SCSL-04-14-T
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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Herman von Hebel
Date:	2 August 2007

PROSECUTOR **Against** **MOININA FOFANA**
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT

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I. INTRODUCTION

1. This trial has commonly been referred to as the Civil Defence Forces ("CDF") trial. In fact, it was not a trial of the CDF organisation itself, but rather a trial of three individuals, alleged to be its top leaders. Samuel Hinga Norman was the "National Coordinator" of the CDF, Moinina Fofana was its "Director of War", and Allieu Kondewa was its "High Priest".

2. The CDF was a security force comprised mainly of "Kamajors", traditional hunters, normally serving in the employ of local chiefs to defend villages in the rural parts of the country. The CDF fought in the conflict in Sierra Leone, between November 1996 and December 1999. In general terms, it can be said that the CDF supported the elected Government of Sierra Leone in its fight against the Revolutionary United Front ("RUF") and the Armed Forces Revolutionary Council ("AFRC"). Leaving aside the motives behind the conflict, it is clear that atrocities of all sorts were committed by members of all the Parties to the conflict.

3. Each of the three Accused was charged with eight counts of war crimes, crimes against humanity and other serious violations of international humanitarian law, relating to atrocities allegedly committed by them during the conflict. The charges included murder of civilians; violence to life, health and physical and mental well-being; inhumane acts; cruel treatment; pillage; acts of terrorism; collective punishments and enlisting children under the age of 15 or using them to participate actively in hostilities.

1.1 The Case against Samuel Hinga Norman Deceased First Accused

4. The first Accused, Samuel Hinga Norman, died untimely in hospital on 22 February 2007, after the completion of trial but before pronouncement of Judgement.

5. In a decision dated the 21st of May, 2007, on the Registrar's Submission of Evidence of the Death of Accused Samuel Hinga Norman and Consequential Issues, We held that "the trial proceedings against Accused Samuel Hinga Norman are hereby terminated by reason of his death". We further held that "the judgement of the Chamber in relation to the 2 remaining Accused Persons will be based on the evidence that was adduced on the record by all the parties".

6. In this regard, we recall, for the record, that Samuel Hinga Norman, the deceased First Accused, in the conduct of his defence before his death, testified on his behalf, was cross examined

by all the Parties and re-examined by his Counsel. In accordance with this Decision, We have, in our deliberations as a Chamber, considered the entire evidence on the record including that given by the deceased Accused.

7. In addition, in arriving at this decision, we were guided by the legal principle that no finding of guilt or of innocence should be made against a deceased person because he no longer has the status nor is he in a position to exercise his right to challenge such a finding by any legally recognised process since the issue of responsibility in criminal matters is personal and personified.

8. Following this Decision, the deceased Accused's Defence Team filed an application asking for an extension of time within which to file an application with the Chamber for leave to appeal against it. The Chamber, by a unanimous decision dated the 19th of July, 2007, dismissed the application for want of merit.

1.2 Accused Moinina Fofana and Allieu Kondewa

9. The Chamber would also like to mention for the record, and as we have already indicated, that in the conduct of the case for the defence, the late First Accused Samuel Hinga Norman testified and gave evidence on his behalf, was cross examined and re-examined. The two remaining Accused Persons, Moinina Fofana and Allieu Kondewa however, did not testify in their defence.

10. As a Chamber, in this regard, we have cautioned ourselves and while we only make mention of this fact for the record, we desist, as the law requires, from attaching any meaning to it nor should we, in so doing, be understood or be seen to be drawing any adverse inferences one way or the other on the exercise by the Accused, of their right as provided under Article 17(4)(g) of the Statute of this Court.

1.3 President Kabbah's Role in the Conflict

11. In the course of these proceedings, persistent references and allusions were made by the Defence Teams to President Kabbah and his alleged involvement in the conflict on the side of the CDF. Specifically and significantly, the Chamber recalls here that the Accused Persons all along, in the course of the trial raised, as a defence, that all they did and stand indicted for was as a result of their struggle to restore to power, President Kabbah's democratically elected Government that had been ousted in a coup d'Etat by the Armed Forces Revolutionary Council (AFRC) on the 25th of May, 1997.

12. The Chamber, in this Judgement, will consider the nature and the extent of this alleged involvement so as to determine whether the President's alleged role, viewed in the light of his political status and that of his Government in-Exile, constitutes a legal defence that is available to the Accused Persons.

1.4 Deletion of the Name of the Late First Accused from the Heading of this Judgement

13. Following our unanimous decision of 21 May 2007 where we held that "The trial proceedings against the deceased First Accused Samuel Hinga Norman are terminated by reason of his death" and a consequential direction by a Chamber Majority (Hon. Justice Benjamin Mutanga Itoe dissenting) that the name of the deceased Accused should no longer feature on the cover sheet of all Court processes and decisions.

14. The Chamber will now proceed to pronounce Judgement in this case but only in respect of Moinina Fofana and Allieu Kondewa, the two remaining Accused Persons.

II. PRELIMINARY ISSUES

1. Challenges to the Form of the Indictment

1.1. Introduction

15. In their Final Trial Briefs, Norman and Fofana raised challenges to the form of the Indictment. As stated above, as a result of the death of Norman, the Chamber cannot make a final pronouncement on his guilt or innocence and will therefore not consider any of the specific arguments that were raised in his defence. The Chamber will therefore only consider the arguments raised by Counsel for Fofana.

16. Fofana has been charged pursuant to Article 6(1) for having personally committed, planned, ordered, instigated and aided and abetted the crimes charged under all eight counts of the Indictment and with having committed them as part of a Joint Criminal Enterprise ("JCE"). In addition, he has been charged pursuant to Article 6(3) of the Statute with the crimes specified in all eight counts of the Indictment. Counsel for Fofana has challenged the form of the Indictment in relation to the manner in which his liability pursuant to both of these Articles has been pleaded.

1.2. Applicable Law

17. Under Article 17(4)(a) of the Statute, an Accused has the right to be informed promptly and in detail in a language that he or she understands of the nature and cause of the charge against him or her. Article 17(4)(b) provides that every Accused has the right to adequate time and facilities for the preparation of his or her defence.

18. As to the sufficiency of the Indictment, Rule 47(C) of the Rules of Procedure and Evidence of the Special Court (the Rules) provides that:

> The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

19. Another relevant provision is Rule 26*bis*. It provides, *inter alia*, that:

> The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted...with full respect for the rights of the Accused and due regard for the protection of victims and witnesses.

20. This Chamber has considered the specificity with which the Prosecution should plead indictments in the following decisions: *Sesay* Decision,[1] *Kanu* Decision,[2] *Kondewa* Decision[3] *Kamara* Decision[4] and in its *Admissibility of Evidence* Decision.[5]

21. In its *Admissibility of Evidence* Decision, the Chamber held that the Indictment is the fundamental accusatory instrument that sets in motion the criminal adjudicatory process and must be framed in such a manner that it is not repetitive, uncertain or vague.[6] Justice Itoe, in his separate concurring opinion, held that the Indictment is the foundation upon which every

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[1] *Prosecutor v Sesay*, SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 13 October 2003 [*Sesay* Decision].
[2] *Prosecutor v Kanu*, SCSL-2003-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 19 November 2003 [*Kanu* Decision].
[3] *Prosecutor v Kondewa*, SCSL-2003-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 27 November 2003 [*Kondewa* Decision].
[4] *Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16-PT (TC), 1 April 2004 [*Kamara* Decision], para. 49.
[5] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence (TC), 24 May 2005 [*Admissibility of Evidence* Decision].
[6] *Ibid.*, para. 18.

prosecution stands and the agenda upon which criminal prosecutions are brought. It is the instrument by which the Prosecution informs the Accused promptly and in detail, in a language that he or she understands of the nature and cause of the charges against him or her, and in so doing, limits the number and nature of the offences on which it has decided to base its prosecution against an Accused.[7] The Indictment should therefore clearly spell out the offences that the Prosecution has selected to prosecute.[8]

22. The Chamber has held that the basic principle emanating from both international and national criminal law on the issue of sufficiency of the Indictment is that an Indictment must embody a concise statement of the facts underpinning the specific crimes such that the Accused is provided with sufficient information to adequately and effectively prepare his defence.[9]

23. The Chamber has held further that, as a general rule, less specificity is required when pleading indictments in international criminal law than is required in national criminal law due to the fact that international criminal law involves the commission of mass crimes, reconfirming, at the same time, that the rights of the Accused must be upheld.[10]

24. Expounding the law further, the Chamber laid down these general principles:[11]

> Allegations in an Indictment are defective in form if they are not sufficiently clear and precise so as to enable the Accused to fully understand the nature of the charges against him.
>
> The fundamental question in determining whether an Indictment was pleaded with sufficient particularity is whether an Accused had enough detail to prepare his defence.
>
> The Indictment must state the material facts underpinning the charges, but need not elaborate on the evidence by which such material facts are to be proved. What is material depends on the facts of the particular case and is not decided in the abstract.

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[7] *Ibid.*, Separate Concurring Opinion of Judge Itoe, para. 25.
[8] *Admissibility of Evidence* Decision, Separate Concurring Opinion of Judge Itoe, para. 38.
[9] *Sesay* Decision, para. 6; *Kanu* Decision, para. 6; *Kondewa* Decision, para. 6; *Kamara* Decision, para. 32. See also *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber Decision (AC), 18 December 2006, para. 21 [*Bagosora* Appeal Decision], *Prosecutor v. Kupreskic, Kupreskic, Kupreskic and Santic*, IT-95-16-A, Judgement (AC), 23 October 2001, para. 114 [*Kupreskic et al.* Appeal Judgement], *Prosecutor v. Ntagerura, Bagambiki and Imanishimwe*, ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 114 [*Ntagerura et al.* Appeal Judgement].
[10] *Sesay* Decision, para. 9.
[11] *Sesay* Decision, *ibid.*, para. 6; *Kanu* Decision, paras 6 and 10; *Kamara* Decision, para. 33.

25. In addition, the Chamber has held that the degree of specificity required in an Indictment must be determined with reference to the relevant variables, which include:[12]

(a) the nature of the allegations;

(b) the nature of the specific crimes charged;

(c) the scale or magnitude on which the acts or events allegedly took place;

(d) the circumstances under which the crimes were allegedly committed;

(e) the duration of time over which the said acts or events constituting the crimes occurred;

(f) the totality of the circumstances surrounding the commission of the alleged crimes;

(g) the Indictment as a whole and not isolated and separate paragraphs.

1.3. Timing of the Objections Raised by Counsel for Fofana

26. The Chamber notes that Counsel for Fofana has raised its objections to the form of the Indictment for the first time in its Final Trial Brief. Rule 72(b)(ii) of the Rules indicates that challenges to the form of the Indictment should be raised as preliminary motions. The Chamber notes that Counsel for Kondewa raised its objections to the form of the Indictment by way of such a preliminary motion.[13] Counsel for Fofana did not raise these objections by way of such a preliminary motion, nor did it raise any objections during the trial. It has provided no explanation for its failure to object to defects in the form of the Indictment prior to its Final Trial Brief.[14]

27. Generally, if defects in the Indictment are alleged, the Prosecution has the burden of demonstrating that the Accused's ability to prepare his case has not been materially impaired. However, where the Defence has raised no objections during the course of the trial, and raises the

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[12] *Sesay* Decision, para. 8; *Kanu* Decision, para. 42; *Kondewa* Decision, para. 6. See also *Prosecutor v Kvocka*, IT 98-30/1-A, Judgement (AC), 28 February 2005, para. 28; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment (TC), 29 November 2004, para. 28 [Decision on the Consolidated Indictment]; Dissenting Opinion of Judge Thompson, para. 10.

[13] *Prosecutor v. Kondewa*, SCSL-03-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 27 November 2003 [*Kondewa* Decision].

[14] The Chamber notes that the Prosecution, in its closing arguments, objected to the timing of when these objections were raised by Counsel for Fofana. The Prosecution argued that a challenge to the Indictment should, as a general rule, be raised as a preliminary motion. It submitted that it was only in exceptional circumstances that a party should be allowed to bring such a challenge at a later stage, and Counsel for Fofana had not raised any such arguments. (Transcript of 28 November 2006, Prosecution's closing argument, pp. 46-47).

matter only in its closing brief, the burden shifts to the Defence to demonstrate that the Accused's ability to defend himself has been materially impaired,[15] unless it can give a reasonable explanation for its failure to raise the objection at trial.[16]

28. The Chamber is of the view that preliminary motions pursuant to Rule 72(b)(ii) are the principal means by which objections to the form of the Indictment should be raised, and that the Defence should be limited in raising challenges to alleged defects in the Indictment at a later stage for tactical reasons.[17] The Chamber is of the opinion, therefore, that Counsel for Fofana should have raised these arguments by way of a preliminary motion, or by raising objections during the course of the trial.

29. However, mindful of its obligations under Rule 26*bis* to ensure the integrity of the proceedings and to safeguard the rights of the Accused, the Chamber will nonetheless consider the objections raised by the Counsel for Fofana at this stage in the proceedings. It notes however, that given that Defence has provided no explanation for its failure to raise the objections at trial, the

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[15] *Bagosora* Appeal Decision, paras 45-47. In several cases dealing with the situation where an accused has raised an objection to the form of the Indictment for the first time on Appeal, the Chamber has consider what form of an objection would suffice for the burden to remain with the Prosecution. In *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 199, the Appeals Chamber held that, unless the Defence had made specific objections at the time the evidence was introduced, the burden would shift to the Defence. In *Prosecutor v. Gacumbitsi*, ICTR-01-64-A, Judgement (AC), 7 July 2006, the Chamber held that any objection during the course of the trial, including during a 98*bis* application, would be sufficient (para. 54) and in *Ntagerura et al.* Appeal Judgement, para. 138, the Chamber held that a general pre-trial objection to the form of the Indictment would suffice. *See also Prosecutor v. Simic*, IT-95-9-A , Judgement (AC), 28 November 2006, para. 25. In this case, Counsel for Fofana has raised no previous objection of these kinds.

[16] In the *Bagosora* Appeal Decision, the Appeals Chamber of the ICTR held that "[. . .] an objection raised later at trial will not automatically lead to a shift in the burden of proof; the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objections at the trial" (para. 47).

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

burden has shifted to the Defence to demonstrate that the Accused's ability to defend himself has been materially impaired by the alleged defects.

1.4. The Specific Challenges Raised by Counsel for Fofana

1.4.1. Challenges to the manner in which the Prosecution has pleaded the Article 6(1) modes of liability of committing, planning, instigating, ordering, aiding and abetting and participation in a joint criminal enterprise

1.4.1.1. Fofana's Arguments

1.4.1.1.1. The Prosecution should have pleaded the different heads of liability under Article 6(1) separately

30. Counsel for Fofana admits that in pleading liability under Article 6(1), the Prosecution has simply repeated the language of the Statute and that it is required to do more.[18] The Indictment should describe the particular course of conduct through which Fofana could be understood as having committed, planned, instigated, ordered, aided and abetted or participated in a JCE. [19] Counsel for Fofana argues that Fofana's name is not mentioned in the factual descriptions preceding each count, creating the impression that he has only been charged as a superior, which is contradicted by the repeated references to Article 6(1).[20]

1.4.1.1.2. The Prosecution should have pleaded the identities of victims and co-perpetrators

31. The Defence contends that the Indictment should also contain the identities of the victims and of the principal or co-perpetrators, which aside from Norman and Kondewa and unidentified Kamajors, it does not.[21] It submits that the Indictment is therefore defective in these respects.

1.4.1.1.3. The Prosecution should have pleaded Fofana's participation in the JCE with greater specificity

32. With regards to Fofana's alleged responsibility for having participated in a JCE, Counsel for Fofana argues that it is necessary to plead (i) the form of JCE upon which the Prosecution intends to rely; (ii) the alleged criminal purpose of the JCE; (iii) the identity of the co-perpetrators,

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[18] *Ibid.*
[19] *Ibid.*, para. 44.
[20] *Ibid.*, para. 43.
[21] *Ibid.*, para. 44.

particularly those who physically perpetrated the crime; and (iv) the nature of the Accused's participation in the enterprise.[22]

33. Counsel for Fofana also contends that the third requirement has not been met because the Indictment does not refer clearly to the identities of alleged co-participants, but rather that it refers vaguely to the three Accused and "subordinate members of the CDF." Counsel for Fofana argues further that neither the Pre-Trial Brief nor the Supplemental Pre-Trial Brief cured this defect.[23]

34. In addition, Counsel for Fofana submits that the failure to specify the identities of the other participants in the JCE, in particular those who had personally carried out the crimes, is a material defect and has resulted in the Accused not being able to answer the charges against him.[24]

1.4.1.2. Analysis

1.4.1.2.1. The Prosecution should have pleaded the different heads of liability under Article 6(1) separately

35. In the *Sesay* Decision, this Chamber held that it may in certain cases be necessary to plead the different heads of liability under Article 6(1) separately and that that the material facts to be pleaded would depend on the mode of Article 6(1) liability pleaded.[25] It held further that the degree of specificity that was required would depend on some or all of the factors which it had identified, particularly where the crimes are of an international character and dimension.[26]

36. In the *Kondewa* Decision and the *Kamara* Decision, the Chamber held that the Accused in those cases had not been prejudiced by the Prosecution's failure to plead the different modes of Article 6(1) liability separately.[27] The Chamber held further that the Prosecution possessed the discretion to plead all the different heads of responsibility under Article 6(1) and that where it chose to do so it carried the burden of proving each one at trial.[28]

37. The Chamber therefore rejects Fofana's argument that the Indictment should have pleaded the different heads of Article 6(1) liability separately.

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[22] *Ibid*, para. 212.
[23] *Ibid.*, para. 218.
[24] *Ibid.*, para. 223.
[25] *Sesay* Decision, para. 12.
[26] *Ibid.* See note *supra* 12 and the accompanying text for the list of relevant factors enunciated by the Trial Chamber.
[27] *Kondewa* Decision, para. 10; *Kamara* Decision, para. 49.
[28] *Ibid.*

1.4.1.2.2. The Prosecution should have pleaded the identities of victims and co-perpetrators

38. This Chamber has previously recognised that in the cases before it, the sheer scale of the offences may make it impossible to identify the victims.[29] The Chamber therefore rejects the argument that the Indictment is vague because it failed to identify the victims. The Chamber has also previously acknowledged that it is sufficient to plead the identities of the perpetrators by reference to their category or group.[30] The Chamber therefore also rejects the argument that it was not sufficient to refer to the co-perpetrators as Kamajors without identifying them any further.

1.4.1.2.3. The Prosecution should have pleaded Fofana's participation in the JCE with greater specificity

39. Regarding the argument that the identities of the co-participants in the JCE should have been pleaded with greater specificity and that the Indictment is vague as a result, in the *Sesay* Decision and the *Kamara* Decision, this Chamber held that identifying co-participants in the JCE by reference to their membership of particular groups, for example the Junta, the RUF and/or the AFRC was sufficient.[31] The Chamber therefore also dismisses this argument.

1.4.1.3. Conclusion

40. The Chamber therefore rejects the specific arguments raised by Counsel for Fofana in relation to Article 6(1). In addition, in the *Kondewa* Decision, the Chamber held that "given the international character and dimension of the crimes alleged in the Indictment and the totality of the circumstances surrounding the commission of the alleged crimes, gathered from a review of the Indictment, *as a whole*, the Chamber finds that the Accused is in no way prejudiced by the present state of the pleadings in relation to Article 6(1) [...]."[32]

41. The Chamber also finds similarly that the Fofana has not been prejudiced by the manner in which the Prosecution has pleaded his alleged responsibility under Article 6(1) of the Statute when considering the international character and dimension of the crime in the light of the Indictment viewed as a whole.

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[29] *Sesay* Decision, paras 7(ix) and 7(x) and 20; *Kanu* Decision, para. 24; *Kamara* Decision, paras 33(x) and 33(xi) and 46.
[30] *Sesay* Decision, para. 7(vii); *Kamara* Decision, para. 33(vii).
[31] *Sesay* Decision, *ibid*, para. 23; *Kamara* Decision, para. 23.
[32] *Ibid.*, *Kondewa* Decision

1.4.2. Challenges to the manner in which the Prosecution has pleaded the Second Accused's alleged command responsibility under Article 6(3)

1.4.2.1. Fofana's Arguments

42. Counsel for Fofana admits that the Indictment does contain references to Fofana's alleged leadership position within the CDF. Despite this however, the Prosecution has failed to plead the conduct by which Fofana may be found to have known or had reason to know that crimes were about to be committed, or had been committed, by his alleged subordinates and by which he could be considered to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[33]

1.4.2.2. Analysis

43. In the *Sesay* Decision, the Chamber held that the relevant indictments did specify the conduct by which it had been alleged that Sesay was responsible for the acts of his subordinates.[34] In the *Kamara* Decision, the Chamber held that the Indictment had pleaded with sufficient particularity the acts or crimes of subordinates for whom the Accused was alleged to be responsible.[35] In addition, the Chamber held that the Indictment had pleaded the acts by which the Accused could be considered to have known or have had reason to know about the crimes of his subordinates and the acts by means of which the Accused failed to take the necessary and reasonable measures to prevent or punish such crimes.[36] The Prosecution has pleaded Fofana's alleged superior responsibility in this case with an analogous degree of specificity to the manner in which the alleged superior responsibility of the Accused was pleaded in those cases.[37] This leads the Chamber to conclude that the Prosecution has pleaded Fofana's alleged superior responsibility with the requisite degree of specificity in the present case.

44. The Chamber is of the opinion that an analysis of the Indictment in the present case confirms this conclusion. Taking into account the material facts of this case, the Pre-trial brief, the totality of the circumstances of the case and the Indictment as a whole, the Chamber finds that

[33] Fofana Final Trial Brief, para. 45.
[34] *Sesay* Decision, para. 16.
[35] *Kamara* Decision, para. 55(iv).
[36] *Ibid.*, para. 55(v).
[37] See in this regard *Prosecutor v Norman, Fofana and Kondewa*, SCSL-2004-14-PT, Indictment, 4 February 2004, paras 14-18 and 21; *Prosecutor v Kamara*, SCSL-2003-10-I, Indictment, 26 May 2003, paras 20-21 and 26; *Prosecutor v Sesay*, SCSL-2003-05-I, Indictment, 7 March 2003, paras 20- 23.

Fofana has been provided with adequate notice of the acts by which he could be considered to have known or had reason to know about the crimes of his subordinates and the acts by which he failed to take the necessary and reasonable measures to prevent or punish such crimes.

45. The Chamber therefore rejects the arguments of Counsel for Fofana in this regard.

1.5. Conclusion

46. The Chamber accordingly concludes that Fofana's alleged criminal responsibility under Articles 6(1) and 6(3) of the Statute has been pleaded in the Indictment with the required degree of specificity. In light of this finding, there is no need for the Chamber to determine whether any defects in the Indictment have been "cured" by subsequent information.[38]

47. The Chamber therefore finds that the Defence has not satisfied its burden of demonstrating that the Accused's ability to defend himself has been materially impaired by the alleged defects, and rejects the challenges to the form of the Indictment as devoid of merit.

2. Interpretation of the Indictment

48. In its Admissibility Decision, the Trial Chamber dismissed evidence of sexual violence that the Prosecution attempted to adduce at trial in support of Counts 3-4. The Chamber held that it would be prejudicial to the Accused to allow such evidence to be admitted, as acts of sexual violence were not plead in the Indictment under these Counts, and the Accused had therefore not been put on notice that they were facing such charges.[39] In line with the reasoning in this Decision, the Chamber has considered only those acts which are listed in the Indictment in relation to Counts 3 and 4 (mental suffering). The Chamber will therefore consider only the following acts for the purposes of its legal findings on Counts 3 and 4:

(i) screening for collaborators;

(ii) unlawfully killing suspected collaborators, often in plain view of friends and relatives;

(iii) illegal arrest and unlawful imprisonment of collaborators;

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[38] See *Kupreskic et al.* Appeal Judgement, where the Chamber held at para. 114 that certain defects in the Indictment may be cured "if the Prosecution provides the Accused with timely, clear and consistent information detailing the basis underpinning the charges". See also *Kvocka et. al.* Appeal Judgement, para. 33.
[39] Admissibility Decision, para. 19(iv).

(iv) the destruction of homes and other buildings;

(v) looting and threats to unlawfully kill, destroy or loot.[40]

49. The Trial Chamber has also adopted a limited interpretation of Counts 6-7. It will consider, under those Counts, only those crimes which are charged and are found to have been committed under Counts 1-5 in the Indictment. If, for example, the Chamber has made a finding about a specific crime (i.e. a murder in Tongo) under another Count in the Indictment (i.e. as a War Crime under Count 2), it will consider this act in relation to Counts 6-7, but it will not consider other killings which may have occurred elsewhere in relation to these Counts.

III. CONTEXT

1. The Conflict Areas

50. Sierra Leone is comprised of the Western Area and three Provinces, namely, the Northern Province, Eastern Province and Southern Province. However, the areas relevant to the Indictment are Bo, Moyamba and Bonthe Districts in the Southern Province and Kenema District in the Eastern Province.

1.1. Kenema District

51. Kenema District is located in the Eastern Province of Sierra Leone.[41] The headquarter town of Kenema District is Kenema Town, which is in Nongowa Chiefdom. Kenema District is composed of 16 chiefdoms with headquarters towns; those relevant to the Indictment are listed below:[42]

Chiefdom	Headquarter Town
Dama	Giema
Gaura	Joru
Kandu Leppeama	Gbando
Koya	Baoma
Lower Bambara	Panguma

[40] Indictment, para. 26(b).
[41] Exhibit 119B.
[42] Exhibit 119B.

Niawa	Sendumei
Nongowa	Kenema
Small Bo	Blama
Tunkia	Gorahun
Dodo	Dodo

52. The towns of Tongo Field are located in Lower Bambara Chiefdom.

1.2. Bo District

53. Bo District is one of four Districts comprising the Southern Province of Sierra Leone, along with Pujehun, Bonthe and Moyamba Districts. The headquarters town of Bo District is Bo Town which is in Kakua Chiefdom. The main road in Bo District is the highway that links Freetown with Kenema Town.[43]

54. Bo District is composed of 15 Chiefdoms. Those relevant to the Indictment are listed below:[44]

Chiefdom	Headquarter Town
Baoma	Baoma
Bumpeh	Bumpeh
Jaima Bongor	Telu
Kakua	Bo
Lugbu	Sumbuya
Valunia	Mongere

55. The town of Koribondo is located in Jaima Bongor Chiefdom.

1.3. Moyamba District

56. Moyamba District is one of the four Districts in the Southern Province of Sierra Leone. The headquarter town, Moyamba Town, is located in Kaiyamba Chiefdom in the centre of Moyamba District. There are 14 chiefdoms in Moyamba District.[45] Those relevant to the Indictment are listed below:[46]

Chiefdom	Headquarter Town
Bagruwa	Sembehun
Bumphe	Rotifunk

[43] Exhibit 119A.
[44] Exhibit 119A.
[45] Exhibit 119G.
[46] Exhibit 119A.

Kagboro	Shenge
Kaiyamba	Moyamba
Ribbi	Bradford

1.4. Bonthe District

57. Bonthe District is located in the south-west of the Southern Province of Sierra Leone. It is the only District in the Southern Province that shares boundaries with the other three Districts in the Province, namely Moyamba and Bo Districts in the north and Pujehun District in the south and east. Bonthe District is bordered by the Atlantic Ocean to the west.

58. Although it is located on Sherbro Island, the Headquarter Town of Bonthe District is not part of the two chiefdoms of the island (Sittia and Dema Chiefdoms). Rather, it is part of another administrative structure, the Sherbro Rural District.

59. There are 11 chiefdoms in Bonthe District. Those relevant to the Indictment are listed below:[47]

Chiefdom	Headquarter Town
Dema	Tissana
Jong	Mattru
Kpanda Kemo	Matuo
Sittia	Yonni
Sogbini	Tihun
Yawbeko	Talia

2. Background to the Armed Conflict and the Political Context in Sierra Leone

2.1. Origin of Kamajors/Role in the Conflict

60. The term "Kamajor"[48] was originally used to refer to "a Mende"[49] male who possessed specialised knowledge of the forest and was an expert in the use of medicines associated with the bush". Kamajors were responsible "not simply for procuring meat but for protecting communities from both natural and supernatural threats said to reside beyond the village boundaries".[50] While

[47] Exhibit 119B.
[48] In the Mende language, traditional hunters are called Kamajoisia, which is the plural of Kamajoi. Transcript of 9 February 2006, Albert Joe Demby, p. 106.
[49] Mende is an ethnic group in Sierra Leone.
[50] Exhibit 165, para. C.1.b.

the Mende referred to them as Kamajors, other ethnic groups referred to them by different names.[51]

61. The genesis of the Kamajor Society[52] can be traced from the Eastern Region Defence Committee (hereinafter ERECOM), which had the late Dr. Alpha Lavalie as Chairman and Dr. Albert Joe Demby as Treasurer. The Kamajor Society at the local level was formed in 1991 and it was structured by Doctor Lavalie in 1992, immediately after the President Strasser's National Provisional Ruling Council took over.[53]

62. When the civil conflict started in 1991, the military decided to enlist Kamajors to use as vigilantes to scout the terrain.[54] Community elders had already suggested to their various chiefs that the hunters should be allowed to protect the communities against the rebels. Due to their limited numbers, arrangements were made by the community leaders and their chiefs to encourage the hunters[55] to expand their defence by increasing manpower through initiation.[56]

63. The Kamajors in their respective chiefdoms were placed at the disposal of the soldiers by their paramount chiefs and acted as allies in the defence of the area. After each deployment, the

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[51] The Kono call them Donsos, and the Korankos, Yalunkas, Madingos call them Tamaboros. In Temne land, the inland Temnes call them Kapras and the river Temnes call them Gbethis. In Freetown, they were referred to as the Organised Body of Hunting Societies (commonly known as OBHS) - which included companies of Ojeh Ogugu hunting society or Padul Ojeh. The latter are confined to the Western Area and are called Western Area hunters, which includes Freetown, Waterloo, and Lumpa. This organization in the Western Area predated the war: Transcript of 24 January 2006, Samuel Hinga Norman, pp. 62-65.

[52] It has variously being described as the Kamajor Society, the Kamajor Movement, the Kamajor Group and the Kamajor Organisation. Initially, it was known as the Kamajor Organisation and later became known as the Kamajor Society when it began to conduct initiations. According to Samuel Hinga Norman, the terms Kamajor Society, Organization and Group are all the same, and refer to "Kamajors". Transcript of 3 February 2006, Samuel Hinga Norman, pp. 36-38.

[53] Transcript of 10 March 2005, Albert J Nallo, pp. 5-8; Transcript of 9 February 2006, Albert Joe Demby, pp. 107-108; Transcript of 17 February 2005, TF2- 222, pp. 10-18 (CS). The Chamber granted protective measures to almost all Prosecution witnesses. The pseudonym assigned to each witness begins with the letters "TF2".

[54] Transcript of 9 February 2006, Albert Joe Demby, pp. 101-102; Transcript of 27 January 2006, Samuel Hinga Norman, p. 37.

[55] Transcript of 27 January 2006, Samuel Hinga Norman, pp. 40-42; The hunter system was a process by which traditional societies prepared their members for their entry into manhood or womanhood. This preparation involved training men to fight, and to be unafraid of the battlefield. The aim of this "preparation" was for traditional warfare, which was initially for the defence of people and property.

[56] Transcript of 27 January 2006, Samuel Hinga Norman, pp. 39-40. The hunters went through a process of initiation, which included military training, and was required before they could be referred to as "soldiers". The initiation would take a few days, weeks or months. The aim of the initiation was to teach recruits not to be afraid, and not to flee from the battlefield.

Kamajors would be returned to their respective communities.[57] This cooperation worked well and the soldiers trained some of the Kamajors.[58]

64. In the Southern regions, Chief Lebbie Lagbeyor of Komboya Chiefdom was the head of the Kamajors.[59] After Chief Lagbeyor's death in 1996, the paramount chiefs in the region decided to appoint Regent Chief Samuel Hinga Norman as Chairman of the Kamajors for the region.[60]

2.2. Coup

65. By November 1996, the Abidjan Peace Accord had been signed between the Government of Sierra Leone and the RUF. However, less than two months later, the war resumed. There was general dissatisfaction in the military mostly among the Soldiers, primarily based on complaints about their welfare.[61]

66. Before the coup took place in 1997, directives came from the government to the army. The army was however unwilling to implement some of these directives. These eventually led to suspicion and distrust from the army.[62]

67. In February / March 1997 the then Vice President Albert Joe Demby organized two meetings. The first was between senior military officials and ministers, while the second was between ministers and non-commissioned officers in the army. The purpose of these meetings was to determine how best to address the needs of the army. At the second meeting, it became apparent that there was dissatisfaction in the army over rice supply and distribution. While senior officers were getting from 50 to 500 bags of rice per person, junior officers were getting one bag for every two people. Demby tried to convince them that they should be paid with money instead of rice. However, all of the sections in the army present at the reception rejected this proposal.[63]

68. Later, at a meeting in late April, President Ahmad Tejan Kabbah expressed concern over the conflicting figures of whether there were 15,000 or 8,000 soldiers in the army. President

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[57] Transcript of 9 February 2006, Albert Joe Demby, p. 107.
[58] Transcript of 10 February 2006, Albert Joe Demby, pp. 43-44.
[59] Transcript of 10 March 2005, Albert J Nallo, pp. 10.
[60] Transcript of 10 March 2005, Albert J Nallo, pp. 10-11.
[61] Transcript of 10 February 2006, Albert Joe Demby, pp. 20-21.
[62] Transcript of 24 January 2006, Samuel Hinga Norman, pp. 69-71.
[63] Transcript of 10 February 2006, Albert Joe Demby, pp. 20-21; Transcript of 8 February 2006, Peter Penfold, p. 9.

Ahmad Tejan Kabbah then ordered that the rice rations be reduced given that so many were being obtained illegally. In this light, Brigadier Conteh proposed to reduce rice rations of the privates and the non-commissioned officers but not those of the senior officers. This decision contributed to the unrest in the army.[64]

69. In April 1997, on the recommendation of Norman, Parliament unanimously passed a decision legitimizing the use of arms by hunters.[65]

70. In April 1997, there was a meeting between President Kabbah, Vice President Demby, Deputy Minister of Defence Norman, Chief of Defence Staff Hassan Conteh, Chief of Army Staff Colonel Max Kanga, Chief of Navy Staff Commander Sesay and the Inspector General of Police Mr. Teddy Williams. During the meeting, Norman Accused two army officials, Hassan Conteh and Colonel Max Kanga of planning a coup, which they both denied.[66]

71. On the morning of 17 May 1997, the British High Commissioner, Peter Penfold, the American Ambassador, John Hirch and the United Nations Special Representative Ambassador, Berhanu Dinka held a meeting with President Ahmad Tejan Kabbah and warned him about a possible coup against his government. President Ahmad Tejan Kabbah told them that he already had heard these rumours and that he would be talking to the military.[67]

72. At around 5:30 a.m. on 25 May 1997, a coup took place.[68] President Ahmad Tejan Kabbah and other members of his Government were forced to leave Sierra Leone and many of them proceeded to Conakry, Guinea.[69]

2.3. Kamajors after the Coup

73. After the overthrow of Kabbah's government on the 25 May 1997, the Kamajors went underground in the bush. Some of the Kamajors based in Pujehun District, Southern Province

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[64] Transcript of 8 February 2006, Peter Penfold, pp. 7-9.
[65] Transcript of 24 January 2006, Samuel Hinga Norman, pp.75-77.
[66] Transcript of 10 February 2006, Albert Joe Demby, pp. 22-23; Transcript of 24 January 2006, Samuel Hinga Norman, pp. 80-83.
[67] Transcript of 8 February 2006, Peter Penfold, pp. 9-10.
[68] Transcript of 24 January 2006, Samuel Hinga Norman, pp. 83-84; Transcript of 8 February 2006, Peter Penfold, p.10.
[69] Transcript of 25 January 2006, Samuel Hinga Norman, pp. 14 and 20-21.

went to Bo Waterside and some stayed in Bo. Those who were in Kenema went to Tunkia Chiefdom.[70]

74. However, the Kamajors were assembled again after an announcement by Eddie Massalay on BBC rallying Kamajors, Kapras, Gbethis, Tamaboros and the Donsos to assemble at Gendema in Pujehun District and to take up arms to fight against the AFRC.[71]

75. One week after the BBC announcement by Eddie Massallay, Norman joined the Kamajors in Gendema. Eddie Massallay relinquished his position and Norman, in his capacity as Deputy Minister of Defence and Chairman of the Kamajors in the Southern Province, became the National Coordinator of the Kamajors.[72]

2.4. President Ahmad Tejan Kabbah in Exile

76. Whilst in Conakry, there were some differences between President Kabbah and Norman, especially after Norman had granted a BBC interview condemning the coup and soliciting the assistance of hunters in reinstating the government.[73]

77. To resolve these disagreements, the Ambassadors of the USA, Great Britain and Nigeria to Sierra Leone and the UNDP representative arranged a meeting with Norman and the President in Conakry.[74] At the meeting, these Ambassadors offered assistance from their respective countries only if both the President and Norman would agree to work together in the interests of Sierra Leone.[75] At the same meeting President Kabbah was told that the Chairman of ECOWAS, General President Sani Abacha of Nigeria, was prepared to support Sierra Leone and convince the rest of the ECOWAS members to assist Sierra Leone, but only he was convinced that it was the wish of the people of Sierra Leone not to accept a military government. President Ahmad Tejan

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[70] Transcript of 10 March 2005, Albert J Nallo, pp. 11-13; Transcript of 26 May 2005, TF2-079, pp. 16-17;
[71] Transcript of 10 March 2005, Albert J Nallo, pp. 11-13; Transcript of 26 May 2005, TF2-079, pp. 16-17.
[72] Transcript of 10 March 2005, Albert J Nallo, p. 14; Transcript of 17 November 2004, TF2-008, pp. 25-28.
[73] Transcript of 25 January 2006, Samuel Hinga Norman, pp.14-17; Transcript of 8 February 2006, Peter Penfold, pp. 24-25.
[74] Transcript of 8 February 2006, Peter Penfold, pp. 24-25.
[75] Transcript of 25 January 2006, Samuel Hinga Norman, pp. 21-24.

Kabbah said that the hunters of Sierra Leone were needed to support the people in rejecting the military government.[76]

78. After this meeting, Norman flew to Monrovia. On 17 June 1997, Norman was briefed on the situation of the Kamajors in Sierra Leone by Eddy Massallay.[77] A meeting was held between General Victor Malu and other senior Nigerian officers with Norman and two leaders of the Kamajors, Eddie Massallay and Bobor Tucker.[78]

79. As a result of the meeting, Norman was charged with mobilizing as much manpower as possible. He was also to be responsible for coordination, especially supply and distribution. Arms and ammunition were brought by helicopter to Gendema.[79]

2.5. Formation of CDF

80. While in exile in Conakry, President Kabbah established the CDF. The creation of the CDF stemmed from the need to coordinate the activities both within these various civil militia groups and with ECOMOG. In addition, President Kabbah, in Conakry, needed a means by which to exercise control over efforts in Sierra Leone to re-establish his government. The Chairman of the CDF was to be the Vice-President, Dr. Demby, who had remained in Lungi and who was to answer directly to President Kabbah.[80]

81. Norman was appointed by President Kabbah as the National Coordinator of the CDF.[81] As the CDF Coordinator, his role was to coordinate the activities of the civil defence/ Kamajors in supporting the military operations of ECOMOG to reinstate the government of President Kabbah. He was also responsible for obtaining assistance and logistics from ECOMOG in Liberia.[82]

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[76] Transcript of 25 January 2006, Samuel Hinga Norman, pp. 24-29.
[77] Transcript of 3 May 2006, Arthur Koroma, pp. 7-9.
[78] Transcript of 25 January 2006, Samuel Hinga Norman, pp. 34-36.
[79] Transcript of 3 May 2006, Arthur Koroma, p.14; Transcript of 25 January 2006, Samuel Hinga Norman, pp. 37-38.
[80] Transcript of 8 February 2006, Peter Penfold, pp. 25-29; Transcript of 10 February 2006, Albert Joe Demby, p. 17.
[81] Transcript of 25 January 2006, Samuel Hinga Norman, pp. 25-27; Transcript of 10 February 2006, Albert Joe Demby, pp. 17-18; Transcript of 8 February 2006, Peter Penfold, pp. 27-28.
[82] Transcript of 8 February 2006, Peter Penfold, pp. 27-29; Transcript of 25 January 2006, Samuel Hinga Norman, p. 27; Transcript of 10 February 2006, Albert Joe Demby, p. 25.

2.6. ECOMOG

82. Upon President Ahmad Tejan Kabbah's arrival in Conakry, the OAU designated ECOWAS to restore Kabbah's government. ECOWAS in turn designated ECOMOG. [83] In furtherance of the ECOWAS policy, the British Government assisted by providing equipment to ECOMOG.[84]

83. In around July 1997 at Bo Waterside, ECOMOG donated logistics to the CDF, including a truck and two Mitsubishi pick-up vans. ECOMOG also provided food and all that was needed for a guerrilla fighting force.[85]

84. In August 1997, ECOMOG provided 430 arms (G3, FN RPG and GPMG) and ammunition to the Kamajors. In addition they provided USD 10,000 for rations and miscellaneous expenses.[86]

85. On 13 August 1997, President Kabbah sent a plan to ECOMOG about action between ECOMOG and the CDF under the coordination of Norman. He also requested logistics for the planned operation.[87]

86. ECOMOG collaborated with the CDF operationally, especially in the Bo-Kenema axis. The Nigerian contingent also supplied arms and ammunition, fuel, food and cash in hard currency, as well as sharing intelligence and medical care with the CDF.[88]

IV. APPLICABLE LAW

1. Introduction

87. The applicable laws of the Special Court include the Statute, the Agreement, and the Rules. The Chamber may also consider customary international law and treaty law. Where

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[83] Transcript of 8 February 2006, Peter Penfold, p. 25.
[84] Transcript of 8 February 2006, Peter Penfold, p. 37.
[85] Transcript of 5 May 2006, Mustapha Lumeh, p. 71; Transcript of 3 May 2006, Arthur Koroma, pp. 15-16.
[86] Exhibit 157.
[87] Exhibit 158.
[88] Exhibit 159.

appropriate, the Chamber may also look to national law, including the laws of the Republic of Sierra Leone.[89]

88. In order to respect the principle of *nullum crimen sine lege*, the Chamber is bound to consider whether the crimes charged in the Indictment were crimes under customary international law at the time they were committed.[90] In determining the state of customary international law, the Chamber has found it useful to consider decisions of the International Criminal Tribunals for Rwanda and the former Yugoslavia. Such decisions have persuasive value, although modifications and adaptations may be required to take into account the particular circumstances of the Special Court.[91]

2. Jurisdiction

89. The Special Court is empowered to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[92] Thus, the Chamber has well-defined jurisdictional limitations within which to try cases, notably:

i. Persons who bear the greatest responsibility;

ii. For serious violations of international humanitarian law and Sierra Leonean law;

iii. Committed in the territory of Sierra Leone;

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[89] Provided that they are not inconsistent with the Statute, Agreement, Rules, customary international law and internationally recognised norms and standards. *See* Rule 72 *bis*.

[90] See the Chamber's ruling on this point: *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment (TC), 1 April 2004, para. 24 [*Kamara* Decision on Form of Indictment]. *See also* Report of the Secretary-General on the Establishment of the Special Court, S/2000/915, 4 October 2000, paras 9 and 12 [Report of the Secretary-General on the Establishment of the Special Court], which provided that the "applicable law [of the Special Court] includes international as well as Sierra Leonean law" and in relation to the crimes under international law specifically noted that: "[i]n recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have the character of customary international law at the time of the alleged commission of the crime."

[91] *Kamara Decision* on Form of Indictment, paras 24-25.

[92] Statute, *Article* 1(1).

iv. Since 30 November 1996;

90. All crimes charged are alleged to have been committed in the territory of Sierra Leone since 30 November 1996, therefore the limitations listed in (iii) and (iv) need not be discussed here further.

2.1. Greatest Responsibility

91. In its Decision on Personal Jurisdiction, the Chamber considered the requirement in Article 1(1) that the Accused be "persons who bear the greatest responsibility". The Chamber clarified that this requirement was not solely a matter of prosecutorial discretion, but was also a jurisdictional limitation upon the Court, the determination of which is a judicial function.[93] The proper exercise of this judicial authority is made by the Confirming Judge who should, in reviewing the Indictment and accompanying material, apply the test of "whether sufficient information [exists] to provide reasonable grounds for believing that the Accused is a person who bears the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law".[94]

92. The Chamber recalled that the Indictment was reviewed by Judge Bankole Thompson, who, in confirming the Indictment, found that sufficient information did indeed exist.[95] The Chamber therefore found that it had personal jurisdiction to try the Fofana as one of the persons who bear the greatest responsibility for the crimes committed in Sierra Leone during the relevant period.[96] Whether or not *in actuality* the Accused could be said to bear the greatest responsibility can only be determined by the Chamber after considering all the evidence presented during trial.[97] However, the Chamber is of the view that given its finding that this is a jurisdictional issue only, the issue of whether or not the Accused in fact bear the greatest responsibility is not a material element that needs to be proved beyond a reasonable doubt.

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[93] Prosecutor v. *Norman, Fofana and Kondewa*, SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on behalf of Accused Fofana, 3 March 2004, para. 27 [Decision on Personal Jurisdiction].
[94] Ibid., para. 38.
[95] *Ibid.*, paras 41 *and* 47.
[96] *Ibid.*, para. 48.
[97] *Ibid.*, para. 44.

2.2. Serious Violations of International Humanitarian Law and Sierra Leonean Law

93. No crimes under Sierra Leonean law are charged in the Indictment.[98] The Chamber will therefore consider only serious violations of international humanitarian law.[99]

94. The Chamber must satisfy itself that the crimes charged in the Indictment amount to violations of customary international humanitarian law which would have attracted individual criminal responsibility at the time of the alleged violation. Additionally, in order for the Accused to incur liability under the Statute, any violation must be a serious violation. Such is the case where a rule protecting "important values" is breached, resulting in "grave consequences" for the victim.[100]

2.2.1. Customary Status of Crimes under International Humanitarian Law

95. The Chamber notes that the Appeals Chamber has held that the core provisions in Article 3 of the Statute formed part of customary international law at the relevant time,[101] and that "[a]ny argument that these norms do not entail individual criminal responsibility has been put to rest in ICTY and ICTR jurisprudence."[102] Furthermore, the Appeals Chamber has also held that

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[98] The Statute grants the Special Court power to try certain violations of Sierra Leonean criminal law (Statute, Article 5). None are alleged.

[99] Crimes against Humanity (Statute, Article 2); Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Statute, Article 3); and Other Serious Violations of International Humanitarian Law (Statute, Article 4);

[100] Prosecutor *v. Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC), 2 October 1995, para. 94 [*Tadic* Appeal Decision on Jurisdiction]. The Appeals Chamber held "[t]hus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law' although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory" (para. 94).

[101] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict (AC), 25 May 2004, paras 21-24 [Appeal Decision on Nature of Armed Conflict], citing *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement (TC), 2 September 1998, paras 601-617 [*Akayesu* Trial Judgement]; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, (1986) ICJ Reports 14, paras 218-219, 255; *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Judgement, IT-96-21-T, Judgement (TC), 16 November 1998, para. 298 [*Celebici* Trial Judgement]; *Tadic* Appeal Decision on Jurisdiction, paras 102, 137; *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Judgement, IT-96-21-A, Judgement (AC), 20 February 2001, paras 143, 147, 150 [*Celebici* Appeal Judgement].

[102] Appeal Decision on Nature of Armed Conflict, para. 24, citing *Tadic* Appeal Decision on Jurisdiction, paras 128-136, *Celebici* Trial Judgement, para. 307; *Celebici* Appeal Judgement, paras 159-174. *See also* Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, para. 14: "Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the

customary international law "represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws".[103]

96. The Chamber concurs with the reasoning of the ICTY Appeals Chamber in *Tadic* on the issue of the evolution of Common Article 3 and Additional Protocol II from conventional into customary international law, where it held:

> Since the 1930s, the aforementioned distinction [between belligerency and insurgency] has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict [...]
>
> The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions [...], but also applies [...] to the core of Additional Protocol II of 1977.
>
> Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.
>
> [C]ustomary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict [...][104]

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establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused."

[103] *Prosecutor v. Norman, Kondewa and Fofana*, SCSL-04-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) (AC), para. 22 [Appeal Decision on Child Recruitment], citing Jean-Marie Henckaerts, *Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law* in Relevance of International Humanitarian Law to Non-state Actors, Proceedings of the Brugge Colloquium, 25-26 October 2002, which states "[I]t is well-settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties".

[104] *Tadic* Appeal Decision on Jurisdiction, paras 97-98, 117, 134. *See also* para. 126: "[t]he emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this

97. The Chamber is also mindful of the finding of the ICTR Trial Chamber in *Akayesu* which relied on *Tadic* and examined specifically Article 4(2) of Additional Protocol II. It held that:

> [I]t should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II. All of the guarantees an enumerated in Article 4 reaffirm and supplement Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law. [...]
>
> The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 – which contains fundamental prohibitions as a humanitarian minimum of protection for war victims – and Article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.[105]

98. The Chamber notes that the Appeals Chamber has examined the issue of the nature of the conflict with regard to the applicability of Common Article 3 and Additional Protocol II. The Appeals Chamber of the SCSL held that:

> Any obstacle to the application of Article 3 to crimes committed during an international armed conflict is nevertheless overcome if the actual violations included in Article 3, sub-paragraphs (a) to (h), are found to be part of customary international law applicable in an identical fashion to both internal and international conflicts.[106]

99. To this end, the Appeals Chamber has held that:

> It has been observed that 'even though the rules applicable in internal armed conflict still lag behind the law that applies in international conflict, the establishment and work of the *ad hoc* Tribunals has

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extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."

[105] *Akayesu* Trial Judgement, paras 610, 616 [footnotes omitted]. A series of other ICTR Trial Chamber decisions have followed this finding, although some have chosen to address the crime only on the basis of treaty law. See, for example: *Prosecutor v. Musema*, ICTR-96-13-T, Judgement and Sentence (TC), 27 January 2000, para. 240 [*Musema* Trial Judgement]; and *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, para. 353 [*Semanza* Trial Judgement].

[106] Appeal Decision on Nature of Armed Conflict, para. 21.

> significantly contributed to diminishing the relevance of the distinction between the two types of conflict'. The distinction [between the rules applicable in internal armed conflict and the rules applicable in international conflict] is no longer of great relevance in relation to the crimes articulated in Article 3 of the Statute *as these crimes are prohibited in all conflicts*. Crimes during internal armed conflict form part of the broader category of crimes during international armed conflict.[107]

100. In this connection, the ICTY Appeals Chamber has stated that "[i]t is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader".[108] Article 4 of Additional Protocol II provides for "fundamental guarantees" of humane treatment and the Chamber is satisfied that this provision is also meant to provide for minimal guarantees in armed conflict. As a result, the Chamber finds that the reasoning of the ICTY Appeals Chamber is also applicable as it pertains to the provisions of Additional Protocol II relevant to this case.

101. The Chamber notes that the list of crimes against humanity in Article 2 of the Statute follows the enumeration included in the Statutes of the ICTY and ICTR, which were patterned on Article 6 of the Nürnberg Charter. [109]

102. In this regard the Chamber recalls the ICTY Trial Chamber Decision in *Tadic* which states:

> The customary status of the Nürnberg Charter, and thus the attribution of individual criminal responsibility for the commission of crimes against humanity, was expressly noted by the Secretary-General [in his Report on the Establishment of the ICTY]. Additional codifications of international law have also confirmed the customary law status of the prohibition of

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[107] *Ibid.*, para. 25, citing Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, and Introduction to International Humanitarian Law* (Geneva: ICRC, 2001), p. 188; Rodney Dixon and Karim Khan, eds., *Archbold: International Criminal Courts, Practice, Procedure and Evidence* (London: Sweet & Maxwell, 2003), paras 11-26 [*Archbold: International Criminal Courts*].

[108] *Celebici* Appeal Judgement, para 150. *See also* Appeal Decision on Child Recruitment, para. 28 (footnotes omitted): "[t]he Special Court Statute, just like the ICTR Statute before it, draws on Part II of Additional Protocol II entitled 'Humane Treatment' and its fundamental guarantees, as well as Common Article 3 to the Geneva Conventions in specifying the crimes falling within its jurisdiction. All the fundamental guarantees share a similar character. In recognizing them as fundamental, the international community set a benchmark for the minimum standards for the conduct of armed conflict".

[109] Report of the Secretary-General on the Establishment of the Special Court, para. 14. However, unlike Article 3 of the ICTR Statute and Article 5 of the ICTY Statute, Article 2 of the Statute of the Special Court incorporates sexual slavery, enforced prostitution, forced pregnancy and any other forms of sexual violence in addition to rape in paragraph (g) and includes ethnic grounds as grounds for persecution in paragraph (h).

> crimes against humanity, as well as two of its most egregious manifestations: genocide and apartheid.
>
> Thus, since the Nürnberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned. It would seem that this finding is implicit in *the [Tadic] Appeals Chamber Decision* [on Jurisdiction] which found that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict". If customary international law is determinative of what type of conflict is required in order to constitute a crime against humanity, the prohibition against crimes against humanity is necessarily part of customary international law [...][110]

103. The Chamber concurs with this position, and finds that each of the Crimes against Humanity as charged in the Indictment was a crime under customary international law at the time of its alleged commission.

104. The Chamber notes that the Accused are charged with only one count of an "other serious violation of international humanitarian law", namely enlisting children under the age of 15 into armed forces or groups or using them to Participate Actively in Hostilities, pursuant to Article 4(c) of the Statute. The Appeals Chamber has already dismissed a Defence Motion objecting to the jurisdiction of the court on crimes under Article 4(c) of the Statute. It found that that the recruitment of child soldiers below the age of 15 did in fact constitute a crime under customary international law which entailed individual criminal responsibility prior to the time frame of the Indictment.[111]

105. Whilst Sierra Leone has ratified both the Geneva Conventions and the Additional Protocols, there is no national implementing legislation.[112] However, since the Chamber has found that these offences constituted crimes under customary international law at the time of their alleged commission, the Chamber need not further consider the issue.

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[110] *Prosecutor v.* Tadic, IT-94-1-T, Judgement (TC), 7 May 1997 [*Tadic* Trial Judgement], paras 622-623 [original footnotes omitted].

[111] Appeal Decision on Child Recruitment, para. 53. See also paras 184-197.

[112] Sierra Leone acceded to the Geneva Conventions of 12 August 1949 on 10 June 1965 and to Additional Protocol II on 21 October 1986. The *Sierra Leone Act No 26 of 1959* entitled "*An Ordinance to enable effect to be given to certain International Conventions done at Geneva on the 12th day of August, 1949 and for purposes connected therewith*" is the only related legislation. However, this legislation predates Sierra Leone's accession to the Conventions and Additional Protocol II.

2.2.2. "Serious" Violations

106. The Chamber is also satisfied that all of the crimes charged in the Indictment qualify as *serious* violations of international humanitarian law. Crimes against Humanity and Violations of Common Article 3 to the Geneva Conventions and of Article 4(2) of Additional Protocol II ("War Crimes") have all been held to be serious violations of international humanitarian law during a period prior to the temporal jurisdiction of this Tribunal.[113] The crimes listed under Article 4 of the Statute (Other Serious Violations of International Humanitarian Law) are serious violations of customary international humanitarian law by definition.

107. Whether or not the acts alleged against the Accused would, if proven, amount to the crimes charged, is a matter for legal findings.

3. Law on the Crimes Charged

3.1. Introduction

108. The Indictment charges the Accused with several counts each of Crimes against Humanity and of War Crimes and with one count of Other Serious Violations of International Humanitarian Law. Proof of these crimes requires proof both of the underlying offence (such as Murder) and of the general requirements of the category of crimes of which the underlying offence forms part.

3.2. General Requirements

109. The Chamber notes that the term "Accused" used in the enumeration of the general requirements for each category of crimes under the Statute, was chosen for purposes of convenience and should be understood in a broad sense. The general requirements, including the

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[113] Regarding Crimes Against Humanity, see *Tadic* Trial Judgement, paras 622-623 (referring therein to *Tadic* Appeal Decision on Jurisdiction, para. 141); regarding Crimes under Common Article 3 to the Geneva Conventions, see *Prosecutor v. Blaskic*, IT-95-14-T, Judgement (TC), 3 March 2000, para. 176 [*Blaskic* Trial Judgement]. The ICTR Trial Chambers have made it clear that violations of Article 4(2) of Additional Protocol II are, by definition of their nature, violations of fundamental humanitarian guarantees and are thus serious: *Akayesu* Trial Judgement, para. 616; *Semanza* Trial Judgement, paras 370-371; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement (TC), 21 May 1999, para. 184 [*Kayishema and Ruzindana* Trial Judgement]; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgement and Sentence (TC), 6 December 1999, para. 106 [*Rutaganda* Trial Judgement].

appropriate mental elements therein, apply, *mutatis mutandis*, to the direct perpetrator of the crime as well as all those whose criminal responsibility may fall under Article 6(1) and (3) of the Statute.

3.2.1. Article 2: Crimes against Humanity

110. The general requirements which must be proved to show the commission of a Crime against Humanity are as follows:

(i) There must be an attack;

(ii) The attack must be widespread or systematic;

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

(iv) The acts of the Accused must be part of the attack; and

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

3.2.1.1. Attack

111. The Chamber adopts the definition of attack as meaning a "campaign, operation or course of conduct"[114] and notes that, in the context of a Crime against Humanity, the said term is not limited to the use of armed force, but also encompasses any mistreatment of the civilian population.[115] The Chamber further notes that an attack can precede, outlast, or continue during an armed conflict. Thus it may, but need not, be part of an armed conflict.[116] Therefore, in the Chamber's opinion, the distinction between an attack and an armed conflict reflects the position in customary international law that crimes against humanity may be committed in peace time and independent of an armed conflict.[117]

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[114] *Prosecutor v. Brima, Kanu and Kamara*, SCSL-03-16-T, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 (TC), 31 March 2006, para. 42 [*Brima et al.* Rule 98 Decision]. *See also Prosecutor v. Naletilic and Martinovic*, IT-03-66-T, Judgement (TC), 31 March 2003, para. 233 [*Naletilic and Martinovic* Trial Judgement]; *Akayesu* Trial Judgement, para. 581.

[115] *Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23 & 23/1-A, Judgement (AC), 12 June 2002, para. 86 [*Kunarac et al.* Appeal Judgement]; *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, Judgement (TC), 30 November 2005, para. 182 [*Limaj et al.* Trial Judgement]; *Prosecutor v. Vasiljevic*, IT-98-32, Judgment (TC), 29 November 2002, paras 29-30 [*Vasiljevic* Trial Judgement].

[116] *Kunarac et al.* Appeal Judgement, para. 86; *Limaj et al.* Trial Judgement, para. 182; *Vasiljevic* Trial Judgment, para. 30; *Naletilic and Martinovic* Trial Judgement, IT-03-66-T, para. 233.

[117] *Prosecutor v. Tadic*, IT-94-1-A, Judgement (AC), 15 July 1999, para. 251 [*Tadic* Appeal Judgment]; *Tadic* Appeal Decision on Jurisdiction, para. 141; *Kunarac et al.* Appeal Judgment, para. 86. *See also Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Motions for Judgment of Acquittal pursuant to Rule 98 (TC), 21 October 2005,

3.2.1.2. Widespread and systematic

112. In the Chamber's view, the requirement that the attack must be either widespread *or* systematic is disjunctive and not cumulative.[118] The Chamber is of the opinion that the term "widespread" refers to the large-scale nature of the attack and the number of victims, while the term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[119] The Chamber adopts the view that "[p]atterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence"[120] and further subscribes to the interpretation of the ICTY Appeals Chamber in the *Kunarac et al.* case which stated that:

> [T]he assessment of what constitutes a 'widespread' or 'systematic' attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. A Trial Chamber must therefore 'first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic'. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis this civilian population.[121]

113. The existence of a policy or plan, or that the crimes were supported by a policy or plan to carry them out, may be evidentially relevant to establish the widespread or systematic nature of the attack and that it was directed against a civilian population, but it is not a separate legal requirement of crimes against humanity.[122] Furthermore, the Chamber is of the view that

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para. 66 [Rule 98 Decision]: "[c]rimes against humanity may be committed in times of peace or times of armed conflict".

[118] *Limaj et al.* Trial Judgement, para. 183; *Kunarac et al.* Appeal Judgement, para. 97; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 93 [*Kordic and Cerkez* Appeal Judgement]. The Chamber notes that, according to the ICTY Appeals Chamber, once it is convinced that either requirement is met, a Chamber is not obliged to consider whether the alternative qualifier is also satisfied: *Kunarac et al.* Appeal Judgement, para. 93.

[119] Rule 98 Decision, para. 56. *See also Kunarac et al.* Appeal Judgement, para. 94; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 101 [*Blaskic* Appeal Judgement]; *Limaj et al.* Trial Judgement, para. 183.

[120] Rule 98 Decision, para. 56, citing, *inter alia*, *Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23 & 23/1-A, Judgement (TC), 22 February 2001, para. 429 [*Kunarac et al.* Trial Judgement]; *Kunarac et al.* Appeal Judgment, para. 94.

[121] *Kunarac et al.* Appeal Judgement, para. 95 (original footnotes omitted).

[122] *Kunarac et al.* Appeal Judgement, para. 98: "neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan' [...] It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or

customary international law does not presuppose a discriminatory or persecutory intent for all crimes against humanity.[123]

3.2.1.3. Directed against any civilian population

114. The attack must be directed against any civilian population. This requires that the civilian population "be the primary rather than an incidental target of the attack".[124] Accordingly, the Chamber recalls its adoption of the interpretation of the ICTY Appeals Chamber in *Kunarac et al.* which stated that:

> [T]he expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity the civilian population is the primary object of the attack'. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.[125]

115. The Chamber concurs with the view of the ICTY Appeals Chamber in the *Blaskic* case that there is an absolute prohibition against targeting civilians in customary international law.[126]

116. The term "civilian population" must be interpreted broadly.[127] The Chamber is satisfied that customary international law, determined by reference to the laws of armed conflict, has

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plan, but it may be possible to prove these things by reference to other matters." *Blaskic* Appeal Judgement, paras 100, 120. While there had previously been some uncertainty in the jurisprudence of the ICTY and ICTR, this was resolved by the *Kunarac et al.* Appeal Judgement.

[123] *Tadic* Appeal Judgement, para. 292. *See also Prosecutor v. Akayesu*, ICTR-96-4-A, Judgement (AC), 1 June 2001, para. 465 [*Akayesu* Appeal Judgement]: "[i]n the case at bench, the Tribunal was conferred jurisdiction over crimes against humanity (as they are known in customary international law), but solely when committed as part of a widespread or systematic attack against any civilian population on certain discriminatory grounds; the crime in question is the one that falls within such a scope. Indeed, this narrows the scope of the jurisdiction, which introduces no additional element in the legal ingredients of the crime as these are known in customary international law".

[124] Rule 98 Decision, para. 57, citing, *inter alia*, *Kunarac et al.* Appeal Judgment, para. 92.

[125] Rule 98 Decision, para. 57, citing *Kunarac et al.* Appeal Judgment, para. 91.

[126] *Blaskic* Appeal Judgement, para. 109.

established that the civilian population includes all of those persons who are not members of the armed forces or otherwise recognised as combatants.[128]

117. In order for a population to be considered "civilian", it must be predominantly civilian in nature; the presence of certain non-civilians in their midst does not change the character of the population.[129] In determining whether the presence of soldiers within a civilian population deprives it of its civilian character, the Chamber must examine, among other factors, the number of soldiers as well as their status.[130] The presence of members of resistance armed groups or former combatants who have laid down their arms, within a civilian population, does not alter its civilian nature.[131]

118. The Chamber recognises that the protection of Article 2 of the Statute extends to "any" civilian population including, if a state takes part in the attack, that state's own population[132] and that there is no requirement that the victims are linked to any particular side.[133] It is also our view that the existence of an attack upon one side's civilian population would not justify or cancel out that side's attack upon the other's civilian population.[134]

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[127] *Prosecutor v. Jelisic*, IT-95-10-T, Judgement (TC), 14 December 1999, para. 54 [*Jelisic* Trial Judgement]; *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, IT-95-16-T, Judgement (TC), 14 January 2000, para. 547 [*Kupreskic* Trial Judgement].

[128] *Blaskic* Appeal Judgement, paras 110-113.

[129] Rule 98 Decision, para. 59, citing *Tadic* Trial Judgement, para. 638; *Kayishema and Ruzindana* Trial Judgement, para. 128; *See also Limaj et al.* Trial Judgement, para. 186; *Jelisic* Trial Judgement, para. 54; *Kupreskic et al.* Trial Judgement, paras 547-549.

[130] *Blaskic* Appeal Judgement, para. 115; *Limaj et al.* Trial Judgement, para. 186.

[131] *Blaskic* Appeal Judgement, para. 113, which states that "Common Article 3 of the Geneva Conventions provides that '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.' That these persons are protected in armed conflicts reflects a principle of customary international law". *See also* Rule 98 Decision, para. 58.

[132] *Kunarac et al.* Trial Judgement, para. 423; *Tadic* Trial Judgement, para. 635.

[133] *Limaj et al.* Trial Judgement, para. 186; *Kunarac et al.* Trial Judgement, para. 423; *Vasiljevic* Trial Judgement, para. 33.

[134] *Kunarac et al.* Appeal Judgement para. 87: "when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population. The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity."

119. The Chamber concurs with the interpretation that "the use of the word 'population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack".[135] However, the targeting of a select group of civilians – for example, the targeted killing of a number of political opponents – cannot satisfy the requirements of Article 2.[136] It would therefore be sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[137]

3.2.1.4. The acts of the Accused must be part of the attack

120. The requirement that the acts of the Accused must be part of the attack is satisfied by the "commission of an act which, by its nature or consequences, is objectively part of the attack."[138] This is established if the alleged crimes were related to the attack on a civilian population, but need not have been committed in the midst of that attack.[139] A crime which is committed before or after the main attack or away from it could still, if sufficiently connected, be part of that attack. However, it must not be an isolated act. "A crime would be regarded as an 'isolated act' when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack."[140] Only the attack, not the individual acts, must be widespread or systematic.[141]

3.2.1.5. Mens rea

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[135] *Kunarac et al.* Appeal Judgement, para. 90; *Limaj et al.* Trial Judgement, para. 187; *Blaskic* Appeal Judgement, para. 105; *Prosecutor v. Galic*, IT-98-29-T, Judgment (TC), 5 December 2003, para. 143 [*Galic* Trial Judgement].

[136] *Limaj et al.* Trial Judgement, para. 187.

[137] *Kunarac et al.* Appeal Judgement para. 90.

[138] *Kunarac et al.* Appeal Judgement, para. 99; *Kunarac et al.* Trial Judgement, para. 434. *See also Limaj et al.* Trial Judgement, para. 188; *Tadic* Appeal Judgement, para. 271.

[139] *Kunarac et al.* Appeal Judgement para. 100; *Limaj et al.* Trial Judgement, para. 189.

[140] *Kunarac et al.* Appeal Judgement, para. 100 referring to *Kupreskic* Trial Judgement, para. 550, *Tadic* Trial Judgement, para. 649 and *Prosecutor v. Mrksic, Radic and Sljivancanin*, IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (TC), 3 April 1996, para. 30 [*Mrksic* Rule 61 Decision]; see also *Limaj et al.* Trial Judgement, para. 189; *Tadic* Appeal Judgement, para. 271; *Kunarac et al.* Appeal Judgement, para. 100.

[141] *Limaj et al.* Trial Judgement, para. 189; *Tadic* Appeal Judgement, para. 251; *Kordic and Cerkez* Appeal Judgement, para. 94.

121. The last general requirement for establishing a Crime against Humanity is the knowledge that there is an attack on the civilian population and that the acts of the Accused are part thereof.[142] The Prosecution must show that the Accused either knew or had reason to know that his acts comprised part of the attack. Evidence of knowledge depends on the facts of a particular case. The manner in which this legal element may be proved may therefore vary from case to case.[143] The Accused must have known or had reason to know that there is an attack on the civilian population and that his acts comprised part of that attack. The Accused needs to understand the overall context in which his acts took place,[144] but need not know the details of the attack or share the purpose or goal behind the attack.[145] The motives for the Accused's participation in the attack are irrelevant.[146] It is also irrelevant whether the Accused intended his acts to be directed against the targeted population or merely against his victim, as it is the attack, and not the acts of the Accused, which must be directed against the targeted population.[147]

3.2.2. Article 3: War Crimes

122. The general requirements which must be proved to show the commission of War Crimes pursuant to Article 3 of the Statute are as follows:

> (i) An armed conflict existed at the time of the alleged violation of Common Article 3 or Additional Protocol II;
>
> (ii) There existed a nexus between the alleged violation and the armed conflict;[148]
>
> (iii) The victim was a person not taking direct part in the hostilities at the time of the alleged violation;[149] and

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[142] *See Kunarac et al.* Appeal Judgement, para. 102; *Kunarac et al.* Trial Judgement, para. 434.
[143] *Blaskic* Appeal Judgement, para. 126.
[144] *Limaj et al.* Judgement, para. 190; *Kordic and Cerkez* Trial Judgement, para. 185.
[145] *Kunarac et al.* Appeal Judgement, paras 102-103.
[146] *Limaj et al.* Trial Judgement, para. 190; *Tadic* Appeal Judgement, paras 248, 252; *Kunarac et al.* Appeal Judgement, para. 103: the Appeals Chamber considered that "[a]t most, evidence that [acts were committed] for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack."
[147] *Kunarac et al.* Appeal Judgement, para. 103; *Limaj et al.* Trial Judgement, para. 190.
[148] *See* Appeal Decision on Nature of Armed Conflict, para. 25, citing *Archbold: International Criminal Courts*, para. 11-27.
[149] *See Prosecutor v. Naletilic and Martinovic*, IT-98-34-A, Judgement (AC), 3 May 2006, para. 116 [*Naletilic and Martinovic* Appeal Judgement]: "[t]he fact that something is a jurisdictional prerequisite does not mean that it does not at the same time constitute an element of a crime".

(iv) The Accused knew or had reason to know that the person was not taking a direct part in the hostilities at the time of the act or omission.

3.2.2.1. The Existence of an Armed Conflict

123. The Chamber concludes that the application of Article 3 of the Statute requires that the alleged acts of the Accused be committed in the course of an armed conflict, and "it is immaterial whether the conflict is internal or international in nature."[150]

124. Relying on the ICTY Appeals Chamber in the *Tadic* case, and as it held in the CDF Rule 98 Decision, the Chamber rules that under Common Article 3, "an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state".[151] Therefore, the criteria for establishing the existence of an armed conflict are the intensity of the conflict and the organisation of the parties.[152] These criteria are used "solely for the purpose, *as a minimum*, of distinguishing an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law".[153]

125. The Chamber notes that Additional Protocol II contains a stricter threshold for the establishment of an armed conflict than Common Article 3. Article 1 of the Protocol provides in relevant parts:

> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

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[150] Rule 98 Decision, para. 68, citing *Kunarac et al.* Appeal Judgement, paras 57-58; *Celebici* Trial Judgement, para. 303; *Celebici* Appeal Judgement, paras 149, 150; *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgement (TC), 10 December 1998, para. 132 [*Furundzija* Trial Judgement]; *Blaskic* Trial Judgement, para. 161; *Prosecutor v. Brdjanin*, IT-99-36-T, Judgement (TC), 1 September 2004, para. 127 [*Brdjanin* Trial Judgement].

[151] Rule 98 Decision, para. 69, citing *Tadic* Appeal Decision on Jurisdiction, para. 70.

[152] *Limaj et al.* Trial Judgement, paras 84, 89; *Tadic* Trial Judgement, para. 562.

[153] *Tadic* Trial Judgement, para. 562 [emphasis added]; *Limaj et al.* Trial Judgement, paras 84, 89.

> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

126. This Chamber is therefore satisfied that where the Prosecution has alleged an offence under Additional Protocol II, then the following conditions must be met in order to establish the element of armed conflict:

> (i) An armed conflict took place in the territory of Sierra Leone between its armed forces and dissident armed forces or other organized armed groups; and
>
> The dissident armed forces or other organized groups:
>
> (ii) Were under responsible command;
>
> (iii) Were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
>
> (iv) Were able to implement Additional Protocol II.[154]

127. The first requirement, that there be an armed conflict, has already been discussed in the context of the Common Article 3 test of armed conflict. The Chamber notes, therefore, that any armed conflict satisfying the higher threshold of the Additional Protocol II test would automatically constitute an armed conflict under Common Article 3. The term "armed forces" is to be defined broadly.[155] The armed forces or groups must be under responsible command which implies a degree of organisation to enable them "to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority."[156] They must also be able to control a part of the territory of the country enabling them "to carry out sustained and concerted military operations" and to implement Additional Protocol II.

128. The Chamber also finds that international humanitarian law applies from the beginning of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of

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[154] *Akayesu* Trial Judgement, para. 523; *See also Rutaganda* Trial Judgement, para. 95; *Musema* Trial Judgement, para. 254.
[155] *Akayesu* Trial Judgement, para. 625.
[156] *Ibid.*, para. 626.

peace is reached, or, in the case of internal conflicts, a peaceful settlement is achieved.[157] Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[158]

3.2.2.2. Nexus

129. What distinguishes a war crime from a purely domestic crime "is that a war crime is shaped by or dependant upon the environment – the armed conflict – in which it is committed".[159] As to the precise nature of the nexus between the alleged violation and the armed conflict, the Chamber, consistent with the decisions of the Appeals Chambers of the ICTY and of the ICTR on this issue, rules that the nexus requirement is fulfilled if the alleged violation was closely related to the armed conflict.[160] When the violation alleged has not occurred at a time and place in which fighting was actually taking place, the ICTY Appeals Chamber has held that "it would be sufficient [...] that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict".[161] The crime 'need not have been planned or supported by some form of policy' and the armed conflict 'need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in

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[157] The term "hostilities" is not synonymous with the term "armed conflict." An armed conflict may continue to exist after the hostilities in an area have ceased. (*Prosecutor v. Halilovic*, IT-01-48-T, Judgement (TC), 16 November 2005, para. 32 and footnoted references [*Halilovic* Trial Judgement]).

[158] *Tadic* Appeal Decision on Jurisdiction, para. 70; *Halilovic* Trial Judgement, para. 26. *See also Kunarac et al.* Appeal Judgement, para. 64: "[f]urthermore, the Appeals Chamber considers that the Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties."

[159] *Kunarac et al.* Appeal Judgement, para. 58; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement (AC), 26 May 2003, paras 569-570 [*Rutaganda* Appeal Judgement].

[160] *Rutaganda* Appeal Judgement, paras 569-570, citing *Kunarac et al.* Appeal Judgement, paras 58-59. In paragraph 25 of the Appeal Decision on Nature of Armed Conflict, the Appeals Chamber stated that: "[i]n respect of Article 3, therefore, the Court need only be satisfied that an armed conflict existed and that the alleged violations were related to the armed conflict". In the view of the Chamber, the requirement that the alleged violations were *closely* related to the armed conflict reflects the jurisprudence of the *Ad Hoc* Tribunals: see *Tadic* Appeal Decision on Jurisdiction, paras 67, 70; *Kunarac et al.* Appeal Judgement, paras 55, 57-59. In addition, in the view of the Chamber, the stricter requirement better characterizes the distinguishing features of a war crime.

[161] *Halilovic* Trial Judgement, para. 29, citing *Kunarac et al.* Appeal Judgement, para. 57; *Tadic* Appeal Decision on Jurisdiction, para. 70.

which it was committed or the purpose for which it was committed'.[162] The nexus requirement is satisfied where the Accused acted in furtherance of or under the guise of the armed conflict.[163] The expression "under the guise of the armed conflict" does not mean simply "at the same time as an armed conflict" and/or "in any circumstances created in part by the armed conflict".[164]

130. The Chamber subscribes to the jurisprudence of the *Ad Hoc* Tribunals which outlined the following factors in determining whether or not the act in question was sufficiently related to the armed conflict, *inter alia*: "the fact that the [Accused] is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the [Accused's] official duties".[165] It has also been stated that the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one.[166]

3.2.2.3. Protected Persons

131. Finally, Common Article 3 applies to "[p]ersons 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" and Additional Protocol II applies to "all persons who do not take a direct part or who have ceased to take part in hostilities". The Chamber holds that these phrases are so similar that, therefore, they may be treated as synonymous and be categorised as "all persons not taking direct part in the hostilities at the time of the alleged violation".[167]

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[162] *Halilovic* Trial Judgement, para. 29, citing *Kunarac et al.* Appeal Judgement, para. 58.
[163] *Kunarac et al.* Appeal Judgement, para. 58; *Rutaganda* Appeal Judgement, para. 570.
[164] *Rutaganda* Appeal Judgement, para. 570.
[165] *Kunarac et al.* Appeal Judgement, para. 59. The nexus does not imply the requirement that the perpetrator be related or linked to one of the parties to the conflict: *Akayesu* Appeal Judgement, paras 443-444.
[166] *Rutaganda* Appeal Judgement, para. 570.
[167] Rule 98 Decision, para. 70, citing Article 3(1) of Geneva Conventions of 1949; *Akayesu* Trial Judgement, para. 629: "Common Article 3 is for the protection of 'persons taking no active part in the hostilities' (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, 'all persons who do not take a direct part or who have ceased to take part in hostilities'. These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous". *See* Article 4(1) of Additional Protocol II: "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities". *See also* Article 4(2) of Additional Protocol II: "the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever". *See also Semanza*

132. The Chamber notes that the test applied by the ICTY Trial Chamber in the *Tadic* case was whether, at the time of the alleged offence, the alleged victim of the said offence was directly taking part in the hostilities, "being those hostilities in the context of which the alleged offences are said to have been committed".[168] If the answer to that question is negative, the victim will be a person protected by Common Article 3 and Additional Protocol II.[169] Thus, for the purpose of establishing the commission of an offence under Article 3, the Prosecution must also prove that the victim was a person not taking a direct part in the hostilities at the time the offence was committed.[170]

133. Adopting the position taken by the Trial Chamber in the ICTY *Tadic* Trial Judgement, this Chamber holds that it does not serve any useful purpose to embark upon an exhaustive definition of the categories of persons who may be said not to be taking a direct part in hostilities.

134. Article 13(3) of Additional Protocol II provides that civilians are immune from attack for as long as they do not take a direct part in hostilities.[171] The question of whether civilians have participated directly in hostilities has to be decided on the specific facts of each case and there must be a sufficient causal relationship between the act of participation and its immediate consequences.[172] The Chamber takes the view that the direct participation should be understood to mean "acts which by their nature and purpose, are intended to cause actual harm to the enemy personnel and material."[173]

Trial Judgement, para. 365 and footnoted references: "[i]n essence, both Common Article 3 and Additional Protocol II protect persons not taking an active part in the hostilities."

[168] *See Halilovic* Trial Judgement, para. 33, citing *Tadic* Trial Judgement, para. 615, referring to persons protected by Common Article 3. *See also Semanza* Trial Judgement, para. 366.

[169] *Semanza* Trial Judgement, para. 366; *Halilovic* Trial Judgement, para. 33; *Tadic* Trial Judgement, para. 615.

[170] *Semanza* Trial Judgement, para. 365. *See also Halilovic* Trial Judgement, para. 32.

[171] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3, Article 13(3) (entered into force 7 December 1978; accession by Sierra Leone on 21 October 1986) [Additional Protocol II]. See also *Juan Carlos Abella* (Argentina), Inter-American Commission on Human Rights, Case 11.137, Report, 18 November 1997, paras 177-178, 189, 328 [*La Tablada* Case].

[172] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva: ICRC, 1987), Article 13 of Additional Protocol II, para. 4787 [ICRC Commentary on Additional Protocols].

[173] Third Report on the Human Rights Situation in Colombia, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999 (Third Report on the Human Rights Situation in Colombia), paras 53 and 56, citing Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), p. 516: "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."

135. The Chamber is therefore of the opinion that persons Accused of "collaborating" with the government or armed forces would only become legitimate military targets if they were taking direct part in the hostilities. Indirectly supporting or failing to resist an attacking force is insufficient to constitute such participation. In addition, even if such civilians could be considered to have taken a direct part in hostilities, they would only have qualified as legitimate military targets during the period of their direct participation.[174] If there is any doubt as to whether an individual is a civilian he should be presumed to be a civilian and cannot be attacked merely because he appears dubious.[175] When it comes to establishing civilian status for the purposes of a criminal prosecution, however, it is the Prosecution which bears the onus of doing so.[176]

136. The armed law enforcement agencies of a State are generally mandated only to protect and maintain the internal order of the State. Thus, as a general presumption and in the execution of their typical law enforcement duties, such forces are considered to be civilians for the purposes of international humanitarian law.[177] This same presumption will not exist for military police or gendarmerie who operate under the control of the military.[178] The Chamber notes that, in accordance with the provisions of the *Constitution* of 1991[179] and the *The Police Act*[180] of 1964, the Sierra Leone Police operates under the control of the Minister of Internal Affairs, a civilian authority.

137. The Chamber is of the opinion that the status of police officers in a time of armed conflict must be determined in light of an analysis of the particular facts of a case. A civilian police force, for example, may be incorporated into the armed forces, which will cause the police to be classified

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[174] *La Tablada* Case, paras 177-178, 189 and 328.

[175] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 609, Article 77(2) (entered into force 7 December 1978; accession by Sierra Leone on 21 October 1986), Article 50(1) [Additional Protocol I]; 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), p. 24.

[176] *Blaskic* Appeal Judgement, para. 111.

[177] ICRC Commentary on Additional Protocols, Article 43 of Additional Protocol I, paras 1682-1683 and Article 59 of Additional Protocol I, paras 2278-2282.

[178] *See, inter alia, Prosecutor v. Oric*, IT-03-68-T, Judgement (TC), 30 June 2006, paras 185-188 and 215-221 [*Oric* Trial Judgement]; *Akayesu* Trial Judgement, para. 68; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement (TC), 7 June 2001, para. 177 [*Bagilishema* Trial Judgement]; *Blaskic* Trial Judgement, paras 455-456.

[179] *The Constitution of Sierra Leone*, 1991 (Act No. 6 of 1991), art. 48(4), Part II [Sierra Leone Constitution].

[180] *An Act to Consolidate and Amend the Law Relating to the Organisation, Discipline, Powers and Duties of the Police Force*, (4 June 1964) No. 7, A65, s. 2 [*The Police Act*].

as combatants instead of civilians. This incorporation may occur *de lege*, by way of a formal Act, or *de facto*.

3.2.3. Article 4: Other Serious Violations of International Humanitarian Law

138. The general requirements which must be proved to establish the commission of an Other Serious Violation of International Humanitarian Law are as follows:

(i) An armed conflict existed at the time of the alleged offence; and

(ii) There existed a nexus between the alleged offence and the armed conflict.

139. These two elements have already been discussed in detail above in relation to the general requirements under Article 3 of the Statute.

140. The Indictment charges the Accused with crimes under Article 4(c) of the Statute (Enlistment of Child Soldiers). As the prohibition against enlistment of child soldiers has its foundation in Article 4(3)(c) of Additional Protocol II,[181] the Chamber holds that the definition of armed conflict under Additional Protocol II should be applied as outlined above.

3.3. Specific Offences

3.3.1. Murder (Count 1)

141. The Indictment charges the Accused with murder as a Crime against Humanity. The Indictment also charges the Accused in Count 2 with murder as a serious violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute. The Counts relate to the Accused's alleged responsibility for the unlawful killings by Kamajors resulting in the death of civilians, captured enemy combatants and Sierra Leone Police Officers at or near a series of locations in Kenema District, Bo District, Moyamba District and Bonthe District, between about October 1997 and December 1999.[182] While Counts 1 and 2 reference the same underlying facts, the law applicable to murder as a Crime against Humanity

[181] Article 4(3)(c) of Additional Protocol II provides that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities". While Article 4 of the Statute uses slightly different terminology, the Chamber is satisfied that this is the origin of the prohibition.
[182] Indictment, para. 25.

and as a serious violation of Common Article 3 and Additional Protocol II will be dealt with separately.

142. The crime of murder as a Crime against Humanity is a well-recognised and defined crime under customary international law that entails individual criminal responsibility.[183]

143. The constitutive elements of the offence of murder as a Crime against Humanity are:

(i) The death of one or more persons;
(ii) The death of the person(s) was caused by an act or omission of the Accused; and
(iii) The Accused intended to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.[184]

144. In this regard, the Chamber is of the opinion that proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. The fact of a victim's death can be inferred circumstantially from all the evidence presented to the Trial Chamber.[185] In addition, the Prosecution must prove that the victim or victims died as a result of acts or omissions of the Accused.[186]

3.3.2. Violence to Life, Health and Physical or Mental Well-Being of Persons, in Particular Murder (Count 2)

145. The Chamber notes that the Indictment charges the Accused under Count 2 with: "violence to life, health and physical or mental well-being of persons, in particular murder", as a serious violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute. The Chamber has analysed this offence as murder, since the

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[183] The crime of murder is criminalised in every domestic system and it has been prosecuted as a crime against humanity on numerous occasions before the *Ad Hoc* Tribunals with general agreement as to the elements: see, for example, *Kordic and Cerkez* Appeal Judgement, para. 113; *Vasiljevic* Trial Judgement, para. 205; *Prosecutor v. Krstic*, IT-98-33-T, Judgement (TC), 2 August 2001, para. 485 [*Krstic* Trial Judgement]; *Blaskic* Trial Judgement, para. 217; *Akayesu* Trial Judgement, para. 588; *Rutaganda* Trial Judgement, para. 79.

[184] *Sesay et al.* Rule 98 Oral Decision; Rule 98 Decision, para. 72; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Judgement (TC), 26 February 2001, para. 236 [*Kordic and Cerkez* Trial Judgement].

[185] *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement (TC), 15 March 2002, para. 326 [*Krnojelac* Trial Judgement]. See also *Tadic* Trial Judgement, para. 240.

[186] *Kvocka et. al.* Appeal Judgement, para. 540, citing *Krnojelac* Trial Judgement, paras 326-327; *Tadic* Trial Judgement, para. 240.

category of 'violence to life and person' does not exist as an independent offence in customary international law.[187]

146. The Chamber takes the view that the elements of the offence of murder as a serious violation of Common Article 3 and Additional Protocol II are the same as for murder as a Crime against Humanity,[188] except for the general elements outlined in the Introduction for crimes of this type. The constitutive elements are as follows:

(i) The death of one or more persons;

(ii) The death of the person(s) was caused by an act or omission of the Accused; and

(iii) The Accused intended to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.

147. The status of the victim as a person not taking direct part in the hostilities is an element of the offence.[189] This implies that the Prosecution must show that the *mens rea* of the Accused encompassed the fact that the victim was a person not taking direct part in the hostilities.[190]

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[187] *Vasiljevic* Trial Judgement, para. 195: "Both 'life' and the 'person' are protected in various ways by international humanitarian law. Some infringements upon each of these protected interests are regarded as criminal under customary international law. It is so, for instance, of murder, cruel treatment, and torture. But not every violation of those protected interests has been criminalised, and those that have, as with the three offences just mentioned, have usually been given a definition so that both the individual who commits the act and the court called upon to judge his conduct are able to determine the nature and consequences of his acts. [...]". *See* also para. 203: "In the absence of any clear indication in the practice of states as to what the definition of the offence of "violence to life and person" identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law." [footnote omitted].

[188] *Kvocka et al.* Appeal Judgement, para. 261; *Celebici* Appeal Judgement, para. 423. *Vasiljevic* Trial Judgement, para. 205; *Krnojelac* Trial Judgement, para. 323: "[i]t is clear from the jurisprudence of the Tribunal that the elements of the offence of murder are the same under both Article 3 and Article 5 of the Statute. These elements have been expressed slightly differently, but those slight variations in expression have not changed the essential elements of the offence". *See also Kordic and Cerkez* Trial Judgement, para. 236. Of course, in order to be characterised as a crime against humanity, a "murder" must have been committed as part of a widespread or systematic attack against a civilian population: *Kordic and Cerkez* Trial Judgement, para. 236; *See also Kvocka et al.* Appeal Judgement, para. 261.

[189] *Naletilic and Martinovic* Appeal Judgement, para. 116: "[t]he fact that something is a jurisdictional prerequisite does not mean that it does not at the same time constitute an element of a crime".

[190] *See Halilovic* Trial Judgement, para. 36, concerning murder pursuant to Common Article 3. *See* also *Halilovic* Trial Judgement, fn 83: "[i]n this respect, the Trial Chamber notes that the knowledge of the status of the victims is one aspect of the *mens rea* that needs to be proven for the conviction on any Article 3 charge based on Common Article 3".

3.3.3. Other Inhumane Acts (Count 3)

148. The Indictment in Count 3 charges the Accused with "other inhumane acts" as a Crime against Humanity under Article 2 of the Statute. This Count relates to the Accused's alleged responsibility for the intentional infliction of serious bodily harm and serious physical suffering between about 1 November 1997 and 30 April 1998, and for the intentional infliction, of serious mental harm and serious mental suffering between November 1997 and December 1999, on civilians by the CDF, largely Kamajors, in a series of locations in Kenema District, Bo District, Moyamba District and Bonthe District. Furthermore, the Indictment in Count 4 charges the Accused with cruel treatment as a serious violation of Common Article 3 and of Additional Protocol II pursuant to Article 3(a) of the Statute for the same underlying facts as other inhumane acts in Count 3.

149. The Chamber is of the opinion that the crime of other inhumane acts is a residual category for serious acts which are not otherwise enumerated in Article 2 but which nevertheless require proof of the same general requirements.[191]

150. In the Chamber's view, the constitutive elements of the crime of other inhumane acts are:

> (i) The occurrence of an act or omission of similar seriousness to the other acts enumerated in Article 2 of the Statute;
> (ii) The act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity;
> (iii) The Accused, at the time of the act or omission, had the intention to commit the inhumane act or acted in the reasonable knowledge that this would likely occur.[192]

151. In order to assess the seriousness of an act or omission, consideration must be given to all the factual circumstances of the case which may include the nature of the act or omission, the

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[191] *Vasiljevic* Trial Judgement, para. 234; *Galic* Trial Judgement, para. 152; *Krnojelac* Trial Judgement, para. 130; *Prosecutor v. Kvocka, Kos, Radic, Zigic and Prcac*, IT-98-30/1-T, Judgement (TC), 2 November 2001, para. 206 [*Kvocka et al.* Trial Judgement].
[192] *Sesay et al.* Rule 98 Oral Decision; Rule 98 Decision, para. 93; *Vasiljevic* Trial Judgement, para. 234; *Galic* Trial Judgement, para. 152.

context in which it occurred, the personal circumstances including the age, gender and health of the victim, and the physical, mental and moral effects of the act or omission on the victim.[193]

152. The Chamber takes the view that the intention to inflict other inhumane acts is satisfied where the Accused, at the time of the act or omission, had the intention to inflict serious mental or physical suffering or injury or to commit a serious attack on the human dignity of the victim, or where he or she had reasonable knowledge that the act or omission would likely cause serious physical or mental suffering or injury or a serious attack on human dignity.[194]

153. The Chamber recognises that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends. The Chamber is also of the opinion that the Accused may be held liable for causing serious mental harm to a third party who witnesses acts committed against others only where, at the time of the act, the Accused had the intention to inflict serious mental suffering on the third party, or where the Accused had reasonable knowledge that his act would likely cause serious mental suffering on the third party. To this effect, the Chamber endorses the view of the ICTR Trial Chamber in *Kayishema and Ruzindana* that "if at the time of the act, the Accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party."[195]

3.3.4. Violence to Life, Health and Physical or Mental Well-Being of Persons, in Particular Cruel Treatment (Count 4)

154. The Indictment charges the Accused under Count 4 with cruel treatment as a serious violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute. Under this Count, the Accused are charged with "violence to life, health and physical or mental well-being of persons, in particular cruel treatment". The

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[193] *Galic* Trial Judgement, para. 153; *Vasiljevic* Trial Judgement, para. 234.
[194] Rule 98 Decision, para. 94; *see also Krnojelac* Trial Judgment, para. 132; *Vasiljevic* Trial Judgement, para. 236; *Kayishema and Ruzindana* Trial Judgment, para. 153.
[195] *Kayishema and Ruzindana* Trial Judgement, para. 153.

Chamber has analysed this offence as cruel treatment, since the category of "violence to life and person" does not exist as an independent offence in customary international law.[196]

155. The Chamber endorses the jurisprudence of the ICTY in which cruel treatment, punishable under Article 3 of the ICTY Statute as a violation of the laws or customs of war, including violations of Common Article 3 and other inhumane acts, punishable under Article 5 of the ICTY Statute as a Crime against Humanity, were said to require proof of the same elements.[197] Thus, the Chamber concludes that elements of the offence of cruel treatment as a serious violation of Common Article 3 and Additional Protocol II are the same as of other inhumane acts as a Crime against Humanity, except that the victim of cruel treatment must be a person not taking direct part in the hostilities,[198] and the Accused must have known or had reason to know that the victim was a person not taking direct part in the hostilities.

156. The Chamber considers that the constitutive elements of cruel treatment are as follows:[199]

(i) The occurrence of an act or omission;

(ii) The act or omission caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity, to a person not taking direct part in the hostilities; and

(iii) The Accused intended to cause serious mental or physical suffering or injury or a serious attack on human dignity or acted in the reasonable knowledge that this would likely occur.[200]

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[196] *See Vasiljevic* Trial Judgement, paras 195, 203, quoted above in the context of murder as a serious violation of Common Article 3 and Additional Protocol II under Count 2.

[197] *See Krnojelac* Trial Judgement, para. 130: "[i]t is apparent from the jurisprudence of the [ICTY] that cruel treatment, inhuman treatment and inhumane acts basically require proof of the same elements. Each offence functions as a residual category for serious charges under Articles 2, 3, and 5 respectively which are not otherwise enumerated under those Articles. The definitions adopted for each offence in the decisions of the [ICTY] vary only by the expressions used." [footnote omitted] *See also Jelisic* Trial Judgement, para. 52 and *Prosecutor v. Simic, Tadic and Zaric*, IT-95-9-T, Judgement (TC), 17 October 2003, para. 74 [*Simic et al.* Trial Judgement].

[198] Rule 98 Decision, para. 95.

[199] In the Rule 98 Decision, the Chamber relied on the *Celebici* decision of the ICTY and adopted the following definition: "an intentional act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. We take the view that such acts may include treatment that does not meet the purposive requirement for the offence of torture." (para. 95).

[200] *See also Limaj et al.* Trial Judgement, para. 231; *Prosecutor v. Strugar*, IT-01-42-T, Judgement (TC), 31 January 2005 [*Strugar* Trial Judgement], para. 261. *See also Simic et al.* Trial Judgement, para. 76.

3.3.5. Pillage (Count 5)

157. The Chamber notes that the Indictment under Count 5 charges the Accused with pillage as a serious violation of Common Article 3 and of Additional Protocol II pursuant to Article 3(f) of the Statute. This Count relates to the Accused's alleged responsibility for the unlawful taking and destruction by burning of civilian owned property between about 1 November 1997 and 1 April 1998 at a series of locations in Kenema District, Bo District, Moyamba District and Bonthe District.

158. As previously observed by the Chamber, the terms "pillage", "plunder" and "spoliation" have been varyingly used to describe the unlawful appropriation of private or public property during armed conflict.[201] The Chamber notes that the ICTR and SCSL Statutes include the crime of pillage, while the ICTY Statute lists the crime of plunder.[202]

159. The Chamber is satisfied that Article 3(f) of the Statute contains a general prohibition against pillage which covers both organised pillage and isolated acts of individuals. Further, the prohibition extends to all types of property, including State-owned and private property.[203]

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[201] Rule 98 Decision, para. 102 referring to *Celebici* Trial Judgement, para. 591. *See also Naletilic and Martinovic* Trial Judgement, para. 612, fn 1499; *Blaskic* Appeal Judgement, paras 147-148. *See also Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-T, Decision on Motion for Acquittal (TC), 3 July 2000, fn 34 [*Kunarac et al.* Rule 98*bis* Decision] which stated that the ICRC Dictionary defines the two terms (plunder and pillage) together. These decisions relied on, *inter alia*: Article 6(b) of the Nürnberg Charter ("Plunder of public or private property" was one of the war crimes coming within the jurisdiction of the Tribunal); Article 2(1)(b) of Control Council Law No. 10 ("Plunder of public or private property" was listed as one of the war crimes); Article 47 of The Hague Regulations ("Pillage is formally prohibited"); Article 28 of the Hague Regulations of 1907 ("Pillage is formally forbidden"); Article 33(2) of the Geneva Convention IV ("Pillage is prohibited"); Article 5(b) of the Tokyo Charter (which merely referred to "violations of the laws or customs of war") and Article 8(2)(a)(iv) and Article 8(2)(b)(xvi) of the ICC Statute (Articles 8(2)(a)(iv) lists "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" under the grave breaches of the Geneva Conventions and Article 8(2)(b)(xvi) lists "Pillaging a town or place, even when taken by assault" under "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law").

[202] Article 4(f) of the ICTR Statute lists pillage among the serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of Additional Protocol II thereto of 8 June 197; Article 3(e) of the ICTY Statute lists plunder of public or private property among violations of the laws or customs of war; Although the official English versions of the ICTY and ICTR Statutes use the terms plunder and pillage, respectively, the official French versions of both the ICTY and ICTR Statutes use the term 'le pillage."

[203] Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Convention IV (Geneva: ICRC, 1960), pp. 226-227 [ICRC Commentary on Geneva Convention IV]; *Celebici* Trial Judgement, para. 590; ICRC Commentary on Additional Protocols, para. 4542: "[t]he prohibition of pillage is based on Article 33, paragraph 2, of the Fourth Convention. It covers both organized pillage and pillage resulting from isolated acts of indiscipline. It is prohibited to issue order whereby pillage is authorized. The prohibition has a general tenor and applies to all categories of property, both State-owned and private."

160. The Chamber notes that the ICTY Trial Chamber in the *Celebici* case found that this prohibition "extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory".[204] In light of the foregoing, the Chamber is of the view that the inclusion of the requirement that the appropriation be for private or personal use is an unwarranted restriction on the application of the offence of pillage.[205]

161. In addition, under international law, pillage does not require the appropriation to be extensive or to involve a large economic value.[206] Whether pillage committed on a small scale fulfils the jurisdictional requirement of the Special Court that the violation be *serious*, is, however, a different question.[207]

162. The seriousness of the violation must be ascertained on a case by case basis, taking into consideration the specific circumstances in each instance.[208] Thus, the Chamber concurs with the ICTY Trial Chamber in *Naletilic and Martinovic* that pillage:

> may be a serious violation not only when one victim suffers severe economic consequences because of the appropriation, but also, for example, when property is appropriated from a large number of people. In the latter case, the gravity of the crime stems from the reiteration of the acts and from their overall impact.[209]

163. The *mens rea* for pillage is satisfied where it is established that the Accused intended to appropriate the property by depriving the owner of it.[210]

164. The Chamber has already noted that the offence of pillage is provided for in Article 4(2) of Additional Protocol II.

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[204] *Celebici* Trial Judgement, para. 590. *See also* Rule 98 Decision, para. 102.
[205] Rule 98 Decision, para. 102, where the Chamber found that one of the elements of pillage was that: "[t]he perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use". This element was not included in the *Sesay et al.* Oral Rule 98 Decision.
[206] *Naletilic and Martinovic* Trial Judgement, para. 612.
[207] *Tadic* Appeal Decision on Jurisdiction, para. 94: In order for a violation to be serious, it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim.
[208] *Naletilic and Martinovic* Trial Judgement, para. 614 (in the context of 'plunder of public or private property' as a violation of the laws or customs of war pursuant to Article 3(e) of the ICTY Statute).
[209] *Naletilic and Martinovic* Trial Judgement, para. 614 (in the context of determining whether the violation – plunder in this case - is a serious violation pursuant to Article 1 of the ICTY Statute).
[210] *Kordic and Cerkez* Appeal Judgement, para. 84. *See also Naletilic and Martinovic* Trial Judgement, para. 612, fn. 1498; *Celebici* Trial Judgement, para. 590.

165. The Chamber finds that the elements of pillage are as follows:

(i) The Accused unlawfully appropriated the property;[211]

(ii) The appropriation was without the consent of the owner; and

(iii) The Accused intended to unlawfully appropriate the property.

166. Although Count 5 of the Indictment is entitled: "Looting and burning," the offence charged under this count is pillage, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute. The acts of burning, as charged in some paragraphs in Count 5 of the Indictment, will not be considered for the purposes of the offence of pillage as charged under Count 5. According to the definition of pillage as stated above, an essential element of pillage is the unlawful appropriation of property. Black's Law Dictionary defines appropriation as "the exercise of control over property; a taking or possession."[212] In the act of looting, the offender unlawfully appropriates the property. Destruction of property by burning, however, does not, by itself, necessarily involve any unlawful appropriation. Thus, while both looting and burning deprive the owner of their property, the two actions are distinct since the latter crime may be committed without appropriation *per se*. As a result, the Chamber is of the view that the destruction by burning of property does not constitute pillage. The Chamber will not, therefore, take into account acts of destruction by burning for the purposes of determining the individual criminal responsibility of the Accused under Count 5.

3.3.6. Acts of Terrorism (Count 6)

167. The Indictment charges the Accused under Count 6 with acts of terrorism as a serious violation of Common Article 3 and of Additional Protocol II pursuant to Article 3(d) of the Statute. This Count relates to the Accused's alleged responsibility for the crimes charged in Counts 1 through 5, including threats to kill, destroy and loot, as part of a campaign to terrorise the civilian populations in those areas.

168. The prohibition against acts of terrorism in Article 3(d) of the Statute is taken from Article 4(2)(d) of Additional Protocol II which prohibits acts of terrorism as a violation of the

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[211] *Kordic and Cerkez* Appeal Judgement, paras 79 and 84.

[212] Black's Law Dictionary, 7th Edition, (St. Paul: West Group, 1999) [Black's Law Dictionary], "appropriation".