SCSL-04-15-A

1282) (2650-3012) 2650

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

IN THE APPEALS CHAMBER

Before: Hon. Justice Renate Winter, President
Hon. Justice Jon Kamanda
Hon. Justice George Gelaga King
Hon. Justice Emmanuel Ayoola
Hon. Justice Shireen Fisher

Acting Registrar: Ms Binta Mansaray

Date filed: 2 June 2009

THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-04-15-A

PUBLIC

PROSECUTION APPEAL BRIEF

Office of the Prosecutor:
Dr Christopher Staker
Mr Vincent Wagona
Dr Nina Jørgensen
Mr Reginald Fynn
Ms Elisabeth Baumgartner
Ms Régine Gachoud

Defence Counsel for Issa Hassan Sesay
Mr Wayne Jordash
Ms Sareta Ashraph

Defence Counsel for Morris Kallon
Mr Charles Taku
Mr Kennedy Ogeto

Defence Counsel for Augustine Gbao
Mr John Cammegh
Mr Scott Martin

Table of Contents

1. Introduction

A. General

1.1 Pursuant to Rule 111 of the Rules of Procedure and Evidence, the Prosecution files this **Appeal Brief** containing the submissions of the Prosecution in its appeal against the Judgement of the Trial Chamber dated 2 March 2009[1] in Case No. SCSL-04-15-T, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the "**Trial Judgement**").

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

1.3 The Prosecution's grounds of appeal against the Trial Judgement are set out in the Prosecution's Notice of Appeal, filed on 28 April 2009 (the "**Prosecution's Notice of Appeal**"). References below to the Prosecution's Grounds of Appeal are to the grounds as set out in the Prosecution's Notice of Appeal.

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

B. Standards of review on appeal

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

(1) a procedural error,

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

(3) an error of fact which has occasioned a miscarriage of justice.[2]

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

---

1 The full written Trial Judgement was issued on 2 March 2009. Previously, on 25 February 2009, the verdict was pronounced in open court, and a written "Judgement Summary" was issued.

2 See Article 20 of the Special Court Statute and Rule 106 of the Rules of Procedure and Evidence.

1.7 Where the appellant alleges an **error of fact**, the Appeals Chamber will not conduct an independent assessment of the evidence admitted at trial, or undertake a *de novo* review of the evidence.[3] The standard of review on appeal for an error of fact of this type has been articulated by this Appeals Chamber as follows:

> Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial. This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[4]

1.8 It has similarly been stated by the ICTY Appeals Chamber that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.
>
> ... it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to 'admit any relevant evidence which it deems to have probative value', as well as to exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial.' As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.

---

[3] See, for instance, *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, ("***Čelebići* Appeal Judgement**"), paras 203–204.

[4] *Prosecutor v. Fofana, Kondewa*, SCSL-04-14-A-829, "Judgmeut", Appeals Chamber, 28 May 2008 ("***CDF* Appeal Judgement**"), para. 33.

> ... The reason that the Appeals Chamber will not lightly disturb findings of faet by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Aecordingly, it is primarily for the Trial Chamber to determine whether a witness is eredible and to deeide which witness' testimony to prefer, without neeessarily artieulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute.[5]

1.9 In other words, in an appeal against conviction, the Appeals Chamber does not determine whether it is *itself* satisfied beyond a reasonable doubt of the guilt of the accused. Rather, it applies a "deferential standard" of review, under which it must decide whether a reasonable Trial Chamber, based on all of the evidence in the case, *could* have been satisfied beyond reasonable doubt as to the finding in question.[6] An appellant can only establish an error of fact where the appellant can establish that the finding of fact reached by the Trial Chamber is one which eould not have been made on the evidence by any reasonable tribunal of fact.

1.10 It has been noted that:

> The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an aequittal. The Appeals Chamber will only hold that an error of law has been committed when it determines that no reasonable trier of fact could have made the impugned finding. However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the aceused beyond reasonable doubt, the significance of an error of fact oecasioning a miscarriage of justiee is somewhat different for a Prosecution appeal against an acquittal than for a defenee appeal against eonviction. A convicted person must show that the Trial Chamber's factual errors create a

---

5 *Prosecutor v. Kupreškić et al.,* IT-95-16-A, " Judgement", Appeals Chamber, 23 October 2001, ("***Kupreškić* Appeal Judgement**"), paras 30–32 (footnotes omitted). See also *Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999, ("***Tadić* Appeal Judgement**"), para. 64; *Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", ("***Aleksovski* Appeal Jndgement**") Appeals Chamber, 24 March 2000, para. 63; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Judgement", Appeals Chamber, 12 June 2002, ("***Kunarac* Appeal Judgement**"), paras 39–42; *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-*Abis*, "Judgment on Sentence Appeal", Appeals Chamber, 8 April 2003, ("***Čelebići* Sentencing Appeal Judgement**"), paras 54–60; *Prosecutor v Bagilishema*, ICTR-95-1A-A, "Judgement (Reasons)" 3 July 2002, ("***Bagilishema* Appeal Judgement**"), paras 11–14; *Prosecutor v. Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003, ("***Rutaganda* Appeal Judgement**"), paras 22–23; *Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003, ("***Krnojelac* Appeal Judgement**"), paras 11–12; *Prosecutor v. Vasiljević*, IT-98-32-A, "Judgement", Appeal Chamber, 25 February 2004, ("***Vasiljević* Appeal Judgement**"), para. 7; *Karera v Prosecutor*, ICTR-01-74-A, "Judgement", Appeals Chamber, 2 February 2009, ("**Karera Appeal Judgement**"), para. 10; *Prosecutor v Kraijisnik*, IT-00-39-A, "Judgement", Appeals Chamber, 17 March 2009, ("***Kraijisnik* Appeal Jndgement**"), para. 14.

6 *Prosecutor v. Blaškić*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004, ("***Blaškić* Appeal Judgement**"), para. 22.

> reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[7]

1.11 It has further been held that in making the determination described above:

> The Appeals Chamber does not review the entire trial record *de novo*; in principle, it only takes into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any.[8]

1.12 Not every error of fact leads to a reversal or revision of a decision of a Trial Chamber. Article 20(1)(c) of the Statute requires that the error of fact be one which has "occasioned a miscarriage of justice". The Appeals Chamber of the ICTY has for instance held that the appellant must establish that the error was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome", or a "flagrant injustice", such as where an accused is convicted despite a lack of evidence on an essential element of the crime.[9]

1.13 Where the appellant alleges an **error of law**, the Appeals Chamber, as the final arbiter of the law of the Court, must determine whether such an error of substantive or procedural law was in fact made.[10] The Appeals Chamber of the ICTY has stated that:

> Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law"[11].

---

7 *Muvunyi v Prosecutor*, ICTR-2000-55A-A, "Judgement", Appeals Chamber, 29 August 2008, ("***Muvunyi* Appeal Judgement**"), para. 10. See also *Prosecutor v. Martić*, IT-95-11-A, "Judgement", Appeal Chamber, 8 October 2008, ("***Martic* Appeal Judgement**"), para. 12; *Prosecutor v Mrkšić*, IT-95-13/1-A, "Judgement", Appeals Chamber, 5 May 2009, ("***Mrkšić* Appeal Judgement**"), para. 15.

8 *Prosecutor v. Brđanin*, IT-99-36-A, "Judgement", Appeals Chamber, 3 April 2007, ("***Brđanin* Appeal Judgemeut**"), para. 15.

9 See, *e.g.*, *Kupreškić* Appeal Judgement, para. 29. See also *Prosecutor v. Furundžija*, IT-95-17/1, "Judgement", Appeals Chamber, 21 July 2000, ("***Furundžija* Appeal Judgement**"), para. 37; *Kunarac* Appeal Judgement, para. 39; *Krnojelac* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 8; *Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement" Appeals Chamber, 28 February 2005, ("***Kvočka* Appeal Judgement**"), para. 18.

10 *Kunarac* Appeal Judgement, para. 38.

11 *Furundžija* Appeal Judgement, para. 35. See also, *e.g.*, *Prosecutor v. Kajelijeli*, ICTR-98-44A, "Judgement", Appeals Chamber, 23 May 2005, ("***Kajelijeli* Appeal Judgement**"), para. 5; *Vasiljević* Appeal Judgement, para. 6.; *Mrkšić* Appeal Judgement, para. 11.

1.14 In other words, the Appeals Chamber accords no partieular deferenee to the findings of law made by the Trial Chamber, since the Appeals Chamber is as eapable as the Trial Chamber of determining what is the law. However, in accordance with the general principle that it is for a party asserting a right or seeking relief to establish the existence of that right or the entitlement to that relief, an appellant may be said to bear a burden of persuasion[12]. Thus, it has been said that:

> [A] party who submits that the Trial Chamber erred in law must at least identify the alleged error and advanee some arguments in support of its contention. An appeal eannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify thc alleged legal error, he or she should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber.[13]

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

> Where the Appeals Chamber finds that there is an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, it is open to the Appeals Chamber to artieulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to thc evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmcd on appeal.[14]

1.16 Thus, not every error of law leads to a reversal or revision of a decision of a Trial Chamber. Pursuant to Article 20(1)(b) of the Statute, the Appeals Chamber is empowered to reverse or revise a Trial Chamber's decision only when the error of law

---

12 See, *e.g.*, *Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence" 15 October 1998, ("***Tadić* Additional Evidence Appeal Decision**"), para. 52.

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

14 *Kvočka* Appeal Judgement, para. 17; see also *Karera* Appeal Judgement, paras 8-9; *Blaškić* Appeal Judgement, para. 15; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004, ("***Kordić and Čerkez* Appeal Judgement**"), para. 17; *Prosecutor v. Stakić*, IT-97-24-A, "Judgement" Appeals Chamber, 22 March 2006, ("***Stakić* Appeal Judgement**"), paras 9, 312 (but see the Partly Dissenting Opinion of Judge Shahabuddeen, paras 2-7); *Brđanin* Appeal Judgement, para. 10; *Martić* Appeal Judgement, para. 10; *Kraijisnik* Appeal Judgement, para. 13.

is one "invalidating the decision".[15] The party alleging an error of law must identify the alleged error and explain how the error invalidates the decision.[16] This Appeals Chamber has acknowledged that some international criminal tribunals have in exceptional circumstances considered legal issues raised by a party or *proprio motu*, even though such legal issues may not lead to the invalidation of the judgment, if their resolution is nevertheless of general significance to the Tribunal's jurisprudence.[17]

1.17 In the case of an alleged **procedural error**, it is necessary to distinguish between cases where it is alleged that there has been a non-compliance with a *mandatory procedural requirement* of the Statute and the Rules, and cases where it is alleged that the Trial Chamber has erroneously exercised a *discretionary power*. Errors of the former type will not necessarily invalidate the Trial Chamber's decision, if there has been no prejudice to the Defence.[18]

1.18 In cases where it is alleged that the Trial Chamber has erroneously exercised its discretion, the issue on appeal is not whether the decision is correct, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently.[19]

1.19 The test for determining whether the Trial Chamber has erred in the exercise of a discretion is whether the Trial Chamber has "misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to

---

15 *CDF* Appeal Judgement, para. 32.

16 See, for instance, *Krnojelac* Appeal Judgement, para. 10; *Kvočka* Appeal Judgement, para. 16; *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-688, "Decision on Interlocutory Appeals against Trial Chamber's Decision refusing to subpoena the President of Sierra Leone", 11 September 2006, ("***CDF* Subpoena Appeal Decision**"), para. 7: "To show that the discretion was based on an error of law, an appellant must give details of the alleged error, and must state precisely how the legal error invalidates the decision." *Stakić* Appeal Jndgement, para. 8: However, even if an appellant's arguments are insufficient to support the contention of an error, the Appeals Chamber may conclude for other reasons that there has been an error of law. See also *Martić* Appeal Judgement, para. 9: "It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments which an appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision."

17 *CDF* Appeal Judgement, para. 32. See also *Martić* Appeal Judgement, para. 8; *Kraijisnik* Appeal Judgement, para. 11.

18 See, e.g., *CDF* Appeal Judgement, para. 35; *Čelebići* Appeal Judgement, paras 630–639. See also *Prosecutor v. Krstić*, IT-98-33-A, "Judgement", Appeals Chamber, 19 April 2004, ("***Krstić* Appeal Judgement**"), paras 187–188 (holding that the prosecution's failure to comply with its disclosure obligations did not warrant a retrial where no prejudice to the accused was established).

19 See, e.g., *CDF* Appeal Judgement, para. 36; *CDF* Subpoena Appeal Decision, para. 5. See also *Mrkšić* Appeal Judgement, para. 16: "On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber".

consider relevant faetors or failed to give suffieient weight to relevant faetors, or made an error as to the facts upon whieh it has exercised its discretion".[20]

1.20 In simple terms, the question is whether the exereise of the discretion was "reasonably open" to the Trial Chamber,[21] or whether, conversely, the Trial Chamber "abused its diseretion",[22] or has "erred and exceeded its discretion",[23] or whether the Trial Chamber has committed a "discernible error" in the exercise of its discretion,[24] or whether the Trial Chamber's decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[25]

2. Prosecution's First Ground of Appeal: Continuation of the joint criminal enterprise after April 1998

A. Introduction

2.1 The Indictment charged all three Accused with committing the crimes in Counts 1 to 14 through participation in a joint criminal enterprise ("**JCE**").[26] During the trial, the Prosecution position was that the JCE spanned the entire Indictment period.[27] In its

---

20 *CDF* Subpoena Appeal Decision, para. 6; *Prosecutor v. Milosević*, IT-01-51-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", 18 April 2002, ("***Milošević* Reasons for Decision**"), para. 5. See also *Prosecutor v. Bizimungu* ICTR-99-50-AR5 "Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 Oetober 2003 denying leave to file an Amended Indictment" 12 February 2004, ("***Bizimungu* Interlocutory Appeal Iudictment Decision**"), para. 11.

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

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

23 *Ibid.*, para. 533.

24 *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006, ("***Naletilić and Martinović* Appeal Judgement**"), paras. 257-259; *Prosecutor v. Mejakić*, IT-02-65-AR11*bis*, "Decision on Joint Defence Appeal Against Decision on Rcferral under Rule 11*bis*",7 April 2006, ("***Mejakić* Rule 11*bis* Decision**"), para. 10.

25 *Mejakić* Rule 11*bis* Appeal Decision, para. 10.

26 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-619, "Corrected Amended Consolidated Indictment", Trial Chamber, 2 August 2006, ("**Indictment**"), paras 36-38; Trial Judgement, para. 251.

27 Trial Judgement, para. 360, referring to Indictment, para. 35. *See also* Transcript of 5 July 2004, David Craue, pp. 20-23; *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-PT-82, "Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Proscecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Ameuded by Order to Extend tbe Time For Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004", 21 April 2004, ("**Supplemental Pre-Trial Brief**"), para. 7; *Prosecutor v. Sesay , Kallon,*

Final Trial Brief, however, the Prosecution limited the allegations of participation in a JCE to the period from 25 May 1997 to January 2000, the time period found by the Appeals Chamber to be applicable in the AFRC Indictment.[28]

2.2 The Trial Chamber accepted this narrowing of the timeframe on the basis that the Indictment is divisible as to time, that the restricted period was within the original timeframe pleaded in the Indictment, and that the ability of the Accused to prepare their defence had in no way been prejudiced.[29]

2.3 In paragraphs 1977-1992 of the Trial Judgement, the Trial Chamber found that a JCE came into existence soon after the 25 May 1997 coup and the establishment of the joint AFRC/RUF Junta, that the participants in the JCE included the three Accused in this case as well as other senior members of the RUF and senior members of the AFRC,[30] and that crimes charged under Counts 1 to 14 were within the JCE and intended by the participants to further the common purpose to take power and control over Sierra Leone.[31]

2.4 In paragraphs 2067-2072 of the Trial Judgement, the Trial Chamber found that following the 14 February 1998 ECOMOG intervention, the common purpose between leading members of the AFRC and RUF continued to exist without fundamental change,[32] and that the participants in the JCE continued to include the three Accused in this case as well as other senior members of the RUF and senior members of the AFRC.[33]

2.5 However, in paragraphs 2073-2076 of the Trial Judgement, the Trial Chamber found that in late April 1998 there was a rift between the AFRC and the RUF, such that the common purpose between senior members of the AFRC and RUF ceased to exist.[34] The Trial Chamber held that after April 1998, no responsibility could be imputed to the three Accused on the basis of JCE liability for criminal acts committed by fighters either of the AFRC or the RUF. The reasoning was (1) that because the JCE between

---

Gbao, SCSL-2004-15-T-650, "Consolidated Skeleton Response to the Rule 98 Motions by the three Accused" 6 October 2006, ("**Prosecution Skeletou Response to Rule 98 Motion**"), para. 18.

28 Prosecution Final Trial Brief, para. 235; Trial Judgement, para. 360. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-A-475, "Judgment", Appeals Chamber, 22 February 2008, ("***AFRC* Appeal Judgement**"), para. 85; Trial Judgement, para. 360.

29 Trial Judgement, para. 361. See also Trial Judgement, para. 354.

30 Trial Judgement, especially para. 1990. Justice Boutet dissented with respect to the finding that Gbao was a participant in the JCE.

31 Trial Judgement, especially para. 1982.

32 Trial Judgement, especially para. 2069.

33 Trial Judgement, especially para. 2068. Justice Boutet again dissented with respect to the finding that Gbao was a participant in tbe JCE.

34 Trial Judgement, especially para. 2076.

the AFRC and RUF had ended, the RUF Accused could not be responsible for crimes of AFRC fighters, and (2) that because the Prosecution had only pleaded a JCE between senior members of the AFRC and RUF, the Trial Chamber would not consider the possibility of the Accused being liable on the basis of a JCE involving members of the RUF only.[35]

2.6 The three Accused were accordingly convicted on Counts 1-11 and 13-14 on the basis of JCE liability in respect of various crimes found by the Trial Chamber to have been committed between 25 May 1997 and late April 1998. The Trial Chamber's findings in this respect are contained in paragraphs 747-941, 1977-2049, 2054-2061, 2067-2110 and 2158-2212 of the Trial Judgement. However, none of the Accused was convicted on any of Counts 1 to 14 on the basis of JCE liability in respect of any of the crimes found by the Trial Chamber to have been committed *after* the end of April 1998.

2.7 The Prosecution's First Ground of Appeal is that the Trial Chamber erred in law and/or erred in fact in finding that the common plan, design or purpose/joint criminal enterprise between leading members of the AFRC and RUF ceased to exist some time in the end of April 1998.

2.8 The Trial Chamber's findings are set out in more detail in Section B below. The law applicable to the JCE mode of liability is then dealt with in Section C below.

2.9 It is submitted that on the Trial Chamber's own findings and/or the evidence before it, the only conclusion open to any reasonable trier of fact is that the common plan, design or purpose/joint criminal enterprise between leading members of the AFRC and RUF continued to exist at least until the end of February 1999 (Section D below), and that the three Accused in this case remained participants in that common plan, design or purpose/joint criminal enterprise throughout that period (Section E below).

2.10 If this ground of appeal is upheld, it follows that the three Accused are responsible on the basis of JCE liability for certain crimes that were found by the Trial Chamber to have been committed after the end of April 1998 and of which the Accused were not convicted by the Trial Chamber. These crimes are dealt with in Section F below.

2.11 The remedy sought by the Prosecution in respect of this Ground of Appeal is set out in Section G below.

---

[35] Trial Judgement, especially para. 2076.

B. The Trial Chamber's findings as to the formation, membership, purpose, continuation and ending of the JCE

2.12 The Trial Chamber found that the JCE originated after the AFRC seized power on 25 May 1997 and Johnny Paul Koroma ("**Koroma**") contacted Foday Sankoh in Nigeria to invite the RUF to form an alliance.[36] The Trial Chamber found that Sankoh accepted the invitation and instructed the RUF Commanders to cease hostilities and unite with the AFRC and work with Koroma's government.[37] Consequently, it was found that RUF fighters moved from the bush to join the AFRC in towns and villages across the country and that the Junta's forces were strengthened by large numbers of Liberian STF fighters who had formerly fought alongside the SLA against the RUF but deserted the SLA after the coup.[38] RUF Commanders including Bockarie and Sesay were found to have met in Kailahun District and Bockarie and Superman were found to have joined the AFRC at Benguema Barracks on the Freetown Peninsula.[39]

2.13 The Trial Chamber found that following the 25 May 1997 coup, high ranking AFRC members and the RUF leadership agreed to form a joint "government" in order to control the territory of Sierra Leone.[40] The Trial Chamber found that the governing body of the Junta Government, referred to as the AFRC Council or Supreme Council, included members of the former SLA and RUF and civilians,[41] including Bockarie, Sesay, Kallon and Superman.[42] It was found that Bockarie was officially subordinate to Johnny Paul Koroma, but otherwise the AFRC and RUF military structures were not integrated into a unitary command structure at that time.[43] Further, it was found that a number of RUF fighters and senior Commanders, including Gbao, remained in Kailahun District where they worked alongside the AFRC and together controlled much of the District.[44]

2.14 The Trial Chamber found that the RUF, including in particular Sankoh, Bockarie, Sesay, Kallon, Superman, Eldred Collins, Mike Lamin, Isaac Mongor, Gibril Massaquoi and other RUF Commanders began working in concert with the AFRC,

36 Trial Judgement, para. 747.
37 Trial Judgement, paras 747-748.
38 Trial Judgement, para. 750.
39 Trial Judgement, paras 751-753.
40 Trial Judgement, para. 1979.
41 Trial Judgement, para. 754.
42 Trial Judgement, para. 755.
43 Trial Judgement, paras 761-762.
44 Trial Judgement, paras 765-766.

including at least Koroma, Alex Tamba Brima ("**Gullit**"),[45] Brima Bazzy Kamara ("**Bazzy**"),[46] Santigie Borbor Kanu ("**Five-Five**"),[47] SAJ Musa (senior AFRC commander),[48] Zagalo, Eddie Kanneh and others to hold power in Sierra Leone on or shortly after 25 May 1997. The Trial Chamber also found that Gbao was a participant in the JCE.[49]

2.15 The Trial Chamber found that AFRC/RUF forces cooperated in armed operations in which crimes against civilians were committed. The Trial Chamber further found that the conduct of these operations demonstrates that the AFRC/RUF alliance intended, through wholly disproportionate means, to suppress all opposition to their regime.[50]

2.16 The Trial Chamber found that "the AFRC/RUF alliance intended through the spread of extreme fear and punishment to dominate and subdue the civilian population in order to exercise power and control over captured territory".[51] It was found that where the taking of power and control over State territory is intended to be implemented through the commission of crimes within the Statute, this may amount to a common criminal purpose.[52]

2.17 The Trial Chamber found that following the establishment of their joint regime, the first acts of the Junta were to suspend the Constitution of Sierra Leone, dissolve the Parliament and eject all political parties, and the Supreme Council assumed the sole authority to make laws and detain persons in the public interest.[53] The Trial Chamber found that the strategy of the Junta was thenceforth to maintain its power over Sierra Leone and to subject the civilian population to AFRC/RUF rule by violent means, and that the means agreed upon to accomplish these goals entailed massive human rights abuses and violence against and mistreatment of the civilian population and enemy forces.[54]

2.18 At the time of the Intervention in February 1998, it was found that the RUF and AFRC withdrew from Freetown and travelled towards Masiaka in Port Loko District

---

45 The First Accused in the *AFRC* case.
46 The Second Accused in the *AFRC* case.
47 The Third Accused in the *AFRC* case.
48 SAJ Musa was found to have withdrawn from the enterprise in February 1998. Trial Judgement, para. 2079.
49 Trial Judgement, para. 1990. Justice Boutet dissented with respect to the finding that Gbao was a participant in the JCE
50 Trial Judgement, paras 1980-1981.
51 Trial Judgement, para. 1981.
52 Trial Judgement, para. 1979.
53 Trial Judgement, para. 1980.
54 Trial Judgement, para. 1980.

where they regrouped.[55] It was found that in the second half of February 1998, a group of AFRC and RUF fighters launched the successful attack on Kono District under the command of Superman[56] and that senior RUF Commanders including Kallon, Mike Lamin and RUF Rambo were present, followed by a convoy that included Koroma and Sesay.[57] The Trial Chamber found that at that point, the AFRC/RUF established an integrated command structure with Superman as the overall Commander for Kono District and that in Gullit's absence from Koidu, Bazzy was appointed as the overall AFRC Commander and Superman's deputy.[58] It was found that AFRC and RUF contingents were stationed throughout the District.[59] However, it was found that in early April 1998, the RUF and AFRC were foreed to retreat from Koidu under heavy attack from ECOMOG forces.[60] The Trial Chamber found that the AFRC/RUF managed to maintain control over much of Kono District and assembled in Meiyor, which Superman renamed "Superman's Ground", and established a radio station.[61] It was found that after the Junta forces were pushed out of Koidu Town, Gullit returned to Kono District and assumed command of the AFRC from Bazzy.[62]

2.19 The Trial Chamber subsequently found that following the 14 February 1998 ECOMOG Intervention, the same common criminal purpose between leading members of the AFRC and RUF continued, notwithstanding that the Junta was no longer in power and that there was therefore a change in the status of the AFRC/RUF allianee.[63] The Trial Chamber thus found that the widespread commission by RUF and AFRC fighters of looting, unlawful killings, rapes, sexual slavery, "forced marriages", mutilations, enslavement, pillage and the enlistment, conscription and use of child soldiers during the attack on Kono and in the subsequent period of joint AFRC/RUF control over Kono District, were crimes committed in furtherance of that common purpose.[64]

2.20 The Trial Chamber found that:

---

55 Trial Judgement, paras 778 and 782.
56 Trial Judgement, para. 794-795.
57 Trial Judgement, para. 795.
58 Trial Judgement, para. 807.
59 Trial Judgement, para. 811.
60 Trial Judgement, para. 813.
61 Trial Judgement, paras 814-815.
62 Trial Judgement, para. 817.
63 Trial Judgement, paras 2067-2069, 2072.
64 Trial Judgement, para. 2070.

(i) the means to terrorise the civilian population included the crimes charged in Counts 3 to 11 of the Indictment, namely unlawful killings, sexual violence and physical violence;[65]

(ii) additional criminal means to achieve the common purpose included crimes charged in Counts 12 to 14 of the Indictment, namely recruitment and use of child soldiers, forced labour of civilians to undertake work that was necessary in furtherance of the common purpose, and the practice of pillage to ensure the willingness of the troops to fight;[66]

(iii) the punishment of the civilian population for their alleged support of opposing forces was also a means to further the joint criminal enterprise.[67]

2.21 The Trial Chamber therefore held that the crimes charged under Counts 1 to 14 were within the joint criminal enterprise and intended by the participants to further the common purpose to take power and control over Sierra Leone.[68]

2.22 Consequently, the Trial Chamber found that the common purpose of the JCE was furthered in Bo District between 1 June 1997 and 30 June 1997, in Kenema District between 25 May 1997 and 19 February 1998, in Kono District from 14 February 1998 until sometime in the end of April 1998 and in Kailahun District from 25 May 1997 to sometime in the end of April 1998.[69]

2.23 According to the Trial Chamber, the relationship between the AFRC and RUF in Kono was "fractious" and tensions coincided with sustained military pressure from ECOMOG on the RUF and AFRC positions.[70] It was found that following Gullit's return, Superman and Isaac Mongor conducted a mission to destroy Sewafe Bridge in which AFRC troops, including Gullit, Bazzy, Idrissa Kamara, and Hassan Bangura participated.[71] After this attack a "rift" was found to have occurred when Gullit disclosed to his troops that Bockarie had beaten him and seized his diamonds and that Johnny Paul Koroma was under RUF arrest.[72]

2.24 The Trial Chamber found as follows:

> following the capture and consolidation of the control of Koidu Town a major rift occurred between the AFRC and RUF forces. It resulted from

65 Trial Judgement, para. 1982.
66 Trial Judgement, para. 1982.
67 Trial Judgement, para. 1982.
68 Trial Judgement, para. 1982.
69 Trial Judgement, paras 1977-2049, 2054-2061, 2067-2110 and 2158-2173.
70 Trial Judgement, para. 817.
71 Trial Judgement, para. 818.
72 Trial Judgement, para. 819.

> claims by Boekarie and other senior RUF officials that the RUF should take command over the AFRC, as the RUF was more experienced in guerrilla tactics. The dispute culminated in the humiliation of Johnny Paul Koroma, the most senior official and former Chairman of the Junta Government, and the rape of his wife by Sesay in Buedu. In addition, Gullit, the most senior AFRC after Johnny Paul Koroma, was beaten by Bockarie, arrested and diamonds were seized from him. Furthermore, Kallon executed two AFRC fighters and attempted to prevent the AFRC from holding muster parades, thereby openly challenging the AFRC to operate as an independent organisation. Following this rift, Gullit announced his plan that the AFRC troops would withdraw from Kono District to join SAJ Musa in Koinadugu District. These events led to the departure of the majority of AFRC fighters from Kono District. Thereafter the AFRC contemplated their own plan to 're-instate the army', which plan did not involve the RUF. Following departure of AFRC Forces, Gullit refused to accept orders from the RUF and ignored a directive from Superman to return to Kono District.[73]

2.25 Consequently, the Trial Chamber found that: "Following the last joined operation between the RUF and AFRC attacking ECOMOG at Sewafe Bridge, which took place sometime in late April [...] the common plan between the AFRC and RUF ceased to exist. Each group thereafter had its own individual plan."[74] The Trial Chamber further held that after April 1998, the AFRC and RUF "remained in sporadic contact" and "cooperated occasionally", but that there was insufficient evidence that senior members of the two groups (including Bockarie, Sesay, Superman, Kallon, Gbao, Gullit, Bazzy and Five-Five) "acted jointly".[75]

C. Applicable legal principles

2.26 The law on the JCE mode of liability is set out at paragraphs 248-266 of the Trial Judgement. The Prosecution does not take issue with the legal framework as set out by the Trial Chamber in those paragraphs. The legal requirements of the JCE mode of liability are well established in the case law of international criminal tribunals.[76]

2.27 The legal requirements, providing the framework for the analysis that follows,[77] include (1) a plurality of persons acting in concert with one another;[78] (2) the existence of a common plan, design or purpose which amounts to or involves the

---

73 Trial Judgement, para. 2073.
74 Trial Judgement, para. 2074.
75 Trial Judgement, para. 2075.
76 See *AFRC* Appeal Judgement, para. 75; *Tadić* Appeal Jugdement, paras 227-228; *Stakic* Appeal Judgement, paras 64-65; *Prosecutor v Milutinović et al.*, IT-05-87-T, "Judgement", Trial Chamber, 26 February 2009, ("*Milutinović* Trial Judgement"), paras 97-112.
77 See further section D(ix) below.
78 Trial Judgement, para. 257.

commission of a crime provided for in the Statute and which may be "fluid in its criminal means";[79] and (3) the participation of the Accused in the common purpose.[80]

D. The errors of fact and law in the Trial Judgement

(i) Introduction

2.28 The Prosecution submits that it is manifestly evident from the Trial Chamber's findings as set out in the following paragraphs that after the end of April 1998, both the RUF and the AFRC continued to pursue the objective to control Sierra Leone and its resources by displacing the elected government and its ECOMOG allies, and that both the RUF and the AFRC continued to utilise the same criminal means to accomplish this goal. Thus, after the end of April 1998, each continued to have the same purpose that was the purpose of the JCE, and each continued to utilise the same criminal means to achieve it.

2.29 The RUF's continued pursuit of this objective is clear, for instance, from the following findings:

- In August 1998, the RUF launched the Fiti Fata mission, attacking ECOMOG troops in Kono District.[81]
- In December 1998, following ECOMOG's capture of Kono, Sesay led a successful attack to recapture Kono.[82]
- In the first week of December 1998, Bockarie convened a strategic meeting in Buedu attended by senior members of the RUF to plan the recapture of Kono, Makeni, Masiaka, Segbwema, Kenema, Bo and finally Freetown.[83]
- The recapture of Koidu Town was carried out successfully on 16 December 1998.[84]
- After Sesay's troops attacked and captured Sewafe, Masingbi and Magburaka, they joined forces with Superman's troops in a combined successful attack on Makeni.[85]

---

79 Trial Judgement, paras 258 and 259.
80 Trial Judgement, para. 261, referring to *Tadić* Appeal Judgement, para. 227.
81 The mission ultimately failed: Trial Judgement, paras 34 and 823.
82 Trial Judgement, para. 34.
83 Trial Judgement, paras 861-862.
84 Trial Judgement, para. 868.
85 Trial Judgement, para. 869 - 870.

- As a result of the capture of Koidu Town and Makeni, "the RUF once again controlled much of the area harbouring Sierra Leone's natural resources and economic assets."[86]
- Following the capture of Makeni, the RUF established a revised command structure in Kailahun District, Kono District, Bombali District (Makeni), Tonkolili District (Magburaka), Kambia District, and Kenema District (Tongo Fields).[87]
- On 7 July 1999, the Lomé Peace Accord was signed, resulting in a power-sharing agreement between the Government of President Kabbah and the RUF, represented by Foday Sankoh.[88] Hostilities resumed shortly thereafter.[89]

2.30 Furthermore, it is manifestly evident from the Trial Chamber's findings that after the end of April 1998, the RUF continued to commit similar crimes to further that purpose, including by means of terrorizing the civilian population. In addition to ongoing forced labour in Kenema and Kailahun Districts, the Trial Chamber found that the attack against the civilian population of Sierra Leone continued throughout other parts of the country between February 1998 and January 2000.[90] In Kono District alone, it was found that civilians were attacked in locations including Tombodu, Koidu, Yardu, Wendedu, Sawao, Kayima, Bumpeh and Kissi Town, and during September 1998 UNOMSIL received reports of attacks on 20 villages in a single week in four small chiefdoms in the north-west of the country.[91] It was found that mass executions of civilians suspected to be Kamajors took place in Kailahun and that the widespread commission of brutal rapes during this period was well-documented.[92] The Trial Chamber found that the Fiti-Fata mission in August 1998 and the RUF attack to recapture Kono District in December 1998 saw numerous atrocities committed against civilians.[93] Specific findings were made in relation to unlawful killings, sexual violence, physical violence and enslavement in Kono District from May 1998 to January 2000[94] and in relation to sexual violence and

86 Trial Judgement, para. 37.
87 Trial Judgement, para. 872.
88 Trial Judgement, para. 41.
89 Trial Judgement, para. 43.
90 Trial Judgement, para. 959.
91 Trial Judgement, para. 959.
92 Trial Judgement, para. 959.
93 Trial Judgement, para. 961.
94 Trial Judgement, para. 2065.

enslavement in Kailahun District continuing beyond April 1998.[95] The Prosecution refers in addition to its arguments in Sub-section (viii) below.

2.31 The Prosecution submits that it is similarly manifestly evident from the Trial Chamber's findings that after the end of April 1998, the AFRC also continued to have the purpose of taking power and control over the territory of Sierra Leone. The AFRC's continued pursuit of this objective is clear, for instance, from the following findings:

- In May 1998, Gullit joined SAJ Musa in establishing a base in the Northwest of the country to prepare for an attack on Freetown.[96]
- From May to November 1998, AFRC fighters led by Gullit moved across the Eastern Province to the Northern Province. From their base in Colonel Eddie Town, the fighters staged a number of attacks on ECOMOG positions.[97]
- In November 1998, the band of AFRC fighters led by SAJ Musa joined the fighters stationed in Colonel Eddie Town in preparation for an attack on Freetown[98] and the advance on Freetown commenced.[99]
- From Major Eddie Town, the troops attacked Mange and Lunsar, and from Lunsar, the troops bypassed Masiaka and attacked the Guinean ECOMOG troops at RDF Junction between Mile 38 and Masiaka.[100]
- In late December 1998, in Benguema outside Freetown, SAJ Musa was killed in an explosion. Gullit filled the leadership vacuum and led his forees in a major attack on Freetown.[101]
- On 6 January 1999, the AFRC fighters entered Freetown, overwhelmed ECOMOG at Upgun and captured State House, the seat of government. They continued to fight ECOMOG and the CDF forces for the next three weeks.[102]

2.32 Furthermore, it is similarly manifestly evident from the Trial Chamber's findings that after the end of April 1998, the AFRC continued to commit similar crimes to further that purpose, including by means of terrorizing the civilian population. The Trial Chamber found that the AFRC troops under Gullit's command committed numerous

---

95 Trial Judgement, para. 2156, sections 5.1.2 and 5.1.3.
96 Trial Judgement, para. 33.
97 Trial Judgement, para. 35.
98 Trial Judgement, para. 36.
99 Trial Judgement, para. 858.
100 Trial Judgement, para. 858.
101 Trial Judgement, para. 38.
102 Trial Judgement, paras 39 and 879.

atrocities against civilians in their destructive march across Bombali District and that villages near Bumbuna and the border of Bombali and Koinadugu Districts were razed by fire.[103] Killings, abductions and amputations were found to have occurred at villages and towns and homes were looted and burned.[104] It was found that upon arrival at Rosos, Gullit declared that no civilians were to be permitted within 15 miles of the camp and that any civilian captured nearby was to be executed.[105] The Trial Chamber similarly stated that it had heard evidence of egregious criminal acts committed in Koinadugu District within the Indictment period but that, as was the case in Bombali District, the fighters in Koinadugu District were under the command of SAJ Musa, Gullit or Superman who were not acting in concert with or under the control of any of the Accused.[106] The Trial Chamber found that countless crimes were committed during the attack on Freetown[107] as set out in detail at paragraphs 1516-1608 of the Trial Judgement. The Trial Chamber also heard evidence of criminal acts committed in Port Loko District within the Indictment period but attributed these acts to renegade AFRC fighters who were not acting in concert with or under the control of any of the Accused.[108] The Prosecution refers in addition to its arguments in Sub-section (viii) below.

2.33 The Prosecution therefore submits that on the Trial Chamber's own findings, it is clear that both the RUF and the AFRC continued to have the same purpose after April 1998. There is no suggestion in the Trial Judgement that either group abandoned the purpose of taking power and control over the territory of Sierra Leone, or that either group abandoned the purpose of committing crimes as a means of furthering that purpose. Rather, what the Trial Chamber found was that after the end of April 1998, senior members of the AFRC on the one hand, and senior members of the RUF on the other, pursued this purpose independently of the other (that is, that "Each ... had its own individual plan"[109]), such that there was no longer a joint purpose common to the two.

2.34 The Trial Chamber found that the JCE continued even after the 14 February 1998 ECOMOG Intervention which resulted in the AFRC/RUF being ousted from power in

103 Trial Judgement, para. 847.
104 Trial Judgement, para. 847.
105 Trial Judgement, para. 847.
106 Trial Judgement, para. 2175.
107 Trial Judgement, para. 1512.
108 Trial Judgement, para. 2219.
109 Trial Judgement, para. 2074.

Freetown. The Prosecution submits that on the basis of the Trial Chamber's findings and the evidence before it, no reasonable trier of fact could have concluded that a particular quarrel in April 1998 spelt the end of that common criminal purpose or that the groups thereafter pursued their purpose independently of each other.

2.35 First, the findings of the Trial Chamber and the evidence before it establish that after April 1998 regular contact continued between AFRC and RUF commanders, that fighters belonging to both groups were intermingled, that military operations were carried out together and that AFRC commanders, up to the highest ranks, such as Gullit, took advice and orders from the RUF high command, particularly during the 1999 Freetown invasion. (See Sub-sections (ii) and (iii) below.)

2.36 Second, the Trial Chamber's finding that the JCE ended in April 1998 was based in part on its finding that after April 1998, the AFRC plan was to "re-instate the army", which was a plan that did not include the RUF. However, the evidence before the Trial Chamber did not establish that any AFRC commander other than SAJ Musa had or supported this plan. (See Sub-section (iv) below.)

2.37 Third, the findings of the Trial Chamber and the evidence before it establish that even in the period between May 1997 and April 1998, during which period the Trial Chamber found that the JCE existed, there was ongoing friction between members of the AFRC and RUF, as well as friction within the RUF itself. There is therefore no basis for assuming that a single incident of fractiousness in April 1998 must have put an end to the JCE (See Sub-section (v) below.)

2.38 Fourth, the findings of the Trial Chamber and the evidence before it establish that even after April 1998, the AFRC and RUF continued to have common interests, and were interdependent in the achievement of the purpose that both continued to have, namely to take power and control over the whole of Sierra Leone. (See Sub-section (vi) below.)

2.39 Fifth, the Trial Chamber, in finding that the JCE ended in April 1998, placed considerable reliance on the evidence of the Accused Sesay, when a reasonable trier of fact could not have placed such reliance on this evidence. (See Sub-section (vii) below.)

2.40 Sixth, the findings of the Trial Chamber and the evidence before it establish that even after April 1998, the pattern of crimes committed by both AFRC and RUF forces continued to be the same. (See Sub-section (viii) below.)

2.41 Seventh, although the Prosecution has stated that it takes no issue of the Trial Chamber's articulation of the legal principles applicable to JCE liability (see Section C above), the Prosecution submits that the Trial Chamber ultimately did not apply the principles correctly. As noted above, the Trial Chamber held that after April 1998, there was insufficient evidence that senior members of the AFRC and RUF "acted jointly" because the evidence showed only that they "remained in sporadic contact" and "cooperated occasionally".[110] Further, the Trial Chamber appeared to be concerned with the extent to which RUF commanders had control over AFRC fighters in attacks after April 1998. It is submitted that the Trial Chamber did not apply the test for determining whether the participants in the JCE continued to act in concert in contributing to the common purpose correctly and therefore also erred in law. (See Sub-section (ix) below.)

(ii) Continued cooperation between the AFRC and RUF prior to the Freetown Invasion

(a) Cooperation in military operations

2.42 The Trial Chamber found that in March 1998, Koroma and his family were escorted from Koidu to Bucdu[111] and that shortly after Koroma arrived in Buedu, Bockarie, Sesay, Mike Lamin and Rambo placed Koroma under arrest at gun point and confiscated the diamonds in his possession.[112] It was found that Sesay drove Koroma's wife to a nearby location and raped her.[113] Further, the Trial Chamber found that Koroma informed Bockarie that Gullit also possessed diamonds from his mining assignments in Kono District and Sesay was sent to arrest Gullit,[114] whereupon the RUF assaulted Gullit and detained him in Kailahun District.[115] It was found that Bockarie then expelled Koroma to Kangama, where he was effectively placed under house arrest.[116] The Trial Chamber also found that Kallon had executed two AFRC fighters and attempted to prevent the AFRC from holding muster parades,

---

110 Trial Judgement, para. 2075.
111 Trial Judgement, para. 800.
112 Trial Judgement, para. 801.
113 Trial Judgement, para. 801.
114 Trial Judgement, para. 803.
115 Trial Judgement, para. 804.
116 Trial Judgement, para. 804.

asserting that the AFRC had no right to assemble as the RUF was the only true fighting force in Kono.[117]

2.43 However, the Trial Chamber's findings show that even after the mistreatment of Koroma and Gullit in Buedu and the execution by Kallon of two AFRC fighters in Kono, Gullit and the AFRC troops participated in the joint AFRC/RUF mission to attack Sewafe Bridge sometime in late April.[118] The Trial Chamber found that the "rift" between the AFRC and RUF occurred only after the Sewafe Bridge attack.[119] Yet the Trial Chamber found that the "rift" was caused by Gullit's disclosure to his troops that he had been mistreated and that Koroma was under RUF arrest.[120] It is submitted that it is unreasonable to conclude that Gullit and the AFRC would have participated with the RUF in the Sewafe Bridge attack if it was events prior to that attack that were the cause of the "rift".

2.44 Further, the evidence of TF1-334, who was in [redacted][121] was that Bazzy was the AFRC commander in Kono until mid-May 1998, when Gullit arrived and took over as commander,[122] and that the Sewafe Bridge operation took place in mid-May 1998.[123] Taking this evidence together with the findings as to the joint Sewafe Bridge attack, the conclusion that the mistreatment of Gullit and Koroma had a dramatic divisive effect in April 1998 was not reasonably open to the Trial Chamber.

2.45 According to the Trial Judgement, when Gullit and his troops departed from Kono District in late April 1998, Gullit was advised by SAJ Musa to establish an AFRC defensive base in Bombali District.[124] It was found that Gullit accordingly led his group to Rosos.[125] Notably, the Trial Chamber found that a small number of RUF fighters formed part of the group.[126] There was additionally evidence that members of the AFRC remained with the RUF in Kono and Kailahun Districts[127] and that certain

---

117 Trial Judgement, para. 817.
118 Trial Judgement, para. 2074.
119 Trial Judgement, para. 819.
120 Trial Judgement, para. 819.
121 Exhibit 119, TF1-334, Transcript from AFRC Trial, 19 May 2005, pp. 14-15; Exhibit 119, TF1-334, Transcript from AFRC Trial, 20 May 2005, pp. 37-37, 55-56.
122 Exhibit 119, TF1-334, Transcript from AFRC Trial, 19 May 2005, pp. 7-8.
123 Exhibit 119, TF1-334, Transcript from AFRC Trial, 20 May 2005, pp. 51-53.
124 Trial Judgement, para. 845.
125 Trial Judgement, para. 845.
126 Trial Jndgement, para. 845.
127 TF1-071, Transcript 21 January 2005, p. 82; George Johnson, Transcript 19 October 2004, p. 32.

AFRC Honourables who had participated in the coup resided in Buedu and took orders from Boekarie.[128]

(b) Communication between Gullit and the RUF

2.46 According to the Trial Chamber's findings, following Gullit's departure from Kono, he later resumed and maintained communication with the RUF, except for the period when he lacked a microphone,[129] and despite SAJ Musa's orders to the contrary.[130] The Trial Chamber found that during the march to Rosos, Gullit's radio operator was captured and the microphone was lost as a result of which the AFRC was unable to transmit or monitor radio signals.[131] It was found that Gullit's group was therefore not in direct communication with SAJ Musa or the RUF High Command until they reached Rosos sometime in July or August 1998.[132] The Trial Chamber found that at about this time, Gullit communicated with Sesay and Kallon on the radio.[133] It was found that in one radio communication between Gullit and Sesay, Gullit told Sesay to have confidence in him and insisted that they needed to co-operate.[134] The Trial Chamber found that in a subsequent radio communication with Bockarie, Gullit explained the logistical reasons for his lack of contact, after which Bockarie indicated that "he was very happy [...] that the two sides, both the RUF and the SLA, were brothers."[135] The Trial Chamber further found that when Gullit's group was forced to proceed to Major Eddie Town, Gullit communicated with AFRC and RUF Commanders including Superman, SAJ Musa and Bockarie.[136]

2.47 The Trial Chamber found that in late August 1998, Boekarie ordered that a group of four radio operators (three RUF and one AFRC) be dispatched from Kono to join Gullit's fighting force.[137] According to the Trial Chamber, these radio operators were sent as informants, to ensure that the RUF High Command was apprised of Gullit's

---

128 TF1-168, Transcript 3 April 2006, pp. 14-15.
129 Trial Judgement, paras 848-849.
130 Trial Judgement, paras 856-858.
131 Trial Judgement, para. 848.
132 Trial Judgement, para. 848.
133 Trial Judgement, para. 848.
134 Trial Judgement, para. 849.
135 Trial Judgement, para. 849.
136 Trial Judgement, para. 850.
137 Trial Judgement, para. 853.

movements and intentions.[138] It is submitted that this finding of the Trial Chamber is one that was not reasonably open to it, in the light of the following evidence.

2.48 The Trial Chamber found TF1-361 to be a reliable witness and largely accepted his evidence.[139] [redacted] Gullit who had gone ahead to Bombali District, that Gullit asked SAJ Musa for manpower[redacted] Sesay and Bockarie, and that the latter sent men from Kailahun while some were sent by Kallon from Kono.[140]

2.49 TF1-360 was found by the Trial Chamber to be "substantially truthful and forthright" and his evidence was generally accepted as being credible.[141] [redacted] SAJ Musa requested reinforcement of communication personnel and combatants on behalf of Gullit.[143] On Bockarie's instructions, Kallon prepared and sent radio operators to go to SAJ Musa's location[144] "to reinforce Gullit because Gullit did not have good communication system."[145] After joining Gullit at Eddie Town, there were communications from Eddie Town to SAJ Musa, Superman and Bockarie.[146]

2.50 The Prosecution submits that the only conclusion reasonably open to the Trial Chamber was that Bockarie sent the radio operators to reinforce the RUF/AFRC fighting force at Rosos.

---

138 Trial Judgement, para. 853.

139 Trial Judgement, para. 549.

140 TF1-361, Transcript 12 July 2005, Closed Session, pp. 59-62; TF1-361, Transcript 18 July 2005, Closed Session, p. 37. Alfred Brown, King Perry and Sheku, a new radio operator who had been a bodyguard for CO Isaac, were the radio operators who, along with other RUF fighters, were sent to Gullit: TF1-361, Transcript 12 July 2005, Closed Session, p. 63.

141 Trial Judgement, para. 564.

142 TF1-360, Transcript 21 July 2005, Closed Session, pp. 7-9.

143 TF1-360, Transcript 20 July 2005, pp. 53-54.

144 TF1-360, Transcript 20 July 2005, pp. 49-52.

145 TF1-360, Transcript 20 July 2005, p. 52; TF1-366, Transcript 11 November 2005, pp. 43-47: TF1-366 testified that when Superman went to Kurubonla [redacted] took with him to Kurubonla were CO Nya, Alfred Brown, Wako Wako and Top Marine.

146 TF1-360, Transcript 21 July 2005, p. 19.

(c) Continued cooperation between Superman and the RUF High Command

2.51 The Trial Chamber found that in August 1998, after the failure of the attempted recapture of Koidu from ECOMOG in an attack led by Superman and code-named the Fiti-Fata mission, Superman joined SAJ Musa in Koinadugu District.[147] He had departed Kono District with a contingent of RUF fighters and a store of captured ammunition.[148] The Trial Chamber found that following the arrival of Superman, three distinct factions of fighters operated in Koinadugu District: the AFRC under the command of SAJ Musa, the STF under the command of Bropleh, and the RUF under the command of Superman.[149] The Trial Chamber found that from August 1998, Superman and those fighters under his command operated as an independent RUF faction and that these individuals were no longer working in concert with the RUF High Command in Buedu.[150]

2.52 The Prosecution submits that for the reasons given below, it was not open to a reasonable trier of fact to so conclude, and that the only reasonable conclusion is that Superman, in joining SAJ Musa in Koinadugu District, continued to work in concert with SAJ Musa and the RUF High Command, during which time, SAJ Musa also worked in concert with the RUF High Command.

2.53 The Trial Chamber found that the AFRC, RUF and STF fighters in Koinadugu established a joint training base and coordinated operations such as the attack on Kabala staged by SAJ Musa and Superman.[151] Superman remained officially the highest ranking RUF officer in Koinadugu District and the Trial Chamber found evidence that Superman communicated with the RUF High Command in this period. For instance, he informed Bockarie and Sesay of the attack on Kabala via the radio.[152]

2.54 The Trial Chamber further found that in late August 1998, when Bockarie ordered that a group of four radio operators (three RUF and one AFRC) be dispatched from Kono to join Gullit's fighting force, the radio operators travelled first to Superman and SAJ Musa in Koinadugu.[153] They departed for Rosos on or about 1 September

147 Trial Judgement, paras 823-824.
148 Trial Judgement, para. 824.
149 Trial Judgement, para. 851.
150 Trial Judgement, para. 854. The Trial Chamber cited the testimony of Sesay and one other witness (DIS-163) in support of this conclusion. DIS-163 in fact referred only to radio communications being cut. See further arguments in section (vii) below.
151 Trial Judgement, para. 852.
152 Trial Judgement, para. 854.
153 Trial Judgement, para. 854.

1998 in the company of a large contingent of fighters sent by SAJ Musa to reinforce Gullit's group.[154] While most were AFRC, there was one platoon of 64 RUF fighters and some STF.[155]

2.55 There was additionally other evidence before the Trial Chamber of the continuing cooperation between the AFRC and RUF in this period.

2.56 There was evidence that after the failed Fiti Fata mission,[156] Bockarie ordered Superman to go to meet SAJ Musa. Superman left for the Northern Jungle, in Koinadugu.[157] TF1-184 testified that there was contact between the RUF in Kailahun and the AFRC in Kurubonla.[158]

2.57 [redacted] before leaving with Superman for SAJ Musa's location in Koinadugu District, a message came from the control station in Buedu saying that ammunition would be sent to them to use, and for them to go and meet SAJ Musa. When the ammunition arrived, Superman's group then departed and went to join SAJ Musa in Kurubonla.[159]

2.58 [redacted] when Superman and his group arrived at SAJ Musa's base [redacted] Bockarie responded that Superman's group should carry on with the plan, which was to attack the Koinadugu headquarters.[161] After this attack, which involved Superman and SAJ Musa, a report was made to Bockarie.[162]

2.59 [redacted] there was also communication with Gullit. On one occasion, Gullit asked SAJ Musa and Bockarie for ammunition and manpower. Two weeks later, Bockarie sent men led by one Jin Gbandeh. Some came from Kailahun while others came from Kono. The men included Alfred Brown and CO Nya. They came to Kurubonla in Koinadugu District at SAJ Musa's location before Superman and SAJ Musa dispatched them to Gullit. While some stayed at

154 Trial Judgement, para. 854.
155 Trial Judgement, para. 853.
156 TF1-366, Transcript 8 November 2005, Closed Session, pp. 78-81. TF1-041 said that the Fiti Fata attack on Koidu took place prior to the rainy season in 1998, at Transcript 10 July 2006, Closed Session, p. 53.
157 TF1-041, Transcript 10 July 2006, Closed Session, pp. 50-54.
158 TF1-184, Transcript 5 December 2005, pp. 21-24.
[redacted]

Koinadugu, Alfred Brown, King Perry and Sheku, who were radio operators, were among those who went to Gullit.[163]

2.60 [redacted] while in Koinadugu, a training base was set-up so that they could train captured civilians to increase the available manpower and that before this was done, Superman and SAJ Musa consulted Bockarie via radio.[164]

2.61 [redacted] after SAJ Musa left Koinadugu with his forces to join Gullit, Superman relocated with his troops to a village close to Fulawa, which they named Pumpkin Ground, from where communieation was established with Boekarie's station at Buedu.[165]

2.62 The Prosecution submits that the only conclusion reasonably open to the Trial Chamber was that the RUF High Command sent Superman to SAJ Musa in order to ensure that the AFRC and RUF continued to act in concert with the aim of achieving their common goals. Further, after his departure from Kono District to join SAJ Musa in Koinadugu District, Superman did in fact work in concert with SAJ Musa during their period together in Koinadugu and continued to work in concert with the RUF High Command.

(iii) Continued cooperation between the AFRC and RUF in the Freetown Invasion

(a) Continued cooperation between Superman and RUF in the lead up to the Freetown invasion

2.63 The Trial Chamber found that in the first week of December 1998, Bockarie convened a strategic meeting in Buedu, attended by senior members of the RUF including Sesay, Kallon, Isaac Mongor, Mike Lamin and Peter Vandi to put in place his plan to recapture Kono and Freetown.[166] It was found that Bockarie ordered Sesay to lead the attack on Koidu Town, appointing Kallon as his deputy.[167] Further, on 6 December 1998, Sesay, Kallon, Lamin and other RUF fighters travelled from Buedu to

[redacted]

166 Trial Judgement, para. 861. [redacted] Akim Turay of the AFRC was also present at this meeting[redacted]

167 Trial Judgement, para. 864.

Superman Ground in Kono and carried out a successful attack on Koidu on 16 December 1998, bringing Koidu Town completely under RUF control.[168]

2.64 The Trial Chamber found that around the time Sesay's troops attacked and captured Sewafe, Masingbi and Magburaka and proceeded towards Makeni, Superman moved from Koinadugu District and launched a failed attack on Makeni.[169] Superman contacted Sesay and proposed that they join forces to capture Makeni and Bockarie instructed Sesay to accept.[170]

2.65 Additionally, there was the following further evidence before the Trial Chamber of the coordinated planning between Superman and Sesay.

2.66 [redacted] a message was received in Koinadugu to the effect that following the intervention of the War Council, Bockarie, Sesay and Superman should work together again, and that there was also a discussion via radio to the same effect between Bockarie and Superman.[171] [redacted] In a subsequent message from Bockarie, Superman was instructed to move to Makeni and attack Teko Barracks.[172] The message stated that Sesay had been dispatched from Kailahun to join Rambo in Kono so as to attack ECOMOG at Koidu.[173] Superman's group then went on to attack a place called Alikalia.[174] Following the attack on Alikalia, Superman's group informed Bockarie via radio of the capture of Alikalia.[175] Superman's group then contacted Sesay's radio and were told that Sesay's group had been able to clear Koidu and were on their way to Makeni.[176]

2.67 After the failed attack on Teko barracks by Superman's group around 23 December 1998, [redacted] contacted Sesay's group by radio. They got through to Rambo's station and were told that Sesay, Rambo and Short Bai Bureh's groups had left Kono and were at Magburaka heading to Makeni.[177] The Witness's group also received a message that there had been communication between Superman and Bockarie who had instructed Superman and his troops to join Sesay at Makeni.[178]

---

168 Trial Judgement, paras 867-868.
169 Trial Judgement, para. 869.
170 Trial Judgement, para. 869.

[redacted]

2.68 The Trial Chamber found that on 24 December 1998, Superman and his fighters joined with Sesay in a combined succcssful attack on Makeni, commanded by Sesay.[179]

2.69 [redacted] After the successful joint attack on Teko Barracks involving Superman's and Sesay's groups, Sesay instructed Superman to clear Kabala.[180] Thereafter, he instructed Superman by radio to go to Lunsar and clear Gberi junction and then attack Port Loko, and these instructions were carried out.[181] While in Lunsar, Sesay sent instructions by radio to Superman to attack Waterloo and the orders were carried out.[182]

(b) Continued cooperation between the AFRC and RUF in the lead up to the Freetown invasion

2.70 The Trial Chamber found that on 23 December 1998, SAJ Musa was inadvertently killed during the destruction of ammunition at Benguema Barracks at Waterloo and that Gullit then assumed overall command of the AFRC forces.[183] The Trial Chamber found that Gullit instructed one of the radio operators to contaet Bockarie to inform him of SAJ Musa's death and to request RUF reinforcements for the attack on Freetown.[184]

2.71 The Trial Chamber further found that on 5 January 1999, on the outskirts of Freetown, Gullit again called Bockarie to inform him that his troops were poised to enter Freetown but lacked logisties, arms and ammunition and needed reinforcements.[185] The Trial Chamber found that Bockarie agreed to send reinforcements from Makeni and told Gullit to postpone the attack until their arrival.[186]

2.72 The Trial Chamber found that the AFRC troops delayed their advance for approximately one day before continuing towards Freetown and that the decision not to wait for the promised RUF support appeared to have been motivated by a combination of impatience on the part of the fighters and pressure from Kamajor

---

179 Trial Judgement, para. 869.

[redacted]

183 Trial Judgement, paras 874-875
184 Trial Judgement, para. 875.
185 Trial Judgement, para. 876.
186 Trial Judgement, para. 876.

attacks.[187] The Prosecution submits that, significantly, it was not found to emanate from any lasting rift with the RUF.

2.73 The Trial Chamber found that Bockarie did order reinforcements but that the timing of the order could not be established with certainty.[188] The Trial Chamber found that Bockarie ordered Sesay to deploy RUF Rambo to assist Superman in Lunsar to secure the Lungi access towards Freetown.[189] A group of RUF troops led by RUF Rambo and Superman were found to have moved from Lunsar to the Waterloo area following Bockarie's order to Sesay to deploy RUF Rambo to Port Loko to assist Superman.[190] It was found that ECOMOG troops blocked the path of the RUF troops from Waterloo to Freetown and heavy fighting ensued.[191]

(c) Continued cooperation between the AFRC and RUF during the Freetown invasion

2.74 The Trial Chamber found that on 6 January 1999, the AFRC entered Freetown and secured State House, the seat of Government.[192] It was found that Gullit then dispatched a group of AFRC troops to Pademba Road Prison, where they released the inmates.[193] Notably the released prisoners included RUF members Gibril Massaquoi and Steve Bio.[194] Furthermore, it was found that the troops searched for Sankoh, but were informed that he had been moved to another location.[195]

2.75 The Trial Chamber found that Gullit contacted Bockarie from State House and informed him that his troops were in control of Freetown.[196] In the afternoon of 6 January 1999, Bockarie was found to have made an announcement on Radio France International that Gullit's troops had captured Freetown and would continue to defend it.[197] Further, Bockarie announced over BBC Radio that he was reinforcing the troops

187 Trial Judgement, para. 877.
188 Trial Judgement, para. 891.
189 Trial Judgement, para. 891.
190 Trial Judgement, para. 884.
191 Trial Judgement, para. 892.
192 Trial Judgement, para. 879.
193 Trial Jndgement, para. 880.
194 Trial Judgement, para. 880.
195 Trial Judgement, para. 880.
196 Trial Judgement, para. 881.
197 Trial Judgement, para. 881.

in Freetown and that he had ordered that strategic positions, including Government buildings, be burned.[198]

2.76 The Trial Chamber found that on 7 January 1999, Gullit sent a message to Bockarie to inform him that the AFRC were pulling back to State House and were unable to advance further.[199] Bockarie advised Gullit that if ECOMOG forced them to retreat further, the troops should burn the central part of Freetown to the ground and Gullit ordered the distribution of petrol for this purpose.[200]

2.77 The Trial Chamber reached the conclusion that there was no genuine understanding and cooperation between the RUF and AFRC over military reinforcement during the Freetown invasion.[201] The Trial Chamber found that Bockarie's announcement over the BBC that "his" troops had invaded Freetown "was intended to overstate his actual role in the Freetown attack".[202] The Prosecution submits that on the contrary, the only reasonable conclusion open to the Trial Chamber on the basis of the evidence as a whole was that Bockarie intended that the RUF would not miss out on participating in the capture of Freetown, being the seat of power, that Gullit acted in concert with Bockarie to achieve the result of burning the central part of Freetown and that despite any frustration over the failure of the AFRC to wait for reinforcements, Bockarie continued to act in concert with the AFRC commanders leading the attack on Freetown. After all, the RUF had planned to attack Freetown.[203]

2.78 [redacted] around the time of the successful attack on Teko Barracks he was in Kambia from where he monitored a radio communication in which Bockarie gave instructions to Rambo to move to Jui to meet up with Gullit so as to enter Freetown.[204] He learned that Rambo's group cleared Jui and waited in vain at the bridge to be received by Gullit's troops that were in Freetown.[205] The Witness later monitored a communication whereby Gullit's troops that were in Freetown were trying to find an escape route out of Freetown and Sesay instructed Rambo to receive them at Waterloo.[206]

198 Trial Judgement, para. 881.
199 Trial Judgement, para. 883.
200 Trial Judgement, para. 883.
201 Trial Judgement, para. 2198.
202 Trial Judgement, para. 2198.
203 Trial Judgement, para. 862.
[redacted]

2.79 The Trial Chamber found that Gullit contacted Bockarie several times before attacking Freetown and that he was promised RUF reinforcement.[207] The Trial Chamber further found that the AFRC troops delayed their advance for approximately one day before continuing towards Freetown.[208] During the attack, Gullit continued to contact Bockarie and was repeatedly promised reinforcement.[209] The Prosecution submits that the only reasonable conclusion open to the Trial Chamber on the basis of the evidence as a whole was that Gullit also intended to cooperate with the RUF in the attack on Freetown and that it was only logistical constraints and opposing military pressure that prevented the AFRC from waiting for the promised RUF support.

2.80 The Trial Chamber found that in this period, Gullit received advice, if not orders, from Bockarie.[210] In particular, Gullit radioed Bockarie to inform him that the AFRC were retreating from Freetown and Bockarie told Gullit that he should not accept Kabbah's request for a ceasefire made over BBC radio.[211] In a further radio communication, Bockarie told Gullit that all high profile politicians should be handed over to Sesay's custody at Waterloo.[212] The Trial Chamber noted that Gullit complied with this order on his arrival in Waterloo.[213]

(d) Continued cooperation between the AFRC and RUF during the retreat from Freetown

2.81 The Trial Chamber found as follows. On 9 January 1999, under pressure from ECOMOG, the AFRC abandoned State House and began retreating. Gullit again radioed Bockarie and requested him to send RUF reinforcements. Bockarie promised to do so, and it was arranged that AFRC fighters would meet the RUF reinforcements at a factory near Wellington on the eastern edge of Freetown. A group of AFRC fighters were dispatched to Wellington and a group of RUF troops led by RUF Rambo and Superman moved from Lunsar to the Waterloo area.

2.82 Ultimately the RUF troops were found to have been unable to break through the ECOMOG position to meet the AFRC fighters.[214] The Trial Chamber found that a

---

207 Trial Judgement, paras 875-876.
208 Trial Judgement, para. 877.
209 Trial Judgement, paras 881, 883-884.
210 Trial Judgement, paras 881, 883.
211 Trial Judgement, para. 886
212 Trial Judgement, para. 887.
213 Trial Judgement, footnote 1735.
214 Trial Judgement, para. 884 and see also para. 892.

small group of around 20 fighters led by AFRC Commander Rambo Red Goat nonetheless broke away from the RUF contingent and managed to join the AFRC forces in Freetown.[215] The Trial Chamber found that there was evidence that Rambo Red Goat advanced into Freetown to assist his AFRC brothers in direct contravention of orders from Kallon.[216] However, on the evidence, Kallon's orders were not against an advance into Freetown to assist the AFRC. Rather, Kallon was against advancing past the Orugu Bridge before ECOMOG could be dislodged from Jui.[217]

2.83 The Trial Chamber found that Gullit radioed Bockarie to inform him that the AFRC were retreating from Freetown.[218] It was found that Gullit then contacted Bockarie to inform him that the AFRC had lost control of Freetown, that as yet no reinforcements had arrived from the RUF and that they were trying to retreat to Waterloo.[219] Further, Bockarie advised Gullit to retreat as quickly as possible to avoid further casualties and to join the RUF at Waterloo.[220]

2.84 The Trial Chamber found that during the retreat from Freetown, Gullit and Bockarie were in regular contact.[221]

2.85 The Trial Chamber found that the AFRC and RUF met in Waterloo about three weeks after the AFRC had first entered Freetown.[222] The Trial Chamber found that the removal of the Guinean ECOMOG troops facilitated the retreat of the AFRC from Freetown to Waterloo.[223] However, the Trial Chamber also found that fighters led by Superman were dispatched in order to open an escape route for the retreating AFRC fighters.[224] The Prosecution submits that this would also be an evident cause of the AFRC retreat from Freetown being facilitated.

(e) The joint RUF/AFRC attempt to re-attack Freetown

2.86 The Trial Chamber found that after the AFRC retreated from Freetown, Sesay chaired a meeting of AFRC and RUF commanders including Kallon, Rambo and Superman at

---

215 Trial Judgement, para. 885.
216 Trial Judgement, para. 2201.
217 TF1-366, Transcript 9 November 2005, pp. 30-31.
218 Trial Judgement, para. 886.
219 Trial Judgement, para. 888.
220 Trial Judgement, para. 888.
221 Trial Judgement, paras 884-888.
222 Trial Judgement, para. 888.
223 Trial Judgement, paras 892 and 2204.
224 Trial Jndgement, para. 2204.

which the two groups planned to cooperate in a second attack on Freetown.[225] The Trial Chamber found that this attack failed as a result of animosities between the fighters.[226] However, this finding does not detract from the fact that the Trial Chamber's own findings establish that notwithstanding animosity between fighters, at the level of AFRC/RUF commanders the two were working together to make a seeond attempt to capture Freetown. Thc Trial Chamber found that AFRC Commanders Gullit and Five-Five retreated to Makeni with Sesay.[227]

(iv) Lack of evidence of AFRC support for SAJ Musa's plan to "reinstate the army"

2.87 The Trial Chamber found that SAJ Musa, who had broken away from the AFRC/RUF alliance prior to the joint attack on Kono District and had established a base in Koinadugu District, subsequently left following a quarrel with Superman and joined Gullit and his force in Bombali District.[228]

2.88 Notably, the Trial Chamber found that when SAJ Musa departed from Koinadugu District to join Gullit, the STF fighters led by Brigadier Mani and Bropleh deeided to remain with Superman.[229] It is submitted that this is indicative both of SAJ Musa's limited support from the fighting groups and the coordination between the groups in Koinadugu.

2.89 The Trial Chamber found that when SAJ Musa arrived at Major Eddie Town, he assumed control over the AFRC forces from Gullit.[230] There were approximately 30 RUF fighters, including the signaller Alfred Brown and several thousand AFRC fighters at Major Eddie Town.[231] SAJ Musa remained hostile to the RUF and attempted to prevent communication with Superman in Koinadugu or Bockarie in Buedu.[232] The Prosecution submits that SAJ Musa's hostility to thc RUF helped sow the seeds of his personal plan to reinstate the AFRC as the army of Sierra Leone. This plan included an attack on Freetown.[233]

---

225 Trial Judgement, para. 894.
226 Trial Judgement, para. 894.
227 Trial Judgement, para. 895.
228 Trial Judgement, para. 855.
229 Trial Judgement, para. 855.
230 Trial Judgement, para. 856.
231 Trial Judgement, para. 856.
232 Trial Judgement, para. 856.
233 Trial Judgement, para. 857.

2.90 There was however no evidence that other AFRC commanders including Gullit, Bazzy and Five-Five supported SAJ Musa's plan to reinstate the army. There was no reasonable basis for concluding that from the time the AFRC forces moved out of Kono, they contemplated their own individual plan to capture Freetown to "reinstate the army".[234] The Trial Chamber had found that SAJ Musa's reason for breaking away from the AFRC/RUF was that "SAJ Musa considered the AFRC to be professional soldiers and would not stand the prospect of subordination to RUF command."[235] It was found that although a number of AFRC troops followed SAJ Musa when he decided to establish his base in Koinadugu District, the majority elected to remain allied with the RUF.[236]

2.91 Indeed, there was evidence before the Trial Chamber to the effect that the reinstatement of the army was SAJ Musa's plan only and that the plan did not continue after SAJ Musa's death.[237] There is no evidence of any attempt to reinstate the army while the AFRC troops were in Freetown under the command of Gullit following the 1999 invasion.

2.92 The Trial Chamber found that contrary to SAJ Musa's instructions not to contact the RUF, communications with the RUF continued during the preparation for the advance on Freetown. O-Five communicated the planned attack to Superman, and Gullit was in radio contact with Bockarie.[238]

2.93 The Trial Chamber found that SAJ Musa and his troops commenced their advance towards Freetown in November 1998.[239] It was found that in Lunsar, a further altercation between SAJ Musa and Gullit occurred as Gullit had again contacted Bockarie by radio.[240] Communications with the RUF therefore continued. The Trial Chamber found that at this point Bockarie claimed on the BBC that his men had staged the ECOMOG attack and that troops under his command were marching on Freetown.[241] It was found that upon learning of Bockarie's statements, SAJ Musa reprimanded the RUF radio operator, Alfred Brown, for relaying information

234 Trial Judgement, para. 2187.
235 Trial Judgement, para. 792.
236 Trial Judgement, para. 793.
237 TF1-184, Transcript 5 December 2005, pp.16, 27-29; TF1-334, Transcript from AFRC Trial, 13 June 2005, pp. 26-27, 49; TF1-334, Transcript from AFRC Trial, 16 June 2005, pp. 35-36; TF1-334, Transcript 6 July 2006, pp. 80-81; TF1-028, Transcript 20 March 2006, p. 28; TF1-263, Transcript 8 April 2005, pp. 39-40; Junior Linn, Transcript 19 October 2004, pp. 59-60.
238 Trial Judgement, para. 857.
239 Trial Judgement, para. 858.
240 Trial Judgement, para. 858.
241 Trial Judgement, para. 859.

regarding the attack to Bockarie.[242] When the AFRC forees reached Newton some time prior to 21 Deeember 1998 and SAJ Musa restructured the fighting force, it was found that RUF officer Brown was one of several fighters designated as "standby officers" to replace injured Commanders if necessary.[243]

(v) Internal discord in AFRC/RUF relations

(a) Introduction

2.94 The findings of the Trial Chamber and the evidence before it established that internal friction was an ongoing feature of relations between the AFRC and RUF, and also within the RUF, throughout the Indictment period, including throughout the period in which the Trial Chamber found that the JCE existed. Harmony between members of a JCE is not a legal requirement of JCE responsibility. In cases of joint criminal enterprise under both national and international law, frictions between members of the JCE are possible, and indeed not unusual. The fact that members of a JCE have disagreements, or even strong personal rivalries, does not prevent them from sharing a common eriminal purpose and from each contributing substantially to the realization of that purpose. In any case of organized crime, there may be power struggles and internal polities between members of the JCE throughout the period that the JCE continues. Furthermore, participants in a JCE will be responsible for crimes committed within the JCE, even if they all have their own separate motives for pursuing the common criminal purpose and diverging agendas for what will happen once the common objective is achieved. The participants must share the common purpose. but need not share the same reasons for doing so.

2.95 The fact of a disagreement between certain members of the AFRC and RUF in April 1998 therefore cannot provide a reasonable basis for a trier of fact to conclude that this must spell the end of the JCE.

(b) Disagreements between the AFRC and RUF

2.96 The Trial Chamber found that the AFRC and RUF initially had a functioning relationship but that over time it began to sour and disagreements were frequent.[244]

---

242 Trial Judgement, para. 859.
243 Trial Judgement, para. 860.
244 Trial Judgement, para. 24.

The Trial Chamber found that around August 1997 discord developed between Bockarie and Koroma, and that Bockarie left Freetown to establish his headquarters in Kenema.[245] The Trial Chamber found that Bockarie left Freetown out of dissatisfaction with the RUF's limited military integration into the AFRC Junta fighting force and out of concern that he might be assassinated.[246]

2.97 The Trial Chamber found that the failure to integrate the two military organizations into a unitary command structure was found to have led to misunderstandings and conflicts, particularly since many RUF fighters felt that the AFRC did not respect the RUF as an organisation.[247]

2.98 The Trial Chamber found that diamonds were a further source of discord.[248] The confiscation of their diamonds appeared to form part of the motivation for the arrests of Koroma and Gullit. The imposition of disciplinary measures in relation to the possession or misuse of diamonds is evident from the punishment of Sesay by Bockarie when Sesay mislaid a package of diamonds on a mission to Monrovia.[249]

(c) Disagreements between SAJ Musa and the RUF

2.99 The Trial Chamber found that during the Intervention, after 14 February 1998, a group of RUF/AFRC fighters under SAJ Musa were unwilling to subordinate themselves to RUF command and broke away from the RUF/AFRC forces that were aiming to attack Kono District and travelled instead to Koinadugu District.[250] Thus, SAJ Musa decided to establish his own base in Koinadugu District with troops loyal to him.[251] The Trial Chamber found that from that point onwards, no relationship existed between SAJ Musa and the RUF.[252] However, these findings contradict other findings of the Trial Chamber, in particular as to the period when Superman joined SAJ Musa in Koinadugu as described above. According to the Trial Chamber, this relationship deteriorated when in October 1998, SAJ Musa shot an RUF fighter who had killed a civilian and the resulting friction between SAJ Musa and Superman led to

245 Trial Judgement, para. 24 and see also para. 764.
246 Trial Judgement, para. 1989.
247 Trial Judgement, para. 763.
248 Trial Judgement, paras 801, 803.
249 Trial Judgement, para. 828.
250 Trial Judgement, para. 30.
251 Trial Judgement, para. 793.
252 Trial Judgement, para. 793.

SAJ Musa and his troops fleeing across the north of the country to join Gullit and his force in Bombali District.[253]

2.100 The Prosecution submits that while the Trial Chamber was entitled to take this evidence into account, SAJ Musa's personal relationship with certain members of the RUF and his general hostility towards the RUF are clearly not conclusive, or even necessarily indicative, as to the relationship between senior members of the AFRC and RUF in general. There was evidence of opposition to SAJ Musa within the AFRC, and evidence that SAJ Musa's hostility to the RUF was not shared by other leading members of the AFRC, in particular Gullit. For instance, the Trial Chamber found that when SAJ Musa arrived at Major Eddie Town in late 1998, he wanted to execute the RUF fighters in the AFRC forces under Gullit, "but he was dissuaded by other AFRC Commanders".[254] SAJ Musa and Gullit also quarrelled when the former discovered that Gullit had been in radio contact with Bockarie, despite SAJ Musa's orders.[255]

2.101 Most importantly, as the Trial Chamber found that SAJ Musa was killed in December 1998, his personal hostility towards the RUF cannot be relevant to the crimes that occurred in Freetown and the Western Area in January and February 1999.

(d) Internal disagreements within the RUF

2.102 The evidence indicated that there were also internal disagreements within the RUF, which was to be expected. The Trial Chamber found that between 1996 and 2000, the composition of the RUF organisation and the roles of its commanders varied depending on where and how military operations were being conducted and also, to a significant extent, on changing allegiances amongst its leadership.[256]

2.103 The relationship between Superman and Kallon was found to have been difficult[257] and to have deteriorated after the ECOMOG recapture of Kono.[258] The Trial Chamber found that in August 1998, the RUF launched the Fiti Fata Mission led by Superman with the aim of attacking ECOMOG troops in Kono District.[259] Although Kallon was Superman's deputy for the mission, there was found to have been enmity between the

253 Trial Judgement, para. 855.
254 Trial Judgement, para. 856.
255 Trial Judgement, paras 857-858.
256 Trial Judgement, para. 650.
257 Trial Judgement, para. 2139.
258 Trial Judgement, para. 816.
259 Trial Judgement, para. 823.

two of them.[260] It was found that there was also friction between Superman and Bockarie.[261] The Trial Chamber found that the failure of the Fiti Fata mission led to relationships between key RUF commanders breaking down and the departure of Superman with a number of fighters to Koinadugu District.[262]

2.104 The Trial Chamber found that Superman joined with Sesay in the 24 Deeember 1998 attack on Makeni despite fearing that Kallon would attempt to take his life.[263] It was found that RUF Rambo persuaded Superman that he would be received by Sesay and Kallon in good faith.[264] In-fighting was also found to persist between Superman and Rambo.[265]

2.105 The Trial Chamber found that tensions erupted between Sesay and Superman after Rambo and Kallon reported to Sesay that Superman had secretly smuggled ammunition from the RUF store at Teko Barracks in Makeni.[266] Bockarie ordered Sesay and Kallon to arrest Superman but he evaded arrest and established a base at Lunsar.[267] Nevertheless, it was found that Bockarie ordered Sesay to deploy RUF Rambo to Port Loko to assist Superman in securing the Lungi access towards Freetown.[268]

2.106 The Trial Chamber found that in Makeni after February 1999, the dispute between Superman and Sesay became violent and that Sesay was subjected to attacks.[269] Nevertheless, it was found that after Sesay took command in Makeni in October 1999, and Superman moved to Lunsar, Superman advised Sesay of military issues from Lunsar.[270]

2.107 Internal differences within the RUF leadership were furthermore found to have heightened during the post-Lomé period of power-sharing between the government and the RUF. The Trial Chamber found that Bockarie left the RUF, Sankoh was

260 Trial Judgement, para. 823.
261 Trial Judgement, para. 824.
262 Trial Judgement, para. 34.
263 Trial Judgement, para. 869.
264 Trial Judgement, para. 869.
265 Trial Judgement, para. 892.
266 Trial Judgement, para. 890.
267 Trial Judgement, para. 890.
268 Trial Judgement, para. 891.
269 Trial Judgement, paras 906-907.
270 Trial Judgement, paras 910-911.

arrested and Sesay became interim leader.[271] By contrast, Bockarie and Sesay had been found to have had a close relationship during 1998.[272] 2692

2.108 The shifting nature of the personal and organizational feuding is evidenced by the fact that Gullit was instrumental in attempting to re-build cooperation with the RUF prior to the attack on Freetown as described above.

(e) Conclusion

2.109 The Prosecution submits that the Trial Chamber erred in taking one particular instance of fractious relations in April 1998 as signifying the end of the JCE, particularly when previous disputes were not seen to have had such a divisive effect and when a degree of infighting was consistently present. Furthermore, the Trial Chamber found that the split in April 1998 resulted from leadership disputes while the AFRC and RUF were operating in Kono District under a joint military command structure.[273] A joint military command structure was not found to have been an essential aspect of the JCE prior to the capture of Kono in 1998 and the rupture of such a structure is not fatal to the continuation of the JCE after the departure of Gullit and his troops. The two groups continued to act in concert, sharing the same common purpose and remaining dependent on one another for the achievement of their objectives and in their commitment to criminal means.

(vi) Continuation of common interests and interdependeney of the AFRC and RUF after April 1998

(a) General

2.110 The Trial Chamber found that following the Intervention, the status of the AFRC/RUF alliance changed drastically and that the senior leadership of the RUF and AFRC had to reorganize itself in order to achieve the common purpose which was then focused on regaining power and control over the territory of Sierra Leone.[274] The Trial Chamber found that a new plan to achieve that purpose was contemplated by high-ranking AFRC and RUF leaders.[275] Kono District and Koidu Town were to

[271] Trial Judgement, para. 42.
[272] Trial Judgement, paras 829 and 832.
[273] Trial Judgement, para. 33.
[274] Trial Judgement, para. 2067.
[275] Trial Judgement, para. 2067.

be attacked due to their strategic importance as the centre for diamond mining and as providing a passage to Kailahun, Bo and Kenema.[276]

2.111 Nonetheless, the Chamber found that the common purpose and the means contemplated to achieve it remained the same as there was no fundamental change.[277] "[I]t was not a new common purpose that was agreed upon by the participants at this stage but a continuation of the common purpose that was in place during the Junta regime."[278] The participants in the JCE were found to remain largely the same and included Bockarie, Johnny Paul Koroma, Sesay, Superman, Kallon, Kamara, Kanu, Mike Lamin, Isaac Mongor and other senior officials of the RUF and AFRC such as Gbao (Justice Boutet dissenting on Gbao's participation).[279]

2.112 The Prosecution submits that the only conclusion reasonably open to the Trial Chamber was that the common purpose and the means contemplated to achieve it also continued after the reorganization that occurred sometime in the end of April 1998.

2.113 For instance, the Trial Chamber found that even though Superman briefly joined the AFRC forces under the command of SAJ Musa, the Trial Chamber was not satisfied that there existed a common plan between the two groups as originally contemplated and as charged in the Indictment.[280] This conclusion appears to have been based on the fact that SAJ Musa refused to take orders from Bockarie or Superman,[281] and that Superman was refusing to take orders from Bockarie or Sesay.[282] However, this is to conflate JCE liability with superior responsibility under Article 6(3).[283] As a matter of law, it is quite possible to have a situation in which a number of people share a common criminal purpose and in which each makes a substantial contribution to furthering that criminal purpose, even though there are disputes between them as to who is in charge of the operation, and even though all of them refuse to take orders from each other. The existence of JCE responsibility does not depend on proof of an established chain of command that was recognized and respected by all participants in the JCE. Indeed, in a JCE, there need be no chain of command at all—a group of "equals" can form a JCE. Disputes over authority do not negate the existence of a

276 Trial Judgement, para. 2067.
277 Trial Judgement, para. 2069.
278 Trial Judgement, para. 2069.
279 Trial Judgement, para. 2068.
280 Trial Judgement, para. 1500.
281 Trial Judgement, para. 1501.
282 Trial Judgement, para. 1502.
283 See further Sub-section (ix) below.

JCE. Moreover, the Trial Chamber found that Superman did impliedly or explicitly take orders from Bockarie and Sesay at earlier and later times.[284]

2.114 The Trial Chamber made detailed findings in relation to the strategic meeting convened by Bockarie in the first week of December 1998 concerning the plan to recapture Freetown.[285] The Trial Chamber found there to be evidence that the ultimate objective of the RUF attack was to coordinate with the AFRC's movements so that the two forces could together recapture Freetown.[286] However, the Trial Chamber found there to be no evidence that this objective was communicated to the AFRC and that the relationship between Bockarie and the AFRC remained highly strained.[287] Thus, the Chamber found that it was not established that a common purpose resurfaced or was newly contemplated between members of the AFRC and RUF before the advance on Freetown on 6 January 1999.[288]

2.115 The Prosecution submits that, on the contrary, the only reasonable conclusion from the evidence of ongoing communication between the AFRC and RUF, the evidence of ongoing planning to achieve the goal of taking control of the country, and the pattern of ongoing atrocities,[289] is that the senior leaders of the RUF intended to cooperate with the AFRC to recapture Freetown. The capture of Freetown, being the seat of power and influence, was integral to the common plan.[290] The fact that strategies may have differed does not detract from the joint commitment to the common goal. This is moreover clear from the developments and communications during the attack and the attempted second joint attack.

2.116 The Trial Chamber found that the AFRC and the RUF were pursuing their own objectives at the time of the Freetown invasion[291] but does not at any point make a finding as to what those independent objectives actually were. The two groups were so closely tied that even if individual members within each group harboured the desire for overall power for themselves, it was not feasible to achieve this without the support and cooperation of the other group. There is no suggestion that armed force

---

284 See Sections D(ii)(c) and D(iii)(a) above.
285 Trial Judgement, paras 861-862.
286 Trial Judgement, para. 863.
287 Trial Judgement, para. 863.
288 Trial Judgement, para. 2190.
289 See Sub-section (viii) below.
290 Sesay's own testimony was that the "RUF had been fighting to come to Freetown because Freetown was the seat of government, which RUF had been fighting the war for." Transcript, 26 June 2007, p. 52 (lines 4-6).
291 See e.g. Trial Judgement, para. 2209.

between the AFRC and the RUF in pursuit of their separate objectives was a serious threat and the evidence is rather of disputes between individual leaders. Indeed, SAJ Musa's death appeared to result in the elimination of one obstacle to effective cooperation. The common goal to "liberate" the country from the so-called "corrupt" government and its supporters kept the AFRC and RUF aligned.

2.117 The Trial Chamber was "not convinced that the only inference from the circumstantial evidence is that Bockarie and Sesay were working together with the AFRC fighters in pursuance of a renewed joint criminal enterprise after the retreat began and prior to the arrival of the AFRC fighters in Waterloo."[292] However, the Prosecution submits that it is not a question of a renewed JCE coming into existence, but rather a question of the continuation of the common plan, purpose or design which remained constant throughout the relevant period up to at least February 1999.

(b) Attempted release of Sankoh by RUF forces

2.118 The continuation of the common plan, purpose or design is further evident from the release by the AFRC troops of high profile RUF prisoners from Pademba Road Prison and the efforts to search for Sankoh.[293] The Prosecution submits that this demonstrates loyalty to leaders of the associated force and an ongoing need for collaboration to achieve common goals. If the AFRC and RUF were each pursuing their own separate plans to take control and power over the territory of Sierra Leone, then they would have been competitors and rivals for power. Had the AFRC been pursuing its own objectives, it is unlikely that high profile RUF leaders would have been released with the consequent risk that the RUF would increase in power and eclipse the AFRC movement. Indeed, the 7 July 1999 Lomé Peace Accord resulted in a power-sharing agreement between the Government of President Kabbah and the RUF, represented by Sankoh.[294] The attempted release of Sankoh is inherently inconsistent with the AFRC and RUF pursuing rival plans.

(c) Specific common interests

2.119 The Chamber found that "it was only through their joint action that the AFRC and RUF were able to control the entire country, because the RUF needed the AFRC to

[292] Trial Judgement, para. 2206.
[293] Trial Judgement, para. 880.
[294] Trial Judgement, para. 41.

access Kenema and Bo Districts, while the AFRC could not bring Kailahun within the sphere of the Junta Government control without cooperation from the RUF."[295]

2.120 The Prosecution submits that the continuation of the common plan, purpose or design is evident from the ongoing commitment of the AFRC/RUF to the retention of control over the diamond mining areas, in particular after the ECOMOG intervention in February 1998. 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 was highlighted in the evidence.[296] The Trial Chamber found that "[t]he RUF leadership repeatedly emphasised the importance of Kono to the RUF rank and file. RUF members were ordered to retain control of Kono for strategic reasons, including its utility as a defensive stronghold and the potential for mineral exploitation."[297] The Trial Chamber further found that Koroma also ordered AFRC troops to retain Kono as a Junta stronghold.[298]

2.121 The Trial Chamber found that as the illicit sale of diamonds was the RUF's primary means of financing its operations, the mining system in Kono District was designed and supervised at the highest levels.[299] The Trial Chamber noted that Kenema was strategically important to the AFRC/RUF Junta as they relied on the proceeds from the sale of diamonds for their operations.[300]

2.122 At the same time, the Trial Chamber found that throughout the Indictment period, the capture of Freetown in order to ensure political and *de facto* control over Sierra Leone was a stated goal for both the AFRC and the RUF.[301]

2.123 It was found that after the Junta period, the AFRC and RUF no longer controlled the revenues and resources of Sierra Leone and could not afford to pay their fighters and as a result looting became endemic.[302] Further, it was found that after their departure from Kono, the AFRC troops no longer received arms and ammunition from Kailahun and had to be self-reliant.[303] The Prosecution submits on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any

---

295 Trial Judgement, para. 2159.
296 TF1-071, Transcript 19 January 2005, Closed Session, pp. 50, 55 and Transcript 21 January 2005, Closed Session, pp. 86-87.
297 Trial Judgement, para. 1137.
298 Trial Judgement, para. 1137.
299 Trial Judgement, para. 2114.
300 Trial Judgement, para. 1042.
301 Trial Judgement, para. 1510.
302 Trial Judgement, para. 2071.
303 Trial Judgement, para. 846.

reasonable trier of fact is that such a state of affairs made it unviable for either the AFRC or the RUF to pursue the aim of gaining control of the territory of Sierra Leone independently of the other, and that this state of affairs necessitated the reeapture of Kono District and its economic potential in order for the RUF and the AFRC to continue their operations, and led to Gullit's request for RUF reinforcements for the attack on Freetown, which Bockarie agreed to provide.

2.124 The Prosecution therefore submits that the continued pursuit of the common plan, purpose or design is evident from the fact that while fighters under AFRC command were advancing towards Freetown, fighters under RUF command recaptured Koidu Town and Makeni on 25 December 1998.[304] "As a result, the RUF once again controlled much of the area harbouring Sierra Leone's natural resources and economic assets."[305]

2.125 The RUF proceeded to send reinforcements to the AFRC troops in Freetown. The Trial Chamber found that the promised RUF reinforcements were unable to enter Freetown due to heavy fighting with ECOMOG and the retreating AFRC eventually met the RUF at Waterloo where the consolidated fighters launched a second, failed attack on Freetown.[306] There were public announcements relating to the cooperation between the RUF and AFRC.[307] The fact that certain operations involved a larger force from one of the groups and that there were internal disputes does not detract from the longstanding interdependency.

2.126 Even if SAJ Musa formulated a plan to re-instate the army after April 1998 and was dissatisfied with the leadership of the RUF, the two forces were by that point intricately tied and could not accomplish their ambitions without mutual support.

(vii) Unreasonable reliance on the testimony of Sesay

2.127 The Trial Chamber placed reliance on the testimony of Sesay in making its findings as to the communication between Gullit and Bockarie.[308] The Trial Chamber expressly relied on that evidence in finding that when Bockarie informed Sesay by radio that SAJ Musa had died, Bockarie told Sesay that he doubted the veracity of Gullit's claim

304 Trial Judgement, para. 37.
305 Trial Judgement, para. 37.
306 Trial Judgement, para. 40.
307 See e.g Trial Judgement, paras 39, 881.
308 See e.g. Trial Judgement, paras 889 and 891.

and suspeeted that the AFRC were deliberately attempting to mislead the RUF.[309] The Trial Chamber further found on the basis of that evidence that despite his representations to Gullit, Bockarie did not immediately order the deployment of RUF troops.[310] The Trial Chamber additionally found on the basis of that evidence that when the AFRC commenced their attack on Freetown, Bockarie regarded their failure to wait for reinforcements as evidence that Gullit had lied to him and that SAJ Musa was in fact still alive.[311]

2.128 However, the Trial Chamber found that it had "concerns regarding both the veracity and accuracy of Sesay's testimony"[312] which it found that it would only accept where it "was certain that such evidence was not a deliberate manipulation by Sesay to distort the truth or mislead the Chamber with regard to the issue of his liability or that of Kallon and Gbao."[313] The Trial Chamber further found that "Sesay's credibility is at issue and his version of events has not generally been accepted, particularly the evidence which deals with his conduct or the conduct of his co-Accused."[314]

2.129 The issue of cooperation betwccn the AFRC and RUF during the Freetown invasion was clcarly linked to Scsay's own conduct and that of his co-Accused since they were part of the decision-making High Command of the RUF. The Prosecution submits that in the circumstances no reasonable tricr of fact could have relied on the evidence of Sesay to make the findings of fact referred to in the previous paragraphs, when thcy were unsupported by other evidence and were against the weight of all of the other evidence and findings in the case referred to above.

(viii) The continuing pattern of crimes

(a) Introduction

2.130 Thc Prosecution submits that it is clear both from the pattern of atrocitics committed by both AFRC and RUF forces throughout Sierra Leone and specific orders given by Bockarie that it was intended that the mcans used to achieve thc goal of capturing Frectown and controlling the seat of power continued to include the same criminal means.

309 Trial Judgement, para. 889.
310 Trial Judgement, para. 889, referring to Issa Sesay, Transcript 18 May 2007, pp. 76-79.
311 Trial Judgement, para. 889, referring to Issa Sesay, Transcript 18 May 2007, pp. 78-80.
312 Trial Judgement, para. 605.
313 Trial Judgement, para. 607.
314 Trial Judgement, para. 608.

(b) Attack on the civilian population

2.131 The Trial Chamber described the attack against the civilian population as occurring in three stages. During the first stage from November 1996 until the formation of the AFRC/RUF Junta government in May 1997, mistreatment of civilians was particularly frequent and endemic in Kailahun District where forced labour, forced military training and forced marriages occurred.[315] The second stage from May 1997 until the ECOMOG intervention of February 1998 was characterised by the joint AFRC/RUF campaign to strengthen their "government" through killings and beatings throughout Districts including Bo, Kenema, and Kailahun and through forced mining in Kenema and Kono.[316] The third stage of the attack from February 1998 to the end of January 2000 involved a series of large-scale military actions undertaken by the AFRC/RUF in multiple locations throughout Sierra Leone. The Trial Chamber further found that during the third stage: "The enslavement and 'forced marriages' of civilians in Kailahun District persisted as before, and these practices *spread* to Kono District, Bombali District, Koinadugu District, Freetown and the Western Area and Port Loko District as troops moved through these areas."[317]

2.132 The Trial Chamber found that the pursuance of the armed conflict and the attack directed against the civilian population were regarded as being mutually reinforcing and "the violence directed against civilians was a fundamental feature of the war effort, utilised amongst other purposes to punish those who provided support for the CDF/ECOMOG and to finance the purchase of arms and ammunition from slave labour."[318]

2.133 The Trial Chamber found that the attack on the civilian population was both widespread and systematic.[319] It was found that during the January 1999 Freetown invasion, rebel troops were ordered by their leaders to burn public and private property and to kill and maim civilians.[320] The widespread violence against civilians was found to be organised.[321] The Trial Chamber found that the evidence contained numerous examples of operations staged by AFRC/RUF forces pursuant to pre-conceived plans or policies which were given particular names and directed at specific

315 Trial Judgement, para. 945.
316 Trial Judgement, para. 946.
317 Trial Judgement, para. 947 (emphasis added).
318 Trial Judgement, para. 950.
319 Trial Judgement, para. 957.
320 Trial Judgement, para. 960.
321 Trial Judgement, para. 961.

objectives.[322] One example given was the RUF attack to recapture Kono District in December 1998 which saw numerous atrocities against civilians.[323] The Trial Chamber noted that witnesses referred to military attacks staged by AFRC/RUF fighters throughout the Indictment period as Operation No Living Thing or Operation Spare No Soul.[324]

2.134 The Trial Chamber stated that it had heard overwhelming evidence of a general nature which established that the AFRC forces in Freetown intended to direct a campaign of violence against the civilian population.[325] The Prosecution submits that the only reasonable conclusion open to the Chamber was that the continuation of this campaign was synonymous with the continuation of the JCE. The campaign continued to amount to a campaign of terror with the commanders instilling in their fighters "a sense of revenge against the civilian population, ECOMOG forces and the Kabbah Government that led directly to widespread violence, chaos and terror during the attack on Freetown."[326]

(c) Burning

2.135 The burning of homes and entire towns was a persistent feature of AFRC/RUF military operations. The Trial Chamber found for example: that Koroma had declared Koidu a "no go area" for civilians and ordered that Koidu was to be burned to the ground;[327] that these orders were "supported and endorsed by Sesay";[328] that in early April 1998, Superman, on Bockarie's orders, ordered the retreating fighters to burn Koidu Town to the ground;[329] and that "[t]he burning in Tombodu was an operation organised jointly between the AFRC and the RUF."[330]

2.136 Similarly, the Trial Chamber found that during the Freetown invasion, Bockarie announced over BBC Radio that he had ordered strategic positions to be burned[331] and "advised Gullit that if ECOMOG forced them to retreat further, the troops should

322 Trial Judgement, para. 961.
323 Trial Judgement, para. 961.
324 Trial Judgement, para. 865.
325 Trial Judgement, para. 1516.
326 Trial Judgement, para. 1597.
327 Trial Judgement, para. 799.
328 Trial Judgement, para. 799.
329 Trial Judgement, para. 813.
330 Trial Judgement, para. 1159.
331 Trial Judgement, para. 881.

burn the central part of Freetown, including all key buildings, to the ground."[332] This instruction was carried out by Gullit who ordered that petrol be distributed to the Commanders at State House and dispatched troops to burn buildings.[333]

2.137 The Trial Chamber found that even though Bockarie gave Gullit instructions to burn strategic points, this had already been done before the advice was received.[334] The Prosecution submits that rather than proving that the AFRC independently contemplated the commission of such crimes, this proves that certain acts, such as burning, were always contemplated as the means of achieving the common purpose. Furthermore, there was evidence before the Trial Chamber that on the second day after the Freetown invasion, [redacted] State House and he saw Bazzy, Gullit and Five-Five together with Gibril Massaquoi, Steve Bio, and Alfred Brown of the RUF at a meeting where a decision was taken to burn Freetown, and it was after this meeting that the petrol was distributed and the burning started.[335]

(d) Looting

2.138 The Trial Chamber found that after the Intervention and during the retreat from Freetown, the AFRC and RUF Commanders decreed that fighters were to "pay themselves" by looting civilian property and Operation Pay Yourself was announced by Koroma over the BBC and endorsed by Superman and Bockarie.[336] The Trial Chamber found that from that point onwards, *looting was a systemic feature of AFRC and RUF operations.*[337] It was found that the RUF officially approved looting, as they used the looted "government properties" to finance the war, including the purchase of ammunition.[338]

(e) Forced recruitment and labour

2.139 The Trial Chamber found that throughout the armed conflict in Sierra Leone, the RUF and AFRC/RUF forces engaged in abduction campaigns in which thousands of

[redacted]

332 Trial Judgement, para. 883.
333 Trial Judgement, para. 883.
334 Trial Judgement, para. 2199.
336 Trial Judgement, para. 783-784.
337 Trial Judgement, para. 784 (emphasis added).
338 Trial Judgement, para. 1140.

children of varying ages were forcibly separated from their families.[339] A substantial pereentage of AFRC/RUF fighters were found to be young recruits.[340] The Chamber found that children under 15 were widely used in the attack on Koidu Town and during the period of AFRC/RUF joint control over the district. Children were being trained through 1998 and 1999.[341] The Chamber also found that the RUF had a planned and organised system in whieh civilians were intentionally forced to engage in various forms of forced labour throughout Kono District between February and December 1998.[342]

2.140 TF1-361 testified as to the training base established in Koinadugu to train captured civilians in order to increase manpower.[343]

2.141 Notably the Trial Chamber found that up to 2000 abducted civilians were present with the troops during the Freetown invasion and forced to carry food and ammunition.[344] Furthermore, as the AFRC/RUF troops were being driven out of Freetown and the Western Area, hundreds of civilians, ineluding a large number of children, were abducted and used for forced labour.[345]

(ix) Incorrect application of legal principles

2.142 The Trial Chamber recalled that "in order to establish the existence of a joint eriminal enterprise, there must be a plurality of persons acting in concert in pursuance of a common plan whose purpose is either inherently criminal or which contemplates the reaslisation of an objective through conduct constituting crimes within the Statute."[346]

2.143 Further, the Trial Chamber found that where the JCE is alleged to include crimes committed over a wide geographical area, an accused may be found criminally responsible for his participation in the enterprise even if his own significant contributions occurred only in a much smaller geographical area, provided that he had knowledge of the wider purpose of the common design.[347] The Trial Chamber also held that the principal perpetrator need not be a member of the joint eriminal

339 Trial Judgement, para. 1617.
340 Trial Judgement, para. 1617.
341 Trial Judgement, para. 2095.
342 Trial Judgement, para. 1324.
343 TF1-361, Transcript 12 July 2005, pp. 64-69.
344 Trial Judgement, para. 860.
345 Trial Judgemeut, paras 1588, 1591.
346 Trial Judgement, para. 1978.
347 Trial Judgement, para. 262.

enterprise, but may be used as a tool by one of the members of the joint eriminal enterprise.[348]

2.144 As to the mental element, the Trial Chamber distinguished the first and third categories of JCE.[349] Under the first category the Accused must be proved to have shared the intent of all the participants to commit the crime and to have intended to participate in a common plan whose objeet was the commission of the crime.[350] Under the third category of JCE, the accused must be proved to have had the intention to take part in and contribute to the common purpose, and incurs responsibility for a crime that was beyond the common purpose but nevertheless a natural and foreseeable consequcnce thereof if he is provcd to have had suffieient knowledge that the additional crime was a natural and foreseeable consequence to him in particular.[351]

2.145 The Trial Chamber found that the RUF had no control over the AFRC forces in Frectown during the attack.[352] The Trial Chamber appearcd to base its conclusion that the Accused could not bc hcld liable for crimes committed by AFRC forces in Frcctown on its findings as to thc absence of control. The Trial Chamber found that the perpetrators of the crimes committed in Freetown and thc Western Area wcre fighters under the command of Gullit.[353] The Chamber recalled that a small contingent of low-ranking RUF fighters participated in the AFRC attack on Freetown but found that thosc men were subordinate to Gullit's command.[354] Thc Trial Chamber considered "that Bockarie's conduet in making announcements over international radio networks in relation to the AFRC attack may also have contributed largely to the incorrect assumption that the troops in Freetown werc under his control."[355] The Trial Chamber reiterated thesc findings as to the lack of "effective control" by RUF commanders over AFRC fighters in relation to Koinadugu[356] and Bombali[357] Districts. The Trial Chamber noted that Superman had no "effective control" over SAJ Musa in Koinadugu District[358] and that he was no longer under the

348 Trial Judgement, para. 263.
349 Trial Judgement, para. 264.
350 Trial Judgement, para. 265.
351 Trial Judgement, para. 266.
352 Trial Judgement, para. 893.
353 Trial Judgement, para. 1514.
354 Trial Judgement, paras 1514 and 2189.
355 Trial Judgement, para. 1512.
356 Trial Judgement, paras 1499, 1500 and 1504. Also para. 2177, but referring more directly to Article 6(3) responsibility.
357 Trial Judgement, paras 1499, 1508 and 2180.
358 Trial Judgement, para. 1501.

"effective control" of Bockarie or Sesay after the failed Fiti-Fata mission.[359] Further, the Trial Chamber found that as a Staff Commander, Gbao did not have effective control over RUF fighters in the context of its finding that Gbao did not share the intent for the crimes committed in Bo District.[360]

2.146 While the Trial Chamber may have been concerned in some instances with superior responsibility under Article 6(3) of the Statute rather than with JCE responsibility, this is not always clear from the context. An accused in a leadership position may contribute to a JCE by consistently failing to take action to prevent crimes or to punish responsible subordinates[361] but "effective control" over subordinates is not a requirement for JCE liability to ensue. Thus, it is not necessary to prove that the forces involved in the attack on Freetown were under the command and authority or "effective control" of the RUF in order for JCE liability to apply with respect to the crimes committed during the attack and its aftermath. Liability on the basis of participation in a JCE may take the form of assistance in, or contribution to, the execution of the common purpose.[362] Furthermore, it is possible for co-perpetrators in a JCE to be removed from the *actus reus* of a crime and it is not required that the accused's participation be necessary or substantial.[363] 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. Indeed, the Trial Chamber found that the "distance of Gbao to many of the crimes is not a reason for denying his participation under the basic form."[364]

---

359 Trial Judgement, para. 1502.

360 Trial Judgement, paras 2040-2041.

361 The Trial Chamber in *Krajišnik* found 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." *Prosecutor v Krajišnik*, IT-00-39-T, "Judgement", Trial Chamber, 27 September 2006, ("***Krajišnik* Trial Judgement**"), para. 1098. *Prosecutor v Blaškić*, IT-95-14-T, "Judgement", Trial Chamber, 3 March 2000, ("***Blaškić* Trial Judgement**"), para. 337: "the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes."

362 Trial Judgement, para. 261, referring to *Tadić* Appeal Judgement, para. 227. See also *Stakic* Appeal Judgement, para. 64.

363 *Brđanin* Appeal Judgement, para. 430-431; *Kvočka* Appeal Judgement, para. 98.

364 Trial Judgement, para. 2013. See *Tadić* Appeal Judgement, para. 199 (citing *Ponzono* case: the accused "must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means[...]." The need for knowledge on the part of the accused as to the intended purpose of the criminal enterprise was stressed.

2.147 The Trial Chamber found that "a joint eriminal enterprise is divisible as to participants, time and loeation."[365] Examining a JCE by location should not mean losing sight of the principle that assistanee in, or eontribution to, the exeeution of the common purpose does not need to be proved for each geographical area as long as the plurality of persons and eommon plan continue and the accused continue to contribute to the exeeution of the JCE. Thus, the Prosecution did not have to prove that the Aeeused themselves participated in the crimes committed in Freetown if these crimes by their nature remained part of the agreed eriminal means to achieve the joint AFRC/RUF objectives.

2.148 For the reasons given above, the only conclusion reasonably opcn on the basis of the findings of the Trial Chamber and the evidence in the ease was that the commanders of the Freetown attaek, with whom the Aceused shared a common criminal plan, in particular Gullit, remained part of the JCE after April 1998. On this basis, the Accused may be held liable for the erimes forming part of the agreed-upon criminal means which occurred during that attack and its aftermath. Where these crimes were carried out by low-level commanders or rank-and-filc fighters, the senior leadcrs who were members of the JCE may nonetheless be held liable on the basis that these individuals were used by the senior leaders to commit erimes that were either intended by the members to further the eommon purpose or were the natural and foreseeable consequence of the implementation of the eommon purpose.[366]

(x) Conclusion

2.149 For the reasons given above, on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any reasonable trier of fact is that the JCE which the Trial Chamber found to have existed from May 1997 to April 1998 continued in existence until at least February 1999, and that after April 1998 it therefore remained the common purpose to regain power over Sierra Leone by means that included the commission of crimes charged in Counts 1 to 14 of the Indictment.

2.150 Alternatively, for the reasons given above, on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any reasonable trier of fact is that, to the extent that any of the crimes in Counts 1 to 14 of the Indictment

[365] Trial Judgement, para. 354.
[366] See Trial Judgement, para. 1992.

may not have been within the intention of any partieular partieipant in the JCE after April 1998, sueh erimes were the natural and foreseeable consequence of the effecting of the common plan, design or purpose / joint criminal enterprise.

E. Continued participation of the Accused in the JCE

(i) Introduction

2.151 The Trial Chamber found that all three of the Accused were participants in the JCE in the period from its inception soon after the 25 May 1997 coup.[367] The Trial Chamber found that all three Accused continued to be participants in the JCE throughout the Junta period, and following the 14 February 1998 ECOMOG intervention until the end of April 1998.[368]

2.152 If the Appeals Chamber upholds the submissions above, and finds that the only conclusion reasonably open to the Trial Chamber was that the JCE continued at least until the end of February 1999, it is submitted that on the basis of the findings of the Trial Chamber and the evidence in the case as a whole, the only conclusion reasonably open to the Trial Chamber was that the three Aecused in this ease continued to be participants in it. There is no basis on which a trier of fact could conclude that, notwithstanding the continuation of the JCE beyond April 1998, one or more of the Accused in this case withdrew from it in April 1998.

(ii) Continued participation of Sesay

2.153 The Trial Chamber found that given his position of power, authority and influence including his role, rank and close relationship and cooperation with Bockarie, Sesay contributed significantly to the JCE in the period up to the end of April 1998.[369]

2.154 The Trial Chamber found that following the recapture of Kono by RUF troops subordinate to Sesay in December 1998, the practice of forced mining became widespread and continued until after January 2000.[370] Sesay's eonduct was found to be a significant contributory factor to the perpetration of enslavement and it was

[367] Trial Judgement, para. 1990
[368] Trial Judgement, paras 2072, 2081.
[369] Trial Judgement, para. 1996. See also Trial Judgement, paras 2085 and 2089.
[370] Trial Judgement, para. 2111.

found that he intended the commission of the crime.[371] The Trial Chamber was satisfied that Sesay, acting in concert with other senior members of the RUF, designed the abduction and enslavement of hundreds of civilians for diamond mining throughout Kono District.[372] The Trial Chamber found Sesay liable under Article 6(1) of the Statute for planning the enslavement of hundreds of civilians to work in mines at Tombodu and throughout Kono District between December 1998 and January 2000, as charged in Count 13 of the Indictment.[373]

2.155 The Trial Chamber found that the "RUF practice of conscripting persons under the age of 15 into their armed group between 1997 and September 2000 in Kailahun, Kono and Bombali Districts was conducted on a large scale and in an organised fashion.[374] Sesay was found to have made a substantial contribution to the planning of this system of conscription[375] and it was found that he "directly participated in and made a substantial contribution to the planning and execution of the use of persons under the age of 15 to participate actively in hostilities."[376] It was found that Sesay had the requisite intent for this crime.[377]

2.156 The recruitment and use of child soldiers was found to be one of the criminal means to achieve the common purpose,[378] and Sesay's involvement in the crime consequently amounts to a substantial contribution to the fulfilment of the common purpose. (While noting this contribution to the JCE for purposes of the present ground of appeal, the Prosecution does not seek to substitute Sesay's existing conviction on Count 12 on the basis of *planning* with a conviction on Count 12 on the basis of JCE liability.)

2.157 In respect of the period after April 1998, the Trial Chamber additionally relevantly found as follows.

2.158 From around May 1998 to November 1998, Sesay was based in Pendembu. He had access to the sole radio set in Pendembu and regularly communicated with Bockarie.[379] By December 1998, he had been recalled to Buedu and reinstated as

371 Trial Judgement, para. 2115.
372 Trial Judgement, para. 2115.
373 Trial Judgement, para. 2116.
374 Trial Judgement, para. 2223.
375 Trial Judgement, para. 2226.
376 Trial Judgement, para. 2228.
377 Trial Judgement, para. 2229.
378 Trial Judgement, para. 1982.
379 Trial Judgement, para. 831.

BFC.[380] He led and eommanded the RUF attaek to reeapture Koidu in Deeember 1998.[381] Gullit communicated with Sesay on the radio after reaching Rosos sometime in July or August 1998.[382] In one radio communication between Gullit and Sesay, Gullit told Sesay to have confidence in him and insisted that they needed to co-operate, whereupon Sesay responded that he was very happy that eommunication had "resumed from the two ends", and referred to Gullit as a "brother."[383] While Gullit's troops in Freetown were trying to find an eseape route out of Freetown, Sesay instructed Rambo to reeeive them at Waterloo.[384]

2.159 The Trial Chamber found that the mere deployment of Rambo and RUF fighters in the direction of the Western Area did not amount to a significant eontribution to erimes committed in Freetown and the Western Area.[385] However, in order to prove that Sesay continued to be a member of the continuing JCE in this period, there is no need to prove that he made a specific contribution to the Freetown operation. The question is whether he continued to share the AFRC/RUF eommon purpose, and whether he continued to make a significant contribution to that common purpose. The AFRC/RUF common criminal purpose was to take power and control over the territory of Sierra Leone through the commission of crimes within the Statute of the Court.[386] If the Appeals Chamber aeeepts that this common criminal purpose continued aftcr April 1998 until at least the end of February 1999, it is submitted that no reasonablc trier of fact could possibly conelude that thc acts of Sesay referred to above did not contribute substantially to the JCE. Sesay is therefore criminally responsible for all of the crimes committed within thc JCE.

2.160 In any event, Sesay could bc said to have made a direct contribution by providing manpower for the Freetown attack, an act which was found to constitutc a significant contribution to the furtherance of the common purpose in a different part of the Trial Judgement.[387]

2.161 The Trial Chamber accepted Sesay's testimony that he had no prior knowlcdgc of the AFRC advance towards Frectown and concluded that he was not in contact with

380 Trial Judgement, para. 861.
381 Trial Judgement, para. 2126.
382 Trial Judgement, para. 848.
[redacted]
385 Trial Judgement, para. 2205.
386 Trial Judgement, para. 1779. See para. 2.21 above.
387 See Trial Judgement, para. 2101.

AFRC commanders until he arrived in Waterloo in January 1999.[388] However, it is not a requirement for JCE responsibility for a particular crime that the accused was aware beforehand that the particular crime in question was about to be committed. All that is required is that the accused was a participant in the JCE, and the accused intended that crimes of the type in question would be committed in furtherance of the common purpose, or that it was a natural and foreseeable consequence that crimes of the type in question would be committed in execution of the common purpose. On the findings of the Trial Chamber and the evidence before it, no reasonable trier of fact could conclude that Sesay did not intend that crimes of the kind committed during the Freetown invasion would be committed in furtherance of the JCE, or that the commission of such crimes were not the natural and foreseeable consequence of the JCE.

(iii) Continued participation of Kallon

2.162 The Trial Chamber found that Kallon participated in the design and maintenance of the system of forced recruitment and use of child soldiers and that his contribution in this regard was substantial.[389] It was found that Kallon had the requisite intent for this crime.[390] Given that the recruitment and use of child soldiers was found to be one of the criminal means to achieve the common purpose,[391] Kallon's involvement in the crime amounts to a substantial contribution to the fulfilment of the common purpose. (As indicated above in relation to Sesay, while noting this contribution to the JCE for purposes of the present ground of appeal, the Prosecution does not seek to substitute Kallon's existing conviction on Count 12 on the basis of *planning* with a conviction on Count 12 on the basis of JCE liability.)

2.163 The Trial Chamber found that following the failed Fiti-Fata mission, Kallon was posted to Pendembu where he remained with Sesay until December 1998.[392]

2.164 There is evidence that in late August 1998, when Bockarie ordered that a group of radio operators be dispatched from Kono to join Gullit's fighting force, Kallon ordered [redacted] leave Kono to go to SAJ Musa who in turn sent them

388 Trial Judgement, para. 900.
389 Trial Judgement, para. 2231.
390 Trial Judgement, para. 2233.
391 Trial Judgement, para. 1982.
392 Trial Judgement, para. 839.

to Gullit in Rosos.[393] There is evidence that Gullit communicated directly with Kallon after reaching Rosos sometime in July or August 1998. Kallon responded that he was happy that communication had resumed.[394]

2.165 After the AFRC retreated from Freetown, Kallon participated in the meeting of AFRC and RUF Commanders at which the two groups planned to cooperate in a second attack on Freetown.

2.166 The Trial Chamber found that the Prosecution had not established that Kallon was present with the RUF troops that were fighting ECOMOG at Waterloo.[395] The Prosecution submits that the Trial Chamber erred in reaching this conclusion and that the only reasonable conclusion, based on the evidence, was that Kallon was present with the troops at that stage.[396]

2.167 The Prosecution repeats the submission in paragraph 2.159 above that there is no need to prove a specific contribution to the Freetown operation but rather a continued commitment and contribution to the AFRC/RUF common purpose. This is demonstrated by communications with Gullit, communications and cooperation with Bockarie and Sesay, continued participation in military operations, the subsequent arrival in Waterloo to provide reinforcement, and the participation in a meeting of AFRC and RUF Commanders aimed at cooperating in a second attack on Freetown. The Prosecution repeats the submissions in paragraphs 2.159-2.160 above which apply *mutatis mutandis* in relation to Kallon.

(iv) Continued participation of Gbao

2.168 Gbao was found to have made a sufficient contribution to the JCE in Kailahun District and his role as ideology instructor was found to have dictated the spirit in which the crimes alleged in the Indictment were committed.[397]

[redacted]

395 Trial Judgement, para. 901.

396 The Chamber noted that George Johnson, TF1-366 and TF1-360 testified that Kallon accompanied Rambo and Superman to Waterloo: George Johnson, Transcript 18 October 2004, pp. 56-59, 65; TF1-366, Transcript 15 November 2005, pp. 23-24; TF1-360, Transcript 25 July 2005, Closed Session, p. 49. The Chamber preferred the evidence of other witnesses who referred exclusively to Rambo and Superman: TF1-184, Transcript 5 December 2005, pp. 52-55; TF1-036, Transcript 28 July 2005, Closed Session, p. 65; Exhibit 119, TF1-334, Transcript from AFRC Trial, 14 June 2005, pp. 55-56, as well as the evidence of Kallon who testified that he travelled from Makeni with Sesay after the fighting at Waterloo: Morris Kallou, Transcript 15 April 2008, pp. 10-11.

397 Trial Judgement, para. 2010.

2.169 On the basis of the findings of the Trial Chamber, there is no suggestion that this role ceased at the end of April 1998. However, in any event, and even more importantly, Gbao contributed substantially to the JCE after the end of April 1998 by the means described in paragraphs 3.45 to 3.83 below.

F. The consequences if this ground of appeal is upheld

(i) Introduction

2.170 If this ground of appeal is upheld, it follows that the three Accused are responsible on the basis of JCE responsibility for crimes that were committed within the JCE after the end of April 1998.

(ii) Crimes committed after the end of April 1998 in Koinadugu District, Bombali District and Port Loko District

2.171 As a consequence of its finding that the JCE ended in April 1998, the Trial Chamber decided to make no factual findings in respect of the evidence of crimes committed after the end of April 1998 in Koinadugu District,[398] Bombali District[399] or Port Loko District.[400] It follows that even if this ground of appeal is upheld, convictions cannot be entered against the Accused for any crimes committed after the end of April 1998 in these Districts, unless and until findings of fact have been made on the evidence relating to such crimes.

2.172 The Prosecution acknowledges that at this stage it would be impracticable to remit the case to the Trial Chamber for further findings of fact on this evidence. The Prosecution similarly acknowledges that in the circumstances of the present case, it would not be appropriate to request the Appeals Chamber to make findings of fact at first instance on the evidence of such crimes. Therefore, even if this ground of appeal is upheld, the Prosecution does not seek any remedy in respect of crimes committed after the end of April 1998 in Koinadugu District, Bombali District or Port Loko District.

---

398 Trial Judgement, paras 2147-2178.
399 Trial Judgement, paras 2179-2181.
400 Trial Judgement, paras 2218-2219.

(iii) Crimes committed in Freetown and the Western Area

2.173 The Trial Chamber made factual findings with respect to Freetown and the Western Area[401] in January-February 1999, during and in the aftermath of the Freetown invasion. However, the Trial Chamber did not enter any convictions for this location.[402]

2.174 If this ground of appeal is upheld, it follows that the Accused in this case are criminally responsible under Article 6(1) of the Statute for committing these crimes, as participants in a JCE.

(iv) Crimes committed after the end of April 1998 in Kono District

2.175 The crimes which the Trial Chamber found to have been committed in Kono District after the end of April 1998 are summarized in paragraph 2065 of the Trial Judgement. Having found that the JCE ended at the end of April 1998, the Trial Chamber entered convictions under other modes of liability for Sesay and Kallon with respect to these crimes.

2.176 It follows logically that if this ground of appeal is upheld, the Accused are criminally responsible under Article 6(1) of the Statute for committing these crimes, as participants in a JCE, at least insofar as these crimes were committed in the period up to the end of February 1999. In case of some of these crimes, the Accused were convicted on the basis of modes of liability other than JCE. In those cases where this has occurred, in the interests of judicial economy, the Prosecution does not seek unnecessarily to substitute convictions already entered under another mode of liability with convictions under the JCE mode of liability.

(v) Crimes committed after the end of April 1998 in Kailahun District

2.177 The crimes which the Trial Chamber found to have been committed in Kailahun District are summarized in paragraph 2156 of the Trial Judgement. The crimes listed in that paragraph at Items 5.1.2 and 5.1.3 were crimes of a continuing nature (forced marriage and enslavement), which the Trial Chamber found to have commenced before the end of April 1998 but to have continued in some cases up to the end of September 2000.

---

401 Trial Judgement, paras 2185-2212.
402 Trial Judgement, paras 2212, 2215, 2216, 2217.

2.178 In relation to the period prior to the end of April 1998, the Trial Chamber found that these crimes were within the JCE.[403] It follows from the submissions above, and from the Trial Chamber's reasoning as to why these crimes were within the JCE prior to the end of April 1998, that these crimes continued to be part of the JCE after the end of April 1998.[404]

2.179 It follows that the three Accused are criminally responsible for crimes in the period after April 1998 as participants in a JCE, and this adds to the criminality of the convictions of the Accused on Counts 1, 7, 9 and 13.[405]

G. Conclusion

2.180 For reasons given above, the Prosecution requests the Appeals Chamber:

(i) to reverse the Trial Chamber's findings that the eommon plan, design or purpose / joint criminal enterprise between leading members of the AFRC and RUF ceased to exist sometime in the end of April 1998;

(ii) to revise the Trial Judgement by adding further findings:

(a) the common plan, design or purpose / joint criminal enterprise between leading members of the AFRC and RUF continued to exist at least until the end of February 1999; and

(b) that Scsay, Kallon and Gbao remained participants in the common plan, design or purpose / joint criminal enterprise throughout that period; and

(c) that the following crimes were within the intent of the participants in that common plan, design or purpose / joint criminal enterprise, including Sesay, Kallon and Gbao:

(I) the crimes that the Trial Chamber found, in paragraphs 1512, and 1516 to 1608 of the Trial Judgement, to have been committed in Freetown and the Western Area;

(II) the crimes referred to in paragraph 2065 of the Trial Judgement, which were found by the Trial Chamber to have been committed in Kono District after the end of April 1998;

(III) the crimes referred to in paragraph 2156 (Items 5.1.2 and 5.1.3) of the Trial Judgement, which were found by the Trial Chamber to

[403] Trial Judgement, paras 2158-2163.
[404] Trial Judgement, paras 2158-2163.
[405] Trial Judgement, para. 2156 (Items 5.1.2 and 5.1.3).

have been committed in Kailahun District, to the extent that such crimes were committed after the end of April 1998; or

(d) alternatively to (c) above, that the crimes referred to in sub-paragraph (c)(I) to (III) above were the natural and foreseeable consequence of the effecting of the common plan, design or purpose / joint criminal enterprise; and

(e) that Sesay, Kallon and Gbao are each individually responsible under Article 6(1) of the Statute for committing, as participants in a joint criminal enterprise, the crimes referred to in sub-paragraph (c)(I) to (III) above;

(iii) to make resulting amendments to the disposition provisions of the Trial Judgement; and

(iv) to increase the sentences imposed on Sesay, Kallon and Gbao to refleet the additional criminal liability.

3. Prosecution's Second Ground of Appeal: Acquittal of Gbao on Count 12

A. Introduction

3.1 The Indictment charged the Aeeused in Count 12 with conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities. The Prosecution alleged that the Accuscd were individually criminally responsible pursuant to Articlc 6(1) of the Statute, or alternatively Article 6(3) of the Statute.[406] The Accused were *inter alia* alleged to have committed the crime through participation in a joint eriminal enterprise ("**JCE**").[407]

3.2 Thc Trial Chamber found that there was a "system of eonscription", which "requircd a substantial degrcc of planning and that this planning was conducted at the highest levels of thc RUF organisation".[408] Sesay and Kallon were both found to have made a substantial contribution to thc planning of this system of conscription.[409] The Trial

[406] Indictment, para. 68.
[407] Indictment, paras 36 – 37 read together with para. 68.
[408] Trial Judgement, para. 2225.
[409] Trial Judgement, paras 2226 and 2231.

Chamber also found that they both participated in and made a substantial contribution to the planning and execution of the use of persons under the age of 15 to participate actively in hostilities.[410] Sesay and Kallon were consequently held liable under Article 6(1) of the Statute for planning the use of persons under the age of 15 to participate actively in hostilities.[411]

3.3 However, Gbao was acquitted on Count 12.

3.4 The Prosecution's Second Ground of Appeal is that the Trial Chamber erred in law and/or erred in fact in finding that Gbao is not individually responsible for the conscription and/or the use of child soldiers as charged in Count 12 of the Indictment.

3.5 The Prosecution submits that the Trial Chamber failed to reason properly and to give due consideration to all modes of liability when considering the individual responsibility of Gbao for this crime.

3.6 In particular, the Prosecution submits that on the findings of the Trial Chamber and the evidence before it, the only conclusion open to any reasonable trier of fact is that Gbao, as a participant in the JCE found by the Trial Chamber to have existed between May 1997 and April 1998, is individually criminally responsible under Article 6(1) of the Statute for committing, as a participant in that JCE, the crimes charged in Count 12 of the Indictment that were found by the Trial Chamber to have been committed between May 1997 and April 1998. (See Section B below.)

3.7 Furthermore, if the Prosecution's First Ground of Appeal is upheld, the Prosecution submits that the only conclusion open to any reasonable trier of fact is that Gbao is individually criminally responsible under Article 6(1) of the Statute for committing, as a participant in that JCE, the crimes charged in Count 12 of the Indictment that were found by the Trial Chamber to have been committed after April 1998. (See Section C below.)

3.8 Additionally and in the alternative, the Prosecution submits that on the Trial Chamber's findings and/or the evidence before it, the only conclusion open to any reasonable trier of fact is that Gbao was responsible for *planning* the system of forced conscription of children under the age of 15 set up in Kailahun District from 1996 to December 1998. Additionally to his liability on the basis of *planning* in Kailahun District, it is submitted that Gbao's conduct in Kailahun District amounted to *aiding and abetting* the crimes charged in Count 12 that were found by the Trial Chamber to

[410] Trial Judgement, paras 2228 and 2231.
[411] Trial Judgement, paras 2230 and 2234.

have been committed outside Kailahun. Alternatively, it is submitted that, at the very least, Gbao is liable for *aiding and abetting* all of the crimes charged in Count 12 of the Indictment that were found by the Trial Chamber to have been committed (See Section D below.)

3.9 The remedy sought by the Prosecution in respect of this Ground of Appeal is set out in Section E below.

B. JCE liability for crimes committed until April 1998

(i) Introduction

3.10 The Trial Chamber found that until some time in the end of April 1998, all three Accused in this case were participants in a joint criminal enterprise whose other participants included other senior members of the RUF and senior members of the AFRC. The Trial Chamber found that all three Accused were guilty of various crimes of which they were charged in the Indictment on the basis of JCE liability, the Trial Chamber having found that these crimes were committed within the JCE. (See paragraphs 2.3 to 2.6 and 2.12 to 2.25 above, in relation to the Prosecution's First Ground of Appeal.)

3.11 As mentioned above, the Indictment clearly alleged JCE liability in respect of Count 12 for the three Accused.[412] This remained the constant position of the Prosecution in respect of Count 12, until the end of the trial. Indeed, the Prosecution Final Trial Brief extensively argues JCE liability in respect of Count 12.[413]

3.12 In respect of other crimes with which the Accused were charged in the Indictment and which the Trial Chamber had found were committed by RUF/AFRC forces, the Trial Chamber expressly considered, in Part VII of the Trial Judgement, whether each of the Accused was individually criminally responsible for those crimes on the basis of JCE liability (see Trial Judgement, Part VII, Section 2.2.2 (paragraphs 1977-2049),[414] Section 3.4 (paragraphs 2054-2061),[415] Section 4.2.2 (paragraphs 2067-2110),[416]

---

412 Indictment, paras 36 – 37 read together with para. 68.
413 Prosecution Final Trial Brief, paras 285-286, 333-335 and 827.
414 Crimes committed in Bo District.
415 Crimes committed in Kenema District.
416 Crimes committed in Kono District.

Section 5.2.2 (paragraphs 2158-2173)[417] and Section 8.2.2 (paragraphs 2184-2212))[418].

3.13 However, despite the fact that the Indictment expressly alleged the crimes in Count 12 to have been committed within the JCE, the Trial Chamber gave no express consideration whatsoever to JCE liability in respect of Count 12.

3.14 Indeed, Part VII, Section 10 of the Trial Judgement (paragraphs 2220 to 2237) is less than four pages long, and only considers the Article 6(1) modes of liability of personal commission (paragraphs 2221 and 2222) and planning (paragraphs 2223 to 2237). No express consideration was given to other Article 6(1) modes of liability.

3.15 The Trial Chamber found at paragraph 2222 of the Trial Judgement that Gbao had not personally committed any crime charged in Count 12. It then dealt with all other Article 6(1) responsibility of Gbao on Count 12 in a single paragraph, paragraph 2235, which merely stated as follows:

> The Chamber has found that Gbao loaded former child fighters onto a truck and removed them from the Interim Care Centre in Makeni in May 2000. We find this insufficient to constitute a substantial contribution to the widespread system of child conscription or the consistent pattern of using children to actively participate in hostilities. We further find that there is no other evidence that Gbao participated in the design of these crimes.[419]

3.16 The Prosecution submits that the Trial Chamber did not properly address its mind to the question of the JCE responsibility of the Accused in relation to Count 12. Indeed, from a reading of the Trial Judgement it is not apparent that the Trial Chamber gave any consideration to this issue at all.

3.17 For the reasons given below, the Prosecution submits that on the findings of the Trial Chamber and the evidence before it, the only conclusion open to any reasonable trier of fact is that Gbao is individually criminally responsible, pursuant to his participation in the JCE found by the Trial Chamber to have existed between May 1997 and April 1998, for the crime charged in Count 12.

3.18 The Prosecution notes that the logical consequence of the remedy above may be that Sesay and Kallon also satisfy the elements under Article 6(1) of the Statute for committing, as participants in a joint criminal enterprise, the crime charged in Count 12. However, the Prosecution does not seek any revision of the Trial Judgement to

---

417 Crimes committed in Kailahun District.
418 Crimes committed in Freetown and the Western Area.
419 Trial Judgement, para. 2235 (footnotes omitted).

reflect joint criminal enterprise responsibility of Sesay and Kallon on Count 12 as the Trial Chamber convicted Sesay and Kallon on Count 12 under Article 6(1) on the basis of planning.

(ii) The crime of conscription and use of child soldiers was committed within the JCE

3.19 The findings of the Trial Chamber clearly show that the crime of conscription and use of child soldiers was repeatedly and widely committed by RUF and AFRC forces during the Junta period and beyond. In particular, it was found that in respect of the crime of *conscription* of child soldiers it was established beyond reasonable doubt that:

(i) between February and April 1998, RUF and AFRC fighters routinely abducted persons under the age of 15 in Kono District for the purpose of using them within their respective organisations; and

(ii) RUF fighters subjected persons under the age of 15 to forced military training at Bayama and Bunumbu in Kailahun District between 1997 and December 1998 [...].[420]

3.20 As regards the crime of *use* of child soldiers, the Trial Chamber also made findings that:

(i) the RUF routinely used persons under the age of 15 to participate actively in hostilities in Kailahun District from November 1996 to 1998 [...]

(ii) the AFRC/RUF routinely used persons under the age of 15 to participate in combat actively in hostilities in Kono District between February and April 1998 [...].[421]

3.21 The Trial Chamber ***expressly*** found that "the crimes charged under Counts 1 to 14 were within the joint criminal enterprise and intended by the participants to further the common purpose to take power and control over Sierra Leone.[422] Thus, the Trial Chamber ***expressly*** found that the crimes of enlistment, conscription and use of child soldiers charged in Count 12 of the Indictment were within the JCE.

3.22 The Trial Chamber said in this respect that "additional criminal means to achieve the common purpose included *the enlistment, conscription and use of Child Soldiers*

[420] Trial Judgement, para. 1708.
[421] Trial Judgement, para. 1747.
[422] Trial Judgement, para. 1982; see also para. 1985.

(Count 12) as a means to enforce the military components of the AFRC/RUF forces in order to assist in specific military operations".[423] In respect of the period following the 14 February 1998 ECOMOG Intervention until the end of April 1998, the Trial Chamber added that:

> There was a widespread commission by AFRC and RUF fighters of [in addition to other crimes] ... conscription and use of child soldiers to participate actively in hostilities during the attack on Kono and in the subsequent period of joint AFRC/RUF control over Kono District. This demonstrates that the common purpose agreed to by the AFRC and RUF leadership continued to contemplate the commission of crimes within the Statute as a means of increasing its exercise of power and control over the territory of Sierra Leone.[424]

3.23 The Trial Chamber found that "the RUF maintained military and civil control in Kailahun District, and during the Junta period, the RUF sustained a widespread and systematic pattern of conduct which included conducting military training, such as the enlistment, conscription and use of children under the age of 15 years to participate in active hostilities."[425] The Chamber also found that the abduction, forced military training and subsequent use of child soldiers was a deliberate, organised and consistent practice in the RUF since its inception, in order to support the war effort of the AFRC and the RUF.[426] Numerous findings of the Trial Chamber indicate that the recruitment of child soldiers was clearly a part of the common plan of the JCE and was a crime contemplated by the participants of the JCE to achieve the common purpose.[427] Indeed, the conscription and use of child soldiers served, alongside unlawful killings, enslavement, sexual and physical violence, as an additional criminal means to achieve the eommon purpose.[428] The recruitment of child soldiers was critical to provide regular military manpower to the RUF, as confirmed by the findings below:

> We find that the RUF depended on this method of conscription to maintain its operational capability. We are reinforced in this finding because the continuous recruitment of manpower by the RUF for combat was capital, vital and indispensable for the pursuit and sustenance of their war effort, in

---

423 Trial Judgement, para. 1982 (emphasis added).
424 Trial Judgement, para. 2070.
425 Trial Judgement, para. 2158.
426 Trial Judgement paras 1614, 1615, 1744, 2023: "The capture and forced conscription of civilians was part of the organisation's way of operating from its earliest days". Notably, the Trial Chamber found that many of the senior members of the RUF were originally forced recruits, including Sesay, Kallon and Gbao (See Trial Judgement, para. 654).
427 Trial Judgemeut, paras 1698, 1982, 1985, 2070.
428 Trial Judgement, para. 1982.

> order to ensure success and to facilitate the survival of the movement and the achievement of its objectives as defined in its ideology.[429]
>
> ...
>
> The training of new recruits was essential to the common purpose of the RUF and AFRC as it ensured the maintenance of the military manpower and the success of operations.[430]

3.24 The Trial Chamber found that "from its inception, the RUF adopted the strategy of the NPFL requiring that upon capturing a village, every member of that village, including the children, were involuntarily conscripted into the fighting forces."[431] The Trial Chamber found that the RUF taught that "the strength of a revolution relied on manpower, women and men, young and old".[432] The military training of children by the RUF indeed dates from the early days of the creation of the armed movement, as it was found that between 1991 and 1992, children between the ages of 8 and 15 were trained at Camp Naama in Liberia.[433] Gbao was a Vanguard who himself was trained at Camp Naama.[434]

3.25 The Trial Chamber established that "the practice of abducting and training persons under the age of 15 with a view to their ultimate use in combat was widespread among both factions throughout the Indictment period".[435]

3.26 The Trial Chamber found that children were "particularly useful in the RUF military operations"[436] and "especially prized as fighters due to their agility and obedience".[437] The Trial Chamber emphasized that "young boys were of particular value to the RUF due to their loyalty to the movement and their ability to effectively conduct espionage activities, as their small size and agility made them particularly suitable for hazardous assignments."[438]

3.27 The Prosecution submits that on the basis of these findings of the Trial Chamber, the only conclusion open to any reasonable trier of fact is that the crimes charged in

---

429 Trial Judgement, para. 1698.
430 Trial Judgement, para. 2088.
431 Trial Judgement, para. 2023; see also para. 654: "A critical pillar of the ideology was thus the notion that the people of Sierra Leone were tasked with helping the revolution succeed. It was common practice for the RUF, upon capturing a village, to conscript its civilians, including children, into the ranks of the fighting forces."
432 Trial Judgement, para. 2023.
433 Trial Judgement, para. 1615.
434 Trial Judgement, paras 667-668.
435 Trial Judgement, para. 1703.
436 Trial Judgement, para. 1710.
437 Trial Judgement, para. 1703.
438 Trial Judgement, para. 1616.

Count 12 were within the JCE, in the sense that it was part of the agreement between the participants in the JCE that child soldiers would be conscripted and used by the RUF. Thus, on the ***express*** findings of the Trial Chamber, there is no doubt that the crimes charged in Count 12 of the Indictment that were committed during this period were within the JCE.

(iii) Gbao was a participant in the JCE

3.28 Gbao was found by the Trial Chamber to be a member and participant of the JCE which it found existed between certain members of the AFRC and the RUF.[439]

3.29 It is submitted that it follows as a matter of law that if the crimes charged in Count 12 were within the JCE, and if Gbao was a participant in the JCE, that he is individually criminally responsible under Article 6(1) of the Statute for committing those crimes, on the basis of JCE liability.

3.30 For the reasons given in Sub-section (iv) below, it is submitted that on the findings of the Trial Chamber and the evidence in the case, the only conclusion reasonably open is that Gbao himself ***did*** share the intent with other participants in the JCE that the crimes charged in Count 12 would be committed.

3.31 Even if it were hypothetically the case that Gbao, although a participant in the JCE, did not share the intent to commit the crimes of conscription and use of child soldiers, he would still be individually criminally responsible for those crimes on the basis of the third form of JCE liability (JCE III), if the commission of the crimes charged in Count 12 was a natural and foreseeable consequence of the effecting of the common purpose.[440] For the reasons given in Sub-section (iv) and (v) below, it is submitted that ***at the very least***, the only conclusion open to any reasonable trier of fact is that the commission of the crimes charged in Count 12 was a natural and foreseeable consequence of the effecting of the common purpose.

3.32 To be responsible for the Count 12 crimes as a participant in the JCE, it is not necessary to demonstrate that Gbao made a substantial contribution specifically to the commission of the Count 12 crimes. It is only necessary to establish that Gbao made a substantial contribution ***to the JCE***.[441] Provided that he made a substantial

---

439 Trial Chamber Judgement, paras 2009, 2057, 2104-2105 and 2164.

440 Trial Judgement, para. 266 referring to *Brdjanin* Appeal Judgement, para. 411. *See also Stakic* Appeal Judgement, para. 65; *Vasiljevic* Appeal Judgement, para. 99; *Tadić* Appeal Judgement, paras 204, 227-228.

441 Trial Judgement, para. 261.

contribution ***to the JCE***, he will be individually criminally responsible for all crimes (i) that were contemplated by the JCE participants to be committed as a means of giving effect to the common purpose, or (ii) that were a natural and foreseeable consequence of the effecting of the common purpose. A participant in a JCE will be individually criminally responsible for all such crimes, even if he did not make a substantial contribution specifically to each and every one of those crimes.[442] The Trial Chamber expressly found that Gbao made a substantial contribution ***to the JCE***.[443] Particularly, the Trial Chamber found that "the acts by Gbao [...] amount to a significant contribution to the furtherance of the common purpose by securing revenue, territory and manpower for the Junta Government".[444] It follows that he is individually criminally responsible for the Count 12 crimes, regardless of whether or not he made a substantial contribution specifically to those crimes.

3.33 However, for the reasons given in Sub-section (iv) below, it is submitted that in any event, on the findings of the Trial Chamber and the evidence before it, the only conclusion reasonably open is that Gbao himself ***did*** make a substantial contribution to the crimes of conscription and use of child soldiers.

(iv) Gbao's role in the system of conscription and use of child soldiers

3.34 The findings of the Trial Chamber indicate that there was a clear pattern of abductions, training and use of child soldiers within the RUF.[445] The Trial Chamber further noted that "the existence of a specific combat unit for child fighters, as well as the fact that its title entered into common parlance in Sierra Leone, further demonstrates the *entrenched and institutionalised nature* of the practice of recruitment and use of child soldiers."[446] The Trial Chamber described the system of conscription to be well organised and designed.[447] It held further that the planning of this system was conducted at the highest level of the RUF organisation.[448]

3.35 The scheme in place in respect of forced recruitment, as found by the Trial Chamber, can be summarised as follows. First civilians were captured or abducted, including

---

442 See Prosecution's First Ground of Appeal, paras 2.147, 2.159 and 2.167 above.
443 Trial Judgement, paras 2009-2049, 2057-2058, 2104-2105 and 2164.
444 Trial Judgement, para. 2164.
445 Trial Judgement, paras 1617-1624.
446 Trial Judgement, para. 1621 (emphasis added).
447 Trial Judgement, para. 2223.
448 Trial Judgement, para. 2225.

children, as age did not matter. The Trial Chamber found that "the RUF/AFRC forces engaged in abduction campaigns in which thousands of children of varying ages were forcibly separated from their families."[449] Civilians were then forcibly brought to Kailahun where they were screened "to ascertain their suitability for combat operations".[450] The Trial Chamber found that "in February 1998, a number of young boys, girls and young women from Koidu and other locations in Kono District were taken to Camp Lion. Among the recruits was [redacted] Civilians, including children under 15 years old, were forcibly trained for military purposes[452] and, upon completion of the training, new freshly trained recruits "were deployed throughout the country [and] SBUs were mixed with other fighters and accompanied them to the front lines".[453] The evidence shows that they were sent to different areas in Kono or Kailahun to perform a variety of military tasks ranging from combat activities[454] such as armed patrols,[455] to serve as bodyguards to commanders[456] or as spies[457], to guard military objectives[458] or to perpetrate crimes against civilians.[459] [redacted]

3.36 Gbao was based in Kailahun during the relevant time period. The Trial Chamber found that "RUF activities in Kailahun furthered the ultimate goal of joint political, economical and territorial control."[461] The Trial Chamber held that "the widespread and systematic crimes were for the benefit of the RUF and the Junta in furthering their ultimate goal of taking political, economic and territorial control over Sierra Leone."[462]

449 Trial Judgement, para. 1617. See also para. 1696: "[...] during military operations and attacks on villages and civilians, the RUF and later the AFRC/RUF, routinely and systematically abducted children including those under the age of 15, who they deemed fit to perform specific functions within their fighting forces."
450 Trial Judgement, para. 1618.
451 [redacted]
452 Trial Judgement, paras 1633-1645 and 1699.
453 Trial Judgement, para. 1644.
454 Trial Judgement, paras 1710-1712.
455 Trial Judgement, paras 1717-1718.
456 Trial Judgement, paras 1731-1742.
457 Trial Judgement, para. 1729.
458 Trial Judgement, paras 1725-1728.
459 Trial Judgement, paras 1719-1724.
[redacted]
461 Trial Judgement, para. 2159.
462 Trial Judgement, para. 2159.

3.37 Gbao was found to have held a "position of power and authority in Kailahun District."[463] The Trial Chamber held that "Gbao's status, assignment, rank and personal relationship with Sankoh, as well as his knowledge of the RUF's ideology, are all factors that, in the Chamber's considered view, demonstrate that Gbao had considerable prestige and power within the RUF in Kailahun District."[464] He was responsible for the maintenance of law and order and he exercised an important overseeing and monitoring role of the various security units in Kailahun.[465] It was found that Gbao travelled widely in Kailahun District in order to visit different areas behind the front lines and to report on whether the MP and G5 units were doing their jobs.[466] The Trial Chamber also found that he had "a supervisory role over the IDU, the MPs, the IO, and the G5", over which he had the power to issue recommendations and over whose decisions he had a considerable influence.[467] His areas of responsibility therefore extended to the G5, the very unit which was in charge of the screening of civilians before sending them to training. It was found that "Gbao worked closely with the G5 in Kailahun Town to manage the large-scale, forced civilian farming", including during the period between 25 May 1997 and 14 February 1998.[468] Furthermore, the G5 unit, which "managed the capture and deployment of civilians in furtherance of the RUF's goals, was considered to be a security agency falling under the purview of the OSC", namely Gbao.[469]

3.38 The Trial Chamber held that "Gbao was directly involved in the planning and maintaining of a system of enslavement."[470] Not only was Gbao found to have made a substantial contribution to the system of enslavement in Kailahun,[471] but the Chamber found that the system of enslavement for which he was found guilty included forced farming, forced labour and carrying loads, forced mining, as well as forced military training.[472] It was found that "an unknown number of civilians were forcibly trained for military purposes from 30 November 1996 to 1998 in Kailahun District."[473] The Trial Chamber found that amongst the civilians brought to Kailahun for training

463 Trial Judgement, para. 2039.
464 Trial Judgement, para. 2033.
465 Trial Judgement, paras 697-699, 710, 2033-2035, 2037, 2039, 2046.
466 Trial Judgement, para. 2035.
467 Trial Judgement, para. 2034.
468 Trial Judgement, para. 2037.
469 Trial Judgement, para. 2045.
470 Trial Judgement, para. 2167.
471 Trial Judgement , paras 2167 and 2172.
472 Trial Judgement, paras 1478 and 2156.
473 Trial Judgement, para. 2156.

purposes, there were also children under the age of 15, [redacted] The civilians subjected to forced military training were found to be victims of forced labour.[475] However, those under the age of 15 who underwent the same treatment were additionally victims of conscription. The Trial Chamber found that the abduction and/or the forced military training of children under the age of 15 is sufficient to independently amount to the crime of conscription.[476]

3.39 On the basis of the above findings, the only conclusion reasonably open is that Gbao was aware of the conscription and use of child soldiers by the RUF.

3.40 The Trial Chamber found that children as young as eight and nine were abducted,[477] and was consequently satisfied that many children abducted were sufficiently young that the perpetrators knew from their physical appearance that they were under the age of 15.[478] The Trial Chamber further found that "the consistent pattern of conduct of using persons under the age of 15 in hostilities was sufficient to put the perpetrators on notice that there is a substantial likelihood that the persons being used by them in hostilities were under the age of 15."[479] It noted further that "the fact that the perpetrators may not in all cases have had actual knowledge of the ages of the persons used is immaterial given that the perpetrators had reason to know of their ages."[480]

3.41 Given the consistent pattern of systematic and large-scale recruitment of children under the age of 15, and having regard to Gbao's position of authority and leadership in Kailahun District, it would be wholly unreasonable to conclude that Gbao did not share the intent that child soldiers should be conscripted and used pursuant to an RUF policy. Indeed, in view of the findings of the Trial Chamber referred to above, it would be wholly unreasonable to conclude that Gbao was not aware that children were being conscripted and used by the RUF.

3.42 In particular, Gbao was convicted,[481] on the basis of JCE liability, for forced military training as a form of forced labour.[482] In so convicting Gbao on the forced labour count, the Trial Chamber found that Gbao shared the intent with the other participants

474 Trial Judgement, para. 1699.
475 Trial Judgement, paras 1487-1488 : "The Chamber finds that the military training constitutes forced labour as it was a preparatory step to forcing these civilians to the front lines of the RUF's military efforts or to becoming the bodyguards of the RUF Commanders."
476 Trial Judgement, paras 1695 and 1700.
477 Trial Judgement, paras 1631-1632 and 1702.
478 Trial Judgement, para. 1702.
479 Trial Judgement, para. 1745.
480 Trial Judgement, para. 1745.
481 Trial Judgement, Disposition, p. 686.
482 Trial Judgement, paras 2156 and 2172.

in the JCE to commit the crime of enslavement, which included the forced military training of civilians.[483] Given that it was found that those civilians forced to undergo military training included children under 15, and given that Gbao necessarily knew this, it would be inconsistent to find that Gbao did not share the same intent in relation to Count 12.

(v) The crimes charged in Count 12 were a natural and foreseeable consequence of the effecting of the common purpose

3.43 Alternatively, at the very least, on the basis of the findings of the Trial Chamber, the only conclusion open to any reasonable trier of fact is that it was foreseeable to any participant in the JCE that the crime of conscription and/or use of child soldiers would be committed in the course of the execution of the JCE. The only conclusion reasonably open is that it must have been the natural and foreseeable consequence that in effecting the common purpose, participants in the common purpose would conscript and use child soldiers.

(vi) Conclusion

3.44 For the reasons given above, on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any reasonable trier of fact is that Gbao is individually criminally responsible under Article 6(1) of the Statute for committing, as a participant in a JCE, the crimes of conscription and use of child soldiers charged in Count 12 of the Indictment, to the extent that such crimes were found by the Trial Chamber to have been committed up to the end of April 1998.

C. JCE liability for crimes committed after April 1998

(i) Introduction

3.45 If the Prosecution's First Ground of Appeal is allowed by the Appeals Chamber, it is submitted that on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any reasonable trier of fact is that Gbao is individually criminally responsible under Article 6(1) of the Statute for committing, as a

[483] Trial Judgement, para. 2172.

participant in a JCE, the crimes of conscription and use of child soldiers charged in Count 12 of the Indictment, to the extent that such crimes were found by the Trial Chamber to have been committed after the end of April 1998.

(ii) Continuing conscription and use of child soldiers after April 1998

3.46 The Trial Chamber found that the RUF subjected civilians including persons under the age of 15 to military training (1) in Bayama and Bunumbu, Kailahun District, between 1997 and December 1998 and (2) in Yengema, Kono District, between December 1998 and September 2000.[484]

3.47 Specifically, the Trial Chamber found that in May 1998, 53 children were being trained as SBUs in Bunumbu.[485] It is significant that on or about 9 June 1998, Kallon, Superman and Sesay issued orders that young boys should be trained to become soldiers and handle weapons at Bunumbu.[486] When Bunumbu training base closed in December 1998, the recruiting activities did not end; they were merely transferred to Yengema.[487] Bunumbu training base was located in Kailahun District.[488] By virtue of his responsibilities and his wide travel within Kailahun District in order to visit different areas,[489] Gbao must have been cognisant of this relocation. The Trial Chamber found that "a large number of recruits from Bunumbu in Kailahun District and from Kono District were trained at Yengema."[490]

3.48 The Trial Chamber not only found that children under the age of 15 were trained, but also that they were used in combat activities or related activities in December 1998. During the attack on Koidu Town in December 1998, Sesay was accompanied by his security guards to ensure his safety. The Trial Chamber found that there were children between the ages of 12 and 15 years with him.[491] [redacted]

[redacted]

[redacted]

484 Trial Judgement, para. 1708.
485 Trial Judgement, para. 1635.
486 Trial Judgement, para. 1638.
487 Trial Judgement, paras 1634, 1646-1648.
488 Trial Judgement, para. 1436.
489 Trial Judgement, para. 2035.
490 Trial Judgement, para. 1646.
491 Trial Judgement, paras 1671 and 1735.

[redacted]

3.49 Children under the age of 15 were also used during the 1999 Freetown invasion. Extensive evidence was accepted by the Trial Chamber to that effect. The Trial Chamber considered that "the AFRC forces who invaded Freetown in January 1999 used children under the age of 15 years to actively participate in hostilities", as "armed children under the age of 15 were in the midst of this military operation".[494] The Trial Chamber found as follows: Many children were abducted during the invasion, some as young as ten years old. Gullit gave orders to commanders to train the children between 10 and 12 years old accompanying them to discharge weapons.[495] Three hundred civilians including children were abducted in Kline Town.[496] SBUs around 13 to 16 years of age were seen by witnesses in Calaba Town,[497] and a 14 year old near Ferry Junction.[498] Children were used to commit crimes, such as burning, raping and killing.[499] In Allen Town, child soldiers between the ages of 9 and 11 were used to perform amputations[500] and SBUs between 13 and 15 years old were assigned to guard groups of captured civilians.[501] [redacted] He recognized them from having worked with them before and they told him they had rejoined the RUF to attack Freetown.[502] The Trial Chamber also recalled the evidence presented by TF1-334, TF1-022 and witness George Johnson regarding the policy of abducting civilians, particularly "young girls, young children" during the attack and retreat from Freetown.[503]

3.50 Finally, the Trial Chamber found that in a drive for new recruits in Makeni made on 3 January 1999, citizens were "requested to contribute young men to train for the RUF".[504] Over a thousand youths were registered for training, the majority of which

492 Trial Judgement, paras 1651 and 1713.
493 Trial Judgement, paras 1652 and 1713.
494 Trial Judgement, para. 1715.
495 Trial Judgement, paras 1676 and 1677.
496 Trial Judgement, para. 1676.
497 Trial Judgement, para. 1678.
498 Trial Judgement, para. 1679.
499 Trial Judgement, para. 1681.
500 Trial Judgement, para. 1682.
501 Trial Judgement, para. 1683.
502 Trial Judgement, para. 1680.
503 Trial Judgement, para. 1589.
504 Trial Judgement, para. 1684.

were children ranging from 11 to 15 years.[505] After having received military training, they participated in RUF attacks as well as in looting, burning and killing.[506]

3.51 It is therefore apparent that the pattern of abduction, training and use of children under the age of 15 remained an important feature of conduct within AFRC/RUF forces beyond April 1998, as the need for manpower was still critical for AFRC/RUF operations to succeed. This is clearly shown by the fact that the military training of civilians, including children, was incessant and persisted in Yengema until the end of the disarmament process, long after February 1999.[507]

(iii) Gbao's continuing participation in the JCE after April 1998

3.52 The Prosecution relies on paragraphs 2.168-2.169 and 3.10-3.44 above. The Trial Chamber found that the JCE ended in April 1998 due to a "rift" between the AFRC and RUF. If the JCE continued beyond April 1998, there is no evidence that Gbao ceased to be a participant in it, or that the nature of his role in the JCE changed. It is significant that the period between April 1998 and December 1998 was an intensive recruitment phase during which Gbao retained the same position, assignments and authority in Kailahun as before April 1998.[508] It is submitted that the extent of his contribution to the JCE therefore remained unchanged, and at least never diminished. The findings of the Trial Chamber show that Gbao only left Kailahun in February 1999 when Sesay decided to transfer him to Makeni.[509] The Prosecution submits that the only conclusion reasonably open is that if the JCE continued beyond April 1998, Gbao continued to contribute to the JCE in the same manner he was found to have contributed to it before April 1998.[510]

(iv) Conclusion

3.53 The only reasonable conclusion, in light of the above, is that Gbao was still a participant in the JCE after April 1998 and that it was at the very least foreseeable to

---

505 Trial Judgement, para. 1684.
506 Trial Judgement, para. 1684.
507 Trial Judgement, para. 1646.
508 See Trial Judgement, para. 734: "Sankoh appointed Gbao as the Overall IDU Commander and the OSC for the RUF, and he retained these appointments until after disarmament."; para. 697: "Gbao was OSC from 1996 to 2001 and he remained so throughout the entire Indictment period".
509 Trial Judgement, para. 934.
510 See Trial Judgement, paras 2009-2049 for Bo District, paras 2057-2058 for Kenema District, paras 2104-2105 for Kono District and para. 2164 for Kailahun District.

him, in the period between the end of April 1998 to February 1999, that the crimes of conscription and use of child soldiers would be committed as part of the JCE and in the furtherance thereof. Given the consistent and systematic pattern regarding abductions of children and their subsequent training and active use in hostilities, it was indeed reasonably foreseeable to Gbao that persons under the age of 15: (1) would be trained in Bunumbu from April to December 1998 and then in Yengema from December 1998 onwards; (2) would be used in RUF military attacks such as the ones in Daru, Manowa and Segbwema in Kailahun District and the recapture of Koidu in December 1998; (3) would be used by both factions during the Freetown invasion to perpetrate crimes against civilians or would be captured in view of using them to participate in attacks; (4) would be solicited for enlistment by the RUF forces upon RUF's arrival and control of Makeni. Gbao should therefore be held liable as a participant in a JCE for the conscription and/or use of children under the age of 15 in hostilities, and at the very least under the third form of JCE.

D. Gbao's responsibility for planning and/or aiding and abetting crimes

(i) Introduction

3.54 In addition and in the alternative to the submissions above in respect of Gbao's individual criminal responsibility on the basis of JCE liability, the Prosecution submits that on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any reasonable trier of fact is that Gbao is criminally responsible for his participation in the planning of the conscription system found to have been put in place in Kailahun District from 1996 to December 1998, or for aiding and abetting the crimes of conscription and/or use of child soldiers that were found by the Trial Chamber to have been committed at any time material to the Indictment.

(ii) Planning

(a) RUF organised structure for civilians and screening procedure

3.55 The Trial Chamber held that "it was common practice of the RUF to capture and forcefully enlist civilians to increase their military capability."[511] The findings of the Trial Chamber clearly indicate that the abductions of civilians and their subsequent military training targeted all civilians of all ages, including children as young as 10 years old and even younger.[512] The Trial Chamber found that between 30 November 1996 and 1998 captured civilians forced to engage in military training in Kailahun District included men, women and children.[513] This is also clearly reflected in the composition of the Bunumbu training base, which comprised 5 platoons: Small Boys Unit, Small Girls Unit, Adult Men, Wives and Old Ages.[514] Children from 8 to 15 years of age were assigned by the RUF into SBUs.[515]

3.56 The use of civilians as forced labour, the primary means for the RUF to acquire manpower, was well thought-out, prepared and under strict control. The Trial Chamber found that there was an organised and institutionalised system of enslavement[516] and that Gbao was "directly involved in [its] planning and maintaining."[517] As mentioned above, the Trial Chamber also found that there was an organised system of conscription, which involved military training:

> The Chamber has found that the RUF operated a well-run system of training bases, with the base at Bayama in 1997 being subsequently moved to Bunumbu and then to Yengema. The Chamber notes the evidence that one of the reasons for the move from Bayama to Bunumbu was so that the base would be closer to RUF Headquarters. At these RUF training bases, persons under the age of 15 were assigned into SBUs and undertook an organised training programme. The number of trainees, including SBUs, was reported to RUF High Command. There is documentary evidence of orders from the

---

511 Trial Judgement, para. 1434.

512 Trial Judgement, paras 1617-1618.

513 Trial Judgement, paras 1434 and 1487.

514 Trial Judgement, para. 1635.

515 Trial Judgement, para. 1621 : "On completion of their military training, the young boys were assigned into units known as Small Boys Units ("SBUs"). TF1-199, himself a child soldier, indicated that SBU was the name that the RUF "gave really small boys" and that the rebels told the children "you're small rebel, that's why we should call you an SBU." See also para. 1622: "Small Girls Units ("SGUs"), similar to the SBUs, also existed and their members underwent training."

516 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1251, "Sentencing Judgement", Trial Chamber, 8 April 2009, ("**Sentencing Judgement**"), para. 165 : "We recall that in Kailahun District, enslavement was an institutionalised system in which civilians were screened and enslaved, forced to farm, mine, perform domestic chores, train for combat, work as porters and engage in other forms of forced labour" (emphasis added).

517 Trial Judgement, para. 2167.

> RUF Chief-of-Staff, Bockarie and other RUF Staff Commanders pertaining to the operation of the Camp Lion base at Bunumbu.[518]

3.57 The Trial Chamber clearly considered the enslavement scheme in Kailahun District to include the continuous forced military training of civilians.[519] The system of conscription therefore cannot be seen as isolated from the system of enslavement, as they both fell under a unique structure set up for the handling of all captured civilians, whether men, women or children.

3.58 Findings of the Trial Chamber relating to the structure of the RUF Headquarters in Kailahun describe in detail the process imposed on all civilians, including children, and thereby demonstrate that a regimented "management" of civilians was critical for the efficiency of the movement to attain its goals. The Trial Chamber explained that "Kailahun as the RUF's stronghold, was organised in a more static way, combining a territorial defence capability with an organised rebel administration encompassing military, police and civilian functions."[520] The Trial Chamber found further that "the RUF comprised a number of special units which did not form part of the operational chain of command and did not participate directly in combat but which were *essential to the pursuance of the RUF war effort*".[521] The five General Staff units were structured similarly to those of a conventional army, as follows:

> The G1 was in charge of recruitment and training of fighters. The G2 was responsible for espionage and counter-intelligence, and was later transformed into the Internal Defence Unit ("IDU") and the Intelligence Office ("IO"). The G3 was in charge of general administration. The G4 handled military logistics, such as ammunition, while the S4 was in charge of food supplies. The G5 was concerned with civilian welfare and relations between civilians and the military. By 1999, the G1 had ceased to exist and the *G5* was in charge of recruitment and training.[522]

3.59 This organised structure entailed a screening procedure, which captured civilians had to undergo before being allocated to the different functions or positions within the movement. Only civilians physically able were selected for military training. The Trial Chamber made numerous findings throughout the judgement as to the *modus operandi* and purpose of such a screening as illustrated below.

---

518 Trial Judgement, para. 2224.
519 See for example, Trial Judgement, paras 1414, 1433-1435, 1478, 1487-1488, 1618-1619, 1633-1635.
520 Trial Judgement, para. 650.
521 Trial Judgement, para. 674 (emphasis added).
522 Trial Judgement, para. 675 (emphasis added).

(i) In Kailahun District, enslavement was an institutionalised system in which civilians were screened and enslaved, forced to farm, mine, perform domestic chores, train for combat, work as porters and engage in other forms of forced labour.[523]

(ii) The G5 unit was responsible for all civilians in rebel territory. [...] Civilians who had been captured by the RUF would be taken to free zones and handed over to the G5, who would register and screen them. The G5 would also monitor the welfare of civilians and act as messengers, passing along orders issued by their superiors to the civilians.[524]

(iii) While most civilians were used to find food and perform domestic chores for the RUF, the stronger ones were combat trained to increase the military manpower of the RUF.[525]

(iv) Captured civilians were placed in the custody of the G5 for screening. The purpose of the screening was to identify possible Kamajors, assess the health of the captives and then allocate them to different units, for combat training, forced farming or other forms of forced labour.[526]

(v) At Bayama training base, some recruits were as young as eight or nine years old, while others were older adults who were still fit to fight.[527]

(vi) Following their abduction, children were screened to ascertain their suitability for combat operations. Children who were deemed unfit for combat were obliged to undertake tasks of logistical importance to the AFRC/RUF forces, such as cooking, conducting food foraging missions and carrying loads including weapons, looted property and food.[528]

3.60 [redacted] He was found to be a credible witness by the Trial Chamber, which placed significance reliance on his testimony

523 Sentencing Judgement, para. 165.
524 Trial Judgement, para. 692.
525 Trial Judgement, para. 1260.
526 Trial Judgement, para. 1414.
527 Trial Judgement, para. 1435.
528 Trial Judgement, para. 1618. See also para. 1696.
529 Trial Judgement, para. 1630.
530 [redacted]

regarding his own experiences as a child combatant in order to make factual and legal findings in relation to child soldiers.[531] [redacted] Upon his arrival in Kailahun Town, he was subjected to screening and expressly said that it was decided at the G5 if he was fit for military training or not.[533]

3.61 As shown by the findings of the Trial Chamber, the screening was a necessary and systematic step which assessed and determined the suitability of civilians, including children, for military training. In addition, it was found that civilians underwent an identical procedure through the G5, before being sent to the forced farming within the Agricultural Unit.[534] Thus, the screening process was undoubtedly a well established feature of the structured system to enslave civilians and a prerequisite in order to allocate captured civilians to the most suited task, whether forced farming, forced labour, the carrying of loads and goods, domestic work, or military training.

(b) Gbao's role in the RUF structure in Kailahun District

3.62 The findings of the Trial Chamber referred to above clearly show that the RUF had set up an elaborate system of administration of civilians and their use as manpower. It is noteworthy that organised forced labour was taking place in the very district where Gbao was stationed as a senior RUF Commander for over 3 years. This level of organisation required a high degree of planning and coordination on the part of the senior members of the RUF, including Gbao, who played an important role.

3.63 It was found that Gbao was the Overall Security Commander (OSC) from 1996 to 2001 and that he remained so throughout the Indictment period.[535] As such, he supervised and advised the IDU, IO, MP and G5[536] and received a copy of all of the reports sent by security units, even if there was no obligation to report to him.[537] The Trial Chamber described Gbao's position in Kailahun District as having "a supervisory role" over the G5 and "a considerable influence over the decisions taken

[531] Trial Judgement, paras 580-583.
[532] Trial Judgement, para. 1636.
[533] [redacted]
[534] Trial Judgement para. 1479.
[535] Trial Judgement, para. 697.
[536] Trial Judgement, para. 697.
[537] Trial Judgement, para. 698.

by these bodies."[538] Gbao was found to be working closely with the G5,[539] which he oversaw.[540]

3.64 It is recalled and emphasised that the screening process described above was carried out under the responsibility of the G5 Commanders in Kailahun Town and there is evidence that the screening sometimes took place in Gbao's presence.[541]

3.65 Moreover, the Trial Chamber found that "the entrenched practices of using civilians as forced labour, women as bush wives and children as participants in active hostilities were not only condoned but *were supervised* by senior Commanders and in particular the Commanders of the G5, *presided over by Gbao as OSC*."[542]

[redacted] The Trial Chamber expressly mentioned that "the OSC enjoyed substantial practical authority over the members of the security units" and that "on occasion *Gbao, as OSC, did in fact give orders to members of the security units and, in particular, to the G5.*"[543] The G5 was the very unit managing "the capture and deployment of civilians",[544] an entity "falling under the purview of the OSC",[545] which received civilians before screening them, including children under the age of 15. [redacted]

3.67 Based on the findings of the Trial Chamber, the only conclusion reasonably open is that Gbao did play an important role in the supervision, coordination and monitoring of the recruitment process. It is submitted that no reasonable trier of fact could have found, considering Gbao's broad involvement in the forced labour in Kailahun District, that his oversight functions could fall short of the screening and military

538 See para. 3.37 above and Trial Judgement, para. 2034.
539 Trial Judgement, para. 2037.
540 Trial Judgement, para. 2046.
541 [redacted]
542 Trial Judgement, para. 710 (emphasis added).
543 Trial Jndgement para. 699 (emphasis added).
544 Trial Judgement, para. 2045.
545 Trial Judgement, para. 2045.
546 [redacted]

training of children, which was found to have occurred on a large scale and was considered to be within his area of responsibility.

3.68 In addition, given the large number of civilians captured and brought to Kailahun over a prolonged period of time, discipline was instrumental to guarantee the effeetive accomplishment of the operations. The disciplinary process was found to be a means for the RUF to keep control over its own fighters.[547] It was also eritical in relation to civilians in RUF controlled areas[548] and Gbao's role was essential in order "to compel the obedience of the civilian population in Kailahun District to RUF authority."[549] The Trial Chamber held in particular "that the RUF's disciplinary system was critical to maintaining its operation as a cohesive military organisation, particularly as the force grew with the addition of captured civilians trained as fighters."[550] Discipline was therefore important for captured civilians sent to traiming, in order to intimidate them. The Trial Chamber found that "the importanee of diseipline and obedience of orders issued by superior offieers was instilled in RUF fighters as part of their training and formed a pillar of the RUF military ideology."[551] It was Gbao's role to maintain and enforce discipline, law and order in RUF controlled zones through disciplinary mechanisms.[552] It is thus evident that his responsibilities encompassed securing discipline, obedience and cohesion in RUF territories and ensuring that RUF policies regarding the use of civilians as forced labour were implemented properly, including the continuous and systematic forced recruitment of under-aged children.[553]

(c) Gbao's contribution to the planning of the crime

3.69 The Prosecution takes no issue with the Trial Chamber's articulation of the elements of the mode of liability of planning.[554] It is submitted that to satisfy thc elements of planning, it is sufficient that the accused contributes substantially to the planning of

547 Trial Judgement, para. 706.
548 For instance, tbe RUF had established a system of passes to eontrol civilian movement (Trial Judgement, para. 1416).
549 Trial Judgement, para. 2039.
550 Trial Judgement, para. 706.
551 Trial Judgement, para. 704.
552 Trial Judgement, para. 700. See also paras 704-707.
553 A similar reasoning was used by the Trial Judgement with regard to Gbao's role in forced farming, see para. 2039: "We are also satisfied that Gbao's role in maintaining order in the fighting fnrce as OSS Overall IDU Commander and his involvement in designing, securing and organising the forced labour of civilians to produce foodstuffs significantly contributed to maintaiming the strength and cohesiveness of the RUF fighting foree."
554 Trial Judgement, paras 268-269.

an operation in which it is intended that crimes will be committed. The accused need not plan in detail every aspect of the operation, and therefore need not necessarily plan in detail, or at all, the actual crimes that are committed in the course of the operation. It is submitted that provided that the operation is one that is launched with the purpose, in whole or in part, of committing crimes, an accused who participates substantially in the planning of that operation has participated substantially in the planning of those crimes, and satisfies the *actus reus* of this mode of liability.[555] Given that the planning may be undertaken by one or more persons, it is not necessary that the accused was responsible for all of the planning.[556]

3.70 It is submitted that the different forms of forced labour found to have taken place in Kailahun District were committed pursuant to a plan.[557] The Prosecution submits that the Trial Chamber erred in fact, and/or erred in law in the approach that it took in the evaluation of the evidence in the case, as it did not consider that Gbao's role and conduct in fulfilling that role, as well as his position of authority in Kailahun District contributed to the commission of the crime charged under Count 12. The Appeals Chamber confirmed in the AFRC case that "planning" a crime "implies that one or several persons contemplate designing the commission of a crime *at both the preparatory and execution phases*."[558] Through his position, role and functions, the only conclusion open to any reasonable trier of fact is that Gbao participated in the execution, administration and running of a plan designed to use civilians as forced labour in Kailahun, which included the military training of both adults and children under the age of 15 in order to increase the RUF armed manpower. Gbao therefore substantially contributed to the criminal conduct which occurred.

(d) Gbao's intent

3.71 The Trial Chamber considered that "the *mens rea* requirement for planning an act or omission is satisfied if the Prosecution proves that the accused acted with an intent that a crime provided for in the Statute be committed or with the awareness of the substantial likelihood that the crime would be committed in the execution of that

555 *Kordić and Čerkez* Appeal Judgement, para. 26.

556 *Prosecutor v Bagilishema*, ICTR-95-1A-T, "Judgement" Trial Chamber, 7 June 2001, ("**Bagilishema Trial Judgement**"), para. 30; *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007, as revised pursuant to SCSL-04-16-T-628,Corrigendum to Judgement Filed on 21 June 2007", Trial Chamber, 19 July 2007, ("***AFRC* Trial Judgement**"), para. 765.

557 See for instance Trial Judgement, paras 1478-1479, 2167.

558 *AFRC* Appeal Judgement, para. 301 (emphasis added); See also Trial Judgement, para. 268.

plan".[559] Planning with such awareness has to be regarded as accepting that crime.[560] Based on the totality of the evidence and, particularly, given Gbao's central role in Kailahun District as OSC, as well as his oversight and supervisory functions there, the only conclusion open to any reasonable trier of fact is that he was aware of the substantial likelihood that children under the age of 15 were being screened at the G5 office and subsequently sent for training for military purposes or other tasks within RUF ranks. It is recalled that Gbao was found to be aware of the forced training of civilians.[561] As one of the senior Commanders on the ground and an active partaker in the forced labour of civilians, Gbao could only have been well aware of the inclusion of children under the age of 15 in the forced labour and training system.

3.72 The Trial Chamber emphasised that even if not necessarily all abducted children were trained, the mere fact that they had been abducted and compelled to join RUF ranks was sufficient to constitute conscription.[562] The Trial Chamber specifically held that "the fact that certain abductees were not ultimately subjected to military training is immaterial, as the purpose of the abductions was to ascertain the child's suitability for such training."[563] This finding is particularly relevant to infer Gbao's *mens rea*. As OSC, he must have known that children under the age of 15, together with other older civilians, were going through the screening procedure after having been abducted.

3.73 Finally, it was found that orders were given by Sesay, Kallon and Superman in June 1998 to train young boys to become soldiers at Bunumbu.[564] These orders were visibly put into effect, as the training of civilians, including young boys, continued in Bunumbu until December 1998. No reasonable trier of fact would have reached the conclusion that Gbao was not aware of these orders, given that he was the one person ensuring that they were implemented properly. The same goes for the transfer of the Bunumbu training base to the Yengema training base: a major order emanating from Bockarie and Sesay, of which Gbao must have been cognisant.[565]

3.74 It is therefore submitted that the only conclusion reasonably open is that Gbao participated in the implementation and maintenance of the RUF policy to conscript

---

559 Trial Judgement, para. 268.
560 *Kordić and Čerkez* Appeal Judgement, para. 31.
561 Trial Judgement, para. 2172.
562 Trial Judgement, paras 1695 and 1700: "We therefore find that notwithstanding their ultimate use, these abductees were compulsorily enlisted as members of the RUF or AFRC forces and therefore conscripted."
563 Trial Judgement, para. 1707.
564 Trial Judgement, para. 1638.
565 Trial Judgement, para. 1646. See also para. 3.47 above.

civilians which he knew or had reason to know included children under the age of 15, and that he acted with the intent that the crime be committed or with the reasonable knowledge that the crime would likely be committed in the execution of the plan.

(e) Conclusion

3.75 It is submitted that the only reasonable inference to be drawn from the Trial Chamber's findings and the evidence accepted is that Gbao substantially contributed to the *planning* of the conscription system which was in place in Kailahun District.

(iii) Aiding and abetting

(f) Introduction

3.76 Additionally to *planning* the crimes charged in Count 12 that were found by the Trial Chamber to have been committed in Kailahun District (Sub-section (ii) above), for the reasons given below, it is submitted that Gbao's conduct in Kailahun District also amounted to *aiding and abetting* the crimes charged in Count 12 that were found by the Trial Chamber to have been committed *outside* Kailahun District.

3.77 Alternatively to Sub-section (ii) above and paragraph 3.76 above, for the reasons given below, it is submitted that Gbao's conduct in Kailahun District (referred to in Sub-section (ii) above) also amounted to *aiding and abetting* all of the crimes charged in Count 12 of the Indictment that were found by the Trial Chamber to have been committed both inside and outside Kailahun District.

(g) From 1996-1999

3.78 The Prosecution takes no issue with the Trial Chamber's articulation of the elements of *aiding and abetting*.[566]

3.79 The Prosecution relies on the findings of the Trial Chamber referred to in Sections B and C above, and Sub-section (ii) above of the present Section.

3.80 Particularly, the Prosecution refers to its arguments above regarding Gbao's contribution to planning the execution of the crime and submits that Gbao's role in Kailahun, in particular his monitoring of the G5 Units, amounted to supporting the commission of the crime of conscripting children under the age of 15. Gbao's conduct

[566] Trial Judgement, paras 275-280.

was specifically directed to assist and support the system of forced labour and forced recruitment in place in Kailahun. It is submitted that the only reasonable inference is that Gbao's position, role and actions, in his capacity as OSC in Kailahun District, had a substantial effect on the planning of the crime of conscription and on its continued perpetration, as he was the most senior commander in charge in Kailahun and supervised the activities of all of the security units dealing with civilians. No reasonable trier of fact would have found that Gbao's conduct was so passive as to have resulted in his acquittal.

3.81 Furthermore, it is settled law that "the physical presence at the crime scene of the Accused, combined with his or her position of authority, allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement" that could amount to aiding and abetting.[567] It is submitted that this applies to Gbao, whose position and authority, notably in Kailahun, cannot be disputed. Gbao did not interfere in the massive recruitment of civilians which included persons under the age of 15 being sent to training and then used for military purposes. This can only be seen as a tacit approval and encouragement of the crime. In his role as ideology instructor and later as IDU and OSC Commander, Gbao clearly tolerated a system in which the RUF secured recruits by the forceful capture of civilians. As such, the only reasonable inference is that his conduct amounted to that of an aider and abettor.

3.82 As to Gbao's intent, the *mens rea* requirement for aiding and abetting is the knowledge that the acts performed by the accused assist the commission of the crime by the principal offender.[568] The Trial Chamber stressed that such knowledge may be inferred from all relevant circumstances.[569] It is not necessary for the accused to share the *mens rea* of the principal offender; he must merely be aware of the principal offender's intention.[570]

---

567 Trial Judgement, para. 279 citing *Brdjanin* Appeal Judgement, para. 273; See also *Prosecutor v. Orić*, IT-03-68-A, "Judgement", Appeals Chamber, 3 July 2008, ("***Orić* Appeal Judgement**"), para. 42; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, "Judgement", Appeals Chamber, 1 June 2001, ("***Kayishema and Ruzindana* Appeal Judgement**"), paras 201-202.

568 Trial Judgement, para. 280 citing *Vasiljevic* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 49; *Tadić* Appeal Judgement, para. 229.

569 Trial Judgement, para. 280 citing *Prosecutor v. Limaj et al.*, IT-03-66-T, "Judgement", Trial Chamber, 30 November 2005, ("***Limaj* Trial Judgement**"), para. 518 referring to *Celebici* Trial Judgement, para. 328 and to *Tadić* Trial Judgement, para. 676.

570 Trial Judgement, para. 280 citing *Aleksavski* Appeal Judgement, para. 162 referring to *Prosecutor v. Furundžija*, ICTY IT-95-17/1-T, "Judgement," Trial Chamber, 10 December 1998, ("***Furundžija* Trial Judgement**"), para. 245.

3.83 It is recalled that there was a consistent, continuous and systematic pattern of abductions, training and use of child soldiers,[571] of which Gbao could not have been unaware. In addition, it was found that Gbao knew or ought to have reason to know that civilians were enslaved in order to pursue the common purpose.[572] The Prosecution submits that the only conclusion reasonably open is that Gbao knew or must have known that persons under 15 were also undergoing the same process of being screened and assigned to training. The Trial Chamber noted that "certain crimes were clearly regarded as permissible at all times" and the recruitment and use of children in hostilities is mentioned among these.[573] Gbao had reason to know that children, abdueted from various areas in Kono and Kailahun Districts, were forcibly subjected to military training, whether in Kailahun between 1996 and 1998 or in Kono thereafter, and that those children would then be sent to perform combat related activities or other tasks within RUF ranks, in various locations in Kailahun and Kono Districts where the RUF was military active.

(h) Bombali District, 2000

3.84 The Trial Chamber found that Gbao loaded former child soldiers from the Interim Care Centre ("**ICC**") onto a truck in Makeni in May 2000 and removed them from the ICC.[574]

3.85 The Trial Chamber found in respect of this incident that:

> In early May 2000, after fighting broke out between the RUF and UNAMSIL personnel in Makeni, Caritas and UNICEF officials returned to Makeni to ensure that children were safely reloeated from the Interim Care Centre there. When they reached Makeni on 14 May 2000, they discovered that the number of children residing in the ICC had reduced drastically from 320 to 150. They were told that Gbao and another RUF fighter had loaded the children onto a truck and removed them.[575]

3.86 This incident was found by the Trial Chamber not to constitute "a substantial contribution to the widespread system of child conscription or the consistent pattern of using children to actively participate in hostilities" on the part of Gbao.[576] The Prosecution takes issue with the reasoning of the Trial Chamber, and submits that the

---

571 Trial Judgemeut, paras 1614-1617.
572 Trial Judgement, para. 2108.
573 Trial Judgement, para. 710.
574 Trial Judgement, paras 1690 and 2235.
575 Trial Judgement, para. 1690.
576 Trial Judgement, para. 2235.

Trial Chamber failed to give proper consideration to whether this incident amounted to aiding and abetting the crimes charged in Count 12.

3.87 The Trial Chamber found that in February 1999, Sesay transferred Gbao to Makeni to enforce law and order there. Gbao was a Lieutenant Colonel in Makeni. By May 2000, Gbao was a full Colonel. He retained the assignments of OSC, Chairman of the Joint Security Board, and Chief of the IDU.[577] The Trial Chamber found further that Gbao retained the same responsibilities in relation to the security units in Makeni that he had held in Kailahun District, but that he enjoyed substantially increased authority over RUF fighters.[578] Indeed, the Chamber considered that with Bockarie's departure and Sankoh's return to Sierra Leone, Gbao's authority among the RUF troops was enhanced. The Trial Chamber explained that Gbao and Sankoh were in contact via radio during late 1999 and early 2000 and that Gbao's close personal relationship with Sankoh increased his prominence in the RUF command structure, as a result of which he acquired greater authority in his role and responsibilities.[579] In March 1999, Gbao left for Magburaka but returned to Makeni in October 1999 where he was based at the time of the UNAMSIL attacks in May 2000.[580] It is submitted that Gbao was clearly part of the RUF High Command at that time and possessed influential decision-making power. He was a figure of authority whose actions and decisions were respected.

3.88 Although 2000 was a time of disarmament, the RUF still considered the recruitment and use of child soldiers as acceptable and was clearly engaged in the illegal conduct in Makeni where it was now based. This is evidenced by findings that, in a meeting with UNAMSIL held to discuss RUF impediments to CARITAS attempts to identify abducted child combatants and return them to their families, Sesay expressed concern that his "combatants" were being removed from the territory by Caritas.[581]

3.89 It is notable that the children removed by Gbao had been disarmed and demobilized. In 1996, UNICEF established Interim Care Centres in various locations throughout Sierra Leone in order to house former child fighters prior to reunification with their families. One such Centre was in Makeni.[582] It was Gbao who in February 2000

---

577 Trial Judgement, para. 934.
578 Trial Judgement, para. 936.
579 Trial Judgement, para. 939.
580 Trial Judgement, para. 935.
581 Trial Judgement, para. 1686.
582 Trial Judgement, para. 1625; [redacted], Transcript 21 March 2006, p. 40.

granted permission on behalf of the RUF High Command, for the re-opening of the ICC in Makeni.[583] Exhibit 86 is Gbao's letter granting the permission.

3.90 The exaet age of the children who had been removed is unknown. However, the Trial Chamber held that "between 1998 and 2002, the majority of the "separated" children (child soldiers, unaccompanied children and children suffering from war-related stress) in ICCs were between the ages of 12 and 16, the mean average being approximately 14 years of age in most Centres."[584] Given the consistent pattern of recruitment of children under 15 years old, it is submitted that the only reasonable inference is that some of the 170 children removed from the Center were under the age of 15.

3.91 The Prosecution submits that on the Trial Chamber's own findings and on the evidence before it, the only reasonable conclusion open to the Trial Chamber was that the children that Gbao had taken from the ICC in Makeni were subsequently used in combat for the RUF.

[redacted]

3.93 The Trial Chamber found that between 3 and 4 May, ZAMBATT contingents were attacked by the RUF on the road going to Lunsar and then at Lunsar.[588] Particularly, the Trial Chamber found that the RUF had set up roadblocks along the Makeni road, with the nearest one 12 kilometres away from Lunsar.[589] It was found that in May 2000, the RUF used children, some as young as ten years of age, armed with light weapons, rocket launchers and grenades, to mount an ambush against UNAMSIL

583 [redacted], Transcript 21 March 2006, p. 40.
584 Trial Judgement, para. 1626.
[redacted]
588 Trial Judgement, paras 1831-1838 and 1843.
589 Trial Judgement, para. 1832.

peacekeepers *on the road from Lunsar to Makeni*.[590] The Trial Chamber also established that UNAMSIL peacekeepers were attacked [by the RUF] in Lunsar on 4 May 2000.[591] The RUF staged a dawn attack on the ZAMBATT group of UNAMSIL peacekeepers who attempted to repel the attack but the RUF captured their position and the ZAMBATT peacekeepers were forced to retreat.[592]

3.94 Based on the findings of the Trial Chamber and the evidence before it, it is therefore it is submitted that the only reasonable inference is that amongst the RUF fighters deployed in the Lunsar area, some were children taken from the ICC by Gbao. The only inference to be drawn and the only reasonable conclusion open to the Trial Chamber was that the children that Gbao had taken from the ICC in Makeni were then used in combat by the RUF during their attack on the ZAMBATT contingent of peaeekeepers in Lunsar.

3.95 "Using" children to "partieipate actively in the hostilities" encompasses putting their lives directly at risk in combat.[593] In the present ease, the Trial Chamber also adopted this approach in determining whether certain conduct amounted to "active participation".[594] The Trial Chamber specifically found that the use of children under 15 years old in attacks against UNAMSIL constituted active participation in hostilities, as "the RUF considered UNAMSIL to be an enemy force and considered that ambushing and abducting UNAMSIL personnel directly supported the RUF war efforts".[595] By using children in such attacks, the RUF put them at direct risk in combat. The Prosecution submits that by removing former child soldiers from their shelter in the context of a an armed conflict, Gbao put those children at sufficient risk to constitute aiding and abetting their illegal use in hostilities, given that some of these children were later used to participate in attacks against UNAMSIL peacekeepers in the Lunsar area. Given the particular timeframe of the attack in Lunsar [redacted] it is submitted that Gbao had the intention that these children be used in hostilities.

---

590 Trial Judgement, para. 1714 (emphasis added).
591 Trial Judgement, para. 2238 (v).
592 Trial Judgement, para. 1843.
593 *AFRC* Trial Judgement, para. 736.
594 See Trial Judgement, para. 1727: "The Chamber is of the view that due to the high risk of enemy attacks, armed childreu that had been previously trained for combat situations that were used to guard the mines were iu direct danger of being caught in hostilities".
595 Trial Chamber Judgement, para. 1714.

3.96 The Prosecution submits that the only conclusion open to a reasonable trier of fact, based on the foregoing, is that Gbao's conduct at the ICC clearly facilitated and assisted in the commission of the crime of use of child soldiers. Given his position of enhanced authority, it is submitted that Gbao aided and abetted the re-recruitment and use of the children removed from the ICC in Makeni, some of whom were under the age of 15.

E. Conclusion

3.97 For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's acquittal of Gbao on Count 12 of the Indictment and to substitute a conviction, and to revise the Trial Judgement by adding further findings:

(i) that Gbao is individually responsible under Article 6(1) of the Statute for committing, as a participant in a joint criminal enterprise, the crime of conscription and use of child soldiers referred to in paragraphs 1708 and 1747 of the Trial Judgement, to the extent that such crimes were committed up to the end of April 1998; and

(ii) if the Prosecution's First Ground of Appeal is allowed by the Appeals Chamber, that Gbao is individually responsible under Article 6(1) of the Statute for committing, as a participant in a joint criminal enterprise, the crime of conscription and use of child soldiers referred to in paragraphs 1708 and 1747 of the Trial Judgement, to the extent that such crimes were committed beyond the end of April 1998;

(iii) in the alternative to (i) and (ii) above, that Gbao was individually responsible under Article 6(1) for the crimes of conscription and/or use of child soldiers referred to in paragraphs 1708 and 1747 of the Trial Judgement, on the basis that he planned such crimes as were committed in Kailahun District and aided and abetted such crimes that were committed outside Kailahun District, or alternatively, on the basis that he aided and abetted all such crimes.

3.98 The Prosecution also requests the Appeals Chamber to make any resulting amendments to the disposition provisions of the Trial Judgement, and to increase Gbao's sentence to reflect the additional criminal liability.

4. Prosecution's Third Ground of Appeal: Acquittals of Sesay, Kallon and Gbao on Count 18

A. Introduction

4.1 The Trial Chamber acquitted Sesay, Kallon and Gbao on Count 18 (taking of hostages, a violation of Common Article 3 of the Geneva Conventions and Additional Protocol II, punishable under Article 3(c) of the Statute).

4.2 This Count was one of four counts (Counts 15-18) which related to attacks on UNAMSIL personnel.

4.3 The Trial Chamber found that numerous attacks had been directed against UNAMSIL personnel by RUF fighters.[596]

4.4 The Trial Chamber found that 14 of these attacks satisfied the elements of Count 15 (intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, an other serious violation of international humanitarian law punishable under Article 14(b) of the Statute).[597]

4.5 The Trial Chamber further found that the killing of four UNAMSIL peacekeepers by RUF fighters satisfied the elements of Count 17 (violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute).[598]

4.6 The Trial Chamber also found that it was proven beyond reasonable doubt that RUF fighters seized hundreds of UNAMSIL peacekeepers in 8 attacks and detained them, and that there was evidence that RUF fighters had threatened to kill, injure or detain them.[599]

4.7 However, the Trial Chamber found that this conduct did not satisfy the elements of Count 18 because the Prosecution had failed to prove what the Trial Chamber considered to be an essential element of the crime of hostage-taking, namely, the use of a threat against the detainees so as to obtain a concession or gain an advantage.[600] The Trial Chamber also found that the RUF did not abduct the peacekeepers in order

[596] The Trial Chamber's findings in this respect are found in the Trial Judgement, paras 1749-1883.
[597] The Trial Chamber's findings in this respect are found in Trial Judgement, especially para. 1944.
[598] The Trial Chamber's findings in this respect are found in Trial Judgement, especially paras 1958-1960.
[599] The Trial Chamber's findings in this respect are found in Trial Judgement, especially paras 1962-1963.
[600] Trial Judgement, para. 1969.

to utilize their detention as leverage for the release of Foday Sankoh ("**Sankoh**"),[601] and that the Prosecution had not established that the RUF detained the peacekeepers with the intention of compelling the Government of Sierra Leone and the UN to halt the disarmament process or to continue it according to conditions set by them.[602] Accordingly, the Trial Chamber found that Count 18 had not been established beyond reasonable doubt[603] and all three Accused were acquitted on this Count.[604]

4.8 In this Third Ground of Appeal, the Prosecution contends that the Trial Chamber erred in law in finding, at paragraph 1964 of the Trial Judgement, that "[T]he offence of hostage-taking requires the threat to be communicated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives". The Prosecution contends that communication of a threat to a third party is not a legal element of the crime of hostage-taking. The Prosecution contends that this error led the Trial Chamber, at paragraphs 1965 to 1969 of the Trial Judgement, to find that the Prosecution had failed to prove an essential element of the crime of hostage-taking. (See Section B below.)

4.9 Additionally and alternatively, the Prosecution contends that the Trial Chamber erred in finding, at paragraph 1965 of the Trial Judgement, that "[T]here is ... no evidence of any conduct on the part of the RUF which could be construed as implicitly threatening to a third party that the peacekeepers would be harmed or communicating an implicit condition for their safety or release". The Prosecution submits that, on the basis of the findings of the Trial Chamber and the evidence before it, the only conclusion open to any reasonable trier of fact is that the RUF in general and the Accused in particular intended to compel third parties and that this intent can be implied from their acts and behaviour prior to and during the attacks. The Prosecution submits that on the findings of the Trial Chamber in this case, all of the elements of Count 18 were satisfied. (See Section C below.)

4.10 The Prosecution further contends that on the basis of the Trial Chamber's findings and the evidence in the case, the only conclusion open to any reasonable trier of fact is that the three Accused were each individually criminally responsible on that Count. (See Section D below.)

---

601 Trial Judgement, paras 1966-1967.
602 Trial Judgement, para. 1968.
603 Trial Judgement, para. 1969.
604 Trial Judgement, Disposition.

4.11 The Prosecution further contends that the Accused can be convicted cumulatively on Count 18, in addition to Count 15. (See Section E below.)

4.12 The remedy sought by the Prosecution in respect of this Ground of Appeal is set out in Sections F and G below.

B. The Trial Chamber's erroneous finding of an additional legal element

(i) Introduction

4.13 Count 18 charged the Accused with "taking of hostages", a violation of Common Article 3 of the Geneva Conventions and Additional Protocol II, punishable under Article 3(c) of the Statute.

4.14 The first paragraph of Common Article 3 to the Geneva Conventions relevantly states:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> ...
>
> (b) taking of hostages;
>
> ...

4.15 Article 4 of Additional Protocol II to the Geneva Conventions relevantly states:

> 1. All 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, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
>
> 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

...

(c) taking of hostages;

...

4.16 The Trial Chamber found that the chapeau elements (general requirements) for common Article 3 of the Geneva Conventions and for Additional Protoeol II were established in this case.[605]

4.17 The Trial Chamber also found that in the circumstances of the present case, UNAMSIL personnel were not taking a direct part in hostilities against the RUF at the time of the attacks against them, that they were in the circumstances entitled to the protection guaranteed to civilians under the international law of armed conflict, and that RUF fighters who staged the attacks knew or had reason to know that the UNAMSIL personnel were not engaged in hostilities at the time.[606] The Prosecution relies on these findings.

4.18 At paragraph 240 of the Trial Judgement, the Trial Chamber further found that in addition to these chapeau elements (general requirements), the specific elements for the offence of hostage-taking as charged in Count 18 are as follows:

(i) The Accused seized, detained, or otherwise held hostage one or more persons;

(ii) The Accused threatened to kill, injure or continue to detain such person(s); and

(iii) The Accused intended to compel a State, an international organisation, 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(s).

The Prosecution takes no issue with this articulation of the elements of the crime.

4.19 The Trial Chamber found that the first and second of these elements were satisfied in the present case.[607]

4.20 However, as to the third of these elements, in paragraph 1964 of the Trial Judgement, the Trial Chamber found, as a matter of law, that "[T]he offence of hostage-taking requires the threat to be communicated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives". At paragraph 1969 of the Trial Judgement, the Trial Chamber again found, as a matter of law, that an essential element of the crime of hostage-taking is

[605] Trial Judgement, paras 964-988.
[606] Trial Judgement, paras 1937-1943, 1959.
[607] Trial Judgement, paras 1962 and 1963.

"the use of a threat against the detainee so as to obtain a concession or gain an advantage". In paragraph 1965 of the Trial Judgement, the Trial Chamber further found, as a matter of fact, that "[T]here is no evidence that the RUF stated to the Government of Sierra Leone, the UN or any other organisation, individual or group of individuals that the safety or release of the peacekeepers was contingent on a particular action or abstention."[608] In the following sentence of that paragraph, the Trial Chamber went on to state that there was similarly "no evidenee of any conduct on the part of the RUF" which could be construed as *implicitly* communicating such a threat to a third party.[609]

4.21 The Prosecution submits that the Trial Chamber thereby introduced an additional element into the offcnce of hostage-taking, and that it erred in law in so doing. The third element in the statement of elements referred to in paragraph 4.18 above requires that the accused had the *intent* of compelling a third party to act or refrain from acting as a condition for the safety or release of the captives. However, as a matter of law, contrary to what the Trial Chamber found, there is no further legal requirement that the threat must have been *communicated to* the third party in question.

4.22 For the reasons given below, the Prosecution submits that the Trial Chamber erred in law in finding that the crime of hostage-taking has this additional legal element requiring that a threat must have *been communicated* to the third party in question.

(ii) Argument

4.23 The effect of the Trial Chamber's finding of this additional legal element is as follows. Suppose that the accused detains a person (the victim), and threatens to continue to detain the victim. Suppose that the intention of the accused in so doing is to seek to compel a third party to act in a certain way as a condition for the safety or the release of the victim. Suppose, however, that before any threat is communicated to the third party, or before the third party becomes aware that the victim has been detained, the victim is released (for instance, because the accused has a change of plans or circumstances), or the vietim escapes. On a plain reading of the elements referred to in paragraph 4.18 above, the accused becomes guilty of the crime of hostage-taking from the time that the victim is first detained, and in the situation

608 Trial Judgement, para. 1965.
609 Trial Judgement, para. 1965.

described, the accused is guilty of this crime. On the view taken by the Trial Chamber in this case, the accused only becomes guilty of the crime of hostage-taking once a threat is (expressly or impliedly) communicated to the third party, and in the situation described, the accused is not guilty of the crime.

4.24 The Prosecution submits that it is self-evident that the purposes of international humanitarian law in prohibiting hostage-taking would be defeated if the situation described above did not fall within the scope of the crime of hostage-taking.

4.25 The Trial Chamber noted that the prohibition against hostage-taking is recognised in common Article 3 to the Geneva Conventions, and is identified as a grave breach under Articles 34 and 147 of Geneva Convention IV, and as a fundamental guarantee for civilians and persons *hors de combat* in Article 75(2)(c) of Additional Protocol I and Article 4(2)(c) of Additional Protocol II.[610] The relevant parts of common Article 3 and Additional Protocol II are quoted in paragraphs 4.14 and 4.15 above. These provisions merely refer to "the taking of hostages", without elaborating on what is meant by that concept. The same is true of the other provisions referred to by the Trial Chamber.[611] Nothing in these provisions suggest that the actual communication of a threat to the third party is a necessary element of the concept of hostage-taking.

4.26 The Trial Chamber also noted that the offence of hostage-taking is included in the Statutes of the ICTY, the ICTR and the International Criminal Court ("**ICC**").[612] These provisions similarly merely refer to "the taking of hostages", without elaborating on the meaning of that concept.[613] However, in the case of the ICC, elements of the crime are articulated in the ICC Elements of Crimes.[614] In the ICC Elements of Crimes, the elements of the crime of hostage-taking under Article 8(2)(c)(iii) of the ICC Statute are:

---

610 See Trial Judgement, para. 237.

611 Geneva Convention IV, Article 34: "The taking of hostages is prohibited". Geneva Convention IV, Article 147: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: ... taking of hostages ...". Additional Protocol I, Article 75(2): "The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: ... (c) the taking of hostages".

612 See Trial Judgement, para. 237.

613 ICTY Statute, Article 2(h), gives the ICTY jurisdiction over the grave breach of the Geneva Conventions of "taking civilians as hostages". ICTR Statute, Article 4(c), gives the ICTR jurisdiction over the crime of "taking of hostages" as a violation of common Article 3 and Additional Protocol II. Under the ICC Statute, the ICC has jurisdiction over the crime of "taking of hostages" both as grave breach of the Geneva Conventions (Article 8(2)(a)(viii)) and as serious violation of common Article 3 (Article 8(2)(c)(iii)).

614 International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 8 (2) (c) (iii) of the ICC Statute ("ICC Elements of Crimes").

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. 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.

4.27 It can be seen that the elements of the crime of hostage-taking under customary international law as articulated by the Trial Chamber (see paragraph 4.18 above) are materially identical to the ICC Elements of Crimes. The same articulation of these elements of hostage-taking is found in the Trial Chamber's Rule 98 Decision rendered in this case on 25 October 2006 where it cited almost *ad verbatim* the third element of the war crime of taking hostages as it stands in the ICC Elements of Crimes.[615] The Prosecution takes no issue with the Trial Chamber's conclusion that the elements of the crime of hostage-taking under customary international law are materially identical to the elements as stated in the ICC Elements of Crimes. There is no requirement in the ICC Elements of Crimes that the threat must have been communicated, expressly or impliedly, to the third party that the perpetrator seeks to compel to act or refrain from acting.

4.28 The Triffterer Commentary explains that the elements of the crime of hostage-taking were largely taken from the definition in the Convention Against the Taking of Hostages (the "Hostage Convention"),[616] but that since the Hostage Convention is not an international humanitarian law treaty and was drafted in a different legal context, the elements were adapted slightly to the context of the law of armed conflict.[617] The notable change was the inclusion of the words "safety" in the phrase, "explicit or implicit condition for the safety or the release of such person or persons".[618] That

---

615 *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Oral Decision on RUF Motions for Judgement of Acquittal Pursuant to Rule 98, Trial Chamber, 25 October 2006, Transcript, 25 October 2006, p. 38 (lines 18-24 and 27-29); p. 39 (lines 1-2).

616 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, accession by Sierra Leone on 26 September 2003 (http://treaties.un.org).

617 O. Triffterer, *Commentary on the Rome Statute of the ICC*, 2nd Ed, Verlag C. H. Beck, 2008, p. 321.

618 *Ibid.*

Commentary notes that the elements are largely in line with the jurisprudence of the ICTY although this jurisprudence is "less specific".[619]

4.29 Dörmann underlines in his commentary that this third element is a "specific mental element"[620] and points out that "[t]here seems to be no specific case law on the mental element of this crime to date."[621]

4.30 Article 1(1) of the Hostage Convention, states:

> 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.

4.31 A commentary on the Hostage Convention prepared by Joseph J. Lambert[622] ("**Lambert Commentary**") notes that Article 1(1) of that Convention lists the acts necessary for the commission of the crime of hostage-taking as follows (1) the seizure or detention of a hostage and (2) a threat to kill, injure or continue the detention. These acts must be committed in order to compel a third party to behave in a certain way.[623] With regard to this latter element, this commentary states:

> [...] the motivation to compel a third party is an indispensable element of the offence. Thus, for example, an abduction, coupled with a threat to kill, is not enough to trigger the mechanisms of the Convention if there is no element of compulsion involved. ***However, the words "in order to compel" seem to relate to the motivation of the hostage-taker, rather than to any physical acts which he might take. Thus, while the seizure and threat will usually be accompanied or followed by a demand that a third party act in a certain way, there is no actual requirement that a demand be uttered. Thus, if there is a detention and threat, yet no demands, there will still be a hostage-taking if the offender is seeking to compel a third party.***[624]

---

619 *Ibid.*

620 K. Dörmann *et al*, Elements of war crimes under the Rome Statute of the International Criminal Court: sources and commentary, Cambridge University Press, 2003, p. 125.

621 *Ibid.* p. 127.

622 J. J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979*, Cambridge University Press, 1990.

623 *Ibid.*, p. 79.

624 *Ibid.*, p. 85 (emphasis added). Interestingly, the author notes in footnote 30 to this paragraph, that "... it might be noted that many kidnappings and hostage –takings do not involve any demands. One author notes that 54 out of 146 kidnappings and seizures in Western Europe between 1970 and 1982 did not result in demands upon a third party."

4.32 The author notes further that the compulsion must be directed towards a third party[625] and that the goal of the hostage-taker may either be to compel a third party to take some positive action or to refrain from some activity.[626]

4.33 The conclusion in this commentary on this issue was affirmed by the United States Court of Appeals, DC Circuit, in *Simpson v. Libya*, 470 F.3d 356 (2006) ("*Simpson*"),[627] a case which concerned the hostage-taking exception in the US Foreign Sovereign Immunities Act (FSIA). Section 1605(e)(2) of the FSIA defines "hostage-taking" as having the same meaning as in Article I of the Hostage Convention.[628] The court in that case said:

> The plain text of the FSIA definition, explanatory commentary on the [Hostage] Convention, and precedent under the Federal Hostage Taking Act ("FHTA"), 18 U.S.C. § 1203, which defines the behavior proscribed in terms identical to the Convention, all reflect that a plaintiff need not allege that the hostage taker had communicated its intended purpose to the outside world. Consistent with the plain text, ... the intentionality requirement focuse[s] on the *mens rea* of the hostage taker. ... "demands" are not required to establish the element of hostage-taking: "The words 'in order to compel' do not require more than a motivation on the part of the offender." (... [citing Lambert Commentary, at 306]. Case law under the FHTA reflects the same analysis. Where air hijackers prosecuted under the FHTA told their hostages of their intended purpose, evidence that a third party was aware of that purpose was not an essential element for conviction. *United States v. Yunis*, 924 F.2d 1086, 1089-90, 1096-97 (D.C.Cir. 1991); *cf. United States v. Crosby*, 713 F.2d 1066, 1070-71, 1079 (D.C.Cir.1983) (regarding 18 U.S.C. § 1201(a)(2)). Libya's assertion that these cases are inapplicable because they involve private actors who, unlike a sovereign, have no authority to detain foreigners misses the point. The text of the Terrorism Exception and the commentary make clear that plaintiffs need not demonstrate that a third party was aware of the hostage-taking.
>
> It suffices, then, for a plaintiff bringing suit under the FSIA Terrorism Exception to allege a *quid pro quo* as the hostage-taker's intended result from the detention at issue. ... [T]he law requires no further showing with respect to third-party awareness of the defendant's hostage-taking intent.[629]
> ...

4.34 The Prosecution therefore submits that it is not a requirement of the crime of hostage-taking as charged in Count 18 of the Indictment in this case that any threat was communicated (expressly or impliedly) to a third party. It is sufficient that the perpetrator had the *intent* to compel a third party to act or refrain from acting. In other

---

625 *Ibid.*, p. 85.
626 *Ibid.*, p. 87.
627 Available at http://cases.justia.com/us-court-of-appeals/F3/470/356/635236/.
628 *Simpson*, para. 7.
629 *Simpson*, paras 15-16.

words, these words do not impose a requirement that a threat actually be communicated to any particular third party.

4.35 The Trial Chamber relied on only a single authority in support of the proposition that there is a requirement of the communication of a threat to a third party. This was a statement by the ICTY Appeals Chamber in the *Blaškić* case,[630] quoted in paragraph 242 of the Trial 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 [...]."[631]

4.36 It is submitted that this statement must be viewed in its proper context, having regard to what had previously been said in the *Blaškić* Trial Judgement and *Kordić and Čerkez* Trial Judgement.

4.37 In the *Blaškić* Trial Judgement, the Trial Chamber found that in order to prove the crime of hostage-taking as a grave breach of the Geneva Conventions, "the Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated ***in order to*** obtain a concession or gain an advantage."[632] The Trial Chamber in that case added that "Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term 'hostage' must be understood in the broadest sense".[633] The Trial Chamber went on to say that:

> The definition of hostages [under common Article 3] must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the [ICTY] Statute, that is - persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking.[634]

The Trial Chamber in this case did not expressly consider the question whether communication of a threat to a third party is a legal requirement. The words "must have been used" in the last sentence of this quote might be taken to suggest that not only must a threat have actually been issued, but the threat must have actually

---

630 *Blaškić* Appeal Judgement, para. 639.

631 Trial Judgement, para. 242 (emphasis added).

632 *Blaškić* Trial Judgement, para. 158 (emphasis added).

633 *Blaškić* Trial Judgement, para. 187, citing the ICRC Commentary as follows: "... hostages are natiouals of a belligerent State who of their nwn free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces"..

634 *Blaškić* Trial Judgement, para. 187.

succeeded in securing the desired advantage to the perpetrator. The Prosecution submits that this cannot be a reasonable interpretation. The Prosecution submits that in the last sentence of this quote, the Trial Chamber is merely referring to a matter not in contention between the parties, and that this sentence is therefore not a considered judicial opinion on the specific issue of whether or not communication of a threat to a third party is required.

4.38 In the *Kordić and Čerkez* Trial Judgement, the Trial Chamber began its discussion of hostage-taking as a grave breach of the Geneva Conventions by quoting the following passage from the ICRC Commentary on Geneva Convention IV:

> *The taking of hostages*: Hostages might be considered as persons illegally deprived of their liberty, a crime which most penal codes take cognizance of and punish. However, there is an additional feature, i.e. the threat either to prolong the hostage's detention or to put him to death. The taking of hostages should therefore be treated as a special offence. Certainly, the most serious crime would be to execute hostages which, as we have seen, constitutes wilful killing. However, the fact of taking hostages, by its arbitrary character, especially when accompanied by a threat of death, is in itself a very serious crime; it causes in the hostage and among his family a mortal anguish which nothing can justify.[635]

4.39 The Trial Chamber then went on to observe that "It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement".[636] The Trial Chamber then stated:

> The additional element that must be proved to establish the crime of unlawfully taking civilians hostage is the issuance of a conditional threat in respect of the physical and mental wellbeing of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a "threat either to prolong the hostage's detention or to put him to death". In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition. The Trial Chamber in the *Blaškić* case phrased it in these terms: "The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage."[637]
>
> Consequently, the Chamber finds that an individual commits the offence of taking civilians as hostages when he threatens to subject civilians, who are

---

635 ICRC Commentary to Art. 147 of the Fourth Geneva Convention, pp. 600–601, quoted in *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, "Judgement", Trial Chamber, 26 February 2001, ("***Kordić and Čerkez* Trial Judgement**"), para. 311.

636 *Kordić and Čerkez* Trial Judgement, para. 312.

637 *Kordić and Čerkez* Trial Judgement, para. 313. (footnotes and emphasis omitted).

> unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition.[638]

4.40 The *Kordić and Čerkez* Trial Judgement does not expressly say that there is any legal requirement of communication of a threat to a third party, and the Trial Chamber did not even consider this specific question. It is submitted that in the quote above, the words "so as to" and "in order to" must be understood as referring to the intent of the perpetrator (that is, the *mens rea*), rather than the conduct of the perpetrator (the *actus reus*). So understood, the quote above does not say that the perpetrator must have obtained a concession or gained an advantage, but only that the perpetrator must have acted with the *intent* of obtaining a concession or gaining an advantage. So understood, the quote does not say that the perpetrator must have compelled a third party to do anything, but must have acted with the *intent* of so compelling a third party. So understood, the quote above does not indicate that actual communication of any threat to a third party is an "essential element" of the crime.

4.41 Subsequently, in the *Blaškić* Appeal Judgement, the ICTY Appeals Chamber made reference to the paragraphs of the *Kordić and Čerkez* Trial Judgement quoted above, and concluded as follows:

> The Appeals Chamber agrees 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 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.[639]

4.42 Again, the ICTY Appeals Chamber in that case did not consider the specific question of whether threats must be communicated to a third party, and the above quote does not on a plain reading necessarily assume this to be the case. It is submitted that in referring to the "essential element" in the crime of hostage-taking as being the "use of a threat", the Appeals Chamber must be understood as referring to the intent of the perpetrator, rather than to the actual communication of any specific threat to a third party. As is apparent from the quote from the ICRC Commentary above, hostage-taking is a crime of unlawful confinement, which has a unique aggravating characteristic, namely the purpose for which the victim is confined. It is submitted

---

638 *Kordić and Čerkez* Trial Judgement, para. 314.
639 *Blaškić* Appeal Judgement, para. 639.

that in none of the authorities is there any suggestion that the unique characteristic of hostage-taking is the actual communication of a specific threat to third parties.

4.43 Furthermore, in the *Blaškić* case and *Kordić and Čerkez*, specific threats to third parties had been made, so that it was immaterial to those cases whether or not this was a legal requirement. The question of whether or not there was such a legal requirement was not an issue in those cases. To the extent that passages in those cases might be taken to suggest that there is such a legal requirement, they are *per incuriam* and *obiter dicta*.[640] The recent decision on preliminary motions challenging jurisdiction in the case *Prosecutor v Radovan Karadžić* takes matters no further. The Trial Chamber in that case merely referred to the *Blaškić* and *Kordić and Čerkez* jurisprudence and found "relying on the Blaskic Trial Judgement, that the elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostage as described by Article 2 (h), namely that they are persons "unlawfully deprived of their freedom, often wantonly and sometimes under threat of death," and taken hostage in order to "obtain, some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking."[641]

4.44 Other commentaries support the conclusion that hostage-taking is a crime of unlawful confinement that is characterized by the specific *intent of the perpetrator*, rather than by the actual making of threats to a third party. The Lee Commentary states that the third element of the crime in the ICC Elements of Crimes (see paragraph 4.26 above)

---

640 *Blaškić* Trial Jndgement, paras 701, 706, 708. See also *Blaškić* Appeal Judgement para. 641: "In convictiog the Appellant of hostage-taking, the Trial Chamber relied on the testimony of Witness Mujezinovic. Witness Mujezinovic testified at trial that, on 19 April 1993, he was taken to a meeting with Čerkez, the Commander of the Vitez Brigade. At that meeting, Witness Mnjezinovic was instructed by Čerkez to contact ABiH commanders and Bosnian leaders, and to tell them that the ABiH was to halt its offensive combat operations on thc town of Vitez, failing which the 2,223 Muslims detainees in Vitez (cxpressly including women and children) would all be killed. Witness Mujezinovic was further instructed to appear in a television broadcast to repeat that threat, and to tell the Muslims of Stari Vitez to surrender their weapons. Thc thrcats were repeated the following morning." (footnotes omitted) Sce also: *Kordić and Čerkez* Trial Judgement, para. 784(a).

641 *Prosecutor v Radovan Karadžić*, IT-95-5/18-I, Trial Chamber Decision on six preliminary mntions challenging jurisdiction, 28 Apr 2009, para. 64, referring to *Blaškić* Appeal Judgement, paras. 638-639. The part of the decision that relates to the hostage-taking count is under appcal. See *Prosecutor v Karadžić*, IT-95-05/18-AR73.4, "Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction", 13 May 2009 and "Prosecution responsc to 'Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction', 25 May 2009 (available on ICTY court records at http://www.icty.org/).

defines a specific intent requirement. It defines an "ulterior motive behind the material elements" laid down in the first and second elements.[642]

4.45 In a similar vein, it has been observed that:

> ... the mental element requires, as a specific subjective criterion, purpose on the part of the perpetrator to coerce a state, international organization, natural or legal person or group of people to act or fail to act in a certain way as an express or implicit condition for the safety, continued bodily integrity, or release of the victims. Thus the perpetrator must expect to obtain a concession or gain an advantage in this way. This special subjective criterion arises not from the text of the Statute itself, but from the Elements of Crimes, which in turn follow Article 1(1) of the [Hostage Convention].[643]

4.46 More generally, it has been noted that: "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."[644]

4.47 Furthermore, numerous examples exist of national legislation establishing crimes of hostage-taking as a matter of national law, as well as national legislation implementing the ICC Statute, as well as national case law, which do not require explicit communication of the threat as an element of the crime of hostage-taking. Examples are set out in Appendix B to this Appeal Brief. References below to the law of a particular country are to the examples from that country contained in Annex B.

4.48 Some countries have legislation containing wording similar to the ICC Elements of Crimes, using the term "with intent to compel". Such countries include Angola, Australia, India, New Zealand, Serbia, and Ukraine. Others use terms such as "in order to compel", "with the aim to compel", "with the purpose to compel", "to compel" or similar wording. Such countries include Argentina, Austria, Bolivia, Costa Rica, El Salvador, Finland, Germany, Ireland, Mexico, Pakistan, Poland, Russia, South Africa, UK and Venezuela.

4.49 French-influenced legislation contains a rather broad definition of hostage-taking. According to Article 224-4 of the French Criminal Code (Code Pénal),[645] for instance, taking a person as a hostage can serve different purposes, such as to "prepare or

---

642 R. S. Lee (Ed), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational: 2001, p. 139.

643 G. Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, 2005, pp. 326-327 (emphasis added).

644 J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. I, Rules*, Cambridge University Press, 2005, p. 336.

645 Penal Code of France (Code pénal de la France, Version consolidée au 1 avril 2009.)

facilitate the commission of a felony or a misdemeanour, or to assist in the escape of or to ensure the impunity of the perpetrator or the accomplice to a felony or a misdemeanour, or to secure the enforcement of an order or a condition, in particular the payment of a ransom..."[646] Other French speaking countries, such as Belgium, Luxembourg and Sénégal use similar wording.

4.50 In Germany, § 239b of the Criminal Code (*Strafgesetzbuch* (StGB)) dealing with the crime of hostage-taking (*Geiselnahme*) states expressly that it is sufficient that the threat to kill, severely injure or to detain the victim for more than a week is communicated *either to the victim* or to a third party; communication of the threat alone to the victim thus being sufficient.[647] The case law regarding § 239b of the StGB is also very clear that communication to a third party is not an element of the crime.[648]

4.51 In Switzerland, under Article 185 of the Criminal Code (*Strafgesetzbuch* (StGB)) dealing with the crime of hostage-taking (*Geiselnahme*),[649] the *actus reus* is fulfilled when the perpetrator deprives a person of his/her liberty, abducts or captures the victim.[650] The *intent* element (intent to coerce a third person to act, abstain from acting or tolerate something) is a purely subjective element.[651] The intent need not

---

646 The French original text is attached to this brief in Appendix C, the translation of the full article is provided for in Appendix B of this brief.

647 This provision states: "Whoever abducts or seizes a person in order to coerce him/her or a third person, through death threats or serious bodily injury (§ 226) to the victim or of [the victim's] deprivation of liberty for longer than one week, to commit, acquiesee in or omit an act, or whoever exploits for purposes of such coercion a person's situation created by such an act, shall be punished with imprisonment for not less than five years" (emphasis added) (Counsel's unofficial translation).

648 For example: BGH 3 StR 320/07 - 8. November 2007 (LG Osnabrück), Also: BGH 1 StR 157/07 - 20. Juni 2007 (LG München), II; BGH 1 StR 376/93 - 5. Oktober 1993 (LG Ansbach): „Hinzu kommt, daß die §§ 239 a, 239 b StGB bereits mit der Entführung oder dem Sich-Bemächtigen in Erpressungs- oder Nötigungsabsicht vollendet sind;" (Counsel's unofficial translation: "Additionally, [the crimes referred to in] §§ 239a, 239b StGB are already fulfilled at the point of abduction or seizure [of a person] with a coercive intent;")

649 Article 185(1) reads: "Whoever deprives somebody of his/her liberty, abducts or seizes somebody, in order to coerce a third person to an action, omission or acquiesee, or whoever exploits for purposes of such coercion sueh a situation created by another person, shall be punished with imprisonment for not less than one year." (emphasis added) (Counsel's unofficial translation).

650 Decision of the Swiss Federal Court (Supreme Court), Bundesgerichtsentscheid, BGE 113 IV 63, Erwägung 2 a): „Der objektive Tatbestand ist erfüllt, wenn sich der Täter durch Freiheitsberaubung, Entführung oder sonstwie des Opfers bemächtigt." (Unoffieial translation: "The *actus reus* is fulfilled when the perpetrator through privation of liberty, abduction or in any other manner, seizes the victim.")

651 *Ibid.* Erwägung 2 bb): "Der subjektive Tatbestand von Art. 185 StGB ist erfüllt, weil der Beschwerdeführer im Bewusstsein handelte, dass er sich der B. bemächtigte, und weil er überdies in der Absicht handelte, auf diese Weise die Postbeamtin zur Herausgabe des Geldes zu veranlassen (Drittnötigungsabsieht)." (Counsel's unofficial translation: "The *mens rea* element of Article 185 StGB is fulfilled since the appellant acted with the knowledge that he seized B., and heeause he additionally acted with the intent to make the postal clerk render him the money.")

exist originally but can develop during the course of events.[652] The offence is completed when the perpetrator has the hostage in his/her power with the requisite intent even if the *actus reus* element of actually compelling a third party is not given.[653]

4.52 In Argentina, Article 142 bis of the Argentinean Criminal Code (*Código Penal de la Nación Argentina*)[654] requires only that the perpetrator withholds, retains or hides the victim with the aim of obliging the victim or a third person to do, not do or tolerate something against his or her will. If the perpetrator achieves this aim, the minimum sentence increases from 5 to 8 years imprisonment. This makes it clear that the achievement of the aim is not an element of the offence, but will be a factor aggravating the sentence.

4.53 In Colombia, Article 148 of the Criminal Code contains a specific provision that applies to situations of an armed conflict (*con ocasión y en desarrollo de conflicto armado*). The original wording of this provision required that the demand to be addressed to the other party in the conflict (*a la otra parte*). This was changed by the Constitutional Court in 2007, because it was considered as not being in accordance with the ICC Statute. The Court referred explicitly to the wording of the ICC Elements of Crimes and came to the conclusion that "to the other party" (*a la otra parte*) should be eliminated.[655]

4.54 Of 29 national laws (and some case law) on hostage-taking set out in Appendix B, the only country that expressly requires communication of a threat to a third party is Canada.[656]

---

652 E.g. in the cited case, the perpetrator first threatened the cashier of the post office in order to get money. When he noticed that the woman would not give him the money he would turn to a customer and take her hostage.

653 Arrêt du Tribunal fédéral (ATF) 133 IV 297, consideration 3.1: "L'infraction est réalisée dès que l'auteur, en vue de contraindre un tiers à un comportement, s'est rendu maître de l'otage." (Counsel's unofficial translation: "Finding 3.1: The criminal act was completed when the perpetrator, with the aim to coerce a third [person] to act, seized the hostage".)

654 Ley 11.179 (T.O. 1984 actualizado). Codigo Penal de la Nación Argentina. The Spanish original text is attached to this brief in Appendix C, the translation of the full article is provided for in Appendix B of this brief.

655 See: Sentencia C-291-07 de 25 de abril de 2007 de la Corte Constitucional, attached to this brief in Appendix C, the unofficial translation of the full text is provided for in Appendix B of this brief.

656 Article 279.1 of the Canadian Criminal Code reads: "Every one takes a person hostage who (a) confines, imprisons, forcibly seizes or detains that person, and (b) in any manner utters, conveys or causes any person to receive a threat that the death of, or bodily harm to, the hostage will be caused or that the confinement, imprisonment or detention of the hostage will be continued with intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage." (emphasis added).

(iii) Conclusion

4.55 For the reasons given above, it is submitted that it is not an element of the crime of hostage-taking as charged in Count 18 that the perpetrator communicated (expressly or implicitly) any threat to a third party, and the Trial Chamber erred in finding to the contrary. It is submitted that elements of the crime of hostage-taking are satisfied where there is a detention of and threat to the victim, with the intent to compel a third party to act or refrain from acting in a certain way, whether or not any demands have yet been (or ever are) communicated to the third party. It is further submitted that the requisite intent can be formed at the time that the victim is detained or later. If the intent is formed later, the situation (which may previously have constituted a different crime) will transform into a situation of hostage-taking at the time that the intent is formed.

C. The Trial Chamber's erroneous finding that intent had not been proved

(i) Introduction

4.56 The Trial Chamber found that the RUF did not abduct the peacekeepers in order to utilize their detention as leverage for the release of Sankoh,[657] and that the Prosecution had not established that the RUF detained the peacekeepers with the intention of compelling the Government of Sierra Leone and the UN to halt the disarmament process (the "**DDR process**") or to continue it according to conditions set by them.[658]

4.57 The Prosecution submits that the Trial Chamber erred in fact in making both of these findings. The Prosecution submits that on the basis of the findings of the Trial Chamber and/or the evidence in the case as a whole, the only conclusion open to any reasonable trier of fact is that the perpetrators had the intent to compel a State, an international organisation, 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 the UNAMSIL peacekeepers who had been seized.

---

[657] Trial Judgement, paras 1966-1968.
[658] Trial Judgement, paras 1966-1968.

(ii) Intent related to the course of the DDR

4.58 Contrary to what the Trial Chamber found, the Prosecution submits that on the basis of the Trial Chamber's findings and evidence in the case, the only conclusion open to any reasonable trier of fact was that it was the intention of the RUF "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."[659]

4.59 First, it was units of the RUF which had not yet disarmed that abducted and detained hundreds of UNAMSIL peacekeepers. Eventually the peacekeepers were released and disarmament continued.[660]

4.60 Secondly, there was a *build up of mistrust and grievances within the RUF* that showed that the RUF was not happy with the DDR process and were aggrieved that the whole process appeared to be just about disarmament without granting them their political aspirations.[661]

4.61 The Trial Chamber for instance found that the UN assessed the response to the DDR programme just before the UNAMSIL attacks as "lukewarm to moderate," observing that mutual distrust among all factions was hampering the process.[662] Further, the Trial Chamber held that "Sankoh repeatedly expressed his dissatisfaction with the disarmament process", complaining that "RUF disarmament was the only aspect of the Lomé Agreement being implemented, while no progress was made on other terms such as the integration of RUF members into key government positions."[663] He also expressed the threat that "if disarmament was to continue, Kabbah had to implement the contents of the Lomé Agreement."[664] In addition, the Trial Chamber stated that "[o]n 1 May 2000, ... Sankoh gave a press conference in Freetown alleging that UNAMSIL peacekeepers had shot the AFRC fighters. The UN Secretary General

---

659 Prosecution Final Trial Brief, para. 1158.
660 Trial Judgement, para. 44.
661 Trial Judgement, para. 1765, referring to Issa Sesay, Transcript 23 May 2007, p. 44.
662 Trial Judgement, para. 1764, referring to Exhibit 302, Operational Order No. 3, January 2000, paras. 3, 6. 8.
663 Trial Judgement, para. 1765, referring to Issa Sesay, Transcript 23 May 2007, p. 44.
664 Trial Judgement, para. 1765, referring to: [redacted] Transcript 19 May 2008, pp. 31-37; Issa Sesay, Transcript 25 May 2007, pp. 42, 44. *See also* Exhibit 323, Letter from the RUF Defence Headquarters Makeni to the UN Secretary General His Excellency Mr Kofi Annan, dated 6 April 2001, pp. 7-8.

shortly afterwards assessed that '[t]his inciting statement' led to an increase in tension between the RUF and UNAMSIL throughout the country.[665]

4.62 The evidence before the Trial Chamber showed that in the months preceding the hostage-taking, in particular in March and April 2000, there was a *build-up of threats and aggression* from the RUF towards UNAMSIL. The Trial Chamber found for instance that "[t]hroughout March 2000, RUF fighters obstructed the deployment of UNAMSIL to Kono District."[666] During training prior to their arrival in Sierra Leone, peacekeepers were informed that the RUF were dissatisfied with the disarmament process.[667] In addition, the Report of the UNAMSIL Headquarters Board of Inquiry also reflects how the build up of tension was perceived by UNAMSIL, stating that "[f]rom the commencement of the DDR Programme, on 17 April 2000, it was apparent to the DDR teams that many RUF combatants were willing to participate in the programme even though they were prevented from doing so through fear or intimidation by their RUF local commanders."[668] The report also said that "local RUF commanders had stated to CO Kenbatt and MILOBs teams that until these issues were addressed they would not allow any of their combatants to participate in the DDR Programme."[669] The UNAMSIL officers had also the impression that the actions of the RUF became increasingly hostile, when "there was no sign that UNAMSIL intended to comply."[670]

4.63 Further, on 3 May 2000 Sankoh sent a radio message to Sesay, copied to all RUF radio stations, claiming that the UNAMSIL Field Commander had stated on Radio France International that they would disarm all RUF fighters by force, commencing the next day. The Trial Chamber concluded from this "that some RUF fighters may have perceived UNAMSIL's actions in disarming their men as a threat or hostile move, the voluntary nature of the programme notwithstanding."[671] The Prosecution submits that a reasonable trier of fact could infer from this wilful misinformation that Sankoh actually intended to fuel the grievance amongst the RUF fighters and thus increased the hostility on the part of RUF towards the peacekeepers. The RUF leaders

---

665 Exhibit 381, Fourth Report of the UN Secretary-General on the UN Mission in Sierra Leone, dated 19 May 2000, p. 3575, para. 18.

666 Exhibit 381, Fourth Secretary-General Report on UNAMSIL, para. 3.

667 Trial Judgement, para. 1769, referring to Joseph Mendy, Transcript 28 June 2006, pp. 55-60.

668 Exhibit 190, Report of UNAMSIL Headquarters Board of Inquiry No. 00/19, para. 7.

669 *Ibid.*, para. 6.

670 *Ibid.*, para. 12, referring to events on 1 May 2000.

671 Trial Judgement, para. 1768, referring to Exhibit 34, RUF Radio Log, p. 8104; TF1-360, Transcript 26 July 2005, Closed Session, pp. 93-94; Exhibit 212, RUF Radio Log Book, p. 28070.

at least knew exactly what the DDR program was about and that it was voluntary. They had regular meetings with UNAMSIL commanders where the DDR program and its implementation were discussed.[672]

4.64 The perception of TF1-071 was that the hostage-taking was in connection with the grievance of RUF commanders with the DDR process.[673] Leonard Ngondi, the KENBATT commander in Makeni pointed out that some of the RUF commanders were "demanding that the [DDR] camp should be closed down".[674]

4.65 In paragraph 1807 of the Trial Judgement, the Trial Chamber described how Ngondi intended to negotiate the release of his abducted colleagues on 2 May 2000 by sending a delegation to the RUF high command:

> The purpose of their mission was to contact Sesay, Kallon, Gbao or any member of the RUF High Command whom they knew, to give them the following message: that the events that had occurred were uncalled for and not in the interests of peace; that holding UN peacekeepers as hostages is illegal and not in the interests of peace, and therefore that the peacekeepers should be unconditionally released; and that if there were issues that the RUF did not understand, they should come to Ngondi's headquarters to discuss them.

4.66 The fact that almost all of the witnesses – both Prosecution and Defence – constantly and consistently used the term "hostage" when referring to the abducted and detained UNAMSIL personnel shows that the actions of the RUF that occurred in May and June 2000 were and are actually perceived as hostage-taking.[675] The report of the UNAMSIL Headquarters Board of Inquiry also came to the conclusion, that 327 Zambians and eight Kenyans were taken hostages by the RUF.[676]

4.67 The peacekeepers were kept safe, although they did not get much food and had little possibilities to wash themselves; they still received all they needed to survive.[677]

---

672 Trial Judgement paras 1773-1776.

673 TF1-071, Transcript 24 January 2005, pp. 4-5 and 13-14.

674 Leonard Ngondi, Transcript 29 March 2006, p. 38: "By the time that we were losing contact, they had reported the situation to be as usual. That is, the RUF, a lot of them surrounding their camp, talking of what they were demanding; demanding the MILOB and even some demanding that the camp should be closed down."

675 E.g. DMK-444, Transcript 19 April 2008, pp. 123-126; Daniel Ishmael Opande, Transcript 11 March 2008, pp. 90 and 117-118; DIS-310/DMK-147, Transcript 6 March 2008, p. 116 and 7 March, pp. 52-53; DIS-249, Transcript 11 March 2008, pp. 19, 90, 117, 118, 121; DMK-159. Transcript 12 May 2008, pp. 91, 95, 111; Edwin Kasoma (TF1-288), Transcript 22 March 2006, p. 38; TF1-296. Transcript 11 July 2006, Closed Session, p. 116; TF1-044, Transcript 27 June 2006, p. 23; Leonard Ngondi, Transcript 29 March 2006, pp. 33, 36, 38-39, 41, Ganese Jaganathan, Transcript 20 June 2006, pp. 33, 47 and 82.

676 Exhibit 190, Report of UNAMSIL Headquarters Board of Inquiry No. 00/19, para 39.

677 Trial Judgement, paras 1821, 1864, 1866, 1867.

Injured hostages were treated.[678] If the RUF simply wanted to fight UNAMSIL, it is more likely that they would have killed the peacekeepers. The fact that they were kept in safe places gives rise to an inference that the RUF wanted to use them for leverage.

4.68 Furthermore, some of the hostages were high-ranking UNAMSIL offieers who seemed to have been specifically targeted due to their rank.[679] They were kept under special conditions in Yengema.[680] The fact that the RUF abducted high-ranking UNAMSIL staff also gives rise to an inference that they intended to keep them as a valuable leverage in exchange for demands.

4.69 Furthermore, the Trial Chamber accepted the evidence that there were direct threats, even death threats, against the detained UNAMSIL personnel. The Trial Chamber explicitly held "that there is evidence that RUF fighters threatened to kill, injure or detain captured UNAMSIL peacekeepers. Fighters including Kallon threatened to kill Major Jaganathan at least twice."[681] In fact there were threats expressed even before Sankoh's arrest. The threats were clearly linked to the actions of the UNAMSIL peacekeepers and the grievances of the RUF with the DDR process. The Trial Chamber for instance found:

(i) Gbao stormed the Reception Centre in Makeni on 17 April 2000 with a group of 25 to 30 armed rebels and told the peacekeepers that if they did not dismantle all the tents, he would burn them with the peacekeepers inside. Ngondi, Wilczynski and Major Musengeh went to meet Gbao and he told them that the RUF disagreed with the manner in which the Lomé Agreement was being implemented. Eventually, Gbao and his men agreed to forward their grievances to their national leadership.[682]

(ii) On 20 April 2000 during a meeting with Ngondi, Sesay summoned a radio operator and ordered that disarmament was to be stopped at Sanguema.[683]

(iii) On 28 April 2000, Kallon came to the Makump DDR Camp and criticised the workers who were preparing beds intended for ex-combatants, stating that the camp "was not meant for pigs, but for human beings." Kallon then approached

678 Trial Judgement, paras 1868, 1874.
679 Trial Judgement, paras 1848-1849.
680 Trial Judgement, paras 1842, 1863.
681 Trial Judgement, para. 1963.
682 Trial Judgement para. 1778 referring to Joseph Mendy, Transcript 26 June 2006, p. 86; Leonard Ngondi, Transcript 29 March 2006. pp. 16-19; TF1-041, Transcript 18 July 2006, Closed Session, pp. 37-49.
683 Trial Judgement para. 1779.

the camp Commander and said: "[t]he tents that you have made for the ex-combatants will be pulled down within 72 hours."[684]

(iv) On 1 May 2000, at the Makump DDR camp, Jaganathan requested Gbao to explain his problems and Gbao responded: "[g]ive me back my five men and their weapons, otherwise I will not move an inch from here." Jaganathan attempted further discussion but did not make any progress in resolving the problem.[685]

(v) Further, Kallon repeatedly threatened Jaganathan asserting that the UN peacekeepers were causing trouble.[686]

(vi) On 1 May 2000, Kallon sent the following message to RUF radio stations: "The UN have seriously attacked our position and taken five of our men and their weapons, but I have one"; "[a]ll stations, red alert, red alert, red alert".[687] The fact that Kallon said that he held a peacekeeper as a qualification to the statement that the UN had attacked the RUF (that is, he effectively stated "The UN have attacked us **but** I have one of them") clearly implies that the captured UN peacekeeper was envisaged as being useful in addressing the fact of the UN attack.

4.70 Several witnesses mentioned that intense negotiations went on between Charles Taylor and the RUF with the UN and ECOWAS in Monrovia – however without giving any indications as to what the negotiations were about.[688] The Prosecution submits that the fact that the RUF leadership was called to Monrovia to negotiate the release of the UNAMSIL peacekeepers is a strong indication that the RUF used the UNAMSIL personnel in order to obtain certain concessions in the DDR process. The aim of the negotiations was clearly to achieve the release the UNAMSIL peacekeepers. This was the reason why the RUF leadership was called to Monrovia. The content of the discussions is unknown but it is reasonable to infer that the RUF did seek certain concessions in exchange for the release of the peacekeepers.

---

684 Trial Judgement para. 1781.

685 Trial Judgement para. 1786.

686 Trial Judgement paras 1791 – 1794; Ganese Jaganathan, Transcript 20 June 2006, pp. 27-28, 53.

687 Trial Judgement, para. 1798 referring to Ganese Jaganathan, Transcript 20 June 2006, p. 31; TF1-360, Transcript 26 July 2005, Closed Session, p. 85.

688 DIS-249, Transcript 11 March 2008, p. 118: the witness mentions negotiation between Taylor and Daniel Chieh in Liberia and that "... even the UN had already gotten in touch with President Taylor, so was the ECOWAS and so we were just adding more pressure on Taylor." This witness also mentioned that disarmament in Kono District did not take place until June, July, August 2001 (ibid. p. 121). See also: John Tarnue, Transcript 5 October 2004, pp. 117-119, pp. 126-129 and p. 130.

(ii) Intent related to Sankoh's arrest

4.71 In addition, it is submitted that the Trial Chamber erred in finding that "... the RUF did not [...] abduct the peacekeepers in order to utilise their detention as leverage for Sankoh's release, as the peacekeepers were already being detained at the time of his arrest."[689] For the reasons given in paragraphs 4.55 and 4.51 above, it is submitted that it makes no difference whether the *mens rea* element for hostage-taking exists at the time of initial detention of the victim, or whether the *mens rea* comes into existence at a later point in time. For the reasons given above, it is submitted that the only reasonable conclusion is that the intention was formed at the time of the initial detention, but in the alternative it is submitted that at the very least, the only reasonable conclusion is that this intention was formed when Sankoh was arrested.

4.72 The Trial Chamber found that "[a]fter Sankoh was arrested in Freetown on 17 May 2000, the treatment of the remaining UNAMSIL captives worsened. The RUF leadership within the Yengema area threatened that the prisoners could be killed at any time. [redacted] told Kasoma that as long as Sankoh remained in detention, anything could happen to the UNAMSIL captives. [...] [redacted] indicated to them that their fate hinged on the release of Sankoh, and that they could face execution if he was not released."[690] [redacted][691]

4.73 The Trial Chamber expressly found that after Sankoh's arrest, Kasoma and other captured peacekeepers at Yengema were repeatedly threatened and told that they could be killed at any time, their fates conditional on Sankoh's release."[692]

4.74 The Prosecution submits that on the basis of this finding alone, the only conclusion open to any reasonable trier of fact is that, regardless of whether or not any threat was communicated to a third party at the time, RUF fighters at the time did have the *mens rea* for hostage-taking.

4.75 In paragraph 1967 of the Trial Judgement the Trial Chamber stated that "[e]ven if this intention crystallized in the minds of some or all of the RUF leaders once Sankoh was arrested, the RUF did not act to put it into effect." The Trial Chamber appears to have based this conclusion partly on the evidence that one group of approximately 40 to 50

689 Trial Judgement, para. 1966.
690 Trial Judgement, paras 1871 and 1872.
691 Trial Judgement, para. 1646.
692 Trial Judgement para. 1963.

peacekeepers were released from Yengema about five days after Sankoh's arrest and that a further group were released about a week thereafter.[693] It is submitted that the release by the RUF of groups of the peacekeepers not too long after Sankoh's arrest, does not explain away the intention to utilise the detained peacekeepers as leverage for Sankoh's release, and fails to consider the circumstances of the release as found by the Trial Chamber. The Trial Chamber had found that in May 2000, Charles Taylor had summoned Sesay to Liberia and told Sesay that ECOMOG leaders wanted the peacekeepers released and he instructed Sesay to release them.[694]

D. Responsibility of the Accused

(i) Introduction

4.76 The Trial Chamber has found that one UNAMSIL peacekeeper was assaulted and one UNAMSIL peacekeeper was abducted at Makump DDR camp on 1 May 2000; three groups of UNAMSIL peacekeepers were abducted in Makeni and one group of UNAMSIL peacekeepers was abducted in Magburaka on 1 May 2000; two groups of UNAMSIL peacekeepers were abducted near Moria village on 3 May 2000. The Trial Chamber qualified these acts as intentionally directing attacks against personnel involved in a humanitarian or a peacekeeping mission, another serious violation of international humanitarian law punishable under Article 4(b) of the Statute as charged under Count 15.[695]

4.77 The Trial Chamber found:

(i) that Sesay is guilty of intentionally directing attacks against the UNAMSIL peacekeeping mission pursuant to Article 6(3) of the Statute, in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts;

(ii) that Kallon is guilty of committing and ordering attacks on peacekeepers pursuant to Article 6(1) in relation to events in Bombali District; and pursuant to Article 6(3) of the Statute in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts; and

693 Trial Judgement para. 1967.
694 Trial Judgement para. 1869.
695 Trial Judgement, para. 2238 (i), (ii) and (iv).

(iii) that Gbao is guilty of aiding and abetting attacks on peacekeepers pursuant to Article 6(1) in Bombali District.

(ii) Responsibility of Sesay

4.78 The Chamber found Sesay liable under Artiele 6(3) of the Statute for failing to prevent or punish his subordinates for directing 14 attacks against UNAMSIL personnel and killing four UNAMSIL personnel in May 2000, as charged in Counts 15 and 17.[696] The Prosecution submits that on the basis of the Trial Chamber's findings and the evidence in the case as a whole, the only conclusion open to any reasonable trier of fact is that the findings in paragraphs 2267 to 2284 as regards Sesay's responsibility as a commander apply *mutatis mutandis* to the erime of taking of hostages as charged under Count 18, for the following reasons.

4.79 As BFC, the effective overall military Commander of the RUF on the ground,[697] and thus second highest in the RUF command after Sankoh,[698] Sesay was actively involved in the disarmament process[699] and there is ample evidence that he attended several meetings with high ranking UNAMSIL members on the issue.[700] In early 2000 he even had a meeting with UNAMSIL Force Commander Jetley in Magburaka to discuss disarmament in Makeni.[701] Further, Commanders frequently contacted Sesay when UNAMSIL personnel sought access to their areas of responsibility and often awaited Sesay's instructions prior to permitting sueh access. Sesay was also the Commander that pcacekeepers in the Makeni area contacted to obtain prior authorisation for their men to move.[702] It is therefore submitted that the only reasonable conclusion is that Sesay must have been very well informed about the DDR program, its implications, thc role of UNAMSIL in the DDR process, thc way disarmament was to be carried out and the mandate of UNAMSIL and military observers.

---

696 Trial Judgement, para. 2284.
697 Trial Judgement, para. 2268.
698 Trial Judgement, paras 42 and 914. From 17 May 2000 on, Sesay was interim leader of the RUF, see Trial Judgement, para. 916.
699 Trial Judgement, para. 1770: the RUF hierarehy and UNAMSIL had agreed on the date of disarmament in the Makeni area. Trial Judgement, para. 1774: Ngondi explained to Sesay that UNAMSIL had deployed in Makeni to cooperate and that cooperation was necessary in order to bring peace and stability to Sierra Leone.
700 Trial Judgement, paras 1774, 1775. Ngondi met with Sesay several times, with their first meeting on 12 April 2000 at KENBATT Battalion Headquarters in Makeni.
701 Trial Judgement, para. 1772.
702 Trial Judgement, para. 2272.

4.80 In April 2000, Sesay informed Brigadier Leonard Ngondi, the Commanding Officer of the UNAMSIL Kenyan Battalion (KENBATT), about his concerns that "their" fighters were being removed from the territory by Caritas.[703] Ngondi tried to ease the situation and held several meetings. In the third meeting a clear threat was uttered by Kallon who said "in three weeks time the world would know what the RUF would do in Sierra Leone."[704] The Prosecution suggests that Sesay, as Kallon's superior knew about this threat and backed it. The only reasonable conclusion must be that the RUF High Command, unhappy with the DDR process, had envisaged the attacks and the hostage-taking even before May 2000.

4.81 This conclusion is supported by a number of findings of the Trial Chamber with regard to the events in April 2000. First, the Trial Chamber found that the DDR programme did not commence on 17 April 2000 as planned because the RUF refused to take part in the programme. Instead, on that day, the RUF demonstrated around Makeni in groups of 30 to 50 fighters.[705] Gbao, who was leading a group of 25 to 30 armed rebels that arrived at the Reception Centre in Makeni, told the peacekeepers that if they did not dismantle all the tents, he would burn them with the peacekeepers inside. He also told Ngondi and the peacekeepers who were with him, that "the RUF disagreed with the manner in which the Lomé Agreement was being implemented."[706] The Trial Chamber further found that Ngondi understood from the meeting with Sesay on 20 April 2000 "that Sesay was displeased with the entire disarmament process. At one point during their meeting Sesay summoned a radio operator and ordered that disarmament was to be stopped at Sanguema."[707]

4.82 The Prosecution submits that Sesay's behaviour prior to the actual hostage-taking clearly showed his strong resistance and opposition to the disarmament process. The events that followed, including the hostage-taking, were the logical consequence of his intent to compel the UN and/or the Sierra Leonean Government to stop the disarmament process or, at least, to continue the DDR program according to the terms set by the RUF.

---

703 Trial Judgement, para. 1775.
704 Trial Judgement, para. 1776.
705 Trial Judgement, para. 1777.
706 Trial Judgement, para. 1778.
707 Trial Judgement, para. 1779.

4.83 The only reasonable conclusion is that when some RUF fighters actually started to disarm in Makeni towards the end of April 2000,[708] the RUF leadership became alarmed and started acting violently against the UNAMSIL peacekeepers. Violent acts were committed in various forms. It started with assault and abductions on 1 May 2000 at Makump DDR Camp,[709] near Makeni,[710] and in Makeni,[711] which were clearly accompanied by massive threats,[712] partly in form of physical violence directed against the peacekeepers and military observers[713] and continued on 2 May 2000 at Teko Barracks in Makeni,[714] and in Magburaka.[715] Sesay was directly involved in the abduction of Major Rono, the Commander of KENBATT B Company at the Magburaka Islamic Centre, and three other peacekeepers,[716] and he was found to be responsible as a commander for the other attacks and abductions.[717]

4.84 Further, it has been found proven that Sesay was involved at a high level in the negotiations with the UN after the first victims were taken. When the first peacekeepers and military observers were detained, Ngondi tried to negotiate with the RUF leadership, including Sesay "as their discussions had been successful in the past."[718] On 2 May 2000, while the RUF held 5 hostages in Teko Barracks in Makeni,[719] Ngondi invited Sesay to his headquarters in Makeni to discuss the situation. As a response to this invitation, Sesay abducted the peacekeepers who transmitted the message to him.[720] It is submitted that on the findings of the Trial Chamber and the evidence, Sesay, as second in command of the RUF at the time of the events, had planned and ordered the orchestrated attacks, assaults and abduction of UNAMSIL peacekeepers and military observers. He intentionally misled the UNAMSIL commanders as to his willingness to negotiate while his subordinates as well as he himself abducted peacekeepers and held them captive at Teko Barracks in Makeni.[721]

---

708 Trial Judgement, paras 1782-1783.
709 Trial Judgement, paras 1784-1793; 1890(ii).
710 Trial Judgement, paras 1795-1797, 1890(iii).
711 Trial Judgement, paras 1803-1806.
712 Trial Judgement, paras 1789, 1791, 1792-1794, 1798.
713 Trial Judgement, paras 1791-1793, 1799, 1890(i).
714 Trial Judgement, paras 1807-1808, 1890(iv) and (v).
715 Trial Judgement, paras 1809-1811, 1890(vi) and 1892(ii).
716 *Ibid.*
717 Trial Judgement, para. 2284.
718 Trial Judgement, paras 1801, 1807.
719 Trial Judgement, para. 1806.
720 Trial Judgement, paras 1809-1811.
721 Trial Judgement, para. 1812.

4.85 It is submitted that Sesay's presence in Matotoka and his behaviour when the first group of peacekeepers was transported from Teko Barracks to Small Sefadu on 3 May 2000[722] clearly show that he was in charge of the systematic and extensive operation that was simultaneously carried out in different places. The Trial Chamber was satisfied that in April and May 2000 Sesay's effective command extended over a wide geographic area of Sierra Leone.[723]

4.86 The Prosecution further submits that Sesay, as the overall military Commander of the RUF on the ground, was also in charge of the abduction of Kasoma and ten ZAMBATT peacekeepers at Moria,[724] as well as the abduction of Kasoma's convoy between Moria and Makeni,[725] although he was not present at the location of the events. The Trial Chamber found for instance that "Sesay gave frequent orders to his deputy Kallon in relation to UNAMSIL peacekeeping personnel, the dismantling of checkpoints and various other operational issues."[726] The Trial Chamber was therefore satisfied that Sesay exercised effective control over RUF fighters in the Makeni area, including Kallon, who perpetrated the attacks directed against UNAMSIL personnel on 1, 2 and 7 May 2000.[727] There is also evidence that he ordered the abductions, or that he was at least informed about the actions of his subordinates.[728] The Trial Chamber further recalled that Sesay was present at Matotoka and presided over the movements of the peacekeepers from Teko Barracks to Small Sefadu. Sesay also ordered the transportation of the captured ZAMBATT and KENBATT peacekeepers to Kono following their abduction at Moria.[729]

4.87 Peacekeepers were kept alive and in circumstances that guaranteed that they would stay alive in captivity in different places in Kono district[730] according to Sesay's orders[731]

---

722 Trial Judgement, paras 1815-1818. Sesay instrueted his men to untie the peacekeepers and told them that they would be taken to a farm where all their belongings would be returned tn them.

723 Trial Judgement, para. 2271.

724 Trial Judgement, paras 1834-1835.

725 Trial Judgement, paras 1836-1838.

726 Trial Judgement, para. 2268.

727 Trial Judgement, para. 2273.

728 Trial Judgement, para. 1837: an RUF fighter "explained that he had been sent by Sesay to accompany the convoy to Makeni".

729 Trial Judgement, para. 2276.

730 "Camp 11" in Small Sefadu: Trial Judgement, paras 1822, 1867-1868; Makeni and Yengema: Trial Judgement, para. 1839; Tombodu: Trial Judgement, paras 1865 and 1866.

731 Trial Judgement, para. 1840. Sesay gave orders for the peacekeepers to be moved to Kono.

and under his supervision.[732] He himself visited Yengema camp several times.[733] On one occasion, Sesay arrived and collected the peacekeepers' passports and money.[734]

4.88 Further, the Trial Chamber found that "Sesay was informed of the attacks in Makeni and Magburaka via radio and Sankoh instructed him to travel to Makeni to ascertain the course of events."[735] There is ample evidence that Sesay ordered the movement of troops,[736] and other actions,[737] that his subordinates reported to him about the hostage-taking.[738] [redacted] was in charge of the Yengema camp, where more than 100 peacekeepers were kept captive.[739] The fact that it was Sesay who allowed the injured Lt. Col. Mendy to be taken to a hospital and then released also shows that he ordered and supervised the hostage-taking.[740] The Trial Chamber concluded that Sesay exercised effective control over the Brigade Commander of Kono District, who in turn was the Commander of the RUF fighters who detained the peacekeepers at Yengema and Small Sefadu.[741]

4.89 Finally, there is evidence that Sesay negotiated the release of the UNAMSIL captives in Monrovia under the auspices of Charles Taylor.[742] High ranking UNAMSIL officers took part in the negotiations.[743] While the negotiations took place, Sankoh was arrested in Freetown on 17 May 2000. There are clear indications that the hostages were used as leverage for Sankoh's release, and the resulting threats were uttered by Sesay's subordinates.[744] Sesay was present when a Liberian "Anti-Terrorist Unit" came to Kailahun to fly some of the hostages to Monrovia.[745]

4.90 The Prosecution therefore submits that ***at the very least***, the only conclusion open to any reasonable trier of fact is that Sesay is responsible under Article 6(3) of the

---

732 Trial Judgement, para. 1864. The prolonged captivity of the UNAMSIL personnel was supervised by subordinates of Sesay. E.g. Monica Pearson at Yengema in Kono District, where Kasoma and approximately 100 ZAMBATT peacekeepers were kept, Trial Judgement, paras 1842, 1863-1864.

733 Trial Judgement, para. 1850.

734 Trial Judgement, para. 1864.

735 Trial Judgement, para. 1844; see also: Trial Judgement, para. 1846.

736 Trial Judgement, para. 1844: "Prior to his departure from Kono District, Sesay contacted the Brigade Commander in Bombali District, Komba Gbundema, and the Commander in Tongo Field in Kenema District and ordered them to send reinforcements to Makeni." Also: para. 1856.

737 Trial Judgement, paras 1851, 1854. Trial Judgement, para. 1847: On 3 May 2000 Sesay sent a message to the Brigade Commander in Kono ordering him to 'keep strong security' in Kono and destroy all motorable roads leading to Masiugbi."

738 Trial Judgement, paras 1848, 1849 and 2270.

739 Trial Judgement, para. 1842.

740 Trial Judgement, para. 1874.

741 Trial Judgement, para. 2275.

742 Trial Judgement, para. 1869.

743 Trial Judgement, para. 1875.

744 Trial Judgement, paras 1871 and 1872.

745 Trial Judgement, paras 1879-1880.

Statute for failing to prevent or punish his subordinates for taking hostages, as charged in Count 18 of the Indictment. The Prosecution further submits that the only conclusion open to any reasonable trier of fact on the basis of the Trial Chamber's findings and the evidence referred to above is that Sesay is also responsible for these crimes under Article 6(1) of the Statute, on the basis that he planned, ordered, instigated or aided and abetted them.

(iii) Responsibility of Kallon

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

4.91 The Trial Chamber found Kallon liable under Article 6(1) of the Statute for ordering the attack directed against Maroa and three peacekeepers on 1 May 2000,[746] for ordering the attack directed against Mendy and Gjellesdad on 1 May 2000,[747] for ordering the attack directed against Kasoma and ten peacekeepers on 3 May 2000,[748] and for ordering the attack directed against Kasoma's convoy of approximately 100 peacekeepers on 3 May 2000, as charged in Count 15 of the Indictment.[749] The Prosecution submits that on the basis of the Trial Chamber's findings and the evidence in the case as a whole, the only conclusion open to any reasonable trier of fact is that Kallon is additionally guilty on the basis of these facts for the crime of hostage-taking.

4.92 The Trial Chamber found that Kallon instructed various RUF fighters to carry out the assault and abduction of Jaganathan and that he used his position of authority as senior RUF Commander and BGC to compel his subordinates to commit the offence. The Trial Chamber thus concluded that there was a clear nexus between Kallon's orders and the actions of his men and found that Kallon intended his orders to be obeyed.[750]

4.93 With regard to the abduction of Maroa and four other peacekeepers on 1 May 2000, the Trial Chamber found that Kallon ordered rebels under his command to capture the

---

[746] Trial Judgement, para. 2250.
[747] Trial Judgement, para. 2253.
[748] Trial Judgement, para. 2255.
[749] Trial Judgement, para. 2258.
[750] Trial Judgement, paras 2247-2248: "The Chamber has found that Kallon ordered his men to 'arrest' Jaganathan and stood by while a group of armed fighters kicked, punched and hit him with rifle butts and threatened him with a pistol. Once Jaganathan had been placed inside Kallon's vehicle with armed RUF fighters on either side, Kallon then ordered the driver of his vehicle to depart. Kallon continued to threaten Jaganathan thereafter."

peacekeepers and bring them to him. The Trial Chamber was satisfied that Kallon as BGC was in a position of authority over the fighters, that he had effective control over them, and that they were acting under his direction.[751]

4.94 As regards the capture of Mendy and Gjellesdad at the RUF Task Force Offiee in Makeni on 1 May 2000, the Trial Chamber found that the fighters who took the peaeekeepers to Teko Barracks were acting on the instructions of Kallon, who used his position of command and authority to direct his subordinates to capture the peacekeepers.[752]

4.95 With regard to the abduction of Kasoma and ten other peacekeepers on 3 May 2000 near Moria, the Trial Chamber has found that Kasoma was taken by RUF fighters including Gbundema to Kallon, who was in a command position, that Gbundema was subordinate to him and that the fighters who eaptured Kasoma and his ten peacekeepers were acting on Kallon's instructions.[753] The same was found in relation to the abduction of Kasoma's convoy from the roadblock near Moria to Makeni by RUF fighters.[754] The Trial Chamber found that Kallon's conduct in forcing Kasoma to write the note to his second-in-command established a clear nexus between Kallon's actions and the subsequent abductions.[755] In addition, the Trial Chamber found that Gbundema was giving orders at the roadblock where Kasoma's convoy was ambushed and that it was inconceivable that such a large military operation would be conducted by Kallon's subordinate Commander without the express authority of Kallon, who was the BGC and the most senior RUF Commander present at the time. The Trial Chamber thus found "Kallon liable under Article 6(1) of the Statute for ordering the attack directed against Kasoma's convoy of approximately 100 peacekeepers on 3 May 2000 [...]."[756]

4.96 There are numerous findings of the Trial Chamber that show that Kallon planned and ordered the abductions and capture of the peacekeepers with the intent to compel a third party to act or abstain from acting. Like Sesay, Kallon had met high ranking commanders of UNAMSIL, including Brigadier Leonard Ngondi the Commanding Officer of the UNAMSIL Kenyan Battalion. In one of the meetings he attended, Kallon stated that "in three weeks time the world would know what the RUF would

751 Trial Judgemeut, para. 2249.
752 Trial Judgement, paras 2251-2252.
753 Trial Judgement, paras 2254-2255.
754 Trial Judgement, para. 2256.
755 Trial Judgement, para. 2257.
756 Trial Judgement, para. 2258.

do in Sierra Leone."[757] As BGC and the most senior RUF Commander present at the time in the Makeni area,[758] he was actively involved in the disarmament process at the highest level and Kallon must have been, like Sesay, well informed about the DDR programme, its implications, the role of UNAMSIL in the DDR process, the way disarmament was to carried out and the mandate of UNAMSIL and military observers.

4.97 It is submitted that Kallon's behaviour prior to the actual hostage-taking clearly showed his hostile position towards the DDR process and his intent to compel the UN and/or the Sierra Leonean Government to stop the disarmament process or at least to continue the DDR program according to the terms set by the RUF. The Trial Chamber found for instance that on 16 April 2000 at 8.35pm, Sankoh transmitted a radio message to Kallon advising him not to be "fooled" on disarmament. Sankoh ordered Kallon that "[t]here should be no disarmament for now until further notice. Any mistake towards that you will be held [sie] responsible. Act on this accordingly."[759] Further, on 28 April 2000, Kallon arrived at the Makump DDR Camp and criticised the workers who were preparing beds intended for ex-combatants, stating that the camp "was not meant for pigs, but for human beings." Kallon then approached the camp Commander and said: "[t]he tents that you have made for the ex-combatants will be pulled down within 72 hours."[760] This threat shows that Kallon wanted to dictate the course of the DDR program and that he was ready to use any means to do so. This became evident when Kallon arrived at the DDR camp some days later on 1 May 2000, fired from his Mercedes Benz, even firing shots on the ground between him and the UNAMSIL peacekeepers present at the camp, as well as when he punched Salahuedin in the face and abducted Jaganathan under massive threats uttered by himself and his men. Jaganathan received several death threats before he was taken to Teko Barracks in Makeni.[761] Kallon's intent to use Jaganathan as leverage must be inferred from his radio communication described above.[762]

---

757 Trial Judgement, paras 1773, 1776.
758 Trial Judgement, para. 1851.
759 Trial Judgement, para. 1851.
760 Trial Judgement, para. 1781.
761 Trial Judgement, paras 1790-1794. Kallon threatened Jaganathan repeatedly, and at a certain point even stated "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." (para. 1793).
762 Trial Judgement, para. 1798. Kallon said: "The UN have seriously attacked our position and taken five of our men and their weapons, but I have one"; "[a]ll stations, red alert, red alert, red alert".

4.98 It is submitted that the reactions of the UNAMSIL Command as described above, show that the abduction of Jaganathan was understood as hostage-taking.[763] Ngondi for instance dispatched four peacekeepers to Teko Barracks to contact the RUF High Command whom they knew, to explain to them that the events that had oeeurred were uncalled for and not in the interests of peace.[764] However, these four peacekeepers were also detained upon their arrival at Teko Barracks.[765]

4.99 The Trial Chamber took the view that "Kallon, as the senior RUF Commander with responsibility for the Makeni-Magburaka area, perceived it necessary to respond to the deployment of the peacekeepers. This conclusion is reinforced by the imperative nature of the recent orders regarding disarmament from his superiors Sankoh and Sesay."[766]

4.100 Further, Kallon was involved in the detention of the hostages. The Trial Chamber found that he visited the Yengema camp about four times, accompanied on each occasion by around 30 to 40 heavily armed RUF fighters.[767] Kallon knew about the negotiations organized by Charles Taylor in Monrovia where the release of the hostages was negotiated between the RUF and ECOMOG leaders.[768]

4.101 The Prosecution therefore submits that the only conclusion open to any reasonable trier of fact is that Kallon is responsible under Article 6(1) of the Statute for the abduction and taking as hostages of Maroa and three peacekeepers on 1 May 2000, for ordering the capture and hostage-taking of Mendy and Gjellesdad on 1 May 2000, for ordering the abduction and hostage-taking of Kasoma and ten peacekeepers on 3 May 2000, and for ordering the abduction and hostage-taking of approximately 100 peacekeepers of Kasoma's convoy on 3 May 2000, as charged in Count 18 of the Indictment.

---

763 Trial Judgement, para. 1801. The Trial Chamber found that Ngondi received instructions from the UNAMSIL Force Headquarters in Freetown that negotiations with the RUF should continue so the situation did not esealate and turn hostile. Ngondi was confident that he would be able to reach an agreement with Sesay, Kallon, Gbao and the nthers, as their discussions had been successful in the past.

764 Trial Judgement, para. 1807.

765 Trial Judgement, paras 1808.

766 Trial Judgement, para. 1854.

767 Trial Judgement, para. 1863.

768 Trial Judgement, para. 1869.

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

4.102 The Chamber found Kallon liable under Article 6(3) of the Statute for eight attacks intentionally directed against UNAMSIL personnel in May 2000 and the killing of four UNAMSIL personnel, as charged in Counts 15 and 17.[769] The Prosecution submits that for the reasons given below, the only conclusion open to any reasonable trier of fact is that the findings in paragraphs 2285 to 2292 as regards Kallon's responsibility as a commander apply *mutatis mutandis* to the crime of taking of hostages as charged under Count 18.

4.103 The Trial Chamber concluded that Kallon exercised effeetive control over the RUF Commanders who carried out the attacks and abductions.[770] This was, first because of Kallon's command role as BGC from February 1999 to September 2000, in particular in the Makeni-Magburaka area;[771] and secondly, because the chain of command between Sankoh, Sesay and Kallon functioned effeetively at the time of the attacks against UNAMSIL personnel. The Trial Chamber found that commanders reported to Kallon who was *de iure* and *de facto* the third-in-command in the RUF hierarchy;[772] that Kallon issued orders to Battalion Commanders and orders addressed to "all Commanders" and that these orders were implemented;[773] and that he received orders from Sankoh and implemented them.[774] The Trial Chamber also found that Kallon had reason to know of the attacks and abductions due to his senior command role in the Makeni-Magburaka area, in the exercise of which he received regular reports from his subordinates[775] and that he made no attempt to prevent or punish the perpetrators of the attacks on UNAMSIL personnel.[776]

4.104 The Prosecution therefore submits that the only conclusion open to any reasonable trier of fact is that Kallon is responsible under Article 6(3) of the Statute for failing to prevent or punish his subordinates for taking hostages, as charged in Count 18 of the Indictment.

---

769 Trial Judgement, para. 2292.
770 Trial Judgement, para. 2286.
771 Trial Judgement, para. 2285.
772 Trial Judgement, para. 2286.
773 Trial Judgement, paras 2286-2287.
774 Trial Judgement, para. 2288.
775 Trial Judgement, para. 2290.
776 Trial Judgement, para. 2291.

(iv) Responsibility of Gbao

4.105 The Trial Chamber found Gbao liable under Article 6(1) of the Statute for aiding and abetting the attacks directed against Salahuedin and Jaganathan on 1 May 2000, as charged in Count 15.[777] The Prosecution submits that on the basis of the Trial Chamber's findings and the evidence in the case as a whole, the only conclusion open to any reasonable trier of fact is that Gbao is additionally guilty under Article 6(1) on the basis of these facts for the crime of hostage-taking.

4.106 The Trial Chamber recognised that the *mens rea* of aiding and abetting was the knowledge that the acts performed by the accused assist the commission of the crime by the principal offender[778] and that "[s]uch knowledge may be inferred from all relevant circumstances."[779] In the case of specific intent offences, the aider and abettor need not possess the principal offender's intent, but must have knowledge that the principal offender possessed the specific intent required.[780] Therefore, "it must be shown that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal."[781]

4.107 Like Sesay and Kallon, Gbao met high ranking commanders of UNAMSIL, including Brigadier Leonard Ngondi the Commanding Officer of the UNAMSIL Kenyan Battalion, who actually met most frequently with Gbao, followed by Kallon.[782] As full Colonel and Overall Security Commander (OSC),[783] Gbao was "heavily involved in the disarmament of RUF fighters and he interacted with external delegations and NGOs in Makeni on behalf of the RUF."[784] The Trial Chamber further found that "Gbao visited the DDR camps in Makeni between two and four times every week in the three months prior to May 2000 and was very well known to UNAMSIL personnel in the area. Gbao was one of the Commanders with whom the UNAMSIL

---

777 Trial Judgement, para. 2265.

778 Trial Judgement, para. 280, referring to *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 49; *Tadić* Appeal Judgement, para. 229.

779 Trial Judgement, para. 280, referring to *Limaj* Trial Judgement, para. 518 referring to *Čelebići* Trial Judgement, para. 328 and to *Tadić* Trial Judgement, para. 676.

780 Trial Judgement, para. 280, referring to *CDF* Appeal Judgement, para. 367, citing *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Judgement", Appeals Chamber, 13 December 2004, ("***Ntakirutimana* Appeal Judgement**"), para. 501 and *Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, Judgement and Sentence, Trial Chamber, 15 July 2004, ("***Ndindabahizi* Trial Judgement**"), para. 457. *See also Krstić* Appeal Judgement, para. 140; *Vasiljević* Appeal Judgement, para. 142; *Krnojelac* Appeal Judgement, para. 52.

781 Trial Judgement, para. 280, referring to *Aleksovski* Appeal Judgement, para. 162.

782 Trial Judgement, para. 1773, see also para. 1776.

783 Trial Judgement, para. 934.

784 Trial Judgement, para. 940.

Commanders regularly met to discuss disarmament. UNAMSIL peacekeepers knew him as the 'chief security officer' for the RUF."[785]

4.108 Gbao's behaviour at the Makeni Reception Centre on 17 April 2000[786] and his statement made in the second half of April 2000, that any fighter who was found disarming secretly would face execution,[787] further show that he was hostile towards the DDR program. The only reasonable inference is that due to his role and position in the RUF hierarehy he must have known about the intent of the main perpetrators to take UNAMSIL personnel as hostages to compel the UN, the Sierra Leonean Government as well as the international community to refrain to continue the disarmament, if the RUF demands were not met.

4.109 The Trial Chamber found that after the first abductions, Mendy and Gjellesdad went first to the headquarters of the security units in Makeni and requested to speak to Gbao, whom they knew as the "chief security officer" of the RUF.[788] Ngondi was confident that he would be able to reach an agreement with Sesay, Kallon, Gbao and the others, as their discussions had been successful in the past.[789] It is submitted that the only reasonable conclusion from these findings is that the UNAMSIL commanders saw in Gbao an important interlocutor to negotiate the release of the hostages.

4.110 When Jaganathan requested Gbao to explain his problems on 1 May 2000, at Makump DDR camp, Gbao responded: "[g]ive me back my five men and their weapons, otherwise I will not move an inch from here."[790] Later the same day, Gbao did not appear willing to enter into discussions with UNAMSIL commanders.[791] On the contrary, the Trial Chamber found that when Maroa arrived at Makump DDR camp, he reported to Ngondi via radio that:

> [...] Gbao was very wild [...] and he was demanding that we must give them their ten combatants and their ten rifles beeause that was RUF territory. He was demanding to a eertain extent to close down the entire exereise and even the camp. And he was calling more combatants who were assembled within the DDR camp.[792]

---

785 *Ibid.*

786 Trial Judgement, paras 1777-1778. Ngondi, Wilczynski and Major Musengeh went to meet Ghao and he told them that the RUF disagreed with the manner in which the Lomé Agreement was heing implemented.

787 Trial Judgement, para. 1780.

788 Trial Judgement, para. 1804.

789 Trial Judgement, para. 1801.

790 Trial Judgement, para. 1786. Jaganathan attempted further diseussion but did not make any progress in resolving the problem.

791 Trial Judgement, para. 1787.

792 Trial Judgement, para. 1789 and Leonard Ngondi, Transcript 29 March 2006, p. 28.

4.111 It was further found that Gbao later escorted the abducted peacekeepers arriving in a Land Rover to Makeni. He took three rifles out of the boot of his car. Maroa was bleeding from his mouth and the other three peacekeepers were limping.[793]

4.112 It is submitted that on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any reasonable trier of fact is that Gbao was aware of the intention of the RUF to capture and detain the UNAMSIL personnel with the intent to compel a third party to act or abstain from acting. It is further submitted that the only conclusion reasonably open is that Gbao's acts and words encouraged and supported the commission of the hostage-taking. The Prosecution therefore submits that the only conclusion open to any reasonable trier of fact is that Gbao is responsible under Article 6(1) of the Statute for aiding and abetting the taking of hostages, as charged in Count 18 of the Indictment.

E. Cumulative convictions

4.113 It is well established that multiple convictions under different statutory provisions for the same conduct are permissible if each statutory provision has a materially distinct element not contained in the other.[794]

4.114 The Accused were all convicted under Count 15 for the crime of intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute. The elements of this crime were found by the Trial Chamber to be as follows.

(i) The Accused directed an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations;

(ii) The Accused intended such personnel, installations, material, units or vehicles to be the object of the attack;

(iii) 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; and

---

793 Trial Judgement, para. 1799.

794 See, for instance, *CDF* Appeal Judgement, para. 220 and the authorities there cited.

(iv) The Accused knew or had reason to know that the personnel, installations, material, units or vehicles were protected.[795]

4.115 The elements of the crime of hostage-taking as charged in Count 18 are set out in paragraph 4.18 above.

4.116 The crime charged in Count 15, and the crime charged in Count 18, each contain a materially distinct element not contained in the other.

4.117 The crime charged in Count 15 requires, in the case of an attack against an individual victim, that the victim be part of the personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations. The crime charged in Count 18 does not contain this element: any individual may be the victim of hostage-taking.

4.118 The crime charged in Count 18 requires that the accused intended to compel a third party to act or refrain from acting as an explicit or implicit condition for the safety or the release of the victim. The crime charged in Count 15 does not contain this requirement.

4.119 It is therefore submitted that cumulative convictions can be entered against the Accused on both Count 15 and Count 18.

F. Issue of general legal importance

4.120 The Prosecution also notes that the Appellants have already been convicted under Count 15 for intentionally directing attacks against the UNAMSIL peacekeeping mission, and have been appropriately sentenced for that count. The Prosecution submits that it would not be "an unnecessary exercise"[796] to add an additional conviction for Count 18. However, even if the Appeals Chamber were to take this view, the Prosecution submits that the issue argued in Section B above (whether communication of a threat to a third party is an essential element of the crime of hostage-taking) is an issue that should be pronounced upon by the Appeals Chamber as an issue of general significance to the Special Court's jurisprudence and to international law generally.

4.121 The Appeals Chambers of international and mixed criminal tribunals play an important role in the development of international criminal law. The Appeals Chamber of the

[795] Trial Judgement, para. 219.
[796] *AFRC* Appeal Judgement, para. 172.

ICTY has indicated that where it is in the interests of justice to do so, it can find that the Trial Chamber erred in acquitting the Accused on the ground that it did, but without either substituting a conviction or ordering a new trial,[797] provided that the issue has a nexus with the case at hand.[798] Furthermore, it has been held that the Appeals Chamber may examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal.[799]

G. Conclusion

4.122 For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's acquittal of Sesay, Kallon and Gbao on Count 18 of the Indictment and to substitute a conviction on Count 18 for each of the Accused.

4.123 The Prosecution also requests the Appeals Chamber to make any resulting amendments to the disposition provisions of the Trial Judgement, and to inerease the sentences imposed on Sesay, Kallon and Gbao to reflect the additional criminal liability.

5. Submissions regarding sentences

5.1 The Prosecution does not appeal, as such, against the "Sentencing Judgement" of the Trial Chamber dated 8 April 2009 in Case No. SCSL-04-15-T, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the "**Sentencing Judgement**"). However, the remedies sought by the Prosecution in respect of the above Grounds of Appeal against the Trial Judgement inelude requests that the Appeals Chamber increase the sentence imposed on each of the three Accused, to reflect their additional criminal liability.

5.2 Where the Appeals Chamber reverses acquittals pronounced by the Trial Chamber for one or more crimes, or makes findings on appeal that inerease the criminal liability of

---

[797] See *Aleksovski* Appeal Judgement, paras 153–154; *Prosecutor v. Jelisić*, IT-95-10-A, "Judgement", Appeals Chamber, 5 July 2001, ("***Jelisić* Appeal Judgement**"), paras 73–77.

[798] *Krnojelac* Appeal Judgement, para. 10.

[799] *Tadić* Appeal Judgement, paras. 241, 315; *Čelebići* Appeal Judgement, paras 67-68, 221; *Krnojelac* Appeal Judgement, paras 6-7 (see also Separate Opinion of Judge Shahabuddeen, paras 2-4); but eompare *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, "Judgement" Appeals Chamber, 9 May 2007, ("***Blagojević and Jokić* Appeal Judgement**"), paras 317-318. See also *Prosecutor v. Akayesu*, ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001, ("***Akayesu* Appeal Judgement**"), para. 23, cited iu *Krnojelac* Appeal Judgement, para. 8; *CDF* Appeal Judgement, para. 32.

an accused, it becomes necessary to determine what additional sentence to impose on the accused in respect of that increased criminal liability. The Statute and Rules of the Special Court do not make clear whether in such situations the Appeals Chamber may itself amend the sentence, or whether it should remit that matter to a Trial Chamber for further sentencing proceedings.

5.3 In the ICTY and ICTR, there are precedents for both courses of action.[800] In the *CDF* Appeal Judgement, this Appeals Chamber assumed that it had the power itself to revise the sentence that had been imposed by the Trial Chamber, and adopted that course.[801] It is currently the normal practice at the ICTY and ICTR for the Appeals Chamber itself to impose a new sentence following any findings of additional criminal liability by the Appeals Chamber on appeal.[802]

5.4 The Prosecution submits that in the event that any of the Prosecution Grounds of Appeal are upheld, the appropriate course, in line with SCSL practice and the current practice at the ICTY and ICTR, would be for the Appeals Chamber itself to determine whether any increased sentence should be imposed, and if so, what sentence.

---

800 Sentencing was remitted to a Trial Chamber in the *Čelebići* case, *Čelebići* Appeal Judgement, paras 710–713 and disposition, paras 2–4; *Tadić* Appeal Judgement, paras 27–28, 327 (3) and (6); and see also *Čelebići* Judgement on Sentence Appeal, para. 3. Examples of where the Appeals Chamber itself revised the sentence include *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006, ("***Gacumbisti* Appeal Judgement**"), paras 205-207; *Krnojelac* Appeal Judgement, paras 263-264; *Mrkšić* Appeal Judgement, para 419; *Krstić* Appeal Judgement, para. 266; *Vasiljević* Appeal Judgement, para. 181; *Aleksovski* Appeal Judgement, paras 186-187, 192; *Prosecutor v. Galić*, IT-98-29-A, "Judgement", Appeals Chamber, 30 November 2006, ("***Galić* Appeal Judgement**"), paras 455-456.

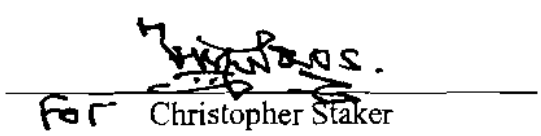
801 *CDF* Appeal Judgement, paras 565-567.

802 See references in footnote 800 above.

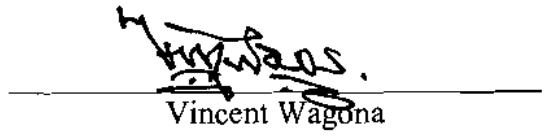
Filed in Freetown,

1 June 2009

For the Prosecution,



For Christopher Staker



Vincent Wagona

APPENDIX A

LIST OF CITED AUTHORITIES AND DOCUMENTS

Authorities and documents for which abbreviated citations are used

1. Decisions, Orders and Judgement in this case

Indictment	*Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-PT-619, "Corrected Amended Consolidated Indictment", Trial Chamber, 2 August 2006
***Sesay et al* Oral Decision on Motion for Acquittal**	*Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Oral Decision on RUF Motions for Judgement of Acquittal Pursuant to Rule 98, 25 October 2006", Transcript, 25 October 2006
***Sesay et al* Prosecution Final Trial Brief**	*Prosecutor v. Sesay, Kallon, Gbao,* SCSL-2004-15-PT-1206, "Prosecution Final Trial Brief" 29 July 2008
***Sesay et al* Prosecution Skeleton Response to Rule 98 Motion**	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-650, "Consolidated Skeleton Response to the Rule 98 Motions by the three Accused" 6 October 2006
***Sesay et al* Prosecution Supplemental Pre-Trial Brief**	*Prosecutor v. Sesay, Kallon, Gbao*, 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", 21 April 2004
***Sesay et al* Sentencing Judgement**	*Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-1251, "Sentencing Judgement", Trial Chamber, 8 April 2009
***Sesay et al* Trial Judgement**	*Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-1234, "Judgement", Trial Chamber, 2 March 2009

2. Decisions, Orders and Judgements in other SCSL cases

***AFRC* Appeal Judgement**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-A-475, "Judgment", Appeals Chamber, 22 February 2008
***AFRC* Trial Judgement**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007, as revised pursuant to SCSL-04-16-T-628,Corrigendum to Judgement Filed on 21 June 2007", Trial Chamber, 19 July 2007
***CDF* Appeal Judgement**	*Prosecutor v. Fofana, Kondewa*, SCSL-04-14-A-829, "Judgment", Appeals Chamber, 28 May 2008
***CDF* Subpoena Appeal Decision**	*Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-688, "Decision on Interlocutory Appeals against Trial Chamber's Decision refusing to subpocna the President of Sierra Leone", 11 September 2006

3. ICTY Case Law and Documents

***Aleksovski* Appeal Judgement**	*Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", Appeals Chamber, 24 March 2000 http://www.un.org/icty/aleksovski/appeal/judgement/index.htm
***Blagojević and Jokić* Appeal Judgement**	*Prosecutor v. Blagojević and Jokić*, IT-02-60-A, "Judgement" Appeals Chamber, 9 May 2007 http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf
***Blaškić* Appeal Judgement**	*Prosecutor v. Blaškić*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 http://www.un.org/icty/blaskic/appeal/judgement/index.htm

***Blaškić* Trial Judgement**	*Prosecutor v. Blaškić*, IT-95-14-T, "Judgement", Trial Chamber, 3 March 2000 http://www.un.org/icty/blaskic/trialc1/judgement/index.htm
***Brđanin* Appeal Judgement**	*Prosecutor v. Brđanin*, IT-99-36-A, "Judgement", Appeals Chamber, 3 April 2007 http://www.un.org/icty/brdjanin/appeal/judgement/brd-aj070403-e.pdf
***Čelebići* Appeal Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 http://www.un.org/icty/celebici/appeal/judgement/index.htm
***Čelebići* Sentencing Appeal Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-*Abis*, "Judgment on Sentence Appeal", Appeals Chamber, 8 April 2003 http://www.un.org/icty/celebici/appeal/judgement2/index.htm
***Čelebići* Trial Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998 http://www.un.org/icty/celebici/trialc2/judgement/index.htm
***Furundžija* Appeal Judgement**	*Prosecutor v. Furundžija*, IT-95-17/1, "Judgement", Appeals Chamber, 21 July 2000 http://www.un.org/icty/furundzija/appeal/judgement/index.htm
***Furundžija* Trial Judgement**	*Prosecutor v. Furundžija*, ICTY IT-95-17/1-T, "Judgement," Trial Chamber, 10 December 1998 http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf

***Galić* Appeal Judgement**	*Prosecutor v. Galić*, IT-98-29-A, "Judgement", Appeals Chamber, 30 November 2006 http://www.un.org/icty/galic/judgment/gal-acj061130e.pdf
***Jelisić* Appeal Judgement**	*Prosecutor v. Jelisić*, IT-95-10-A, "Judgement", Appeals Chamber, 5 July 2001 http://www.un.org/icty/jelisic/appeal/judgement/index.htm
***Karadžic* Decision Challenging Jurisdiction**	*Prosecutor v Radovan Karadžic*, IT-95-5/18-I, "Decision on six preliminary motions challenging jurisdiction Trial Chamber," 28 April 2009 http://www.icty.org/x/cases/karadzic/tdec/en/090428.pdf
***Kordić and Čerkez* Appeal Judgement**	*Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004 http://www.un.org/icty/kordic/appeal/judgement/index.htm
***Kordić and Čerkez* Trial Judgement**	*Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, "Judgement", Trial Chamber, 26 February 2001 http://www.un.org/icty/kordic/trialc/judgement/index.htm
***Krajisnik* Appeal Judgement**	*Prosecutor v Krajisnik*, IT-00-39-A, "Judgement", Appeals Chamber, 17 March 2009 http://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf
***Krajišnik* Trial Judgement**	*Prosecutor v. Krajišnik and Plavsić*, IT-00-39-T, "Judgement," Trial Chamber, 27 September 2006 http://www.un.org/icty/krajisnik/trialc/judgement/kra-jud060927e.pdf

***Krnojelac* Appeal Judgment**	*Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003 http://www.un.org/icty/krnojelac/appeal/judgement/index.htm
***Krstić* Appeal Judgement**	*Prosecutor v. Krstić*, IT-98-33-A, "Judgement", Appeals Chamber, 19 April 2004 http://www.un.org/icty/krstic/Appeal/judgement/index.htm
***Kunarac* Appeal Judgement**	*Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Judgement", Appeals Chamber, 12 June 2002 http://www.un.org/icty/kunarac/appeal/judgement/index.htm
***Kupreškić* Appeal Judgement**	*Prosecutor v. Kupreškić et al.*, IT-95-16-A, " Judgement", Appeals Chamber, 23 October 2001 http://www.un.org/icty/kupreskic/appeal/judgement/index.htm
***Kvočka* Appeal Judgement**	*Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement" Appeals Chamber, 28 February 2005 http://www.un.org/icty/Kvočka/appeal/judgement/index.htm
***Limaj* Trial Judgement**	*Prosecutor v. Limaj et al.*, IT-03-66-T, "Judgement", Trial Chamber, 30 November 2005 http://www.un.org/icty/limaj/trialc/judgement/index.htm
***Martić* Appeal Judgement**	*Prosecutor v. Martić*, IT-95-11-A, "Judgement", Appeal Chamber, 8 October 2008 http://www.icty.org/x/cases/martic/acjug/en/mar-aj081008c.pdf
***Mejakić* Rule 11*bis* Decision**	*Prosecutor v. Mejakić*, IT-02-65-AR11*bis*, "Decision on Joint Defence Appeal Against Decision on Referral under Rule 11*bis*",7 April 2006 http://www.iety.org/x/cases/mejakic/acdec/en/060407.htm

64
27492

***Milošević* Reasons for Decision**	*Prosecutor v. Milosević*, IT-01-51-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", 18 April 2002 http://www.un.org/icty/milosevic/appeal/decision-e/020418.htm
***Milutinović* Trial Judgement**	*Prosecutor v Milutinović et al.*, IT-05-87-T, "Judgement", Trial Chamber, 26 February 2009 http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226e1of4.pdf
***Mrkšić* Appeal Judgement**	*Prosecutor v Mrkšić*, IT-95-13/1-A, "Judgement", Appeals Chamber, 5 May 2009 http://www.iety.org/x/cases/mrksic/acjug/en/090505.pdf
***Naletilić and Martinović* Appeal Judgement**	*Prosecutor v. Naletilić and Martinović,* IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006 http://www.un.org/icty/naletilic/appeal/judgement/index.htm
***Orić* Appeal ~~Judgement~~**	*Prosecutor v. Orić,* IT-03-68-A, "Judgement", Appeals Chamber, 3 ~~July 2008~~ http://www.un.org/icty/oric/appeal/judgement/oric_jud080703.pdf
***Stakić* Appeal Judgemeut**	*Prosecutor v. Stakić,* IT-97-24-A, "Judgement" Appeals Chamber, 22 March 2006 http://www.un.org/icty/stakic/appeal/judgement/index.htm
***Tadić* Additional Evidence Appeal Decision**	*Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence" 15 October 1998 http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf

***Tadić* Appeal Judgement**	*Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999 http://www.un.org/icty/tadic/appeal/judgement/index.htm
***Tadić* Trial Judgement**	*Prosecutor v. Tadić*, IT-94-1-T, "Opinion and Judgement", Trial Chamber, 7 May 1997 http://www.un.org/icty/tadic/trialc2/judgement/index.htm
***Vasiljević* Appeal Judgement**	*Prosecutor v. Vasiljević*, IT-98-32-A, "Judgement", Appeal Chamber, 25 February 2004 http://www.un.org/icty/vasiljevic/appeal/judgement/index.htm

4. ICTR Case Law and Documents

***Akayesu* Appeal Judgement**	*Prosecutor v. Akayesu*, ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001 http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/Arret/index.htm
***Bagilishema* Trial Judgement**	*Prosecutor v Bagilishema* ICTR-95-1A-T "Judgement" Trial Chamber, 7 June 2001 http://69.94.11.53/ENGLISH/cases/Bagilishema/judgement/index.htm
***Bagilishema* Appeal Judgement**	*Prosecutor v Bagilishema* ICTR-95-1A-A "Judgement (Reasons)", 3 July 2002 http://www.ictr.org/ENGLISH/cases/Bagilishema/judgement/aejudge/131202.htm
***Bizimungu* Interloeutory Appeal Indictment Decision**	*Prosecutor v. Bizimungu* ICTR-99-50-AR5 "Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 denying leave to file an Amended Indictment",

	12 February 2004 http://www.ictr.org/ENGLISH/cases/Bizimungu/decisions/120204.htm
***Gacumbitsi* Appeal Judgement**	*Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006 http://69.94.11.53/ENGLISH/cases/Gachumbitsi/judgement/judgement_appeals_070706.pdf
***Kajelijeli* Appeal Judgement**	*Prosecutor v. Kajelijeli*, ICTR-98-44A, "Judgement", Appeals Chamber, 23 May 2005 http://69.94.11.53/ENGLISH/cases/Kajelijeli/judgement/appealsjudgement/index.pdf
***Karera* Appeal Judgement**	*Karera v Prosecutor*, ICTR-01-74-A, "Judgement", Appeals Chamber, 2 February 2009 http://www.ictr.org/ENGLISH/cases/Karera/decisions/090202apl.pdf
***Kayishema and Ruzindana* Appeal Judgement**	*Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, "Judgement", Appeals Chamber, 1 Juue 2001 http://69.94.11.53/ENGLISH/cases/KayRuz/appeal/index.htm
***Muvunyi* Appeal Judgement**	*Muvunyi v Prosecutor*, ICTR-2000-55A-A, "Judgement", Appeals Chamber, 29 August 2008 http://www.ictr.org/ENGLISH/cases/Muvunyi/decisions/080829-apl-judgement.pdf
***Ndindabahizi* Judgement and Sentenee**	*Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, Judgement and Sentence, Trial Chamber, 15 July 2004 http://www.ictr.org/ENGLISH/cases/Ndindabahizi/judgement/150704_Judgment.pdf

***Ntakirutimana* Appeal Judgement**	*Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Judgement", Appeals Chamber, 13 December 2004 http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/judgement/Arret/Index.htm
***Rutaganda* Appeal Judgement**	*Prosecutor v. Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003 http://69.94.11.53/ENGLISH/cases/Rutaganda/decisions/030526%20Index.htm

5. Other authorities and documents

(i) International treaties and constitutive documents of international tribunals

The Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9.

http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000)

http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf

Geneva Convention (IV) Relative to the Protection of Civilian Persons in time of War, Geneva, 12 August 1949

http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol 1), 8 June 1977

http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument

Statute of the International Criminal Tribunal for Rwanda (ICTR)

http://www.ictr.org/ENGLISH/basicdocs/statute/2007.pdf

Statute of the International criminal Tribunal for the former Yugoslavia (ICTY)

http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf

Convention Against the Taking of Hostages General, Assembly Resolution 146 (XXXIV), U.N GAOR, 34th Session, Supp. No. 46, at 245, U.N Doc. A/34/46

http://www.unodc.org/documents/treaties/Special/1979%20International%20Convention%20against%20the%20Taking%20of%20Hostages.pdf

(ii) Books, Articles and Commentaries

Dörmann Knut (ed) *et al.*, *Elements of War Crimes under the Rome Statute of the International Criminal Court.* Cambridge University Press, 2002.

(Extract attached in Appendix C. This authority exceeds 30 pages: see Practice Direction on the Filing of Documents, Article 7(E).)

Henckaerts Jean-Marie (ed) *et al.*, International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, 2005.

(Extract attached in Appendix C. This authority exceeds 30 pages: see Practice Direction on the Filing of Documents, Article 7(E).)

Lambert J. J., *Terrorism and Hostages in International Law, A Commentary on the Hostages Convention 1979*, Cambridge University Press, 1990.

(Copy attached in Appendix C)

Lee Roy S. (ed) *et al, The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational, 2001.

(Extract attached in Appendix C. This authority exceeds 30 pages: see Praetice Direction on the

Filing of Documents, Article 7(E).)

Triffterer Otto (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Oxford, 2008, pp. 330-338.

(Extract attached in Appendix C. This authority exceeds 30 pages: see Practice Direction on the Filing of Documents, Article 7(E).)

Werle Gerhard, *Principles of International Criminal Law*, T.M.C. Asser Press, 2005.

(Extract attached in Appendix C. This authority exceeds 30 pages: see Praetice Direction on the Filing of Documents, Article 7(E).)

(iii) National Cases

Decision of the Swiss Federal Court (Supreme Court), Arrêt du Tribunal fédéral, ATF 6B_161/2007 /rod, (extract as provided on the website of the Swiss Federal Court)

(Copy of original German version attached in Appendix B with eounsel's unofficial translation of the underlined portion of the text)

http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=15.08.2007_6B_161/2007

Decision of the Swiss Federal Court (Supreme Court), Bundesgerichtsentscheid, BGE 113 IV 63, Erwägung 2 a)(extract as provided on the website of the Swiss Federal Court)

(Copy of original Frech version attached in Appendix B with counsel's unoffieial translation of the underlined portion of the text)

http://relevancy.bger.ch/cgi-bin/JumpCGI?id=BGE-113-IV-63&lang=de&zoom=OUT&system=clir.

Judgement of the German Federal Court of Justice, BGH 1 StR 157/07 - Bundesgerichtshof, Urteil vom 8. November 2007

(Copy of original German version attached in Appendix B with eounsel's unofficial translation of the underlined portion of the text)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=190566982c8aa7924aac83e2c6eac239&nr=40422&pos=0&anz=25

Judgement of the German Federal Court of Justice, BGH 1 StR 320/07 – Bundesgerichtshof Urteil vom 8. November 2007

(Copy of original German version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=36339ac9cc4f6102c41f619085f8c478&nr=42491&pos=1&anz=34

Judgement of the German Federal Court of Justice, BGH 1 StR 376/93 - Bundesgerichtshof, Urteil vom 5. Oktober 1993

(Copy of original German version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Simpson v. Libya, 470 F.3d 356 (2006) United States Court of Appeals, DC Circuit

http://cases.justia.com/us-court-of-appeals/F3/470/356/635236/

(i) National Legislation

Angolan Penal Code, Código Penal (CP), Número: S/N/2006, Data: 3/10/2006, Publicado em: 5/10/2006, Atualizado em: 12/9/2007

(Extract of original Portuguese version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.angola-portal.ao/PortalDoGoverno/LegislacaoD.aspx?Codigo=76

Argentinian Penal Code, Código Penal de la Naeión Argentina, Ley 11.179 (T.O. 1984 actualizado)

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16546/texaet.htm#19

Australian Crimes (Hostages) Act 1989 (Cth) [federal legislation]

(Extract attached in Appendix B)

Source: http://www.austlii.edu.au/au/legis/cth/consol_act/ca1989168/

Australian International Criminal Court (Consequential Amendments) Act 2002

(Extract attached in Appendix B)

Source: http://www.legal-tools.org/en/search-the-tools/record/file.html?fileNum=63254&hash=384931b72b16b107ea9ad1e47e92e0bd46ec918e3646d560f4fb1529a796d839

Austrian Penal Code, Strafgesetzbuch (StGB), Bundesgesetz vom 23. Jänner 1974 über die mitgerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch-StGB), BGBl 1974/60

(Extract of original German version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.ris.bka.gv.at

Belgian Penal Code, Code Pénal (CP), Publieation: 09-06-1867, Entrée en vigueur: 5-10-1867, Dossier numéro: 1867-06-08/01

(Extract of original French version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source : http ://www.juridat.be/cgi_loi/loi_F.pl ?cn=1867060801

Bolivian Penal Code, Código Penal Bolivia

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source : http ://www.oas.org/juridico/spanish/gapeca_sp_docs_bol1.pdf

Canadian Criminal Code

(Extract Attached in Appendix B)

Source:

English: http://laws.justice.gc.ca/en/ShowDoc/cs/C-46/bo-ga:l_VIII::bo-ga:l_IX//en?page=6&isPrinting=false#codese:279_1

French: http://laws.justice.gc.ca/fr/ShowDoc/cs/C-46/bo-ga:l_VIII::bo-ga:l_IX//fr?page=6&isPrinting=false#codese:279_1

Colombian Penal Code, Código Penal (CP), Ley 599 de 2000 (julio 24) - Por la cual se expide el Código Penal

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000.html

and accompanying decision to amend the norm of the Constitutional Court: Sentencia C-291-07 de 25 de abril de 2007 de la Corte Constitucional

Source : http://www.secretariasenado.gov.co/senado/basedoc/cc_sc_nf/2007/c-291_2007.html#1.

Costa Rican Penal Code, Código Penal (CP), Actualizdo a 26 febrero 2002, Ley No. 4573 del 04 de mayo de 1970, En vigor desde el 15 de mayo de 1971

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.oas.org/JURIDICO/mla/sp/cri/sp_cri-int-text-cpenal.pdf

Finish Penal Code, (39/1889; amendments up to 650/2003 as well as 1372/2003, 650/2004 and 1006/2004 included), Unofficial translation by the Ministry of Justice, Finland

(Extract attached in Appendix B)

Source:http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf

French Penal Code, Code Pénal (CP), Version consolidée au 14 mai 2009

(Extract of original French version attached in Appendix B with counsel's unofficial translation from the French Government on www.legifrance.gouv.fr/)

Source:
http://www.legifrance.gouv.fr/affichCode.do;jsessionid=2AEE5C3333C54A10A59707E21ED96819.tpdjo03v_1?cidTexte=LEGITEXT000006070719&dateTexte=20090502

German Penal Code: Strafgesetzbuch (StGB), in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), zuletzt geändert durch Artikel 1 des Gesetzes vom 31. Oktober 2008 (BGBl. I S. 2149)

(Extract of original German version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.gesetze-im-internet.de/bundesrecht/stgb/gesamt.pdf

Indian Suppression of Terrorism Act 1993, SAARC, 1993 No. 36 OF 1993, 26th April 1993

(Extract attached in Appendix B)

Source: http://www.commonlii.org//cgi-bin/disp.pl/in/legis/num_act/scota1993484/scota1993484.html?query=hostage

Irish Criminal Justice (Terrorist Offences) Act 2005

(Extract attached in Appendix B)

Source: http://www.irishstatutebook.ie/2005/en/act/pub/0002/sec0009.html#sec9

Luxembourgian Penal Code, Code Pénal (CP), Loi du 16 juin 1879, Mém. 1879, 589 – Pas. 1879, 231

(Extract of original French version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.legilux.publie.lu/leg/texteseoordonnes/codes/code_penal/cp_L2T08.pdf

Mexican Penal Code, Código Penal Federal (CP), Nuevo Publicado en el Diario Oficial de la Federación el 14 de agosto de 1931, Última reforma publicada DOF 23-01-2009

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.cddhcu.gob.mx/LeyesBiblio/pdf/9.pdf

New Zealand Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 of

(Extract attached in Appendix B)

http://www.legislation.govt.nz/act/public/1980/0044/latest/whole.html#DLM36736

Pakistani Penal Code (Act XLV of 1860), October 6th, 1860, Amended by: Protection of Women (Criminal Laws Amendment Act (Amendment) Ordinance (LXXXV of 2002, Criminal Laws (Reforms) Ordinance (LXXXVI of 2002),etc.

(Extract attached in Appendix B)

Source: http://www.unhcr.org/refworld/docid/485231942.html

Peruvian Penal Code, Código Penal (CP), Decreto Legislativo N° 635, Promulgado: 03.04.91, Publicado: 06.04.91

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.devida.gob.pe

Polish Penal Code, Kodeks karny (Penal Code), USTAWA z dnia 6 czerwca 1997 r. (ACT of 6 June 1997)

(Extract of original Polish version attaehed in Appendix B with unofficial translation from ICC Legal Tools Wehsite)

Source: Polish version: http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU19970880553&type=3&name=D19970553Lj.pdf,

Source English translation: http://www.legal-tools.org/en/search-the-tools/record/file.html?fileNum=67443&hash=4a8b04a8b30f717e7a2413473ed7057042e218c4ea28e1d36bf5a53b24c85721

Russian Criminal Code, Уголовный кодекс РФ от 13 июня 1996 г. N 63-ФЗ, Принят Государственной Думой 24 мая 1996 года, Одобрен Советом Федерации 5 июня 1996 года (The Criminal Code of the Russian Federation of 13 June 1996 no. 63-FZ, Adopted by the State Duma on 24 May 1996, Adopted by the Federation Council on 5 June 1996)

(Extract of original Russian version attached in Appendix B with unofficial translation from ICC Legal Tools Website)

Source: Russian version: http://www.legal-tools.org/en/access-to-the-tools/record/ltdetails/27568/3028a5db4aa7cef346a84dda1944c05a91d60d7ee28edc8914bf90ca996b7a29/

Source English translation: http://www.legal-tools.org/en/access-to-the-tools/record/ltdetails/27567/87d74407feda8cccf6a89d88143ad359b1f73b53fd0a9b8ac6dcb1e4dc63256c/

Salvadorian Penal Code, Código Penal (CP), Decreto N°: 1030, Fecha: 26/4/1997, D. Official: 105, Tomo: 335, Publicación DO: 10/06/1997

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.csj.gob.sv

Senegalese Penal Code, Code Pénal (CP), Code pénal (Loi de base No. 65-60 du 21 juillet 1965 portant Code pénal) [Senegal], No. 65-60, 21 July 1965, Entrée en vigueur: 1er février 1966

(Extract of original French version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.unhcr.org/refworld/docid/49f5d8262.html

Serbian Criminal Code (KRIVIČNI ZAKON REPUBLIKE SRBIJE), Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005, unofficial translation by OSCE Mission February 2006

(Extract of original Serbian version attached in Appendix B with unofficial translation from by OSCE Mission, February 2006)

Source Serbian version:

http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=285&t=Z

Source translated version: http://www.osce.org/item/18196.html

South African Protection of Constitutional Democracy against Terrorist and Related Activities Act, No. 33 of 2004

(Extract attached in Appendix B)

Source: http://www.legalb.co.za/SANatTxt/2004_000/2004_033_000-Act-v20050211asunamended.htm

Swiss Penal Code, Strafgesetzbuch (StGB), Code Pénal (CP), SR 311.0 Sehweizerisches Strafgesetzbuch vom 21. Dezember 1937 / RS 311.0 Code pénal suisse du 21 décembre 1937

(Extract of original German version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source German version: http://www.admin.ch/ch/d/sr/3/311.0.de.pdf

Source French version: http://www.admin.ch/ch/f/rs/3/311.0.fr.pdf

United Kingdom (UK) Criminal Code (IOM Act 1872-1)

(Extract attached in Appendix B)

Souree: http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1982/cukpga_19820028_en_1

US Hostage Taking Act, 18 USC

(Extract attached in Appendix B)

Source: http://uscode.house.gov/download/title_18.shtml

Venezuelan Penal Code, Código Penal (CP), Gaceta Oficial de la República Bolivariana de Venezuela, N° 5494 Extraordinario Caracas, viernes 20 de octubre de 2000

(Extract of original Spanish version attached in Appendix B with counsel's unofficial translation of the underlined portion of the text)

Source: http://www.mintra.gov.ve/legal/codigos/penaldevenezuela.html

Appendix B

Prosecution's Third Ground of Appeal

National legislation and case law on the crime of hostage taking and analogous crimes under national law

Note: copies of the legislation and cases referred to below are attached to this Appendix. Where the original text is not in English, an attachment to this Appendix contains a copy of the original language version, and this Appendix provides counsel's unofficial English translation of the portion of the text that is underlined in attachment to this Appendix.

1. **Angola**

Criminal Code (Código Penal)

Article 164 (Tomada de reféns - Hostage Taking)

See attachment to this Appendix for original Portuguese text. Counsel's unofficial translation:

> Whoever holds captive or abducts [a person] with the intention to achieve political aims and to compel a State, an international organisation, an individual or a legal [collective] person or a collective to act, refrain from acting or acquiesce, by threatening to
>
> a) kill the captive or abducted person,
>
> b) inflict serious injuries to his/her physical integrity or
>
> c) continue to deprive [the victim] of his/her liberty,
>
> shall be punishable by imprisonment from 2 to 8 years.
>
> ...
>
> (emphasis added)

2. **Argentina**

Criminal Code (Código Penal de la Nación Argentina)

Article 142bis

See attachment to this Appendix for original Spanish text. Counsel's unofficial translation:

> A prison sentence from five (5) to fifteen (15) years shall be imposed upon [a person] who abducts, holds captive or hides a person with the aim of obliging the victim or a third [person] to do, abstain from doing or acquiesce to something against his/her will. If the perpetrator achieves his/her purpose, the minimum penalty shall be increased to eight (8) years.
>
> (emphasis added)

3. **Australia**

Crimes (Hostages) Act 1989 (Cth) [federal legislation]

Section 7 (Meaning of hostage taking)

For the purposes of this Act, a person commits an act of hostage-taking if the person:

(a) seizes or detains another person (in this section called *the hostage*); and

(b) threatens to kill, to injure, or to continue to detain, the hostage;

with the intention of compelling:

(c) a legislative, executive or judicial institution in Australia or in a foreign country;

(d) an international intergovernmental organisation; or

(e) any other person (whether an individual or a body corporate) or group of persons;

to do, or abstain from doing, any act as an explicit or implicit condition for the release of the hostage.

(emphasis added)

Australian International Criminal Court (Consequential Amendments) Act 2002

Subdivision D—War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator seizes, detains or otherwise holds hostage one or more persons; and

(b) the perpetrator threatens to kill, injure or continue to detain the person or persons; and

(c) the perpetrator intends to compel the government of a country, an international organisation or a person or group of persons to act or refrain from acting as an explicit or implicit condition for either the safety or the release of the person or persons; and

(d) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and

(e) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and

(f) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

....

(emphasis added)

4. **Austria**

Criminal Code (Strafgesetzbuch - StGB)

§ 102 (Erpresserische Entführung – extortionary abduction)

See attachment to this Appendix for original German text. Counsel's unofficial translation:

(1) Whoever abducts or seizes another [person] without his/her consent, or after he/she obtained the [victim's] consent through dangerous threat or deceit, in order to coerce a third [person] to act, acquiesce or refrain form acting, shall be punishable by imprisonment from ten to twenty years.

(2) Also punishable is whoever

1. ...
2. coerces a third [person] to act, acquiesce or refrain from acting, by using an abduction or seizure of a person that had been committed without [an initially] coercive intent.

(emphasis added)

5. **Belgium**

Criminal Code (Code Pénal)

Article 347bis

See attachment to this Appendix for original French text. Counsel's unofficial translation:

§ 1. The following acts constitute hostage-taking: the arrest, detention or abduction of a person in order to obtain the fulfilment of a demand or a condition, or to prepare or facilitate the commission of a crime or an offence, or to assist in the escape of, or to ensure the impunity of, the perpetrator or the accomplice of a crime or an offence.

§ 2. The hostage-taking shall be punishable by imprisonment from twenty to thirty years.

[...]

(emphasis added)

6. **Bolivia**

Criminal Code (Código Penal Bolivia)

Aricle. 334 (Secuestro)

See attachment to this Appendix for original Spanish text. Counsel's unoffieial translation:

Whoever abducts a person with the aim of obtaining a ransom or another illegal advantage or a concession for him/herself or for others in exchange for the liberty of the victim, shall be punished with a sentence of ...

(emphasis added)

7. **Canada**

Criminal Code

Article 279.1

See attachment to this Appendix for official English and French texts.

Everyone takes a person hostage who – with intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage –

(a) confines, imprisons, forcibly seizes or detains that person; and

(b) in any manner utters, conveys or causes any person to receive a threat that the death of, or bodily harm to, the hostage will be caused or that the confinement, imprisonment or detention of the hostage will be continued.

(emphasis added)

8. **Colombia**

Criminal Code (Código Penal)

Article 148 (Toma de rehenes)

See attaehment to this Appendix for original Spanish text. Counsel's unofficial translation:

Whoever, on the occasion, and in the eourse, of an armed conflict, ~~deprives~~ a person of his/her liberty in making [the victim's] liberty or security a condition for the fulfilment of demands ~~to the other party [in the conflict]~~, or uses them as a defenee, shall be punished with imprisonment of three hundred and twenty (320) months to five hundred and forty (540) months, a fine of [...]

Sentencia C-291-07 de 25 de abril de 2007 de la Corte Constitucional (Decision of the Constitutional Court dated 25th April 2007)

See attachment to this Appendix for original Spanish text. Counsel's unofficial translation:

CRIME OF HOSTAGE-TAKING – The requirement [of this crime], that the deprivation of liberty of the hostage is a condition for the fulfillment of demands uttered to "the other party" in the armed conflict is unconstitutional.

Based on the customary definition of the international crime of hostage taking, as indicated in the preceding paragraph 5.4.4, and as crystallized in the definition of the Elements of Crimes of the International Criminal Court, the Chamber observes that the petitioner has reasons in submitting that the requirement that conditions for liberating or keeping a hostage safe are directed towards the other party in an armed conflict, as provided for in article 148 of the Criminal Code, is unconstitutional. In fact, this requirement is not provided for in the customary norms which incorporate the definition of the elements of this

war crime; thus, introducing said condition would narrow the scope of application of the crime in question, and would unjustifiably reduce the scope of protection established in International Humanitarian Law, since it would leave [those] hostages unprotected for which conditions are not uttered to the other party in the armed conflict, but to a subject distinct from said party – which, according to the Elements of Crimes of the International Criminal Court, could be a State, an international organization, a natural or a legal person, or a group of persons. [...]

9. **Costa Rica**

Criminal Code (Código Penal)

Article 215 (Secuestro extorsivo)

See attachment to this Appendix for original Spanish text. Counsel's unoffieial translation:

A prison sentence between ten and fifteen years shall be imposed upon whoever abducts a person in order to obtain a ransom for economic, political, social-political, religious or racial purposes, ...

(emphasis added)

10. **El Salvador**

Criminal Code (Código Penal)

Article 149 (Secuestro)

See attachment to this Appendix for original Spanish text. Counsel's unofficial translation:

Whoever deprives another [person] of his/her individual liberty with the purpose of obtaining a ransom, the fulfilment of a specific condition, or in order that a public authority carries out a specific act or refrains from carrying out such an act, shall be punished with ...

(emphasis added)

11. **Finland**

Finnish Penal Code

Section 4 - Hostage taking (578/1995)

See attachment to this Appendix for unofficial translation provided by the Ministry of Justice, Finland:

(1) A person who deprives another of his/her liberty in order to have a third person

do, endure or omit to do something, under threat that the hostage will otherwise not be released or he/she will be killed or harmed, shall be sentenced, if the act is aggravated when assessed as a whole, for hostage taking to imprisonment for at least one and at most ten years.

(2) An attempt is punishable.

(emphasis added)

~~629~~
2810

12. **France**

Criminal Code (Code Pénal de la France)

Article 224-4

See attachment to this Appendix for original French text. Included in this attachment is the translation of the French Code Pénal provided by the French Government on www.legifrance.gouv.fr/:

> Where the person was arrested, abducted, detained or restrained as a hostage either to prepare or facilitate the commission of a felony or a misdemeanour, or to assist in the escape of or to ensure the impunity of the perpetrator or the accomplice to a felony or a misdemeanour, or to secure the enforcement of an order or a condition, in partieular the payment of a ransom, thc offence set out under article 224-1 is punished by thirty years' criminal imprisonment.

13. **Germany**

Criminal Code (Strafgesetzbuch - StGB)

§ 239b (Geiselnahme – hostage taking)

See attachment to this Appendix for original German text. Counsel's unofficial translation:

> Whoever abducts or seizes a person in order to coerce him/her or a third person, through death threats or serious bodily injury (§ 226) to thc victim or of [the victim's] deprivation of liberty for longer than one week, to commit, omit to do or acquiesee in somcthing, or whoever ~~exploits the purposes of such coercion a person's situation created by~~ such an act, shall be punishcd with imprisonment for not less than five years. (emphasis added)

Judgement of the German Federal Court of Justice, BGH 1 StR 376/93, para. 8

See attachment to this Appendix for original German text. Counsel's unofficial translation:

> Additionally, [the crimes referred to in] §§ 239a, 239b StGB are already fulfilled at the point of abduction or seizure [of a person] with a coercive intent; ...

Decision of the German Federal Court of Justice, BGH 1 StR 157/07, para. 8

See attachment to this Appendix for original German text. Counsel's unoffieial translation:

> However, evcn the achievement of a partial success by the perpetrator, who acts, in view of a further-reaching goal, constitutes [the element] of coercion. In any case, any act by the victim, which in the mind of the perpetrator represents a preliminary stage of the intended final outcome, constitutes the completion of the coercion that is intended with the qualified threat.

Decision of the German Federal Court of Justice, BGH 1 StR 320/07, para. 13

See attachment to this Appendix for original German text. Counsel's unofficial translation:

> If he [the perpetrator] intended at the moment when he established physical control over the plaintiff, to achieve his further aims through an implicit death threat, the conditions for the first alternative of § 239b para. 1 StGB would be fulfilled.

14. **India**

Suppression of Terrorism Act 1993, SAARC

Article 4. Hostage-taking.

(1) Whoever, by force or threat of force or by any other form of intimidation, seizes or detains any person and threatens to kill or injure that person with intent to cause a Convention country to do or abstain from doing any act as the means of avoiding the execution of such threat, commits the offence of hostage-taking.

(2) Whoever commits the offence of hostage-taking shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

(emphasis added)

15. **Ireland**

Criminal Justice (Terrorist Offences) Act 2005

Part 3, Suppression of Hostage-Taking, Terrorist Bombing and Crimes Against Internationally Protected Persons, Section 9, Offence of hostage-taking.

(1) Subject to subsections (3) to (5), a person is guilty of the offence of hostage-taking if he or she, in or outside the State

(a) seizes or detains another person ("the hostage"), and

(b) threatens to kill, injure or continue to detain the hostage,

in order to compel a state, an international intergovernmental organisation, a person or a group of persons to do, or abstain from doing, any act.

(2) Subject to subsections (3) to (5), a person who attempts to commit an offenee under subsection (1) is guilty of an offence.

(3) Subsections (1) and (2) apply to an act committed outside the State if

(a) the act is committed on board an Irish ship,

(b) the act is committed on an aircraft registered in the State,

(c) the act is committed by a citizen of Ireland or by a stateless person habitually resident in the State,

(d) the act is committed in order to compel the State to do or abstain

from doing an act, or

(e) the hostage is a citizen of Ireland.

(4) Subsections (1) and (2) apply also to an act committed outside the State in circumstances other than those referred to in subsection (3), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43 (2) for an offence in respect of that act except as authorised by section 43 (3).

(5) Subsections (1) and (2) do not apply in respect of any act of hostage-taking that constitutes an offence under section 3 of the Geneva Conventions Act 1962.

(6) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

(emphasis added)

16. **Luxembourg**

Criminal Code (Code Pénal)

Article 442-1 (Chapitre IV-I. - De la prise d'otages – about hostage taking)

See attachment to this Appendix for original French text. Counsel's unofficial translation:

Between 15 and 20 years of imprisonment shall be imposed upon whoever abducts, arrests, detains or holds captive a person, or has a person abducted, of whatever age, either to prepare or facilitate the commission of a crime or an offence, or to assist in the escape, or to ensure the impunity, of the perpetrators or the accomplices of a crime or an offence, or to use the abducted, arrested, detained or captive person as leverage for the fulfilment of a demand or a condition.

17. **Mexico**

Criminal Code (Código Penal)

Article 366

See attachment to this Appendix for original Spanish text. Counsel's unofficial translation:

A [person] who deprives another [person] of his/her liberty shall be punished with: fifteen to forty years of imprisonment and ..., if the prevention of liberty was committed with the purpose of:

...

b) Detaining a person as a hostage and threatening to kill him/her or to cause him/her injuries, in order that the authorities or an individual carries out, or refrains from carrying out, an action, [...]

(emphasis added)

18. **New Zealand**

The Crimes (Internationally Protected Persons, United Nations and Associated

Personnel, and Hostages) Act 1980

Section 8 Hostage-taking

(1) Subject to subsection (2) of this section, every one commits the crime of hostage-taking who, whether in or outside New Zealand, unlawfully seizes or detains any person (in this section called the hostage) without his consent, or with his consent obtained by fraud or duress, with intent to compel the Government of any country or any international intergovernmental organisation or any other person to do or abstain from doing any act as a condition, whether express or implied, for the release of the hostage.

(2) No one shall be convicted of the crime of hostage-taking if

(a) The act of hostage-taking takes place in New Zealand; and

(b) The alleged offender and the hostage are New Zealand citizens; and

(c) The alleged offender is in New Zealand.

(3) Every one who commits the crime of hostage-taking is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

(emphasis added)

19. **Pakistan**

Criminal Code

[illegible] (Kidnapping or abducting for extorting property valuable security)

Whoever kidnaps or abducts any person for the purpose of extorting from the person kidnapped or abdueted, or from any person interested in the person kidnapped or abdueted any property, whether movable or immovable, or valuable security, or to compel any person to comply with any other demand, whether in eash or otherwise, for obtaining release of the person kidnapped or abducted, shall be punished with death or imprisonment for life and shall also be liable to forfeiture of property.

(emphasis added)

20. **Peru**

Criminal Code (Código Penal)

Artículo 200 (Extorsión)

See attachment to this Appendix for original Spanish text. Counsel's unofficial translation:

Extortion. Whoever, by violence or threat to or through hostage taking of a person, obliges the latter or another [person] to grant to the perpetrator or a third [person] an illegal economic advantage or an advantage of any other nature, shall be punished with imprisonment of not less than six and not more than twelve years.

(emphasis added)

21. **Poland**

Criminal Code (Kodeks Karny)

Article 252

See attachment to this Appendix for original Polish text. Included in this attachment is the unofficial translation from ICC Legal Tools Website:

§ 1. Whoever takes or detains a hostage with the purpose of forcing a state or local government authority, an institution or organisation, legal or natural person, or a group of persons to act in a specified manner shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

§ 2. If the consequence of the act specified in § 1 is the death of a person or a serious detriment to health, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 2 aud 12 years.

§ 3. Whoever makes preparations for the offence specified in § 1, shall be subject to the penalty of deprivation of liberty for up to 3 years.

§ 4. Whoever abandoned the intent to extort or releases the hostage shall not be subject to the penalty for the offence specified in § 1.

(emphasis added)

22. **Russia**

Criminal Code (Уголовный кодекс РФ)

Article 206 (Hostage-Taking)

See attachment to this Appendix for original Russian text. Included in this attachment is the unofficial translation from ICC Legal Tools Website:

1. The capture or detention of a hostage, committed to compel the State, an organization, or an individual to perform or to abstain from taking any action as a condition for the release of the hostage, shall be punishable by deprivation of liberty for a term of five to ten years.
2. The same deeds committed:
   a) by a group of persons in a preliminary conspiracy;
   b) abolished
   c) with the use of violence posing a danger to human life and health;
   d) with the use of arms or objects used as arms;
   e) against an obvious minor;
   f) against a woman in a state of pregnancy obvious to the

convicted person;

g) against two or more persons;

h) out of mercenary motives or by hire,

shall be punishable by deprivation of liberty for a term of six to fifteen years.

3. Deeds provided for by the first or second part of this Artiele, if tbey have been committed by an organized group or have involved by negligence the death of a person, or any other grave consequences,

shall be punishable by deprivation of liberty for a term of eight to twenty years.

(emphasis added)

23. **Senegal**

Criminal Code (Code Pénal)

Article 337 bis

See attaehment to this Appendix for original Freneh text. Counsel's unoffieial translation:

In a case, where a person, of whatever age, has been arrested, detained or held captive as a hostage, either to prepare or faeilitate the eommission of a crime or an offence, or to assist in the escape of or to ensure the impunity of the perpetrator or the accomplice of a crime or an offence, or to obtain the payment of a ransom, the fulfillment of a demand or a condition, the perpetrator shall be punished with the death penalty.

24. **Serbia**

Criminal Code (KRIVIČNI ZAKONIK)

Article 392 Taking Hostages

See attachment to this Appendix for original Serbian text. Included in this attachment is the unofficial translation by OSCE Mission, February 2006

(1) Whoever abducts another person and threatens to kill, injure or keep him/her hostage with intent to force another country or international organisation to do or not to do something, shall be punished by imprisonment of two to ten years.

(2) The offender speeified in paragraph 1 of this Article who voluntarily releases the abducted person although not achieving the objective of the abduetion, may be remitted from punishment.

(3) If the offenee specified in paragraph 1 of this Article results in the death of the abducted person, the offender shall be punished by imprisonment of three to fifteen years.

(4) If in eommission of the offence speeified in paragraph 1 of this Article the offender intentionally kills the abducted person, the offender shall be punished by imprisonment of minimum ten years or imprisonment of thirty to forty years.

(emphasis added)

25. **South Africa**

South Africa Protection of Constitutional Democracy against Terrorist and Related Activities Act, No. 33 of 2004

7. Offences relating to taking a hostage

Any person who intentionally

(a) seizes or detains; and

(b) threatens to kill, to injure or to continue to detain,

any other person (hereinafter referred to as a hostage), in order to compel a third party, namely a State, an intergovernmental organisation, 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, is guilty of an offence of taking a hostage.

(emphasis added)

26. **Switzerland**

Criminal Code (Strafgesetzbuch – StGB / Code Pénal)

Article 185(1) (Geiselnahme / Prise d'otage – hostage taking)

See attachment to this Appendix for original German and French texts. Counsel's unofficial translation of the German text:

(1) Whoever deprives somebody of his/her liberty, abduets or seizes somebody, in order to coerce a third person to an action, omission or acquiesce, or whoever exploits for purposes of such coereion such a situation created by another person, shall be punished with imprisonment for not less than one year.

Decision of the Swiss Federal Court (Supreme Court), Bundesgerichtsentscheid, BGE 113 IV 63

See attachment to this Appendix for original German text. Counsel's unofficial translation:

Consideration 2 a): The *actus reus* is fulfilled when the perpetrator through deprivation of liberty, abduction or by any other means, seizes the vietim.

...

Finding 2 bb): The *mens rea* element of Article 185 StGB is fulfilled since the appellant acted with the knowledge that he seized B., and because he additionally acted with the intent to make the postal clerk render him the money.

Decision of the Swiss Federal Court (Supreme Court), Arrêt du Tribunale

federale, ATF 6B_161/2007 /rod:

See attachment to this Appendix for original French text. Counsel's unofficial translation:

Finding 3.1: The criminal act was completed when the perpetrator, with the aim to coerce a third [person] to act, seized the hostage.

(emphasis added)

27. **UK**

The Taking of Hostages Act 1982 (c. 28)

Hostage-taking

(1) A person, whatever his nationality, who, in the United Kingdom or elsewhere,

(a) detains any other person ("the hostage"), and

(b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage,

commits an offence.

(2) A person guilty of an offence under this Act shall be liable, on conviction on indictment, to imprisonment for life.

(emphasis added)

28. **Ukraine**

The Criminal Code of Ukraine

Article 147. Hostage taking

See attachment to this Appendix for original Ukrainian text. Included in this attachment is the unofficial translation from http://www.legislationline.org/:

1. Taking or holding a person as a hostage with the intent to induce relatives of the hostage, any government agency or other institution, business or organization, any natural person or any official to make or refrain from any action as a condition for release of the hostage shall be punishable by imprisonment for a term of five to eight years.

2. The same acts committed in respect of a minor, or by an organized group, or accompanied with threats to destroy people, or causing any grave consequences, shall be punishable by imprisonment for a term of seven to fifteen years.

(emphasis added)

29. **USA**

US Hostage Taking Act, 18 USC

§ 1203

[...], whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another

person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(emphasis added)

30. **Venezuela**

Criminal Code (Código Penal)

Article 462

See attachment to this Appendix for original Spanish text. Counsel's unofficial translation:

A [person] who has abducted a person in order to obtain from him/her or from a third [person], in exchange for his/her liberty, money, goods, titles or documents with any legal effect in favour of the perpetrator or another person the perpetrator indicates, shall be punished with imprisonment from ten to twenty years, even if the perpetrator did not achieve the intended aim.

(emphasis added)

638
2819

Angola

Código Penal (CP)

Número: S/N/2006, Data: 3/10/2006, Publicado em: 5/10/2006, Atualizado em: 12/9/2007

Source: http://www.angola-portal.ao/PortalDoGoverno/LegislacaoD.aspx?Codigo=76

~~639~~ 2820

LIVRO I
PARTE GERAL

TÍTULO I
DA LEI CRIMINAL

CAPÍTULO ÚNICO
PRINCÍPIOS GERAIS

Art.º 1.º
(Princípio da legalidade)

1. Só pode ser punido criminalmente o facto descrito e declarado passível de pena por lei anterior ao momento da sua prática.
2. Só pode ser aplicada medida de segurança a estados de perigosidade cujos pressupostos estejam fixados em lei anterior à sua verificação.
3. Não é permitido o recurso à analogia nem à interpretação extensiva para qualificar um facto como crime, para definir um estado de perigosidade ou para determinar a pena ou a medida de segurança que lhes correspondem.

Art.º 2.º
(Aplicação no tempo)

1. As penas e as medidas de segurança são determinadas pela lei vigente ao tempo da prática do facto ou da verificação dos pressupostos de que dependem.
2. Sempre que as disposições penais vigentes no momento da prática do facto forem diferentes das estabelecidas em leis posteriores, aplica-se o regime que concretamente se mostrar mais favorável ao agente, salvo se este já tiver sido condenado por sentença transitada em julgado, sem prejuízo do disposto no número seguinte.

640
2821

2. Quando a privação da liberdade:
   a) for precedida ou acompanhada de tortura ou outro tratamento cruel, desumano ou degradante;
   b) for praticada com o pretexto falso de que a vítima sofria de anomalia psíquica ou contra pessoa indefesa, em razão da idade, deficiência física ou psíquica, doença ou gravidez;
   c) for praticada simulando o agente autoridade pública ou com abuso grosseiro de autoridade;
   d) for praticada contra as pessoas referidas nas alíneas d) e e) do artigo 136.º;
   e) durar mais de 15 dias,

a pena é de prisão de 2 a 8 anos.

3. Quando a privação da liberdade:
   a) durar mais de 30 dias;
   b) for precedida, acompanhada ou dela resultar ofensa grave à integridade física da vítima, nos termos do artigo 148.º ou dela resultar o suicídio da vítima,

a pena é de prisão de 2 a 12 anos.

4. **A pena é de prisão de 3 a 14 anos**, se da privação da liberdade resultar a morte da vítima.

Art.º 163.º
(Rapto)

1. Quem, por meio de violência, ameaça ou astúcia, raptar outra pessoa, transferindo-a de um lugar para outro, com a intenção de:
   a) a submeter à escravidão;
   b) a submeter a extorsão;
   c) cometer crime contra a sua autodeterminação sexual;
   d) obter resgate ou recompensa

é punido com pena de prisão de 1 a 5 anos.

2. **A pena é de prisão de 2 a 10, de 2 a 12 ou de 5 a 14 anos**, se ocorrer, respectivamente, qualquer das situações descritas nos n.ºs 2, 3 ou 4 do artigo anterior.

Art.º 164.º
(Tomada de reféns)

1. Quem cometer sequestro ou rapto com a intenção de realizar finalidades de natureza política e coagir um Estado, uma organização internacional, uma pessoa singular ou colectiva ou colectividade a uma acção ou omissão ou a suportar uma actividade, ameaçando:
   a) matar a pessoa sequestrada ou raptada;

641
2822

b) infligir ofensas graves à sua integridade física; ou
c) mantê-la privada da sua liberdade

é punido com pena de prisão de 2 a 8 anos.

2. É correspondentemente aplicável ao crime de tomada de reféns o disposto no n.º 2 do artigo anterior quanto ao rapto.
3. As penas estabelecidas nos números anteriores são igualmente aplicáveis àquele que, determinado pela intenção e finalidades descritas no n.º 1, se aproveitar da tomada de reféns praticada por outrem.

Art.º 165.º
(Escravidão)

1. Quem reduzir outra pessoa ao estado de indivíduo sobre quem se exerçam, no todo ou em parte, os poderes inerentes ao direito de propriedade **é punido com pena de prisão de 7 a 15 anos**.
2. Comete o mesmo crime e **é punido com a mesma pena** quem alienar, ceder, adquirir ou se apoderar de uma pessoa com o propósito de a manter no estado ou condição descritos no número anterior.
3. Comete, ainda, o crime de escravidão e **é punido com pena de prisão de 1 a 5 anos** quem comprar ou vender criança menor de 14 anos para adopção ou, para o mesmo fim, intermediar negócio ou transacção igual ou similar.

Art.º 166.º
(Intervenção médica sem consentimento)

1. Quem, sendo médico ou pessoa legalmente autorizada, realizar intervenção ou tratamento médico sem o consentimento do paciente **é punido com pena de prisão até 3 anos ou com a de multa até 360 dias**.
2. **O facto não é punível**, se o consentimento:
   a) não puder ser obtido ou renovado sem dilação que ponha em risco a vida do paciente ou que implique perigo grave para o seu corpo ou saúde;
   b) for dado para certa intervenção ou tratamento e acabar por ser realizada intervenção ou tratamento diferente por estes terem sido considerados, de acordo com os conhecimentos e a experiência da medicina, o meio adequado para evitar um perigo sério para a vida, o corpo ou a saúde do paciente.
3. O facto descrito na alínea b) do número anterior **é punível**, se ocorrerem circunstâncias que permitam concluir, com segurança, que o consentimento teria sido recusado pelo paciente.

642
2823

Argentina

Código Penal de la Nación Argentina

Ley 11.179 (T.O. 1984 actualizado)

Source: http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16546/texact.htm#19

643
2824

CODIGO PENAL DE LA NACION ARGENTINA

LEY 11.179 (T.O. 1984 actualizado)

Indice Temático

LIBRO PRIMERO

DISPOSICIONES GENERALES

LIBRO SEGUNDO

DE LOS DELITOS

LEY 11.179

(T.O. 1984 actualizado)

644
2825

NACION AR

DELITOS CONTRA LA LIBERTAD

Capítulo I

Delitos contra la libertad individual

ARTICULO 140. - Serán reprimidos con reclusión o prisión de tres a quince años, el que redujere a una persona a servidumbre o a otra condición análoga y el que la recibiere en tal condición para mantenerla en ella.

ARTICULO 141. - Será reprimido con prisión o reclusión de seis meses a tres años; el que ilegalmente privare a otro de su libertad personal.

ARTICULO 142. - Se aplicará prisión o reclusión de dos a seis años, al que privare a otro de su libertad personal, cuando concurra alguna de las circunstancias siguientes:

1. Si el hecho se cometiere con violencias o amenazas o con fines religiosos o de venganza;

2. Si el hecho se cometiere en la persona de un ascendiente, de un hermano, del cónyuge o de otro individuo a quien se deba respeto particular;

3. Si resultare grave daño a la persona, a la salud o a los negocios del ofendido, siempre que el hecho no importare otro delito por el cual la ley imponga pena mayor;

4. Si el hecho se cometiere simulando autoridad pública u orden de autoridad pública;

5. Si la privación de la libertad durare más de un mes.

ARTICULO 142 bis. - Se impondrá prisión o reclusión de cinco (5) a quince (15) años, al que sustrajere, retuviere u ocultare a una persona con el fin de obligar a la víctima o a un tercero, a ~~hacer~~, no hacer, o tolerar algo contra su voluntad. Si el autor lograre su propósito, ~~el mínimo de la~~ pena se elevará a ocho (8) años.

La pena será de diez (10) a veinticinco (25) años de prisión o reclusión:

1. Si la víctima fuese una mujer embarazada; un menor de dieciocho (18) años de edad; o un mayor de setenta (70) años de edad.

2. Si el hecho se cometiere en la persona de un ascendiente; de un hermano; del cónyuge o conviviente; o de otro individuo a quien se deba respeto particular.

3. Si se causare a la víctima lesiones graves o gravísimas.

4. Cuando la víctima sea una persona discapacitada, enferma o que no pueda valerse por sí misma.

5. Cuando el agente sea funcionario o empleado público o pertenezca o haya pertenecido al momento de comisión del hecho a una fuerza armada, de seguridad u organismo de inteligencia del Estado. *(Inciso sustituido por art. 3° del Anexo I de la Ley N° 26.394 B.O. 29/8/2008. Vigencia: comenzará a regir a los SEIS (6) meses de su promulgación. Durante dicho período se llevará a cabo en las áreas pertinentes un programa de divulgación y capacitación sobre su contenido y aplicación)*

6. Cuando participaran en el hecho tres (3) o más personas.

La pena será de quince (15) a veinticinco (25) años de prisión a reclusión si del hecho resultara la muerte de la persona ofendida, como consecuencia no querida por el autor.

La pena será de prisión o reclusión perpetua si se causare intencionalmente la muerte de la

645
2826

persona ofendida.

La pena del partícipe que, desvinculándose de los otros, se esforzare de modo que la víctima recupere la libertad, sin que tal resultado fuese la consecuencia del logro del propósito del autor, se reducirá de un tercio a la mitad.

(Artículo sustituido por art. 3° de la Ley N° 25.742 B.O. 20/6/2003)

~~646~~
2827

Australia

Crimes (Hostages) Act 1989

Act No. 26 of 1989 as amended up to *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*

Source: http://www.austlii.edu.au/au/legis/cth/consol_act/ca1989168/

International Criminal Court (Consequential Amendments) Act 2002

Assented to 27 June 2002

Source: http://www.legal-tools.org/en/search-the-tools/record/file.html?fileNum=63254&hash=384931b72b16b107ea9ad1e47e92e0bd46cc918e3646d560f4fb1529a796d839

647
2828

Commonwealth Consolidated Acts

CRIMES (HOSTAGES) ACT 1989

TABLE OF PROVISIONS

6478
2829

Commonwealth Consolidated Acts

CRIMES (HOSTAGES) ACT 1989 - SECT 7

Meaning of hostage-taking

For the purposes of this Act, a person commits an act of hostage-taking if the person:

(a) seizes or detains another person (in this section called *the hostage*); and

(b) threatens to kill, to injure, or to continue to detain, the hostage;

with the intention of compelling:

(c) a legislative, executive or judicial institution in Australia or in a foreign country;

(d) an international intergovernmental organisation; or

(e) any other person (whether an individual or a body corporate) or group of persons;

to do, or abstain from doing, any act as an explicit or implicit condition for the release of the hostage.

International Criminal Court (Consequential Amendments) Act 2002

Subdivision D—War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions

268.24 War crime—wilful killing

(1) A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator causes the death of one or more persons; and

(b) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and

(c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and

(d) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for life.

(2) Strict liability applies to paragraph (1)(b).

268.25 War crime—torture

(1) A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons; and

(b) the perpetrator inflicts the pain or suffering for the purpose of:

(i) obtaining information or a confession; or

(ii) a punishment, intimidation or coercion; or

(iii) a reason based on discrimination of any kind; and

(c) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and

(d) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and

(e) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 25 years.

(2) Strict liability applies to paragraph (1)(c).

268.26 War crime—inhumane treatment

(1) A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons; and

(e) the perpetrator's condnet takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 10 years.

(2) Strict liability applies to:

(a) the physical element of the offence referred to in paragraph (1)(a) that the judicial guarantees are those referred to in paragraph (1)(b); and

(b) paragraphs (1)(b) and (c).

268.32 War crime—unlawful deportation or transfer

(1) A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator unlawfully deports or transfers one or more persons to another country or to another location; and

(b) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and

(c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so proteeted; and

(d) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to paragraph (1)(b).

268.33 War crime—unlawful confinement

(1) A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator unlawfully confines or continues to confine one or more persons to a eertain loeation; and

(b) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and

(c) the perpetrator knows of, or is reckless as to, the faetual circumstances that establish that the person or persons are so proteeted; and

(d) the perpetrator's conduet takes place in the contcxt of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to paragraph (1)(b).

268.34 War crime—taking hostages

(1) A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator seizes, detains or otherwise holds hostage one or more persons; and

(b) the perpetrator threatens to kill, injure or continue to detain the person or persons; and

(c) the perpetrator intends to compel the government of a country, an international organisation or a person or group of persons to act or refrain from acting as an explicit or implicit condition for either the safety or the release of the person or persons; and

(d) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and

(e) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and

(f) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to paragraph (1)(d).

Subdivision E—Other serious war crimes that are committed in the course of an international armed conflict

268.35 War crime—attacking civilians

A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator directs an attack; and

(b) the object of the attack is a civilian population as such or individual civilians not taking direct part in hostilities; and

(e) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for life.

268.36 War crime—attacking civilian objects

A person (the ***perpetrator***) commits an offence if

(a) the perpetrator directs an attack; and

(b) the object of the attack is not a military objective; and

(c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 15 years.

268.37 War crime—attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission

(1) A person (the ***perpetrator***) commits an offence if:

(a) the perpetrator directs an attack; and

(b) the object of the attack is personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; and

(c) the personnel are entitled to the protection given to civilians under the Geneva Conventions or Protocol I to the Geneva Conventions; and

652
2833

Austria

Strafgesetzbuch (StGB)

Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch-StGB) BGBl 1974/60

Source: http://www.ris.bka.gv.at

Kurztitel

Strafgesetzbuch

Kuudmachungsorgan

BGBl. Nr. 60/1974

§/Artikel/Anlage

§ 102

Inkrafttretensdatum

01.01.1975

Text

Erpresserische Entführung

§ 102. (1) Wer einen anderen ohne dessen Einwilligung mit Gewalt oder nachdem er die Einwilligung dureh gefährliche Drohung oder List erlangt hat, entführt oder sich seiner sonst bemäehtigt, um einen Dritten zu einer Handlung, Duldung oder Unterlassung zu nötigen, ist mit Freiheitsstrafe von zehn bis zu zwanzig Jahren zu bestrafen.

(2) Ebenso ist zu bestrafen, wer

1. in der im Abs. 1 genannten Absicht eine unmündige, geisteskranke oder wegen ihres Zustands zum Widerstand unfähige Person entführt oder sich ihrer sonst bemächtigt oder
2. unter Ausnützung einer ohne Nötigungsabsicht vorgenommenen Entführung oder sonstigen Bemächtigung einer Persnn einen Dritten zu einer Handlung, Duldung oder Unterlassung nötigt.

(3) Hat die Tat den Tod der Person zur Folge, die entführt worden ist oder deren sieh der Täter sonst bemächtigt hat, so ist der Täter mit Freiheitsstrafe von zehn bis zu zwanzig Jahren oder mit lebenslanger Freiheitsstrafe zu bestrafen.

(4) Läßt der Täter freiwillig unter Verzicht auf die begehrte Leistung die Person, die entführt worden ist oder deren sich der Täter sonst bemächtigt hat, ohne ernstlichen Schaden in ihren Lebenskreis zurückgelangen, so ist er mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu bestrafen.

654
2835

Belgium

Code Pénal (CP)

Publication: 09-06-1867, Entrée en vigueur: 5-10-1867, Dossier numéro: 1867-06-08/01

Source: http://www.juridat.be/cgi_loi/loi_F.pl?cn=1867060801

2836

TITRE VIbis. - (DES CRIMES RELATIFS A LA PRISE D'OTAGES). <L 02-07-1975, art. 1>

Art. 347bis. <L 2000-11-28/35, art. 4, 029; En vigueur : 27-03-2001> § 1er. Constituent une prise d'otages, l'arrestation, la détention ou l'enlèvement de personnes pour répondre de l'exécution d'un ordre ou d'une condition, tel que préparer ou faciliter l'exécution d'un crime ou d'un délit, favoriser la fuite, l'évasion, obtenir la libération ou assurer l'impunité des auteurs ou des complices d'un crime ou d'un délit.

§ 2. La prise d'otages sera punie de la réclusion de vingt ans à trente ans.

La peine sera la réclusion à perpétuité si la personne prise comme otage est un mineur.

§ 3. Sauf dans les eas vises au § 4, la peine sera la réclusion de quinze ans à vingt ans si dans les einq jours de l'arrestation, de la détention ou de l'enlèvement, la personne prise comme otage a été libérée volontairement sans que l'ordre ou la condition ait été exécuté.

§ 4. La peine sera la réelusion à perpétuité dans les cas suivants :

1° si l'arrestation, la détention ou l'enlèvement dc la personne prise comme otage a causé soit une maladie paraissant incurable, soit une incapacité permanente physique ou psychique, soit la perte complète de l'usage d'un organe, soit une mutilation grave, soit la mort;

2° (si la personne prise comme otage a été soumise aux actes visés à l'article 417ter, alinéa premier.) <L 2002-06-14/42, art. 2, 036; En vigueur : 24-08-2002>

2837

Bolivia

Código Penal

Código Penal Bolivia

Source: http://www.oas.org/juridico/spanish/gapeca_sp_docs_bol1.pdf

CODIGO PENAL BOLIVIA

LIBRO PRIMERO

PARTE GENERAL

TÍTULO I
LA LEY PENAL

CAPÍTULO ÚNICO
REGLAS PARA SU APLICACIÓN

Art. 1°.- (EN CUANTO AL ESPACIO). Este Código se aplicará:

1. A los delitos cometidos en el territorio de Bolivia o en los lugares sometidos a su jurisdicción.

2. A los delitos cometidos en el extranjero, cuyos resultados se hayan producido o debían producirse en el territorio de Bolivia o en los lugares sometidos a su jurisdicción.

3. A los delitos cometidos en el extranjero por un boliviano, siempre que éste se encuentre en territorio nacional y no haya sido sancionado en el lugar en que delinquió.

4. A los delitos cometidos en el extranjero contra la seguridad del Estado, la fe pública y la economía nacional. Esta disposición será extensiva a los extranjeros, si fueren habidos por extradición o se hallasen dentro del territorio de la República.

5. A los delitos cometidos en naves, aeronaves u otros medios de transporte bolivianos en país extranjero, cuando no sean juzgados en éste.

6. A los delitos cometidos en el extranjero por funcionarios al servicio de la Nación, en el desempeño de su cargo o comisión.

7. A los delitos que por tratado o convención de la República se haya obligado a reprimir, aún cuando no fueren cometidos en su territorio.

Art. 2°.- (SENTENCIA EXTRANJERA). En los casos previstos en el artículo anterior, cuando el agente sea juzgado en Bolivia, habiendo sido ya sentenciado en el extranjero, se computará la parte de pena cumplida en aquél si fuere de la misma especie y si fuere de diferente, el juez disminuirá en todo caso la que se imponga al autor.

Art. 3°.- (EXTRADICIÓN). Ninguna persona sometida a la jurisdicción de las leyes bolivianas podrá ser entregada por extradición a otro Estado, salvo que un tratado internacional o convenio de reciprocidad disponga lo contrario.

La procedencia o improcedencia de la extradición será resuelta por la Corte Suprema.

En caso de reciprocidad, la extradición no podrá efectuarse si el hecho por el que se reclama no constituye un delito conforme a la ley del Estado que pide la extradición y del que la debe conceder.

obtener para sí o un tercero indebida ventaja o beneficio económico, incurrirá en reclusión de uno a tres años.

Art. 334°.- (SECUESTRO). El que secuestrare a una persona con el fin de obtener rescate u otra indebida ventaja o concesión para sí o para otros como precio de la libertad de la víctima, será sancionado con la pena de cinco a quince años de presidio.

Si como consecuencia del hecho resultaren graves daños físicos en la víctima o el culpable consiguiere su propósito, la pena será de quince a treinta años de presidio.

Si resultare la muerte de la víctima, se aplicará la pena correspondiente al asesinato.

CAPÍTULO IV
ESTAFAS Y OTRAS DEFRAUDACIONES

Art. 335°.- (ESTAFA). El que con la intención de obtener para si o un tercero un beneficio económico indebido, mediante engaños o artificios provoque o fortalezca error en otro que motive la realización de un acto de disposición patrimonial en perjuicio del sujeto en error o de un tercero, será sancionado con reclusión de uno a cinco años y multa de sesenta a doscientos días.

Art. 336°.- (ABUSO DE FIRMA EN BLANCO). El que defraudare abusando de firma en blanco y extendiendo con ella algún documento en perjuicio de quien firmó o de un tercero, será sancionado con privación de libertad de uno a cuatro años y multa de sesenta a ciento cincuenta días.

Art. 337°.- (ESTELIONATO). El que vendiere o gravare como bienes libres los que fueren litigiosos o estuvieren embargados o gravados y el que vendiere, gravare o arrendare, como propios, bienes ajenos, será sancionado con privación de libertad de uno a cinco años.

Art. 338°.- (FRAUDE DE SEGURO). El que con el fin de cobrar para si o para otros la indemnización de un seguro o para incrementarla por encima de lo justo, destruyere, perdiere, deteriorare, ocultare o hiciere desaparecer lo asegurado, o utilizare cualquier otro medio fraudulento, incurrirá en la pena de privación de libertad de uno a cinco años.

Si lograre el propósito de cobrar el seguro, la pena será agravada en una mitad y multa de treinta a cien días.

Art. 339°.- (DESTRUCCIÓN DE COSAS PROPIAS, PARA DEFRAUDAR). El que por cualquier medio destruyere o hiciere desaparecer sus propias cosas con el propósito de defraudar los derechos de tercero o de causarle perjuicio, incurrirá en reclusión de uno a tres años.

Art. 340°.- (DEFRAUDACIÓN DE SERVICIOS O ALIMENTOS). El que consumiere bebidas o alimentos en establecimientos donde se ejerza ese comercio, o se hiciere prestar o utilizare un servicio cualquiera de los de pago inmediato y no los abonare al ser requerido, será sancionado con reclusión de uno a dos años y multa de treinta a cien días.

Art. 341°.- (DEFRAUDACION CON PRETEXTO DE REMUNERACION A FUNCIONARIOS PUBLICOS). El que defraudare a otro con pretexto de supuesta

659
2840

Canada

Criminal Code

Version in Force since 1 October 2008

Source:
English: http://laws.justice.gc.ca/en/ShowDoc/cs/C-46/bo-ga:l_VIII::bo-ga:l_IX//en?page=6&isPrinting=false#codese:279_1
French: http://laws.justice.gc.ca/fr/ShowDoc/cs/C-46/bo-ga:l_VIII::bo-ga:l_IX//fr?page=6&isPrinting=false#codese:279_1

660
2841

Criminal Code

C-46

An Act respecting the Criminal Law

SHORT TITLE

Short title

1. This Act may be cited as the *Criminal Code*.

R.S., c. C-34, s. 1.

INTERPRETATION

Definitions

2. In this Act,

"Act"
«loi »

"Act" includes

(*a*) an Act of Parliament,

(*b*) an Act of the legislature of the former Province of Canada,

(*c*) an Act of the legislature of a province, and

(*d*) an Act or ordinance of the legislature of a province, territory or place in force at the time that province, territory or place became a province of Canada;

"associated personnel"
«personnel associé »

"associated personnel" means persons who are

(*a*) assigned by a government or an intergovernmental organization with the agreement of the competent organ of the United Nations,

(*b*) engaged by the Secretary-General of the United Nations, by a specialized agency of the United Nations or by the International Atomic Energy Agency, or

(*c*) deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations, by a specialized agency of the United Nations or by the International Atomic Energy Agency,

to carry out activities in support of the fulfilment of the mandate of a United Nations operation;

"Attorney General"
«procureur général »

"Attorney General"

(*a*) subject to paragraphs (*b.1*) to (*g*), with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his or her lawful deputy,

(*b*) with respect to the Yukon Territory, the Northwest Territories and Nunavut, or with respect to proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of, a conspiracy or attempt to contravene, or counselling the contravention of, any Act of Parliament other than this Act or any regulation made under such an Act, means the Attorney General of Canada and includes his or her lawful deputy,

Hostage taking

279.1 (1) Everyone takes a person hostage who — with intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage —

(*a*) confines, imprisons, forcibly seizes or detains that person; and

(*b*) in any manner utters, conveys or causes any person to receive a threat that the death of, or bodily harm to, the hostage will be caused or that the confinement, imprisonment or detention of the hostage will be continued.

Hostage-taking

(2) Every person who takes a person hostage is guilty of an indictable offence and liable

(*a*) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(*i*) in the case of a first offence, five years, and

(*ii*) in the case of a second or subsequent offence, seven years;

(*a.1*) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(*b*) in any other case, to imprisonment for life.

Subsequent offences

(2.1) In determining, for the purpose of paragraph (2)(*a*), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(*a*) an offence under this section;

(*b*) an offence under subsection 85(1) or (2) or section 244; or

(*c*) an offence under section 220, 236, 239, 272 or 273, subsection 279(1) or section 344 or 346 if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(2.2) For the purposes of subsection (2.1), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

Non-resistance

(3) Subsection 279(3) applies to proceedings under this section as if the offence under this section were an offence under section 279.

R.S., 1985, c. 27 (1st Supp.), s. 40; 1995, c. 39, s. 148; 2008, c. 6, s. 31.

2843

Code criminel

C-46

Loi concernant le droit criminel

TITRE ABRÉGÉ

Titre abrégé

1. *Code criminel.*

S.R., ch. C-34, art. 1.

DÉFINITIONS ET INTERPRÉTATION

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

«acte d'accusation »
"indictment"

«acte d'accusation » Sont assimilés à un acte d'accusation :

a) une dénonciation ou un chef d'accusation qui y est inclus;

b) une défense, une réplique ou autre pièce de plaidoirie;

c) tout procès-verbal ou dossier.

«acte de gangstérisme » [Abrogée, 2001, ch. 32, art. 1]

«acte testamentaire »
"testamentary instrument"

«acte testamentaire » Tout testament, codicille ou autre écrit ou disposition testamentaire, soit du vivant du testateur dont il est censé exprimer les dernières volontés, soit après son décès, qu'il ait trait à des biens meubles ou immeubles, ou à des biens des deux catégories.

«activité terroriste »
"terrorist activity"

«activité terroriste » S'entend au sens du paragraphe 83.01(1).

«agent »
"representative"

«agent » S'agissant d'une organisation, tout administrateur, associé, employé, membre, mandataire ou entrepreneur de celle-ci.

«agent de la paix »
"peace officer"

«agent de la paix »

a) Tout maire, président de conseil de comté, préfet, shérif, shérif adjoint, officier du shérif et juge de paix;

b) tout agent du Service correctionnel du Canada, désigné comme agent de la paix conformément à la partie I de la *Loi sur le système correctionnel et la mise en liberté sous condition*, ainsi que tout directeur, sous-directeur, instructeur, gardien, geôlier, garde et tout autre fonctionnaire ou employé permanent d'une prison qui n'est pas un pénitencier au sens de la partie I de la *Loi sur le système correctionnel et la mise en liberté sous condition*;

c) tout officier de police, agent de police, huissier ou autre personne employée à la préservation et au maintien de la paix publique ou à la signification ou à

663
2844

Prise d'otage

279.1 (1) Commet une prise d'otage quiconque, dans l'intention d'amener une personne, ou un groupe de personnes, un État ou une organisation internationale ou intergouvernementale à faire ou à omettre de faire quelque chose comme condition, expresse ou implicite, de la libération de l'otage :

a) d'une part, séquestre, emprisonne, saisit ou détient de force une autre personne;

b) d'autre part, de quelque façon, menace de causer la mort de cette autre personne ou de la blesser, ou de continuer à la séquestrer, l'emprisonner ou la détenir.

Peine

(2) Quiconque commet une prise d'otage est coupable d'un acte criminel passible :

a) s'il y a usage d'une arme à feu à autorisation restreinte ou d'une arme à feu prohibée lors de la perpétration de l'infraction, ou s'il y a usage d'une arme à feu lors de la perpétration de l'infraction et que celle-ci est perpétrée au profit ou sous la direction d'une organisation criminelle ou en association avec elle, de l'emprisonnement à perpétuité, la peine minimale étant :

(i) de cinq ans, dans le cas d'une première infraction,

(ii) de sept ans, en cas de récidive;

a.1) dans les autres cas où il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

Récidive

(2.1) Lorsqu'il s'agit de décider, pour l'application de l'alinéa (2)*a*), si la personne déclarée coupable se trouve en état de récidive, il est tenu compte de toute condamnation antérieure à l'égard :

a) d'une infraction prévue au présent article;

b) d'une infraction prévue aux paragraphes 85(1) ou (2) ou à l'article 244;

c) d'une infraction prévue aux articles 220, 236, 239, 272 ou 273, au paragraphe 279(1) ou aux articles 344 ou 346, s'il y a usage d'une arme à feu lors de la perpétration de l'infraction.

Toutefois, il n'est pas tenu compte des condamnations précédant de plus de dix ans la condamnation à l'égard de laquelle la peine doit être déterminée, compte non tenu du temps passé sous garde.

Précision relative aux condamnations antérieures

(2.2) Pour l'application du paragraphe (2.1), il est tenu compte de l'ordre des déclarations de culpabilité et non de l'ordre de perpétration des infractions, ni du fait qu'une infraction a été commise avant ou après une déclaration de culpabilité.

Non-résistance

(3) Le paragraphe 279(3) s'applique aux poursuites engagées en vertu du présent article comme si l'infraction que ce dernier prévoit était celle que prévoit l'article 279.

L.R. (1985), ch. 27 (1er suppl.), art. 40; 1995, ch. 39, art. 148; 2008, ch. 6, art. 31.

~~664~~
2845

Colombia

Código Penal (CP)

Ley 599 de 2000 (julio 24) - Por la cual se expide el Código Penal

Source:
http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000.html

and accompanying decision to amend the norm of the Constitutional Court:
Sentencia C-291-07 de 25 de abril de 2007 de la Corte Constitucional

Source :
http://www.secretariasenado.gov.co/senado/basedoc/cc_sc_nf/2007/c-291_2007.html#1.

665
Artículo 2846

Siguiente

LEY 599 DE 2000

(julio 24)
Diario Oficial No 44.097 de 24 de julio del 2000

<ADVERTENCIA: Ver el Resumen de Notas de Vigencia en relación con los criterios adoptados por el editor para calcular los aumentos de penas de que trata el Artículo 14 de la Ley 890 de 2004.

Sobre el particular, el editor destaca que en la comunidad jurídica del país existen diferentes interpretaciones sobre el alcance de la siguiente frase del Artículo 14 de la Ley 890 de 2004: "Las penas previstas en los tipos penales contenidos en la Parte Especial del Código Penal ..."

La interpretación del editor se basa en la claridad del texto del Artículo 14 de la Ley 890 de 2004 y en las definiciones contenidas en los Artículos 35 y 43 del Código Penal (Ley 599 de 2000)>

<Según lo dispuesto por el Artículo 476 este Código entra a regir un (1) año después de su promulgación.>

EL CONGRESO DE COLOMBIA

Por la cual se expide el Código Penal
<Resumen de Notas de Vigencia>

DECRETA:

LIBRO I.
PARTE GENERAL

TITULO I.
DE LAS NORMAS RECTORAS DE LA LEY PENAL COLOMBIANA

CAPITULO UNICO

ARTICULO 1o. DIGNIDAD HUMANA. El derecho penal tendrá como fundamento el respeto a la dignidad humana.

ARTICULO 2o. INTEGRACION. Las normas y postulados que sobre derechos humanos se encuentren consignados en la Constitución Política, en los tratados y convenios internacionales ratificados por Colombia, harán parte integral de este código.

ARTICULO 3o. PRINCIPIOS DE LAS SANCIONES PENALES. La imposición de la pena o de la medida de seguridad responderá a los principios de necesidad, proporcionalidad y razonabilidad.

El principio de necesidad se entenderá en el marco de la prevención y conforme a las instituciones que la desarrollan.

experimentos biológicos, o la someta a cualquier acto médico que no esté indicado ni conforme a las normas médicas generalmente reconocidas incurrirá, por esa sola conducta, en prisión de ochenta (80) a ciento ochenta (180) meses, multa de doscientos sesenta y seis punto sesenta y seis (266.66) a mil quinientos (1500) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de ochenta (80) a ciento ochenta (180) meses.
<Notas de Vigencia>
<Legislación Anterior>

ARTICULO 147. ACTOS DE DISCRIMINACION RACIAL. <Penas aumentadas por el artículo 14 de la Ley 890 de 2004, a partir del 10. de enero de 2005. El texto con las penas aumentadas es el siguiente:> El que, con ocasión y en desarrollo de conflicto armado, realice prácticas de segregación racial o ejerza tratos inhumanos o degradantes basados en otras distinciones de carácter desfavorable que entrañen ultraje contra la dignidad personal, respecto de cualquier persona protegida, incurrirá en prisión de ochenta (80) a ciento ochenta (180) meses, multa de doscientos sesenta y seis punto sesenta y seis (266.66) a mil quinientos (1500) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de ochenta (80) a ciento ochenta (180) meses.
<Notas de Vigencia>
<Legislación Anterior>

ARTICULO 148. TOMA DE REHENES. <Aparte tachado INEXEQUIBLE> <Penas aumentadas por el artículo 14 de la Ley 890 de 2004, a partir del 10. de enero de 2005. El texto con las penas aumentadas es el siguiente:> El que, con ocasión y en desarrollo de conflicto armado, prive a una persona de su libertad condicionando ésta o su seguridad a la satisfacción de exigencias formuladas ~~a la otra parte~~, o la utilice como defensa, incurrirá en prisión de trescientos veinte (320) a quinientos cuarenta (540) meses, multa de dos mil seiscientos sesenta y seis punto sesenta y seis (2.666.66) a seis mil (6000) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de doscientos cuarenta (240) a trescientos sesenta (360) meses.
<Notas de Vigencia>

667
2848

- Ver la ADVERTENCIA y el Resumen de Notas de Vigencia al comienzo de este Código.

Artículo modificado por el artículo 14 de la Ley 890 de 2004, publicada en el Diario Oficial No. 45.602, de 7 de julio de 2004, el cual establece en su versión original:

'ARTÍCULO 14. Las penas previstas en los tipos penales contenidos en la Parte Especial del Código Penal se aumentarán en la tercera parte en el mínimo y en la mitad en el máximo. En todo caso, la aplicación de esta regla general de incremento deberá respetar el tope máximo de la pena privativa de la libertad para los tipos penales de acuerdo con lo establecido en el artículo 20. de la presente ley. ...'

El artículo 15, dispone: '... La presente ley rige a partir del 10. de enero de 2005 ...'

<Jurisprudencia Vigencia>

Corte Constitucional

- Aparte tachado declarado INEXEQUIBLE por la Corte Constitucional mediante Sentencia C-291-07 de 25 de abril de 2007, Magistrado Ponente Dr. Manuel José Cepeda Espinosa. next pages

<Legislación Anterior>

Texto original de la Ley 599 de 2000:

ARTICULO 148. TOMA DE REHENES. El que, con ocasión y en desarrollo de conflicto armado, prive a una persona de su libertad condicionando ésta o su seguridad a la satisfacción de exigencias formuladas a la otra parte, o la utilice como defensa, incurrirá en prisión de veinte (20) a treinta (30) años, multa de dos mil (2000) a cuatro mil (4.000) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de quince (15) a veinte (20) años.

Sentencia C-291/07

PERSONA PROTEGIDA POR EL DERECHO INTERNACIONAL HUMANITARIO-Combatiente que ha depuesto las armas por captura, rendición u otra causa análoga/**NORMAS DE DERECHO INTERNACIONAL HUMANITARIO EN BLOQUE DE CONTITUCIONALIDAD**-No vulneración por norma que considera como persona protegida al combatiente que ha depuesto las armas por captura, rendición u otra causa análoga/**HOMICIDIO EN PERSONA PROTEGIDA**-Tipificación como delito en combatientes que han depuesto las armas

Afirma el demandante que la expresión "combatientes" del artículo 135, parágrafo, numeral 6 de la Ley 599 de 2000 desconoce los artículos 93 y 94 de la Carta Política, en la medida en que las normas de Derecho Internacional Humanitario incorporadas al bloque de constitucionalidad no utilizan la figura de los "combatientes" en el ámbito de los conflictos armados no internacionales. Observa la Corte que la disposición acusada –el término "combatientes"- se refiere a una de las sub-categorías de las personas fuera de combate, en tanto una de las diversas categorías de "personas protegidas por el Derecho Internacional Humanitario" –las personas que han participado en las hostilidades y ya no lo hacen por haber depuesto las armas por captura, rendición u otra causa similar-, y que necesariamente debe interpretarse en su acepción genérica, explicada en el Acápite 3.3.1. de la Sección D precedente. Por otra parte, incluso si se interpretara en su acepción específica, el uso de este término en sí mismo no riñe con el bloque de constitucionalidad, por cuanto su incorporación al tipo penal que se estudia no reduce el ámbito de protección dispensado por la garantía fundamental de la prohibición del homicidio a quienes no participan de las hostilidades en un conflicto interno. Únicamente serían contrarias al bloque de constitucionalidad aquellas disposiciones legales que, al incorporar la noción de "combatiente" al ámbito de la regulación de los conflictos armados internos, disminuyan o reduzcan el campo de aplicabilidad o la efectividad de tal garantías, o impidan que éstas se constituyan en medios para la materialización de los referidos principios.

DELITO DE TOMA DE REHENES-Inclusión como norma de *ius cogens* que vincula al Estado colombiano como parte del bloque de constitucionalidad

Si bien Colombia es parte de la Convención Internacional contra la Toma de Rehenes, la cual fue ratificada mediante Ley 837 de 2003 y sujeta a revisión previa de la Corte Constitucional en sentencia C-405 de 2004 (M.P. Clara Inés Vargas Hernández), esta Convención no ha sido incorporada formalmente al bloque de constitucionalidad mediante un pronunciamiento expreso de esta Corporación. A pesar de lo anterior, resulta claro –por las razones expuestas extensamente en el apartado 5.4.4. de la Sección D de esta providencia- que el delito de toma de rehenes, a la fecha en que se adopta esta providencia, ha sido incluido como conducta punible en normas de ius cogens que vinculan al Estado colombiano como parte del bloque de constitucionalidad, y que constituyen un parámetro obligado de referencia para ejercer el control de constitucionalidad sobre la disposición legal acusada.

DELITO DE TOMA DE REHENES-Requisito que exige para la tipificación, que privación de la libertad del rehén se condicione a la satisfacción de exigencias formuladas "a la otra parte" del conflicto armado desconoce bloque de constitucionalidad

Con base en la definición consuetudinaria del crimen internacional de toma de rehenes, señalada en el acápite 5.4.4. precedente y cristalizada en la definición de los Elementos de los Crímenes de la Corte Penal Internacional, observa la Sala que efectivamente asiste razón al peticionario cuando afirma que el requisito consistente en que las exigencias para liberar o preservar la seguridad del rehén se dirijan a la otra parte en un conflicto armado no internacional, plasmado en el artículo 148 del Código Penal, es violatorio del bloque de constitucionalidad. En efecto, este requisito no se encuentra previsto en las normas consuetudinarias que consagran la definición de los elementos de este crimen de guerra, por lo cual la introducción de dicha condición, al restringir las hipótesis de configuración del delito en cuestión, reduce injustificadamente el ámbito de protección establecido en el Derecho Internacional Humanitario, puesto que deja desprotegidos a los rehenes cuyos captores han formulado exigencias, no a la otra parte en el conflicto armado, sino a sujetos distintos a dicha parte –los cuales, según se enuncia en los Elementos de los Crímenes de la Corte Penal Internacional, pueden ser un Estado, una organización internacional, una persona natural o jurídica, o un grupo de personas-. Dado que quienes se encuentran en esta hipótesis fáctica han de recibir la protección plena del Derecho Internacional Humanitario y no existen en el ordenamiento jurídico constitucional elementos que justifiquen reducir el grado de protección previsto por la tipificación del crimen de guerra en cuestión, concluye la Sala Plena que se ha desconocido, con la introducción del requisito acusado, el bloque de constitucionalidad y, por lo mismo, los artículos 93 y 94 Superiores, así como al artículo

570
505

28 de la Constitución, que consagra el derecho fundamental a la libertad personal, el cual se ve protegido directamente por esta garantía fundamental del principio humanitario.

TOMA DE REHENES Y SECUESTRO EXTORSIVO-Distinción

DELITO DE DESTRUCCION O UTILIZACION ILICITA DE BIENES CULTURALES Y DE LUGARES DE CULTO-Requisito que exige para la tipificación, que dichos bienes y lugares se hallen debidamente señalados es inconstitucional

La Corte declarará inexequible la expresión "debidamente señalados con los signos convencionales" de los artículos 156 y 157, demandados, puesto que según se explicó en los capítulos 6.1. y 6.2. de la Sección D de esta providencia, este requisito no está incluido dentro de las normas convencionales y consuetudinarias de Derecho Internacional Humanitario que protegen los bienes culturales y las obras o instalaciones que contienen fuerzas peligrosas; en consecuencia, la introducción del requisito de señalización en el tipo penal que se estudia restringe el alcance de las salvaguardas internacionales aplicables, puesto que excluiría del ámbito de protección de estas normas a los bienes culturales y religiosos y a las obras e instalaciones que contienen fuerzas peligrosas que no se encuentren señalizados. Al restringir el ámbito de protección provisto por estas garantías, que reflejan principalmente el principio de distinción, las normas acusadas contrarían los artículos 93, 94 y 214 de la Carta Política.

TRATADOS INTERNACIONALES QUE HACEN PARTE DEL BLOQUE DE CONSTITUCIONALIDAD-Deben interpretarse de manera armónica y sistemática

LIBERTAD DE CONFIGURACION LEGISLATIVA EN MATERIA PENAL-Límites/**BLOQUE DE CONSTITUCIONALIDAD**-Función interpretativa/**BLOQUE DE CONSTITUCIONALIDAD**-Función integradora

Las normas que forman parte del bloque de constitucionalidad cumplen diversas funciones dentro del ordenamiento jurídico colombiano; en relación con el

~~671~~
2852(A

Costa Rica

Código Penal (CP)

Actualizado a 26 febrero 2002
Ley No. 4573 del 04 de mayo de 1970.
En vigor desde el 15 de mayo de 1971.

Source: http://www.oas.org/JURIDICO/mla/sp/cri/sp_cri-int-text-cpenal.pdf

672
28526

Actualizado a 26 febrero 2002

LEY No. 4573 del 04 de mayo de 1970.
En vigor desde el 15 de mayo de 1971.

LA ASAMBLEA LEGISLATIVA DE LA REPÚBLICA DE COSTA RICA,
DECRETA:

EL SIGUIENTE

CÓDIGO PENAL

LIBRO PRIMERO
DISPOSICIONES GENERALES

TÍTULO I
LA LEY PENAL

SECCIÓN I
Normas preliminares

Principio de legalidad
ARTÍCULO 1.- Nadie podrá ser sancionado por un hecho que la ley penal no tipifique como punible ni sometido a penas o medidas de seguridad que aquella no haya establecido previamente.

Prohibición de analogía
ARTÍCULO 2.- No podrá imponerse sanción alguna, mediante aplicación analógica de la ley penal.

Valor supletorio de este Código
ARTÍCULO 3.- Las disposiciones generales de este Código se aplicarán también a los hechos punibles previstos en leyes especiales, siempre que estas no establezcan nada en contrario.

SECCIÓN II
Aplicación en el espacio

Territorialidad
ARTÍCULO 4.- La ley penal costarricense se aplicará a quien cometa un hecho punible en el territorio de la República, salvo las excepciones establecidas en los tratados, convenios y reglas internacionales aceptados por Costa Rica.

1.- Con prisión de seis meses a tres años, cuando la sustracción fuere cometida con fuerza en las cosas y su cuantía no excediere de tres veces el salario base (*).
2.- Con prisión de uno a seis años, si mediare la circunstancia prevista en el inciso anterior y el monto de lo sustraído excediere de tres veces el salario base.
3.- Con prisión de tres a nueve años, cuando el hecho fuere cometido con violencia sobre las personas. Sin embargo, si el apoderamiento se realizare por arrebato y no se causare lesión a la víctima que incapacite para el trabajo por más de diez días, la pena por imponer será de uno a tres años de prisión, siempre que la cuantía no exceda del monto señalado en el inciso 1) anterior, y de dos a seis años de prisión, si el valor de lo sustraído excede de ese monto.

(Así reformado por la Ley No. 7337 del 5 de mayo de 1993).
(*) El término "salario base" se encuentra definido en el artículo 2° de la Ley No. 7337 de cita.

Robo agravado
ARTÍCULO 213.- Se impondrá prisión de cinco a quince años, en los siguientes casos:

1) Si el robo fuere perpetrado con perforación o fractura de una pared, de un cerco, de un techo, de un piso, de una puerta o de una ventana, de un lugar habitado, o de sus de dependencias;
2) Si fuere cometido con armas; y
3) Si concurriere alguna de las circunstancias de los incisos 1), 2), 4), 5), 6) y 7) del artículo 209.

Los casos de agravación y atenuación para el delito de hurto, serán también agravantes y atenuantes del robo, y la pena será fijada por el juez, de acuerdo con el artículo 71.
(Así reformado por la Ley No. 6726 del 10 de marzo de 1982).

SECCIÓN III
Extorsiones

Extorsión simple
ARTÍCULO 214.- Será reprimido con prisión de dos a seis años, el que para procurar un lucro injusto obligare a otro con intimidación o con amenazas graves a tomar una disposición patrimonial perjudicial para sí mismo o para un tercero.

Secuestro extorsivo
ARTÍCULO 215.- Se impondrá prisión de diez a quince años a quien secuestre a una persona para obtener rescate con fines de lucro, políticos, político-sociales, religiosos o raciales.

Si el sujeto pasivo es liberado voluntariamente dentro de los tres días posteriores a la comisión del hecho, sin que le ocurra daño alguno y sin que los secuestradores hayan obtenido su propósito, la pena será de seis a diez años de prisión.

La pena será de quince a veinte años de prisión:

1. Si el autor logra su propósito.
2. Si el heeho es cometido por dos o más personas.
3. Si el secuestro dura más de tres días.
4. Si el secuestrado es menor de edad, mujer embarazada, persona incapaz, enferma o anciana.
5. Si la persona secnestrada sufre daño físico, moral, síqnico o económico, debido a la forma en que se realizó el secuestro o por los medios empleados en su consumación.
6. Si se ha empleado violencia contra terceros que han tratado de auxiliar a la persona secuestrada en el momento del hecho o con posterioridad, cuando traten de liberarla.
7. Cuando la persona secuestrada sea un funcionario público, un diplomático o cónsul acreditado en Costa Rica o de paso por el territorio nacional y para liberarla se exijan condiciones políticas o polítieo-sociales.
8. Cuando el secuestro se realice para exigir a los poderes públicos nacionales o de un país amigo, una medida o concesión.

La pena será de veinte a veinticinco años de prisión si se le infringen a la persona secuestrada lesiones graves o gravísimas, y de treinta y cinco a cincuenta años de prisión si muerc.

(El artículo 215, fue reformado por el artículo único de la Ley N° 8127, de 29 de agosto de 2001. Publicada en La Gaceta N° 179, de 18 de setiembre de 2001.)

SECCIÓN IV
Estafas y Otras Defraudaciones

Estafa

ARTÍCULO 216.- Quien induciendo a error a otra persona o manteniéndola en él, por medio de la simulación de hechos falsos o por medio de la deformación o el ocultamiento de hechos verdaderos, utilizándolos para obtener un bencficio patrimonial antijurídico para sí o para un tercero, lesione el patrimonio ajeno, será sancionado en la siguiente forma:

1) Con prisión de dos meses a tres años, si el monto de lo defraudado no excediere de diez veces el salario base (*).
2) Con prisión de seis meses a diez años, si el monto de lo defraudado excediere de diez veees el salario base.

Las penas precedentes se elevarán en un tercio cuando los hechos señalados los realice quien sea apoderado o administrador de una empresa que obtenga, total o parcialmente, sus recursos del ahorro del público, o por quien, personalmente o por medio de una entidad inscrita o no inscrita, de cualquier naturaleza, haya obtenido sus recursos, total o parcialmente del ahorro del público.

(Así reformado por la Ley No. 7337 del 5 de mayo de 1993).

(*) El término "salario base" se encuentra definido en el artículo 2 de la Ley No. 7337 de cita.

675
2855

El Salvador

Código Penal (CP)

Decreto N°: 1030, Fecha: 26/4/1997, D. Official: 105, Tomo: 335, Publicación DO: 10/06/1997

Source: http://www.csj.gob.sv

676
2856

CORTE SUPREMA DE JUSTICIA DE EL SALVADOR
CENTRO DE DOCUMENTACIÓN JUDICIAL

LEGISLACIÓN

Nombre: **CODIGO PENAL**

Materia: **Derecho Penal** Categoría: **Derecho Penal**
Origen: **ORGANO LEGISLATIVO** Estado: **VIGENTE**
Naturaleza : **Decreto Legislativo**
Nº: **1030** Fecha:**26/04/1997**
D. Oficial: **105** Tomo: **335** Publicación DO: **10/06/1997**
Reformas: **(44) Decreto Legislativo No. 745 de fecha 05 de noviembre de 2008, publicado en el Diario Oficial No. 222, Tomo 381 de fecha 25 de noviembre de 2008.**
Comentarios: **El presente Código tiene como finalidad primordial orientar nuestra normativa penal dentro de una concepción garantista, de alta efectividad para evitar la violencia social y delincuencial que vive nuestro país.**

Contenido;

DECRETO Nº 1030.-

LA ASAMBLEA LEGISLATIVA DE LA REPUBLICA DE EL SALVADOR

CONSIDERANDO:

I.- Que el actual Código Penal, fue aprobado por Decreto Legislativo No. 270 de fecha 13 de febrero de 1973, publicado en el Diario Oficial No. 63, Tomo 238, de fecha 30 de marzo del mismo año, el cual entró en vigencia el 15 de junio de 1974, y éste representó un adelanto dentro del desarrollo de la ciencia penel y la técnica legislativa y en la actualided ya no se perfila de la misma manera porque su contenido no guarda concordancia con el texto de la Constitución de la República de 1983, ni con la realidad política y social que vive el país;

II.- Que los Estados Democráticos de Derecho, se han visto en la necesidad de adecuar sus normativas peneles a la nueva orientación doctrinaria, que considera el Derecho Penal como último recurso para resolver los conflictos sociales y el instrumento más efectivo para lograr la paz y seguridad jurídica de los pueblos, lo cual El Salvador comparte plenamente;

III.- Que con el objeto de orientar nuestra normativa penal dentro de una concepción garantista, de alta efectividad para restringir la violencia social y con una amplia proyección de función punitiva no selectivista, resulta conveniente que se emita un nuevo Código Penal, que sin apartarse de nuestros patrones culturales, se constituya en un instrumento moderno dinámico y eficaz para combatir la delincuencia;

POR TANTO,

en uso de sus facultades constitucionales y a iniciativa del Presidente de la República por medio del Ministro de Justicia y de los diputados Walter René Araujo Morales, Arturo Argumedo h., Francisco Alberto Jovel Urquilla, Gerardo Antonio Suvillaga, Oscar Armando Avendaño, José Armando Cienfuegos Mendoza, Francisco Antonio Rivas Escobar, David Acuña, Jorge Alberto Villacorta Muñoz, Marcos Alfredo Valladares y Eli Avileo Díaz Alvarez,

DECRETA, el siguiente:

677
2857

TITULO III

DELITOS RELATIVOS A LA LIBERTAD

CAPITULO I

DE LOS DELITOS RELATIVOS A LA LIBERTAD INDIVIDUAL

PRIVACIÓN DE LIBERTAD

Art. 148.- El que privare a otro de su libertad individual, será sancionado con prisión de tres a seis años. (13)

SECUESTRO

Art. 149.- El que privare a otro de su libertad individual con el propósito de obtener un rescate, el cumplimiento de determinada condición, o para que la autoridad pública realizare o dejare de realizar un determinado acto, será sancionado con pena de treinta a cuarenta y cinco años de prisión, en ningún caso podrá otorgarse al condenado el beneficio de libertad condicional o libertad condicional anticipada. (13)(15)

PROPOSICION Y CONSPIRACION EN LOS DELITOS DE PRIVACION DE LIBERTAD Y SECUESTRO

Art. 149-A.- La proposición y conspiración para cometer cualquiera de las conductas descritas en los dos artículos anteriores, serán sancionadas, para el caso de privación de libertad con prisión de uno a tres años, y para el caso de secuestro, con prisión de diez a veinte años. (13)

ATENTADOS CONTRA LA LIBERTAD INDIVIDUAL AGRAVADOS

Art. 150.- La pena correspondiente a los delitos descritos en los artículos anteriores, se aumentará hasta en una tercera parte del máximo, en cualquiera de los casos siguientes:

1) Si el delito se ejecutare con simulación de autoridad pública o falsa orden de la misma;

2) Si la privación de libertad se prolongare por más de ocho días;

3) Si se ejecutare en persona menor de dieciocho años de edad, mayor de sesenta, inválido, o en mujer embarazada;

4) Si se ejecutare con el fin de cambiar la filiación;

5) Si implicare sometimiento o servidumbre que menoscabe su dignidad como persona;

6) Si la víctima fuere de los funcionarios a que se refiere el Art. 236 de la Constitución de la República; y,

7) Si se ejecutare en persona, a quien, conforme a las reglas del derecho internacional, El Salvador debiere protección especial.

ATENTADOS CONTRA LA LIBERTAD INDIVIDUAL ATENUADOS

Art. 151.- Si se deja voluntariamente en libertad a la víctima antes de las setenta y dos horas, sin que se hubieren obtenido los fines específicos de la privación de libertad, la pena de prisión a que se refieren los artículos anteriores se reducirá hasta en una tercera parte del máximo.

~~678~~ 2858

Si la liberación voluntaria procediere antes de las veinticuatro horas de la privación de libertad, sin que se hayan obtenido los fines específicos de ésta, se reducirá la pena de prisión hasta la mitad del máximo.

DETENCIÓN POR PARTICULAR

Art. 152.- El particular que detuviere a una persona sorprendida en flagrancia y no diere cuenta con ella a la autoridad competente inmediatamente después de la captura, será sancionado con prisión de seis meses a un año.

679
2859

Finland

The Penal Code of Finland

No. 39/1889; amendments up to 650/2003 as well as 1372/2003, 650/2004 and 1006/2004 included), Unofficial translation by the Ministry of Justice, Finland,

Source: http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf

680
2860

NB: Unofficial translation
Ministry of Justice, Finland

The Penal Code of Finland

(39/1889; amendments up to 650/2003 as well as 1372/2003, 650/2004 and 1006/2004 included)

Chapter 1 - **Scope of application of the criminal law of Finland** (626/1996)

Section 1 - *Offence committed in Finland*

Finnish law applies to an offence committed in Finland.

Section 2 - *Offence connected with a Finnish vessel*

(1) Finnish law applies to an offence committed on board a Finnish vessel or aircraft if the offence was committed
  (1) while the vessel was on the high seas or in territory not belonging to any State or while the aircraft was in or over such territory, or
  (2) while the vessel was in the territory of a foreign State or the aircraft was in or over such territory and the offence was committed by the master of the vessel or aircraft, a member of its crew, a passenger or a person who otherwise was on board.

(2) Finnish law also applies to an offence committed outside of Finland by the master of a Finnish vessel or aircraft or a member of its crew if, by the offence, the offender has violated his/her special statutory duty as the master of the vessel or aircraft or a member of its crew.

Section 3 - *Offence directed at Finland*

(1) Finnish law applies to an offence committed outside of Finland that has been directed at Finland.

(2) An offence is deemed to have been directed at Finland
  (1) if it is an offence of treason or high treason,
  (2) if the act has otherwise seriously violated or endangered the national, military or economic rights or interests of Finland, or
  (3) if it has been directed at a Finnish authority.

Section 4 – *Offence in public office and military offence*

(1) Finnish law applies to an offence referred to in chapter 40 of this Code that has been committed outside of Finland by a person referred to in chapter 40, section 11, paragraphs 1, 2, 3 and 5 (604/2002).

(2) Finnish law also applies to an offence referred to in chapter 45 that has been committed outside of Finland by a person subject to the provisions of that chapter.

Seetion 5 - *Offence directed at a Finn*

Finnish law applies to an offence committed outside of Finland that has been directed at a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner permanently resident in Finland if, under Finnish law, the act may be punishable by imprisonment for more than six months.

Section 6 - *Offence committed by a Finn*

(1) Finnish law applies to an offence committed outside of Finland by a Finnish citizen. If the offence was committed in territory not belonging to any State, it is a precondition for the imposition of punishment that, under Finnish law, the act is punishable by imprisonment for more than six months.

(2) A person who was a Finnish citizen at the time of the offence or is a Finnish citizen at the beginning of the trial is deemed to be a Finnish citizen.

(3) The following are deemed equivalent to a Finnish citizen:

Chapter 25 - **Offences against personal liberty** (578/1995)

Section 1 - *Deprivation of personal liberty* (578/1995)

A person who by confinement, bondage, transportation or otherwise unlawfully prevents another from moving or isolates him shall be sentenced for *deprivation of personal liberty* to a fine or to imprisonment for at most two years.

Section 2 - *Aggravated deprivation of personal liberty* (578/1995)

If in the deprivation of personal liberty

(1) the loss of personal liberty lasts for longer than 72 hours;
(2) a serious danger to the life or health of another is caused; or
(3) exceptional cruelty or the threat of severe violence is used

and the deprivation of personal liberty is aggravated also when assessed as a whole, the offender shall be sentenced for *aggravated deprivation of personal liberty* to imprisonment for at least four months and at most four years.

Section 3 - *Trafficking in human beings* (650/2004)

(1) A person who
  (1) by abusing the dependent status or insecure state of another person,
  (2) by deceiving another person or by abusing the mistake made by that person,
  (3) by paying remuneration to a person who has control over another person or
  (4) by accepting such remuneration

  takes control over another person, recruits, transfers, transports, receives or harbours another person for purposes of sexual abuse referred to in chapter 20(9)(1)(1) or comparable sexual abuse, forced labour or other demeaning circumstances or removal of bodily organs or tissues for financial gain shall be sentenced for *trafficking in human beings* to imprisonment for a minimum of four months and a maximum of six years.

(2) A person who takes control over another person under 18 years of age or recruits, transfers, transports, receives or harbours that person for the purposes mentioned in subsection 1 shall be sentenced for trafficking in human beings even if none of the means referred to in subsection 1(1 – 4) have been used.

(3) An attempt shall be punished.

Section 3a - *Aggravated trafficking in human beings* (650/2004)

(1) If, in trafficking in human beings,
  (1) violence, threats or deceitfulness is used instead of or in addition to the means referred to in section 3,
  (2) grievous bodily harm, a serious illness or a state of mortal danger or comparable particularly grave suffering is deliberately or through gross negligence inflicted on another person,
  (3) the offence has been committed against a child younger than 18 years of age or against a person whose capacity to defend himself/herself has been substantially diminished or
  (4) the offence has been committed within the framework of a criminal organisation referred to in chapter 17(1a)(4)

  and the offence is aggravated also when considered as whole, the offender shall be sentenced for *aggravated trafficking in human beings* to imprisonment for a minimum of two years and a maximum of ten years.

(2) A person who enslaves or keeps another person in servitude, transports or trades in slaves shall also be sentenced for aggravated trafficking in human beings if the act is aggravated when assessed as whole.

(3) An attempt shall be punished.

Section 4 - *Hostage taking* (578/1995)

(1) A person who deprives another of his/her liberty in order to have a third person do, endure or omit to do something, under threat that the hostage will otherwise not be released or he/she will be killed or harmed, shall be sentenced, if the act

...nal liberty (578/1995) is aggravated when assessed as a whole, for *hostage taking* to imprisonment for at least one and at most ten years.

(2) An attempt is punishable.

Section 5 - *Abduction of a child* (578/1995)

If the parent, foster parent or custodian of a child under sixteen years of age or a person close to the child, by self-help, takes custody of the child for himself/herself or another person referred to above from the person in whose custody the child is, he/she shall be sentenced for *abduction of a child* to a fine or to imprisonment for at most six months.

Section 6 - *Negligent deprivation of personal liberty* (578/1995)

(1) A person who through negligence causes another to lose his/her liberty shall be sentenced, unless the act is of minor significance in view of the harm or injury caused, for *negligent deprivation of personal liberty* to a fine or to imprisonment for at most six months.

(2) A person shall also be sentenced for negligent deprivation of personal liberty if he/she unlawfully deprives another of his/her liberty under the conviction that he/she has a right to the same, unless the act is of minor significance in view of the harm or injury caused.

Section 7 - *Menace* (578/1995)

A person who points a weapon at another or otherwise threatens another with an offence under such circumstances that the person so threatened has reason to believe that his/her personal safety or property or that of someone else is in serious danger shall be sentenced, unless a more severe penalty for the act is provided elsewhere in the law, for *menace* to a fine or to imprisonment for at most two years.

Section 8 - *Coercion* (578/1995)

A person who unlawfully by violence or threat forces another to do, endure or omit to do something shall be sentenced, unless a more severe penalty for the act is provided elsewhere in the law, for *coercion* to a fine or to imprisonment for at most two years.

Section 9 - *Right to bring charges* (578/1995)

(1) The public prosecutor shall not bring charges for negligent deprivation of personal liberty, menace or coercion, unless the injured party reports the offence for the bringing of charges or unless a lethal instrument has been used to commit menace or coercion, or unless a very important public interest requires that charges be brought.

(2) The public prosecutor shall not bring charges for abduction of a child, if this would be contrary to the interests of the child. Before charges are brought, the public prosecutor shall hear the social welfare board of the municipality where the child resides or is staying, or which otherwise evidently has the best information concerning the child.

Section 10 - *Criminal liability of a legal person* (650/2004)

The provisions laid down on criminal liability of a legal person apply to trafficking in human beings and aggravated trafficking in human beings.

Chapters 26 and 27 have been repealed.

France

Code Pénal (CP)

Version consolidée au 14 mai 2009

Source:
http://www.legifrance.gouv.fr/affichCode.do;jsessionid=2AEE5C3333C54A10A59707E21ED96819.tpdjo03v_1?cidTexte=LEGITEXT000006070719&dateTexte=20090502

684
2864

Legifrance.gouv.fr

Code pénal

- Partie législative
  - LIVRE II : Des crimes et délits contre les personnes.
    - TITRE II : Des atteintes à la personne humaine.
      - CHAPITRE IV : Des atteintes aux libertés de la personne.

Section 1 : De l'enlèvement et de la séquestration.

Article 224-1 En savoir plus sur cet article...

Modifié par Ordonnance n°2000-916 du 19 septembre 2000 - art. 3 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002

Le fait, sans ordre des autorités constituées et hors les cas prévus par la loi, d'arrêter, d'enlever, de détenir ou de séquestrer une personne, est puni de vingt ans de réclusion criminelle.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables à cette infraction.

Toutefois, si la personne détenue ou séquestrée est libérée volontairement avant le septième jour accompli depuis celui de son appréhension, la peine est de cinq ans d'emprisonnement et de 75000 euros d'amende, sauf dans les cas prévus par l'article 224-2.

Article 224-2 En savoir plus sur cet article...

L'infraction prévue à l'article 224-1 est punie de trente ans de réclusion criminelle lorsque la victime a subi une mutilation ou une infirmité permanente provoquée volontairement ou résultant soit des conditions de détention, soit d'une privation d'aliments ou de soins.

Elle est punie de la réclusion criminelle à perpétuité lorsqu'elle est précédée ou accompagnée de tortures ou d'actes de barbarie ou lorsqu'elle est suivie de la mort de la victime.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables aux infractions prévues par le présent article.

Article 224-3 En savoir plus sur cet article...

Modifié par Loi n°2004-204 du 9 mars 2004 - art. 6 JORF 10 mars 2004

L'infraction prévue par l'article 224-1 est punie de trente ans de réclusion criminelle lorsqu'elle est commise à l'égard de plusieurs personnes.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables à cette infraction.

Toutefois, si la personne détenue ou séquestrée ou toutes les personnes détenues ou séquestrées sont libérées volontairement dans le délai prévu par le troisième alinéa de l'article 224-1, la peine est de dix ans d'emprisonnement, sauf si la victime ou l'une des victimes a subi l'une des atteintes à son intégrité physique mentionnées à l'article 224-2.

Article 224-4 En savoir plus sur cet article...

Si la personne arrêtée, enlevée, détenue ou séquestrée l'a été comme otage soit pour préparer ou faciliter la commission d'un crime ou d'un délit, soit pour favoriser la fuite ou assurer l'impunité de l'auteur ou du complice d'un crime ou d'un délit, soit pour obtenir l'exécution d'un ordre ou d'une condition, notamment le versement d'une rançon, l'infraction prévue par l'article 224-1 est punie de trente ans de réclusion criminelle.

685
2865

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables à cette infraction.

Sauf dans les cas prévus à l'article 224-2, la peine est de dix ans d'emprisonnement si la personne prise en otage dans les conditions définies au premier alinéa est libérée volontairement avant le septième jour accompli depuis celui de son appréhension, sans que l'ordre ou la condition ait été exécuté.

Article 224-5 En savoir plus sur cet article...

Lorsque la victime de l'un des crimes prévus aux articles 224-1 à 224-4 est un mineur de quinze ans, la peine est portée à la réclusion criminelle à perpétuité si l'infraction est punie de trente ans de réclusion criminelle et à trente ans de réclusion criminelle si l'infraction est punie de vingt ans de réclusion criminelle.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables dans les cas prévus par le présent article.

Article 224-5-1 En savoir plus sur cet article...

Créé par Loi n°2004-204 du 9 mars 2004 - art. 12 JORF 10 mars 2004

Toute personne qui a tenté de commettre les crimes prévus par la présente section est exempte de peine si, ayant averti l'autorité administrative ou judiciaire, elle a permis d'éviter la réalisation de l'infraction et d'identifier, le cas échéant, les autres auteurs ou complices.

La peine privative de liberté encourue par l'auteur ou le complice d'un des crimes prévus à la présente section est réduite de moitié si, ayant averti l'autorité administrative ou judiciaire, il a permis de faire cesser l'infraction ou d'éviter que l'infraction n'entraîne mort d'homme ou infirmité permanente et d'identifier, le cas échéant, les autres auteurs ou complices. Lorsque la peine encourue est la réclusion criminelle à perpétuité, celle-ci est ramenée à vingt ans de réclusion criminelle.

Article 224-5-2 En savoir plus sur cet article...

Créé par Loi n°2004-204 du 9 mars 2004 - art. 6 JORF 10 mars 2004

Lorsque les infractions prévues par le premier alinéa de l'article 224-1 et par les articles 224-2 à 224-5 sont commises en bande organisée, les peines sont portées à 1 000 000 Euros d'amende et à :

1° Trente ans de réclusion criminelle si l'infraction est punie de vingt ans de réclusion criminelle ;

2° La réclusion criminelle à perpétuité si l'infraction est punie de trente ans de réclusion criminelle.

Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables dans les cas prévus aux 1° et 2°.

686
2866

Germany

Strafgesetzbuch (StGB)

in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), zuletzt geändert durch Artikel 1 des Gesetzes vom 31. Oktober 2008 (BGBl. I S. 2149)

Source: http://www.gesetze-im-internet.de/bundesrecht/stgb/gesamt.pdf

---

National Case Law

Judgement of the German Federal Court of Justice, BGH 1 StR 320/07 – Bundesgerichtshof, Urteil vom 8. November 2007

Judgement of the German Federal Court of Justice, BGH 1 StR 157/07 - Bundesgerichtshof, Urteil vom 20. Juni 2007

Judgement of the German Federal Court of Justice, BGH 1 StR 376/93 - Bundesgerichtshof, Urteil vom 5. Oktober 1993

687
2867

Strafgesetzbuch (StGB)

StGB

Ausfertigungsdatum: 15.05.1871

Vollzitat:

"Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), zuletzt geändert durch Artikel 1 des Gesetzes vom 31. Oktober 2008 (BGBl. I S. 2149)"

Stand: Neugefasst durch Bek. v. 13.11.1998 I 3322;
zuletzt geändert durch Art. 1 G v. 31.10.2008 I 2149

Fußnote

Textnachweis Geltung ab: 1.1.1982 Amtlicher Hinweis des Normgebers auf EG-Recht:
Umsetzung der
EWGRL 439/91 (CELEX Nr: 391L0439) vgl. G v. 24.4.1998 I 747 Maßgaben aufgrund Ei
nicht mehr anzuwenden

Inhaltsübersicht

(4) In den Fällen des Absatzes 1 wird die Tat nur auf Antrag verfolgt, es sei denn, dass die Strafverfolgungsbehörde wegen des besonderen öffentlichen Interesses an der Strafverfolgung ein Einschreiten von Amts wegen für geboten hält.

§ 239 Freiheitsberaubung

(1) Wer einen Menschen einsperrt oder auf andere Weise der Freiheit beraubt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.

(2) Der Versuch ist strafbar.

(3) Auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren ist zu erkennen, wenn der Täter

1. das Opfer länger als eine Woche der Freiheit beraubt oder
2. durch die Tat oder eine während der Tat begangene Handlung eine schwere Gesundheitsschädigung des Opfers verursacht.

(4) Verursacht der Täter durch die Tat oder eine während der Tat begangene Handlung den Tod des Opfers, so ist die Strafe Freiheitsstrafe nicht unter drei Jahren.

(5) In minder schweren Fällen des Absatzes 3 ist auf Freiheitsstrafe von sechs Monaten bis zu fünf Jahren, in minder schweren Fällen des Absatzes 4 auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren zu erkennen.

§ 239a Erpresserischer Menschenraub

(1) Wer einen Menschen entführt oder sich eines Menschen bemächtigt, um die Sorge des Opfers um sein Wohl oder die Sorge eines Dritten um das Wohl des Opfers zu einer Erpressung (§ 253) auszunutzen, oder wer die von ihm durch eine solche Handlung geschaffene Lage eines Menschen zu einer solchen Erpressung ausnutzt, wird mit Freiheitsstrafe nicht unter fünf Jahren bestraft.

(2) In minder schweren Fällen ist die Strafe Freiheitsstrafe nicht unter einem Jahr.

(3) Verursacht der Täter durch die Tat wenigstens leichtfertig den Tod des Opfers, so ist die Strafe lebenslange Freiheitsstrafe oder Freiheitsstrafe nicht unter zehn Jahren.

(4) Das Gericht kann die Strafe nach § 49 Abs. 1 mildern, wenn der Täter das Opfer unter Verzicht auf die erstrebte Leistung in dessen Lebenskreis zurückgelangen läßt. Tritt dieser Erfolg ohne Zutun des Täters ein, so genügt sein ernsthaftes Bemühen, den Erfolg zu erreichen.

§ 239b Geiselnahme

(1) Wer einen Menschen entführt oder sich eines Menschen bemächtigt, um ihn oder einen Dritten durch die Drohung mit dem Tod oder einer schweren Körperverletzung (§ 226) des Opfers oder mit dessen Freiheitsentziehung von über einer Woche Dauer zu einer Handlung, Duldung oder Unterlassung zu nötigen, oder wer die von ihm durch eine solche Handlung geschaffene Lage eines Menschen zu einer solchen Nötigung ausnutzt, wird mit Freiheitsstrafe nicht unter fünf Jahren bestraft.

(2) § 239a Abs. 2 bis 4 gilt entsprechend.

§ 239c Führungsaufsicht

In den Fällen der §§ 239a und 239b kann das Gericht Führungsanfsicht anordnen (§ 68 Abs. 1).

§ 240 Nötigung

(1) Wer einen Menschen rechtswidrig mit Gewalt oder durch Drohung mit einem empfindlichen Übel zu einer Handlung, Duldung oder Unterlassung nötigt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.

6869
2869

BUNDESGERICHTSHOF

IM NAMEN DES VOLKES

URTEIL

3 StR 320/07

vom

8. November 2007

in der Strafsache

gegen

wegen schwerer Vergewaltigung u. a.

690
2870

Der 3. Strafsenat des Bundesgerichtshofs hat in der Sitzung vom 8. November 2007, an der teilgenommen haben:

Richter am Bundesgerichtshof
Becker
als Vorsitzender,

die Richter am Bundesgerichtshof
Pfister,
von Lienen,
Hubert,
Dr. Schäfer
als beisitzende Richter,

Staatsanwältin
als Vertreterin der Bundesanwaltschaft,

Justizamtsinspektor
als Urkundsbeamter der Geschäftsstelle,

für Recht erkannt:

Auf die Revision der Staatsanwaltschaft wird das Urteil des Landgerichts Osnabrück vom 26. Februar 2007 mit den Feststellungen aufgehoben, jedoch bleiben die Feststellungen zum objektiven Tatgeschehen aufrechterhalten.

Im Umfang der Aufhebung wird die Sache zu neuer Verhandlung und Entscheidung, auch über die Kosten des Rechtsmittels und die der Nebenklägerin hierdurch entstandenen notwendigen Auslagen, an eine andere Strafkammer des Landgerichts zurückverwiesen.

Von Rechts wegen

Gründe:

1 Das Landgericht hat den Angeklagten wegen schwerer Vergewaltigung in Tateinheit mit gefährlicher Körperverletzung, Freiheitsberaubung und Bedrohung zu einer Freiheitsstrafe von vier Jahren und sechs Monaten verurteilt. Mit ihrer hiergegen gerichteten, zu Ungunsten des Angeklagten eingelegten Revision rügt die Staatsanwaltschaft die Verletzung materiellen Rechts. Das Rechtsmittel führt zur Aufhebung des Urteils; jedoch sind die rechtsfehlerfrei getroffenen Feststellungen zum objektiven Tatgeschehen aufrechtzuerhalten (§ 353 Abs. 2 StPO).

2 I. Nach den Feststellungen versuchte der Angeklagte über einen längeren Zeitraum vergeblich, mit der Nebenklägerin eine Liebes- und Sexualbeziehung einzugehen. Nachdem dies gescheitert war, traf er umfangreiche Vorbereitungen, um die Nebenklägerin gegebenenfalls gegen ihren Willen in einem

Kotten festzuhalten, und lockte sie dorthin. Nach einem ersten Gespräch erkannte er, dass sich die Nebenklägerin erneut ablehnend verhielt und auch nicht bereit war, freiwillig seinen Wünschen zur einverständlichen Vornahme sexueller Handlungen und zur Anfertigung erotischer Fotos nachzukommen. Er äußerte nun, sie solle hier bleiben, sie gehe nirgendwo mehr hin. Der Angeklagte fesselte die Nebenklägerin, kettete sie an, strangulierte sie in lebensbedrohlicher Weise und verbrachte sie mehrfach für längere Zeiträume in eine von ihm präparierte sargähnliche Kiste. Während des sich über fast einen Tag hinziehenden Tatgeschehens führte er der Nebenklägerin gegen ihren Willen einen Finger in die Scheide ein, fotografierte sie in von ihm zuvor beschafften Dessous, präsentierte ihr ein von ihm erstelltes "Drehbuch", in dem er seine die Nebenklägerin betreffenden sexuellen Gewaltphantasien festgehalten hatte, und drohte ihr schließlich, sie mittels einer Kettensäge umzubringen. Daneben versuchte er weiter, sie in mehreren Gesprächen von seinen Absichten zu überzeugen. Nachdem ein erster Fluchtversuch der Nebenklägerin gescheitert war, gelang es ihr schließlich, die Abwesenheit des Angeklagten auszunutzen, sich aus der sargähnlichen Kiste zu befreien, zu dem benachbarten Anwesen zu gelangen und dort Hilfe zu finden.

3 II. Das Urteil hält sachlichrechtlicher Prüfung nicht stand.

4 1. Die Strafkammer hat mit ihrem Schuldspruch den Unrechtsgehalt der von ihr festgestellten Tat nicht ausgeschöpft und ist somit ihrer Kognitionspflicht nicht nachgekommen (vgl. Meyer-Goßner, StPO 50. Aufl. § 264 Rdn. 10). Der festgestellte Sachverhalt enthält mehrere Nötigungen (§ 240 StGB), die über das hinausgehen, was zur Verwirklichung der Vergewaltigung und der Freiheitsberaubung erforderlich war, und die deshalb nicht im Wege der Gesetzeskonkurrenz von den §§ 177, 239 StGB verdrängt werden (vgl. Tröndle/Fischer, StGB 54. Aufl. § 177 Rdn. 105; § 239 Rdn. 18), so etwa das gewaltsame

Verbringen der Nebenklägerin in die sargähnliche Kiste oder das erzwungene Anziehen der Dessous und Dulden der Fotoaufnahmen. Diese Delikte hätte das Landgericht gesondert aburteilen müssen.

5 2. Die Annahme des Landgerichts, die nach seiner rechtlichen Würdigung verwirklichte schwere Vergewaltigung (§ 177 Abs. 1, Abs. 3 Nr. 2 StGB), gefährliche Körperverletzung (§ 224 Abs. 1 Nr. 2 und 5 StGB) und Bedrohung (§ 241 StGB) stünden untereinander im Verhältnis der Tateinheit, da sie von der Freiheitsberaubung (§ 239 StGB) als Dauerdelikt gemäß § 52 StGB zu einer Tat verklammert würden, ist ebenfalls rechtsfehlerhaft.

6 Grundsätzlich kann zwar ein Delikt, das sich über einen gewissen Zeitraum hinzieht, andere Straftaten, die bei isolierter Betrachtung in Tatmehrheit zueinander stünden, zu Tateinheit verbinden, wenn es seinerseits mit jeder dieser Straftaten tateinheitlich zusammentrifft. Diese Wirkung tritt jedoch dann nicht ein, wenn das Dauerdelikt in seinem strafrechtlichen Unwert, wie er in der Strafandrohung Ausdruck findet, deutlich hinter den während seiner Begehung zusätzlich verwirklichten Gesetzesverstößen zurückbleibt. Denn eine minderschwere Dauerstraftat hat nicht die Kraft, mehrere schwerere Einzeltaten, mit denen sie ihrerseits jeweils tateinheitlich zusammentrifft, zu einer materiellrechtlichen Tat im Sinne des § 52 Abs. 1 StGB zusammenzufassen (vgl. BGHR StGB § 52 Abs. 1 Klammerwirkung 4, 5, 7; § 129 a Konkurrenzen 4).

7 Danach scheidet die Annahme von Tateinheit zwischen der schweren Vergewaltigung und der gefährlichen Körperverletzung aus. Die schwere Vergewaltigung ist gemäß § 177 Abs. 3 StGB mit Freiheitsstrafe nicht unter drei Jahren bedroht. Der Strafrahmen der gefährlichen Körperverletzung reicht gemäß § 224 Abs. 1 StGB von sechs Monaten bis zu zehn Jahren Freiheitsstrafe. Demgegenüber wird die Freiheitsberaubung gemäß § 239 Abs. 1 StGB nur mit

Freiheitsstrafe bis zu fünf Jahren oder Geldstrafe geahndet. Sowohl die schwere Vergewaltigung als auch die gefährliche Körperverletzung weisen somit im Vergleich zur Freiheitsberaubung einen so deutlich höheren Unrechtsgehalt auf, dass sie durch diese nicht zu Tateinheit verbunden werden können (vgl. Träger/Schluckebier in LK 11. Aufl. § 239 Rdn. 42). Sie stehen vielmehr im Verhältnis der Tatmehrheit zueinander, wobei in beiden Fällen jeweils tateinheitlich die Freiheitsberaubung hinzutritt (vgl. Rissing-van Saan in LK 12. Aufl. § 52 Rdn. 30). Die Bedrohung gemäß § 241 StGB bildet mit der schweren Vergewaltigung und der Freiheitsberaubung eine materiellrechtliche Tat, da sie der schweren Vergewaltigung zeitlich nachfolgt und nach den dargestellten Grundsätzen von der Freiheitsberaubung mit dieser verklammert wird.

8 3. Schließlich hält das angefochtene Urteil aber auch deswegen rechtlicher Prüfung nicht stand, weil das Landgericht nicht erörtert hat, ob sich der Angeklagte der Geiselnahme (§ 239 b StGB) schuldig gemacht hat. Diese Erörterung drängte sich nach dem Beweisergebnis auf; dessen Würdigung erweist sich daher als lückenhaft.

9 a) Allerdings enthält das Urteil entgegen der Ansicht des Generalbundesanwalts keinen beachtlichen Widerspruch hinsichtlich des Zeitpunkts, in welchem der Angeklagte der Nebenklägerin ausdrücklich androhte, sie mit der Kettensäge umzubringen. Die Strafkammer hat bei der Darstellung des Sachverhalts eindeutig festgestellt, diese Drohung habe am frühen Morgen des nächsten Tages stattgefunden, nachdem der Angeklagte die Nebenklägerin bereits vergewaltigt hatte und nicht mehr gewusst habe, wie es nunmehr weitergehen solle. Diese Feststellung fügt sich zwanglos und plausibel in das übrige Geschehen ein. Sie stimmt darüber hinaus mit der in den Urteilsgründen ausführlich wiedergegebenen Aussage der Nebenklägerin überein. Soweit die Strafkammer an einer späteren Stelle im Rahmen der Beweiswürdigung ausgeführt

hat, die Drohung sei vor der Vergewaltigung ausgesprochen worden, handelt es sich deshalb um ein offensichtliches und somit unbeachtliches Fassungsversehen. Hierfür spricht auch, dass das Landgericht weder bei der rechtlichen Würdigung noch bei der Strafzumessung auf diesen Umstand abgestellt hat.

10 Danach kommt diese Todesdrohung aber als qualifizierte Nötigungshandlung im Sinne des § 239 b Abs. 1 2. Alt. StGB nicht in Betracht, denn sie diente nicht mehr der Erzwingung einer weiteren Handlung, Duldung oder Unterlassung der Nebenklägerin, sondern war vielmehr Ausdruck der Ratlosigkeit des Angeklagten. Dem entsprechend bot ihm die Nebenklägerin aus Angst um ihr Leben von sich aus an, sich wieder in die sargähnliche Kiste zu legen. Diesen "Vorschlag" griff der Angeklagte auf und fuhr sodann zur Arbeit.

11 b) Jedoch erfüllte schon das festgestellte frühere Geschehen nahe liegend die objektiven Merkmale des § 239 b Abs. 1 1. oder 2. Alt. StGB. Das Landgericht musste sich daher notwendigerweise mit diesem Straftatbestand auseinandersetzen und insbesondere prüfen, ob der Angeklagte (auch) in subjektiver Hinsicht eine der beiden Alternativen dieser Vorschrift erfüllt hat.

12 Der Angeklagte hatte sich der Nebenklägerin bemächtigt; die Bemächtigungslage hatte sich - entsprechend seinen Vorstellungen - stabilisiert (vgl. BGHSt 40, 350, 359). Das Vorgehen des Angeklagten war geeignet, bei der Nebenklägerin die Befürchtung zu wecken, der Angeklagte wolle sie töten, wenn sie seine genannten Vorstellungen und Wünsche nicht erfüllte. Damit liegt objektiv eine gemäß § 239 b Abs. 1 StGB qualifizierte Drohung vor. Diese muss nicht ausdrücklich erklärt werden; sie kann vielmehr auch konkludent erfolgen oder sich aus den tatsächlichen Umständen der Tat ergeben (vgl. Träger/Schluckebier in LK 11. Aufl. § 239 b Rdn. 4). Unter diesen Umständen liegt

es nicht fern, dass der Angeklagte eine der beiden Alternativen des § 239 b Abs. 1 StGB in objektiver und subjektiver Hinsicht vollständig verwirklichte.

13 Beabsichtigte er bereits im Zeitpunkt der Begründung des physischen Herrschaftsverhältnisses über die Nebenklägerin, seine weitergehenden Ziele mittels konkludenter Todesdrohung zu erreichen, so wären allein schon hierdurch die Voraussetzungen der ersten Alternative des § 239 b Abs. 1 StGB erfüllt. Der Angeklagte hätte dagegen die zweite Alternative des § 239 b Abs. 1 StGB verwirklicht, wenn er zwar nicht bereits zu dem Zeitpunkt, zu dem er sich der Nebenklägerin bemächtigte, diese Absicht hatte, jedoch die von ihm geschaffene Lage aufgrund eines nachträglich gefassten Vorsatzes zu einer solchen Nötigung mittels konkludenter Todesdrohung ausnutzte. Hiermit hätte sich das Landgericht auseinandersetzen müssen.

14 III. Das angefochtene Urteil kann somit keinen Bestand haben. Jedoch können die Feststellungen zum objektiven Tatgeschehen aufrechterhalten werden, denn sie sind von den dargelegten Rechtsfehlern nicht betroffen. Weitergehende Feststellungen hierzu darf der nunmehr zur Entscheidung berufene Tatrichter nur treffen, soweit sie zu den bisherigen nicht in Widerspruch stehen. Sollte er zu der Überzeugung gelangen, dass sich der Angeklagte auch der Geiselnahme schuldig gemacht hat, wird er zu beachten haben, dass dieses

Dauerdelikt aufgrund seines Unrechtsgehalts geeignet ist, die während seiner Begehung vom Angeklagten verwirklichten weiteren Straftaten zur Tateinheit zu verklammern (vgl. BGH NStZ-RR 2004, 333, 335 zu § 239 a StGB).

Becker Pfister von Lienen

Hubert Schäfer

BUNDESGERICHTSHOF

IM NAMEN DES VOLKES

URTEIL

1 StR 157/07

vom

20. Juni 2007

in der Strafsache

gegen

wegen gefährlicher Körperverletzung u. a.

Der 1. Strafsenat des Bundesgerichtshofs hat in der Sitzung vom 20. Juni 2007, an der teilgenommen haben:

Vorsitzender Richter am Bundesgerichtshof
Nack

und die Richter am Bundesgerichtshof
Dr. Wahl,
Dr. Kolz,
Hebenstreit,
Dr. Graf,

Bundesanwalt
als Vertreter der Bundesanwaltschaft,

Rechtsanwalt
als Verteidiger,

Rechtsanwalt
als Vertreter des Nebenklägers,

Justizangestellte
als Urkundsbeamtin der Geschäftsstelle,

für Recht erkannt:

Die Revisionen der Staatsanwaltschaft und des Angeklagten gegen das Urteil des Landgerichts München I vom 11. September 2006 werden verworfen.

Die Staatskasse hat die Kosten des Rechtsmittels der Staatsanwaltschaft und die hierdurch dem Angeklagten entstandenen notwendigen Auslagen zu tragen. Der Angeklagte hat die Kosten seines Rechtsmittels und die insoweit entstandenen notwendigen Auslagen des Nebenklägers zu tragen.

Von Rechts wegen

Gründe:

1 Das Landgericht hat den Angeklagten wegen Freiheitsberaubung in Tateinheit mit gefährlicher Körperverletzung und Bedrohung zu einer Freiheitsstrafe von fünf Jahren verurteilt. Hiergegen richtet sich die auf die Sachrüge gestützte Revision des Angeklagten. Die Staatsanwaltschaft beanstandet mit ihrer ebenfalls auf die Verletzung sachlichen Rechts gestützten Revision, dass der Angeklagte nicht wegen Geiselnahme gemäß § 239b Abs. 1 StGB verurteilt worden ist. Beide Rechtsmittel haben keinen Erfolg.

I.

2 1. Das Landgericht hat im Wesentlichen folgende Feststellungen getroffen:

3 Der Mitangeklagte Ö. , der seine Verurteilung nicht angefochten hat, hatte bei einem nächtlichen Kontrollbesuch in der Wohnung seiner 17-jährigen Schwester T. Ö. den Zeugen E. vorgefunden. Er hatte deshalb seine Schwester und E. geschlagen und mit einem Messer bedroht. Gemeinsam mit dem telefonisch herbeigerufenen Angeklagten und den gesondert Verfolgten K. und Ek. zwang er sodann den verängstigten E. , mit ihnen zu einem abgelegenen Parkplatz zu fahren. Dort erklärte er dem Angeklagten, E. müsse weiter eingeschüchtert werden, damit er seine Schwester nunmehr heirate. Der Angeklagte erwiderte, er werde "dies" nun regeln.

4 Der Angeklagte setzte sich mit E. auf die Rücksitzbank des Kraftfahrzeugs, ergriff eine (ungeladene) Gaspistole, hielt sie so vor das Gesicht des E. , dass dieser sie wegen des nicht verschlossenen Laufs für eine scharfe Waffe hielt, und steckte ihm ihren Lauf gewaltsam in den Mund. Er erweckte den Anschein, die Waffe auslösen zu wollen, woraufhin E. in Todesangst aufschrie. Nunmehr drehte der Angeklagte die Waffe um und schlug mit ihrem metallischen Griff mehrmals kräftig gegen den Kopf des E. . Er zwang ihn, wieder auszusteigen, und forderte ihn auf, sich - wie schon zuvor - bei Ö. nochmals zu entschuldigen und diesem zum Zeichen der Respektbekundung nach türkischer Sitte die Hand zu küssen. Zusätzlich erklärte er, falls Ö. die Geste der Entschuldigung nicht annehme, müsse er damit rechnen, umgebracht zu werden. Ö. seinerseits erließ dem E. den Handkuss, drohte ihm aber an, es werde noch schlimmer kommen, wenn er sich nicht an seine Vorgaben halte, und ließ ihn daraufhin gehen.

5 Der Angeklagte wusste bei seinem Vorgehen gegen E. , dass dieser sich bereits mehrfach bei Ö. entschuldigt hatte und selbst nach weiteren Möglichkeiten zur Entschuldigung und Respektbezeugung suchte. Die Drohungen des Angeklagten dienten nicht dem Zweck, der Aufforderung zur Entschuldigung Nachdruck zu verleihen, sondern sollten die Einschüchterung des E. nochmals steigern, um für die Zukunft sicher zu stellen, dass E. außereheliche Beziehungen zu T. Ö. unterlässt und diese heiratet.

6 2. Das Landgericht hat dieses Geschehen nicht als Geiselnahme gemäß § 239b Abs. 1 StGB gewertet. Der Angeklagte habe dem Geschädigten E. zwar im Rahmen einer zuvor geschaffenen Bemächtigungssituation mit dem Tode gedroht. Die Drohung habe jedoch nicht dazu gedient, E. ein Verhalten noch während der Dauer der Zwangslage abzunötigen.

II.

7 Die Revision der Staatsanwaltschaft ist unbegründet. Das Landgericht hat zu Recht eine Strafbarkeit des Angeklagten wegen eines Verbrechens der Geiselnahme verneint.

8 Nach der Rechtsprechung des Bundesgerichtshofs ist § 239b StGB - schon wegen der hohen Mindeststrafe von fünf Jahren - einschränkend auszulegen. Zwischen der Entführung eines Opfers und einer beabsichtigten Nötigung muss ein funktionaler und zeitlicher Zusammenhang derart bestehen, dass der Täter das Opfer während der Dauer der Entführung nötigen will und die abgenötigte Handlung auch während der Dauer der Zwangslage vorgenommen werden soll (vgl. BGH NJW 1997, 1082; NStZ 2006, 36). Denn der Zweck dieser Strafvorschrift besteht gerade darin, das Sich-Bemächtigen oder die Entführung des Opfers deshalb besonders unter Strafe zu stellen, weil der Täter seine Drohung während der Dauer der Zwangslage jederzeit realisieren

kann (BGH StV 1997, 302; NStZ 2006, 36). Allerdings kann auch das Erreichen eines Teilerfolges des Täters, der mit Blick auf ein weitergehendes Ziel jedenfalls vorbereitend wirkt, eine Nötigung darstellen (BGH NJW 1997, 1082; NStZ 2006, 36). Jedenfalls solche Handlungen des Opfers, die eine nach der Vorstellung des Täters eigenständig bedeutsame Vorstufe des gewollten Enderfolgs darstellen, führen zur Vollendung der mit der qualifizierten Drohung erstrebten Nötigung (BGH aaO).

9 Diese Voraussetzungen sind hier nicht erfüllt. Der Angeklagte wollte den Geschädigten E. einschüchtern und ihn dadurch dazu bringen, künftig außereheliche Beziehungen zu der Zeugin T. Ö. zu unterlassen und diese zu heiraten. Damit waren seine Ziele auf ein Verhalten des E. in einem Zeitraum gerichtet, zu dem dieser aus der Gewalt der beiden Angeklagten wieder entlassen sein würde. Aus den rechtsfehlerfrei getroffenen Feststellungen des Landgerichts ergibt sich nicht, dass der Angeklagte erreichen wollte (und erreicht hat), dass E. bereits während der Bemächtigungssituation sich verbindlich zu seinem künftigen Verhalten gegenüber T. Ö. festlegt.

10 Auch soweit der Angeklagte dem E. eine nochmalige Entschuldigung für dessen bisheriges Verhalten und einen Handkuss als Respektbezeugung abverlangte, ist keine hinreichende Vorstufe des gewollten Enderfolgs - zukünftige Beziehungen zu T. Ö. - gegeben. Es fehlt insoweit bereits die erforderliche finale Verknüpfung zwischen der Bemächtigungslage und ihrer Ausnutzung zum Zwecke der Nötigung. Dem Angeklagten war nach den ausdrücklichen Feststellungen des Landgerichts bewusst, "dass dem Geschädigten E. die Aufforderung zur nochmaligen Entschuldigung und Respektbezeugung als Gelegenheit zur Besänftigung des Angeklagten Ö. willkommen war und dass E. ihr auch ohne zusätzliche Drohungen nachkommen würde."

Insoweit wollte der Angeklagte daher schon nicht - was eine Nötigung voraussetzt - einen entgegenstehenden Willen des Geschädigten überwinden.

11 Damit erfüllt das Verhalten des Angeklagten nur die Tatbestände der tateinheitlich begangenen Freiheitsberaubung, Bedrohung und gefährlichen Körperverletzung.

III.

12 Die Revision des Angeklagten ist aus den in der Antragsschrift des Generalbundesanwalts zutreffend genannten Gründen unbegründet.

Herr VRiBGH Nack ist wegen Urlaubs an der Unterschrift gehindert.

Wahl Wahl Kolz

Hebenstreit Graf

BGH 1 StR 376/93 - 5. Oktober 1993 (LG Ansbach)

BGHSt 39, 330; einschränkende Auslegung des Tatbestands der Geiselnahme (Entführen oder das Sich-Bemächtigen ist unmittelbares Nötigungsmittel einer alsbald durchgeführten Vergewaltigung oder sexuellen Nötigung)

§ 239b StGB

Leitsatz

§ 239b StGB ist in einschränkender Auslegung auf solche Fälle nicht anwendbar, in denen das Entführen oder das Sich-Bemächtigen unmittelbares Nötigungsmittel einer alsbald durchgeführten Vergewaltigung oder sexuellen Nötigung ist und in denen eine über das hierdurch begründete unmittelbare Gewaltverhältnis zwischen Täter und Opfer hinausreichende (Außen-)Wirkung des abgenötigten Verhaltens nach der Vorstellung des Täters nicht eintreten soll (Fortführung BGH, 17. November 1992, 1 StR 534/92, BGHSt 39, 36). (BGHSt)

Entscheidungstenor

1. Auf die Revision des Angeklagten wird das Urteil des Landgerichts Ansbach vom 25. Februar 1993

a) im Schuldspruch dahin geändert, daß im Fall II 2 der Urteilsgründe die Verurteilung wegen Geiselnahme entfällt und der Angeklagte insoweit verurteilt wird wegen Vergewaltigung in Tateinheit mit sexueller Nötigung, mit gefährlicher Körperverletzung und mit Entführung gegen den Willen der Entführten,
b) im Ausspruch über die Einzelstrafe in diesem Fall und über die Gesamtstrafe mit den Feststellungen aufgehoben.

Im Umfang der Aufhebung wird die Saehe zu neuer Verhandlung und Entscheidung, auch über die Kosten des Rechtsmittels, an eine andere Strafkammer des Landgerichts zurückverwiesen.

2. Die weitergehende Revision wird verworfen.

Gründe

Das Landgericht hat den Angeklagten wegen Vollrausches und wegen Geiselnahme in Tateinheit mit Vergewaltigung, mit sexueller Nötigung und mit gefährlicher Körperverletzung zur Gesamtfreiheitsstrafe von sechs Jahren und seehs Monaten verurteilt, die Unterbringung in einer Entziehungsanstalt angeordnet und ihm die Fahrerlaubnis entzogen, den Führerschein eingezogen und eine Sperrfrist von drei Jahren ausgesprochen. Die auf die allgemein erhobene Sachrüge gestützte Revision des Angeklagten ist teilweise begründet.

Anlaß zur Erörterung gibt allein die Frage, ob hier neben Vergewaltigung und sexueller Nötigung auch der Tatbestand der Geiselnahme nach § 239 b StGB erfüllt ist. Der Senat verneint dies und ändert den Schuldspruch.

Nach den rechtsfehlerfrei getroffenen Feststellungen erklärte sich der Angeklagte bereit, die Zeugin S., die nachts nach einer Autopanne in geschlossener Ortschaft Hilfe suchte, auf ihren Wunsch zu einer im gleichen Ort gelegenen Diskothek zu bringen, weswegen die Frau arglos in den Pkw des Angeklagten einstieg. Zugleich entschloß sich der Angeklagte, "mit ihr ein intimes Abenteuer zu suchen und das notfalls gegen den Willen der Frau mit Gewalt durchzusetzen". Der Angeklagte steuerte sein Fahrzeug trotz des Protests der Frau aus der Ortschaft heraus in einen Wald. Dort veränderte er mehrfach die Fahrtrichtung, um dem Tatopfer die Orientierung zu nehmen und es so völlig seinem Einfluß preiszugeben. Bereits während der Fahrt forderte er Frau S. auf, sich zu entkleiden. Als diese das entschieden ablehnte, drohte er, sie umzubringen, wenn sie sich nicht füge. Im Wald erzwang er nach massiver Gewalteinwirkung gegen den Hals und unter Todesdrohungen schließlich neben einer Reihe gravierender sonstiger sexueller Handlungen mehrfach den Geschlechtsverkehr.

Diese Feststellungen ergeben, daß die Voraussetzungen des § 239 b StGB dem Wortlaut nach erfüllt sind: Der Angeklagte hat sein Opfer entführt und sich dessen bemächtigt, er hat es mit dem Tode bedroht, um es zur Duldung unter anderem des Geschlechtsverkehrs zu nötigen. Gleichwohl ist der Senat der Auffassung, daß der Angeklagte nicht auch wegen Geiselnahme nach § 239 b StGB verurteilt werden kann.

Der Senat hat in seinem Urteil vom 17. November 1992 (BGHSt 39, 36) entschieden, in einschränkender Auslegung seien die §§ 239 a, 239 b StGB auf solche Fälle nicht anwendbar, in denen das bloße Sich-Bemächtigen unmittelbares Nötigungsmittel einer Vergewaltigung, einer sexuellen Nötigung oder einer räuberischen Erpressung ist und in denen eine über das hierdurch begründete Gewaltverhältnis zwischen Täter und Opfer hinausreichende Außenwirkung des abgenötigten Verhaltens nach der Vorstellung des Täters nicht eintreten soll. Danach gilt: Bemächtigt sich der Täter des Opfers allein zu dem Zweck, es zu vergewaltigen, sexuell zu nötigen oder zu erpressen, und verwirklicht er diese Absicht innerhalb des genannten Gewaltverhältnisses, so ist er lediglich nach § 177, § 178 oder §§ 253, 255 StGB zu bestrafen (so auch BGH, Urt. vom 19. Januar 1993 - 1 StR 782/92). Diese Entscheidung läßt offen, wie der Fall zu beurteilen ist, daß der Täter einen anderen entführt, also die andere Handlungsalternative der §§ 239 a, 239 b StGB erfüllt, um unter sonst gleichen Umständen eine der genannten Straftaten zu begehen. Auch die Senatsentscheidung vom 22. Juni 1993 - 1 StR 69/93 (Der Kriminalist 1993, 363) sowie der Beschluß des Bundesgerichtshofs vom 23. Juli 1993 - 2 StR 346/93 - lassen die Frage ausdrücklich offen, ob die einschränkende Auslegung der §§ 239 a, 239 b StGB auch bei Vorliegen der Handlungsalternative "Entführen" gilt. Die Verurteilungen auch wegen erpresserischen Menschenraubs durch Entführen wurden in diesen Fällen neben schwerem Raub bestätigt, weil jeweils das dem Opfer abgenötigte Verhalten eine Wirkung außerhalb des unmittelbaren Gewaltverhältnisses entfaltete.

Zur Begründung der einschränkenden Auslegung der Vorschriften über erpresserischen Menschenraub und Geiselnahme hat der Senat in seiner Entscheidung vom 17. November 1992 (aaO) u.a. erwogen: Wendete man § 239 a und § 239 b StGB im Rahmen eines Zwei-Personen-Verhältnisses auf Fälle an, in denen der Nötigungserfolg im unmittelbaren Gewaltzusammenhang des Sich-Bemächtigens eintritt, so führte dies dazu, daß der weit überwiegende Teil aller Vergewaltigungen - wie auch sexuell geprägter Nötigungen zu Lasten der eigenen Ehefrau - gleichzeitig als Geiselnahme, ein großer Teil der räuberischen Erpressungen zugleich als erpresserischer Menschenraub zu qualifizieren wäre; denn in der Regel 'bemächtigt sich' der Täter des Opfers, in dem er es durch körperliche Kraft oder durch Bedrohung

707
2887

mit einer Waffe (physisch) in seine Gewalt bringt. Damit würden strafrechtliche Sachverhalte, die seit jeher znm Kernbestand des materiellen Strafrechts zählen, gleichsam in die 'zweite Reihe' gerückt. Die tateinheitliche Verurteilnng wegen Vergewaltigung oder räuberischer Erpressung würde nur noch klarstellen, daß das mit dem 'Vorbereitungsdelikt' Geiselnahme oder erpresseriseher Menschenraub verfolgte Ziel tatsäehlich erreicht wnrde. Das entspräche nieht dem Willen des Gesetzgebers (Hinweis auf Beschlußempfehlung des Reehtsaussehusses, BT-Drucks. 11/4359 S. 13 und auf BT-Drucks. 11/2834 S. 9).

In den Fällen der hier vorliegenden Art - die Entführung ist bereits unmittelbares Nötigungsmittel für ein Handlungsziel, das keinerlei Wirkung außerhalb des unmittelbaren Gewaltverhältnisses entfalten soll - ist eine nnterschiedliche Behandlung der Handlungsalternativen 'Entführen' und 'Bemächtigen' nicht veranlaßt. Beide werden vom Gesetz gleichgestellt; tatsächlich stellt die zur Entführung notwendige Ortsveränderung nur die Vorstufe zum Sich-Bemächtigen dar oder fällt mit diesem bereits zeitlich zusammen; Ziel der Entführung ist immer, sich des Opfers zu bemächtigen (vgl. hierzu Eser in Schönke/Schröder, StGB 24. Anfl. § 239 a Rdn. 6; Horn in SK 27. Lfg. § 239 a Rdn. 4; Dreher/Tröndle, StGB 46. Aufl. § 239 a Rdn. 5).

Der Senat verkennt nicht, daß das durch eine Entführung unterstützte Sich-Bemächtigen gekennzeichnet ist durch erhöhte Gefahr für das Opfer: Die mit dem Entführen einhergehende Ortsveränderung bewirkt eine Loslösung von örtlichen Einflüssen, die geeignet sein könnten, das Handlungsziel - hier: Vergewaltigung, sexuelle Nötigung - zu erschweren oder ganz zu verhindern. Das Gefühl des Ausgeliefertseins, das durch die bloße Ausübung der physischen Gewalt im Rahmen des Sich-Bemächtigens begründet wird, findet in der Ortsveränderung durch Entführen eine Verstärkung. Auch handelt es sich bei der Entführung, anders als beim bloßen Sich-Bemächtigen, nicht um einen notwendigen oder auch nur regelmäßigen Bestandteil eines Sexualdelikts. Die Entführung kann somit insgesamt eigenständiges oder zusätzliches Tatunrecht begründen.

Dem hat der Gesetzgeber jedoch für den Bereich der sexuellen Selbstbestimmung der Frau bereits in § 237 StGB - Entführung gegen den Willen der Entführten - Rechnung getragen. Das in der Entführung liegende, über die Vergewaltigung hinausgehende Handlnngsunreeht wird damit erfaßt. Zudem kann der in der Art der Entführung (also im Nötigungsmittel) liegende erhöhte Unrechtsgehalt im Strafmaß berücksichtigt werden. Demgegenüber entspricht es nicht dem Willen des Gesetzgebers, in den kriminologisch gerade typischen Fällen von Sexualdelikten innerhalb einer Zwei-Personen-Beziehung, das tatbestandliche Unrecht mit seinem Schwerpunkt von speziellen Straftatbeständen (Entführung, Vergewaltigung, sexuelle Nötigung) auf eine andersartige, allgemeinere Strafnorm zu verlagern, die mit ihrer außergewöhnlich hohen Mindeststrafe von fünf Jahren für eine völlig andere Gruppe von Straftaten - solche aus dem Bereich politisch motivierter, terroristischer Gewaltkriminalität - geschaffen wurde (vgl. BGHSt 39, 36, 41).

Die Fälle des Abweichens vom (verabredeten) Fahrtweg zu dem Zweck, die Ortsveränderung und die dadurch bewirkte hilflosere Lage als Nötigungsmittel zum Geschlechtsverkehr oder zur sexuellen Nötigung einzusetzen, rechtfertigen dauach nicht die Anweuduug der Vorschrift über die Geiselnahme.

Hinzu kommt, daß die §§ 239 a, 239 b StGB bereits mit der Entführung oder dem Sich-Bemächtigen in Erpressungs- oder Nötigungsabsicht vollendet sind; das Unrechtsziel der Vergewaltigung u.a. braucht zur Anwendung der Mindeststrafe von fünf Jahren nicht erreicht zu werden. Freiwilliger Rücktritt vom Versuch der Vergewaltigung führt dann angesichts der bereits vollendeten Tat 'Geiselnahme' allenfalls zur Strafrahmenmilderung nach § 239 a Abs. 4, § 49 Abs. 1 StGB i.V. mit § 239 b Abs. 2 StGB.

Auch von dem in der Gesetzesüberschrift 'Geiselnahme' zum Ausdruck kommenden gesetzgeberischen Willen ausgehend, begegnet die Anwendung des § 239 b StGB auf Fälle der vorliegenden Art Bedenken und bestärkt den Senat in seiner Auffassung, der Gesetzgeber habe diese Fälle nicht unter den Tatbestand einordnen wollen. Der Begriff der Geiselnahme umfaßt von jeher solche Fallgestaltungen, in denen das Opfer fremder Gewalt unterstellt und festgehalten wird, um durch Bedrohuug eine Forderuug gegen Dritte durchzusetzen (vgl. Brockhaus Enzyklopädie 19. Aufl. und Meyers Enzyklopädisches Lexikon 9. Aufl., je zum Stichwort 'Geiselnahme'). Dem entsprach auch die ursprüngliche Fassung des § 239 b StGB. Das Änderungsgesetz vom 9. Juni 1989 (BGBl I 1059) wollte das nicht grundsätzlich ändern, sondern hatte nur den Zweck, auch die Fälle zu erfassen, in denen auf den Entführten weiterer Zwang ausgeübt werden sollte, um ihn selbst zu einer Handlung, Duldung oder Unterlassung zu nötigen, wobei das "abgepresste Verhalten eine Wirkung außerhalb des unmittelbar tatbezogenen Gewaltverhältnisses - der Bemächtigung oder Entführung - haben sollte" (BGHSt 39, 36, 43; ablehnend Bohlander NStZ 1993, 439). Geiselnahme im Sinne des § 239 b StGB bedeutet daher, daß das Tatopfer wie eine 'Geisel' für etwas einstehen soll, was über das im unmittelbaren Gewaltzusammenhang erstrebte Nötigungsziel der alsbald ausgeführten Vergewaltigung oder sexuellen Nötigung hinausgeht. Nicht erfaßt sind jedenfalls die Fälle, in denen - wie hier - die Entführung nach dem Willen des Täters auch räumlich zu einer nur so weit gehenden kurzzeitigen Ortsveränderung führen soll, wie das zur alsbaldigen Verwirklichung des eigentlichen Tatzieles erforderlich ist.

Dienen daher das Entführen und Bemächtigen allein dem Zweck, unmittelbares Nötigungsmittel zur alsbaldigen Vergewaltigung oder sexuellen Nötigung zu sein, und soll das hierdurch zwischen Täter und Opfer bewirkte Gewaltverhältnis keine über dieses hinausreichende (Außen-) Wirkung entfalten, so ist der Tatbestand der Geiselnahme nicht anwendbar.

Andererseits ist nach den Feststellungen der objektive und subjektive Tatbestand des § 237 StGB erfüllt, Strafantrag ist gestellt. Das Landgericht hatte bereits auf die mögliche Änderung dieses reehtlichen Gesichtspunkts hingewiesen (§ 265 StPO).

Der Senat ändert den Schuldspruch. Über die Einzelstrafe im Fall II 2 und damit auch über die Gesamtstrafe muß neu entschieden werden. Die Einzelstrafe im Fall II 1 und die Maßregeln der Besserung und Sicherung sind von der Aufhebung nicht betroffen.

709
2889

India

Suppression of Terrorism Act 1993, SAARC

NO. 36 OF 1993 [26th April, 1993 An Act to give effect to the South Asian Association for Regional Cooperation Convention on Suppression of Terrorism and for matters connected therewith or incidental thereto]

Source:
http://www.commonlii.org/in/legis/num_act/scota1993484/scota1993484.html

2890

SAARC CONVENTION (SUPPRESSION OF TERRORISM) ACT 1993

THE SAARC CONVENTION (SUPPRESSION OF TERRORISM) ACT, 1993 NO. 36 OF 1993 [26th April, 1993 An Act to give effect to the South Asian Association for Regional Cooperation Convention on Suppression of Terrorism and for matters connected therewith or incidental thereto. WHEREAS a Convention on the Suppression of Terrorism was signed on behalf of the Government of India at Kathmandu on the 4th day of November, 1987; AND WHEREAS India, having ratified the said Convention, should make provisions for giving effect thereto and for matters connected therewith or incidental thereto; BE it enacted by Parliament in the Forty-fourth Year of the Republic of India as follows:-

1.Short title, extent and application. (1) This Act may be called the SAARC Convention (Suppression of Terrorism) Act, 1993.

(2) It extends to the whole of India and, subject to the provisions of section 6, it applies also to any offence under this Act committed outside India by any person. 2

2.Definitions. In this Act, unless the context otherwise requires,- (a) "Convention" means the South Asian Association for Regional Cooperation Convention on Suppression of Terrorism signed at Kathmandu on the 4th day of November, 1987 as set out in the Schedule; (b) "Convention country" means a country in which the Convention is for the time being in force.

3. Application of the Convention. Notwithstanding anything to the contrary contained in any other law, the provisions of Articles I to VIII of the Convention shall have the force of law in India.

4. Hostage-taking. (1) Whoever, by force or threat of force or by any other form of intimation, seizes or detains any person and threatens to kill or injure that person with intent to cause a Convention country to do or abstain from doing any act as the means of avoiding the execution of such threat, eommits the offenee of hostage- taking.

(2) Whoever commits the offence of hostage-taking shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

5. Provisions as to Extradition Act. For the purposes of the Extradition Act, 1962 (34 of 1962), in relation to a Convention

country, an offence under sub-section (1) of section 4 or any other offence specified in Article I of the Convention, shall not be consi- dered to be an offence of a political eharacter.

711
2891

Ireland

Criminal Justice (Terrorist Offences) Act 2005

[8th March, 2005]

Source: http://www.irishstatutebook.ie/plweb-cgi/fastweb?state_id=1243784523&view=aq-view&numhitsfound=45&query_rule=(($query1)%3C%3DYEAR%3C%3D($query2))%20AND%20(($query3))%3Aleqtitle%20AND%20(($query4))%3Anumber%20AND%20(($query5))%3Asectionno%20%20AND%20(($query0))&query3=criminal%20justice%20(terrorist%20offences)%20act%202005&docid=66773&docdb=Acts&dbname=Acts&dbname=SIs&sorting=none&operator=and&TemplateName=predoc.tmpl&setCookie=1

2892
712

Criminal Justice (Terrorist Offences) Act 2005

Number 2 *of* 2005

CRIMINAL JUSTICE (TERRORIST OFFENCES) ACT 2005

ARRANGEMENT OF SECTIONS

2893
743

Criminal Justice (Terrorist Offences) Act 2005

Offence of hostage-taking.

9.—(1) Subject to *subsections (3)* to *(5)*, a person is guilty of the offence of hostage-taking if he or she, in or outside the State—

(*a*) seizes or detains another person ("the hostage"), and

(*b*) threatens to kill, injure or continue to detain the hostage,

in order to compel a state, an international intergovernmental organisation, a person or a group of persons to do, or abstain from doing, any aet.

(2) Subjeet to *subsections (3)* to *(5)*, a person who attempts to commit an offence under *subsection (1)* is guilty of an offence.

(3) *Subsections (1)* and *(2)* apply to an act committed outside the State if—

(*a*) the act is committed on board an Irish ship,

(*b*) the act is committed on an aircraft registered in the State,

(*c*) the act is committed by a citizen of Ireland or by a stateless person habitually resident in the State,

(*d*) the act is committed in order to compel the State to do or abstain from doing an act, or

(*e*) the hostage is a citizen of Ireland.

(4) *Subsections (1)* and *(2)* apply also to an act committed outside the State in circumstances other than those referred to in *subsection (3)*, but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in *section 43 (2)* for an offence in respect of that act except as authorised by *section 43 (3)*.

2894
744

(5) *Subsections (1)* and *(2)* do not apply in respect of any act of hostage-taking that constitutes an offence under section 3 of the Geneva Conventions Act 1962 .

(6) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

2895
~~715~~

Luxembourg

Code Pénal (CP)

Loi du 16 juin 1879, Mém. 1879, 589 – Pas. 1879, 231

Source:
http://www.legilux.public.lu/leg/textescoordonnes/codes/code_penal/cp_L2T08.pdf

2896
716

CODE PÉNAL

(Loi du 16 juin 1879)

Mém. 1879, 589 - Pas. 1879, 231.

Travaux préparatoires et discussions à la Chambre des Députés.

Session de 1875-1876: - Examen préparatoire - avis sur la proposition d'adopter le Code pénal belge, sous réserve de modifications: tribunal de Luxembourg, a 1; tribunal de Diekirch, a 3; cour supérieure de justice, a 4. - Observations de M. le prof. Nypels, a 5. - Projet de modifications présenté par M. le dir. gén. Vannerus, a 28; - avis des corps judiciaires: tribunal de Luxembourg, a 52; tribunal de Diekirch, a 53; cour supérieure, a 63; - avis du Conseil d'Etat, a 68.

Projet de révision déposé par M. le dir. gén. Funck, séance du 7 décembre 1875, p. 169: rapport au Prince-Lieutenant, a 94; projet de loi a 107; - projet de loi sur les circonstances atténuantes et rapport, a 236 et 239.

Session de 1876-1877: Rapport de la Commission spéciale (livre I), séance du 26 juin 1877, p. 957, a 575.

Session de 1877-1878: Observations du parquet général, a 165.

Dépôt du 2e rapport de la Commission spéciale (livre II), séance du 30 avril 1878, p. 701.

Session de 1878-1879: - Texte du 2e rapport de la Commission spéciale (livre II), a 58. Observations de M. le prof. Nypels, a 460; - id. de M. le substitut Limelette, a 469.

Résumé des amendements proposés en commun par la Commission spéciale et par M. le dir. gén. Eyschen, séance du 18 mars 1879, p. 595, a 680.

Discussion gén., séance du 19 mars, p. 597-603.

Discussion des articles: séance du 19 mars, art. 1-7, p. 604-634;
séance du 20 mars, art. 7, p. 635-658;
séance du 25 mars, art. 8-30, p. 660-691;
séance du 26 mars, art. 30-99, p. 692-722;
séance du 27 mars, art. 100-192, p. 725-731;
séance du 1er avril, art. 193-314, p. 770-780;
séance du 2 avril, art. 315-460, p. 784-792;
séance du 3 avril, art. 461-568, p. 818-837.

Renvoi au Conseil d'Etat afin d'avis sur les articles amendés, séance du 3 avril, p. 837.

Projet de loi sur les circonstances atténuantes - rapport de la Commission, discussion et vote des articles, séance du 3 avril, p. 837.

Avis du Conseil d'Etat sur les articles amendés et conclusions définitives de la Commission spéciale, séance du 1er mai 1879, p. 1054.

Second vote des articles amendés, séance du 1er mai, p. 1069-1104.

Vote sur l'ensemble et adoption, dispense du second vote, ib. p. 1104.

Vote définitif de la loi sur les circonstances atténuantes, ib. p. 1104.

Chapitre IV-I. - De la prise d'otages.

(L. 29 novembre 1982)

Art. 442-1. (L. 29 novembre 1982) Sera puni de la réclusion de quinze à vingt ans celui qui aura enlevé, arrêté, détenu ou séquestré ou fait enlever, arrêter, détenir ou séquestrer une personne, quel que soit son âge, soit pour préparer ou faciliter la commission d'un crime ou d'un délit, soit pour favoriser la fuite ou assurer l'impunité des auteurs ou complices d'un crime ou d'un délit, soit pour faire répondre la personne enlevée, arrêtée, détenue ou séquestrée de l'exécution d'un ordre ou d'une condition.

Toutefois la peine sera celle de la réclusion de dix à quinze ans si la personne enlevée, arrêtée, détenue ou séquestrée pour répondre de l'exécution d'un ordre ou d'une condition est libérée volontairement avant le cinquième jour accompli depuis celui de l'enlèvement, de l'arrestation, de la détention ou de la séquestration sans que l'ordre ou la condition ait été exécuté.

La peine sera celle de la réclusion à vie, si l'enlèvement, l'arrestation, la détention ou la séquestration a été suivi de la mort de la personne enlevée, arrêtée, détenue ou séquestrée.

Chapitre V. - Des atteintes portées à l'honneur ou à la considération des personnes.

Art. 443. Celui qui, dans les cas ci-après indiqués, a méchamment imputé à une personne un fait précis qui est de nature à porter atteinte à l'honneur de cette personne ou à l'exposer au mépris public, est coupable de calomnie, si, dans les cas où la loi admet la preuve légale du fait, cette preuve n'est pas rapportée. Il est coupable de diffamation, si la loi n'admet pas cette preuve.

(L. 8 juin 2004) La personne responsable au sens de l'article 21 de la loi du 8 juin 2004 sur la liberté d'expression dans les médias n'est pas non plus coupable de calomnie ou de diffamation

1) lorsque, dans les cas où la loi admet la preuve légale du fait, cette preuve n'est pas rapportée, mais que la personne responsable au sens de l'article 21 précité, sous réserve d'avoir accompli les diligences nécessaires, prouve par toutes voies de droit qu'elle avait des raisons suffisantes pour conclure à la véracité des faits rapportés ainsi que l'existence d'un intérêt prépondérant du public à connaître l'information litigieuse;

2) lorsqu'il s'agit d'une communication au public en direct à condition:

a) que toutes les diligences aient été faites et toutes les précautions prises afin d'éviter une atteinte à la réputation ou à l'honneur, et

b) que l'indication de l'identité de l'auteur des propos cités accompagne l'information communiquée;

3) lorsqu'il s'agit de la citation fidèle d'un tiers à condition:

a) que la citation soit clairement identifiée comme telle, et

b) que l'indication de l'identité de l'auteur des propos cités accompagne l'information communiquée, et

c) que la communication au public de cette citation soit justifiée par l'existence d'un intérêt prépondérant du public à connaître les propos cités.

1° Lorsqu'un article ne contient que des insinuations blessantes et injurieuses, présentant l'imputation de toute sorte de défauts et de vices, mais que dans aucune de ces imputations on ne trouve l'articulation d'un fait punissable suivant la loi, il ne présente pas le caractère de délit de calomnie. (art. 367 du Code pénal, 443 nouveau), mais bien celui d'injure (art. 375 ibid., 448 et 561 7° nouveaux). Cour 29 juillet 1865, Recueil I 1864/66, 2e partie, 288.

2° Les délits de calomnie et de diffamation n'existent qu'à la condition que le fait imputé ait un caractère de précision tel qua sa véracité ou sa fausseté puissent faire l'objet d'une preuve directe et contraire. Cour 4 décembre 1909, P. 8, 187.

3° S'il est universellement admis et conforme aux principes que tous les membres d'une communauté religieuse injuriée ou diffamée ont qualité pour se plaindre et agir en justice, soit individuellement, soit collectivement, que la communauté soit autorisée ou non, lorsque l'injure ou la diffamation est présentée de telle façon qu'elle puisse rejaillir sur tous, en laissant planer le doute sur chacun d'eux, il doit en être ainsi à plus forte raison lorsque les demandeurs soutiennent qu'ils se trouvent tout simplement visés et atteints, parce qu'on leur reproche comme préposés à la communauté, d'avoir toléré des faits répréhensibles, ou même d'avoir été de connivence avec les auteurs de ces faits. Cour 30 janvier 1904, P. 6, 429.

2878
~~HG~~

Mexico

Código Penal Federal (CP)

Nuevo Publicado en el Diario Oficial de la Federación el 14 de agosto de 1931, Última reforma publicada DOF 23-01-2009

Source: http://www.cddhcu.gob.mx/LeyesBiblio/pdf/9.pdf

2899
719

CÓDIGO PENAL FEDERAL

Nuevo Código Publicado en el Diario Oficial de la Federación el 14 de agosto de 1931

TEXTO VIGENTE
Última reforma publicada DOF 23-01-2009

Al margen un sello que dice: Poder Ejecutivo Federal.- Estados Unidos Mexicanos.-México.- Secretaría de Gobernación.

El C. Presidente Constitucional de los Estados Unidos Mexicanos, se ha servido dirigirme el siguiente Decreto:

PASCUAL ORTIZ RUBIO, Presidente Constitucional de los Estados Unidos Mexicanos, a sus habitantes, sabed:

Que en uso de las facultades que le fueron concedidas por Decreto de 2 de enero de 1931, ha tenido a bien expedir el siguiente

CÓDIGO PENAL FEDERAL

LIBRO PRIMERO
TITULO PRELIMINAR

Artículo 1o.- Este Código se aplicará en toda la República para los delitos del orden federal.

Artículo 2o.- Se aplicará, asimismo:

I. Por los delitos que se inicien, preparen o cometan en el extranjero, cuando produzcan o se pretenda que tengan efectos en el territorio de la República; o bien, por los delitos que se inicien, preparen o cometan en el extranjero, siempre que un tratado vinculativo para México prevea la obligación de extraditar o juzgar, se actualicen los requisitos previstos en el artículo 4o. de este Código y no se extradite al probable responsable al Estado que lo haye requerido, y

II.- Por los delitos cometidos en los consulados mexicanos o en contra de su personal, cuando no hubieren sido juzgados en el país en que se cometieron.

Artículo 3o.- Los delitos continuos cometidos en el extranjero, que se sigan cometiendo en la República, se perseguirán con arreglo a las leyes de ésta, sean mexicanos o extranjeros los delincuentes.

La misma regla se aplicará en el caso de delitos continuados.

Artículo 4o.- Los delitos cometidos en territorio extranjero por un mexicano contra mexicanos o contra extranjeros, o por un extranjero contra mexicanos, serán penados en la República, con arreglo a las leyes federales, si concurren los requisitos siguientes:

I.- Que el acusado se encuentre en la República;

II.- Que el reo no haya sido definitivamente juzgado en el país en que delinquió, y

2900
720

Artículo 365 Bis.- Al que prive ilegalmente a otro de su libertad con el propósito de realizar un acto sexual, se le impondrá pena de uno a cinco años de prisión.

Si el autor del delito restituye la libertad a la víctima sin haber practicado el acto sexual, dentro de los tres días siguientes, la sanción será de un mes a dos años de prisión.

Este delito sólo se perseguirá por querella de la persona ofendida.

Artículo 366.- Al que prive de la libertad a otro se le aplicará:

I. De quince a cuarenta años de prisión y de quinientos a dos mil días multa, si la privación de la libertad se efectúa con el propósito de:

a) Obtener rescate;.

b) Detener en calidad de rehén a una persona y amenazar con privarla de la vida o con causarle daño, para que la autoridad o un particular realice o deje de realizar un acto cualquiera, o

c) Causar daño o perjuicio a la persona privada de la libertad o a cualquier otra.

d) Cometer secuestro exprés, desde el momento mismo de su realización, entendiéndose por éste, el que, para ejecutar los delitos de robo o extorsión, prive de la libertad a otro. Lo anterior, con independencia de las demás sanciones que conforme a este Código le correspondan por otros delitos que de su conducta resulten.

II. De veinte a cuarenta años de prisión y de dos mil a cuatro mil días multa, si en la privación de la libertad a que se hace referencia en la fracción anterior concurre alguna o algunas de las circunstancias siguientes:

a) Que se realice en camino público o en lugar desprotegido o solitario;

b) Que el autor sea o haya sido integrante de alguna institución de seguridad pública, o se ostente como tal sin serlo,

c) Que quienes lo lleven a cabo obren en grupo de dos o más personas;

d) Que se realice con violencia, o

e) Que la víctima sea menor de dieciséis o mayor de sesenta años de edad, o que por cualquier otra circunstancia se encuentre en inferioridad física o mental respecto de quien ejecuta la privación de la libertad.

III. Se aplicarán de veinticinco a cincuenta años de prisión y de cuatro mil a ocho mil días multa, cuando la privación de libertad se efectúe con el fin de trasladar a un menor de dieciséis años fuera de territorio nacional, con el propósito de obtener un lucro indebido por la venta o la entrega del menor.

Se impondrá una pena de treinta a cincuenta años de prisión al o a los secuestradores, si a la víctima del secuestro se le causa alguna lesión de las previstas en los artículos 291 a 293 de este Código.

En caso de que el secuestrado sea privado de la vida por su o sus secuestradores, se aplicará pena de hasta setenta años de prisión.

2901
~~724~~

New Zealand

Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980

Public Act : 1980 No 44, Date of assent : 2 December 1980

Source:
http://www.legislation.govt.nz/act/public/1980/0044/latest/096be8ed8009c7fa.pdf

2902
~~422~~

Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980

Public Act 1980 No 44
Date of assent 2 December 1980

The title of this Act was amended, as from 1 March 1999, by section 2(1) Crimes (Internationally Protected Persons and Hostages) Amendment Act 1998 (1998 No 36) by substituting the words "Internationally Protected Persons, United Nations and Associated Personnel, and Hostages" for the words "Internationally Protected Persons and Hostages". *See* clause 2 Crimes (Internationally Protected Persons and Hostages) Amendment Act 1998 Commencement Order 1999 (SR 1999/9).

Contents

Note

This Act is administered in the Department of Justice.

2903
723

No 36). *See* clause 2 Crimes (Internationally Protected Persons and Hostages) Amendment Act 1998 Commencement Order 1999 (SR 1999/9).

Hostages

8 Hostage-taking

(1) Subject to subsection (2) of this section, every one commits the crime of hostage-taking who, whether in or outside New Zealand, unlawfully seizes or detains any person (in this section called the hostage) without his consent, or with his consent obtained by fraud or duress, with intent to compel the Government of any country or any international intergovernmental organisation or any other person to do or abstain from doing any act as a condition, whether express or implied, for the release of the hostage.

(2) No one shall be convicted of the crime of hostage-taking if—

(a) The act of hostage-taking takes place in New Zealand; and

(b) The alleged offender and the hostage are New Zealand citizens; and

(c) The alleged offender is in New Zealand.

(3) Every one who commits the crime of hostage-taking is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

General provisions

9 Extradition Act amended

[Repealed]

Section 9 was repealed, as from 1 September 1999, by section 111 Extradition Act 1999 (1999 No 55).

10 Crimes deemed to be included in extradition treaties

(1) For the purposes of the Extradition Act 1999 and any Order in Council in force under section 15 or section 104 of that Act,—

(a) Each crime described in section 3 or section 4 or section 8, including—

(i) Attempting to commit that crime (where it is not itself constituted by a mere attempt); or

2904
~~724~~

Pakistan

Pakistan Penal Code (Act XLV of 1860)

Act XLV of 1860, October 6th, 1860, Amended by: Protection of Women (Criminal Laws Amendment Act (Amendment) Ordinance (LXXXV of 2002, Criminal Laws (Reforms) Ordinance (LXXXVI of 2002),etc.

Source: http://www.unhcr.org/refworld/docid/485231942.html

2905
725

Pakistan Penal Code (Act XLV of 1860)

Act XLV of 1860

October 6th, 1860

Amended by: Protection of Women (Criminal Laws Amendment) Act, 2006,Criminal Laws (Amendment) Act, 2004 (I of 2005),Criminal Law (Amendment) Ordinance (LXXXV of 2002),Criminal Laws (Reforms) Ordinance (LXXXVI of 2002),etc.

Whereas it is expedient to provide a general Penal Code for Pakistan:

It is enaeted as follows:-

CHAPTER I

INTRODUCTION

1. Title and extent of operation of the Code.
This Act shall be called the Pakistan Penal Code, and shall take effect throughout Pakistan.

2. Punishment of offences committed within Pakistan.
Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Pakistan.

3. Punishment of offences committed beyond, but which by law may be tried within Pakistan.
Any person liable, by any Pakistan Law, to be tried for an offence committed beyond Pakistan shall be dealt with according to the provision of this Code for any act committed beyond Pakistan in the same manner as if such act had been committed within Pakistan.

4. Extension of Code to extra-territorial offences.
The provisions of this Code apply also to any offence committed by:-
[1][(1) any citizen of Pakistan or any person in the service of Pakistan in any place without and beyond Pakistan;][1]
[2][][3][4][][4]
(4) any person on any ship or aircraft registered in Pakistan wherever it may be.
Explanation: In this section the word "offence" includes every act committed outside Pakistan which, if committed in Pakistan, would be punishable under this Code.

Illustrations

murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

Illustrations

(a) A kidnaps Z from Pakistan, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(b) A forcibly carries or entices 5 away from his home in order that B may be murdered. A has committed the offence defined in this section.

364- Kidnapping or abducting a person under the [140][age of fourteen] [140]:

A. Whoever kidnaps or abducts any person under the [141][age of fourteen] [141] in order that such person may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years.

365. Kidnapping or abducting with intent secretly and wrongfully to confine person:

Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[142][

365- Kidnapping or abducting for extorting property, valuable security, etc.:

A. Whoever kidnaps or abducts any person for the purpose of extorting from the person kidnapped or abducted, or from any person interested in the person kidnapped or abducted any property, whether movable or immovable, or valuable security, or to compel any person to comply with any other demand, whether in cash or otherwise, for obtaining release of the person kidnapped or abducted, shall be punished with death or imprisonment for life and shall also be liable to forfeiture of property.

][142]

[143][

365B. Kidnapping, abducting or inducing woman to compel for marriage etc.-

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced, or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in this Code, or of abuse of authority or any other method of compulsion, induces

2907
727

Peru

Código Penal (CP)

Decreto Legislativo N° 635, Promulgado: 03.04.91, Publicado: 06.04.91

Source: http://www.devida.gob.pe

2908

CODIGO PENAL

DECRETO LEGISLATIVO N° 635

Promulgado : 03.04.91
Publicado : 08.04.91

INDICE

8. Usar en provecho propio, o de otro, el patrimonio de la persona.

Artículo 199.- Contabilidad paralela
El que, con la finalidad de obtener ventaja indebida, mantiene contabilidad paralela distinta a la exigida por la ley, será reprimido con pena privativa de libertad no mayor de un año y con sesenta a noventa días-multa.(*)

(*) Rectificado por Fe de Erratas, publicado el 10-04-91.

CAPITULO VII
EXTORSION

Artículo 200.- Extorsión
El que mediante violencia, amenaza o manteniendo en rehén a una persona, obliga a ésta o a otra a otorgar al agente o a un tercero una ventaja económica indebida o de cualquier otra índole, será reprimido con pena privativa de libertad no menor de seis ni mayor de doce años.

La pena será privativa de libertad no menor de veinte años cuando:

1. El rehén es menor de edad.
2. El secuestro dura más de cinco días.
3. Se emplea crueldad contra el rehén.
4. El rehén ejerce función pública o privada o es representante diplomático.
5. El rehén es inválido o adolece de enfermedad.
6. Es cometido por dos o más personas.

La pena será no menor de veinticinco años si el rehén muere y no menor de doce ni mayor de quince años si el rehén sufre lesiones graves a su integridad física o mental."(*)

(*) Texto vigente conforme a la modificación establecida por el Artículo 1 de la Ley Nº 27472 publicada el 05-06-2001

(*) Este artículo anteriormene fue modificado por el Artículo 1 del Decreto Legislativo N° 896, publicado el 24-05-98, expedido con arreglo a la Ley N° 26950, que otorga al Poder Ejecutivo facullades para legislar en materia de seguridad nacional

CONCORDANCIA: R.Adm. Nº 185-2001-P-CSJLI-PJ

Artículo 201.- Chantaje
El que, haciendo saber a otro que se dispone a publicar, denunciar o revelar un hecho o conducta cuya divulgación puede perjudicarlo personalmente o a un tercero con quien esté estrechamente vinculado, trata de determinarlo o lo determina a comprar su silencio, será reprimido con pena privaliva de libertad no menor de tres ni mayor de seis años y con ciento ochenta a trescientos sesenticinco días-multa.

CAPITULO VIII
USURPACION

Artículo 202.- Usurpación
Será reprimido con pena privativa de libertad no menor de uno ni mayor de tres años:

1. El que, para apropiarse de todo o parte de un inmueble, destruye o altera los linderos del mismo.

2910
730

Poland

Kodeks karny (Penal Code)

USTAWA
z dnia 6 czerwca 1997 r.

ACT
of 6 June 1997

Source:
Polish version:
http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU19970880553&type=3&name=D19970553L.pdf

English Translation: http://www.legal-tools.org/en/search-the-tools/record/file.html?fileNum=67443&hash=4a8b04a8b30f717e7a2413473ed7057042e218c4ea28e1d36bf5a53b24c85721

USTAWA
z dnia 6 czerwca 1997 r.

Kodeks karny

CZĘŚĆ OGÓLNA

Rozdział I
Zasady odpowiedzialności karnej

Art. 1.

§ 1. Odpowiedzialności karnej podlega ten tylko, kto popełnia czyn zabroniony pod groźbą kary przez ustawę obowiązującą w czasie jego popełnienia.

§ 2. Nie stanowi przestępstwa czyn zabroniony, którego społeczna szkodliwość jest znikoma.

§ 3. Nie popełnia przestępstwa sprawca czynu zabronionego, jeżeli nie można mu przypisać winy w czasie czynu.

Art. 2.

Odpowiedzialności karnej za przestępstwo skutkowe popełnione przez zaniechanie podlega ten tylko, na kim ciążył prawny, szczególny obowiązek zapobiegnięcia skutkowi.

Art. 3.

Kary oraz inne środki przewidziane w tym kodeksie stosuje się z uwzględnieniem zasad humanitaryzmu, w szczególności z poszanowaniem godności człowieka.

Art. 4.

§ 1. Jeżeli w czasie orzekania obowiązuje ustawa inna niż w czasie popełnienia przestępstwa, stosuje się ustawę nową, jednakże należy stosować ustawę obowiązującą poprzednio, jeżeli jest względniejsza dla sprawcy.

§ 2. Jeżeli według nowej ustawy czyn objęty wyrokiem zagrożony jest karą, której górna granica jest niższa od kary orzeczonej, wymierzoną karę obniża się do górnej granicy ustawowego zagrożenia przewidzianego za taki czyn w nowej ustawie.

Opracowano na podstawie: Dz.U. z 1997 r. Nr 88, poz. 553, Nr 128, poz. 840, z 1999 r. Nr 64, poz. 729, Nr 83, poz. 931, z 2000 r. Nr 48, poz. 548, Nr 93, poz. 1027, Nr 116, poz. 1216, z 2001 r. Nr 98, poz. 1071, z 2003 r. Nr 111, poz. 1061, Nr 121, poz. 1142, Nr 179, poz. 1750, Nr 199, poz. 1935, Nr 228, poz. 2255, 2004 r. Nr 25, poz. 219, Nr 69, poz. 626, Nr 93, poz. 889, Nr 243, poz. 2426, z 2005 r. Nr 86, poz. 732, Nr 90, poz. 757, Nr 132, poz. 1109, Nr 163, poz. 1363, Nr 178, poz. 1479, Nr 180, poz. 1493, z 2006 r. Nr 190, poz. 1409, Nr 218, poz. 1592, Nr 226, poz. 1648, z 2007 r. Nr 89, poz. 589, Nr 123, poz. 850, Nr 124, poz. 859, Nr 192, poz. 1378, z 2008 r. Nr 90, poz. 560, Nr 122, poz. 782, Nr 171, poz. 1056, Nr 173, poz. 1080, Nr 214, poz. 1344, z 2009 r. Nr 62, poz. 504, Nr 63, poz. 533.

Rozdział XXXII

Przestępstwa przeciwko porządkowi publicznemu

Art. 252.

§ 1. Kto bierze lub przetrzymuje zakładnika w celu zmuszenia organu państwowego lub samorządowego, instytucji, organizacji, osoby fizycznej lub prawnej albo grupy osób do określonego zachowania się,

podlega karze pozbawienia wolności od roku do lat 10.

§ 2. Jeżeli następstwem czynu określonego w § 1 jest śmierć człowieka lub ciężki uszczerbek na zdrowiu, sprawca

podlega karze pozbawienia wolności od lat 2 do 12.

§ 3. Kto czyni przygotowania do przestępstwa określonego w § 1,

podlega karze pozbawienia wolności do lat 3.

§ 4. Nie podlega karze za przestępstwo określone w § 1, kto odstąpił od zamiaru wymuszenia i zwolnił zakładnika.

Art. 253.

§ 1. Kto uprawia handel ludźmi nawet za ich zgodą,

podlega karze pozbawienia wolności na czas nie krótszy od lat 3.

§ 2. Kto, w celu osiągnięcia korzyści majątkowej, zajmuje się organizowaniem adopcji dzieci wbrew przepisom ustawy,

podlega karze pozbawienia wolności od 3 miesięcy do lat 5.

Art. 254.

§ 1. Kto bierze czynny udział w zbiegowisku wiedząc, że jego uczestnicy wspólnymi siłami dopuszczają się gwałtownego zamachu na osobę lub mienie,

podlega karze pozbawienia wolności do lat 3.

§ 2. Jeżeli następstwem gwałtownego zamachu jest śmierć człowieka lub ciężki uszczerbek na zdrowiu, uczestnik zbiegowiska określony w § 1,

podlega karze pozbawienia wolności od 3 miesięcy do lat 5.

Art. 255.

§ 1. Kto publicznie nawołuje do popełnienia występku lub przestępstwa skarbowego,

podlega grzywnie, karze ograniczenia wolności albo pozbawienia wolności do lat 2.

§ 2. Kto publicznie nawołuje do popełnienia zbrodni,

podlega karze pozbawienia wolności do lat 3.

§ 3. Kto publicznie pochwala popełnienie przestępstwa,

podlega grzywnie do 180 stawek dziennych, karze ograniczenia wolności albo pozbawienia wolności do roku.

Act

of 6 June 1997

The Penal Code

GENERAL PART

Chapter I

Principles of penal liability

Article 1. § 1. Penal liability shall be incurred only by a person who commits an act prohibited under penalty, by a law in force at the time of its commission.

§ 2. A prohibited act whose social consequences is insignificant shall not constitute an offence.

§ 3. The perpetrator of an prohibited act does not commit an offence if guilt cannot be attributed to him at the time of the commission of the act.

Article 2. Penal liability for an offence with criminal consequences committed by omission shall be incurred only by a person who had borne a legal, special duty to prevent such a consequence.

Article 3. Penalties and other measures provided for in this Code shall be applied with a view to humanitarian principles, particularly with the respect for human dignity.

CHAPTER XXXII

Offences against Public Order

Article 252. § 1. Whoever takes or detains a hostage with the purpose of forcing a state or local government authority, an institution or organisation, legal or natural person, or a group of persons to act in a specified manner

shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

§ 2. If the consequence of the act specified in § 1 is the death of a person or a serious detriment to health, the perpetrator

shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years.

§ 3. Whoever makes preparations for the offence specified in § 1,

shall be subject to the penalty of deprivation of liberty for up to 3 years.

§ 4. Whoever abandoned the intent to extort or releases the hostage shall not be subject to the penalty for the offence specified in § 1.

Article 253. § I. Whoever conducts white slavery (trade in humans) even with their consent

shall be subject to the penalty of deprivation of liberty for a minimum term of 3 years.

§ 2. Whoever, in order to gain material benefits, organises the adoption of children in violation of the law,

2915
735

Russia

Russian Criminal Code

Уголовный кодекс РФ
от 13 июня 1996 г. N 63-ФЗ
Принят Государственной Думой 24 мая 1996 года, Одобрен Советом Федерации 5 июня 1996 года

The Criminal Code of the Russian Federation,
of 13 June 1996 no. 63-FZ
Adopted by the State Duma on 24 May 1996, Adopted by the Federation Council on 5 June 1996

Source:
Russian version: http://www.legal-tools.org/en/access-to-the-tools/record/ltdetails/27568/3028a5db4aa7cef346a84dda1944c05a91d60d7ee28edc8914bf90ca996b7a29/

English translation: http://www.legal-tools.org/en/access-to-the-tools/record/ltdetails/27567/87d74407feda8cccf6a89d88143ad359b1f73b53fd0a9b8ac6dcb1e4dc63256c/

2916

736

Федеральным законом *от 8 декабря 2003 г. N 162-ФЗ в настоящий Кодекс внесены изменения*
См. текст Кодекса в предыдущей редакции

Уголовный кодекс РФ от 13 июня 1996 г. N 63-ФЗ (с изменениями от 27 мая, 25 июня 1998 г., 9 февраля, 15, 18 марта, 9 июля 1999 г., 9, 20 марта, 19 июня, 7 августа, 17 ноября, 29 декабря 2001 г., 4, 14 марта, 7 мая, 25 июня, 24, 25 июля, 31 октября 2002 г., 11 марта, 8 апреля, 4, 7 июля, 8 декабря 2003 г., 21, 26 июля 2004 г.)

Принят Государственной Думой 24 мая 1996 года Одобрен Советом Федерации 5 июня 1996 года

2917

737

Постатейное содержание Уголовного кодекса РФ

Федеральный закон от 13 июня 1996 г. N 64-ФЗ "О введении в действие Уголовного кодекса Российской Федерации"

2918

738

Статья 206. Захват заложника

1. Захват или удержание лица в качестве заложника, совершенные в целях понуждения государства, организации или гражданина совершить какое-либо действие или воздержаться от совершения какого-либо действия как условия освобождения заложника, -

наказываются лишением свободы на срок от пяти до десяти лет.

2. Те же деяния, совершенные:

а) группой лиц по предварительному сговору;

б) утратил силу

См. текст пункта "б"

в) с применением насилия, опасного для жизни и здоровья;

г) с применением оружия или предметов, используемых в качестве оружия;

д) в отношении заведомо несовершеннолетнего;

е) в отношении женщины, заведомо для виновного находящейся в состоянии беременности;

ж) в отношении двух или более лиц;

з) из корыстных побуждений или по найму, -

наказываются лишением свободы на срок от шести до пятнадцати лет.

3. Деяния, предусмотренные частями первой или второй настоящей статьи, если они совершены организованной группой либо повлекли по неосторожности смерть человека или иные тяжкие последствия, -

наказываются лишением свободы на срок от восьми до двадцати лет.

Примечание. Лицо, добровольно или по требованию властей освободившее заложника, освобождается от уголовной ответственности, если в его действиях не содержится иного состава преступления.

deprivation of freedom for a term of seven to fifteen years with or without a fine in the amount of up to one million roubles or in the amount of the wage or salary, or any other income on the convicted person for a period of up to five years.

Note. A person who has committed the crime specified in this Article shall be released from criminal responsibility if through his voluntary and timely warning of the authorities or otherwise he assisted to prevent the act of terrorism or suppress the crime of terrorist nature named in this article, unless the actions of this person contain a different corpus delicti.

See the reference on changes of Article 205.1 of the Criminal Code

---

Article 206. Hostage-Taking

1. The capture or detention of a hostage, committed to compel the State, an organization, or an individual to perform or to abstain from taking any action as a condition for the release of the hostage,

shall be punishable by deprivation of liberty for e term of five to ten years.

2. The same deeds committed:

a) by a group of persons in a preliminary conspiracy;

b) abolished

c) with the use of violence posing a danger to human life and health;

d) with the use of arms or objects used as arms;

e) against an obvious minor;

f) against a woman in a state of pregnancy obvious to the convicted person;

g) against two or more persons;

h) out of mercenary motives or by hire,

shall be punishable by deprivation of liberty for a term of six to fifteen years.

3. Deeds provided for by the first or second part of this Article, if they have been committed by an organized group or have involved by negligence the death of a person, or any other grave consequences,

shall be punishable by deprivation of liberty for a term of eight to twenty years.

Note: A person who released a hostage voluntarily or on the demand of the authorities shall be relieved from criminal responsibility, unless his actions contain a different corpus delicti.

See the reference on changes of Article 206 of the Criminal Code of the Russian Federation

Article 207. Knowingly Making a False Communication About an Act of Terrorism

A knowingly false communication about an impending explosion, act of arson, or any other action creating a danger of killing people, inflicting sizable damage to property, or entailing other socially hazardous consequences,

shall be punishable by a fine in the amount up to 200 thousand roubles, or in the amount of the wage or salary, or any other income of the convicted person for a period up to 18 months, or by corrective works for a term of one year to two years, or by arrest for a term of three to six months, or by deprivation of liberty for a term of up to three years.

See the reference on changes of Article 207 of the Criminal Code of the Russian Federation

Article 208. Organization of an Illegal Armed Formation, or Participation in It

1. Creation of an armed formation (unit, squad, or any other group) that is not envisaged by a federal law, and likewise operating of such a formation,

shall be punishable by deprivation of liberty for a term of two to seven years.

2. Participation in an armed formation that is not provided for by a federal law

shall be punishable by restraint of liberty for a term of up to three years, or by arrest for a term of up to six months, or by deprivation of liberty for a term of up to five years.

Note: A person who has ceased to take part in an illegal armed formation of his own free will, and has handed in his weapons, shall be released from criminal responsibility unless his actions contain a different corpus delicti.

Article 209. Banditry

1. Creation of a stable armed group (band) with the aim of assaulting individuals or organizations, and also operation of such a group (band),

shall be punishable by deprivation of liberty for a term of up to 15 years, with or without a fine in the amount of up to one million roubles or in the amount of the wage or salary, or any other income of the convicted person for a

2920
740

Sénégal

Code Pénal (CP)

Code pénal (Loi de base No. 65-60 du 21 juillet 1965 portant Code pénal) [Senegal], No. 65-60, 21 July 1965, Entrée en vigueur: 1er février 1966

Source: http://www.unhcr.org/refworld/docid/49f5d8262.html

2921
741

CODE PENAL

Sénégal

SOMMAIRE

Sénégal

d'emprisonnement pourra être portée à cinq ans si la personne mise ou reçue en gage est âgée de moins de quinze ans.

Les coupables pourront en outre dans tous les cas être privés des droits mentionnés en l'article 34 pendant cinq ans au moins et dix ans au plus.

Article 335

Si la détention ou séquestration a duré plus d'un mois, la peine sera celle des travaux forcés à perpétuité.

Article 336

La peine sera réduite à l'emprisonnement d'un an à cinq ans, si le coupable des délits mentionnés en l'article 334, non encore poursuivis de fait, ont rendu la liberté à la personne arrêtée, séquestrée ou détenue, avant le dixième jour accompli depuis celui de l'arrestation, détention ou séquestration.

Les coupables pourront néanmoins être interdits de séjour pendant cinq à dix ans.

Article 337

Dans chacun des deux cas suivants:

1) Si l'arrestation a été exécutée avec un faux costume, sous un faux nom, ou sur un faux ordre de l'autorité publique;

2) Si l'individu arrêté, détenu ou séquestré, a été menacé de la mort.

Les coupables seront punis des travaux forcés à perpétuité.

Mais la peine sera celle de la mort, si les personnes arrêtées, détenues ou séquestrées ont été soumises à des tortures corporelles.

Article 337 bis

(Loi n° 76-02 du 25 mars 1976)

Dans le cas ou la personne, quelque soit son âge, a été arrêtée, détenue ou séquestrée comme otage, soit pour préparer ou faciliter la commission d'un crime ou d'un délit, soit pour favoriser la fuite ou assurer l'impunité des auteurs ou complices d'un crime ou d'un délit, soit pour répondre du paiement d'une rançon, de l'exécution d'un ordre ou d'une condition, le coupable sera puni de la peine de mort.

Toutefois, la peine sera celle des travaux forcés à temps de dix à vingt ans, si la personne arrêtée, détenue ou séquestrée comme otage est libérée volontairement, sans qu'il y ait eu exécution d'aucun ordre ou réalisation d'aucune condition, avant le cinquième jour accompli depuis celui de l'arrestation, de la détention ou de la séquestration.

Le bénéfice des circonstances atténuantes ne pourra pas être accordé aux accusés reconnus coupables du crime spécifié à l'alinéa premier lorsqu'il est résulté de la prise d'otage la mort d'une personne quelconque ou celle de la personne prise en otage, que la mort soit survenue alors que cette personne était entre les mains de ses ravisseurs ou à la suite des blessures ou des violences subies au cours de son enlèvement.

Lorsque la prise d'otage n'aura entraîné la mort d'aucune personne et que le bénéfice des circonstances atténuantes aura été accordé aux accusés reconnus coupables du crime spécifié à l'alinéa 1er, la peine des travaux forcés à perpétuité sera obligatoirement prononcée, nonobstant les dispositions de l'article 432, alinéa 2.

SECTION VII
INFRACTIONS RELATIVES A L'ETAT CIVIL D'UN ENFANT, ENLEVEMENT DE MINEURS, ABANDON DE FAMILLE, INFRACTIONS AUX LOIS SUR LES INHUMATIONS

Paragraphe premier
Crimes et délits envers l'enfant

Article 338

Les coupables d'enlèvement, de recel, ou de suppression d'un enfant, de substitution d'un enfant à un autre, ou de supposition d'un enfant à une femme qui ne sera pas accouchée, seront punis d'un emprisonnement de cinq à dix ans.

Seront punis de la même peine ceux qui, étant chargés d'un enfant, ne le représenteront point aux personnes qui auront le droit de le réclamer.

Article 339

Toute personne qui, ayant assisté à un accouchement, n'aura pas fait la déclaration à elle prescrite par la réglementation de l'état civil, sera punie d'un emprisonnement d'un mois à six mois et d'une amende de 20.000 à 75.000 francs.

Article 340

Toute personne qui, ayant trouvé un enfant nouveau-né, ne l'aura pas remis à l'officier de l'état civil, sera punie des

2923
743

Serbia

Serbian Criminal Code (KRIVIČNI ZAKON REPUBLIKE SRBIJE)

Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005
Translated by OSCE Mission February 2006,

Source:
http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=285&t=Z#

English Translation: http://www.osce.org/item/18196.html

2924
744

KRIVIČNI ZAKONIK

OPŠTI DEO

GLAVA PRVA

OSNOVNE ODREDBE

Nema krivičnog dela niti kazne bez zakona

Član 1.

Nikome ne može biti izrečena kazna ili druga krivična sankcija za delo koje pre nego što je učinjeno zakonom nije bilo određeno kao krivično delo, niti mu se može izreći kazna ili druga krivična sankcija koja zakonom nije bila propisana pre nego što je krivično delo učinjeno.

Nema kazne bez krivice

Član 2.

Kazna i mere upozorenja mogu se izreći samo učiniocu koji je kriv za učinjeno krivično delo.

Osnov i granice krivičnopravne prinude

Član 3.

Zaštita čoveka i drugih osnovnih društvenih vrednosti predstavlja osnov i granice za određivanje krivičnih dela, propisivanje krivičnih sankcija i njihovu primenu, u meri u kojoj je to nužno za suzbijanje tih dela.

Krivične sankcije i njihova opšta svrha

Član 4.

(1) Krivične sankcije su: kazne, mere upozorenja, mere bezbednosti i vaspitne mere.

(2) Opšta svrha propisivanja i izricanja krivičnih sankcija je suzbijanje dela kojima se povređuju ili ugrožavaju vrednosti zaštićene krivičnim zakonodavstvom.

(3) Krivične sankcije se ne mogu izreći licu koje u vreme kada je delo učinjeno nije navršilo četrnaest godina. Vaspitne mere i druge krivične sankcije mogu se izreći maloletniku pod uslovima propisanim posebnim zakonom.

kazniće se zatvorom najmanje tri godine.

Zasnivanje ropskog odnosa i prevoz lica u ropskom odnosu

Član 390.

(1) Ko, kršeći pravila međunarodnog prava, stavi drugog u ropski ili njemu sličan odnos ili ga drži u takvom odnosu, kupi, proda, preda drugom licu ili posreduje u kupovini, prodaji ili predaji ovakvog lica ili podstiče drugog da proda svoju slobodu ili slobodu lica koje izdržava ili o kojem se stara,
kazniće se zatvorom od jedne do deset godina.

(2) Ko prevozi lica koja se nalaze u ropskom ili njemu sličnom odnosu iz jedne zemlje u drugu,
kazniće se zatvorom od šest meseci do pet godina.

(3) Ko delo iz st. 1. i 2. ovog člana učini prema maloletnom licu,
kazniće se zatvorom od pet do petnaest godina.

Međunarodni terorizam

Član 391.

(1) Ko, u nameri da naškodi stranoj državi ili međunarodnoj organizaciji, izvrši otmicu nekog lica ili neko drugo nasilje, izazove eksploziju ili požar ili preduzme druge opšteopasne radnje ili preti upotrebom nuklearnog, hemijskog, bakteriološkog ili drugog sličnog sredstva,
kazniće se zatvorom od tri do petnaest godina.

(2) Ako je usled dela iz stava 1. ovog člana nastupila smrt jednog ili više lica,
učinilac će se kazniti zatvorom od pet do petnaest godina.

(3) Ako je pri izvršenju dela iz stava 1. ovog člana učinilac neko lice sa umišljajem lišio života,
kazniće se zatvorom najmanje deset godina ili zatvorom od trideset do četrdeset godina.

Uzimanje talaca

Član 392.

(1) Ko izvrši otmicu nekog lica i preti da će ga ubiti, povrediti ili zadržati kao taoca u nameri da prinudi neku državu ili međunarodnu organizaciju da nešto učini ili ne učini,
kazniće se zatvorom od dve do deset godina.

(2) Učinilac dela iz stava 1. ovog člana koji dobrovoljno pusti na slobodu oteto lice, iako nije ostvaren cilj otmice, može se osloboditi od kazne.

(3) Ako je usled dela iz stava 1. ovog člana nastupila smrt otetog lica, učinilac će se kazniti zatvorom od tri do petnaest godina.

(4) Ako je pri izvršenju dela iz stava 1. ovog člana učinilac oteto lice sa umišljajem lišio života,

kazniće se zatvorom najmanje deset godina ili zatvorom od trideset do četrdeset godina.

Finansiranje terorizma

Član 393.

(1) Ko obezbeđuje ili prikuplja sredstva namenjena za finansiranje vršenja krivičnog dela iz čl. 312, 391. i 392. ovog zakonika,

kazniće se zatvorom od jedne do deset godina.

(2) Sredstva iz stava 1. ovog člana oduzeće se.

GLAVA TRIDESET PETA

KRIVIČNA DELA PROTIV VOJSKE SRBIJE I CRNE GORE

Izbegavanje vojne obaveze

Član 394.

(1) Ko se, bez opravdanog razloga, ne odazove pozivu za izvršenje regrutne obaveze, obaveze služenja vojnog roka ili obaveze lica u rezervnom sastavu ili izbegava prijem poziva za izvršenje te obaveze,

kazniće se novčanom kaznom ili zatvorom do jedne godine.

(2) Ko se krije da bi izbegao obavezu iz stava 1. ovog člana,

kazniće se zatvorom od tri meseca do tri godine.

(3) Ko napusti zemlju ili ostane u inostranstvu da bi izbegao izvršenje vojne obaveze iz stava 1. ovog člana,

kazniće se zatvorom od jedne do osam godina.

(4) Ko poziva ili podstiče više lica na izvršenje dela iz st. 1. do 3. ovog člana,

kazniće se za delo iz stava 1. zatvorom do tri godine, a za delo iz st. 2. i 3. zatvorom od dve do dvanaest godina.

(5) Učinilac dela iz st. 1. do 3. ovog člana koji se dobrovoljno prijavi nadležnom državnom organu može se osloboditi od kazne.

Izbegavanje popisa i pregleda

Član 395.

Ko se protivno zakonom utvrđenoj obavezi, bez opravdanog razloga, ne odazove pozivu nadležnog organa za popis ili pregled ili se protivi popisu ili pregledu ljudstva ili materijalnih sredstava potrebnih za odbranu zemlje ili ko pri ovakvom popisu ili pregledu da netačne podatke,

kazniće se novčanom kaznom ili zatvorom do jedne godine.

2927
747

Translated by OSCE Mission to SaM
February 2006

CRIMINAL CODE

(Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005)

GENERAL PART

CHAPTER ONE
GENERAL PROVISIONS

No Criminal Offence or Punishment without Law

Article 1

No one may be punished or other criminal sanction imposed for an offence that did not constitute a criminal offence at the time it was committed, nor may punishment or other criminal sanction be imposed that was not applicable at the time the criminal offence was committed.

No Punishment without Guilt

Article 2

Punishment and caution may be imposed only on an offender who is guilty of the committed criminal offence.

Basis and Scope of Criminal Law Compulsion

Artiele 3

Proteetion of a human being and other fundamental social values constitute the basis and seope for defining of eriminal aets, imposing of criminal sanctions and their enforcement to a degree necessary for suppression of these offences.

Criminal Sanctions and their General Purpose

Article 4

(1) Criminal sanctions are punishment, eaution, seeurity measures and rehabilitation measures.

(2) The general purpose of prescription and imposing of eriminal sanctions is to suppress acts that violate or endanger the values proteetcd by criminal legislation.

2928
748

International Terrorism

Article 391

(1) Whoever with intent to cause harm to a foreign state or international organisation eommits abduction of a person or other violent act, causes explosion or fire or commits other generally dangerous acts or threatens use of nuclear, chemical, bacteriological or other similar means,

shall be punished by imprisonment of three to fifteen years.

(2) If the offence specified in paragraph I of this Article resulted in death of one or more persons,

the offender shall be punished by imprisonment of five to fifteen years.

(3) If in commission of the offence specified in paragraph 1 of this Article the offender kills another person with intent,

the offender shall be punished by imprisonment of minimum ten years or imprisonment of thirty to forty years.

Taking Hostages

Article 392

(1) Whoever abducts another person and threatens to kill, injure or keep hostage with intent to force another country or international organisation to do or not to do something,

shall be punished by imprisonment of two to ten years.

(2) The offender specified in paragraph 1 of this Article who voluntarily releases the abducted person although not achieving the objective of the abduction, may be remitted from punishment.

(3) If the offence specified in paragraph 1 of this Article results in death of the abducted person,

the offender shall be punished by imprisonment of three to fifteen years.

(4) If in commission of the offence specified in paragraph 1 of this Artiele the offender intentionally kills the abducted person,

the offender shall be punished by imprisonment of minimum ten years or imprisonment of thirty to forty years.

Financing Terrorism

Article 393

(1) Whoever provides or collects funds intended for finaneing commission of criminal offences specified in Articles 312, 391 and 392 hereof,

shall be punished by imprisonment of one to ten years.

(2) The funds speeified in paragraph 1 of this Article shall be seized.

2929
749

South Africa

Protection of Constitutional Democracy against Terrorist and Related Activities Act, No. 33 of 2004

Date of assent : 4 February 2005

Source: http://www.legalb.co.za/SANatTxt/2004_000/2004_033_000-Act-v20050211asunamended.htm

2930
750

South Africa
NATIONAL LEGISLATION TEXTS

Protection of Constitutional Democracy against Terrorist and Related Activities Act, No. 33 of 2004

Version : As unamended wef 2005/05/20 [GG27502]

EXPLANATION OF MARKS:
Two asterisks thus ** indicates text must only be read in the light of our commentary on this legislation
[Grey text in square brackets] is text containing LegalB's references or comments
Grey text outside of square brackets is text that has to be verified

ACT

Long title

To provide for measures to prevent and combat terrorist and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities; to provide for Convention offences; to give effect to international instruments dealing with terrorist and related activities; to provide for a mechanism to comply with United Nations Security Council Resolutions, which are binding on member States, in respect of terrorist and related activities; to provide for measures to prevent and combat the financing of terrorist and related activities; to provide for investigative measures in respect of terrorist and related activities; and to provide for matters connected therewith.

[Act 2004_033_000 Long title unamended wef 2005/05/20]

PREAMBLE

WHEREAS the Republic of South Africa is a constitutional democracy where fundamental human rights, such as the right to life and free political activity, are constitutionally enshrined;

AND WHEREAS terrorist and related activities, in whichever form, are intended to achieve political and other aims in a violent or otherwise unconstitutional manner, and thereby undermine democratic rights and values and the Constitution;

AND WHEREAS terrorist and related activities are an international problem, which can only be effectively addressed by means of international co-operation;

AND WHEREAS the Government of the Republic of South Africa has committed itself in international fora such as the United Nations, the African Union and the Non-Aligned Movement, to the prevention and combating of terrorist and related activities;

AND WHEREAS the United Nations Security Council Resolution 1373/2001, which is binding on all Member States of the United Nations, as well as the Convention for the Prevention and Combating of Terrorism, adopted by the Organisation of African Unity, requires Member States to become Party to instruments, dealing with terrorist and related activities, as soon as possible;

AND WHEREAS the Republic of South Africa has already become Party to the following instruments of the United Nations:

(a) The Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo

751
2931

7. Offences relating to taking a hostage

Any person who intentionally-

(a) seizes or detains; and

(b) threatens to kill, to injure or to continue to detain,

any other person (hereinafter referred to as a hostage), in order to compel a third party, namely a State, an intergovernmental organisation, 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, is guilty of an offence of taking a hostage.

[Act 2004_033_007 unamended wef 2005/05/20]

8. Offences relating to causing harm to internationally protected persons

Any person who, knowing that a person is an internationally protected person, intentionally-

(a) murders or kidnaps or otherwise violently attacks the person or liberty of that person; or

(b) executes a violent attack upon the official premises, the private accommodation or the means of transport of that person, which attack is likely to endanger his or her person or liberty,

is guilty of an offence relating to causing harm to an internationally protected person.

[Act 2004_033_008 unamended wef 2005/05/20]

9. Offences relating to hijacking an aircraft

Any person who intentionally, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft and with the purpose of-

(a) causing any person on board the aircraft to be detained against his or her will;

(b) causing any person on board the aircraft to be transported against his or her will to any place other than the next scheduled place of landing of the aircraft;

(c) holding any person on board the aircraft for ransom or to service against his or her will; or

(d) causing that aircraft to deviate from its flight plan,

is guilty of an offence of hijacking an aircraft.

[Act 2004_033_009 unamended wef 2005/05/20]

10. Offences relating to hijacking a ship or endangering safety of maritime navigation

Any person who intentionally-

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;

(b) performs any act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causes damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their

2932
752

Switzerland

Strafgesetzbuch (StGB)
Code Pénal (CP)

SR 311.0 Schweizerisches Strafgesetzbuch vom 21. Dezember 1937
RS 311.0 Code pénal suisse du 21 décembre 1937

Source:
German : http://www.admin.ch/ch/d/sr/3/311.0.de.pdf
French : http://www.admin.ch/ch/f/rs/3/311.0.fr.pdf

National Case Law

Decision of the Swiss Federal Court (Supreme Court), Bundesgerichtsentscheid, BGE 113 IV 63, Erwägung 2 a)(extract as provided on the website of the Swiss Federal Court)

Decision of the Swiss Federal Court (Supreme Court), Arrêt du Tribunale federaleATF 6B_161/2007 /rod, (extract as provided on the website of the Swiss Federal Court)

753

2-933

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Schweizerische Bundeskanzlei

SR-Nummer	311.0
Titel	**Schweizerisches Strafgesetzbuch vom 21. Dezember 1937**
Abkürzung	StGB
Datum	21. Dezember 1937
Inkrafttreten	1. Januar 1942
Fundstelle	AS **54** 757
Verzeichnisse	Chronologie Änderungen / Aufhebungen Zitate
Rechtstext *Stand: 1. April 2009*	HTML Artikel einzeln
	PDF (170 Seiten, 891 KB)

~~454~~
2934

Art. 185[1]

Geiselnahme

1. Wer jemanden der Freiheit beraubt, entführt oder sich seiner sonst wie bemächtigt, um einen Dritten zu einer Handlung, Unterlassung oder Duldung zu nötigen,

wer die von einem anderen auf diese Weise geschaffene Lage ausnützt, um einen Dritten zu nötigen,

wird mit Freiheitsstrafe nicht unter einem Jahr bestraft.

2. Die Strafe ist Freiheitsstrafe nicht unter drei Jahren, wenn der Täter droht, das Opfer zu töten, körperlich schwer zu verletzen oder grausam zu behandeln.

3. In besonders schweren Fällen, namentlich wenn die Tat viele Menschen betrifft, kann der Täter mit lebenslänglicher Freiheitsstrafe bestraft werden.

4.[2] Tritt der Täter von der Nötigung zurück und lässt er das Opfer frei, so kann er milder bestraft werden (Art. 48a).

5. Strafbar ist auch, wer die Tat im Ausland begeht, wenn er in der Schweiz verhaftet und nicht ausgeliefert wird. Artikel 7 Absätze 4 und 5 sind anwendbar.[3]

[1] Fassung gemäss Ziff. I des BG vom 9. Okt. 1981, in Kraft seit 1. Okt. 1982 (AS **1982** 1530 1534; BBl **1980** I 1241)

[2] Fassung gemäss Ziff. II 2 des BG vom 13. Dez. 2002, in Kraft seit 1. Jan. 2007 (AS **2006** 3459 3535; BBl **1999** 1979).

[3] Fassung des zweiten Satzes gemäss Ziff. II 2 des BG vom 13. Dez. 2002, in Kraft seit 1. Jan. 2007 (AS 2006 3459 3535; BBl 1999 1979)

Stand am 1. April 2009

755

2935

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Confédération suisse

Numéro RS	311.0
Titre	**Code pénal suisse du 21 décembre 1937**
Abréviation	CP
Date	21 décembre 1937
Entrée en vigueur	1er janvier 1942
Source	RO **54** 781
Listes	Chronologie Modifications / Abrogations Citations
Texte *Etat: 1er avril 2009*	HTML articles individuels PDF (174 pages, 892 KB)

2756
2936

Art. 185[1]

Prise d'otage

1. Celui qui aura séquestré, enlevé une personne ou de toute autre façon s'en sera rendu maître, pour contraindre un tiers à faire, à ne pas faire ou à laisser faire un acte,

celui qui, aux mêmes fins, aura profité d'une prise d'otage commise par autrui,

sera puni d'une peine privative de liberté d'un an au moins.

2. La peine sera la peine privative de liberté de trois ans au moins, si l'auteur a menacé de tuer la victime, de lui causer des lésions corporelles graves ou de la traiter avec cruauté.

3. Dans les cas particulièrement graves, notamment lorsque l'acte a été dirigé contre un grand nombre de personnes, le juge pourra prononcer une peine privative de liberté à vie.

4.[2] Lorsque l'auteur a renoncé à la contrainte et libéré la victime, la peine pourra être atténuée (art. 48*a*).

5. Est également punissable celui qui aura commis l'infraction à l'étranger, s'il est arrêté en Suisse et n'est pas extradé. L'art. 7, al. 4 et 5, est applicable.[3]

---

[1] Nouvelle teneur selon le ch. I de la LF du 9 oct. 1981, en vigueur depuis le 1er oct. 1982 (RO **1982** 1530 1534; FF **1980** I 1216).

[2] Nouvelle teneur selon le ch. II 2 de la LF du 13 déc. 2002, en vigueur depuis le 1er janv. 2007 (RO **2006** 3459 3535; FF **1999** 1787).

[3] Nouvelle teneur de la phrase selon le ch. II 2 de la LF du 13 déc. 2002, en vigueur depuis le 1er janv. 2007 (RO **2006** 3459 3535; FF **1999** 1787)

Etat le 1er avril 2009

2937
757

Tribunal fédéral

BGE 113 IV 63: http://relevancy.bger.ch/cgi-bin/JumpCGI?id=BGE-113-IV-63&lang=de&zoom=OUT&system=clir

20. Urteil des Kassationshofes vom 28. September 1987 i.S. L. gegen Staatsanwaltschaft des Kantons Aargau (Niehtigkeitsbeschwerde)

Regeste

Verhältnis von Art. 139 (Raub) und 185 StGB (Geiselnahme). 1. Beim Raub gemäss Art. 139 StGB richtet sich die Gewaltanwendung oder Drohung gegen eine Person mit Schutzposition in bezug auf die Sache, die der Täter zu stehlen beabsichtigt, bei der Geiselnahme gemäss Art. 185 StGB gegen eine Drittperson (E. 2). 2. Geht ein Raub in eine Geiselnahme über, so ist Idealkonkurrenz zwischen Art. 139 und Art. 185 StGB anzunehmen (E. 3).

Sachverhalt ab Seite 63

BGE 113 IV 63 S. 63
A.- Am 24. März 1986 betrat L., mit einem blauen Overall bekleidet, den Vorraum Postgebäude in Biberstein. Er streifte sich dort eine selbst angefertigte Maske über den Kopf und betrat darauf den Schalterraum. Zunächst bedrohte er die am Schalter stehende Postbeamtin A. mit einer geladenen Pistole, verlangte Bargeld und überreichte ihr einen Plastiksack, in welchen sie das Geld packen sollte. Als sie ihm lediglich Münzen, die auf dem Schalter lagen, zuschob, verlangte er mehr Geld und drohte, er würde schiessen. Er richtete nun die Waffe gegen die rechts von ihm stehende Postkundin B. und drohte nochmals, er wolle mehr Geld und er würde schiessen, er sei nervös. In der Folge packte A. Bargeld im Betrage von Fr. 2'946.-- in die Tasche und übergab dieses dem Angeklagten.
Das Bezirksgericht Aarau sprach L. deswegen mit Urteil vom 5. November 1986 des qualifizierten Raubes gemäss Art. 139 Ziff. 3 und in Idealkonkurrenz dazu der qualifizierten Geiselnahme gemäss Art. 185 Ziff. 2 StGB schuldig.
Das Obergericht des Kantons Aargau hat mit Urteil vom 7. Mai 1987 den Entscheid des Bezirksgerichtes insoweit bestätigt
BGE 113 IV 63 S. 64
und L. deswegen und aufgrund weiterer, jetzt nicht mehr strittiger Anklagepunkte zu 7 Jahren und 4 Monaten Zuchthaus verurteilt.
L. erhebt eidgenössische Nichtigkeitsbeschwerde mit dem Antrag, die Verurteilung wegen Geiselnahme gemäss Art. 185 Ziff. 2 StGB aufzuheben und insoweit den Fall zur Freisprechung und zu neuer Straffestsetzung an die Vorinstanz zurückzuweisen, wobei die Strafe nicht mehr als 5 Jahre Zuchthaus betragen dürfe. Er macht geltend, dass neben einer Verurteilung wegen Raubes für den gleichen Vorfall eine Verurteilung wegen Geiselnahme generell nicht möglich sei, zumindest aber nicht aufgrund der konkreten Umstände des vorliegenden Falles.

Auszug aus den Erwägungen:

Aus den Erwägungen:

1. Vom Beschwerdeführer unangefochten haben die kantonalen Instanzen angenommen, durch den Vorfall im Postgebäude sei jedenfalls der Tatbestand des Raubes gemäss Art. 139 StGB erfüllt. Sie begründen dies jedoch nicht im einzelnen, weil der Beschwerdeführer den Grundtatbestand nicht in Abrede stellte. Für die Entscheidnng der mit der Nichtigkeitsbeschwerde aufgeworfenen Fragen, ob überdies der Tatbestand der Geiselnahme gemäss Art. 185 StGB erfüllt sei und - gegebenenfalls - in welchem Konkurrenzverhältnis Geiselnahme und Raub stehen, ist es jedoch notwendig zu prüfen, worauf sich die Verurteilung wegen Raubes stützt. Das Geschehen lässt sich in zwei zeitlich naheliegende und unmittelbar ineinander übergehende Phasen trennen: In einer ersten bedrohte der Beschwerdeführer einzig die Postbeamtin und erreichte dadurch, dass sie ihm Münzen, die auf dem Schalter lagen, zuschob; in einer zweiten richtete er die Waffe gegen die Postkundin B. Erst dies veranlasste die Postbeamtin, Bargeld im Betrage von Fr. 2'946.-- in die Tasche zu packen und diese dem Beschwerdeführer zu übergeben. Dass er in dieser zweiten Phase die Postbeamtin erneut persönlich bedroht hätte, wird von den kantonalen Instanzen nicht festgestellt.
Das Geschehen in der ersten Phase erfüllt den Tatbestand des vollendeten Raubes, denn die Postbeamtin schob unter dem Eindruck der auf sie gerichteten Pistole dem Beschwerdeführer Münzen zu, und zwar bevor dieser seine Pistole auf die anwesende Kundin richtete.
BGE 113 IV 63 S. 65

2. Zu prüfen ist, wie das Verhalten des Beschwerdeführers in der zweiten Phase zu qualifizieren ist.
a) Den Tatbestand der Geiselnahme gemäss Art. 185 StGB erfüllt, wer jemanden der Freiheit beraubt, entführt oder sich seiner sonstwie bemächtigt, um einen Dritten zu einer Handlung zu nötigen. Der Tatbestand der Geiselnahme ist gekennzeichnet durch die Kombination von Freiheitsberaubung gegenüber der Geisel und der Nötigungsabsicht gegenüber einem Dritten (SCHUBARTH, Kommentar Strafrecht, Besonderer Teil, 3. Band, Art. 185 N. 1; vgl. STRATENWERTH, Schweizerisches Strafrecht, Besonderer Teil I, S. 106; REHBERG, Strafrecht III, S. 168; HANSPETER EGLI, Freiheitsberaubung, Entführung und Geiselnahme, Diss. Zürich 1986, S. 152 ff.). Der objektive Tatbestand ist erfüllt, wenn sich der Täter durch Freiheitsberaubung, Entführung oder sonstwie des Opfers bemächtigt.
Eine Freiheitsberaubung ist dann gegeben, wenn der Täter die Freiheit des Opfers, seinen Aufenthaltsort zu verändern, aufhebt (SCHUBARTH, Art. 183 N. 15). Ein bloss unerhebliches Festhalten, eine nur ganz vorübergehende Freiheitsentziehung ist allerdings nach allgemeiner Auffassung nicht tatbestandsmässig (SCHUBARTH, Art. 183 N. 23 mit Hinweisen).
b) Gemäss den tatsächlichen Feststellungen der Vorinstanzen steht fest, dass der Beschwerdeführer B. vorübergehend derart mit der Pistole bedroht hat, dass diese bewegungslos an ihrem Platze beim Schalter stehen geblieben ist, nicht in das Geschehen eingegriffen und auch keinen Fluchtversuch unternommen hat. Ob dies für eine Freiheitsberaubung ausreicht, kann offenbleiben, da der Beschwerdeführer mit seinem Vorgehen sich jedenfalls die Verfügungsmacht über B. verschafft hat, was für die Erfüllung der dritten Tatbestandsalternative von Art. 185 StGB, des

Sichbemächtigens, ausreicht (vgl. SCHUBARTH, Art. 185 N. 2 unter Hinweis auf die Botschaft zur Neufassung von Art. 185, BBl 1980 I 1261). Somit ist der objektive Tatbestand von Art. 185 StGB erfüllt.

c) Der Beschwerdeführer macht geltend, der neue Tatbestand der Geiselnahme sei für besonders qualifizierte Fälle politischer oder ideeller Natur geschaffen worden, bei welchen mit dem Druck der Geiselnahme Geldforderungen, Freilassung anderer oder sonstwie erpresserische Lösungen durchzusetzen versucht würden. Dagegen habe der Gesetzgeber einen Fall wie den vorliegenden, wo bei einem qualifizierten Raub zusätzlich eine mit dem Beraubten

BGE 113 IV 63 S. 66

nicht identische Person bedroht werde, nicht als Geiselnahme ansehen wollen; vielmehr werde dieses Verhalten von Art. 139 StGB erfasst. Der Beschwerdeführer unterstellt offenbar, dass vorliegendenfalls auch in der zweiten Phase der Tatbestand des Raubes erfüllt sei, weshalb eine zusätzliche Verurteilung wegen Geiselnahme abzulehnen sei.

aa) Die Gewaltanwendung oder die Drohung gemäss Art. 139 StGB muss sich gegen eine Person richten, die zumindest eine faktische Schutzposition in bezug auf die Sache hat, die gestohlen werden soll. Diese Person kann sein der Gewahrsamsinhaber (etwa ein Geldbote), der Gewahrsamshüter (z.B. ein Securitasmann auf nächtlichem Rundgang um das Haus) wie auch ein Dritter, der Nothilfe leistet (vgl. STRATENWERTH, a.a.O., S. 213; REHBERG, a.a.O., S. 47). Richtet sich dagegen die Gewalt oder die Drohung gegen andere Personen wie etwa Passanten oder Kunden, kommt Art. 139 StGB nicht mehr zur Anwendung (teilweise abweichend ARZT, ZStR 99 1983, S. 261). Umgekehrt fällt jede Drohung gegen jemanden, der nicht selbst eine faktische Schutzposition in bezug auf die Sache hat, unter Art. 185 StGB, sofern die Drohung zu einem Sichbemächtigen im Sinne dieser Bestimmung führt. Die EntscheidungBGE 102 IV 20, wo für den Fall der Drohung gegen eine Kundin die Erfüllung des Raubtatbestandes angenommen wurde, ist durch die Gesetzesrevision vom 9. Oktober 1981 mit der Einführung des Tatbestandes der Geiselnahme überholt.

bb) Aus dem Gesagten ergibt sich, dass in dieser zweiten Phase der objektive Tatbestand von Art. 185 StGB erfüllt ist, nicht jedoch derjenige von Art. 139, da keine Drohung gegen die Postbeamtin festgestellt ist. Die Vorinstanz hat somit den Beschwerdeführer zu Recht aus Art. 185 StGB verurteilt. Zwar mag eine Geiselnahme nicht zu seinem ursprünglichen Tatplan gehört haben. Dies ändert jedoch nichts daran, dass er aus der Situation heraus gegen die für ihn überraschend anwesende Drittperson B. vorgegangen ist. Der subjektive Tatbestand von Art. 185 StGB ist erfüllt, weil der Beschwerdeführer im Bewusstsein handelte, dass er sich der B. bemächtigte, und weil er überdies in der Absicht handelte, auf diese Weise die Postbeamtin zur Herausgabe des Geldes zu veranlassen (Drittnötigungsabsicht).

3. Der Beschwerdeführer hat sich somit in der ersten Phase wegen Raubes nach Art. 139 StGB, in der zweiten wegen Geiselnahme nach Art. 185 StGB strafbar gemacht. Zu prüfen ist das Konkurrenzverhältnis.

BGE 113 IV 63 S. 67

Idealkonkurrenz ist dann gegeben, wenn der Täter mehrere Tatbestände durch eine Handlung erfüllt, von denen keiner den Unrechtsgehalt der Tat ganz erfasst. Bei einer Aktion wie der vorliegenden ist von einer einzigen Handlung auszugehen, und zwar auch dann, wenn zwischen zwei Phasen unterschieden werden kann und wenn im

Ergebnis die Erfüllung des Raubtatbestandes nur für die erste und die der Geiselnahme nur für die zweite bejaht werden kann.
Der Unrechtsgehalt des Raubes besteht im Angriff auf das in fremdem Gewahrsam stehende Eigentum, vorliegendenfalls der Post, und in der Beeinträchtigung der persönlichen Freiheit des Gewahrsamsinhabers, hier der Postbeamtin. Der Unrechtsgehalt der Geiselnahme liegt demgegenüber im Angriff auf die Person der Geisel, in casu der Kundin, sowie in der Beeinträchtigung der persönlichen Freiheit der genötigten Person, konkret der Postbeamtin. Daraus erhellt, dass keiner der beiden Tatbestände den Unrechtsgehalt der Tat voll ausschöpft. Der Raubtatbestand erfasst nicht den Angriff auf die Geisel und die Geiselnahme nicht jenen auf fremdes Vermögen und fremden Gewahrsam. Die Vorinstanz hat deshalb im Ergebnis zutreffend Idealkonkurrenz zwischen Art. 139 und Art. 185 StGB angenommen (ebenso REHBERG, Strafrecht III, S. 52 und 170; ARZT, a.a.O., S. 260 Fn 8 und S. 268).
Allerdings ist einzuräumen, dass sich vorliegendenfalls Art. 139 und 185 StGB in ihrem Unrechtsgehalt nicht unerheblich überschneiden. Dies schliesst jedoch Idealkonkurrenz nicht aus, sondern betrifft das Ausmass der gemäss Art. 68 Ziff. 1 Abs. 1 StGB vorzunehmenden Straferhöhung. Dass die Strafe in Verkennung dieses Gesichtspunktes ausgefällt worden sei, wird aber in der Beschwerde nicht geltend gemacht und ist im Hinblick auf die weiteren Straftaten des Beschwerdeführers auch nicht ersichtlich.

Entscheid

Demnach erkennt das Bundesgericht:
Die Nichtigkeitsbeschwerde wird abgewiesen.

294
Rol

Tribunal fédéral

Tribunale federale
Tribunal federal

{T 0/2}
6B_161/2007 /rod

Arrêt du 15 août 2007
Cour de droit pénal

Composition
MM. les Juges Schneider, Président,
Wiprächtiger, Ferrari, Favre et Zünd.
Greffière: Mme Angéloz.

Parties
X._____,
recourant, représenté par Me Vincent Spira, avocat,

contre

Procureur général du canton de Genève,
case postale 3565, 1211 Genève 3.

Objet
Prise d'otage (art. 185 CP),

recours en matière pénale contre l'arrêt de la Cour de cassation du canton de Genève du 5 avril 2007.

Faits :

A.
Par arrêt du 17 novembre 2006, la Cour d'assises du canton de Genève a condamné X._____, ressortissant français né en 1968, pour brigandages aggravés, crimes manqués de brigandage aggravé, prise d'otage aggravée, violences et menaces contre les fonctionnaires, violations graves des règles de la circulation, vols d'usage et infraction à la loi fédérale sur le séjour et l'établissement des étrangers, à 17 ans de réclusion, sous déduction de la détention préventive subie, et à l'expulsion du territoire suisse pour une durée de 15 ans.

B.
Cette condamnation repose, pour l'essentiel et en résumé, sur les faits suivants.
B.a Le 1er mars 2003 à 19 heures 15, X._____, faisant usage d'une voiture volée, s'est posté, avec un comparse, à la sortie du magasin Conforama de Meyrin. Armé d'un fusil de chasse à deux canons juxtaposés, dont le canon et la crosse étaient sciés, alors que son comparse était muni d'une arme factice, ils ont suivi un employé, Y._____, qui quittait son lieu de travail en voiture.

A un feu rouge, le comparse de X._____ est sorti du véhicule, a ouvert la portière avant droite de celui de l'employé, lequel se trouvait devant le leur. Pointant son arme sur le ventre

de l'employé, il a effectué un mouvement de charge et lui a intimé l'ordre de le conduire au magasin. Repoussé par l'employé, il lui a asséné un coup sur le front, lui causant une plaie de 3 cm. L'employé a toutefois réussi à s'enfuir, à quatre pattes, vers le véhicule de X._____, dont il a ouvert la portière en demandant du secours. Sur quoi, X._____ a pointé son arme dans sa direction, mais a quitté les lieux à l'arrivée de son comparse.
B.b Le 3 mars 2003, également avec un comparse, X._____, armé d'un fusil de chasse à deux canons juxtaposés, dont chacun était chargé d'une cartouche, s'est rendu à 6 heures du matin sur le parking du magasin Conforama de Bussigny, où il a guetté l'arrivée du personnel. A 8 heures 30, cagoulé, il s'en est d'abord pris à une secrétaire et l'a contrainte, sous la menace de son fusil, à lui ouvrir les bureaux du personnel. Avec son comparse, lui aussi cagoulé et muni d'un revolver factice ainsi que d'un appareil à décharges électriques, il s'est posté dans le couloir d'entrée donnant accès aux bureaux du personnel. Au fur et à mesure de leur arrivée, les 30 employés du magasin ont été enfermés dans les toilettes, sous la menace des armes, qui leur étaient appliquées sur la tempe, le cou, le visage ou le torse. Certains d'entre eux ont été violemment frappés. Pour impressionner les employés et les soumettre à sa volonté, X._____ a fait feu avec son arme en direction du sol. Des menaces de mort ont été proférées à réitérées reprises.

Lorsque le directeur du magasin est arrivé, accompagné de sa fille de 16 ans, X._____ a menacé de le tuer s'il n'ouvrait pas le coffre-fort, pendant que son comparse contraignait la jeune fille à rejoindre les employés dans les toilettes. Le directeur a crié qu'il n'avait pas le code du coffre et a alors été frappé. Il craignait pour sa vie, celle de sa fille et celle des employés. Il régnait un climat de terreur. Finalement, une des employés enfermés dans les toilettes a fait savoir qu'elle connaissait le code du coffre et a été contrainte de l'ouvrir, sous la menace d'être tuée au cas où elle appellerait la police ou le service de sécurité du magasin. Avec un butin d'environ 277'000 fr., les deux agresseurs ont ensuite quitté les lieux, tout en menaçant encore un chauffeur de poids-lourd qui obstruait leur passage sur le parking du magasin.
B.c Le 13 juillet 2004, à 9 heures, après un repérage des lieux, X._____, à nouveau accompagné d'un comparse auquel il avait remis un revolver chargé, s'est rendu, avec un véhicule volé, à l'armurerie de Z._____, à Genève. Le visage dissimulé par un masque à poussière, il a braqué son arme chargée, dont le chien était armé, sur la tête de l'armurier et l'a contraint à lui remettre des armes de poing et de collection. Il l'a ensuite ligoté et obligé à se mettre à genoux, puis l'a attaché à un tour dans l'arrière boutique. Après quoi, il a tiré un coup de feu dans la porte du coffre-fort ouvert et s'est fait remettre les clefs du premier étage, où se trouvaient les armes de type fusil à pompe. Le butin a été de 14 armes (10 pistolets et 4 revolvers).
B.d Le 2 août 2004 à 19 heures 45, derechef au volant d'une voiture provenant d'un vol, X._____ s'est à nouveau rendu au magasin Conforama de Bussigny. Muni d'une des armes volées chez Z._____ et la tête camouflée par une casquette et un masque, il a braqué son pistolet sur une employée qui se trouvait à l'extérieur de la porte de service du magasin. Elle discutait avec un collègue de la sécurité, qui se tenait dans l'embrasure de la porte en la maintenant ouverte. Alors qu'il ordonnait à l'employée de rentrer dans le magasin sous la menace de son pistolet, l'agent de sécurité s'est réfugié à l'intérieur, laissant la porte se verrouiller derrière lui et l'employée à l'extérieur. X._____ a alors pris la fuite. Pris en chasse par la police, qui avait été alertée par l'agent de sécurité, il a commis des excès de vitesse et de nombreuses infractions graves à la circulation routière, mettant en danger les usagers de la route, avant de perdre la maîtrise de son véhicule et d'être arrêté.
B.e Le 5 avril 2005, alors qu'il était incarcéré à Champ-Dollon et était convoqué chez le juge d'instruction, X._____, au sortir des toilettes, a menacé un convoyeur avec une arme factice, confectionnée avec une semelle de chaussure. Il a été repoussé à l'intérieur des toilettes par le convoyeur, et, avec l'aide de collègues de ce dernier, a pu être maîtrisé.
B.f S'agissant du verdict de culpabilité relatif aux faits survenus le 3 mars 2003 au magasin Conforama, la Cour d'assises a retenu que ces faits étaient constitutifs de brigandage qualifié au sens de l'art. 140 ch. 2 CP et de prise d'otage qualifiée au sens de l'art. 185 ch. 2 et ch. 3 CP

et que ces deux infractions entraient en concours. Elle a notamment relevé que le brigandage, même sous sa forme qualifiée, ne recouvrait pas la totalité des agissements délictueux de l'accusé, précisant que dans la mesure où les faits constitutifs de cette infraction se recoupaient avec ceux de la prise d'otage, il en serait tenu compte dans la fixation de la peine.

C.
X._____ s'est pourvu en cassation. En ce qui concerne les faits survenus le 3 mars 2003, il contestait que la prise d'otage puisse être retenue en sus du brigandage.

Par arrêt du 5 avril 2007, la Cour de cassation genevoise a écarté le pourvoi, considérant à son tour que les infractions litigieuses étaient réalisées et entraient en concours.

D.
X._____ forme un recours en matière pénale au Tribunal fédéral. Invoquant une violation de l'art. 185 CP, il conclut à l'annulation de l'arrêt attaqué, en sollicitant l'assistance judiciaire.

Une réponse n'a pas été requise.

Le Tribunal fédéral considère en droit:

1.
L'arrêt attaqué a été rendu par une autorité cantonale de dernière instance (art. 80 al. 1 LTF), dans une cause de droit pénal (art. 78 al. 1 LTF). Il peut donc faire l'objet d'un recours en matière pénale (art. 78 ss LTF), que le recourant, qui remplit manifestement les conditions de l'art. 81 al. 1 LTF, est habilité à former.

Le recours peut notamment être formé pour violation du droit fédéral (art. 95 let. a LTF), y compris les droits constitutionnels. Il ne peut critiquer les constatations de fait qu'au motif que les faits ont été établis de façon manifestement inexacte, c'est-à-dire arbitraire (cf. Message du 28 février 2001 relatif à la révision totale de l'organisation judiciaire fédérale; FF 2001, 4000 ss, 4135) ou en violation du droit au sens de l'art. 95 LTF, et pour autant que la correction du vice soit susceptible d'influer sur le sort de la cause (art. 97 al. 1 LTF).

Le Tribunal fédéral applique le droit d'office (art. 106 al. 1 LTF). Il n'est donc limité ni par les arguments du recourant ni par la motivation de l'autorité précédente. Toutefois, compte tenu, sous peine d'irrecevabilité (art. 108 al. 1 let. b LTF), de l'exigence de motivation prévue à l'art. 42 al. 1 et 2 LTF, il n'examine en principe que les griefs invoqués et n'est dès lors pas tenu de traiter des questions qui ne sont plus discutées devant lui. Il ne peut aller au-delà des conclusions des parties (art. 107 al. 1 LTF).

2.
Le recourant allègue d'abord que, sur un point, l'état de fait de l'arrêt attaqué est incomplet.

2.1 Comme il le relève, le caractère incomplet d'un état de fait ne se confond pas avec l'établissement manifestement inexact des faits. Il peut néanmoins être invoqué en tant qu'il aboutit à une violation de la loi matérielle et revient alors à se plaindre d'une violation du droit au sens de l'art. 95 LTF (cf. Message précité, 4135/4136; Alain Wurzburger, Présentation générale et système des recours, in La nouvelle loi sur le Tribunal fédéral, édité par Urs Portmann, Lausanne 2007, p. 20/21: Bernard Corboz, Introduction à la nouvelle loi sur le Tribunal fédéral, in SJ 2006 p. 319 ss, p. 342). Comme pour le grief d'établissement manifestement inexact des faits, il faut toutefois que la réparation du vice soit susceptible d'influer sur le sort de la cause.

2.2 Le recourant soutient que l'arrêt attaqué est incomplet dans la mesure où il constate que, lorsqu'il s'en est pris à la secrétaire arrivée en premier lieu le 3 mai 2003, il lui a intimé l'ordre

de lui ouvrir "les bureaux du personnel". En réalité, comme l'avait retenu la Cour d'assises, il lui avait ordonné d'ouvrir "le bureau de la comptabilité" et ce n'est qu'après avoir appris qu'elle n'en détenait pas les clefs qu'il l'avait contrainte à ouvrir "les bureaux du personnel". A raison de cette lacune, l'autorité cantonale aurait méconnu qu'il n'avait pas d'emblée l'intention d'enfermer la secrétaire, mais ne l'avait fait que pour commettre le brigandage, et, de la sorte, aurait admis à tort que c'est intentionnellement qu'il avait pris des personnes en otage.

2.3 Cette critique tombe à faux. Ce n'est pas parce qu'elle aurait méconnu le fait invoqué que l'autorité cantonale a retenu que le recourant a agi intentionnellement, mais parce qu'elle a considéré que le braquage avait été planifié et mené à bien de telle manière que le caractère intentionnel de la prise d'otage n'était pas contestable. Le complètement de l'état de fait dans le sens voulu par le recourant ne serait dès lors pas susceptible d'influer sur le sort de la cause.

3.
Le recourant conteste la réalisation des éléments constitutifs de l'infraction de prise d'otage.

3.1 Sur le plan objectif, la prise d'otage suppose que l'auteur ait séquestré une personne, l'ait enlevée ou, de toute autre façon, s'en soit rendu maître. Du point de vue subjectif, l'auteur doit avoir agi pour contraindre un tiers à faire, à ne pas faire ou à laisser faire un acte; il faut en outre que son comportement ait été intentionnel, le dol éventuel étant suffisant. Il s'agit d'une infraction contre la liberté, qui protège au premier chef la liberté personnelle de l'otage ainsi que son intégrité physique et psychique, mais aussi la liberté de détermination de la personne contrainte à adopter le comportement exigé par l'auteur (ATF 121 IV 178 consid. 2a p. 181; 113 IV 63 consid. 2a p. 65). L'infraction est réalisée dès que l'auteur, en vue de contraindre un tiers à un comportement, s'est rendu maître de l'otage.

La séquestration consiste à retenir, par la contrainte, une personne en un lieu déterminé (ATF 113 IV 63 consid. 2a p. 65), alors que l'enlèvement consiste à emmener, contre sa volonté, une personne dans un autre lieu, où elle se trouve sous la maîtrise de son ravisseur (ATF 119 IV 216 consid. 2f p. 221). Le comportement délictueux est aussi réalisé lorsque, de toute autre façon, l'auteur se rend maître de la victime. Il s'agit d'une clause générale visant à éviter que des comportements qui ne constituent pas, à proprement parler, une séquestration ou un enlèvement, mais qui permettent à l'auteur de se rendre maître de la victime, échappent à toute sanction.

Le comportement délictueux doit viser à contraindre un tiers à faire, à ne pas faire ou à laisser faire un acte. Selon la jurisprudence, approuvée par une majorité de la doctrine, est un tiers toute personne autre que l'auteur ou l'otage (ATF 121 IV 162 consid. 1e p. 170 ss, dans lequel le Tribunal fédéral a exposé pourquoi, avec la doctrine majoritaire, il n'entendait pas s'écarter de sa jurisprudence antérieure sur la question).

L'auteur doit avoir agi avec l'intention aussi bien de se rendre maître de l'otage que de contraindre un tiers à un certain comportement.

3.2 Il est indéniable que le recourant, en enfermant les 30 employés dans les toilettes, sous la menace de son arme, en frappant certains d'entre eux et en tirant un coup de feu en direction du sol pour les terroriser, les a séquestrés. Il n'est pas non plus contestable qu'il a agi ainsi pour contraindre le garant effectif du bien convoité, qu'il croyait être le directeur, à le laisser s'en emparer. Enfin, il est indiscutable qu'il a agi de la sorte avec conscience et volonté, donc intentionnellement. Les éléments constitutifs de la prise d'otage sont ainsi réalisés.

4.
En réalité, le recourant conteste surtout que l'infraction litigieuse puisse être retenue en concours avec le brigandage.

4.1 Il y a concours réel en cas de concours d'infractions, c'est-à-dire lorsque, par plusieurs actes, l'auteur commet plusieurs infractions. Il y a concours idéal, lorsque, par un seul acte ou un ensemble d'actes formant un tout, l'auteur enfreint plusieurs dispositions pénales différentes, dont aucune ne saisit l'acte délictueux sous tous ses aspects.

L'art. 140 CP, qui réprime le brigandage, protège le patrimoine, mais aussi la liberté d'autrui (ATF 129 IV 61 consid. 2.1 p. 63). En revanche, l'art. 185 CP protège exclusivement la liberté, de l'otage, d'une part, et du tiers contraint, d'autre part (cf. supra, consid. 3.1). Les biens juridiques protégés par l'une et l'autre disposition ne se recouvrent donc pas entièrement.
Dans l'ATF 113 IV 63, le Tribunal fédéral a été amené à examiner le cas où, dans un premier temps, l'auteur avait exclusivement menacé l'employée de la poste avec un pistolet et obtenu ainsi qu'elle lui remette l'argent déposé près du guichet, puis, dans un second temps, dirigé son arme contre une cliente, ce qui avait conduit l'employée de la poste à placer une somme d'argent dans un sac et à le lui remettre, sans que, durant cette seconde phase, l'employée ait été à nouveau menacée. Il a estimé que le comportement adopté par l'auteur durant la première phase était constitutif de brigandage et que celui par lequel, durant la seconde phase, il avait uniquement menacé la cliente pour l'immobiliser près du guichet et l'avait ainsi mise hors d'état de résister, était constitutif de prise d'otage. Il a considéré que, dans un tel cas, il y a concours entre le brigandage et la prise d'otage.

La doctrine majoritaire souscrit à cette jurisprudence (cf. Bernard Corboz, Les infractions en droit suisse, vol. I, Berne 2002, art. 185 CP, n° 53; Rehberg/Schmid, Strafrecht III, Delikte gegen den Einzelnen, 7ème éd. Zurich 1997, p. 366; Schubarth, Kommentar zum schweizerischen Strafrecht, vol. II, art. 139 aCP, n° 97; Trechsel, Kurzkommentar, 2ème éd. Zurich 1997, art. 185 CP, n° 11; Andreas Koch, Zur Abgrenzung von Raub, Erpressung und Geiselnahme, Thèse Zurich 1994, p. 153 ss, qui estime toutefois que dans l'ATF 113 IV 63 c'est le concours réel qui eût dû être retenu).

Certains auteurs sont en revanche d'un autre avis. Ainsi, pour Stratenwerth, la prise d'otage absorbe le brigandage, car la peine encourue pour la première de ces infractions suffit pour tenir compte des spécificités de la seconde dans le cadre de la fixation de la peine (cf. Stratenwerth, Schweizerisches Strafrecht, Partie spéciale II, 6ème éd. Berne 2003, § 5 n° 58). Vera Delnon et Bernhard Rüdy estiment que, lorsque la violence ou la menace exercée par l'auteur contre des tiers ou des personnes susceptibles de le protéger vise exclusivement à briser la résistance de celui qui a la garde du bien convoité, seul le brigandage doit être retenu. En revanche, si la volonté de l'auteur va au-delà de la remise du bien convoité et s'il prend une personne en son pouvoir ou s'il utilise une personne qu'il a déjà maîtrisée, pour, par exemple, obliger la police à le laisser s'enfuir, il y a concours idéal entre le brigandage et la prise d'otage (cf. Vera Delnon/Bernhard Rüdy, Verbrechen und Vergehen gegen die Freiheit, Strafgesetzbuch II, in Basler Kommentar II, art. 185 CP, n° 52; dans le même sens, cf. également Marcel Alexander Niggli/Christof Riedo, Strafbare Handlungen gegen das Vermögen, Strafgesetzbuch II, in Basler Kommentar II, art. 140 CP, n° 183).

4.2 L'opinion de Stratenwerth n'est pas convaincante. Pour déterminer s'il y a concours idéal entre deux infractions ou si, au contraire, l'une d'elles absorbe l'autre, la question pertinente est de savoir si les biens juridiques protégés par chacune d'elles se recouvrent. S'ils ne se recouvrent pas ou pas entièrement, aucune des deux infractions ne saisit le comportement de l'auteur sous tous ses aspects, de sorte que toutes deux doivent être retenues. On ne voit pas en quoi le fait que la peine encourue, théoriquement, pour l'une d'elles suffirait pour conclure qu'elle absorbe l'autre.

L'opinion de Vera Delnon et de Bernhard Rüdy peut être suivie, dans la mesure où ces deux auteurs admettent le concours entre le brigandage et la prise d'otage, lorsque celui qui commet un brigandage se rend aussi maître d'une personne pour empêcher la police de le poursuivre.

Dans la mesure toutefois où ils considèrent que le recours à la violence ou à la menace contre une personne non impliquée, dans le but d'exercer une contrainte sur celui qui a la garde du bien convoité, est constitutif de brigandage, leur opinion repose sur le raisonnement de l'ATF 102 IV 20, qui a été abandonné dans l'ATF 113 IV 63, depuis lequel le Tribunal fédéral qualifie un tel comportement de prise d'otage.

4.3 En l'espèce, le recourant et son comparse ont menacé des personnes dont ils croyaient qu'elles pourraient leur donner accès au coffre, afin qu'elles le leur ouvrent et qu'ils puissent s'emparer de son contenu, adoptant ainsi un comportement qui doit être qualifié de brigandage. Ils se sont cependant aussi rendus maîtres de nombreuses autres personnes, non impliquées, et cela également dans le but de contraindre celles qui étaient susceptibles de le faire de leur ouvrir le coffre; un tel comportement doit être qualifié de prise d'otage. Les deux infractions sont donc réalisées et doivent être retenues en concours, cela d'autant plus que les agissements du recourant et de son comparse ont porté atteinte non seulement à la liberté des employés séquestrés et de la personne contrainte de leur ouvrir le coffre, mais aussi au patrimoine d'autrui, soit à un bien juridique protégé par l'art. 140 CP, mais non par l'art. 185 CP. Subséquemment, l'arrêt attaqué ne viole pas le droit fédéral en tant qu'il retient le concours entre le brigandage et la prise d'otage.

5.
Le recours doit ainsi être rejeté. Compte tenu du fait que le recourant a été condamné à une lourde peine et que la l'affaire soulevait une question juridique présentant une certaine difficulté, la requête d'assistance judiciaire sera admise. En conséquence, il ne sera pas perçu de frais et une indemnité de dépens sera allouée au mandataire du recourant.

Par ces motifs, le Tribunal fédéral prononce:

1.
Le recours est rejeté.

2.
La requête d'assistance judiciaire est admise.

3.
Il n'est pas perçu de frais.

4.
Une indemnité de dépens de 3000 fr. est allouée au mandataire du recourant.

5.
Le présent arrêt est communiqué en copie au mandataire du recourant, au Procureur général du canton de Genève et à la Cour de cassation du canton de Genève.
Lausanne, le 15 août 2007
Au nom de la Cour de droit pénal
du Tribunal fédéral suisse
Le président: La greffière:

~~767~~
2947

UK

Taking of Hostages Act 1982 (c. 28)

Act not in force at Royal Assent; Act wholly in force at 26 November 1982

Source:
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1982/cukpga_19820028_en_1

2948
768

Taking of Hostages Act 1982

1982 CHAPTER 28

An Act to implement the International Convention against the Taking of Hostages; and for connected purposes.

[13th July 1982]

Annotations:

Commencement Information

I1 Act not in force at Royal Assent; Act wholly in force at 26.11.1982, see s. 6

1 Hostage-taking

(1) A person, whatever his nationality, who, in the United Kingdom or elsewhere,—

(a) detains any other person ("the hostage"), and

(b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage,

commits an offence.

(2) A person guilty of an offence under this Act shall be liable, on conviction on indictment, to imprisonment for life.

2 Prosecution of offences

(1) Proceedings for an offence under this Act shall not be instituted—

(a) in England and Wales, except by or with the consent of the Attorney General; and

(b) in Northern Ireland, except by or with the consent of the Attorney General for Northern Ireland.

(2) As respects Scotland, for the purpose of conferring on the sheriff jurisdiction to entertain proceedings for an offence under this Act, any such offence shall, without prejudice to any jurisdiction exercisable apart from this subsection, be deemed to have been committed in any place in Scotland where the offender may for the time being be.

F1(3) .....

Annotations:

Amendments (Textual)

F1 S. 2(3) repealed (17.8.1991) by Northern Ireland (Emergency Provisions) Act 1991 (c. 24, SIF 39:1), ss. 69(1), 70(4), Sch. 8 Part I

3 Extradition

(1) F1

(2) In Schedule 1 to the M1 Suppression of Terrorism Act 1978 (offences not to be regarded as of a political character) after paragraph 11 there shall be inserted the following paragraph—

" *Taking of hostages*

2949
769

Ukraine

Кримінальний кодекс України

(від статті 147 до статті 263), (ст.1 - ст.146 (2001-05), (Додатки (2003-05)

Source: http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2002-05
Translation: http://www.legislationline.org/documents/section/criminal-codes

КРИМІНАЛЬНИЙ КОДЕКС УКРАЇНИ

(Кодекс набирає чинності з 1 вересня 2001 року, див. п.1 розділу I "ПРИКІНЦЕВІ ТА ПЕРЕХІДНІ ПОЛОЖЕННЯ")

(Відомості Верховної Ради України (ВВР), 2001, N 25-26, ст.131)

(Із змінами, внесеними згідно із Законами
N 2953-III (2953-14) від 17.01.2002, ВВР, 2002, N 17, ст.121
N 3075-III (3075-14) від 07.03.2002, ВВР, 2002, N 30, ст.206
N 430-IV (430-15) від 16.01.2003, ВВР, 2003, N 14, ст.95
- набуває чинності 11.06.2003
N 485-IV (485-15) від 06.02.2003, ВВР, 2003, N 14, ст.104
- набуває чинності 11.06.2003 року
N 662-IV (662-15) від 03.04.2003, ВВР, 2003, N 27, ст.209
- набуває чинності 01.08.2003 року
N 668-IV (668-15) від 03.04.2003, ВВР, 2003, N 26, ст.198
N 669-IV (669-15) від 03.04.2003, ВВР, 2003, N 26, ст.199
N 744-IV (744-15) від 15.05.2003, ВВР, 2003, N 29, ст.234
N 850-IV (850-15) від 22.05.2003, ВВР, 2003, N 35, ст.271
N 908-IV (908-15) від 05.06.2003, ВВР, 2003, N 38, ст.320
N 1098-IV (1098-15) від 10.07.2003, ВВР, 2004, N 7, ст.46
N 1130-IV (1130-15) від 11.07.2003, ВВР, 2004, N 8, ст.66
N 1626-IV (1626-15) від 18.03.2004, ВВР, 2004, N 26, ст.361
N 1723-IV (1723-15) від 18.05.2004, ВВР, 2004, N 36, ст.430)

(Щодо визнання неконституційними окремих положень див. Рішення Конституційного Суду N 15-рп/2004 (v015p710-04) від 02.11.2004)

(Із змінами, внесеними згідно із Законами
N 2252-IV (2252-15) від 16.12.2004, ВВР, 2005, N 5, ст.119
N 2276-IV (2276-15) від 21.12.2004, ВВР, 2005, N 6, ст.134
N 2289-IV (2289-15) від 23.12.2004, ВВР, 2005, N 6, ст.139
N 2308-IV (2308-15) від 11.01.2005, ВВР, 2005, N 6, ст.145
N 2322-IV (2322-15) від 12.01.2005, ВВР, 2005, N 10, ст.187
N 2456-IV (2456-15) від 03.03.2005, ВВР, 2005, N 16, ст.260
N 2598-IV (2598-15) від 31.05.2005, ВВР, 2005, N 27, ст.359

777
2951

Умисне розголошення лікарської таємниці особою, якій вона стала відома у зв'язку з виконанням професійних чи службових обов'язків, якщо таке діяння спричинило тяжкі наслідки, -

карається штрафом до п'ятдесяти неоподатковуваних мінімумів доходів громадян або громадськими роботами на строк до двохсот сорока годин, або позбавленням права обіймати певні посади чи займатися певною діяльністю на строк до трьох років, або виправними роботами на строк до двох років.

Р о з д і л III

ЗЛОЧИНИ ПРОТИ ВОЛІ, ЧЕСТІ ТА ГІДНОСТІ ОСОБИ

Стаття 146. Незаконне позбавлення волі або викрадення людини

1. Незаконне позбавлення волі або викрадення людини -

караються обмеженням волі на строк до трьох років або позбавленням волі на той самий строк.

2. Ті самі діяння, вчинені щодо малолітнього або з корисливих мотивів, щодо двох чи більше осіб або за попередньою змовою групою осіб, або способом, небезпечним для життя чи здоров'я потерпілого, або таке, що супроводжувалося заподіянням йому фізичних страждань, або із застосуванням зброї, або здійснюване протягом тривалого часу, -

караються обмеженням волі на строк до п'яти років або позбавленням волі на той самий строк.

3. Діяння, передбачені частинами першою або другою цієї статті, вчинені організованою групою, або такі, що спричинили тяжкі наслідки, -

караються позбавленням волі на строк від п'яти до десяти років.

Стаття 147. Захоплення заручників

1. Захоплення або тримання особи як заручника з метою спонукання родичів затриманого, державної або іншої установи, підприємства чи організації, фізичної або службової особи до вчинення чи утримання від вчинення будь-якої дії як умови звільнення заручника -

карається позбавленням волі на строк від п'яти до восьми років.

2. Ті самі дії, якщо вони були вчинені щодо неповнолітнього або організованою групою, або були поєднані з погрозою знищення людей, або такі, що спричинили тяжкі наслідки, -

караються позбавленням волі на строк від семи до п'ятнадцяти років.

Стаття 148. Підміна дитини

Підміна чужої дитини, вчинена з корисливих або інших особистих мотивів, -

792
2932

USA

18 U.S.C. 1203 (US code Title 18)

The statute became effective on January 6, 1985

Source: http://uscode.house.gov/download/title_18.shtml

~~793~~
2953

U.S. House of Representatives
Downloadable U.S. Code

2254

-CITE-
18 USC CHAPTER 55 - KIDNAPPING 01/08/2008

-EXPCITE-
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 55 - KIDNAPPING

-HEAD-
CHAPTER 55 - KIDNAPPING

-MISC1-
Sec.
1201. Kidnapping.
1202. Ransom money.
1203. Hostage taking.
1204. International parental kidnapping.

AMENDMENTS

1994 - Pub. L. 103-322, title XXXIII, Sec. 330021(1), Sept. 13, 1994, 108 Stat. 2150, which directed the amendment of this title by "striking 'kidnaping' each place it appears and inserting 'kidnapping' ", was executed by substituting "KIDNAPPING" for "KIDNAPING" in chapter heading and "Kidnapping" for "Kidnaping" in item 1201, to reflect the probable intent of Congress.

1993 - Pub. L. 103-173, Sec. 2(c), Dec. 2, 1993, 107 Stat. 1999, added item 1204.

1984 - Pub. L. 98-473, title II, Sec. 2002(b), Oct. 12, 1984, 98 Stat. 2186, added item 1203.

1972 - Pub. L. 92-539, title II, Sec. 202, Oct. 24, 1972, 86 Stat. 1072, substituted "Kidnaping" for "Transportation" in item 1201.

-End-

2955
775

-CITE-
18 USC Sec. 1203 01/08/2008

-EXPCITE-
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 55 - KIDNAPPING

-HEAD-
Sec. 1203. Hostage taking

-STATUTE-
(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless -

(A) the offender or the person seized or detained is a national of the United States;
(B) the offender is found in the United States; or
(C) the governmental organization sought to be compelled is the Government of the United States.

(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

(c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

-SOURCE-
(Added Pub. L. 98-473, title II, Sec. 2002(a), Oct. 12, 1984, 98 Stat. 2186; amended Pub. L. 100-690, title VII, Sec. 7028, Nov. 18, 1988, 102 Stat. 4397; Pub. L. 103-322, title VI, Sec. 60003(a)(10), Sept. 13, 1994, 108 Stat. 1969; Pub. L. 104-132, title VII, Sec. 723(a)(1), Apr. 24, 1996, 110 Stat. 1300.)

-MISC1-
AMENDMENTS

1996 - Subsec. (a). Pub. L. 104-132 inserted "or conspires" after "attempts".

1994 - Subsec. (a). Pub. L. 103-322 inserted before period at end "and, if the death of any person results, shall be punished by death or life imprisonment".

1988 - Subsec. (c). Pub. L. 100-690 substituted "(c) As" for "(C) As".

EFFECTIVE DATE

Section 2003 of part A (Secs. 2001-2003) of chapter XX of title II of Pub. L. 98-473 provided that: "This part and the amendments made by this part [enacting this section and provisions set out as a note under section 1201 of this title] shall take effect on the later of -

"(1) the date of the enactment of this joint resolution [Oct. 12, 1984]; or

"(2) the date the International Convention Against the Taking of Hostages has come into force and the United States has become

a party to that convention [the convention entered into force June 6, 1983; and entered into force for the United States Jan. 6, 1985]."

2956 2976

-End-

776

29757

Venezuela

Código Penal (CP)

Gaceta Oficial de la República Bolivariana de Venezuela
N° 5494 Extraordinario Caracas, viernes 20 de octubre de 2000

Source: http://www.mintra.gov.ve/legal/codigos/penaldevenezuela.html

Gaceta Oficial de la República Bolivariana de Venezuela

Nº 5494 Extraordinario Caracas, viernes 20 de octubre de 2000

La Comisión Legislativa Nacional

En ejercicio de la atribución que le confiere el artículo 6, ordinal 1 del Decreto de la Asamblea Nacional Constituyente mediante el cual se establece el Régimen de Transición del Poder Público, publicado en la Gaceta Oficial N° 36.920 de fecha 28 de marzo del año 2.000, en concordancia con lo dispuesto en el artículo 187 ordinal 1 de la Constitución de la República Bolivariana de Venezuela.

Decreta

El siguiente,

Código Penal

Libro Primero, Disposiciones Generales sobre los Delitos y las Faltas, las Personas Responsables, y las Penas

Título I.

De La Aplicación de la Ley Penal

Artículo 1°
Nadie podrá ser castigado por un hecho que no estuviese expresamente previsto como punible por la ley, ni con penas que ella no hubiere establecido previamente.

Los hechos punibles se dividen en delitos y faltas.

Artículo 2°
Las leyes penales tienen efecto retroactivo en cuanto favorezcan al reo, aunque al publicarse hubiere ya sentencia firme y el reo estuviere cumpliendo la condena.

Artículo 3°
Todo el que cometa un delito o una falta en el territorio de la República será penado con arreglo a la ley venezolana.

Artículo 4°
Están sujetos a enjuiciamiento en Venezuela y se castigarán de conformidad con la ley penal venezolana:

libertad individual, la pena de presidio será por tiempo de ocho a dieciséis años; sin perjuicio de aplicación a la persona o personas acusadas, de la pena correspondiente al delito de porte ilícito de armas.

Artículo 461°
El que infundiendo por cualquier medio el temor de un grave daño a las personas, en su honor, en sus bienes, o simulando órdenes de la autoridad, haya constreñido a alguno a enviar, depositar o poner a disposición del culpable, dinero, cosas, títulos o documentos que produzcan algún efecto jurídico, será castigado con presidio de tres a cinco años.

Artículo 462°
El que haya secuestrado a una persona para obtener de ella o de un tercero, como precio de su libertad, dinero, cosas, títulos o documentos que produzcan un efecto jurídico cualquiera en favor del culpable o de otro que este indique, aun cuando no consiga su intento, será castigado con presidio de diez a veinte años. Si el secuestro se ejecutare por causar alarma, la pena será de dos a cinco años de presidio.

Artículo 463°
El que fuera de los casos previstos en el artículo 84, sin dar parte de ello a la autoridad, haya llevado correspondencia o mensajes escritos o verbales, para hacer que se consiga en fin del delito previsto en el artículo anterior, será castigado con prisión de cuatro meses a tres años.

Capítulo III.

De la estafa y otros fraudes

Artículo 464°
El que, con artificios o medios capaces de engañar o sorprender la buena fe de otro, induciéndole en error, procure para sí o para otro un provecho injusto con perjuicio ajeno, será penado con prisión de uno a cinco años. La pena será de dos a seis años si el delito se ha cometido:

1°. En detrimento de una administración pública, de una entidad autónoma en que tenga interés el Estado o de un instituto de asistencia social.

2°. Infundiendo en la persona ofendida el temor de un peligro imaginario o el erróneo convencimiento de que debe ejecutar una orden de la autoridad. El que cometiere el delito previsto en este artículo utilizando como medio de engaño un documento público, falsificado o alterado o emitiendo un cheque sin provisión de fondos incurrirá en la pena correspondiente aumentada de un sexto a una tercera parte.

~~780~~
2960

APPENDIX C

COPIES OF AUTHORITIES

Knut Dörmann, ***Elements of War Crimes under the Rome Statute of the International Criminal Court, Cambridge University Press,*** **2002**

Elements of War Crimes

under the Rome Statute of the International Criminal Court

KNUT DÖRMANN

with contributions by
Louise Doswald-Beck
and Robert Kolb

ICRC

CAMBRIDGE

Elements of War Crimes under the Rome Statute of the International Criminal Court

Sources and Commentary

KNUT DÖRMANN

with contributions by
LOUISE DOSWALD-BECK
and
ROBERT KOLB

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2002

Printed in the United Kingdom at the University Press, Cambridge

Typefaces Utopia 9.5/13 pt & Univers *System* LaTeX 2ε [TB]

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication data

Dörmann, Knut
Elements of war crimes under the Rome Statute of the International
Criminal Court: sources and commentary / Knut Dörmann; with
contributions by Louise Doswald-Beck and Robert Kolb.
p. cm.
Includes bibliographical references and index.
ISBN 0 521 81852 4 (hb)
1. Rome Statute of the International Criminal Court (1998)
2. War crimes. 3. International criminal courts.
I. Doswald-Beck, Louise. II. Kolb, Robert. III. Title.
K5301.D64 2002
341.6'9 – dc21 200202335]

ISBN 0 521 81852 4 hardback

~~785~~
2965

5. Article 8(2)(a) ICC Statute – Grave breaches of the 1949 Geneva Conventions

5.1. Elements common to all crimes under Article 8(2)(a) ICC Statute

Four elements describing the subject-matter jurisdiction for war crimes under Art. 8(2)(a) ICC Statute are drafted in the same way for all crimes under this section and will therefore be discussed separately from the specific elements of each particular crime. Two of the four deal with the persons/property affected and the other two with the context in which the war crime took place.

Text adopted by the PrepCom

- Such person or persons/property[1] were/was protected under one or more of the Geneva Conventions of 1949.
- The perpetrator was aware of the factual circumstances that established that protected status.[*][**]
- The conduct took place in the context of and was associated with an international armed conflict.[***]
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[*] This mental element recognizes the interplay between articles 30 and 32. This footnote also applies to the corresponding element in each crime under article 8(2)(a), and to the element in other crimes in article 8(2) concerning the awareness of factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict.

[1] The protection of property is only relevant in the context of Art. 8(2)(a)(iv) of the ICC Statute. All the other crimes are crimes committed against protected persons.

~~786~~ 2966

Art. 8(2)(a)(viii) – Taking of hostages

Text adopted by the PrepCom

War crime of taking hostages

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. 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.

4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

5. The perpetrator was aware of the factual circumstances that established that protected status.

6. The conduct took place in the context of and was associated with an international armed conflict.

7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

With regard to the war crime of 'taking of hostages' it is worth noting that the elements of this offence are largely based on the definition in the 1979 International Convention against the Taking of Hostages ('the Hostages Convention'),[1] which is not a treaty of international humanitarian law and which was drafted in a different legal context. However, as in the case of the crime of torture, the definition of the crime of hostage-taking was adapted by the PrepCom to the context of the law of armed conflict. According to Article 1(1) of the Hostages Convention,

> any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the 'hostage') in order to compel a third party, namely a State, an international organisation, a natural or judicial 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 crime of hostage-taking. Taking into account the case law from the Second World War, this definition was considered to be too narrow.

[1] 18 ILM (1979) 1457.

The text in the EOC, therefore, defines the specific mental element in the following terms, adding the emphasised element:

> The perpetrator intended to compel a State, an international organisation, a natnral 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.

It seems that Element 1 may also be a bit broader than the definition in the Hostages Convention in so far as it adds the catch-all formulation 'or otherwise held hostage'.

The other changes from the Hostages Convention have no substantive impact. Given the ensuing list, the words 'a third party, namely' were felt to be superfluous. The term 'legal person' was considered to be the correct term instead of 'judicial person'. There is also no obvious difference in meaning between the verbs 'to refrain' and 'to abstain'.

Legal basis of the war crime

The offence of hostage-taking is a grave breach under the 1949 Geneva Conventions (Art. 147 GC IV).

Remarks concerning the material elements

In the *Blaskic* case, the ICTY was less specific than the PrepCom and defined the crime in the following terms:

> Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However, . . . detention may be lawful in some circumstances, *inter alia* to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was *perpetrated in order to obtain a concession or gain an advantage.* The elements of the offence are similar to those of Article 3(b) of the Geneva Conventions covered under Article 3 of the Statute.[2]

[2] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 158 (emphasis added, footnotes omitted); 122 ILR 1 at 66. See also ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 312 ff.:

> It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement . . .
>
> The additional element that must be proved to establish the crime of unlawfully taking civilians hostage is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a 'threat either to prolong the hostage's detention or to put him to death'. In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition. The Trial Chamber in the Blaskic case phrased it in these terms: 'The Prosecution must establish that, at the time

The most comprehensive trial at Nuremberg on hostages was the 'Hostages Trial', the *W. List and Others* case.[3] In that decision, hostages were defined as

> those persons of the civilian population who are *taken into custody* for the purpose of *guaranteeing with their lives* the future good conduct of the population of the community from which they are taken. [Emphasis added.]

The GC do not contain further clarification which could be used for determining the elements of this crime. Art. 34 GC IV simply states: 'The taking of hostages is prohibited.'

The ICRC Commentary on GC IV defines hostages as

> *persons illegally deprived of their liberty*, a crime which most penal codes take cognisance of and punish.[4]

The Commentary also states that there is an additional feature to this offence, i.e. *the threat either to prolong the hostage's detention or to put him to death.*

Hostages are defined in the ICRC Commentary on Art. 75 of AP I as

> persons who find themselves, willingly or unwillingly, *in the power of the enemy* and who answer *with their freedom or their life* for compliance with the orders of the latter and for upholding the security of its armed forces.[5]

The offence of hostage-taking is also prohibited under the Hostages Convention. According to Article 1(1) of the Convention, the crime is committed by

> any person who *seizes or detains* and *threatens to kill, to injure or to continue to detain* another person (the 'hostage') in order to compel

of the supposed detention, the allegedly censurable act was *perpetrated in order to obtain a concession or gain an advantage.'*

Conseqnently, the Chamber finds that an individnal commits the offence of taking civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhnman treatment or death as a means of achieving the fulfilment of a condition. [Footnote omitted.]

[3] In UNWCC, *LRTWC*, vol. VIII, pp. 34 ff., 60 ff., 76–8 (commentator); 15 AD 632 at 642.

[4] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 600 (emphasis added).

[5] C. Pillond and J. S. Pictet, 'Art. 75' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinns Nijhoff, Geneva, 1987), no. 3051 (emphasis added). This source can be of further assistance in the interpretation of this offence because Art. 75 AP I ('The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: ... (c) the taking of hostages ...') does not add any further element to Art. 34 GC IV; therefore, the terms in hoth rules must he understood in the same way.

a third party, namely a State, an international organisation, a natural or judicial 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.* [Emphasis added.]

It appears from these various sources that the elements of this offence are: unlawful deprivation of liberty (i.e. seizing or detaining or taking into custody) and threat of death, injury or further detention in order to compel a third party to act or abstain to act (as a condition for the release of the hostage).

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[6]

There seems to be no specific case law on the mental element of this crime to date. The formulation in the Convention against the Taking of Hostages ('in order to . . .') can be seen as an indication for the necessary intent.

[6] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

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)

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

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge, CB2 2RU, UK
40 West 20th Street, New York, NY 10011–4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2005

Printed in the United Kingdom at the University Press, Cambridge

Typeface Trump Medieval 10/13 pt. *System* LaTeX 2ε [TU]

A catalogue record for this book is available from the British Library

ISBN 0 521 80899 5 hardback
ISBN 0 521 00528 0 paperback

Hardback also available as:
ISBN 0 521 53925 0 set including Volume II

CHAPTER 32

FUNDAMENTAL GUARANTEES

Introduction

The fundamental guarantees identified in this chapter apply to all civilians in the power of a party to the conflict and who do not take a direct part in hostilities, as well as to all persons who are *hors de combat*. Because these fundamental guarantees are overarching rules that apply to all persons, they are not sub-divided into specific rules relating to different types of persons. The rules applicable to specific categories of persons are to be found in Chapters 33–39.

The fundamental guarantees listed in this chapter all have a firm basis in international humanitarian law applicable in both international and non-international armed conflicts. Most of the rules set out in this chapter are couched in traditional humanitarian law language, because this best reflects the substance of the corresponding customary rule. Some rules, however, are drafted so as to capture the essence of a range of detailed provisions relating to a specific subject, in particular the rules relating to detention (see Rule 99), forced labour (see Rule 95) and family life (see Rule 105). In addition, references to human rights law instruments, documents and case-law have been included. This was done, not for the purpose of providing an assessment of customary human rights law, but in order to support, strengthen and clarify analogous principles of humanitarian law. While it is the majority view that international human rights law only binds governments and not armed opposition groups,[1] it is accepted that international humanitarian law binds both.

It is beyond the scope of this study to determine whether these guarantees apply equally outside armed conflict although collected practice appears to indicate that they do.

Continued applicability of human rights law during armed conflict

Human rights law applies at all times although some human rights treaties allow for certain derogations in a "state of emergency".[2] As stated by the

[1] But see, e.g., Christian Tomuschat, "The Applicability of Human Rights Law to Insurgent Movements", in Horst Fischer *et al.*, *Crisis Management and Humanitarian Protection*, Berliner Wissenschafts-Verlag, Berlin, 2003.

[2] International Covenant on Civil and Political Rights, Article 4; European Convention on Human Rights, Article 15; American Convention on Human Rights, Article 27 (which also expressly

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.*, § 2194).
[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).

the taking of hostages.[215] This prohibition is also set forth in the legislation of numerous States.[216]

Instances of hostage taking, in both international or non-international armed conflicts, have been condemned by States.[217] International organisations, in particular the United Nations, have also condemned such instances with respect to the Gulf War and the conflicts in Cambodia, Chechnya, El Salvador, Kosovo, Middle East, Sierra Leone, Tajikistan and the former Yugoslavia.[218]

In the *Karadžić and Mladić case* in 1995 before the International Criminal Tribunal for the Former Yugoslavia, the accused were charged with grave breaches for taking UN peacekeepers as hostages. In its review of the indictments, the Tribunal confirmed this charge.[219] In the *Blaškić case* in 2000, the Tribunal found the accused guilty of the taking of hostages as a violation of the laws and customs of war and the taking of civilians as hostages as a grave breach of the Fourth Geneva Convention.[220] In the *Kordić and Čerkez case* before the Tribunal in 2001, the accused were found guilty of the grave breach of taking civilians hostage.[221]

The ICRC has called on parties to both international and non-international armed conflicts to refrain from taking hostages.[222]

[215] See, e.g., the military manuals of Argentina (*ibid.*, § 2070), Australia (*ibid.*, §§ 2071–2072), Belgium (*ibid.*, §§ 2073–2074), Benin (*ibid.*, § 2075), Burkina Faso (*ibid.*, § 2076), Cameroon (*ibid.*, §§ 2077–2078), Canada (*ibid.*, § 2079), Colombia (*ibid.*, § 2080), Congo (*ibid.*, § 2081), Croatia (*ibid.*, §§ 2082–2083), Dominican Republic (*ibid.*, § 2084), Ecuador (*ibid.*, § 2085), France (*ibid.*, §§ 2086–2089), Germany (*ibid.*, § 2090), Hungary (*ibid.*, § 2091), Italy (*ibid.*, §§ 2092–2093), Kenya (*ibid.*, § 2094), South Korea (*ibid.*, § 2095), Madagascar (*ibid.*, § 2096), Mali (*ibid.*, § 2097), Morocco (*ibid.*, § 2098), Netherlands (*ibid.*, § 2099), New Zealand (*ibid.*, § 2100), Nicaragua (*ibid.*, § 2101), Nigeria (*ibid.*, § 2102), Philippines (*ibid.*, § 2103), Romania (*ibid.*, § 2104), Russia (*ibid.*, § 2105), Senegal (*ibid.*, § 2106), South Africa (*ibid.*, § 2107), Spain (*ibid.*, § 2108), Sweden (*ibid.*, § 2109), Switzerland (*ibid.*, § 2110), Togo (*ibid.*, § 2111), United Kingdom (*ibid.*, §§ 2112–2113), United States (*ibid.*, §§ 2114–2117) and Yugoslavia (*ibid.*, § 2118).

[216] See, e.g., the legislation (*ibid.*, §§ 2119–2194).

[217] See, e.g., the statements of Germany (in the context of the conflict in Nagorno-Karabakh) (*ibid.*, § 2200), Italy (*ibid.*, § 2201), Pakistan (in the context of the conflict in Kashmir) (*ibid.*, § 2204), United States (in relation to the Gulf War) (*ibid.*, §§ 2206–2207) and Yugoslavia (*ibid.*, § 2209).

[218] See, e.g., UN Security Council, Res. 664 (*ibid.*, § 2212), Res. 674 (*ibid.*, § 2212), Res. 686 (*ibid.*, § 2212) and Res. 706 (*ibid.*, § 2212); UN Security Council, Statements by the President (*ibid.*, §§ 2213–2214); UN General Assembly, Res. 53/164 (*ibid.*, § 2215); UN Commission on Human Rights, Res. 1992/71 (*ibid.*, § 2216), Res. 1992/S-1/1 (*ibid.*, § 2217), Res. 1995/55 (*ibid.*, § 2218), Res. 1998/60 (*ibid.*, § 2219) and Res. 1998/62 (*ibid.*, § 2220), Council of Europe, Parliamentary Assembly, Res. 950 (*ibid.*, § 2226), European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya (*ibid.*, § 2227), OAS, Permanent Council, Resolution on Hostages in El Salvador (*ibid.*, § 2229).

[219] ICTY, *Karadžić and Mladić case*, Initial Indictment and Review of the Indictments (*ibid.*, § 2233).

[220] ICTY, *Blaškić case*, Judgement (*ibid.*, § 2234).

[221] ICTY, *Kordić and Čerkez case*, Judgement (*ibid.*, § 2235).

[222] See, e.g., ICRC, Memorandum on the Applicability of International Humanitarian Law (*ibid.*, § 2238), Press Release, Tajikistan: ICRC urges respect for international rules (*ibid.*, § 2240), Communication to the Press No. 98/25 (*ibid.*, § 2242), Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, § 2243), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise (*ibid.*, § 2244).

International human rights law does not specifically prohibit "hostage-taking", but the practice is prohibited as part 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 as 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 the ICC Concerning (*ibid.*, § 2246).

223 UN Commission on Human Rights, Res. 1999/73 (*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.*, § 2078).

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)).

J. J. Lambert, *Terrorism and Hostages in International Law, A Commentary on the Hostages Convention 1979*, Cambridge University Press, 1990

TERRORISM AND HOSTAGES IN INTERNATIONAL LAW

— A COMMENTARY ON THE HOSTAGES CONVENTION 1979

by

JOSEPH J. LAMBERT

A PUBLICATION OF
THE RESEARCH CENTRE FOR INTERNATIONAL LAW,
UNIVERSITY OF CAMBRIDGE

CAMBRIDGE
GROTIUS PUBLICATIONS LIMITED
1990

SALES & ADMINISTRATION
GROTIUS PUBLICATIONS LTD.
PO BOX 115, CAMBRIDGE CB3 9BP, UK

British Library Cataloguing in Publication Data

Lambert, Joseph J.
Terrorism and hostages in international law: a commentary on the Hostages Convention 1979.
1. Taking as hostage — Treaties
I. Title
341.7'7

ISBN 0-949009-46-6

Typeset and printed by
The Burlington Press (Cambridge) Limited, Foxton, Cambridge

2980 800

Article 1

THE OFFENCES OF HOSTAGE-TAKING, ATTEMPT AND PARTICIPATION*

1. 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.

2. Any person who:
(a) attempts to commit an act of hostage-taking, or
(b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking
likewise commits an offence for the purposes of this Convention.

1. Introduction

This Article sets forth the elements of the offence of hostage-taking and establishes that both an attempt to commit an act of hostage-taking and participation in an act, or attempted act, of hostage-taking are also offences under the Convention. Pursuant to Article 2, Parties must make these offences punishable under their domestic laws. Although all States may be presumed to have offences under their domestic laws which would cover the offence of hostage-taking as here defined, e.g., kidnapping, false imprisonment and unlawful detention,[1] this Article provides a uniform definition of a discrete offence, the essential elements of which must be covered by the domestic laws of all Parties. It should be noted that this Convention is not concerned with all acts of abduction or kidnapping which have an

* Captions identifying the subject matter of each article are supplied by the author and are not part of the official text of the Hostages Convention.

[1] See, e.g., Swedish Penal Code, Chap. 4, §1, which provides that a person is guilty of the offence of kidnapping if he "seizes and carries away or confines . . . [a] person with the intent of injuring him in body or health or forcing him into service, or to practise extortion". (English translation by the National Council for Crime Prevention, Stockholm, 1984.) Under English law there exists the offence of false imprisonment, which consists of the restraint of a victim's freedom of movement from a particular place; an aggravated form of the offence is kidnapping, which consists of the stealing and carrying away or secreting of the person. See Smith & Hogan, *Criminal Law* 381-82, 388 (5th ed., 1983). The offence of hostage-taking seemingly fits under these provisions.

international dimension: this Article is drafted in such a way as to include only those offences which are directed towards compelling some act or forbearance from a third party.[3] It should also be noted that although the Convention is clearly aimed at the taking of hostages in political acts of terrorism, the definition contained in this Article is not restricted to such activity. Rather, the Convention may also cover the taking of hostages for private gain with no political element.[4]

Except for various drafting changes, noted where relevant, this Article is very similar to the corresponding provision in the FRG draft.[5] The interrelated questions of the definition of hostage-taking and the scope of this Convention, however, were the most hotly debated and time consuming issues faced by the draftsmen. While most of the debate centred around the scope of the Convention, particularly whether or not it should cover acts of hostage-taking committed by national liberation movements (and acts committed

[3] This also appears to be the position under the 1949 Geneva Conventions on the laws of armed conflict and 1977 Additional Protocols thereto. See citations at p. 263 (note 1 in the commentary on Article 12). As noted in detail in the commentary on Article 12, the Geneva instruments contain various prohibitions against the taking of hostages. While "hostage-taking" is not defined anywhere in those instruments, the official commentaries thereto shed some light on the meaning of the term. The commentary to Article 147 of the Civilians Convention states that: "Hostages might be considered as persons illegally deprived of their liberty . . . there is an additional feature, i.e., the threat either to prolong the hostage's detention or to put him to death." See Pictet (ed.), *Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 600 (1958). The commentary to Article 34 notes that the word "hostage" has been given various meanings, is not easy to define, and should, in the spirit of the Convention, be understood in the widest possible sense; however, it states, "[g]enerally speaking, hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces." In its modern form, the commentary continues, hostage-taking is a means of preventing breaches of the law and sabotage. Examples given are, *inter alia*, the taking of hostages by an Occupying Power from amongst prominent persons in a city to prevent disorder or attacks on occupation troops and the taking of hostages by such a power in order to obtain the delivery of foodstuffs and supplies. *Id.* at pp. 229-230. These examples all contain an element of compulsion directed towards a third party. A similar definition is contained in the commentary to the 1977 Additional Protocols. See Sandoz, Swinarski & Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 874 & 1375 (1987). See also *In re List*, 15 Annual Digest and Reports of Public International Law Cases 632, 642 (US Military Tribunal at Nuremberg, 1948), wherein the court stated that "[f]or the purposes of this opinion the term 'hostage' will be considered as [meaning] those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the good conduct of the population of the community from which they are taken".

[4] This is also the case with respect to the implementing legislation of various States. See the UK Taking of Hostages Act 1982, §1; 18 USC §1203(a). See also the comments of the UK Under-Secretary of State, Foreign and Commonwealth Office, in the House of Commons debate on the UK implementing legislation, H.C. Debs., Vol. 25, 11 June 1982, col. 57; comments of the representative of the Justice Department, in US Senate, Committee on the Judiciary, *Hearings before the Subcommittee on Security and Terrorism on*, inter alia, *S. 2624, Act for the Prevention and Punishment of the Crime of Hostage-taking*, 98th Cong., 2d Sess., p. 18 (1984).

[5] FRG draft, Art. 1.

during armed conflicts generally), there was also considerable debate over the definition itself, resulting from the efforts of many developing States to create exceptions based on the motives of the hostage-takers and to focus attention on other problems such as colonialism, foreign occupation, etc.[3] In the end, however, no exceptions were provided for in this Article, and it maintained its original focus.

This Article corresponds to Article 1 of the Hague Convention, Article 2 of the Montreal Convention, Article 2 of the Montreal Protocol, Article 2 of the New York Convention, Article 3 of the Rome Convention and Article 2 of the Rome Protocol.[4] All of the other instruments similarly provide that attempt and participation are offences thereunder.

2. Interpretation

Paragraph 1: The definition of the offence of hostage-taking

Paragraph 1 lists the acts necessary for the commission of the offence of hostage-taking. These are 1) the seizure or detention of a hostage; and 2) a threat to kill, injure or continue the detention. These acts must be committed in order to compel a third party to behave in a certain way.[5]

"Any person who . . ."

The words "Any person" make it clear that this Convention applies regardless of the identity of, or cause espoused by, the offender. They also make it clear that the Convention is directed towards individual liability, rather than State action. This is not to say, however, that the Convention does not apply to acts committed by a person acting at the

[3] See pp. 62-63 (notes 226-228 in Part I); pp. 266-268 (notes 12-17 in the commentary on Article 12).

[4] The corresponding provisions of the Hague, Montreal and Rome Conventions and Protocols similarly describe in some detail the proscribed conduct, while Article 2 of the New York Convention differs slightly in that it simply lists certain offences by name, e.g., murder and kidnapping.

[5] It may be noted that the corresponding provisions of the Montreal Convention and Protocol, the New York Convention and the Rome Convention and Protocol provide that an offence is committed only if the acts are committed intentionally. However, as with the offence of hijacking as defined in the Hague Convention, no such specific requirement was necessary in this instrument since the proscribed acts could hardly be committed in anything but an intentional manner. Moreover, all the other anti-terrorism instruments provide that an offence is committed only if the actions are done "unlawfully". In this case, it may be assumed that the Convention is concerned with unlawful conduct. See generally Stubbier, pp. 211-212.

behest of a State. No exception for State agents can be implied from this wording. Indeed, the draftsmen made it clear that this definition includes acts by such persons. During the first session of the Hostages Committee, the representative of the FRG stated that in his opinion the Convention covers "the case of a person who, acting on behalf of a public institution or State, committed an offence within the terms of the convention".[8] Similarly, during the second session of the Hostages Committee, the Chairman noted that individual responsibility would arise if a government official of any State committed an act of hostage-taking.[9] This was not the subject of further debate on record and it may be assumed that the words "Any person", unconditional as they stand, cover acts committed by State agents as well as those committed by private persons.

"... seizes or detains ..."

The seizure or detention of another person constitutes the first act necessary to commit the offence of hostage-taking. The variety of ways in which this seizure and/or detention may be carried out seems almost limitless and would include, for example, detention inside the victim's home, abduction in the street with subsequent detention elsewhere, and, overlapping with the Hague Convention, seizure and detention in an aircraft hijacking.[10]

The words "detain" and, particularly, "seize" imply the use of force, although the Article does not specifically provide that the seizure or detention must be effected by force. In fact, the Article makes no reference to the manner of seizure or detention. By way of contrast, Article 1 of the Hague Convention prohibits seizure of an aircraft "by

[8] First Report of the Hostages Committee, p. 64, para. 21. This was in response to a comment by the Mexican representative that "responsibility for hostage-taking in many cases rested with an authority for which the individual was merely acting as agent". He further stated that although it was implicit that agents of an authority were also prohibited from taking hostages, it might be useful to make a specific reference to such a case. *Id.* at p. 63, para. 18.

The coverage of acts of hostage-taking by individuals acting pursuant to the authority of a State is consistent with the rules under the Geneva instruments. In fact, although those instruments clearly provide for individual liability, the problem faced in armed conflicts is with "hostages taken by an authority — and not by individuals". See *Commentary to the Protocols*, note 2, *supra*, at p. 874.

[9] Second Report of the Hostages Committee, p. 58, para. 5. This statement arose in the context of the report of the Chairman that, while many States wanted the Convention to cover acts committed by States, others maintained that hostage-taking was a matter of individual responsibility, "a concept established and enhanced by international law since the Second World War". *Id.*

[10] The French delegation to the Hostages Committee submitted a proposal that would have required the detention to be in a "secret place". UN Doc A/AC.188/L.13, in First Report of the Hostages Committee, p. 113. However, as the UK representative pointed out, there are cases of hostage-taking where the place of detention is not secret. Second Report of the Hostages Committee, p. 55, para. 57.

force or threat
the Sixth Com
representative
to include a re
e.g., use of forc
inclusion of su
cases of seizur
force;[12] howev
similar to the
of intimidatior
effect the seiz
within the scop
State for Forei
Commons deb
relevant consi
whether it in
It is worth
word "detains'
seizure, couple
detention, no
the UK imple
and contains
for Foreign a
Commons deb
would have a
and purpose o
no offence of
amount to a d
He explained

[11] UN GAOR,
(1979).
[12] See, e.g., the
2-3 (notes 10-11
[13] See Shubber,
[14] In the Comm
with the purpo
"constructive det
Secretary of State
determine wheth
"should not matt
restraint or beca
remaining in a pl
the accused". *Id.*
[15] Taking of H
chosen to use bot
Zealand legislatic
1980 (No. 44), §

force or threat thereof, or by any other form of intimidation". During the Sixth Committee deliberations on the present Convention, the representative of Austria stated that he would have preferred Article 1 to include a reference to the means by which the act was committed, e.g., use of force, threat of force, etc., although he did not insist on the inclusion of such a reference.[11] It would seem that the vast majority of cases of seizure and detention of hostages will result from the use of force;[12] however, the absence of such a requirement suggests that, similar to the Hague Convention, the threat of force or other means of intimidation, e.g., blackmail, or indeed any other method used to effect the seizure or detention, would suffice to bring the conduct within the scope of this Convention.[13] As the UK Under-Secretary of State for Foreign and Commonwealth Affairs stated in the House of Commons debate concerning the UK implementing legislation, the relevant consideration is not how the detention came about, but whether it in fact happened.[14]

It is worth noting that the use of both the word "seizes" and the word "detains" is essentially tautologous. It is difficult to discern how a seizure, coupled with a threat, could be seen as anything other than a detention, no matter how short the duration. This fact is recognized in the UK implementing legislation which uses only the word "detains", and contains no mention of a seizure.[15] The Under-Secretary of State for Foreign and Commonwealth Affairs explained in the House of Commons debate on the UK legislation that use of the word "seizes" would have added nothing to the word "detains" within the context and purpose of the bill. He stated that if there is no detention, there is no offence of hostage-taking and that, therefore, the seizure must amount to a detention for an offence to be committed under the Act. He explained away the use of both "seizes" and "detains" in the

[11] UN GAOR, 34th Sess., C.6 (14th mtg.), p. 5, para. 19, UN Doc A/C.6/34/SR.14 (1979).

[12] See, e.g., the OPEC hostage-taking in 1975 and the Entebbe incident in 1976, pp. 2-3 (notes 10-11 and accompanying text in the Introduction).

[13] See Shubber, p. 213, who reaches the same conclusion.

[14] In the Commons, a proposal had been mooted to add the words "or makes a threat with the purpose of detaining" to the Taking of Hostages Act, thus covering "constructive detention". H.C. Debs., note 3, *supra*, at cols. 565-566. The Under-Secretary of State responded that such an addition was not necessary since a court could determine whether the facts and circumstances amount to a detention; if they do, it "should not matter one whit whether the detention has come about through physical restraint or because of threats or other action which . . . have led to [the hostage] remaining in a place in which he would not have chosen to remain but for the action of the accused". *Id.* at cols. 567-568.

[15] Taking of Hostages Act 1982, §(1)(a). Some other jurisdictions, however, have chosen to use both words. See, e.g., the US legislation at 18 USC §1203(a), and the New Zealand legislation, the Crimes (Internationally Protected Persons and Hostages) Act 1980 (No. 44), §8.

Convention as required by the need to be more flexible in a document drafted in many languages.[66]

". . . and threatens to kill, to injure or to continue to detain . . ."

The threat to kill, to injure or to continue the detention in order to compel a third party is the second of two acts necessary to complete the offence of hostage-taking. A detention or seizure of an individual is not enough, therefore, to commit the offence. If there is no threat, or if the acts of the offenders are not directed towards the compulsion of a third party, no offence within the meaning of this Convention is committed.

The FRG draft provided that the threat must be to kill, to continue the detention or to cause "severe" injury to the hostage.[67] In the first session of the Hostages Committee, the representative of Canada argued that since the threat of continued detention was considered sufficient to incur criminal liability, it was not necessary to qualify the word "injury" with the word "severe".[68] The FRG representative replied that his delegation might have trouble deleting the word "severe" since in his country's legal system the notion of "injury" without any qualifying adjective would include minor forms of physical harm.[69] The Sixth Committee Working Group deleted the word "severe" from the draft instrument, although it is not clear from the record why.[70] Deletion of the word "severe" may have resulted from a lack of consensus as to a proper definition of the word[71] or from agreement with the Canadian point of view. In any event, it may be assumed that the injury threatened does not have to be severe for the Convention to apply (although it is unlikely that a hostage-taker would ever threaten injury which is less than "severe").[72]

In a case where the threat is of continued detention, it would seem that the threat of any continued detention, regardless of how short the duration, would be sufficient for the act to fall within the Convention.

The scope of liability for "threats"

The threat to kill, injure or continue the detention is an

[66] H.C. Debs., note 3, *supra*, at cols. 565-567.
[67] FRG draft, Art. 1.
[68] First Report of the Hostages Committee, p. 71, para. 2.
[69] *Id.* at p. 92, para. 2.
[70] UN GAOR, 34th Sess., G.6 (53rd mtg.), p. 7, para. 18, UN Doc. A/C.6/34/SR.53 (1979).
[71] Cf. pp. 106-107 (note 59 and accompanying text in the commentary on Article 2).
[72] In any event, a threat to injure unless another person does or forbears from doing an act is really also a threat to continue the detention.

indispensabl
normally occ
hostage. It i
Montreal C
Protocol, bu
not cover th
delegate of
Convention
major inter
country to c
hostages".[73]
inter alia, tha
difficult to a
and that no
Convention
The decis
probably a
have meant
hostage-taki
is no real p
Although th
of injury to
the purpos
occurrence
moreover,

[73] Article 2(1
threats to com
Rome Conven
commit prosec
commit the act
actually to effe
[74] First Repo
Denmark agre
[75] See, e.g.,
representative
28, p. 66, para
ambivalent, n
would not be c
states that the
Rosenstock, p
[76] Many me
against intern
money or to r
should be c
Commission's r
Vol. I, p. 23
delegate of M
diplomat or h
of an embass
UN GAOR, 2

indispensable element of the offence of hostage-taking which will normally occur either at the time of or subsequent to the seizure of the hostage. It is worth noting that similar to the Hague Convention, Montreal Convention and Protocol and Rome Convention and Protocol, but unlike the New York Convention, this Convention does not cover the case of a threat to commit the proscribed offence.[23] The delegate of Mexico to the Hostages Committee suggested that the Convention should cover threats, arguing that they "had become a major international problem: potential kidnappers travelled from country to country, extracting ransoms merely by threatening to take hostages".[24] Other delegations disagreed for various reasons, arguing, *inter alia*, that the concept of threat is too "subjective", that it would be difficult to apply the Convention in a case that involved only a threat, and that no such reference was included in the Hague and Montreal Conventions.[25] The proposal does not appear to have been pressed.

The decision to omit coverage of threats to take hostages was probably a wise one. Extending the Convention in that way would have meant that it could be invoked in every case of threatened hostage-taking containing an international element, even where there is no real probability that a hostage-taking will actually take place. Although threats are covered by the New York Convention, the threat of injury to a diplomat or other internationally protected person for the purposes of extortion can be appreciated as a more likely occurrence than a threat to take other persons hostage and one which, moreover, seemingly has more international significance.[26] Even so,

[23] Article 2(1)(c) of the New York Convention requires Parties to make punishable threats to commit any of the attacks covered by that instrument. Article 3(2)(c) of the Rome Convention and Article 2(2)(c) of the Rome Protocol also cover certain threats to commit proscribed acts. Article 1 of the Hague Convention does not cover threats to commit the act of hijacking but, as noted above, prohibits the use of the threat of force actually to effect the hijacking.

[24] First Report of the Hostages Committee, p. 77, para. 24. The representative of Denmark agreed that the Convention should cover threats. *Id.* at p. 85, para. 12.

[25] See, e.g., the comments of the Chairman of the Hostages Committee and the representatives of the Netherlands, the US and Italy, *id.* at p. 64, para. 19, p. 65, para. 28, p. 66, para. 36, & p. 78, para. 27, respectively. The FRG representative appeared ambivalent, noting that if other delegations wanted the Convention to cover threats, it would not be outside the Committee's mandate. *Id.* at p. 64, para. 20. One commentator states that the Hostages Convention covers the offence of threats to take hostages. Rosenstock, p. 177. However, this is clearly not the case.

[26] Many members of the ILC expressed the opinion that threats to commit violence against internationally protected persons in an attempt at blackmail, e.g., to extort money or to obtain the release of prisoners, are a very serious form of terrorism which should be covered by the New York Convention. See, e.g., the comments of Commission members Bilge, Tsiam, Sette Camara, Ushakov & Reuter, 1972 YBILC, Vol. I, p. 238. In the Sixth Committee debate on the New York Convention, the delegate of Mexico argued that "[t]elephone calls made to threaten the life of a diplomat or his family were not negligible matters and interfered with the normal work of an embassy or mission, thus hampering normal communications between States". UN GAOR, 28th Sess., C.6 (1434th mtg.), para. 30, UN Doc A/C.6/SR.1434 (1973).

inclusion of threat liability in the New York Convention was the cause of much debate during the drafting of that Convention, with many draftsmen opposed on various grounds, including the prospective problems of proof, the possibility of frivolous threats, the difficulty of deciding what constitutes a threat when no steps towards commission are made, and the "danger of abuse".[27] It would appear that it was best to establish the threshold of liability under the Hostages Convention at the point where steps are actually taken to perpetrate the crime, i.e., attempt. Threats to commit the offence are best left to internal law.

". . . another person . . ."

As regards the identity of the hostage, this Article simply states that it must be "another person". Early in the drafting process, some delegations from developing countries indicated their belief that the Convention should only protect "innocent" hostages, suggesting that leaders or citizens of States considered to be "colonialist" or "racist", etc., may legitimately be taken hostage.[28] These proposals were not adopted, however, and it is clear that the Convention will apply without regard to the identity of the hostage.

". . . in order to compel . . ."

The acts of taking the hostage and uttering the threat must be done for the purpose of compelling a third party to do or abstain from doing a certain act. Although the United Kingdom representative to the Hostages Committee suggested that the definition in Article 1 was somewhat restrictive in so far as it did not take into account situations in which the offender had no desire to compel any person to do or abstain from doing anything, or in which the element of compulsion

[27] See, e.g., the comments of ILC members Ramangasoavina and Quentin-Baxter, 1972 YBILC, Vol. I, p. 238. This division of opinion was noted by the ILC in its commentary to that instrument, although it also stated that the concept of threat is "well-defined . . . under most systems of criminal law" and, therefore, needed no detailed explanation. 1972 YBILC, Vol. II, p. 315. Earlier, the Chairman of the ILC noted that the Convention should not apply to every form of threat, e.g., those of an unbalanced individual who had no intention of carrying out the threat, and spoke of limiting coverage of threats to those which were serious enough to bring in the relevant State's machinery for the protection of diplomats. See YBILC, Vol. I, p. 239. The ILC, however, seemed unable to reach agreement on how the concept should be limited. *Id.* at p. 250. In the Sixth Committee, not all draftsmen were in favour of including threats in the New York Convention. See, e.g., the comments of the representative of Cuba. UN GAOR, 28th Sess., C.6 (1112th mtg.), para. 12, UN Doc A/C.6/SR.1412 (1973). However, a Tunisian proposal to delete the reference to threats was defeated. UN GAOR, 28th Sess., C.6 (1135th mtg.), para. 1, UN Doc A/C.6/SR.1135 (1973).

[28] See p. 62 (note 22) and accompanying text in Part I).

was not clearly identified,[29] no concrete action was suggested or taken in this regard and it must be concluded that the motivation to compel a third party is an indispensable element of the offence. Thus, for example, an abduction, coupled with a threat to kill, is not enough to trigger the mechanisms of the Convention if there is no element of compulsion involved. However, the words "in order to compel" seem to relate to the motivation of the hostage-taker, rather than to any physical acts which he might take. Thus, while the seizure and threat will usually be accompanied or followed by a demand that a third party act in a certain way, there is no actual requirement that a demand be uttered. Thus, if there is a detention and threat, yet no demands, there will still be a hostage-taking if the offender is seeking to compel a third party.[30]

"... a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons ..."

The compulsion must be directed towards a "third party", and the Convention specifically lists these as a "State, an international intergovernmental organization, a natural or juridical person, or a group of persons". Most political acts of hostage-taking are committed in order to obtain concessions from a State; however, this Article makes it clear that the offence of hostage-taking is committed regardless of the identity of the third party. That this listing covers all possible third parties is confirmed by the comments of the Chairman-Rapporteur of the Sixth Committee Working Group who explained that, according to an agreed interpretation, the listing of third parties was intended to be "exhaustive". He also stated that the category of "a group of persons" was added to the original FRG draft article "for the sake of completeness".[31]

It would appear that States also consider that the offence of hostage-taking is committed regardless of the identity of the third party. The US implementing legislation as originally sent to Congress simply prohibited compulsion against a "third party", omitting the

[29] Second Report of the Hostages Committee, p. 54, para. 56.

[30] In this connexion it might be noted that many kidnappings and hostage-takings do not involve any demands. One author notes that 54 out of 146 kidnappings and seizures in Western Europe between 1970 and 1982 did not result in demands upon a third party. See Aston, "Political Hostage-Taking in Western Europe", in Gutteridge, *The New Terrorism* 61 & 71 (1986). Incidents wherein demands are not made will not necessarily fall outside the scope of this Convention; however, in such cases the intent to compel will be difficult to discern.

[31] UN GAOR, 34th Sess., C.6 (53rd mtg.), p. 7, para. 18, UN Doc A/C.6/34/SR. 53 (1979).

listing of possible third parties contained in the Convention.[57] A section-by-section analysis of the bill contained in the Presidential message to Congress explained that the omission was intended

> to make it clear that attempts to influence third parties not expressly listed in the definition, such as US state governments and unincorporated local governments, would violate the statute. There is no need to define 'third parties' in the legislation since the phrase speaks for itself and is intended to have the broadest possible meaning.[58]

The Department of Justice added that the wide construction of "third party" is intended to "avoid possible loopholes".[59] Although the statute as finally adopted refers to "third person or a governmental organization",[60] this appears to be a clarification of, rather than a restriction on, the meaning of "third party". The United Kingdom legislation refers to "a State, intergovernmental organisation or person", similarly exhaustive language.[61]

Another issue related to the category of third persons is the scope of the word "international" as used in "international intergovernmental organization". In the Sixth Committee deliberations on the Convention, the representative of the Philippines stated that he favoured the deletion of the word "international", positing that it would exclude intergovernmental organizations at the regional level.[62] After the Sixth Committee Working Group had completed its work on the draft, however, the Chairman-Rapporteur stated that, according to an agreed interpretation, the phrase "international intergovernmental organization" covers "universal, regional and subregional organizations of an intergovernmental character".[63]

[57] See *Message from the President Transmitting Four Drafts of Proposed Legislation to Attack the Pressing and Urgent Problem of International Terrorism*, H.R. Doc 98-211, 98th Cong., 2nd Sess., p. 7 (1984).

[58] *Id.* at pp. 7-8.

[59] See *Hearings before the Subcommittee on Security and Terrorism*, note 3, *supra*, at p. 122.

[60] See 18 USC §1203(a).

[61] See Taking of Hostages Act 1982, §1(1)(b). In the UK, the word "person" in an Act "includes a body of persons corporate or unincorporate". Interpretation Act 1978, Schedule 1.

[62] UN GAOR, 34th Sess., G.6 (13th mtg.), p. 20, para. 98, UN Doc A/C.6/34/SR.13 (1979).

[63] UN GAOR, 34th Sess., G.6 (55rd mtg.), p. 7, para. 18, UN Doc A/C.6/34/SR.53 (1979). It may be noted that Article 1 of the FRG draft listed as third parties "international organizations" and "international conferences". However, these did not need to be listed separately inasmuch as they fall under other categories. International organizations of a non-governmental type would fit under the descriptions "juridical person" or "group of persons", while international conferences, if made up of the representatives of States, could fall under the category of "State", and, if made up of private persons, could fall under the category "group of persons".

". . . to do or :

The goal of
some positive
incident,"[9] or,
extracting an
situations. Th
apply regardl
abstained fror

**". . . as an e:
hostage . . ."**

This phrase
paragraph 1
without any e
added simply
utters a threa
that an act be
will be release
may normally
quid pro quo
otherwise the

[9] See pp. 2-3 (

[10] Such a situat
in Frankfurt arre
with the 1985 hij
passenger. A few
allegedly by a gi
force the release
made in accord
acknowledging t
kill the two Germ
Ali Hamadeh, t
hostage-takings c
another German
third Hamadeh
1988, p. 1. Two
Hamadeh was co
Germans remain
charges of hijack
July 6, 1988, p.
prosecuted to th
May 1989, Moha
committed in co
The cycle contir
West German re
pressure the FR
p. A11.

[11] See Third I

". . . to do or abstain from doing any act . . ."

The goal of a hostage-taker may be to compel a third party to take some positive action, e.g., release prisoners as in the Entebbe incident,[39] or, alternatively, to refrain from some activity, e.g., extraditing an accused criminal.[40] This Convention applies to both situations. The words "any act" indicate that this Convention will apply regardless of the nature of the act which must be done or abstained from.

". . . as an explicit or implicit condition for the release of the hostage . . ."

This phrase was not included in the FRG draft; it was added to paragraph 1 during the third session of the Hostages Committee without any explanation appearing on the record.[41] Most likely, it was added simply to cover situations wherein an offender takes a hostage, utters a threat to kill, injure or continue the detention and demands that an act be done or abstained from, yet never states that the hostage will be released upon compliance with the demand. In such a case, it may normally be assumed that the release of the hostage will be the *quid pro quo* for the third party's action or forbearance (indeed, otherwise there would be little reason for the third party to submit to

[39] See pp. 2-3 (note 11 and accompanying text in the Introduction).

[40] Such a situation was recently faced by the FRG. In early 1987, German authorities in Frankfurt arrested Mohammed Ali Hamadeh, a member of Hezbollah, in connexion with the 1985 hijacking of a TWA airliner that resulted in the murder of an American passenger. A few days later, two German businessmen were taken hostage in Beirut, allegedly by a group with ties to the pro-Iranian group Hezbollah, in an attempt to force the release of Hamadeh. Subsequently, Bonn refused a US extradition request made in accordance with the bilateral treaty between those two States, later acknowledging that it did so as a result of threats by the hostage-takers that they would kill the two German hostages. However, in January 1988, the FRG placed on trial Abbas Ali Hamadeh, the brother of Mohammed Hamadeh, on charges relating to the hostage-takings committed in order to secure his brother's release, despite the fact that another German hostage was seized in January 1988, apparently on the orders of a third Hamadeh brother. *International Herald Tribune*, Jan. 27, 1988, p. 5 & Jan. 28, 1988, p. 1. Two of the German hostages have been released and, in April 1988, Abbas Hamadeh was convicted and sentenced to 13 years' imprisonment. Although one of the Germans remained held hostage, in July 1988 the trial of Mohammed Hamadeh on charges of hijacking and murder began. *International Herald Tribune*, July 5, 1988, p. 2 & July 6, 1988, p. 2. The FRG assured the US that Mohammed Hamadeh would be prosecuted to the full extent of the law. 87 Dept St. Bull., No. 2125, p. 85 (1987). In May 1989, Mohammed Hamadeh was convicted of murder, air piracy and other crimes committed in connexion with the hijacking and was sentenced to life imprisonment. The cycle continued, however, in as much as shortly before the Hamadeh verdict three West German relief workers in southern Lebanon were seized, in an apparent effort to pressure the FRG to release Hamadeh. See *The Washington Post*, May 18, 1989, p. A1 & p. A41.

[41] See Third Report of the Hostages Committee, p. 10, para. 33.

the compulsion). This provision makes it clear that the Convention will apply even when the offender makes no express promise to release the hostage upon compliance with the demand.

The words "as an explicit or implicit condition for the release of the hostage" do not seem particularly necessary or helpful in this context.[12] While they do serve to make it clear that the release of the hostage does not have to be explicitly promised in order for the Convention to apply, as just noted where a hostage is seized and a threat and demand are made, it may normally be assumed that submission to the demand is a condition for the release of the hostage. The words "in order to compel" seem to make it clear that the hostage-taker is bargaining for the health, safety and release of the hostage in exchange for the act or forbearance. Because of the qualifying words "as an explicit or implicit condition for the release of the hostage", it appears that the Convention would not apply in a case where the hostage-taker makes it clear that he will never release the hostage, that he fully intends to kill him, but bases the compulsion upon a threat, for example, to brutally torture the hostage before the ultimate killing. However unlikely such a scenario may appear, the phrase "explicit or implicit condition for the release of the hostage" seems an unnecessary limitation of the scope of the definition of hostage-taking.

Indeed, while the legislation adopted by the United States to implement the Convention employs the "explicit or implicit condition" language,[13] the United Kingdom apparently felt it unnecessary or undesirable and did not include the phrase in its legislation. The statute states simply that "A person . . . who . . . (a) detains any person ("the hostage"), and (b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence".[14] This appears to be a more flexible approach, and, if employed in this Convention, would have required its application when release of the hostage is neither implicitly or explicitly the *quid pro quo* for the submission of the third party to the compulsion.

". . . commits the offence of taking of hostages (hostage-taking) within the meaning of this Convention."

While this language suggests that all acts of hostage-taking as

[12] One commentator approves of the language, stating that it more clearly defines the aims of the hostage-takers, "an important re-emphasis of the element of duress". Rosenne, p. 127.

[13] See 18 USC §1203(a).

[14] Taking of Hostages Act 1982, §1(1)(b).

defined by this Article will be offences under this Convention, subsequent provisions place a limitation on this wording. Specifically, pursuant to Article 12, if Parties to this instrument are obliged to extradite or prosecute an alleged offender in a given hostage-taking situation under the 1949 Geneva Conventions on the laws of armed conflict or additional protocols thereto, then this Convention will not apply to that act. Further, pursuant to Article 13, the Convention will not apply to acts of hostage-taking which are essentially of domestic concern.

PARAGRAPH 2: ATTEMPT AND PARTICIPATION AS OFFENCES UNDER THE CONVENTION

Paragraph 2 provides that anyone who attempts to commit hostage-taking or participates in such acts "likewise commits an offence for the purpose of this Convention".

"Any person who: (a) attempts to commit an act of hostage-taking . . ."

In its commentary to the New York Convention, the International Law Commission stated that attempt is a "well-defined" concept under most systems of criminal law and does "not require, therefore, any detailed explanation in the context of the present draft".[45] Because there will be different definitions of attempt in various States, however, the precise nature of liability under this paragraph could differ from State to State. It could in theory transpire that the elements of attempt in a particular case will be satisfied in one jurisdiction but not in another. Since one State will not normally employ the criminal law of another,[46] the possibility exists, for example, that an alleged offender could be tried for attempted hostage-taking in a State other than that in which his conduct took place, and ultimately acquitted, even though his conduct may have constituted attempt under the criminal law of the territorial State and/or of other States Parties. However, it seems that definitions of attempt are essentially similar in most jurisdictions,[47] and it is unlikely

[45] 1972 YBILC, Vol. II, p. 315.
[46] See Akehurst, "Jurisdiction in International Law", 46 BYIL 145, 165-66 (1972).
[47] For example, in the UK, Section 1 of the Criminal Attempts Act 1981 provides that a person who, with intent to commit an offence to which the act applies (all offences which, if completed, would be triable in England or Wales with some exceptions not relevant here), "does an act which is more than merely preparatory to the commission of the offence, [is] guilty of attempting to commit the offence". In the US, although there is no comprehensive statutory definition of attempt in federal law (see *US* v. *Heng*

(continued on p. 90)

that any steps which come dangerously close to the commission of the offence of hostage-taking will fall outside the scope of any State's definition of the offence of attempt.

The inclusion of attempt liability in this instrument recognizes that those who attempt to commit terrorist acts such as hostage-taking, but who are, for whatever reason, unsuccessful, pose as great a threat to the stability of the international order as those who are successful. It can be appreciated that many terrorist acts are unsuccessful and the thwarted perpetrators may simply keep looking for the right opportunity. Success may be more elusive if the Parties are required to extradite or prosecute those who attempt to take hostages.

". . . or (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking . . ."

Participation in a hostage-taking or an attempted hostage-taking is also an offence under this Convention.

As with attempt, the ILC stated in its commentary to the New York Convention that participation is a well-known concept in most criminal law systems.[48] During the drafting of this Convention, some light on this subparagraph was shed by the Chairman-Rapporteur of the Sixth Committee Working Group who stated that 'according to an agreed interpretation, the concept of participating as an accomplice was intended to cover aiding and abetting, conspiring or otherwise being an accessory".[49] Thus, it is clear that the scope of the phrase "participates as an accomplice" is very wide indeed.

(" *continued*)
Awkal Roman, 356 F. Supp. 434, 437 (SDNY, 1978), *aff'd* 484 F. 2d 1271 (2d Cir. 1973), *cert. den.* 415 US 978 (1974)), many federal courts have applied the "substantial step" test, i.e., whether the defendant, acting with the kind of culpability required for the commission of the crime which he is charged of attempting, actually engaged in conduct which constitutes a substantial step towards commission of the crime. See *US* v. *Mandujano*, 499 F. 2d 370, 376 (5th Cir. 1974), *cert. den.* 419 US 1114 (1975); *US* v. *Jackson*, 560 F. 2d 112, 120, 121 (2d Cir. 1977), *cert. den.* 434 US 941 (1978), *cert. den.* 434 US 1017 (1978). In Sweden, liability for attempt occurs when a person "has begun to commit a crime without bringing it to completion . . . if there had been a danger that the act would lead to the completion of the crime or such danger had been precluded only because of accidental circumstances". See Swedish Penal Code, note 1, *supra*, at Chap. 23, §1. Thus, the UK and US definitions of attempt, at least, are very similar in so far as they both require an intent to commit the underlying crime plus an act in furtherance of the crime which is more than simply preparatory. In Sweden, the definition of attempt is somewhat less refined; however, it is not substantially different from the UK and US models.

[48] 1972 YBILC, Vol. II, p. 315.

[49] UN GAOR, 34th Sess., C.6 (53rd mtg.), p. 7, para. 19, UN Doc A/C.6/34/SR.53 (1979). The only recorded objection to this interpretation came from the representative of Pakistan who stated that he did not think that participation should include conspiracy. UN GAOR, 34th Sess., C.6 (62nd mtg.), p. 2, para. 2, UN Doc A/C.6/34/SR.62 (1979).

As regards the Chairman-Rapporteur's reference to "conspiring", the question arises as to whether his comments can be interpreted as meaning that conspiracy to take hostages is a distinct offence under this Convention, i.e., an offence regardless of whether or not an act of hostage-taking, or attempted hostage-taking, has been committed.[86] It would seem that such an interpretation is strained. Conspiracy is not specifically listed as an offence under this Convention (or under the other anti-terrorism instruments). Moreover, while many or most States generally consider conspiracy to be a distinct offence under their laws,[87] this does not appear to be universally so: in its commentary to the New York Convention, the ILC stated that it did not include as an offence "conspiracy to commit any of the violent acts referred to . . . because of the great differences in its definition under the various systems . . . some systems do not even recognize it as a separate crime".[88] It would seem that if the draftsmen of the Hostages Convention had intended conspiracy to be a distinct offence under the instrument, they would have provided so expressly, as has been done in some other conventions dealing with international offences.[89]

Given the context in which the reference to "conspiring" was made, i.e., in a clarification of the concept of "participating as an accomplice", the better interpretation of the Chairman-Rapporteur's statement is that when an offence of hostage-taking, or attempted hostage-taking, has occurred, those who have acted as conspirators must be considered as accomplices.[90] If a Party's laws on participation are not broad enough to include conspirators as accomplices, those laws must be altered accordingly.

[86] One commentator has apparently interpreted the Chairman-Rapporteur's comments in this way. See Rosenne, p. 128.

[87] In the UK, for example, the Criminal Law Act 1977, §1(1) (as amended by the Criminal Attempts Act 1981) provides that "[i]f a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions . . . will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement . . . he is guilty of conspiracy"

[88] 1972 YBILC, Vol. II, p. 316. Moreover, in the Sixth Committee deliberations on the New York Convention, it was proposed that conspiracy be included in that instrument as an ancillary offence. See the proposal of the Spanish delegation in UN Doc A/C.6/L.913 (1973). While there appeared to be considerable support for the proposal, it was not adopted. See e.g., the comments of the representatives of Yugoslavia, Uganda, Oman and Pakistan in UN GAOR, 28th Sess., C.6 (1443rd mtg.), paras. 8, 25, 45 & 58, respectively, UN Doc A/C.6/SR.1413 (1973).

[89] See, e.g., Art. III(b), 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; Art III(a), 1973 International Convention on the Suppression of the Crime of Apartheid, 1015 UNTS 244.

[90] In the UK, for example, the Accessories and Abettors Act 1861, §8 (as amended by the Criminal Law Act 1977), provides that "[w]hosoever shall aid, abet, counsel or procure the commission of any indictable offence . . . shall be liable to be tried, indicted and punished as a principal offender". Conspiracy to commit an offence constitutes counselling if the offence is actually committed. See Smith & Hogan, *Criminal Law* 121 (1983).

The importance of the Convention's coverage of accomplice liability can hardly be overstated. International acts of terrorism such as hostage-taking very often rely on the assistance, and indeed direction, of sympathetic groups and individuals who do not appear at the scene of the crime but whose criminal culpability is at least as great as that of the perpetrators themselves. Moreover, these accomplices may be residents of and/or present in different States from each other and from the actual perpetrators. The provisions of this Convention can assist States in bringing such participants to justice.

ES

Each State P
by appropriate
offences.

While Article
hostage-taking,
that offence. Tl
obligation upon
taking, as well
punishable by '
may be noted, h
penalties are in
This Article
Article 3 of the
New York Con

The role of munic
and other "interr

This is the fi
obligations upc
of the offence
participation. (
Parties to esta
circumstances,
or submit for
territory. It car
against hostage
terrorism conv
This is the case
crimes", i.e., bc
are considered

[1] Piracy may be
crimes can also p

2996 $16

R. S. Lee (Ed), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational: 2001

The International Criminal Court

Elements of Crimes and Rules of Procedure and Evidence

Edited by Roy S. Lee

Associate Editors: Håkan Friman, Silvia A. Fernández de Gurmendi,
Herman von Hebel, and Darryl Robinson

Transnational Publishers, Inc.

Published and distributed by Transnational Publishers, Inc.
410 Saw Mill River Road
Ardsley, NY 10502, USA

Phone: 914-693-5100
Fax: 914-693-4430
E-mail: info@transnationalpubs.com
Web: www.transnationalpubs.com

Library of Congress Cataloging-in-Publication Data

The International Criminal Court : elements of crimes and rules of procedure and evidence / edited by Roy S. Lee
p. cm.
Includes index.
ISBN 1-57105-209-7
1. International criminal courts—Rules and practice. 2. International offenses. I. Lee, Roy S.

KZ6310.I579 2000
341.7'7—dc21 2001052029

Manufactured in the United States of America

2999 819

CHAPTER 5

THE ELEMENTS OF WAR CRIMES

I. INTRODUCTION

Herman von Hebel

A. War Crimes in the Rome Statute

From the very beginning of the process of creating an international criminal court, it has never been disputed that the Court should have jurisdiction over war crimes. The Draft Statute prepared by the International Law Commission included war crimes, but refrained from providing any definition. In the early negotiations on the Statute, it was agreed that the term "war crimes" was general enough to cover the whole field of norms applicable to armed conflict, and that the term should be used for the purposes of the Statute and should be defined in the Statute in order to meet the principle of legality.

An extensive body of international humanitarian law has been developed over more than a century. Major instruments in this respect are, *inter alia*, the 1899 and 1907 Hague Conventions and Regulations, the four 1949 Geneva Conventions and the two 1977 Additional Protocols to the Geneva Conventions. Given this large body of law, it became necessary to make a selection of the norms that merited inclusion in article 8 of the Statute. Three different considerations played a dominant role in this selection process. The first was whether the proposed crimes were serious and egregious enough to merit inclusion. The second was whether the norms proposed for inclusion were established as part of customary international law entailing individual criminal responsibility. The third was whether only norms applicable to international armed conflicts should be included, or whether norms applicable to internal armed conflicts should be included as well.

The process of selection of norms for war crimes largely took place on the basis of two proposals: one submitted by the United States, and the other by New Zealand and Switzerland, which was based on a paper prepared by the International Committee of the Red Cross. Whereas the US proposal was largely based on the Hague law and the Geneva Conventions of 1949, the New Zealand/Switzerland proposal also included several norms stemming from the 1977 Additional Protocols. Both proposals included norms relating to both international and internal armed conflicts. From 1997 up until the end of the Rome Conference, the process of elaboration of definitions was primarily focused on bridging gaps between these two proposals. Although a clear majority of delegations favored the inclusion of norms applicable to internal armed conflicts,

certain procedural rights, which may he found in article 43 of Geneva Convention No. IV, are granted to the persons detained. Since articles 27, 42 and 78 of Geneva Convention No. IV leave a great deal to the discretion of the party concerning the initiation of such measures of confinement, it obliges the detaining party to reconsider its decision to intern or place a protected person in assigned residence as soon as possihle by an appropriate court or administrative board.[47]

The judicial or administrative body must bear in mind that such measures of detention should only be taken if absolutely necessary for security reasons. If this was initially not the case, the body would be bound to vacate them. The relevant provisions of Geneva Convention No. IV are based on the fundamental consideration that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires.[48]

The Preparatory Commission agreed with the finding of the ICTY that "[a]n initially lawful internment clearly hecomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV,"[49] or in the case of confinement of civilians in occupied territory, as prescribed in article 78 of this Convention.

These considerations expressed by the ICTY in *Delalić et al.* are now clearly covered in the Elements of Crimes.

Consistent with paragraph 6 of the General Introduction to the Elements of Crimes, the reqnirement of "unlawfulness" as contained in the definition of the crime in the ICC Statute has not been repeated. The Court will need to consider in particular the conditions included in articles 27, 42, and 78 of Geneva Convention No. IV.

Mental Element:

Article 30 applies to this material element.

8. Article 8(2)(a)(viii)—Taking Hostages

Rome Statute:

8(2)(a)(viii) Taking of hostages;

Relevant Elements:

1. The perpetrator seized, detained or otherwise held hostage one or more persons.

47. *Delalić et al., supra note 5*, para. 580.

48. *Id.*, para. 581. Referring to art. 78 of Geneva Convention No. IV relative to the confinement of civilians in occupied territory, which safeguards the basic procedural rights of the person concerned, the Trial Chamber found that "respect for these procedural rights is a fundamental principle of the convention as a whole," *Id.*, para. 582.

49. *Id.*, para. 583.

2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
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.

Background:

The war crime of hostage taking is a grave breach under article 147 of Geneva Convention No. IV.

Material Elements:

The elements of this offence are largely based on the definition taken from the 1979 International Convention against the Taking of Hostages, which is not usually considered as part of international humanitarian law and was not drafted in the context of armed conflicts. However, as in the case of the crime of torture, the definition of the crime of hostage taking was adapted by the Preparatory Commission in the context of the law of armed conflict. The Hostage Convention defines hostage taking in article 1.1:

> any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the "hostage") in order to compel a third party, namely a State, an international organisation, a natural or judicial 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.

Element 1 may be a bit broader than the Hostage Convention in so far as it contains an "catch all" formulation: "or otherwise held hostage."

Mental Element:

With regard to elements 1 and 2, article 30 applies.

Element 3 defines a specific intent requirement, i.e., it defines an ulterior motive behind the material elements laid down in 1 and 2. It deviates slightly from the definition contained in the Hostage Convention. Taking into account the case law from the Second World War, this definition was considered to be too narrow. The text in the Elements of Crimes, therefore, defines this mental element in the following terms, adding the emphasized element:

> The perpetrator intended to compel a State, an international organisation, 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.

9. General Assessment for Grave Breaches

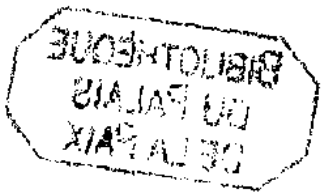
The provisions on the grave breaches—as far as the specific elements of the war crimes are concerned—is rather satisfactory. The essentials are reflected in the elements. The elements provide sufficient guidance to the Court, without unduly restricting judicial freedom to interpret the law. Nevertheless, the judges will need to have

Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Oxford, 2008, pp. 330-338

Commentary on the Rome Statute of the International Criminal Court

- Observers' Notes, Article by Article -

Second Edition



Edited by

Otto Triffterer

C.H.Beck · Hart · Nomos

Published by
Verlag C.H.Beck oHG, Wilhelmstraße 9, 80801 München, Germany.
eMail: bestellung@beck.de

Co-published by
Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom.
eMail: hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5,
76530 Baden-Baden, Germany, eMail: nomos@nomos.de

Published in North America (US and Canada) by Hart Publishing, c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300, Portland, OR 97213-3786, USA, eMail: orders@isbs.com

ISBN 978-3-406-57841-0 (Verlag C.H.Beck)
ISBN 978-1-84113-888-6 (Hart Publishing)
ISBN 978-3-8329-0927-7 (Nomos)

Printed in Germany by
Kösel GmbH & Co. KG,
Am Buchweg 1, 87452 Altusried-Krugzell

Typeset by the Editor

1. The notion and co
the Rome Statute sepa
appreciated and appro
continue this line, fam
the law to be applied i
and comment on crit
framework like a mo
aspects as well as with
necessarily lead to an
help for all practitione
Rome Statute and the j

In order to preser
atmosphere at the Rom
17th July 1998, the exp
of doubt or even opp
Bassiouni) and the Int
notion and concern ma
first activities of the Cr
homepage of the ICC w

2. The Second Editio
First. The jurisprudenc
international" or nation
literature since 1999, a
the case *Prosecutor* v. T

Meanwhile the "Elc
adopted by the Assemb
by the Judges on 27 Ma
the day to day practice
they can be a valuable
at hand directly when u
in the original version
Website in the Official
Regulations of the Cou
than those not reprinted
four sources of law me
article 21 para. 1 (a) R
"assist the Court in the
priority. Of course, the
those Articles of the R
be commented in the sa

1 The trial against Thom
Trial Chamber took pl
OF THE COALITION
cpi.int/cases/RDC/c01
Chamber, see www.ico

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) 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;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying

eir liberty for security reasons must
l basis[160]. The Detaining Power may
n the basis that all of their members

nary international law, complements
at any person arrested, detained or
nformed promptly, in a language he
ken.
TY based on facts where procedural
granted. This possibility has been
the words "continued to confine" in
protected person has been lawfully
2 and 78 of the Fourth Geneva
at a certain moment later on
s, which may be found in articles 43
e persons detained. Given the great
ng the initiation of such measures of

igned residence of an individual] are
court or administrative board"[161].

ear in mind that such measures of
ecurity reasons. If this was initially
Tribunal concluded that

kept in assigned residence or in an
party absolutely requires"[162].

unlawful if the detaining party does
ersons and does not establish an
ticle 43 GC IV"[163] or in the case of
in article 78 of the Fourth Geneva
mutatis mutandis in article 78: Any
e such action reconsidered as soon
ent or placing in assigned residence
ally, and at least twice yearly, give
amendment of the initial decision
rt or board must be done on an
l Protocol I reflecting customary
th Geneva Convention, the person
event as soon as the circumstances

dalic case are now clearly covered
ay consequently be summarized as

was confirmed by the *supra* note 153.

The detention or confinement of protected persons will be unlawful in the following two circumstances:

- When a protected person or persons have been detained in contravention of Article 42 of the Fourth Geneva Convention, i.e. they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and
- where the procedural safeguards required by Article 43 of the Fourth Geneva Convention are not complied with in respect of detained protected persons, even where their initial detention may have been justified[164].

The same applies mutatis mutandis to the situation in Occupied Territories covered by article 78 of the Fourth Geneva Convention.

No mental element has been added to the elements. Consequently, the article 30 standard applies.

(viii) "Taking of hostages"

This act is a grave breach of the Fourth Convention only (article 147 GC IV). Hostage taking 29
is specifically prohibited in article 34 of the Fourth Geneva Convention. Article 34 is part of the section "provisions common to the territories of the Parties to the conflict and to occupied territories" and thus applies to all protected persons in the sense of article 4 of the Fourth Convention. The prohibition of hostage-taking is now firmly entrenched in customary international law and considered a fundamental guarantee. It applies to all persons in the power of an adverse party[165].

The specific elements of this crime are defined in the following way:

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. 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.

The elements of this crime are largely taken from the definition in the 1979 International Convention against the Taking of Hostages. Given that this convention is not an international humanitarian law treaty and that it was drafted in a different legal context, the elements of this war crime were slightly adapted to the context of the law of armed conflict. The Hostage Convention defines hostage-taking in Article 1.1 as

"any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the "hostage") in order to compel a third party, namely a State, an international organisation, a natural or judicial 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".

Taking into account the case law from the Second World War, this definition was considered to be too narrow. The text in the Elements of Crimes, therefore, defines the specific mental element in the following terms, adding the emphasized element:

"The perpetrator intended to compel a State, an international organisation, 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".

The elements are largely in line with the jurisprudence of the ICTY, which is, however, less specific. The Appeals Chamber stated that the essential element of this crime is the use of a threat concerning detainees in order to obtain a concession or gain an advantage. A hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain

[160] *Supra* note 157, *Prosecutor v. Delalic et al.*, para. 322; *supra* note 89, *Prosecutor v. Kordic and Cerkez*, para. 72.

[165] For further discussion of the origins and the customary nature of the prohibition, see *supra* note 2, J.-M. Henckaerts/L. Doswald-Beck, CUSTOMARY 334, 336, 574; see also article 75 Add. Prot. I.

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[166].

The jurisprudence of the ICTY, in line with the ICRC Commentary on the Fourth Geneva Convention, added however some clarification in so far as it stressed – contrary to what W. Fenrick indicated in the First Edition of this commentary – that the deprivation of liberty must be unlawful[167].

(b) Other serious violations of the laws and customs applicable in international armed conflicts

Literature:

Michael Bothe/Karl Josef Partsch/Waldemar A. Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY (1982); Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICTS (2004); H. 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); Dieter Fleck (ed.), THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (1995); *id.*, *Strategic Bombing and the Definition of Military Objectives*, 27 ISRAEL Y.B. HUM. RTS. (1997); Knut Dörmann (with contributions by Louise Doswald-Beck and Robert Kolb), ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2003), *id.*, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 M.P. Y.B. UN L. 341 (2003); Judith Gail Gardam, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW (1993); Julie Gaudreau, *Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre*, 849 INT'L REV. RED CROSS 143 (2003); William Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1 (1990); Jean-Marie Henckaerts/Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES (2005); Guénaël Mettraux, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS (2005); Jean-François Quéguiner, *Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie évaluation de l'apport de sa jurisprudence au droit international humanitaire*, 850 INT'L REV RED CROSS 271 (2003); Horace B. Robertson, *The Principle of the Military Objective in the Law of Armed Conflict*, in: Michael N. Schmitt, (ed.), THE LAW OF MILITARY OPERATIONS. LIBER AMICORUM PROFESSOR JACK GRUNAWALT. INTERNATIONAL LAW STUDIES 72 (1998), Anthony P.V. Rogers, LAW ON THE BATTLEFIELD (2004); Yves Sandoz/Christophe Swinarski/Bruno Zimmermann (eds), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987); Marco Sassòli, *Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts*, in: David Wippman/Matthew Evangelista (eds.), NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS (2005); Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, in: Horst Fischer et al. (eds.), KRISENSICHERUNG UND HUMANITÄRER SCHUTZ – CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION, FESTSCHRIFT FUR DIETER FLECK (2004); UK Ministry of Defence, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004); United State Department of Defense, *Report to Congress on the Conduct of the Persian Gulf War - Appendix on the Role of the Law of the War*, 10 April 1992, 31 I.L.M. 3 (1992).

Case law:

Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, Trial Chamber, 3 Mar 2000; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004; *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement, Trial Chamber, 5 Dec 2003; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Judgement, Trial Chamber, 14 Jan 2000; *Prosecutor v. Martic*, Case No. IT-95-11-R61, Review of the Indictment, 8 Mar. 1996, reprinted in: 108 I.L.R. 39.

---

166 *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 639. See also the finding of the Trial Chamber in the same case:

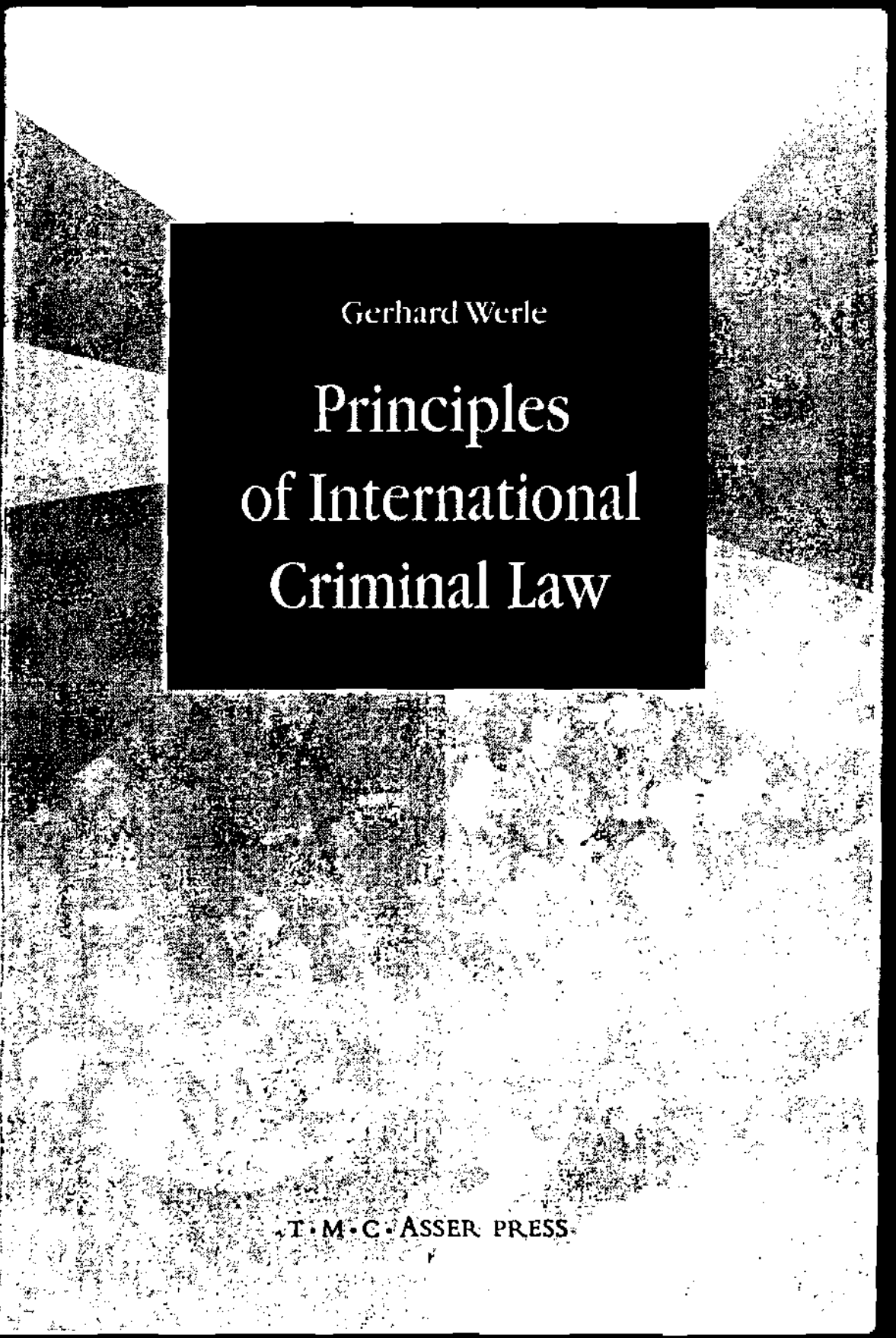
> "Within the meaning of Article 2 of the Statute [listing the grave breaches of the GC], civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However [...] detention may be lawful in some circumstances, inter alia to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage". *supra* note 50, *The Prosecutor v. Blaskic*, para. 158.

See also, *supra* note 113, *Prosecutor v. Kordic and Cerkez*, paras. 312 *et seq.*

167 *Supra* note 50, *Prosecutor v. Blaskic*, para. 158; *supra* note 113, *Prosecutor v. Kordic and Cerkez*, paras. 312 *et seq.*; *supra* note 2, J. S. Pictet (ed.), COMMENTARY IV, ARTICLE 147, 600. See also M. Ch. Bassiouni, *Hostages*, in: R. Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 877, 879, Vol. II (1995).

3008

G. Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, 2005



Gerhard Werle

Principles of International Criminal Law

T·M·C·ASSER PRESS

3010 830

Principles of International Criminal Law

by

Gerhard Werle
Professor of German and International Criminal Law
Humboldt-Universität zu Berlin

in cooperation with

Florian Jessberger
Senior Research Fellow
Humboldt-Universität zu Berlin

Wulf Burchards
Senior Research Fellow
Humboldt-Universität zu Berlin

Volker Nerlich
Former Senior Research Fellow
Humboldt-Universität zu Berlin

Belinda Cooper
Senior Fellow
World Policy Institute
New York

With special acknowledgments to the role and contribution of the Library of the Peace Palace

T·M·C·ASSER PRESS

Hans-Peter Jaul
3/21/2005

Published by T.M.C.Asser press
P.O.Box 16163, 2500 BD The Hague, The Netherlands
<www.asserpress.nl>

T.M.C.Asser press' English language books are distributed exclusively by:

Cambridge University Press, The Edinburgh Building, Shaftesbury Road,
Cambridge CB2 2RU, UK,
or
for customers in the USA, Canada and Mexico:
Cambridge University Press, 100 Brook Hill Drive, West Nyack, NY 10994-2133, USA
<www.cambridge.org>

Author:

Prof. Dr. Gerhard Werle
Lehrstuhl für deutsches und internationales Strafrecht,
Strafprozessrecht und Juristische Zeitgeschichte
Juristische Fakultät der Humboldt-Universität zu Berlin
Unter den Linden 6
10099 Berlin
Germany
Email: gerhard.werle@rewi.hu-berlin.de

ISBN 90-6704-202-1
ISBN 9789067042024 } paperback

ISBN 90-6704-196-3
ISBN 9789067041966 } hardcover

PRINTED IN THE NETHERLANDS

International crimir
ation of the Yugosl
Criminal Court, wl
1990s, the very exis
the baseline today i
tional law, not sim
international courts
mestic incorporatio
for the study of inte
a merely historical
analysis of this body
the foundations anc
of the core crimes -
crime of aggression.

The subject of tl
nal responsibility u
of the International
true that the Statut
customary internat
criminalization of v
international tribur
particularly the case
contributed signific

This volume is a
with international
or application of in
tion is based on m
2003 (publishers M
and revised to mee
ences to Germany
relevance to the inte
cluded through Au
the extent permitte

I am grateful to th
funded this project
former researchers
tion. Above all, my

Part Five: War Crimes

Georges Abi-Saab and Rosemary Abi-Saab: Les Crimes de Guerre, in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit International Pénal* (2000), pp. 265 et seq.; George H. Aldrich: Violations of the Laws or Customs of War, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts*, Vol. 1 (2000), pp. 95 et seq.; Hans Boddens Hosang, Knut Dörmann, Daniel Frank, Charles Garraway, Hermann von Hebel, Eve La Haye and Didier Pfirter: The Elements of War Crimes, in Roy S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 109 et seq.; Michael Bothe: War Crimes, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (2002), pp. 379 et seq.; Michael Bothe: War Crimes in Non-International Armed Conflicts, 24 *Israel Yearbook on Human Rights* (1994), pp. 241 et seq.; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf: *New Rules for Victims of Armed Conflicts* (1982); François Bugnion: Droit de Genève et Droit de La Haye, 83 *International Review of the Red Cross* (2001), pp. 901 et seq.; François Bugnion: Guerre Juste, Guerre D'Aggression et Droit International Humanitaire, 84 *International Review of the Red Cross* (2002), pp. 523 et seq.; Antonio Cassese: On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9 *European Journal of International Law* (1998), pp. 2 et seq.; Antonio Cassese: *International Criminal Law* (2003), pp. 47 et seq.; Luigi Condorelli: War Crimes and Internal Conflicts in the Statute of the International Criminal Court, in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court, A Challenge to Impunity* (2001), pp. 107 et seq.; Michael Cottier, William J. Fenrick, Patricia Viseur Sellers and Andreas Zimmermann: Commentary on Art. 8 ICC Statute, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (1999), pp. 181 et seq.; Isabelle Daoust, Robin Coupland and Rikke Ishoey: New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare, 84 *International Review of the Red Cross* (2002), pp. 345 et seq.; Eric David: *Principes de droit des conflits armés*, 3rd edn. (2002); Ingrid Detter: *The Law of War*, 2nd edn. (2000); Knut Dörmann: *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2002); Knut Dörmann: Preparatory Commission for the International Criminal Court: the Elements of War Crimes, 82 *International Review of the Red Cross* (2000), pp. 771 et seq.; Knut Dörmann: Preparatory Commission for the International Criminal Court: the Elements of War Crimes, 83 *International Review of the Red Cross* (2001), pp. 461 et seq.; Knut Dörmann: War Crimes in the Elements of Crimes, in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (2001), pp. 95 et seq.; Louise Doswald-Beck and Sylvain Vité: International Humanitarian Law and Human Rights Law, 75 *International Review of the Red Cross* (1993), pp. 94 et seq.; G.I.A.D. Draper: The relationship between the human rights regime and the law of armed conflict, 1 *Israel Yearbook on Human Rights* (1971), pp. 191 et seq.; John Dugard: Bridging the gap between human rights and humanitarian law: The punishment of offenders, 80 *International Review of the Red Cross* (1998), pp. 445 et seq.; Horst Fischer: Grave Breaches of the 1949 Geneva Conventions, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts*, Vol. 1 (2000), pp. 63 et seq.; Dieter Fleck (ed.): *The Handbook of Humanitarian Law in Armed Conflicts* (1999); Hans-Peter Gasser: Acts of terror, "ter- **772**