RUF members. Koroma's brother, Brigadier S.FY. Koroma, was appointed chief of staff, while Solomon 'Saj' Musa, the feared ex-security chief in the 1992-96 NPRC military government, became chief secretary. Junta leadership was dominated by the Limba tribe (10 per cent of the Sierra Leone population) and the northern Temne (25 per cent of the population). Other members were generally young, unknown, poorly educated junior officers and non-commissioned officers, most of whom had benefited from inflation in the ranks when the SLA grew from 8,000 to 12,000 men after the 1992 coup. Many of the new recruits were street children and petty criminals.

The army eventually grew to a strength of 14,000 before the 1996 Abidjan agreement called for a 50 per cent reduction in its numbers. Though poorly trained and incapable in the field, the SLA was not happy when the South African mercenary firm, Executive Outcomes, was engaged to provide security in the mineral fields, the government promoted the Kamajor militia, and Kabbah chose Nigerian troops for

his personal bodyguard. Many of the rank and-file expressed their dissatisfaction by becoming part of the 'Sobel' phenomenon - 'soldiers by day, rebels by night.' The high level of resentment reached the senior ranks of the SLA: even the chief of staff, Hassan Conteh, gave his support to the junior officers' coup.

A national 'People's Army' was formed soon after the coup from 8,000 SLA regulars and 5,000 RUF guerrillas. They were initially effective in holding off Nigerian forces in the Freetown area. In response to a Nigerian naval bombardment of Cockerill military barracks on 2 June, 300 Nigerian troops were disarmed and taken hostage, an action that brought an early end to negotiations between the AFRC and the Nigerian high commissioner, Chedi Abubakr.

As well as the SLA and the RUF, there were two other active armed groups - the mercenaries and the Kamajor militias. The approximately 5,000 Kamajor, or 'traditional hunters,' have proven to be deadly opponents of the junta and the RUF. A rural militia, they combine bullet-thwarting talismans, traditional hunting skills, and mercenary-provided military training in support of their leading civilian patron, Tejan Kabbah. They are drawn mainly from the Mende tribal group (about 25 per cent of the population and Kabbah's biggest support-base). Sam Hinga Norman, a cabinet minister, important supporter of Kabbah, former Kamajor leader, and long-time Executive Outcomes lobbyist, has played an important role in co-ordinating Kamajor training by mercenary units.

The hunters' militia was already active against the RUF before the Koroma coup, fighting for control of coffee and cocoa plantations in the Kailahun District of eastern Sierra Leone. At the time, Kailahun was run as a mini-state by Foday Sankoh and was the centre for his trade in agricultural products and diamonds with merchants from Liberia and Guinea. Considering the hostility of the RUF and the resentment of the often unpaid SLA of the highly funded Kamajor militia, it was hardly surprising that the AFRC's first official announcement was a ban on Kamajor activities. Open conflict followed swiftly as the junta forces attempted to disarm the militias, but the Kamajor were highly successful in operations against the 'People's Army' in southeast Sierra Leone, often with the benefit of superior weapons supplied by Nigeria. After Kabbah's restoration, the Kamajor militia seized the provincial towns of Bo and Kenema, executed soldiers of the People's Army, and put the homes of AFRC backers to the torch.

Andrew McGregor

THE MERCENARY ROLE

The 1992-6 NPRC government had engaged a force of Gurkha mercenaries to combat the RUF, but these troops became demoralized after the death of their commander and returned home. In their place came a number of South African and British 'security' firms, on both government and private contracts. Executive Outcomes, a South African firm, proved very successful in action against the RUF, but was officially withdrawn from Sierra Leone on 3 February 1997 under the terms of the Abidjan agreement. Control of Sierra Leone's prosperous diamond fields was considered essential by all parties to the conflict, as well as by the private mining companies. After the coup, Lifeguard (an affiliate of Executive Outcomes) was hired by Branch Energy Limited (a subsidiary of Canadian-owned DiamondWorks) and two other mining operations. Two British mercenary groups were also active, Defence Systems Limited and Sandline International, which played a crucial part in the ECOMOG offensive against the junta.5

Recent revelations have confirmed earlier speculation6 that the restoration of the Kabbah government was carefully planned by Kabbah, senior Nigerian staff officers, and Sandline International. In early May 1998, in response to a British Customs and Excise probe into Sandline's alleged involvement in supplying weapons and military expertise to pro-Kabbah forces in violation of a United Nations arms embargo, Sandline's lawyers released a letter listing numerous officials in the British and American governments who were fully briefed in advance about the March assault that expelled Koroma's junta.7 The resulting 'Arms to Africa' scandal proved a major embarrassment to Robin Cook, the British foreign secretary.

5 Sandiine International is run by Tim Spicer and Tony Buckingham, both ex-British army officers,. Buckingham is also the largest shareholder in DiamondWorks Limited of Vancouver. Defence Systems Limited are rivals of Sandline and are closely involved with Jean-Raymond Boulle's Nord Resources and Toronto-listed American Mineral Fields. Defence Systems also provides security for United Nations relief convoys.

6 Africa Confidential 39(6 March 1998), 8.

7 Jimmy Burns, 'President denies military aid allegations,' Financial Times (London), 13 May 1998. Sandline arranged for the shipment of 35 tons of military equipment from Bulgaria to ECOMOG forces (Africa Confidential 39[6 March 1998], I). An investigation into the abortive 1997 mercenary intervention in Papua New Guinea found that Heritage Oil and Gas owned Sandline. In January 1998, Heritage Oil and Gas was given a conditional listing on the Toronto Stock Exchange. Buckingham was named as director and principal shareholder (Richard Blackwell, 'Heritage Oil given conditional fSE listing,' Globe and Mail[Toronto], 6 January 1999).

Quagmire in west Africa

In a letter released on 12 May 1998, which was intended to support the besieged British Labour government, Kabbah stated that he had neither asked for nor received any military assistance from Britain and that the role of Sandline International in his restoration had been exaggerated. The letter unfortunately appeared the same day as press revelations that a major in the Scots Guards had been decorated by the Queen for his part in defending a position held by a pro-Kabbah militia against AFRC forces. The Financial Times claimed to have independent eyewitness accounts that the major was fighting alongside eight white mercenaries at the time.8 The permanent secretary to the Foreign Office, Sir John Kerr, was compelled to admit on 14 May that Lt Col Spicer of Sandline had regularly briefed senior Foreign Office officials about the situation, contrary to previous assertions that only junior officials had had some minor contacts with the Sandline chairman. The prime minister, Tony Blair, praised the work of the high commissioner to Sierra Leone, Peter Penfold, who was accused of working closely with the Sandline mercenaries, possibly with the encouragement of British intelligence agencies. Blair later claimed, in what seems a tacit admission of official British involvement, that Britain had been right to help restore the democratic government of Tejan Kabbah. Unfortunately for Nigeria, the emergence of the 'Arms to Africa' scandal overshadowed its operations in Sierra Leone; operations which were, after all, designed to display a capable and benevolent image of the Nigerian regime to the international community.

ECOWAS AND ECOMOG

Sandline's collaboration with what was ostensibly a peacekeeping mission raises questions about the direction Nigeria has taken regional peacekeeping and the impact this has had on ECOWAS and ECOMOG. Almost from the beginning, the Nigerian role in Sierra Leone was one of intervention rather than peacekeeping; Nigeria frequently claimed that it had the full blessings of the United Nations, the Commonwealth, and the OAU as it gradually dropped any pretense of impartiality in the Sierra Leone power struggle. The Nigerian plan

8 Andrew Parker and Michela Wrong; 'Blair praises accused Sierra Leone envoy,' Financial Times 12 May 1998.
9 Madelaine Drohan, 'UK knew of Sierra Leone plan, mercenaries say,' Globe and Mail, 9 May 1998.

seems to have been to use military pressure to force on the ruling AFRC a diplomatic solution favourable to Nigeria; if that failed, the option of a direct strike with overwhelming force remained open. In pushing for a solution it desired, Nigeria made full use of its size and economic dominance of its ECOWAS partners - its population of 107 million exceeds the combined population of the 15 other ECOWAS nations, while its gross national product is only slightly less than that of its partners combined.

As justification for its interventionist approach, Nigeria cited the 1981 ECOWAS Protocol Relating to Mutual Assistance.'0 The relevant sections of the protocol are article 2 - 'Member States declare and accept that any armed threat or aggression directed against any member state will constitute a threat or aggression against the entire Community' - and article 16 - 'When an external armed threat or aggression is directed against a member state of the Community, the Head of State of that country shall send a written request for assistance to the current Chairman of the Authority of ECOWAS.' When a written request from Kabbah for intervention in Sierra Leone was received in Abidjan, the Nigerian government was satisfied that the necessary conditions for direct action had been met.

The original purpose of ECOWAS was to promote economic integration amongst the disparate anglophone, francophone, and lusophone nations of west Africa. The organization is currently in financial peril; only Nigeria, Benin, and C6te d'Ivoire are fully paid up members. Efforts at economic and monetary union have largely failed, distrust between anglophone and francophone members has resurfaced, and organizations such as the European Union that once took a great interest in ECOWAS's success have begun to divert their funds and energies to the more promising Southern Africa Development Community.

ECOMOG, the military arm of ECOWAS, was formed in 1990 to present a united front in the Liberian crisis. Increasingly, it has become the most active part of ECOWAS, even though many ECOWAS members have little or no participation in its operations. Nigeria has inevitably dominated ECOMOG, but a poor effort by the government to inform the population at home about the intent or value of Nigerian peacekeeping efforts has led to indignation over the large expenditure of national

io Protocol Relating to Mutual Assistance on Defence, ECOWAS Secretariat, Lagos, 1981.

resources required to maintain such forces and to a number of popular campaigns to reduce Nigeria's prominence in ECOMOG."

The original ECOMOG mission in Liberia quickly incorporated elements of peacemaking and peace enforcement. Charles Taylor (now president of Liberia) refused to accept the legitimacy of the mission, especially as it seemed designed to halt what looked like the inevitable military victory of Taylor's forces in 1990. After heavy fighting between ECOMOG and Taylor's National Patriotic Front of Liberia (NPFL), the supposed impartiality of the ECOMOG forces was open to question. The mission tended to look more like a relief force for Samuel Doe, a close personal friend of Nigeria's president, Ibrahim Babingida.

So far, ECOMOG forces have, for the most part, avoided the severe ruptures between the field commands of member-states that occurred in the underfunded OAU peacekeeping mission in Chad (1981-2),"2 largely because Nigeria underwrites nearly the entire cost of the mission. The other ECOWAS states that provide combat troops to ECOMOG (Ghana, Gambia, and Guinea) have long-standing ties to Nigeria.

On 26 June 1997, the ECOWAS community took its first steps towards a diplomatic solution to the crisis in Sierra Leone. The foreign ministers meeting in Conakry declared their willingness to use dialogue, economic sanctions, or military action to restore the elected government. A Committee of Four (C6te d'Ivoire, Ghana, Guinea, and Nigeria) was established to oversee the process. (Liberia as a late addition made it a Committee of Five.) Their recommendations were endorsed at the 20th ECOWAS summit, and a wide range of sanctions was implemented against the AFRC regime. Use of force to remove the Koroma regime was initially backed by Gambia and Guinea, while C6te d'Ivoire and Ghana (temporarily) led the call for a negotiated settlement.

Contacts between the junta and the Committee of Five (led by Nigeria's foreign minister, Tom Ikimi) had some results. The Conakry

ii See, for example, H.A. Saliu and F.A. Ebo, 'Nigeria in international organizations: overview and limitations,' Foreign Affairs Reports 460anuary/February 1997), 1-24.
12 See Amadu Sesay, 'Peacekeeping by regional organizations: the OAU and ECOWAS peacekeeping forces in comparative perspective,' in David A. Charters, ed, Peacekeeping and the Challenge of Civil Conflict Resolution, Proceedings of the 6th Annual Conflict Studies Conference, University of New Brunswick, September 1992 (Fredericton: University of New Brunswick 1994), 111-34.

peace agreement of 23 October 1997 called for an immediate cessation of hostilities, a monitored disarmament, recognition of Foday Sankoh's leadership role, a broadening of the power base, and the restoration of the constitutional government of Tejan Kabbah by 22 April 1998. Unfortunately, considerable pressure from the RUF faction of the junta led to the effective scuttling of the agreement in December 1997 when Koroma issued a new set of conditions, including the release of Sankoh, a reduction in the Nigerian contingent of ECOMOG in Sierra Leone, and full control of the disarmament process by the SLA.

After Freetown was taken and the AFRC junta was eliminated, Ghana and Gambia publicly approved the ECOMOG action, but other ECOWAS states resisted Nigeria's claim that its mandate for Liberian peacekeeping now extended to Sierra Leone. Liberia refused to turn over RUF fugitives who had fled from ECOMOG forces and complained that arms obtained by Executive Outcomes were transported by ECOMOG forces through Liberia on their way to pro-government Kamajor militias in Sierra Leone.

Ghana is seen as a moderating influence on Nigerian ambitions, and its continued involvement in the Sierra Leone peacekeeping force is strongly encouraged by Britain and the United States. Further Guinean military involvement in ECOMOG can also be expected, especially as Guinea has security concerns about a rebel movement operating from the Sierra Leone side of their common border. Aside from Guinea, however, most francophone members of ECOWAS (Benin, Burkina Faso, C6te d'Ivoire, Mali, Mauritania, Niger, Senegal, and Togo) are reluctant to become involved. Some have questioned Nigeria's sudden opposition to regional military coups when it gave every indication of welcoming Captain Yahya Jammeh's 1994 coup in Gambia and because it has its own notorious history of military coups.

THE ROLE OF THE UNITED NATIONS

The United Nations response to the Sierra Leone crisis may be described as ambiguous and reactive at best. Chapter VIII of the United Nations Charter describes recourse to multipurpose regional security organizations, although their main roles are mediation and arbitration. In 1995 the Joint Inspection Unit recommended that regional organizations should be encouraged to form the first resort for resolution of

local conflicts." Article 53 of the Charter would seem to require explicit authorization for the use of force: 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.' The closest the Security Council came to such an authorization was on 8 October 1997 when it adopted a resolution empowering ECOWAS to impose oil and arms sanctions against Sierra Leone. The ensuing Nigerian naval blockade and occupation of Freetown's Lungi International Airport proved very effective; AFRC government revenues fell by almost 90 per cent. In addition, all foreign aid (normally 30 per cent of the national budget) was halted. Some weapons were successfully smuggled to the regime in Freetown, along with Liberian recruits to the 'People's Army' and a dozen Ukrainian mercenaries," but the smuggling was dealt with forcefully; the Nigerian navy shelled Freetown's port in August 1997, killing 30 people.

A situation in which an arms embargo was authorized by the Security Council but the use of military force was not was identical to the situation in Liberia in 1992 when Nigerian-led ECOMOG forces took the initiative for military action. Winrich Kiihne has noted the lesson that Nigeria must have absorbed from this earlier experience: 'the political message of the Security Council's behaviour is clear: if the leading powers in the Security Council are loath to involve the UN or themselves in a regional conflict, regional powers and regional arrangements will not have to worry about the stringent application of the authorization clause in Article 53 of the UN Charter."5

The almost total embargo on arms, fuel, food, and medical supplies went well beyond the official mandate but was doubtless encouraged by the equivocal remarks of the United Nations secretary general, Kofi Annan: 'Where democracy has been usurped, let us do all in our power to restore it to the people. Neighbouring states, regional groups and

13 Report of the Joint Inspection Unit (United Nations), Sharing Responsibilities in Peacekeeping: the United Nations and Regional Organizations, JIU/REP/95/4, 17 October 1995.
14 Africa Confidential 38(21 November 1997), 5.
15 Winrich Kuhne; 'Lessons from peacekeeping operations in Angola, Mozambique, Somalia, Rwanda and Liberia,' in Winrich Kuhne, Guido Lenzi, and Alvaro Vasconcelos, WEU's Role in Crisis Management and Conflict Resolution in Sub-SaharanAfrica, Chaillot Paper 22 (Paris: Institute for Security Studies, Western European Union, December 1995), 41.

international organisations must all play their parts to restore Sierra Leone's constitutional and democratic government."6

In early 1997, prior to the Koroma coup, the United Nations Security Council was divided over the value and expense of an official United Nations peacekeeping force in Sierra Leone. The reluctance of the RUF and the Sierra Leone government to implement the November 1996 peace accord and the continued instability within Sierra Leone were noted as impediments to deploying a peacekeeping force. A small observer mission was eventually settled on, which it was hoped would meet with more success than the United Nations Observer Mission in Liberia (UNOMIL), an earlier and largely unsuccessful effort at co-ordinating United Nations and ECOMOG activities.17

THE OAU AND COMMONWEALTH ROLES

As for the OAU, the Nigerian intervention was welcomed by its chairman, Robert Mugabe, and its secretary-general, Salim Ahmed Salim, at the Zimbabwe summit in June 1997. A later ministerial meeting in Addis Ababa gave its support for sanctions and the imposition of an embargo. It also called, unsuccessfully, for United Nations financial and material support to ECOWAS efforts."8 Ever since its embarrassment over the failure of its first and only attempt at peacekeeping in Chad, the OAU has been reluctant to initiate peacekeeping operations. Despite recent interest from the United Nations, the Western European Union (WEU), the United States, and France in establishing a permanent pan-African peacekeeping force under OAU direction, such a force is unlikely to develop without a solid and continuing financial commitment from external sources. Meetings of OAU military chiefs of staff in Addis Ababa in 1996 and Harare in 1997 confirmed

16 Claudia McElroy, 'Freetown battle shatters peace hopes,' Guardian Weekly (Manchester), 8 June 1997.

17 United Nations Security Council Resolution 1181 of 13 July 1998 established the uN Observer Mission in Sierra Leone (UNOMSIL) for an initial six months. Kabbah suggested a mission of 720 observers, but Sankoh insisted on only 7o, and the Security Council agreed. The mission has a four-part mandate: i) monitor the military and security situation in Sierra Leone; 2) monitor the demobilization and disarmament of combatants; 3) monitor and report on violations of international humanitarian law; and 4) advise the government on police practice and training.

18 Communiqu6 of the 7th Ordinary Session of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution at Ministerial Level (Addis Ababa, 20-21 November 1997).

that 'the OAU's main responsibility should be to anticipate and prevent conflicts but that, in exceptional circumstances, the OAU should deploy limited peace maintenance and observer missions.'

Despite Nigeria's lengthy peacekeeping experience in Liberia, Sierra Leone, and lately, Guinea-Bissau, the question remains open as to what role, if any, Nigeria will have in a proposed United Nations/OAU peacekeeping force. So far it has not been involved in planning for the force, but it is difficult to envision this type of regional force without Nigeria's clout and experience. The question is whether the Nigerian practice of unilateral decision-making at staff-level and unsanctioned use of force in the field will prove a useful contribution to such a force. The direction of a new democratic government in Nigeria and the success or failure of Nigerian field forces in Sierra Leone will eventually provide the answer. Nigeria's president, General Olusegun Obasanjo, supports a continued military role in Sierra Leone (with extensive British financing) for the time being.20

Although the Commonwealth secretary general, Emaka Anyaoku, claimed that military intervention was 'totally justified,'2" the Commonwealth nations are divided over their treatment of Nigeria's role in Sierra Leone. Nigerian expectations of being welcomed back to the Commonwealth following a successful restoration of the Kabbah government met with strong opposition from Canada and Britain. Nevertheless, the Abacha regime had allies within the Commonwealth, notably President Jerry Rawlings of Ghana. Rawlings spoke on behalf of Nigeria as a proponent of ECOMOG activities in Sierra Leone, despite domestic opposition and a number of outstanding bilateral differences between the two countries. When Britain condemned Nigeria's actions at the 2 March 1998 meeting of the Commonwealth Ministerial Action Group, Ghana turned the condemnation into a statement of approval for ECOWAS operations (without mentioning the Nigerian-dominated ECOMOG). Britain has, nevertheless, committed substantial funds for both further ECOMOG activities and a disarmament and demobilization programme aimed at re-integrating rebels into Sierra Leone society.

19 W.O. Leba, 'Conflict management in Africa,' The Courier (United Nations) (no 168, March/April 1998), 77.
2o After the sudden death of Abacha on 8 june 1998, General Abusalam Abubakr was sworn in as interim ruler. Obasanjo was elected president of Nigeria in February 1999 and was sworn in on 29 May 1999.
21 'African leaders back intervention in Sierra Leone,' Globe and Mail, 3 June 1997.

Andrew McGregor

THE NIGERIAN ROLE

Nigeria became a key mover in the ECOWAS/ECOMOG alliance not only because of its size but also because of its domestic economic crisis and the political isolation of the Abacha government. Nigeria has a us$34 billion external debt and has so neglected its petroleum facilities that, even though it produces 1.5 million barrels of oil per day, it has a perpetual fuel shortage. Political strife in the oil-rich Niger delta also severely reduced output in the last year. Despite financial mismanagement, endemic corruption, and political intransigence in the democratic transition programme, the Abacha regime continued to receive mixed signals from the West. The last year of Abacha's rule witnessed a growing rapprochement between Nigeria and France, which was seeking a new partner in west Africa after the overthrow of Zaire's francophile Mobutu government. Relations between the two have been strained since de Gaulle supported the Biafran secessionists (1967-70), but Abacha tried to make French Nigeria's second language and moved its European oil headquarters from London to Paris. In an effort to win friends within ECOWAS, he awarded lucrative crude oil contracts to most of the francophone members who traditionally oppose Nigeria's dominant role in the region.

Before his death on 8 June 1998, Abacha no longer trusted his military power base. ECOMOG service was presented as a carrot to disaffected military units or officers; Nigerian troops on active ECOMOG duty are paid according to the ECOMOG pay-scale, a substantial improvement on the salary they could expect in Nigeria. ECOMOG service had the added benefit of keeping suspect units and officers out of the country for extended periods. Unofficially, service abroad also offered the chance for some unsanctioned looting - in Liberia ECOMOG was said to stand for 'Every Car Or Moveable Object Gone.'22

Nigeria's barely covert collaboration with mercenaries in the restoration offensive marked a full turn in Nigerian policy; it had reacted with outrage to the activities of mercenaries on its soil during the Biafran insurgency. Further revelations of deep mercenary involvement in the campaign threatened even the limited credibility the military regime had accrued through its costly intervention in Sierra Leone. After its initial military setbacks, the Nigerian command no doubt felt the need

22 Abiodun Alao, The Burden of Collective Goodwill: The International Involvement in the Liberian Civil War (Aldershot: Ashgate 1998), 77.

for external military expertise which was, however, unavailable from United Nations, Commonwealth, or OAU sources.

THE POLITICAL FUTURE

The success of Nigeria's efforts to restore stability to Sierra Leone will be severely tested in the coming months because the root causes of instability remain. Though the Nigerian assault on Freetown quickly achieved its military objectives, the unexpected depth of resistance was a clear indication of further turmoil. Mercenary activities are likely to continue for some time; Sierra Leone is still a long way from being able to provide effective internal security, the Nigerian military has no objection to mercenary security operations, and the security firms themselves are widely believed to have traded their services for financial interests in mining operations within Sierra Leone, lending credence to the belief that they are there for the long haul. New government-issued mineral contracts will likely contain stipulations for private security.

On 13 July 1998, the Kabbah government disbanded what remained of Sierra Leone's standing army and began recruiting a small 'reformed' armed force, but the loosely disciplined Kamajor militia remained the government's strongest domestic defendant. Since the restoration of their patrons, Kabbah and Norman, the Kamajor have directed their operations against the Limba and other northern tribes who were seen as supporters of the junta. The militia appears to have had little impact on the RUF's terror campaign; when the two forces do clash, the frontline fighters on both sides are usually well-armed and drug-stimulated children.

If a peace agreement can be reached between RUF and the government, the Nigerians can still expect a lengthy stay. Even a reformed SLA cannot be expected to provide an effective level of security in the foreseeable future. The Kabbah government hardly returned to a hero's welcome from many of the loyal Sierra Leonans who had to endure the privations, looting, and violence of the Koroma regime. The bombardment of Freetown in early February 1998 by Nigerian jets and heavy artillery was little appreciated by those residents who opposed the AFRC regime, and blame for the destruction was eventually laid by many at the feet of Kabbah. A prolonged stay in Sierra Leone may well suit some factions within the Nigerian military who have an interest in the country's mineral wealth and in helping Nigeria contain the

regional ambitions of Liberia's Charles Taylor. A Nigerian presence in Sierra Leone is unlikely to meet serious Western opposition if the alternative is the insertion of a Western-based peacekeeping force.

That a continued international military presence is desirable is shown by the random vengeance exacted upon the rural population by surviving RUF units through 1998 and early 1999. Far from being a spent force, the RUF has conducted a ruthless campaign of indiscriminate terror in the interior (codenamed Operation No Living Thing), amputating the hands and feet of thousands of rural civilians, including children, before striking into the heart of Freetown again in early January 1999. Apparently concluding that international acceptance for the movement was irrevocably lost after their initial defeat in Freetown, the RUF opted to surpass the worst excesses of its earlier terror campaigns and developed into a personality cult revolving around its imprisoned leader, Foday Sankoh.2" The ability of the rebels to penetrate the capital, commit major atrocities, and send government leaders fleeing to the ECOMOG airbase north of the city was a major blow to Nigerian military prestige and forced the Sierra Leone government to open negotiations with Sankoh, even though it had sentence him to death after Kabbah's restoration. The events of the last year have produced widespread alienation amongst potential RUF supporters and deepened the enmity among its traditional foes.

CONCLUSION: REPRISALS IN SIERRA LEONE AND POLITICAL OPENING IN NIGERIA

That the Nigerians have pegged their national prestige and reputation to the success of their ECOMOG activities can be clearly seen. The interim government of General Abusalam Abubakr pledged to commit 20,000 men (a quarter of the Nigerian army) to operations in Sierra Leone even as the 1999 Nigerian budget forecast a 54 per cent drop in revenues because of sharply reduced petroleum prices." Since the initial success of ECOMOG forces in restoring the Kabbah government, the intervention has had its weaknesses exposed through allegations of illegal arms transfers to loyalist forces, its inability to provide effective

23 On Kamajor indiscipline and RUF atrocities see 'Sierra Leone - sowing terror-atrocities against civilians in Sierra Leone,' Human Rights Watch io(no 3A, July 1998).
24 William Wallis, 'Sierra Leone peace hopes prove premature,' Financial Times 4 January 1999.

security in rural or urban areas, the pursuit of an internationally condemned policy of lethal reprisals by the government, and the incursion into Freetown by supposedly defeated rebels.

The seriousness of the continuing crisis, the obvious need for armed intervention, and successful democratic elections in Nigeria in February have tended to bring the international community on side with Nigerian efforts (together with its ECOMOG and mercenary allies) to preserve Kabbah's tenuous presidency. While backing off from Abacha's growing partnership with France, the Abubakr transitional regime made successful representations to the annual International Monetary Fund/World Bank meeting in the autumn of 1998 and convinced Canada to restore diplomatic relations after a two-year suspension.25

A leading point of contention between Kabbah's government and elements of the international community is the policy of retaliation against former army officers, captured rebels, and their alleged civilian collaborators. After Kabbah's government was restored, over 5,000 accused collaborators were arrested and over 100 civilian and military officers were charged with the capital offence of treason. On 8 April 1998, the government suspended the Criminal Procedures Act so that suspects could be tried quickly under emergency regulations. In defence of the alleged collaborators, the London-based Alliance for Peace and Democracy in Sierra Leone pointed out that several leading government members, including Kabbah, had accepted public appointments under the illegal NPRC military regime. According to the Alliance: 'No one charged them with treason or aiding and abetting. It seems ironic therefore that these same people now leading a civilian government see it fit to charge with capital offence civilians who found themselves in exactly the same position as they did.'26

Despite international appeals for clemency, executions were carried out by Nigerian ECOMOG members. On 19 October 1998, 24 army officers, convicted without appeal, were executed in Freetown. The dead included the former chief of staff, Conteh, and Col S.F.Y. Koroma. At least one of the condemned expressed bewilderment at the role of the Nigerians; the last words of Col David Anderson were 'So

25 Jeff Sallot, 'Canada to restore relations with Nigeria,' Globe and Mail, 23 January 1999.
26 Baffour Ankomah, 'Sierra Leone's death list,' NewAfrican (no 367, October 1998), 18.

you Nigerians came here to kill us while you have more coups in Nigeria than any other country?'27

Once begun, popular pressure for continued executions as the RUF-carried out daily atrocities in an attempt to free Sankoh began to give the reprisal programme a life of its own, making it almost impossible for the government to back down, even if it were so inclined. Sankoh was returned to Sierra Leone from Nigeria in July 1998 and was sentenced to death on 23 October after a short trial in which he was unrepresented by counsel; no lawyer could be found in Sierra Leone willing to defend him. Documents presented during the trial indicated a continuing Libyan connection in the form of a RUF funding pipeline through the Libyan People's Bureau in Ghana.28

The Nigerian experience demonstrates that although the United Nations Charter appears to recommend the use of regional and subregional peacekeeping organizations, no effective framework exists for those organizations to report to a world body such as the United Nations or to seek its approval for actions in the field. The Nigerian regime exploited this situation to further its own regional and international interests, always keeping one step ahead of what had been sanctioned by ECOWAS, the OAU, the Commonwealth, and the Security Council. So long as decision-making in peacekeeping policy continues to be made on the basis of winks and nods from members of the international community, rather than on the basis of verifiable resolutions and authorizations, the resulting operations will hold little credibility and will remain open to legitimate challenge from any of the involved parties.

Nigeria has demonstrated an affinity for a unilateral approach to regional peacekeeping, using its wealth and military power to drag its ECOWAS partners along with it. If the result of such unilateral action happens to coincide with the aims of the international community, as in Sierra Leone, the international response is bound to be confused. The new realpolitik from Britain's foreign secretary (almost prophetic in light of Britain's energetic defence of NATO's unsanctioned intervention in Yugoslavia) was that 'nobody should lose sight of the fact that the outcome of what happened was positive.'29 Abacha was able to

27 Sheku Saccoh, 'Nigerians execute Sierra Leone coupists,' ibid (no 369, December 1998) 24.

28Africa Confidential 39(23 October 1998), 4.

29 Liam Halligan, 'Foreign minister stumbles on "arms-to-Africa,"' Financial Times ii May 1998.

exploit these mixed signals to a certain extent in his attempts to regain international acceptance, if not respect. Ultimately he discovered that the main precondition for the re-admission of Nigeria to the Commonwealth and other international bodies was his removal in favour of a democratically elected government. But he was unwilling to step down, and his mysterious death went largely unlamented as Nigerians hastened to exploit the sudden opportunity for political reform. In light of the democratic transition, Nigeria was reinstated to the Commonwealth in May 1999.

A. C. Arend, 'United Nations, Regional Organizations, and Military Operations: The Past and the Present', Duke Journal of Comparative and International Law, Vol. 7, 1996

Introduction

THE UNITED NATIONS, REGIONAL ORGANIZATIONS, AND MILITARY OPERATIONS: THE PAST AND THE PRESENT

ANTHONY CLARK AREND*

I. INTRODUCTION

In the post-Cold War era, multilateral organizations have been playing an unprecedented role in conflict management. The United Nations and a number of other international organizations have expended great resources to attempt to prevent or end bloodshed, beginning with the Persian Gulf War2 and continuing through struggles in places such as Somalia,3 Rwanda,4 the Balkans,5 and Haiti.6 While

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1. Many recent works discuss the role of the United Nations and other organizations in the maintenance of international peace and security. See, e.g., ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM (1993); PAUL F. DIEHL, INTERNATIONAL PEACEKEEPING (1993); WILLIAM DURCH & BARRY BLECHMAN, KEEPING THE PEACE: THE UNITED NATIONS IN THE EMERGING WORLD ORDER (1992); ENFORCING RESTRAINT:. COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS (Lori Fisler Damrosch ed., 1993) [hereinafter ENFORCING RESTRAINT]; LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Damrosch & David Scheffer eds., 1991); REGIONALISM IN WORLD POLITICS: REGIONAL ORGANIZATION AND INTERNATIONAL ORDER (Louise Fawcett & Andrew Hurrell eds., 1995); UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993); THE UNITED NATIONS AND CIVIL WARS (Thomas G. Weiss ed., 1995); Thomas G. Weiss, New Challenges for U.N. Military Operations: Implementing the Agenda for Peace, 16 WASH. U. L.Q. 51 (1993).

2. For discussion of the role played by supranational organizations in the Gulf War, see JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW (1992); Michael J. Glennon, Agora: The Gulf Crisis in International and Foreign Relations Law, 85 AM. J. INT'L L. 63-109, 506-535 (1991); THE KUWArr CRISIS: BASIC DOCUMENTS (Elihu Lauterpacht et al. eds., 1991); AFTER THE STORM: LESSONS FROM THE GULF WAR (Joseph S. Nye, Jr. & Roger K. Smith eds., 1992); THE GULF WAR READER: HISTORY, DOCUMENTS, OPINIONS (Micah L. Sifry & Christopher Cerf eds., 1991).

3. See ROBERT OAKLEY & JOHN HIRSCH, SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING (1995); Chester Crocker, The Lessons of Somalia, 74 FOREIGN AFF., May-June 1995,2.

Charter, this ambiguity has presented numerous problems. In 1962, for example, when the Organization of American States authorized the "quarantine" of Cuba, some asserted that this action, which had not been authorized by the Security Council, was an impermissible "enforcement action."[99] In 1983, the United States invaded the island state of Grenada with the authorization of another Western Hemispheric arrangement, the Organization of East Caribbean States.[100] Once again, some critics asserted that this invasion action was illegal because the Security Council had failed to provide any kind of authorization."[101] In both cases, however, advocates for the actions taken offered a variety of reasons why these uses of force did not amount to "enforcement actions."[102]

In the post-Cold War era, one of the most notable examples highlighting the ambiguous meaning of "enforcement action" was the intervention in Liberia by the Economic Community of West African States (ECOWAS), an organization created to promote economic cooperation.[103] On Christmas Eve, 1989, Charles Taylor, a Liberian ex-patriot, invaded his home state with a rebel group known as the National Patriotic Front of Liberia. Civil war ensued and thousands of refugees began fleeing into Guinea and C6te d'Ivoire."[104] Despite efforts by Liberia to take the matter to the U.N. Security Council, that body did not address the conflict until 1991. By May of 1990, however, ECOWAS began formal consideration of the Liberian matter. Initially, the regional body attempted to achieve a peaceful resolution of the conflict. However, the situation in Liberia deterio-

99. See, e.g., Quincy Wright, The Cuban Quarantine, 57 AM. J. INT'L L. 546 (1963).

100. See ROBERT J. BECK, THE GRENADA INVASION: POLITICS, LAW, AND FOREIGN POLICY DECISIONMAKING (1993); David Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, supra note 1, at 157,184.

101. See AREND & BECK, supra note 1, at 64 (arguing that the regional action in Grenada was impermissible under the U.N. Charter paradigm).

102. In support of the Cuba action, see Abram Chayes, Law and the Quarantine of Cuba, 41 FOREIGN AFF. 550 (1963); Leonard Meeker, Defensive Quarantine and the Law, 57 AM. J. INT'L L. 515 (1963). In support of the Grenada invasion, see JOHN NORTON MOORE, LAW AND THE GRENADA MISSION (1984).

103. The chronology in this section is drawn from Stephen John Stedman, Conflict and Conciliation in Sub-Saharan Africa, in INTERNATIONAL DIMENSIONS, supra note 73, at 235, 250-253 and Abiodun Williams, Regional Peacemaking: ECOWAS and the Liberian Civil War, in THE DIPLOMATIC RECORD 1990-1991 213 (David D. Newsom ed., 1992).

104. "[I]n August 1990, the conflict had generated an estimated 250,000-375,000 refugees; by October 1994, the war had produced an estimated 1.25 million refugees." Stedman, supra note 103, at 252.

rated, and on August 24, 1990, ECOWAS dispatched a three thousand person force known as the ECOWAS Monitoring Group (ECOMOG), which was charged by ECOWAS with "keeping the peace, restoring law and order, and ensuring that the cease-fire is respected."'s

Was the action by ECOWAS, taken without Security Council sanction, an "enforcement action"? A strong argument can be made that it was. While the members of ECOWAS may have been concerned about the flow of refugees and the concern that the fighting would spill over into neighboring states, ECOMOG's mandate to keep the peace and restore law and order seemed to extend beyond the limits of a purely defensive action allowed under the U.N. Charter. If the organization was acting solely under Article 51 of the U.N. Charter as a collective self-defense body, its resolutions would logically state such a legal basis. Moreover, the protracted involvement of ECOMOG in Liberia seems to indicate more ambitious goals than collective self-defense.

In spite of these arguments that the ECOMOG action was an impermissible "enforcement action," the U.N. Security Council did not condemn the intervention when it finally addressed the matter on January 22, 1991.126 Instead, the President of the Security Council issued a statement on behalf of the Security Council supporting the activities of ECOWAS: "The members of the Security Council commend the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia."'7 Does this mean that the Security Council was providing an ex post facto authorization for the intervention? If so, would it not have made more sense for the Security Council to adopt a formal resolution to clarify the the legal status of the Security Council's action? Perhaps the Security Council's action meant that ECOMOG's military action fell below the threshold of an "enforcement action." Some scholars, including Professor John Norton Moore, have contended that regional intervention in civil conflict for purposes of promoting self-determination does not constitute an impermissible "enforcement ac-

105. See Peter da Costa, Life After Doe, 1990 WEST AFRICA 2510 (No. 3813, 24-30 September 1990). For further discussion on the creation of ECOMOG, see David Wippman, Military Intervention, Regional Organizations, and Host-State Consent, 7 DUKE J. COMP. & INT'L L. 224-30 (1996).

106. See U.N. SCOR, 47th Sess., 2974th mtg., U.N. Doc. SIPV.2974 (1991) (provisional verbatim record, statement of the President, Mr. Bagbeni Adeito Nzengeya).

107. Id. at 9.

tion."'O' The Security Council may have been implicitly agreeing with this contention, though it could have made that point more clearly. Nevertheless, the Liberian conflict did not resolve the lack of clarity surrounding the words "enforcement action." If anything, the reaction of the Security Council merely added more uncertainty to the meaning of Article 53 of the U.N. Charter.

While these problems relating to both the nature of organizational jurisdiction and the meaning of "enforcement action" may not have an easy solution, Professor Henrikson does make a novel suggestion. In his article in this Symposium, he proposes that the United Nations establish formal relationships between itself and regional organizations." If the United Nations could conclude special agreements with certain regional organizations, perhaps these agreements could delineate both jurisdiction and authority for the regional conduct of enforcement actions."' When crises arise, a set of guidelines outlining appropriate responses would already be in place. Such an arrangement would not be a panacea, but might be a beginning.

V. NEW TENSIONS BETWEEN REGIONALISM AND GLOBALISM

In addition to the tension that can be traced directly to the U.N. Charter framework, several other specific problems have emerged in the new terrain of the post-Cold War world. These tensions were not

108. JOHN NORTON MOORE, supra note 102, at 23-32.

109. See Henrikson, supra note 34, at 63 (suggesting that special agreements concluded under Article 43 of the U.N. Charter "could... both harness the energies of regionally powerful countries... and restrain them, precluding a devolution of the world system into spheres-of-influence order, or disorder."). ,

110. As Henrikson notes, such agreements could be under Article 43 of the United Nations Charter. Id. Article 43 provides, in part, that:

> 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
>
> 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

U.N. CHARTER art. 43. Henrikson highlights the reference in Article 43 to the possibility of agreements between the Council and "groups of Members." Henrikson, supra note 34, at 67-68.

Richard May and Marieka Wierda (2002), International Criminal Evidence, Transnational Publishers, Inc., Ardsley, New York, 2002

ing of six innocent men on a date and place other than those mentioned in the charge, a crime very similar to that charged.[50] The prosecution did so not to obtain a conviction on the uncharged facts but "to establish a systematic course of conduct in which he participated, so that he cannot be so innocent as he is trying to make the Court think today."[51]

4.31 Similar act evidence is also admissible before the ad hoc tribunals, pursuant to Rule 93 which states that "evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice." On the other hand, if such evidence is outside the scope of the indictment it can only be relied on to prove that there had been a systematic pattern of conduct.[52]

4.32 *Evidence outside the scope of the indictment.* In *Kvočka et al.*, a witness testified that one of the accused had raped her, but there was no mention of this in the indictment. The Trial Chamber considered that out of fairness to the accused, new charges could not be brought against the accused in mid-trial without notice. It therefore determined that it would not consider the rape in determination of guilt. However, it decided that the testimony would assist in establishing a consistent pattern of conduct pursuant to Rule 93.[53] A different approach was taken in *Kupreškic et al.*, where the accused were charged with persecution including the deliberate and systematic killing of Bosnian Muslim civilians. At trial, the prosecution brought evidence of a particular murder not pleaded in the indictment. The Trial Chamber convicted two of the accused, finding that the murder was encompassed in the persecution charge. The Appeals Chamber, however, overturned this conviction and held:

> There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.[54]

4.33 *Evidence relevant to sentencing.* Pursuant to Rule 85 (A) (vi) the parties may present "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found

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50. *Eberhard Schoengrath et al.*, British Military Court, Burgsteinfurt, Germany, Feb. 7–11, 1946, UNWCC Law Reports, Case. 71, Vol. XI, at 84–85.
51. *Id.* at 85.
52. *Kvočka et al.*, Judgment, Nov. 2, 2001 at ¶ 652.
53. *Id.* at ¶ 556.
54. *Kupreškić et al.*, Appeals Judgment, Oct. 23, 2001 at ¶ 92.

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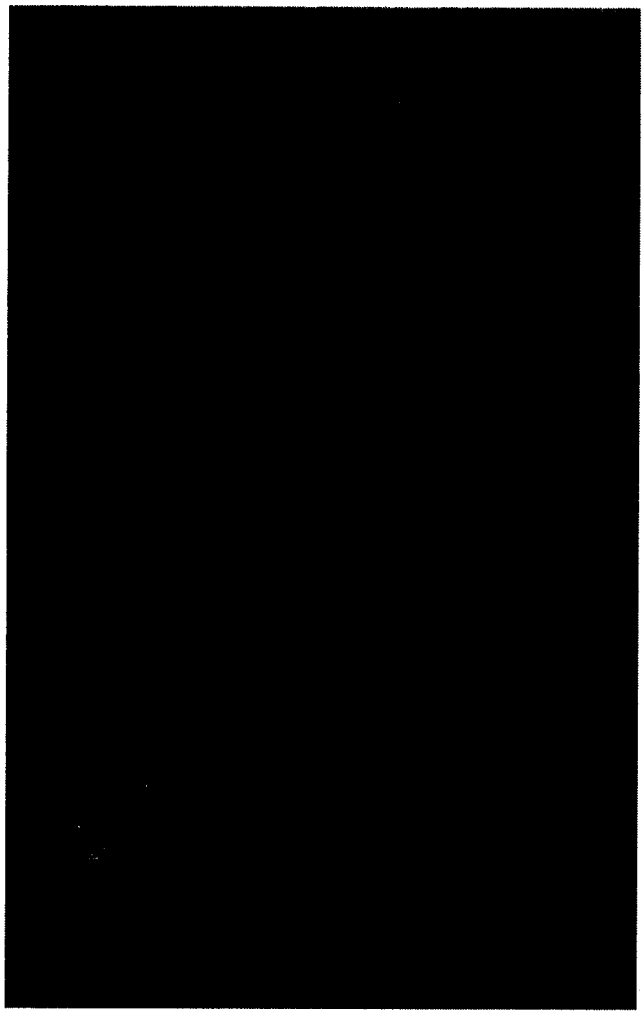

international law" as mentioned in the chapeau of article 8 para. 2 (b) of the ICC Statute only for those States and in relation to those States that have accepted the treaty prohibition[217].

As in the case of the war crime of attacking civilians, the elements do not require that a particular result be caused – contrary to the jurisprudence of the ICTY. The reasons that led to this approach are the same as described under (i), see margin Nos. 29 *et seq.*

With regard to the mental elements required, reference may be made to the explanations given for the war crime of attacking civilians (see (i), margin Nos. 30 *et seq.*). The same approach was taken *mutatis mutandis* for all crimes covering unlawful attacks.

(iii) Attacks on humanitarian assistance or peacekeeping missions

Literature:

Yves Beigbeder, THE ROLE OF AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE (1991); Claude C. Emanuelli, *The Protection afforded to Humanitarian Assistance Personnel under the Convention on the Safety of United Nations and Associated Personnel*, HUMANITÄRES VÖLKERRECHT 4 (1996); Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, in: Avril McDonald (Managing ed.), 1 Y.B. INT'L HUMAN. L. 3 (1998); *Symposium: The United Nations, Regional Organizations, and Military Operations*, 7 DUKE J. COMP. & INT'L L. 1 (1996); Frits Kalshoven (ed.), ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS (1989).

α) Normative origins and drafting history

37 Throughout the *Ad Hoc* and Preparatory Committees and a large part of the Rome Conference, delegations considered to include violations of the Convention on the Safety of United Nations and Associated Personnel as a "treaty crime", without however substantially debating the content and scope of this "treaty crime"[218]. It was only towards the end of the Rome Conference, when it had become clear that no treaty(-based) crimes would be included as such, that the negotiations focused on including attacks on UN personnel as a war crime. The qualification as a war crime led to an extension of the prohibition's scope of application to humanitarian assistance and non-UN peacekeeping missions. In response in particular to concerns about peacekeeping missions that might use force and become involved in war type operations, it was stipulated that attacks on missions would incur individual criminal responsibility only as long as the personnel and objects involved in the missions "are entitled to the protection given to civilians or civilian objects under the international law of armed conflict". By thus limiting the scope of application, article 8 para. 2 (b) (iii) does in fact not seem to criminalize any conduct which would not be covered by the criminalization of attacks on civilians and civilian objects contained in article 8 para. 2 (b) (i) and (ii)[219], notwithstanding that it is unclear and controversial to what extent and under what conditions personnel and objects involved in peacekeeping missions are entitled to the protection of civilians and civilian objects. Nevertheless, delegations felt a need to explicitly condemn and criminalize attacks against humanitarian assistance and peacekeeping missions and thereby visibly signal the exceptional seriousness of such most serious crimes of international concern.

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217 This may explain the Declaration that the United Kingdom has made when ratifying the Rome Statute: "The United Kingdom understands the term "the established framework of international law", used in Article 8 (2)(b) and (e), to include customary international law [...]. In that context the United Kingdom confirms and draws to the attention of the Court its views as expressed, inter alia, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977", see *supra* note 182, UK Ministry of Defence, THE MANUAL, No. 16.34.

218 The identical draft text passed from session to session with virtually no debate on the substance, see Preparatory Committee (Consolidated) Draft, p. 33; Zutphen Draft, p. 35; Preparatory Committee Decisions Feb. 1997, pp. 16-17.

219 See K. Dörmann, *article 8 para. 2 (b) (i) and (ii)*, and also R. Arnold, *article 8 para. 2 (b) (xxiv)*.

In the 1990's, attacks on UN and humanitarian assistance personnel have become a matter of concern on the agenda of the international community[220]. Such attacks are considered to be of exceptional gravity, and, as the ILC stated, are "of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind"[221]. In addition, they may increase the hesitancy of individuals to participate, and, where applicable, of States to provide personnel for such missions[222]. **38**

The provision is on the one hand largely inspired by the UN Convention on the Safety of United Nations and Associated Personnel, which has yet to enter into force[223], the debate on the applicability of international humanitarian law to UN operations, and recent developments regarding peacekeeping operations and attacks on UN and humanitarian assistance personnel[224]. Article 19 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind also contains an offense entitled "Crimes against United Nations and associated personnel" which is strongly influenced by the UN Convention[225]. On the other hand, international humanitarian law is relevant to the interpretation of the scope of application as it determines which individuals and which objects are entitled to the protection of civilians, and for instance requires proportionality of any collateral injury or damage. **39**

β) "humanitarian assistance"

There is no generally accepted definition of what constitutes a "humanitarian assistance mission", nor is it clear what standards are applicable to this generic category which covers diverse phenomena. The humanitarian assistance mission must however be "in accordance with the Charter of the United Nations". In this context, the UN Charter prohibits in particular any use of force or intervention in internal affairs[226]. Further standards may be derived and **40**

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220 For instance, the Security Council has repeatedly condemned attacks against personnel of peacekeeping operations in recent years, see, *e.g.*, S.C. Res. 788 (1992); S.C. Res. 813 (1993); S.C. Res. 987 (1995). However, as early as 1919 the Responsibilities Commission of the Paris Peace Conference considered the "destruction of fishing boats and relief ships" a violation of the laws and customs of war, *supra* note 9, 14 AM. J. INT'L L. 114 (1920); *supra* note 12, J. J. Paust *et al.*, CASES AND MATERIALS 24.

221 1996 ILC Draft Code, *Commentary to article 19.*

222 See 1996 ILC Draft Code, *Commentary to article 19.*

223 Annex to U.N. Doc. A/RES/49/59 (1994). The resolution to which this Convention is annexed was unanimously adopted by the General Assembly. The Convention has, as of Sep. 1998, 43 signatories and 20 States Parties, and will enter into force thirty days after 22 instruments of ratification, acceptance, approval or accession have been deposited with the UN Secretary-General (article 27 para. 1). The Convention, however, has a substantially different scope of application, for instance, covering a wider range of UN operations but not operations under the control of regional organizations. For discussion of the Convention see M.-C. Bourloyannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 INT'L & COMP. L.Q. 560 (1995); C. C. Emanuelli, *The Protection afforded to Humanitarian Assistance Personnel under the Convention on the Safety of United Nations and Associated Personnel*, HUMANITÄRES VÖLKERRECHT 4 (1996); W. G. Sharp, *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93 (1996); E. T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621 (1995); Ph. Kirsch, *The Convention on the Safety of United Nations and Associated Personnel*, 2 INT'L PEACEKEEPING 102 (1995).

224 The Security Council for example demanded that States, where necessary, prosecute and punish all those responsible for attacks against UN forces and personnel, S/25493. Also, *Prosecutor v. Karadzic, Mladic and Stanisic*, Case No. IT-95-5-D, Decision on the Deferral Proposal to the Competence of the Tribunal, 16 May 1995, para. 6, mentions a significant investigation concerning the prolonged siege of Sarajevo (including attacks, considered unlawful, against civilian members of humanitarian organizations, United Nations peacekeeping forces and humanitarian-aid convoys).

225 1996 ILC Draft Code.

226 It is submitted that so-called "humanitarian interventions" that use force and do not have the consent of all the parties to the conflict are not "humanitarian assistance missions" in the meaning of this provision. Furthermore, their use of force without the government's consent excludes them from an entitlement to the protection of civilians and civilian objects. However, as the ICJ stated, "[t]here is no doubt that the provision of strictly humanitarian assistance to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international

developed from international humanitarian law and from the practice and standards of inter-governmental organizations, States, the ICRC and non-governmental organizations.

41 It is submitted that "humanitarian assistance"[227] in or in connection with an armed conflict refers primarily to relief assistance, that is, assistance to prevent or alleviate human suffering of victims of armed conflicts and other individuals with immediate and basic needs. In particular, it includes relief actions with the purpose of ensuring the provision of supplies essential to the survival of the civilian population. Such supplies should at the very least include food, medical supplies, clothing and means of shelter[228], and should necessarily also extend to the required means of transport. The personnel may include administrative staff, coordinators and logistic experts, doctors, nurses and other specialists and relief workers. It is submitted that the term also extends to assisting refugees and internally displaced persons to resettle or return to their homes with the agreement of the parties to the conflict. "Humanitarian assistance" may also include developmental aspects but in a strict understanding the notion does not seem to extend to development aid as such, which pursues rather long-term objectives than immediate assistance after or during disasters and conflicts, and potentially has more difficulty to undertake relief actions of an exclusively humanitarian and impartial nature.

42 The standards that can be derived from humanitarian law in regard to humanitarian organizations and relief actions in general may provide a useful legal framework[229]. Drawing on it, it is submitted that humanitarian assistance missions should (as far as possible) be guided by the *humanitarian* needs of the suffering individuals[230], and be of an *impartial* and *non-discriminatory* nature. Consequently, the receivers of the assistance should be selected on exclusively humanitarian grounds, and no party to the conflict or other group should be given undue advantage. Furthermore, "assistance" suggests that such missions may *not use any force*, except in strict self-defense. The humanitarian assistance should also receive the *consent* of the

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law", *Nicaragua* v. *USA, Merits, Judgement*, (1986) I.C.J. Rep. 124, para. 242 (see also *Dissenting Opinion Schwebel*, 351, para. 180). Article 70 para. 1 Add. Prot. I provides that offers of humanitarian, impartial and non-discriminatory relief "shall not be regarded as interference in the armed conflict or as unfriendly acts".

227 See, for instance, P.J.I.M. de Waart, *Long-term aspects of humanitarian assistance in armed conflicts*, in: F. Kalshoven (ed.), ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS 71-74 (1989); F. Kalshoven, *Assistance to victims of armed conflicts*, in: *id.* (ed.), ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS 19-24; P. Macalister-Smith, *Rights and duties of the agencies involved in providing humanitarian assistance and their personnel in armed conflict*, in: F. Kalshoven (ed.), ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS 99; P. Macalister-Smith, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION (1985); Y. Beigbeder, THE ROLE OF AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE 4-6 (1991); M. A. Meyer, *Humanitarian action: A delicate balancing act*, 260 INT'L REV. RED CROSS 485 (1987).

228 See article 69 Add. Prot. I. The U.S. Congress defined permissible humanitarian assistance in legislation regarding support to the Nicaragua resistance as "the provision of food, clothing, medicine and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict bodily harm or death", quoted in: *supra* note 226, the ICJ judgement in *Nicaragua* v. *USA*, 57, para. 97.

229 Humanitarian law contains standards which are not only confined to Red Cross and Red Crescent institutions and actions but refer also to other humanitarian organizations and their relief actions in situations of armed conflict. Article 10 of the Fourth Geneva Convention provides that "[t]he provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross *or any other impartial humanitarian organization* may, subject to the *consent* of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief" (emphasis added). Article 18 para. 2 Add. Prot. I provides for internal conflicts that "[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned". See also article 18 para. 2 of the GC I, article 125 of the GC III, articles 63 para. 1 and 142 of the GC IV, and articles 15 para. 1, 17, 61-66, and 81 para. 4 Add. Prot. I.

230 *Article 9 of the First Geneva Convention*, in: *supra* note 2, Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds.), COMMENTARY 108-109, defines a humanitarian organization in that "it must be concerned with the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit", and that its humanitarian activities "must not be affected by any political or military consideration".

parties to the conflict the territory of which it must pass or in which it carries out its tasks. Article 71 para. 1 Add. Prot. I subjects the participation of personnel participating in relief actions, for instance for the transportation and distribution of relief consignments, to the approval of the State in whose territory they will carry out their duties. In particular, according to article 70 Add. Prot. I, the State is permitted to prescribe technical arrangements and locally supervise distributions. However, should a mission be excluded from the protection when it does not respect these fundamental principles and/or does not have the agreement of the host State, and what should be the threshold? In any event, the individuals and objects involved in such missions will still generally be entitled to the protection of civilians provided they do not engage in the hostilities.

"Humanitarian assistance" covers assistance by non-governmental organizations and by **43**
inter-governmental organizations, as for instance the specialized agencies and programs of the United Nations such as UNHCR, UNICEF, UNESCO, or the World Food Programme. The humanitarian activities and functions of the Red Cross and Red Crescent assigned to them by the Geneva Conventions and Protocols are also covered by article 8 para. 2 (b) (xxiv). While humanitarian assistance may in addition be offered by individual States, questions as to the humanitarian and impartial character of such missions are more likely to be raised.

γ) "peacekeeping mission"

The term "peacekeeping mission" has originated in the UN system and is most commonly **44**
used to refer to operations authorized or established by the UN. Also, the Rome Conference initially intended to only criminalize attacks on UN peacekeeping missions, and the legislative history does not seem to offer an intent to depart fundamentally from the principles and standards developed in regard to peacekeeping missions established or authorized by the UN, which therefore provide a useful basis of departure as to what kind of operations should be subsumed under this article.

Peace*keeping* must be distinguished from peace-*enforcement* missions that are established or **45**
authorized by the Council under Chapter VII or VIII of the UN Charter, and which have a mandate or are authorized to use force in order to achieve their objective beyond self-defense. In view of the UN practice, the following elements seem to characterize peacekeeping operations[231]. Peacekeeping missions are generally understood to be actions involving the *temporary* deployment of military personnel typically in a situation of tension but where no or no generalized fighting takes place, after hostilities have ceased de facto or by agreement, or to prevent the breaking out of fighting. The primary aim is to hinder the aggravation or spread of conflicts, to stabilize the situation and the relations among the disputing parties, and to allow for conditions favourable to a transition to a stable peace without using any coercive means to settle the underlying causes of tension. Peacekeeping missions *may only use force in self-defence*, but may be armed with (light) weapons of a defensive character. The essential idea is that the mere presence of a neutral and impartial multinational force or observing mission may deter and prevent the resumption of hostilities. The government of the host country must *consent* to the presence of the peacekeeping mission on its territory, and in practice agreement is also sought and considered necessary on operational matters and of all other parties to the conflict including

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231 See generally C. Heje, *United Nations Peacekeeping – An Introduction*, in: E. Moxon-Browne (ed.), A FUTURE FOR PEACEKEEPING? 1 (1998); K. Rudolph, *Peace-keeping Forces*, in: R. Wolfrum (ed.), UNITED NATIONS: LAW, POLICIES AND PRACTICE 957, Vol. 2 (1995) (with further references); E. Suy, *United Nations Peacekeeping System*, in: supra note 167, R. Bernhardt (ed.), ENCYCLOPEDIA 258, Vol. IV; S. M. Hill/S. P. Malik, PEACEKEEPING AND THE UNITED NATIONS (1996); H. McCoubrey/N.D. White, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS (1996); J. T. Fishel (ed.), "THE SAVAGE WARS OF PEACE" – TOWARD A NEW PARADIGM OF PEACE OPERATIONS (1998); United Nations, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING (1996).

irregular forces. It follows that peacekeeping missions typically must not engage in hostilities and be neutral and impartial.

46 Peacekeeping missions may take on observation tasks such as monitoring agreements and cease-fires, truces or armistices, may interpose itself between the opposing parties so as to interdict movement across the lines and to create buffer zones to prevent from a resumption of hostilities, may assist the parties in withdrawing or disarming their forces, or may verify limitations of forces and armaments. The term "peacekeeping missions" should be understood as also covering multinational military observer missions[232]. In addition, peacekeeping missions have also taken on tasks of "maintenance of law and order", policing and administration, and even mediation or settlement of disputes. However, tasks like the administration of a State and policing after a conflict, as for instance to ensure free elections in Cambodia, have also been referred to as "peace-building" missions. Whether the provision applies to fact-finding and peace-building missions is open to interpretation. In any case, personnel and objects of such missions in principle enjoy the protection civilians are entitled to in armed conflicts if the situation can still be qualified as an armed conflict.

47 If a peacekeeping mission uses self-defence in an expanded sense so as to defend property or ensure the fulfilment of the mandate, this goes beyond the traditional core tasks of peace*keeping* missions which are more "static", and has been called "wider peace-keeping"[233]. It is uncertain whether personnel and objects of such missions should also be subsumed under the term "peacekeeping" in article 8 para. 2 (b) (iii).

Personnel and objects "involved in such missions" covers the various categories of persons who are taking part in, or are otherwise associated with the mission. However, the wording excludes persons but who are present in the area and who are associated with the organization that sends the mission but not with the mission concerned.

48 Peacekeeping missions are generally established, mandated or authorized by *international organizations*[234]. However, even if the organization retains the control and command over the peacekeeping mission, the contingents assigned to the mission are generally provided by member States of the organization concerned. Even though peacekeeping missions established or authorized by the *UN*[235] are not mentioned in the UN Charter, it is not contested that their establishment is lawful and fully respects the Charter[236]. Also, *regional organizations* such as the OSCE[237], EU[238] or ECOWAS have been establishing or authorizing peacekeeping and observer missions[239].

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232 See *Prosecutor v. Karadzic and Mladic*, Case No. IT-95-5-I, (Initial) Indictment, 24 July 1995, para. 13: "The term 'UN peacekeepers' used throughout this indictment includes UN military observers of the United Nations".

233 U.S. Army, FIELD MANUAL, *Wider Peacekeeping*, 5th Draft (Revised), quoted by F. Hampson, *States' military operations authorized by the United Nations and international humanitarian law*, in: L. Condorelli *et al.* (eds.), LES NATIONS UNIES ET LE DROIT INTERNATIONAL HUMANITAIRE – THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW 375, fn. 6 (1996).

234 Missions established by one single State with no legitimizing authorization by an international organization inevitably will raise more concerns as to its political interests and impartiality.

235 UN missions were the sole object of negotiations up to the end of the Diplomatic Conference.

236 Secretary-General Hammarskjöld invented the term "Chapter VI-and-a-half operations" to indicate this fact that peacekeeping operations have not precise foundation in the Charter.

237 See M. Bothe *et al.* (eds.), THE OSCE IN THE MAINTENANCE OF PEACE AND SECURITY (1997).

238 The common foreign and security policy includes "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking", article J.7 of the Amsterdam Treaty.

239 The UN Security Council has repeatedly condemned armed attacks against peacekeeping forces set up by regional organizations (S.C. Res. 788 (1992), para. 4, and S.C. Res. 813 (1993), para. 6, on ECOWAS peace-keeping forces in Liberia), and asked the parties to the conflicts to ensure their safety (S.C. Res. 993 (1995), preamble, and S.C. Res. 1036 (1996), paragraph 8, on CIS peace-keeping forces). On peacekeeping of regional organizations see, *e.g.*, I. J. Rikhye, THE THEORY & PRACTICE OF PEACEKEEPING 131 (1984).

δ) "entitled ... under the international law of armed conflict"

As regards the conditions and the content of the specific protection civilians and civilian objects are entitled to under international humanitarian law, reference is made to the commentary on article 8 para. 2 (b) (i) and (ii). **49**

A *humanitarian assistance* mission must not be used outside the humanitarian function to conduct hostilities or "to commit acts harmful to the enemy"[240]. However, it is submitted that personnel involved in humanitarian assistance are entitled to *self-defence* to the extent protected persons such as medical personnel are permitted to self-defence under international humanitarian law, without forgoing the protection they are entitled to as civilians. According to Add. Prot. I, personnel of civilian medical units may be "equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge", and may be guarded by armed guards or escorts, without being deprived of their protected status[241]. Such self-defence protection is particularly important when bandits, plunderers or common criminals present a possible danger, and when in a so-called *conflit destructuré* no disciplined armed force possesses firm authority over certain areas through which relief convoys need to pass or in which the humanitarian assistance will be delivered. However, the full approval of the actual parties to the conflict must be given so that no risk of a conflict with these parties arises[242]. Using force to gain access to a certain area or to certain persons would disqualify the involved personnel and objects from this protection. In the case of hostile acts beyond self-defence, it is submitted in analogy to article 13 para. 1 Add. Prot. I that, at least in cases where the mission in general remains within its humanitarian mission, the protection ceases only after a warning has remained unheeded[243], unless such warning was impossible under the circumstances.

As to *peacekeeping missions*, international humanitarian law has not been drafted to specifically apply to UN forces, and peacekeeping as well as peace-enforcement missions do not readily fit in the categories of international humanitarian law which has been drafted and has emerged without a focus on the particularities of such missions. While there has been considerable controversy about exactly what rules apply and on what legal basis, it seems now broadly accepted that humanitarian law applies generally if not fully to UN peace-enforcement operations which are authorized to use force to achieve their objective and which in fact engage in hostilities against armed forces; it is also generally accepted that UN operations in which the basic mandate is not to engage in combat but that might become involved in hostilities should at least respect the "principles and spirit"[244] of international humanitarian law[245]. Paragraph 2 of **50**

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240 Article 13 Add. Prot. I.

241 Article 13 Add. Prot. I. Article 22 of the GC I provides basically the same.

242 See *Working Paper submitted jointly by the International Federation and the ICRC: Follow-up to Resolution 5 (Armed Protection of Humanitarian Assistance)*, Council of Delegates, Geneva 1-2 Dec. 1995, 95/CD/12/1.

243 Article 13 para. 1 first sentence Add. Prot. I.

244 Article 28 of the Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, U.N. Doc. A/46/185 (23 May 1991), Annex, article 28; article 17 of the Agreement between the United Nations and the Government for the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda, signed on 5 Nov. 1993, quoted in: C. Greenwood, *International Humanitarian Law and United Nations Military Operations*, in: A. McDonald (Managing ed.), 1 Y.B. INT'L HUMAN. L. 3, 21 (1998).

245 As a survey of legal doctrine see, *e.g.*, *supra* note 244, C. Greenwood, *International Humanitarian Law* 3 and 20-21; *id.*, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185 (1996); D. Schindler, *United Nations Forces and International Humanitarian Law*, in: C. Swinarski (ed.), STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW 521 (1984); L. Condorelli/A.-M. La Rosa/S. Scherrer (eds.), LES NATIONS UNIES ET LE DROIT INTERNATIONAL HUMANITAIRE – THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW (1996); U. Palwankar, *Applicability of international humanitarian law to United Nations peace-keeping forces*, 294 INT'L REV. RED CROSS 227 (1993); S. Oeter, *Civil War, Humanitarian Law and the United Nations*, in: J. A. Frowein/R. Wolfrum, 1 M.P. Y.B. UN L. 219 (1997); H.-P. Gasser, *Humanitäres Völkerrecht und militärische Operationen der Vereinten Nationenen zur Sicherung oder Schaffung des Friedens*, HUMANITÄRES VÖLKERRECHT 72 (1995).

article 2 of the Convention on the Safety of United Nations and Associated Personnel also seems to assume that humanitarian law applies to peace-enforcement operations[246].

51 While it may be argued that personnel of peacekeeping missions engaging as combatants are not entitled to the protection of civilians according to humanitarian law, it does not necessarily follow from the non-involvement of peacekeeping forces in hostilities that they are entitled to the protection as civilians. However, the Karadzic/Mladic Indictment by the ICTY asserts that peacekeeping personnel may enjoy the status of persons protected by the Geneva Conventions of 1949[247]. Furthermore, article 37 para. 1 (d) Add. Prot. I prohibits "the feigning of protected status by the use of signs ... of the United Nations", and thus assumes that individuals entitled to use these signs enjoy a "protected status", which, it is submitted, refers to the same protection afforded to civilians or persons *hors de combat*[248]. Furthermore, UN personnel and objects not engaged or contributing to hostilities would not constitute military objects.

52 However, while these provisions presuppose that the UN mission is taking no active part in hostilities, in reality there is a grey area and there is no clear threshold as to when certain acts must be considered as "taking part in hostilities".

While peacekeeping missions are not entitled to use force on an own initiative, they may nevertheless be authorized to use force in "*self-defence*". However, this term, as applied by the United Nations to its peacekeeping forces, is frequently used and understood in a substantially broader sense than the strict self-defence permitted to protected persons according to humanitarian law. For instance, when the Security Council considered setting up the UN Interim Force in Lebanon in 1978, the Secretary-General stated that:

> "[t]he Force will be provided with weapons of a defensive character. It shall not use force except in self-defence. Self-defence would *include resistance to attempts by forceful means to prevent [the United Nations force] from discharging its duties under the mandate of the Security Council*"[249].

While in regard to other operations the notion of self-defence was interpreted even more extensively[250], the Secretary-General did not strictly follow this approach in his Supplement to an Agenda for Peace and for instance did not consider the use of armed force for protection of humanitarian convoys or protection of safe areas as self-defence[251].

53 It is submitted that, similarly to personnel involved in humanitarian assistance missions, personnel involved in peacekeeping missions are entitled to *self-defence* to the extent protected persons are permitted to use self-defence under humanitarian law without forgoing the protection they are entitled to as civilians[252]. However, if peacekeeping personnel are using force, are actually drawn into and engaging in hostilities, they not only must apply the "principles and spirit" of humanitarian law, but they in addition forgo the protection of civilians under humanitarian law, as they are acting as combatants. Of course, the line between self-defence in the strict meaning of humanitarian law and a use of force by which the peacekeepers would forgo the protection of civilians will be difficult to draw and to perceive, and will largely depend on the circumstances.

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246 See, however, *supra* note 223, also article 20 (a) of the Convention on the Safety of United Nations and Associated Personnel, and, *supra* note 223, the commentary of C.C. Emanuelli, *Protection* 4.

247 *Supra* note 332, *Prosecutor* v. *Karadzic and Mladic*, para. 14: "The UN peacekeepers and civilians referred to in this indictment were, at all relevant times, persons protected by the Geneva Conventions of 1949".

248 The Report of the Third Committee of the Diplomatic Conference clarifies that this article 37 para. 1 (d) was not intended to apply to situations in which United Nations forces were engaged as combatants, in stating that "it should be noted that the misuse of United Nations signs ... would be perfidious in cases where the United Nations and its personnel enjoyed a neutral protected status, but not, of course, in situations where the United Nations forces were involved as combatants in a conflict", O.R. XV, p. 382, CDDH/236/Rev.1, para. 18.

249 Report of the Secretary-General, S/12611, p. 2 (emphasis added).

250 In regard to ONUC, see M. Arsanjani, *Defending the Blue Helmets: Protection of United Nations Personnel*, in: *supra* note 245, L. Condorelli/A.-M. La Rosa/S. Scherrer (eds.), 134-141.

251 See U.N. Doc. A/50/60–S/1995/1, para. 34.

252 See above, margin No. 47.

It may be argued that a formal authorization of peace-enforcement or "widened peacekeeping" missions to use force on their own initiative excludes its personnel and the entire mission from the entitlement to the protection accorded to civilians. It seems reasonable to exclude an entitlement to the protection of civilians when a "peacekeeping force"[253] is authorized to use force to a degree which essentially reaches the use of offensive force, as for instance the use of force by ONUC against the secessionist forces in Katanga province. A mission may of course also forgo the entitlement to civilian protection when the mandate is changed after an initial "static" peacekeeping mandate, as for instance when the mandate is extended to a full-blown enforcement operation under Chapter VII. **54**

An open question is whether *all* personnel and objects involved in a peacekeeping mission forgo the protection they are entitled to as civilians respectively civilian objects if solely a part of it in fact becomes engaged in hostilities[254]. While in such a case the whole peacekeeping operation may not any more be perceived as neutral by combatants of the parties, the perception certainly cannot be the sole determining factor. **55**

In sum, without clearer standards it will be difficult to determine under what circumstances the entitlement to the protection as civilians exists, or ceases to exist.

ε) "Intentionally directing attacks"

As the personnel and objects covered by article 8 para. 2 (b) (iii) must be entitled to the protection given to civilians or civilian objects under international humanitarian law, they thus necessarily enjoy (at least) the same protection as these persons and objects. In regard to the meaning of "[i]ntentionally directing attacks" against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission, and as to the required knowledge and intent, reference can thus be made *mutatis mutandis* to the commentary of article 8 para. 2 (b) (i) and (ii)[255]. It may be mentioned, however, that the term "intentionally" is used to convey the requirement that the perpetrator of the crime must in fact have been aware that the personnel or objects were involved in a humanitarian assistance or peacekeeping mission[256]. Thus, it is a required that the attack was on humanitarian assistance or peacekeeping personnel or objects as such. **56**

Is the notion of "attacks" in this provision limited to the meaning it has in a strict Hague law perspective of restrictions on the means and methods of warfare? This seems to be confirmed by the position of article 8 para. 2 (b) (iii) immediately after the prohibitions of attacks against civilians respectively against civilian objects in article 8 para. 2 (b) (i) and (ii). Furthermore, attacks against the person or liberty of civilians may be charged as another war crime under the jurisdiction of the Court, such as hostage-taking or another grave breach (article 8 para. 2 (a)). However, the definition of attacks in article 49 para. 1 Add. Prot. I[257] as "acts of violence against the adversary, whether in offence or defence" does not necessarily exclude acts like kidnapping, and peacekeeping and humanitarian mission fulfil a particular and important function, and even minor attacks may lead the sending organizations or States to refrain from such missions. However, if it would be contended that the protection of article 8 para. 2 (b) (iii) goes beyond a strict Hague law interpretation, it might be preferable to limit such an extension to specific **57**

253 If such an operation is still to be considered a peacekeeping mission.

254 *Supra* note 223, *article 2*, Convention on the Safety of United Nations and Associated Personnel, provides that if *any* of the personnel of an enforcement operation engage as combatants the Convention shall not apply to the entire operation.

255 See K. Dörmann, *article 8 para. 2 (b) (i) and (ii)*.

256 On identification of UN personnel see *supra* note 223, M.-C. Bourloyannis-Vrailas, *The Convention* 569-570.

257 See C. Pilloud/J. de Preux, *Article 49 Additional Prototocol I*, in: *supra* note 2, Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds.), COMMENTARY, paras. 1877-1882.

offences such as kidnapping of humanitarian or peacekeeping personnel than to extend the meaning of "attacks" to the whole range of (serious) attacks upon the person or liberty[258].

Attacks do not have to result in deaths, injury or damages[259].

(iv) Intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment

Literature:

Roberta Arnold, *The protection of the civilian population from the effects of hostilities*, 4 HUMANITÄRES VÖLKERRECHT 159 (2004); *id.*, THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM (2004); Michael Cottier, *Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the [ICTY] Prosecutor's Report of 13 June 2000*, in: Horst Fischer/Claus Kress/Sascha Rolf Lüder (eds.), INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 505 (2001); Knut Dörmann *et al.*, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2003); Harold Wayne Elliott, *Open Cities and Undefended Places*, THE ARMY LAWYER 39 (1995); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982); *id.*, *Attacking the Enemy Civilian as a Punishable Offence*, 7 DUKE J. COMP. & INT'L L. 539 (1997); Hans-Peter Gasser, *Protection of the Civilian Population*, in: Dieter Fleck (ed.), THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 209 (1999); Hermann Von Hebel/Darryl Robinson, *Crimes within the jurisdiction of the court*, in: Roy S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 79 (1999); William H. Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1 (1990); Anthony P.V. Rogers, LAW ON THE BATTLEFIELD (2004); Yves Sandoz/Christophe Swinarski/Bruno Zimmermann *et al.* (eds.), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987); Waldemar A. Solf, *Article 57*, in: Michael Bothe/Karl J. Partsch/Waldemar A. Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 (1982); Otto Triffterer, *Ius in bello: Eskalation durch "Kollateralschäden" wie durch Kriegsverbrechen – Beweisbarkeit und Vermeidbarkeit?*, in: Reinhard Moos/Udo Jesionek/Otto F. Müller, STRAFPROZESSRECHT IM WANDEL: FESTSCHRIFT FÜR ROLAND MIKLAU ZUM 65. GEBURTSTAG 559 (2006).

58 The *actus reus* of article 8 para. 2 (b) (iv) was principally framed on the basis of articles 51 para. 5 (b), 85 para. 3 (b), 35 para.3 (b) and 55 para. 1 Add. Prot. I. It requires that:

a) The perpetrator launched an attack;
b) The attack was such that it would cause incidental death or injury to civilians *or* damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The distinction between "directing" and "launching" an attack (the definition of attack is provided in the commentary on article 8 para. 2 (b) (v)) is unclear. According to *W. Fenrick*[260] it may be that "launching" is used to indicate implicitly that attack decisions where proportionality is a relevant issue are normally made at a higher level headquarters and involve a formal planning process.

The content of article 8 para. 2 (b) (iv) reflects the three pillar principles of International Humanitarian Law (IHL): distinction, military necessity and proportionality. The principle of distinction is based on the idea that only combatants should engage in hostilities. For this reason a combatant, whose task is to fight, will not be held criminally liable for having killed an enemy. In fact IHL, unlike human rights law, accepts that violence and the loss of lives are intrinsic to

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258 See, however, *supra* note 223, *article 9 para. 1 (a)* of the Convention on the Safety of United Nations and Associated Personnel, which prohibits "murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel". See also *supra* note 232, *Prosecutor* v. *Karadzic and Mladic*, paras. 46-48 (on the seizure and hostage-holding of 284 UN peacekeepers in order to prevent NATO air strikes, use as "human shields" and assault of some of the UN hostages).

259 The Convention on the Safety of United Nations and Associated Personnel in addition explicitly obliges every State Party to also criminalize "*threat[s]* to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act" and "violent attack[s] ... *likely to endanger* his or her person or liberty" (emphasis added), *supra* note 223, *article 9 para. 1 (c)* respectively (b) of the Convention on the Safety of United Nations and Associated Personnel.

260 W. Fenrick, First Edition of this Commentary, *article 8*, margin No. 49.

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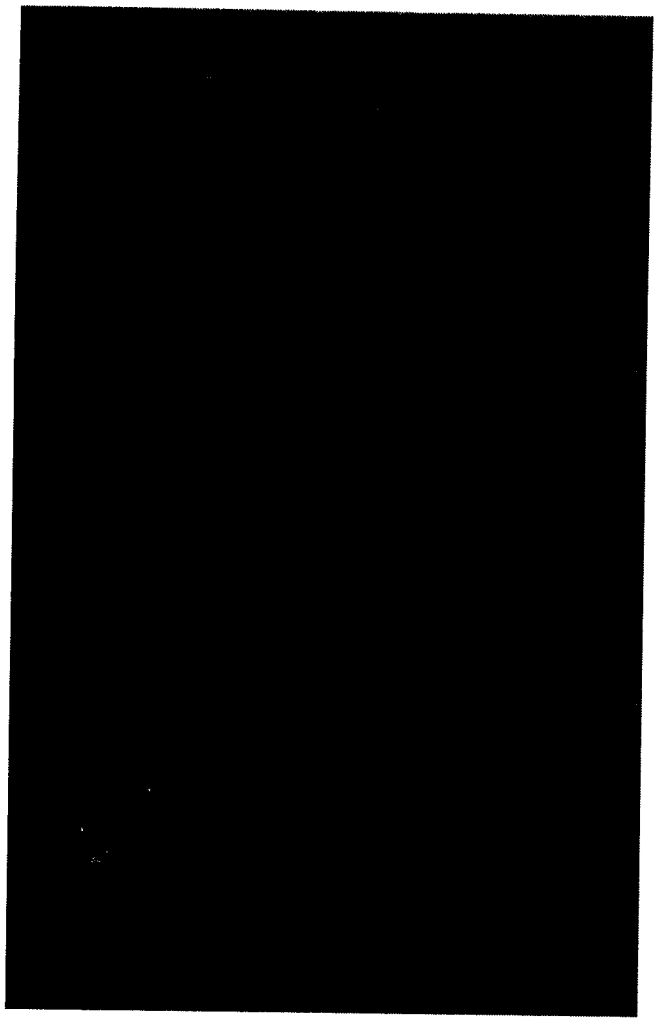

δ) War crime of conscripting or enlisting children

230 The war crime of conscripting or enlisting children under the age of fifteen into the national armed forces is an important corollary to the crime of using children to participate actively in hostilities. In fact, once children have been incorporated into military units and trained in military combat they have become militarily all too "valuable" to military commanders and decision-takers to not use them when a large-scale conflict breaks out and all fighting force is needed. To preclude their presence in military units is thus essential to help pre-empt their use in armed hostilities[985]. Besides, once children have been incorporated into armed forces, they constitute legitimate military targets since they are members of these forces.

aa) "Conscripting or enlisting ... into the ... armed forces"

231 There is no definition in international law of the notions of 'conscripting' and 'enlisting' into armed forces. In its ordinary national signification, "conscription" into armed forces appears to refer to the act of compelling to military service, that is, to the compulsory enlistment or entry into the armed forces[986]. Enlistment into armed forces appears to refer to the enrolment of someone on the "list" of a military body[987], indicating his or her membership and incorporation into the armed forces and engagement as a soldier[988]. Enlistment does not require any use of *de facto* or *de iure* force. Article 8 para. 2 (b) (xxvi) thus also criminalizes the act (or rather omission) of not refusing voluntary enlistment, provided the required mental elements (intention and knowledge) are met[989]. The terms conscripting or enlisting therefore refer to the moment of formal enrolment or incorporation into the armed forces, that is, of joining the armed forces, whether or not the child genuinely consents to it[990].

Up to the beginning of the Rome Conference, the proposals for the eventual article 8 para. 2 (b) (xxvi) included only the term "recruiting"[991]. At the Rome Conference, however, a small number of delegations, including the United States, feared that the term recruiting could be understood as also prohibiting *recruitment campaigns* addressed to children under the age of fifteen, even though such endeavors to have persons join the armed forces do not necessarily aim at an immediate beginning of military training within the armed forces. In order to exclude

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985 See *supra* note 980, D. Helle, *Optional protocol* 803.

986 See *supra* note 964, A. J. M. Delissen, *Legal protection of child-combatants* 156-157.

987 According to H. von Hebel/D. Robinson, the words "conscripting or enlisting" have a more passive connotation than "recruiting" and "relate primarily to the administrative act of putting the name of a person on a list", *supra* note 263, H. von Hebel/D. Robinson, *Crimes* 118.

988 *Cf. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (4 October 2000), para. 18 ("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"). According to major English dictionaries, "to conscript" is defined as "to compel to military service by conscription; to enlist compulsorily", THE OXFORD ENGLISH DICTIONARY 848, Vol. II (reprint 1978), and as "to force someone by law to serve in one of the armed forces", THE CAMBRIDGE INTERNATIONAL DICTIONARY 289 (1995). "To enlist" means "to enroll on the 'list' of a military body; to engage a soldier", THE OXFORD ENGLISH DICTIONARY 191, Vol. III (reprint 1978), and "to (cause to) join something, esp. the armed forces", THE CAMBRIDGE INTERNATIONAL DICTIONARY 459 (1995).

989 With regard to article 4 para. 3 (c) Add. Prot. II, see *supra* note 857, S. S. Junod, *Article 4 Add. Prot. II*, 1380 (No. 4557).

990 According to Garraway, the terms "conscripting or enlisting" were "designed to catch the moment that a person joined the armed forces, whether voluntarily or by some form of coercion", *supra* note 708, C. Garraway, *Elements of the Specific Forms of Genocide* 205.

991 See *supra* note 965, H. Mann, *International Law and the Child Soldier*. According to major English dictionaries, "to recruit" is defined as "to enlist new soldiers; to get or seek for fresh supplies of men for the army", *supra* note 991, THE OXFORD ENGLISH DICTIONARY 191, Vol. III, and "to persuade someone to become a new member of an organization, esp. the army", *supra* note 988, THE CAMBRIDGE INTERNATIONAL DICTIONARY 1188.

that the war crime would also extend to such early recruitment campaigns, the United States proposed the eventually adopted wording of "conscripting or enlisting"[992].

Another concern particular to the United Kingdom delegation was to rule out the application of the provision to children under fifteen who enter *schools funded, supervised or operated by the armed forces*. In view of the terms eventually selected and the negotiating history, article 8 para. 2 (b) (xxvi) does not apply to recruitment campaigns nor membership in scout groups. However, the enrolment in educational institutions operated or supervised by armed forces could qualify insofar it constitutes or is tantamount to an "enlistment into armed forces"[993]. This would not appear to be the case if children under 15 in these institutions receive an essentially civilian curriculum providing secondary education or vocational training. However, if the enrolment of children under 15 in such institution would mean that they thereby are eligible for armed combat in the event of an armed conflict or that they may be used to participate in hostilities even if under 15, the effects would be sufficiently similar to a direct enlistment into the armed forces to be considered, considering the offense's humanitarian object and purpose, as qualifying under article 8 para. 2 (b) (xxvi). But what if children enrolled in such a school receive a primarily military training, including in military combat, but do not in any way become eligible for armed combat before they reach 15 years?

bb) "National armed forces"

The wording "national armed forces" was accepted as a compromise. The adjective "national" was added to "armed forces" in order to meet the concerns of several Arab States who feared that "armed forces" alone might be applied to the Intifada and young Palestinians joining it. An earlier proposal had suggested the words "regular armed forces". Several delegations however strongly opposed a limitation of the scope of article 8 para. 2 (b) (xxvi) to "regular" armed forces. It is rather unclear to what extent the qualifier "national" limits what armed forces may be subsumed under article 8 para. 2 (b) (xxvi). To give this adjective an overly restrictive meaning would be incoherent with the broad scope of application of article 8 para. 2 (e) (vii), covering, with regard to non-international armed conflicts, conscription or enlistment into *any* armed forces or groups. Article 43 para. 1 Add. Prot. I provides that the armed forces of a party to the conflict "consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party". The party to the conflict thus need not be represented by a recognized government or authority or state[994]. In any event, stone-throwing children not subject to military training nor incorporated into armed forces would not fall under the prohibition of conscription or enlistment into armed forces, 232

992 See *supra* note 263, H. von Hebel/D. Robinson, *Crimes* 118.

993 In this regard, it may be interesting to consider that according to article 3 para. 5 of the Optional Protocol on the Involvement of Children in Armed Conflicts the requirement for States Parties to raise the recruitment age to at least 16 years does not apply "to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the convention on the Rights of the Child"[993]. Articles 28 and 29 of the Convention on the Rights of the Child recognize the right of the child to education, require states to take measures to ensure that school discipline is administered in a manner consistent with the child's human dignity, and states certain goals of the education. Article 3 para. 5 of the Optional Protocol thus implies that, in the view of the states adopting the Protocol, the prohibition under article 38 of the Convention to recruit children under 15 may also apply to enrolment in schools operated by or under the control of the armed forces, and provides that such schools must respect the child's human dignity and direct the education towards certain educational goals (which, it is submitted, cannot be exclusively military objectives). For the different options that were discussed during the negotiations leading to the adoption of the Optional Protocol, see, *e.g.*, Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its second session, E/CN.4/1996/102 (21 Mar. 1996), in particular paras. 102 *et seq*. See also *supra* note 980, D. Helle, *Optional protocol* 805.

994 See J. de Preux, *Article 43 Add. Prot. I*, in: *supra* note 2, Y. Sandoz/Ch. Swinarski/B. Zimmermann (eds), COMMENTARY 506 *et seq*. (paras. 1659 *et seq*.). See also article 1 para. 4 Add. Prot. I.

whereas, of course, a person using them to participate actively in hostilities might become criminally responsible under article 8 para. 2 (b) (xxvi).

cc) Any need of a nexus to an armed conflict?

233 Article 8 para. 2 (b) (xxvi) criminalizes "conscripting or enlisting children under the age of fifteen years into the national armed forces". While the second part of sub-paragraph (xxvi) contains an explicit reference to "hostilities" and seems to require the existence of hostilities and, thus, an armed conflict, the first part of the provision relating to conscription and enlistment does not contain any such reference. This raises the question whether article 8 para. 2 (b) (xxvi) also criminalizes conscription or enlistment of children in peace time, that is, without a nexus of that conduct to any particular armed conflict. Generally, international humanitarian law and, consequently, also war crimes concern conduct taking place during armed conflict. This seems to be confirmed by the chapeau of article 8 para. 2 (b) and by the elements for article 8 para. 2 (b) (xxvi), even though it must be pointed out that the general elements for war crimes, once their formulation was agreed on, were rather automatically inserted into the elements for each offense. To this author's knowledge, elements 4 and 5 for article 8 para. 2 (b) (xxvi) were added to the list of elements for sub-paragraph (xxvi) without any discussion of the special nature of the war crime of conscripting or enlisting children into armed forces. However, the essence of the war crime of conscripting or enlisting children rather points to its applicability at all times.

The *legal sources* of the prohibition underlying the offense other than the Rome Statute do not restrict its applicability to times of armed conflict. The relevant parts of article 77 para. 2 Add. Prot. I[995] and article 38 of the Convention on the Rights of the Child as well as the Optional Protocol to that Convention do not contain any restriction of the prohibition of recruitment of children to times of armed conflict.

Yet, a main *objective* of the prohibition of incorporating children into armed forces appears to be, as above seen, to protect them from involvement in armed conflict. Having children incorporated into the armed forces makes it difficult to keep them out of armed conflicts since that would upset the mechanics of armed forces. Armed hostilities may suddenly and unexpectedly break out, and it is unrealistic to expect that all children will immediately be expelled from armed forces as soon as an armed conflict breaks out. Keeping children out of armed forces also helps to avoid that they might qualify as legitimate targets under humanitarian law. Permitting children's conscription and enlistment in times of peace is hardly coherent with the aim of protecting them. The provision is given full effectiveness only if conscription and enlistment of children is proscribed both in the presence as well as absence of an armed conflict.

In addition, permitting conscription or enlistment of children in times of peace would lead to not overly convincing consequences. If an armed conflict should suddenly break out, the retention in the armed forces of a child conscripted or enlisted prior to the conflict's outbreak would either be considered lawful, in which the prohibition to conscript or enlist children would be greatly undermined. The other possibility is to consider the retention of the children unlawful and a war crime, since such retention is equivalent to a conscription or enlistment. This however would also seem an awkward and not very practical solution, and would not reach those who first conscripted or enlisted the children.

The literal and systematic interpretation of the war crime under article 8 para. 2 (b) (xxvi) of conscripting or enlisting children under 15 does not conclusively exclude its application during times of peace, while the prohibition's fundamental purpose and essence suggest its applicability

995 Article 3 Add. Prot. I specifies that the Conventions and the Protocol apply during armed conflict, "[w]ithout prejudice to the provisions which are applicable at all times". Common article 2 to the Geneva Conventions similarly implies that certain provisions of the Geneva Conventions (and through article 1 para. 3 Add. Prot. I also of Add. Prot. II) must be "implemented in peacetime".

at all times. It consequently is submitted that this war crime can also be applied to conduct occurring without a nexus to an armed conflict[996].

ε) Knowledge that the child is under 15

According to the default standard of the requisite *mens rea* spelled out in article 30 of the Rome Statute, the perpetrator must have been aware of the circumstance that the child was under the age of 15 years. This "awareness" may include *dolus eventualis*, that is, a situation in which the perpetrator did not know that the child was under 15, but thought this might be possible and went ahead anyway. According to element 3 to article 8 para. 2 (b) (xxvii), it is even sufficient that "[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years". This standard of *mens rea* clearly deviates from the requirement of awareness under article 30 Rome Statute. The formulation "should have known" appears to imply that it is sufficient that the perpetrator could have known the age of the child had he not been wilfully blind to it or had he taken reasonable and feasible safeguards to avoid using or conscripting or enlisting a child under 15, in particular when the person's appearance did not permit to exclude with certainty that he or she clearly was above 15 years. This essentially creates a duty to take reasonable and feasible safeguards against using or conscripting or enlisting children under 15. **234**

Preliminary Remarks on para. 2 (c)-(f) and para. 3: War crimes committed in an armed conflict not of an international character

Literature:
General:

Kai Ambos, *Aktuelle Probleme der deutschen Verfolgung von "Kriegsverbrechen" in Bosnien-Herzegowina*, NStZ 226 (1999); Roberta Arnold, *The development of the notion of war crimes in non-international conflicts through the jurisprudence of the UN Ad Hoc Tribunals*, 3 Humanitäres Völkerrecht 134 (2002),; Michael Bothe, *War crimes in non-international armed conflicts*, in: Yoram Dinstein, WAR CRIMES IN INTERNATIONAL LAW 293 (1996); Christine Byron, *Armed conflicts: international or non-international?*, J. OF CONFLICT & SECURITY L. 63 (2001); Dieter Fleck, *Humanitarian protection in non-international armed conflicts – the new research project of the International Institute of Humanitarian Law*, ISRAEL Y.B. HUM. RTS. 1 (2000/2001); Thomas Graditzky, *La résponsabilité pénale pour violation du droit international humanitaire applicable en situation de conflit armé non international*, REVUE INTERNATIONALE DE LA CROIX ROUGE 29 (1998); Christine Gray, *Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterisation and Consequences*, BRIT. Y.B. INT'L L. 165 (1996); Leslie Green, *Criminal responsibility of individuals in non-international conflicts*, GERMAN Y.B. INT'L L. 82 (2002); Christopher K. Hall, *The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law*, in: Flavia Lattanzi (ed.), THE INTERNATIONAL CRIMINAL COURT – COMMENTS ON THE DRAFT STATUTE 19 (1998); Claus Kreß, *Der Jugoslawien-Strafgerichtshof im Grenzbereich zwischen internationalem bewaffnetem Konflikt und Bürgerkrieg*, in: H. Fischer/S. Lüder (eds.), VÖLKERRECHTLICHE VERBRECHEN VOR DEM JUGOSLAWIEN-TRIBUNAL, NATIONALEN GERICHTEN UND DEM INTERNATIONALEN STRAFGERICHTSHOF – BEITRÄGE ZUR ENTWICKLUNG EINER EFFEKTIVEN INTERNATIONALEN STRAFGERICHTSBARKEIT 15; *id.*, *War crimes committed in non-international armed conflict and the emerging system of international criminal justice*, ISRAEL Y.B. HUM. RTS. 103 (2000/2001); Erich Kussbach, *Die Rechtsstellung nationaler Befreiungsbewegungen im humanitären Völkerrecht*, in: Herbert Miehsler *et al.* (eds.), JUS HUMANITATIS – FESTSCHRIFT ZUM 90. GEBURTSTAG VON A. VERDROSS 499 (1980); Hilaire MacCoubrey, *War crimes jurisdiction and a permanent International Criminal Court*, J. OF ARMED CONFLICT 9 (1998); Christa Meindersma, *Applicability of humanitarian law in international and internal armed conflict*, HAGUE Y.B. INT'L L. 113 (1994); Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236 (1998); *id.*, *War crimes law comes of age*, 92 AM. J. INT'L L. 462 (1998); *id.*, *Cassese's Tadić and the law of non-international armed conflicts*, in: Lal Chand Vorah *et. al.* (eds.), MAN'S INHUMANITY TO MAN - ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 553 (2003); William A. Schabas, *Punishment of non-state actors in non-international armed conflict*, FORDHAM INT'L L. J. 907 (2003); Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, II RECUEIL DES COURS 117 (in particular 133 *et seq.* and 145 *et seq.*) (1979); Heike Spieker, *The International Criminal Court and non-international armed conflicts*, LEIDEN J. INT'L L. 395 (2000); Deidre Willmott, *Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court*, MELBOURNE J. INT'L L. 196 (2004); Robert Zischg, NICHT-INTERNATIONALER BEWAFFNETER KONFLIKT UND VÖLKERRECHT (in particular 26 *et seq.*) (1996).

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996 See also *supra* note 962, M. Happold, *Child Soldiers* 33.

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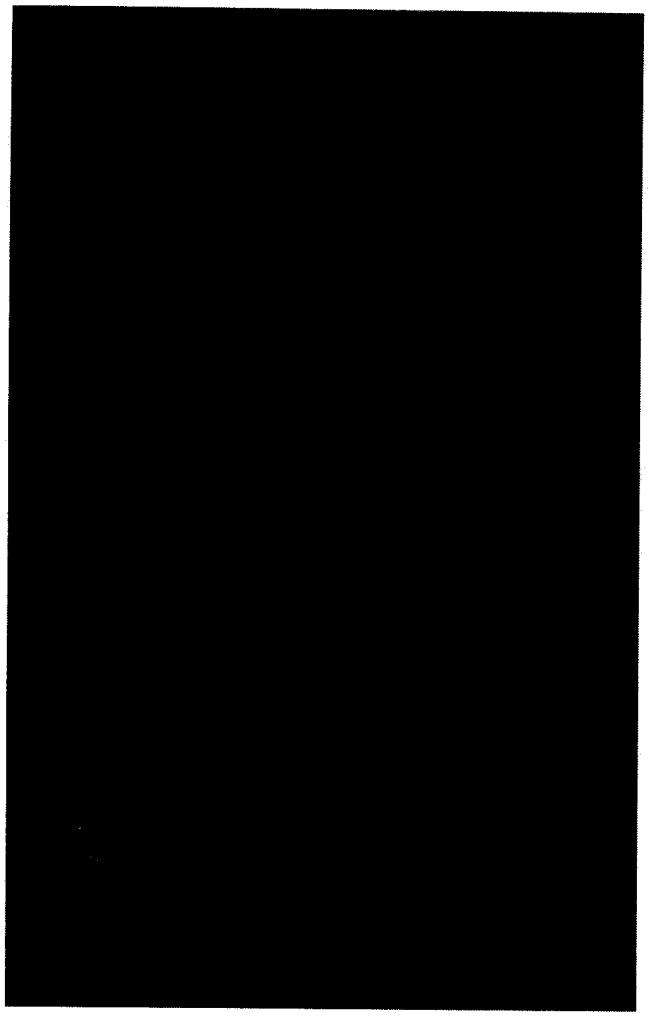

Thus, the motive of the perpetrator is irrelevant, providing that it can be shown that the person acted with the required knowledge of the attack, and, in the case of persecution, harboured a discriminatory intent[105].

g) Special Remarks

An important issue that will have to be addressed during each case before the ICC is what evidence will be sufficient to prove the widespread or systematic attack on the civilian population. Such attacks often involve a large number of acts, and complex and multi-layered forms of organisation and conduct[106]. It is not always possible to locate evidence concerning every aspect of the attack. One possible approach which may be pursued in certain cases is to focus on the planning, preparation and execution of the overall campaign against the civilian population, in question, at the highest levels of organisation, and use particular incidents to illustrate the various components of the campaign. Individual perpetrators could be fitted into such a criminal scheme[107]. 17

A second question that should be highlighted relates to the sentencing for crimes against humanity. It is now generally accepted that crimes are not inherently more serious than war crimes for the purposes sentencing[108]. In any event, it must be recognised that crimes against humanity by definition must be regarded as one of the gravest categories of crimes for the purposes of punishment[109]. 18

2. The different subparagraphs

(a) "Murder" (*Christopher K. Hall*)

Murder as a crime against humanity was recognized as early as the 1915 *Declaration of France, Great Britain and Russia*[110] and was included in the list of violations of the laws of humanity in the 1919 Peace Conference Commission report. It has been listed as the first crime against humanity in every instrument defining crimes against humanity[111]. In the light of this 19

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105 *Attorney General* v. *Eichmann*, Supreme Court of Israel, 29 May 1962, 36 INT'L L. REP. 277, 243-4 (1968); and, *supra* note 47, *Finta*, 819.

106 *Pohl* case, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. II, p. 49, which stated that in "an elaborate and complex operation", the execution thereof, occurs "far removed from the original planners. As may be expected, we find the various participants in the programme tossing the shuttlecock of responsibility from one to the other".

107 For example, see the ICTY's Indictments against *Radovan Karadzic* and *Ratko Mladic* (25 July 1995), and *Dario Kordic* (30 Sep. 1998).

108 *Prosecutor v. Furundzija*, Judgment, Appeals Chamber, 21 July 2000, para. 247 ("[T]here is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter"); *supra* note 99, *Tadic* (Appeals Chamber), para. 69 ("[T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case") (reversing the Trial Chamber sentencing judgment which made this distinction). These judgments squarely rejected the approach in the joint separate opinion of Judges McDonald and Vorah in *Prosecutor* v. *Erdemovic*, Judgment, Appeals Chamber, 7 Oct. 1997 (*Erdemovic* Judgment), paras. 20-26, which stated that "all things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime".

109 *Prosecutor v. Kambanda,* Case No. 97-23-S, Judgement, Trial Chamber, 4 Sep. 1998, para. 43.

110 *Supra* note 4, Declaration of France, Great Britain and Russia, 24 May 1915.

111 *Supra* note 7, Nuremberg Charter (1945), article 6 (c); *supra* note 7, Allied Control Council Law No. 10 (1945), article II para. 1 (c); *supra* note 7, Tokyo Charter, article 5 (c); *supra* note 7, Nuremberg Principles (1950), princ. VI (c); *supra* note 7, 1954 ILC Draft Code 1954, article 2 para. 10 (inhuman acts); *supra* note 7, ICTY Statute (1993), article 5 (a); *supra* note 7, ICTR Statute (1994), article 3 (a); *supra* note 7, 1996 ILC Draft Code, *supra* note 39, UNTAET Reg. 2000/15 (2000), sect. 5.1 (a); *supra* note 40, Sierra Leone Statute, article 2 (a); and *supra* note 41, Cambodia Extraordinary Chambers Law, article 5.

history, there was little controversy about including murder as a crime against humanity during the drafting of the Rome Statute[112].

The ILC in 1996 explained why it did not define this crime in the *Draft Code*: "Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation"[113]. However, there are significant differences between national definitions of murder, as some delegations recognized in the Preparatory Committee, which will require the Court, like the other international criminal courts, to consider its definition under international law[114]. For example, under English common law, murder is an unlawful homicide committed with "malice aforethought"; such malice implying neither pre-meditation nor ill-will, but either the intention to kill (express malice) or the intention to cause grievous bodily harm (implied malice), whether the accused foresaw the possibility of death or not[115]. French law appears to restrict the crime of murder (*meurtre*) to cases where the person intended to kill the victim[116]. Unfortunately, few decisions of international courts or commentators discussed the elements of the crime before the diplomatic conference[117]. The Nuremberg Judgment did not discuss the elements of the crime of murder.

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112 Murder was included as the first crime against humanity in one of the lists in the 1996 Preparatory Committee's compilation of proposals (known as the Telephone Book of Buenos Aires because of its length), but bracketed with wilful killing, the term used in the grave breaches provisions of the Geneva Conventions, as an alternative suggesting that the scope of each crime was considered similar. 1996 Preparatory Committee II, p. 65. Other formulations in the two other lists were "[wilful] murder [killing or extermination] [including killings by knowingly creating conditions likely to cause death]" and "wilful killing". *Ibid.*, 67, 69. The report stated that some delegations had "expressed the view that murder required further clarification given the divergences in national criminal laws. There were proposals to refer to wilful killing or to murder, including killings done by knowingly creating conditions likely to cause death". *Supra* note 10, 1996 Preparatory Committee I, p. 23. In February 1997, the Preparatory Committee list of crimes simply listed murder, without any further elaboration.

Murder, but without any further explanation, was the first crime against humanity listed in the Zutphen Draft under the chairmanship of Adriaan Bos. The Dutch delegation had invited the chairpersons of the various working groups of the Preparatory Committee to draft a new consolidated Draft that would merge the existing proposals to a workable text for the final meeting of the Preparatory Committee before the Rome Conference in spring of 1998. The result of the deliberations at Zutphen (www.iccnow.org/romearchive/zutphenmeeting.html). All citations to the Zutphen Draft in this Commentary are to the relevant draft articles. The Zutphen Draft was reorganized and partly revised at the final session of the Preparatory Committee held from 16 Mar. to 3 Apr. 1998 in what is sometimes known as the New York Draft, U.N. Doc. A/CONF.183/2/Add.2 (1998), which was submitted to the Rome Diplomatic Conference, but the list and order of crimes against humanity in article 5 of the New York Draft remained the same.

In Rome the inclusion of murder as the first in the list of crimes against humanity "was approved on the first day of negotiations on the definition of crimes against humanity and was not referred to again in the oral negotiating sessions". T. L.H. McCormack, *Crimes against Humanity*, in: D. McGoldrick/P. Rowe/E. Donnelly (eds.), THE INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 179, 190 (2004).

113 *Supra* note 7, 1996 ILC Draft Code, p. 96 (commentary to article 18).

114 See *supra* note 10, 1996 Preparatory Committee I, para. 92; G. Heine/H. Vest, *Murder/Wilful Killing*, in: G. Kirk McDonald/O. Swaak-Goldman (eds.), SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 175, Vol. 1 (2000) (discussing the wide range of definitions of murder and homicide under national law); J. Horder, HOMICIDE IN COMPARATIVE PERSPECTIVE (2007) (same).

115 M. J. Allen, TEXTBOOK ON CRIMINAL LAW 255-256 (3rd ed. 1991). A Parliamentary committee has recommended that unforeseen but unlawful killings be considered manslaughter instead of murder. Report of the Select Committee of the House of Lords on Murder and Life Imprisonment (HL PAPER 78-1 1989), para. 68. The government has proposed to amend the law of murder, but as of 1 Dec. 2006, the proposals had not yet been enacted into law.

116 Code Pénal (Dalloz 1997-1998), article 221-1 (*"Le fait de donner volontairement la mort à autrui constitue un meurtre"*).

117 Professor Bassiouni is a notable exception. He argued in 1992 that state practice, in international and national prosecutions, indicated that "murder is not intended to mean only those specific intentional killings without lawful justification", but also "the creation of life endangering conditions likely to result in death according to reasonable human experience", such as mistreatment of prisoners of war and civilians, and "a closely related form of unintentional but foreseeable death which the common law labels manslaughter". M. C. Bassiouni, CRIMES AGAINST HUMANITY 290-293 (1992).

However, there has been extensive and often contradictory jurisprudence, largely since the Rome Conference, concerning the definitions of murder as a crime against humanity and as a war crime. As recently as December 2004, the ICTY Appeals Chamber in the *Kordic* case concluded after reviewing jurisprudence in the ICTY and ICTR since the Rome Diplomatic Conference in 1998 that "[t]he elements of murder as a crime against humanity are undisputed"[118]. However, in the light of the continuing divergences in the jurisprudence of the ICTY and ICTR Trial and Appeals Chambers on the definition of this crime, in particular whether it requires premeditation or not and whether recklessness is sufficient, this conclusion is not accurate[119]. The most one can say is that the definition of this crime is still evolving. A harsher judgment might be that for nearly a decade ICTY and ICTR Trial Chambers have continued to convict persons in exactly the same circumstances that would lead to acquittals in other Trial Chambers, and the Appeals Chambers of the two Tribunals have failed to resolve this problem, thus denying justice to accused, victims and the general public[120]. **20**

There is general agreement, starting with the September 1998 (Trial Chamber Judgment) in *Prosecutor* v. *Akayesu*, that (apart from the common contextual elements for crimes against humanity) the *actus reus* for murder as a crime against humanity requires: that "the victim is dead" and that "the death resulted from an unlawful act or omission of the accused or a subordinate"[121]. ICTR Trial Chambers have generally identified the same two elements as articulated in *Akayesu*[122]. The ICTY Trial Chambers have done the same[123]. However, at least one ICTY Trial Chamber has formulated the second element slightly more broadly. In the 2002 *Krnojelac* judgment, the ICTY Trial Chamber stated the second physical element as: "The victim's death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility"[124].

The first fundamental split in the jurisprudence of the international criminal courts with regard to the mental element of murder as a crime against humanity is whether as part of the *mens rea* the perpetrator has premeditated the murder. The Trial Chamber in *Akayesu* did not require premeditation under article 3 of the ICTR Statute and this view has been followed by some other ICTR Trial Chambers[125]. However, other ICTR Trial Chambers have insisted that

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118 *Supra* note 72, *Kordic* (Appeals Chamber Judgment), para. 113.

119 For a thorough analysis of the conflicting jurisprudence on this question through 2002, see K. Ambos/S. Wirth, *The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L.F. 1 (2002).

120 The Appeals Chambers could have resolved this conflicting jurisprudence in any case involving murder as a crime against humanity, even if the mental element was not in issue. For example, the ICTY Appeals Chamber decided the question whether crimes against humanity could be committed for purely personal motives even when it had no bearing on the verdict in the case because the question was "a Matter of general significance" and decided that the Trial Chamber's conclusion that they could not was erroneous as a matter of law. *Supra* note 99, *Tadic* (Appeals Chamber Judgment), para. 272.

121 *Supra* note 15, *Akayesu* (Trial Chamber Judgment), para. 589. These three elements were in addition to the elements common to all crimes against humanity within the definition in article 3 of the Statute.

122 See, for example, *supra* note 46, *Rutaganda* (Trial Chamber Judgment), para. 80.

123 *See Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Judgment, Trial Chamber, 27 Sep. 2006, para. 715; *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgment, Trial Chamber, 17 Jan. 2005, para. 556; *Prosecutor v. Krnojelac*, Case No. IT-97-25, Judgment, Trial Chamber, 15 Mar. 2002, para. 324; *supra* note 96, *Delalic (Celebici)* (Trial Chamber Judgment), paras. 422, 439; *Prosecutor v Jelisic*, Case No. IT-95-10, Judgment, Trial Chamber, 14 Dec. 1999, para. 35; *supra* note 94, *Blaskic*, (Trial Chamber Judgment), para. 217; *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, Trial Chamber, 14 Jan. 2000, paras. 560-561; *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, Trial Chamber, 26 Feb. 2001, para. 236; *Prosecutor v. Krstic*, Case No. IT-93-33-T, Judgment, Trial Chamber, 2 Aug. 2001, para. 485, *Prosecutor v. Kvocka*, Case No. IT-95-30/1-T, Judgment, Trial Chamber, 2 Nov. 2001, para. 132.

124 *Supra* note 123, *Krnojelac* (Trial Chamber Judgment), para. 324 (fn. omitted) (citing: *supra* note 123, *Kordic* (Trial Chamber Judgment), para. 236); *supra* note 96, *Delalic* (*Celebici*) (Trial Chamber Judgment), para. 439.

125 ICTR judgments concluding premeditation is not required: *Supra* note 46, *Musema* (Trial Chamber Judgment), paras. 214-216; *supra* note 46, *Rutaganda* (Trial Chamber Judgment), paras. 79-80; *supra* note 15, *Akayesu* (Trial Chamber Judgment), para. 588.

premeditation is required under the ICTR Statute, although not under customary international law[126]. Such premeditation need not be an intent to kill a particular individual; "it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds"[127]. In contrast, most ICTY Trial Chambers have concluded that premeditation is not required under the identically worded ICTY Statute[128]. As of 1 December 2006, the conflicting jurisprudence had not yet been resolved, but the split has no significance with regard to interpretation of the scope of the jurisdictional definition in the Rome Statute of the crime against humanity of murder. The French version of the article 7 para. 1 (a) uses the term "*meurtre*", not "*assassinat*".

The second fundamental split regarding *mens rea* is whether, as with war crime of murder under common article 3 of the Geneva Conventions (incorporated in article 8 para. 2 (c) (i) of the Rome Statute) and willful killing as a grave breach of those Conventions (article 8 para. 2 (a) (i) of the Rome Statute), recklessness is sufficient to prove murder as a crime against humanity[129]. In *Akayesu*, the ICTR Trial Chamber stated that the crime of murder as a crime against humanity under article 3 of its *Statute* was "the unlawful, intentional killing of a human being", when "at the time of the killing the accused or a subordinate had the intention to kill or inflict bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not". This slightly convoluted formulation requires that the perpetrator have intended to kill or inflict bodily harm on the victim and have known that the harm was likely to cause death and been reckless whether death would result. Several of the ICTY Trial Chambers have required that the perpetrator have intended to inflict severe, grievous or serious bodily harm[130]. A more significant difference has

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126 ICTR judgments requiring premeditation: The first of these judgments was *supra* note 99, *Kayishema* (Trial Chamber Judgment), paras. 138-139 (concluding that premediation was required, based not on an interpretation of customary international law, but on the use of the narrow term *assassinat* in the French version of the ICTR and ICTY Statutes as a translation for the English term murder, rather than on the broader term *meurtre* used in the Rome Statute), *Prosecutor v. Kayishema,* Case No. ICTR-95-1-A, Judgment (Reasons), Appeals Chamber, 1 June 2001 (issue not addressed because the Prosecutor's appeal filed late). See also *supra* note 94, *Baglishema*, (Trial Chamber Judgment), para. 84, *Prosecutor v. Baglishema on other grounds*, Case No. ICTR-95-1A-A, Judgment (Reasons), Appeals Chamber, 3 July 2002; *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgment and Sentence, Trial Chamber, 25 Feb. 2004; *supra* note 47, (Trial Chamber Judgment), para. 339; *Prosecutor v. Semanza,* Case No. ICTR-97-20-A, Judgment,Appeals Chamber, 20 May 2005 (issue of definition of murder not addressed); *supra* note 73, *Muhimana* (Trial Chamber Judgment), para. 569 (quoting *supra* note 47, *Semanza* (Trial Chamber Judgment)), *appeal pending.* For an analysis of the Trial Chamber Judgment in *Kayishema*, see M. Boot, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 494-496 (2002). In the Trial Chamber's Judgment in *supra* note 99, the *Ntakirutimana* case, para. 808, it simply said that the accused "had the requisite intent" without specifying what it was.

127 *Supra* note 126, *Ntagerura* (Trial Chamber Judgment), para. 700 (citing *supra* note 47, *Semanza* (Trial Chamber Judgment), para. 339; *supra* note 126 Semanza (Appeals Chamber Judgement), (issue of definition of murder not addressed).

128 See, for example, *supra* note 123, *Kordic* (Trial Chamber Judgment), para. 235; *supra* note 123, *Jelisic* (Trial Chamber Judgment), para. 51; *supra* note 94, *Blaskic* (Trial Chamber Judgment), para. 216. In contrast, an ICTY Trial Chamber in the *Kupreskic* case defined murder as an "intentional and premeditated killing", but it did not refer to the latter element in its factual findings, para. 818. Similarly, the ICTY Trial Chamber in *Krstic* stated that it "subscribes to the position previously adopted by the ICTR in the *Akayesu* Judgement" with regard to premeditation. *Supra* note 123, *Krstic* (Trial Chamber Judgement), para. 484, para. 1119.

129 The term willful includes both intentional and reckless conduct. *Supra* note 96, *Delalic (Celibici)* (Trial Chamber Judgment), paras. 437 and 439 (Add. Prot. I, articles 11 and 85); *supra* note 123, *Kordic* (Trial Chamber Judgment), para. 229; B. Zimmermann, *Article 85*, in: Y. Sandoz/C. Swinarski/B. Zimmermann, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 3474 (1987); K. Dörmann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 43 (2002).

130 ICTY: *supra* note 123, *Krstic* (Trial Chamber Judgment), para. 485 ("serious bodily harm"); *supra* note 123, *Krnojelac* (Trial Chamber Judgment), para. 324 ("grievous bodily harm") (citing: *supra* note 123, *Kordic* (Trial Chamber Judgment), para. 236); *supra* note 96, *Delalic* (*Celebici*) (Trial Chamber Judgment), para. 439), *Prosecutor v. Delalic*, Case No. IT-97-25-A, Judgement, Appeals Chamber, 17 Sep. 2003 (definition of murder not addressed). ICTR: *Prosecutor v. Bisengimana*, Judgement, Case No. ICTR 00-60-

been that ICTY Trial Chambers and the Appeals Chamber have not included recklessness as a component of the mental element of murder as a crime against humanity[131]. For example, in the 2002 *Krnojelac* judgment, the ICTY Trial Chamber stated the mental element of the crime of murder was:

> "That act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
>
> 1. to kill, or
> 2. to inflict grievous bodily harm, or
> 3. to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death"[132].

One of the Special Panels for Serious Crimes of the District Court for Dili in East Timor (now Timor-Leste), implementing UNTAET Reg. 2000/15, with the same wording as article 7 para. 1 (a), has articulated a more restrictive four-part test which requires that the perpetrator's act be a substantial cause of the victim's death[133]. Several judgments of the Special Panels have indicated that premeditation is not required with respect to the crime against humanity of murder[134].

T, Trial Chamber, 13 Apr. 2006, para. 87 ("grievous bodily harm").

131 See *supra* note 123, *Krajisnik* (Trial Chamber Judgment), para. 715; *supra* note 123, *Blagojevic* (Trial Chamber Judgment), para. 556; *supra* note 123, *Krnojelac* (Trial Chamber Judgment), para. 324; *supra* note 123, *Delalic (Celebici)* (Trial Chamber Judgment), paras. 422, 439; supra note 123, *Jelisic* (Trial Chamber Judgment), para. 35; *supra* note 94, *Blaskic* (Trial Chamber Judgment), para. 217; *supra* note 123, *Kupreskic* (Trial Chamber Judgment), paras. 560-561; *supra* note 123, *Kordic* (Trial Chamber Judgment), para. 236; *supra* note 123, *Krstic* (Trial Chamber Judgment), para. 485, *supra* note 123, *Kvocka* (Trial Chamber Judgment), para. 132.

132 *Supra* note 123, *Krnojelac* (Trial Chamber Judgment), para. 324 (fn. omitted) (citing: *supra* note 123, *Kordic* (Trial Chamber Judgment), para. 236; *supra* note 96, *Delalic* (*Celebici*) (Trial Chamber Judgment), para. 439). The Trial Chamber in *Krnojelac* added:

> "Many decisions of this Tribunal and of the ICTR have adopted a definition of murder which refers to only one or two of these alternative states of mind. The relevant states of mind have nevertheless been expressed in this way, sometimes in differing terms but to substantially the same effect", in those decisions: *supra* note 15, *Akayesu* (Trial Chamber Judgment), para. 589; *supra* note 96, *Delalic* (Trial Chamber Judgment), paras. 425, 434-435, 439; *supra* note 99, *Kayishema* (Trial Chamber Judgment), paras. 150-151; *supra* note 46, *Rutaganda* (Trial Chamber Judgment), para. 80; *supra* note 123, *Jelisic* (Trial Chamber Judgment), para. 35; *supra* note 46, *Musema* (Trial Chamber Judgment), para. 215; *supra* note 94, *Blaskic* (Trial Chamber Judgment), paras. 153, 181.

133 The Special Panel stated in the *Los Palos* case:

> "644. The Panel accepts the opinion of the parties in relation to the general *mens rea* provided by Sect. 18 of UR-2000/15. For this reason, an accused charged with murder as a crime against humanity shall have his or her *mens rea* deemed by this Panel insofar as he or she has shown intent to cause the death of the victim or be aware that it will occur in the ordinary course of events. Accordingly, the Panel lists the four requisite elements of murder as a crime against humanity:
>
> 645. The victim is dead.
>
> 646. The death of the victim is the result of the perpetrator's act.
>
> 647. The act must be a substantial cause of the death of the victim.
>
> 648. At the time of the killing, the accused must have meant to cause the death of the victim or was aware that it would occur in the ordinary course of events".

Prosecutor v. Marques (Los Palos case), Case No. 09/2000, Judgment, Special Panel for Serious Crimes, Dili District Court, 11 Dec. 2001, paras. 644-649; see also *Prosecutor v. Lino de Carvalho*, No. 10/2001, Judgment, 18 Mar. 2004, pp. 12-13 (adopting position in *Marques* case). Other judgments (where they are readily available) do not expressly mention the elements of murder as a crime against humanity. See, for example, *Prosecutor v. A. Martins*, Case No. 11/2001, Judgment, Special Panel for Serious Crimes, Dili District Court, 13 Nov. 2003. Although the Special Court for Sierra Leone has issued indictments for murder as a crime against humanity based on command responsibility, the indictments shed little light on the elements of that crime and, as of 1 Dec. 2006, the Special Court had not issued any judgments of conviction or acquittal.

134 The Special Panels for Serious Crimes of the Dili District Court in East Timor have convicted persons of murder as a crime against humanity where there was no evidence of premeditation. *Supra* note 133, *Marques*, para. 649 ("[I]n a murder, as a crime against humanity, there is no requirement of premeditation as the mental element for murder ... The *mens rea* is restricted to the deliberate intent to cause the death of the victim or that such result would occur in the ordinary course of events".); *Supra* note 133, *Martins*, (some of the murders were not premeditated); *Prosecutor v. Agostinho Cloe*, No. 4/2003, Judgment, 16 Nov. 2004,

Despite the statements by the ICTY Trial Chambers in *Krnojelac* and *Blagojevic* that the elements of the crime of murder as a crime against humanity and as a war crime are essentially the same, other ICTY (Trial Chamber Judgment)s have recognized that the war crimes of murder under common article 3 of the *Geneva Conventions* and wilful killing as a grave breach under these *Conventions* have a broader mental element, by stating, as in the *Celibici* case, that both require "an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life"[135].

21 In the absence of a jurisdictional definition in article 7 of murder as a crime against humanity and the limited guidance in the Elements of Crimes (see below), the Court will have to draw upon the somewhat inconsistent experience of international criminal tribunals, which have had to define this crime based on the purposes of the prohibition in international law and, to a lesser extent, on common elements of the crime of murder in different legal systems[136]. In the First Edition of this Commentary, it was stated that such precedents, in particular the judgments of the Trial Chambers of the ICTY and the ICTR, would suggest that murder as a crime against humanity falls within the meaning of article 7 when the killing was either intentional or reckless, when the requirements of the chapeau are met. First, murder would occur where the accused or a subordinate intended (see article 30 para. 2 for a definition of intention) to kill the victim, the victim died, and the death was the result of an unlawful act or omission of the accused or a subordinate (where the requirements of superior responsibility under article 28 have been met). Second, murder would occur where the accused or a subordinate intended to inflict grievous bodily harm on the victim having known (see article 30 para. 3 for a definition of knowledge) that such bodily harm was likely to cause the victim's death and was reckless whether death would ensue or not, the victim died, and the death was the result of an unlawful act or omission of the accused or a subordinate (where the requirements of superior responsibility under article 28 have been met). However, as noted above, jurisprudence of international criminal courts subsequent to the First Edition of this commentary have indicated that it will be difficult to predict whether it will be possible to prove the crime against humanity of murder based on recklessness under the ICTY or ICTR Statutes or the UNTAET regulation establishing the Special Panels. In the light of the inconsistencies in this jurisprudence on this issue, as well as the conflicts between decisions regarding other mental elements, such as premeditation, the weight of this post-Rome Conference jurisprudence in determining the scope of article 7 para. 1 (a) mental element remains unclear.

22 The text of article 7 para. 1 (a), which is silent on the mental element for murder, must first be interpreted independently of the jurisprudence in the light of the somewhat confusing and circular definitions of intent and knowledge in article 30. However, apart from the two contextual elements of the crime of murder as a crime against humanity, which are common to all crimes against humanity (see margin Nos. 11–16 above), the Elements of Crimes lists only

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para. 15 (murder as a crime against humanity "does not require deliberate intent or premeditation"). For the status of judgments by the Special Panels, see *supra* note 133 above.

135 *Supra* note 96, *Delalic (Celebici)* (Trial Chamber Judgment), para. 439. Subsequent judgments of the ICTY have reached similar conclusions with regard to these war crimes.

136 Four of the first five arrest warrants issued by the Court each include counts of murder as a crime against humanity. See *Situation in Uganda*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 Sep. 2005, Case No. ICC-02/04-01/05-53, Pre-Trial Chamber II, 27 Sep. 2005 (counts 12, 16, 17, 20 and 27); *ibid.*, Warrant of Arrest for Dominic Ongwen ICC-02/04-01/05-57, Pre-Trial Chamber II, 8 July 2005 (count 27); *ibid.*, Warrant of Arrest for Okot Odhiambo, Case No. ICC-02/04-01/05-56, Pre-Trial Chamber II, 8 July 2005 (count 10); *ibid.*, Warrant of Arrest for Vincent Otti, Case No. ICC-02/04-01/05-54, Pre-Trial Chamber II, 8 July 2005 (counts 16, 20 and 27). However, the arrest warrants are heavily redacted and the Prosecutor's application for Warrants of Arrest under article 58, dated 6 May 2005, as amended and supplemented by the Prosecutor on the 13 May 2005 and 18 May 2005, as well as the hearing on the application, remain under seal, so it is impossible to determine what the factual and legal basis was for each count. *Situation in Uganda*, Decision on the Prosecutor's Application for Warrants of Arrest under article 58, Unsealed pursuant to Decision ICC-02/04-01/05-52, dated 13.10.2005, Case No. ICC-02/04-01/05-1-US-Exp, Pre-Trial Chamber II, 8 July 2005.

one material element of this crime: "(1) The perpetrator killed [fn. 7 omitted] one or more persons". Footnote 7 adds that it "applies to all elements which use either of these concepts", which would include the crime against humanity of extermination and certain war crimes[137]. In the absence of any mental element with respect to this material element, article 30 applies[138].

Article 30 para. 1 states that "[u]nless otherwise provided", the material elements of the crime must be "committed with intent and knowledge". In relation to *conduct*, the accused has *intent* under article 30 para. 2 (a) where "that person means to engage in the conduct". Therefore, a person would have the necessary intent to engage in the conduct that amounts to murder where the person meant to carry out the act that killed the victim or caused the death of the victim or meant to omit carrying out an act led to the same result (such as a prison commandant intentionally failing to provide food or medicine to a prisoner in his or her custody where the failure to do so resulted in the prisoner's death). In relation to a *consequence*, the accused has *intent* under article 30 para. 2 (b) where "that person means to cause that consequence or is aware that it will occur in the ordinary course of events". A person has *knowledge* under article 30 para. 3 where there is "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".

Thus, under article 30 a person would have intent to commit murder if the person meant to engage in certain conduct that killed or caused the death of the victim, including the infliction of grievous bodily harm where the person was aware that the act or omission *would lead to death* in the ordinary course of events. It is less clear, but still possible, that if the accused was aware that the act or omission *would be likely to lead to death* in the ordinary course of events that the accused would be responsible for murder. Since knowledge includes awareness that a circumstance exists, that circumstance could be the *likelihood* that death would ensue as a result of the actions rather than the *certainty* that death would occur. There would be then no need to show that the person was reckless whether the death occurred or not, only that the person *intentionally* inflicted grievous bodily harm *knowing* that in such circumstances death would be likely to occur. Such an interpretation of the crime of murder as a crime against humanity would be generally consistent with the majority of decisions by international courts and interpretation of commentators about the customary international law definition of the crime and with the purpose of the *Statute*, as well as with the broad range of conduct that constitutes extermination under article 7 para. 1 (b), which is murder on a large scale.

In the context of an armed conflict, unlawful acts or omissions include those in violation of international humanitarian law, as well as those in violation of national law. In time of peace, unlawful acts or omissions include those which would cause "extra-legal, arbitrary and summary executions" prohibited by article 1 of the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*[139], as well as those in violation of national law. The United States of America has stated that such killings are crimes under the Rome Statute[140]. **23**

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137 *Supra* note 129, K. Dörmann, para. 39 (In discussing the elements of the war crime of wilful killing in article 8 para. 2 (a) (i), which were agreed before the elements of crimes against humanity, he stated: "The term 'killed' creates the link to the 'title' of the crime, and the term 'caused death' was felt necessary to make it clear that conduct such as the reduction of rations for prisoners of war resulting in their starvation and ultimately their death is also covered by this crime.").

138 Although there was some jurisprudence by the ICTY and ICTR defining the mental element of the crime of murder when the Elements of Crimes were drafted, no agreement could be reached on the *mens rea* after delegates engaged in an extensive discussion in the context of the mental elements required for war crimes of different concepts in various national legal systems. Ch. K. Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AM. J. INT'. L. 773, 781 (2000); D. Robinson, *Article 7 (1) (a) – Crime Against Humanity of Murder*, in: R. S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 80, 81 (2001).

139 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by Economic and Social Council (ECOSOC) Res. 1989/65 of 24 May 1989, article 1.

140 During the drafting of the 2004 GA Res. (UN Doc. A/C.3/59/L.57/Rev.1)), the United States urged that the

Of course, a commander or a superior could be individually responsible pursuant to article 28 for murder on the basis of command or superior responsibility even though he or she did not actually kill the victim. Footnote 7 states that "[t]he term 'killed' is interchangeable with the term 'caused death'". Therefore, a person could be held criminally responsible for murder for both acts and omissions, such as failing to feed or to provide necessary medical attention to a prisoner in his or her custody, where that failure caused the victim's death.

(b) "Extermination" *(Christopher K. Hall)*

24 Like murder, the crime of extermination has been listed in all instruments concerning crimes against humanity since the Second World War[141]. There was general support for including extermination as a crime against humanity within the Court's jurisdiction, although some questioned whether it duplicated murder and genocide[142]. Although the crime of extermination included much of the genocide committed during the Second World War and it overlaps with the definition of that crime as defined in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (see commentary to article 6 above and analysis below), the crimes are distinct. The ILC explained the differences between the crimes against humanity of murder and extermination and killings constituting genocide in its comment on article 18 of the *1996 Draft Code*:

> "[Murder and extermination] consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared"[143].

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following language be included: "Acknowledges that extra-judicial, summary or arbitrary executions are crimes under the *Rome Statute* of the ICC and notes the 97 ratifications or accessions by States and the 139 signatures to date by States of the *Rome Statute* of the ICC". This language was not included in the resolution as adopted solely because of concerns that the United States of America was seeking to minimize acceptance of the Rome Statute by omitting a call to states to consider ratifying the *Rome Statute*.

141 It is included in *supra* note 7, article 6 (c) of the Nuremberg Charter, *supra* note 7, article II para. 1 (c) of Allied Control Council Law No. 10, article 5 (c) *supra* note 7, of the Tokyo Charter, *supra* note 7, principle VI (c) of the 1950 Nuremberg Principles, *supra* note 7, article 2 para. 10 (inhuman acts) of the 1954 ILC Draft Code, *supra* note 7, article 5 (b) of the 1993 ICTY Statute, and *supra* note 7, article 3 (b) of the 1994 ICTR Statute, *supra* note 7, article 18 (b) of *supra* note 7, the 1996 ILC Draft Code, *supra* note 39, sections 5.1 (b) and 5.2 (a) of UNTAET Reg. 2000/15, *supra* note 40, article 2 (b) of the Sierra Leone Statute, and *supra* note 41, article 5 of the Cambodia Extraordinary Chambers Law.

142 Extermination was proposed in the *Ad Hoc* Committee to be included in the list of crimes against humanity, but it was also suggested that this was one of the crimes for which it was necessary to elaborate further its content. *Supra* note 10, *Ad Hoc* Committee Report, p. 17.

Extermination was included in two of the lists of crimes against humanity in the *supra* note 112, 1996 Preparatory Committee II, pp. 65 and 67, but omitted in the third list. An annex to one of the lists defined extermination as:

> "(i) mass murder; or
>
> (ii) intentionally inflicting conditions of life [calculated to][which the accused knew or had reason to know would] bring about the physical destruction of a defined segment of the population".

Ibid., p. 68. The report noted that "[t]he view was expressed that extermination should be deleted as a duplication of murder or clarified to distinguish between the two, with a proposal being made to refer to alternative offences"; *supra* note 10, 1996 Preparatory Committee I, p. 23. In February 1997, the Preparatory Committee list of crimes simply listed extermination, in the first paragraph of the article on crimes against humanity and in a second paragraph it explained that this crime "includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population".

Extermination was the second crime against humanity listed in the first paragraph of the crimes against humanity section of article 5 [20] of the *supra* note 112, Zutphen Draft, together with a second paragraph that was indentical to the one in the February 1997 Report, and this wording remained unchanged in article 5 of the *supra* note 112, New York Draft.

143 *Supra* note 7, 1996 ILC Draft Code, p. 97. A leading commentator came to a similar conclusion about the