Chapter Four: Legal Analysis of the Conflict in Sierra Leone

1. INTRODUCTION

NPWJ's Outreach and Conflict Mapping Programs focused on the crimes within the jurisdiction of the Special Court for Sierra Leone so that the people of Sierra Leone might understand more about how the Court could assist in the accountability process, by gaining an understanding of the types of crimes on which the Court would be able to adjudicate. This section is, in many ways, intended to be an extension of those programs. This analysis therefore focuses on the crimes within the jurisdiction of the Court and related matters, including the principle of individual criminal responsibility. As such, it is not intended to be an academic analysis of all aspects of the crimes within the Court's jurisdiction. Rather, it is aimed at filling out the factual analysis contained in this report by outlining the crimes and their elements in more detail than was possible during the training seminars and demonstrating how this law might apply to the facts uncovered from the information gathered during the Conflict Mapping Program.

This section will first give an overview of what is international humanitarian law (IHL), including its sources and key provisions. It will go on to examine whether or not there was an armed conflict in Sierra Leone and, if so, its duration and its nature. The section will go on to discuss the legal aspects of each category of crimes over which the Court has jurisdiction, in the order in which the crimes are listed within the Statute of the Special Court. The discussion of each category of crimes will conclude with an identification of what crimes were committed during the conflict, by applying the law as discussed to the facts as described in the factual analysis. The section will conclude with a discussion of the personal and temporal jurisdiction of the Court, namely the people over whom the Court has jurisdiction and when the acts had to be allegedly committed in order to be considered by the Court, finishing with a brief discussion of the principles of individual criminal responsibility, both direct and command responsibility.

It should be noted that in some circumstances the same set of facts can be characterised as a crime against humanity, a war crime and a crime under Sierra Leone law. For example, the rape of a 10 year-old can be the crime against humanity of rape, where committed as part of a widespread or systematic attack; the war crime of rape, when committed during an armed conflict; and a crime under Sierra Leone law, namely a violation of section 6 of the Prevention of Cruelty to Children Act 1926. In such a situation, this report considers that the legal basis for each of those crimes has been made out and reflects this in the list of crimes committed, although an accused may be charged with only one of those crimes. Conversely, there are some crimes that do not have counterparts and, as such, some facts only fit into one category of crimes over which the Court has jurisdiction. These include the crime against humanity of enslavement, the war

International humanitarian law, also known as "the laws of war", is the area of international law that regulates conduct during an armed conflict.

crime of pillage, the serious violation of international humanitarian law of the conscription of children and the crime under Sierra Leone law of the burning of public buildings.

For reasons of clarity and manageability, the crimes are also identified according to the fighting faction identified as being responsible. However, it must be emphasised that responsibility for these crimes cannot be extended to every member of the fighting faction: the relevant provisions of international humanitarian law are premised on the basis of individual criminal responsibility, both direct and command responsibility. As such, liability will only fall on the people who devised and implemented the policies to commit such crimes, i.e. the leaders and planners, the commanders responsible for the individuals who committed the crimes and each individual who committed that crime.

Responsibility for these crimes cannot be extended to every member of the fighting faction: liability rests with people who devised and implemented the policies to commit such crimes, the commanders responsible for the individuals who committed the crimes and each individual who committed that crime.

As mentioned, the facts as described in this report are the result of the collection of information from key persons throughout Sierra Leone; that is, persons who by virtue of their profession or their position in society were in a position to have an overview of the conflict in particular in their area. This information has been used to compile the factual analysis section of this report, on which the following legal analysis is based. Every care has been taken to establish the veracity of the information gathered in Sierra Leone, including cross-checking and, to an extent, supplementing this information with open source and other materials.[1] Details that could not be verified or information on events coming from only one source were generally not included in the final report. However, it must be borne in mind that this information has not been tested to the level required for sustaining a conviction, for example through cross-examination in court, nor have the alleged perpetrators had the opportunity to tell their side of the story or answer the allegations made in this report. Therefore, although every care has been taken to ensure the correctness of the facts contained in this report, these limitations must be borne in mind when considering the following analysis.

2. APPLICABLE LAW

2.(a) Introduction to international humanitarian law (IHL)

International humanitarian law, also known as "the laws of war", is the area of international law that regulates conduct during an armed conflict. In the modern era, the development of the rules of IHL began in the late nineteenth and early twentieth century in an attempt to mitigate some of the consequences of the conflicts prevalent at the time. In essence, they attempted to regulate wars to prevent unnecessary suffering being inflicted upon combatants and civilians. Their development attempted to set specific rules concerning what were and were not legitimate targets in conflict and refined the distinction between combatants and civilians. The protection of persons not taking an active part in hostilities became a basic principle of IHL.

Traditionally, there have been two branches of international humanitarian law: the "Hague law", concerned with means and methods of warfare, and the "Geneva law", concerned with the more humanitarian issues, including the protection of civilians; this distinction is largely illusory, as there is a wide degree of overlap between the two.[2] The prohibition on intentionally directing attacks against civilians, which is applicable irrespective of the nature of the armed conflict, is one of the cornerstones of international humanitarian law. This prohibition derives from one of the key tenets of international humanitarian law, that a distinction be made between legitimate and illegitimate military targets.

Accordingly, some targets will always be illegitimate, such as undefended towns and objects employed solely for the provision of humanitarian assistance, while some targets will always be legitimate, such as military installations. Additionally, some methods of attack, such as carpet bombing, and some weapons, such as indiscriminate weapons, may not be employed. A key feature underpinning international humanitarian law is the principle of proportionality, according to which the military advantage expected to be gained in any attack must be balanced against the likely incidental or collateral damage to non-military persons and objects. Therefore, in all cases where either the target, methods, or weapons are not prohibited, the military commander must apply the principle of proportionality to weigh whether or not a particular target can be attacked in a particular way using particular weapons.

Currently, the Geneva Conventions of 12 August 1949, and the two Additional Protocols of 8 June 1977,[3] form the heart of international humanitarian treaty law and are its most frequently cited sources.[4] The 1949 Geneva Conventions, much but not all of which are now considered to be customary international law, were aimed at both codifying customary international humanitarian law as it had emerged following World War II and at developing law to address the experiences of World War II.[5] These four Conventions concern the treatment of:

(I) sick and wounded combatants on land;
(II) sick and wounded combatants at sea;
(III) prisoners of war (POWs); and
(IV) civilians.

The Geneva Conventions marked the first inclusion in a humanitarian law treaty of a set of war crimes explicitly attracting individual criminal responsibility – the "grave breaches" of the conventions.[6] Each of the four Conventions contains its own list of grave breaches, expanded by Additional Protocol I of 1977. Grave breaches are crimes considered so serious that all States Parties are required to prosecute persons accused of such offences, or to hand them over to other States Parties willing to conduct such prosecutions. However, the grave breaches provisions only apply in international armed conflicts as opposed to non-international armed conflicts[7] and then only to acts against persons protected by each of the Geneva Conventions ("protected persons"), namely sick and wounded combatants on land and sea, POWs and civilians who find themselves in the hands of a State of which they are not nationals. The primary responsibility for enforcement of these grave breaches provisions, and indeed of international humanitarian law in general, rests with States themselves.

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International humanitarian law has two main sources: treaty law and customary international law; it can also be found in general principles of law and in judicial decisions and the writings of eminent jurists,[8] as subsidiary means that are of particular importance in this field. Treaty law refers to the obligations binding on a State because they are a party to a treaty containing those obligations. Customary international law, on the other hand, refers to those obligations that are binding on States irrespective of whether they are contained in a treaty or not. The existence of customary international law is determined by reference to State practice and *opinio juris*.[9] State practice is the actions undertaken by States and *opinio juris* means that States undertake such actions because they believe they are under a legal obligation to do so.[10] State practice in the absence of *opinio juris,* no matter how uniform or consistent, will therefore not amount to customary international law; one example is the cancellation of diplomats' parking tickets, which is a standard

practice but does not give rise to legal consequences if it is not followed. Official statements and declarations can provide evidence of *opinio juris* and can even amount to State practice in some circumstances, depending on their context. Generally, customary international law is binding on all States. However, it is not binding on a persistent objector, namely a State that has consistently made its objections manifest during the emergence of a new rule,[11] except if it amounts to *jus cogens,* which is a peremptory norm of international law from which no derogation is permissible and, as such, is binding on all States.[12] It should be borne in mind that customary international law is a continually evolving process and what was customary international law 20 years ago will not necessarily be customary international law today.

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While international humanitarian law regulates the conduct of war, not all of its provisions attract individual criminal responsibility. For example, the violation of the provision stating the prisoners of war shall be permitted to use tobacco[13] is not considered to be a crime. However, there are a wide number of provisions, based both in treaty and customary law, that do attract individual criminal responsibility, so that people who violate the obligations in those provisions can be held accountable in a court of law. These provisions are considered to form part of a discrete area of law called international criminal law.[14] Many of these provisions will be discussed in the following sections on the crimes over which the Special Court has jurisdiction. The classic modern examples of the enforcement of international humanitarian law are found in two military tribunal established after World War II: the Nuremberg Tribunal, established to try the 22 major Nazi war criminals and the International Military Tribunal for the Far East, established to try major war criminals in the Pacific. The Nuremberg Charter, which gave the Tribunal jurisdiction over war crimes, crimes against humanity and crimes against peace,[15] is often cited as the basis for the development of international criminal law in the latter half of the twentieth century. In fact, "[t]he 1949 Geneva Conventions were prepared in the wake of the Nuremberg trials and were heavily influenced by them".[16]

2.(b) The International Criminal Court (ICC), including the Elements of Crimes

The preliminary and traditional problem with international humanitarian law is its lack of enforceability. Despite the advances made after World War II by the International Military Tribunals and several notable cases tried in domestic courts, including Eichmann, Barbie and Trouvier, it is only with the advent of the ad hoc tribunals and subsequent developments through the 1990s and beyond that this historic lack of enforceability is being addressed.[17]

In the early 1990s, the international community took steps to enforce international humanitarian law in the former Yugoslavia and in Rwanda, through the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) in 1993 and 1994 respectively. These Tribunals were established by Security Council Resolutions adopted under Chapter VII of the Charter of the United Nations.[18] Crimes within their jurisdictions include genocide, crimes against humanity and violations of the laws and customs of war. The decisions of these tribunals, which are based on customary international law as identified by the judges, represent the first major post-Nuremberg decisions on crimes under international humanitarian law. While the decisions of these international tribunals are not binding on other courts, whether domestic and international, this growing body of jurisprudence is at the very least highly persuasive and was referred to extensively by the Preparatory

Commission of the International Criminal Court (ICC) when the time came to elaborate the Elements of Crimes within the jurisdiction of the ICC.

Indeed, the main step forward in the codification of international criminal law since Nuremberg and Tokyo is the creation of the International Criminal Court. In many ways, the ICC can be seen as a logical next step of the process begun at Nuremberg and traced through the establishment of the ICTY and ICTR, albeit a step that would be blocked for 50 years by the Cold War, among other things. The main difference between the ICC and the tribunals that preceded it is that the Statute of the ICC was negotiated by all member States of the United Nations, thereby representing for the first time a truly universal attempt to codify those laws and customs of war that attract individual criminal responsibility.

The Rome Statute of the International Criminal Court was adopted in Rome on 17 July 1998, after weeks of intensive negotiations and debate, and entered into force on 1 July 2002. Following the Diplomatic Conference, the Preparatory Commission comprised of representatives of States[19] with significant input from international organisations and non-governmental organisations, debated the particulars of the supporting documents for the Rome Statute, in particular the Elements of Crimes and the Rules of Procedure and Evidence.[20] During the negotiations, the often long debates centred around what was and what was not customary international law, with delegates accepting the former and rejecting the latter. As such, the crimes within the jurisdiction of the ICC, found in articles 6 to 8, are the best possible indication of customary international law at the time of the adoption of the Rome Statute, as are their Elements of Crimes, which were approved at the June 2000 session of the Preparatory Commission for the International Criminal Court and subsequently adopted during the first meeting of the Assembly of States Parties in September 2002.[21]

2.(c) Note on procedural law

Along with substantive provisions on international criminal law, the ICTY, the ICTR and the ICC have also contributed to the development of a set of procedural rules for international courts and tribunals. Thus each of the international criminal tribunals and the ICC has its own "Rules of Procedure and Evidence", which represent a cross-fertilisation between major legal systems.[22] The rules have a large impact on the evidence that is accepted at trial and, as such, forms the basis for judgments. As such, these rules have contributed to the development of the procedural and substantive elements of this area of law. While the Rules of Procedure and Evidence of the Special Court fall outside the ambit of this report, interested readers are directed towards NPWJ's *Lawyer's Guide to the Special Court,* which goes into these Rules in detail.[23]

3. Special Court for Sierra Leone: Background and Establishment

In June 2000, H.E. Alhaji Dr. Ahmad Tejan Kabbah, the President of the Republic of Sierra Leone, requested the assistance of the United Nations to establish a court to try people who committed crimes in Sierra Leone during the conflict. On 14 August 2000, the UN Security Council passed a Resolution requesting the Secretary-General to negotiate an agreement with the Government of Sierra Leone to allow the Special Court to be established.[24] It also asked the Secretary-General to report back to the Security Council on a number of points raised in the resolution, including: from what date the Special Court should have jurisdiction, where an alternative seat for the Special

Court outside Sierra Leone might be located, how appeals should be made and how much assistance will be required from the international community in terms of finance and personnel.

Negotiations between the Government of Sierra Leone and the United Nations began in September 2000 in New York, continuing later that month in Freetown. The Secretary-General reported back to the Security Council on 4 October 2000. This was followed by an exchange of letters on some of the more contentious areas in the Sierra Leone-United Nations negotiations between the Security Council and the Secretary-General in December 2000 and January 2001, which detailed some changes the Security Council believed should be made to the draft Statute and Agreement. These changes were agreed to by Sierra Leone and the Agreement for the Establishment of the Special Court for Sierra Leone, to which the Statute is annexed, was signed in a ceremony in Freetown on 16 January 2002 by then Attorney-General and Minister of Justice, the Hon. Solomon E. Berewa, and the UN Under Secretary-General for Legal Affairs, Mr Hans Corell. This Agreement forms the legal basis for the Special Court and in addition to the substantive functioning of the Court includes matters such as privileges and immunities of officials, staff and the premises of the Special Court, which was supplemented by a Headquarters Agreement signed on 21 October 2003 by the Attorney-General and Minister of Justice, The Hon. Eke A. Halloway, and the Registrar of the Special Court, Mr Robin Vincent.

In early 2002, the Prosecutor, Registrar and Judges of the Special Court were named by the United Nations and the Government of Sierra Leone, each of whom was responsible for appointing a number of officials. The Special Court began its operations in late July 2002, when the Registrar, the Prosecutor and some initial staff arrived in Freetown. The first set of indictments was approved on 7 March 2003, arrests were made on 10 March 2003 and initial appearances began on 15 March 2003 at temporary facilities in Bonthe, a small town in southern Sierra Leone. A number of indictments were approved in the following months and all detainees were moved to the Special Court's detention facilities in New England, Freetown, once construction on the site of the Special Court was complete. Since that time a number of pre-trial motions have been heard by the Judges of the Special Court, including applications for provisional release[25] and jurisdictional matters, heard by a panel of Judges of the Appeals Chamber sitting for the first time in October 2003.[26]

4. Crimes within the jurisdiction of the Special Court

In his letter of 12 June 2000, the President of Sierra Leone suggested that the Special Court have as its applicable law a blend of international and domestic Sierra Leone law.[27] Security Council Resolution 1315 (2000) therefore recommended that the Special Court was to have jurisdiction over crimes under international law and selected crimes under Sierra Leonean law. Pursuant to the Statute of the Special Court, the crimes under international law fall under the broad categories of crimes against humanity; violations of common Article 3 of the Geneva Conventions and Additional Protocol II; and other serious violations of international humanitarian law, including crimes against peacekeepers and the use of child soldiers.[28] These are crimes under international humanitarian law that were considered to have had the status of customary international law at the time the alleged crimes were committed.[29] Violations of common article 3 and Additional Protocol II and the "other serious violations of international

humanitarian law" both require the existence of an armed conflict as a condition of applicability, therefore this will be discussed separately at the beginning of this section. The crimes under Sierra Leonean law cover offences relating to the abuse of girls and wanton destruction of property, taken from Sierra Leone legislation dating from 1926 and 1861 respectively; these are the only crimes under Sierra Leone law over which the Special Court has jurisdiction.[30]

This selection of subject matter jurisdiction was done to pre-empt any challenge to the Court's legality on the basis of the principle of *nullum crimen sine lege,*[31] since the acts these provisions are purporting to address had been criminalised at the time those acts were allegedly committed.[32] It should be emphasised that the Statute of the Special Court does not create the crimes to which it refers: rather, articles 2 to 5 of the Statute simply provide that the Special Court has jurisdiction over pre-existing crimes. Therefore, an examination of the applicability and content of the norms referred to within the Statute – whether as a result of customary international law or voluntary adoption of norms by Sierra Leone – is necessary to determine the elements of the crimes.

Thus the elements elaborated below are drawn primarily from the Elements of Crimes of the ICC, which are the best current indication of customary international law, and the decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda. While their decisions are not binding *per se* on the Special Court for Sierra Leone, they are persuasive. According to the Statute, the Appeals Chamber "shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda";[33] furthermore, it is also in the interests of certainty of the law and consistency of the application of its provisions that the Special Court for Sierra Leone follow these decisions.

4.(a) The existence and nature of an armed conflict: the law

International humanitarian law applies during times of armed conflict, whether international or non-international in nature. The exception to this is crimes against humanity, namely certain acts committed as part of a widespread or systematic attack against a civilian population, and genocide, namely certain acts committed against a national, racial, ethnic or religious group with the intent to destroy that group in whole or in part, as such.[34] According to customary international law, the prohibitions against these acts apply during times of war and times of peace.[35] In all other cases, however, in order to apply these norms, it must first be determined whether an armed conflict existed, before going on to consider whether the conflict was international or non-international in nature.

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The ICTY considered the definition of an armed conflict early in its history and stated the following:

> "[A]n 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. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities

> until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. 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."[36]

International humanitarian law draws a distinction between international armed conflicts, i.e. those between two or more States, and non-international armed conflicts, i.e. those between a State and a non-State organised armed group or between such groups. The majority of provisions in the Geneva Conventions and the Additional Protocol I apply only to international armed conflicts. Nonetheless, article 3 common to the Geneva Conventions and Additional Protocol II lay down a set of basic minimum rules and basic protections applicable in any armed conflict.[37]

Whether an armed conflict is international or non-international in nature depends on the parties to the conflict. In essence, a conflict will be "international" when it is conducted between two or more States and will be "non-international" when it is conducted between a State and another armed force not qualified as a State or between such forces.[38] The character of a conflict can change during its course from being non-international in nature to being international in nature.[39] In the *Tadic* decision, the ICTY Appeals Chamber specifically addressed the question of when a conflict that is *prima facie* internal in nature may be regarded as involving forces acting on behalf of a foreign power, thereby rendering the conflict international in nature.[40] The Appeals Chamber identified three specific tests concerning the necessary degree of control by a foreign power to determine whether this had occurred, namely overall control of an armed group or individuals; specific instructions to an armed group or individuals; and actual behaviour of an armed group or individuals, irrespective of any specific instructions.

The Statute of the Special Court only gives the Court jurisdiction over crimes committed in non-international armed conflicts. Particularly given the three-part test identified by the Appeals Chamber, it is debatable whether the drafters of the Statute for the Special Court should have limited the jurisdiction of the Special Court only to crimes committed within an non-international armed conflict. A more sensible approach would have been to leave that determination to the Special Court itself, so it could have applied the test of whether the conflict was rendered international in nature on the basis of evidence presented to it.

4.(b) The existence and nature of an armed conflict: the facts

It seems almost counter-intuitive to be asking the question of whether an armed conflict existed in Sierra Leone. The facts as adduced in this report, including the descriptions of fighting between various forces at different times, as well as the numerous public reports from the media, human rights organisations and others seem to negate the need for even raising the issue. Nevertheless, it is important to examine this question, in particular to determine when the conflict began, which determines when international humanitarian law begins to apply, and also to determine the nature of the conflict, in order to determine what provisions of international humanitarian law are applicable.[41]

4.(b)(i) Existence of an armed conflict

As noted, an armed conflict is deemed to have begun whenever there is "protracted armed violence between governmental authorities and organized

armed groups or between such groups within a State."[42] Revolutionary United Front (RUF) and National Patriotic Front of Liberia (NPFL) forces coming from Liberia first entered Sierra Leone through Kailahun District on 23 March 1991, at which time they engaged the Sierra Leone Army (SLA) in battle. From the very beginning, the RUF was organised according to a military structure, including identifiable chains of command, rules of engagement and disciplinary structures. From that time, RUF/NPFL forces would spread throughout the country, engaging the SLA in battle and establishing their own bases, including for recruiting and training.

As the conflict progressed, different fighting factions became involved, including loosely organised groups of local hunters and "vigilantes"; the more organised and structured Civil Defence Forces; the Armed Forces Revolutionary Council (AFRC), who took over power during a coup in May 1997; Nigerian and Guinean forces, both independently at the invitation of the Sierra Leone Government and as part of ECOMOG; Executive Outcomes, the South African private military company who entered Sierra Leone under contract with the Sierra Leone Government; and the United Nations military peacekeeping force (UNAMSIL). Some of these armed forces and groups would, at different points, also begin fighting each other, notably the Civil Defence Forces and the SLA, both before and after the establishment of the AFRC during the coup of May 1997.

Thus to greater and lesser degrees from 1991 there was protracted armed violence between both governmental authorities and organised armed groups[43] on the one hand and between such groups[44] within the territory of Sierra Leone on the other hand. It is therefore clear that an armed conflict began in Sierra Leone in March 1991, thereby triggering the application of international humanitarian law.

The question of when the armed conflict ended turns on when a general conclusion of peace was reached or when a peaceful settlement was achieved.[45] At various times throughout the conflict, attempts were made to reach a peaceful settlement between the RUF and the Government of Sierra Leone. A number of ceasefires were declared and peace agreements were negotiated and signed, notably in Abidjan, Côte d'Ivoire, on 30 November 1996 and in Lomé, Togo, on 7 July 1999.[46] None of the agreements would last for any appreciable length of time, instead taking on the appearance of temporary lulls in the fighting, during which each of the armed forces and groups would regroup, sometimes retrain and on all occasions prepare for further fighting.

By the end of 2001, disarmament was well under way in all Districts across the country, leading the President of Sierra Leone to declare an official end to the war during a symbolic weapons-burning ceremony on 18 January 2002. Such a declaration does not necessarily mean that an armed conflict has concluded, as this falls to be determined by whether there is a general conclusion of peace or a peaceful settlement. Nevertheless, those conditions had clearly been met by that time, therefore this report is taking 18 January 2002 as the date on which the armed conflict ended.

4.(b)(ii) Nature of the armed conflict

The fact that there was a non-international armed conflict – that is, between government authorities and organised armed groups – is clear. The more complex question is whether the armed conflict was international in nature at any point and, if so, when and for how long.

Because the Special Court only has jurisdiction over those crimes specifically included in the Statute, the answer to this question does not have a practical effect on the work of the Court. Nevertheless, it is useful from the perspective of

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contextualising the conflict in Sierra Leone and, furthermore, as an indication of whether international or internationalised courts should have jurisdiction over all crimes under international humanitarian law and then determine on the basis of evidence presented to them whether a conflict was international or non-international in nature.

The test of whether an armed conflict is an international armed conflict is based on the presence of forces that are under the control of a foreign power. This falls to be determined by who was controlling the different fighting factions at any given time, for which the ICTY has identified a test consisting of three parts, namely:

- Overall control of an armed group or individuals;
- Specific instructions to an armed group or individuals; and
- Actual behaviour of an armed group or individuals, irrespective of any specific instructions.[47]

Factual information gathered in Sierra Leone reveals very clearly that the RUF was operating under direct orders from Charles Taylor, the leader of the NPFL,[48] to greater and lesser degrees throughout the entire conflict, particularly during the early years. Indeed, NPFL forces had entered Sierra Leone together with the RUF in 1991 under the direct orders of their leader. Throughout the conflict, logistics and weapons were supplied from Liberia in exchange for property taken by RUF/NPFL forces and later by RUF forces from civilians and other commodities, in particular diamonds that were mined throughout the country.

Therefore, given that the test of control is satisfied, the conflict in Sierra Leone was international in nature during those periods when Charles Taylor was an official of the State of Liberia. For those periods when he was not an official of the State of Liberia, even during times when the NPFL controlled up to 90% of the territory, there is at least a question about the nature of the conflict, although the answer to this question is beyond the scope of this report. However, as noted, the fact that the conflict was international in nature for at least some periods of time does not alter the crimes over which the Special Court has jurisdiction and it is those crimes that this report will focus on in the following sections.

4.(b)(iii) Conclusion

The facts clearly demonstrate that there was an armed conflict in Sierra Leone from 23 March 1991 until the most definitive statement of peace, namely in 18 January 2002. In addition, the facts also demonstrate that, at times, this armed conflict was international in character, at the very least from 1997 until sometime in 2001. Given this, international humanitarian law began to apply in Sierra Leone on 23 March 1991 and continued to apply across the whole territory until 18 January 2002.

4.(c) Crimes Against Humanity (Article 2): The law

Article 2 of the Statute of the Special Court for Sierra Leone reads as follows:

> "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation;
> (e) Imprisonment;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
> (h) Persecution on political, racial, ethnic or religious grounds;
> Other inhumane acts."

Aside from the Elements of Crimes of the International Criminal Court, there is no other document defining crimes

against humanity and their legal elements. There are eleven international texts defining the crimes and they all differ slightly. Although the term originated in the preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land,[49] which codified then existing customary law relating to armed conflict, the crimes were first defined in article 6(c) of the Nuremberg Charter following the end of World War II. The category of crimes has been included in the Statutes of the ICTY and ICTR and, in 1998, in the Rome Statute of the ICC.

The UN Secretary-General's report on the establishment of the Special Court for Sierra Leone states that "The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter."[50] Considerations on this by the Appeals Chamber of the ICTY and ICTR clearly state that these crimes had the status of customary international law as at the time of the establishment of those Tribunals, i.e. in 1993 and 1994 respectively.[51]

4.(c)(i) Contextual elements of crimes against humanity

There are two sets of elements for crimes against humanity; one of which may be described as the "contextual" elements; the other of which may be described as the elements of the acts enumerated in article 2 of the Special Court Statute. The contextual elements – spelt out in the chapeau to article 2 – must be met in all cases for an act to constitute a crime against humanity. These elements are:

- There is an attack against a civilian population;
- The attack is widespread or systematic;
- The act in question was committed as part of that attack; and
- The accused knew of the broader context in which his or her act is committed.

1. An attack against a civilian population

The "attack against a civilian population" means a course of conduct involving the multiple commission of acts enumerated in article 2.[52] Thus the "attack" does not refer to an armed conflict as such, or even to an armed attack or a military attack, but instead refers to one of the acts enumerated in article 2. As such, the attack does not need to be a physical attack but can consist of other forms of inhumane mistreatment of a civilian population.[53]

Customary international law does not require that the attack itself be committed on discriminatory grounds.[54] The case law of the ICTR can be distinguished on this point, as the jurisdiction of the ICTR over crimes against humanity is limited solely to cases where the attack was carried out on discriminatory grounds.[55] The Statute of the Special Court does not contain such a limitation, therefore, in keeping with customary international law, there is no requirement that the attack itself be committed on prohibited discriminatory grounds.

A crime against humanity is a prohibited act that is committed as part of a widespread or systematic attack against a civilian population.

A "civilian population" refers to a population that is predominantly civilian in nature, i.e. that the people comprising the population do not take a direct part in the hostilities or no longer take a direct part in hostilities, including those who are placed *hors de combat,* namely those who are not fighting because they are wounded or otherwise incapacitated.[56] The presence of non-civilians within the population will not deprive that population of its civilian character.[57] In addition, the specific situation of a victim at the time of the commission of a crime is the critical point at which to determine the person's standing as a civilian rather than his or her general status.[58]

The definition of "civilian" and "civilian population" is of critical importance in international humanitarian law, which prohibits targeting civilians, a civilian

population and civilian objects, such as schools and hospitals. To constitute a crime against humanity, the civilian population must be the primary object of the attack, although it is not required that the entire population of a territory is victimised.[59]

2. The attack is widespread or systematic

To fulfil the contextual elements for a crime against humanity, an attack must be *either* widespread *or* systematic, but does not have to be both.[60] 'Widespread' means that the attack takes place on a large scale and is perpetrated against a number of victims, whereas 'systematic' refers to an organised pattern of conduct.[61]

Early jurisprudence of the international criminal tribunals considered whether 'systematic' required the existence of a pre-conceived policy or plan, either of a State or some other organised group.[62] The Appeals Chamber of the ICTY has concluded that while a widespread or systematic attack can be evidence of a pre-existing policy or plan, and in practical terms such a policy or plan would in all likelihood be necessary for an attack to be carried out in a widespread or systematic manner, such a policy or plan is not in itself a necessary element:

> "There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes … proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a 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 plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime."[63]

As long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity.

3. The act was committed as "part of" the attack

An act must have been committed or intended to be committed as part of the attack against a civilian population to qualify as a crime against humanity. There must therefore be a nexus between the act and the attack,[64] namely that the act was related to the attack.[65] As such, this excludes random or isolated acts – those not forming "part of" the attack – from the definition of crimes against humanity.

While the attack itself will generally involve a large number of acts, as evidenced by the definitions of 'widespread' and 'systematic', a single act may constitute a crime against humanity if it is perpetrated as part of a larger attack. This has been made clear by the ICTY Trial Chamber, which stated that:

> "Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above."[66]

4. The accused knew of the broader context in which his or her act was committed

As with most crimes, there is a mental element to crimes against humanity that

must be satisfied in order for an accused to be found guilty of that crime. This element is twofold, namely that the accused acted with knowledge of the broader context of the attack and the accused knew that his or her act formed part of the attack on the civilian population.[67]

Simple knowledge on the part of the accused is sufficient to satisfy this requirement; it is not necessary to show that the accused shared the purpose or goal behind the attack against the civilian population.[68] Indeed, the motive with which the accused commits the act is irrelevant. There is no requirement that an act must not have been carried out for purely personal reasons; the only requirement is that the act is related to the attack and the accused knows it is so related.[69]

This is made clear in the Elements of Crimes of the ICC, which states that: "The perpetrator *knew that the conduct was part of* or intended the conduct to be part of a widespread or systematic attack against a civilian population."[70] This is elaborated in the chapeau to the elements of crimes against humanity, which states that:

> "[This element] should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack."[71]

4.(c)(i) Elements of enumerated acts constituting crimes against humanity

Once the contextual elements are met, the elements of the acts that constitute crimes against humanity also have to be established. There are nine types of acts that can constitute a crime against humanity, as outlined in paragraphs (a) to (i) of article 2 of the Statute of the Special Court. Although not all of these acts have been considered by the ICTY or ICTR, they have all been elaborated in the Elements of Crimes of the ICC.

a) Crime against humanity of murder

The elements for the crime against humanity of murder are:[72]

1. The perpetrator unlawfully killed or caused the death of one or more persons.
2. The perpetrator acted:
   (a) With the intent to cause someone's death; or
   (b) With the intent to cause grievous bodily harm and with the knowledge that that bodily harm was likely to cause death and was reckless as to whether death would actually occur.[73]
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Customary international law does not require the element of premeditation for the crime against humanity of murder and, as such, all the different types of murder known to common law would satisfy this requirement.[74] This is mirrored in the Elements of Crimes of the ICC, which refer simply to "killing", with a footnote indicating that this is interchangeable with the phrase "caused the death of".[75]

b) Crime against humanity of extermination

The elements of the crime against humanity of extermination are:[76]

1. The perpetrator unlawfully killed or caused the death of one or

more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.

2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The perpetrator acted:
   (a) With the intent to cause someone's death; or
   (b) With the intent to cause grievous bodily harm and with the knowledge that that bodily harm was likely to cause death and was reckless as to whether death would actually occur.
4. The accused acted with the knowledge that his or her act was part of a vast murderous enterprise in which a large number of individuals were systematically marked for killing or were killed.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The crime against humanity of enslavement recognises that the prohibition against slavery is an inalienable, non-derogable and fundamental right, one of the core rules of general customary and conventional international law.

Extermination contains an element of mass destruction, requiring that the act of extermination be "collective in nature rather than directed towards singled out individuals."[77] This mass destruction can include direct killing of individuals but can also include causing the conditions of life calculated to bring about such destruction, for example by detaining individuals and withholding food or by introducing a deadly virus into a population and withholding vital medical supplies.[78] Generally, a numerically significant proportion of the population must be destroyed to constitute the crime against humanity of extermination.[79]

The ICTY recently considered the crime against humanity of extermination in *Valsiljevic*, in particular the required level of participation of the accused. The Trial Chamber concluded that in order to be guilty of the crime against humanity of extermination, an accused person has to be responsible for a "large number of deaths",[80] even if the accused's involvement was remote or indirect. Further, the accused must have known of the "vast scheme of collective murder and have been willing to take part therein".[81]

c) Crime against humanity of enslavement

The elements of the crime against humanity of enslavement are:[82]

1. The accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The ICTY has held that the crime against humanity of enslavement has the same elements as the war crime of slavery and violates both treaty and custom based international humanitarian law.[83] Indeed, the prohibition against slavery is an "inalienable, non-derogable and fundamental right, one of the core rules of general customary and conventional international law".[84]

The ICTY Appeals Chamber has held that "the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery", has evolved to encompass various contemporary forms of slavery which are also based on the

exercise of any or all of the powers attaching to the right of ownership."[85] Thus the indicia of slavery include the following: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".[86] This is mirrored in the footnote to the Elements of Crimes of the crime of humanity of slavery, which reads as follows:

> "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."[87]

Given that the definition of slavery is exercising "any or all" of the powers attaching to "ownership" over a person,[88] the exaction of forced labour from a person held captive would be sufficient to establish the commission of this crime, provided the other elements are also established. It should further be noted that the lack of consent is not an element of the crime, although "consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership."[89]

d) Crime against humanity of deportation

The elements of deportation as a crime against humanity are:[90]

1. The accused deported, without grounds permitted under international law, one or more persons to another State, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The accused was aware of the factual circumstances that established the lawfulness of such presence.[91]
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Deportation is to be distinguished from forcible transfer, with the former referring to the displacement of people across national borders and the latter simply referring to the forced movement of people, which can occur within the confines of national borders.[92] The ICTY has made it clear that "forced displacement" – charged in the *Krnojelac* case as persecution – is a stand-alone crime and is not a lesser, included offence of deportation.[93] This is mirrored in the Rome Statute of the ICC, which refers to the crime against humanity of "deportation or forced transfer of population".[94]

e) Crime against humanity of imprisonment

The elements of imprisonment as a crime against humanity are:[95]

1. The accused imprisoned one or more persons or otherwise severely deprived one or more persons of their liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that

established the gravity of the conduct.[96]

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The crime against humanity of imprisonment, which incorporates deprivation of liberty, has only been considered in two cases at the international criminal tribunals.[97] The ICTY has held that the elements of this crime are not limited by the elements of the similar crime of unlawful confinement, which is a grave breach of the Geneva Conventions, but that any form of arbitrary physical deprivation of liberty might constitute imprisonment.[98] This is mirrored in the Elements of Crimes of the Rome Statute of the International Criminal Court, in which the elements of this crime differ from those for the crime of unlawful confinement.[99]

Torture can be distinguished from ill treatment or other inhumane acts by the level of intensity of the pain or suffering inflicted.

One of the elements of the crime against humanity of imprisonment is that the deprivation of liberty is imposed arbitrarily, namely that no legal basis can be invoked to justify the deprivation of liberty.[100] Therefore, a determination has to be made regarding the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question,[101] including the fact that the deprivation may be initially justified but may become arbitrary "if the deprivation is being administered under serious disregard of fundamental procedural rights of the person deprived of his or her liberty as provided for under international law."[102] This is mirrored in the Elements of Crimes of the ICC, which refers to the gravity of the conduct being in violation of fundamental rules of international law.[103]

f) Crime against humanity of torture

The elements of the crime against humanity of torture are:[104]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The essential element of the crime against humanity of torture is "the infliction, by act or omission, of severe pain and suffering, whether physical or mental".[105] Torture can therefore be distinguished from ill treatment or other inhumane acts by the level of intensity of the pain or suffering inflicted; the standard adopted by the European Court of Human Rights, for example, is "very serious and cruel suffering".[106] The ICTY Appeals Chamber has also addressed this question, stating that, "In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm."[107] The ICTY Appeals Chamber has further stated that rape, as an act necessarily implying pain and suffering, can amount to torture provided the other elements are established.[108]

The Convention Against Torture, which requires States to criminalise torture as a self-standing offence, contains the element that the torture be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[109] However, both the ICTY Appeals Chamber[110] and the Elements of Crimes for the ICC[111] recognise that this element is applicable only to torture pursuant to the Convention and that customary international law does not impose such a limitation in the context of crimes against humanity.

Where the ICTY and ICTR jurisprudence and the Elements of Crimes of the ICC diverge is on the question of whether a purpose is required as an element of this crime. Both the ICTY[112] and the ICTR[113] have held that one of four purposes is required for conduct to rise to the level of torture, namely that the conduct was committed for the purposes of 1) obtaining information or a confession from the victim or a third party; 2) punishing the victim or a third party; 3) intimidating or coercing the victim or a third party; or 4) for any reason based on discrimination of any kind, although the conduct need not have been committed solely for one of the prohibited purposes.[114]

The Elements of Crimes of the ICC, however, specifically states that "[i]t is understood no specific purpose need be proved for this crime".[115] This was considered by the vast majority of delegations at the Preparatory Commission to reflect customary international law, in part because the Rome Statute – which includes only those crimes already established under customary international law – does not contain any reference to a purpose element.[116] This can be distinguished from the elements of the war crime of torture, which does contain the purpose requirement[117] so as to distinguish it from inhuman treatment,[118] which is included within the offence of torture.[119] Nevertheless, for the purposes of crimes against humanity, the international community has affirmed that torture does not require that the conduct in question be carried out for any particular purpose.[120]

g.i) Crime against humanity of rape

The elements of the crime against humanity of rape are:[121]

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight: (a) of any part of the body of the victim or of the perpetrator with a sexual organ; or (b) of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Much of the jurisprudence of the ICTR about this crime has focused on the discussion of whether rape should be defined as a contextual framework, or whether the elements of the crime should be explicitly defined. The general trend at the ICTR has been to adopt a contextual framework, according to which rape is defined as "the physical invasion of a sexual nature committed

under circumstances that are coercive".[122]

However, the ICTY Appeals Chamber, considering this matter in the context of common elements in national legislation and the trend for States to broaden the definition of rape, which has as its core element forced physical penetration, has followed the approach of defining the elements of the crime. Thus, the Appeals Chamber held that rape means the non-consensual penetration, however slight, of the vagina or anus of the victim by the perpetrator's penis or another object used by the perpetrator, or of the victim's mouth by the perpetrator's penis.[123] Consent must be given freely and voluntarily, which must be assessed in the context of the surrounding circumstances.[124]

The question of consent is further addressed in the Rules of Procedure and Evidence of the Special Court, which set out the following guiding principles:

> "(i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
> (ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
> (iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
> (iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of [the] sexual nature of the prior or subsequent conduct of a victim or witness."[125]

It is submitted that explicitly stating the elements of the crime, rather than adopting a loose conceptual framework, is the more appropriate approach, as it gives more certainty to the law in respect of this crime. Indeed, this is the approach adopted in the Elements of Crimes of the ICC, which also incorporates aspects of the contextual approach and, as such, better reflects customary international law.

g.ii) Crime against humanity of sexual slavery

The elements of the crime against humanity of sexual slavery are:[126]

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

While the crime of sexual slavery is not addressed in the jurisprudence of the ad hoc tribunals, it is nevertheless comprehensively addressed in the Elements of Crimes of the ICC. While not explicitly stated in the elements, the framers understood that "deprivation of liberty" in this context may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[127]

g.iii) Crime against humanity of enforced prostitution

The elements of the crime against humanity of enforced prostitution are:[128]

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

g.iv) Crime against humanity of forced pregnancy

The elements of the crime against humanity of forced pregnancy are:[129]

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

g.v) Crime against humanity of other forms of sexual violence

The elements of the crime against humanity of other forms of sexual violence are:[130]

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature.
2. The act was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
3. Such conduct was of a gravity comparable to the other offences in article 2(g) of the Statute of the Special Court.
4. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.[131]
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Gender-based crimes, such as rape and other forms of sexual violence, may be prosecuted as war crimes and, where they are part of a widespread or systematic attack against a civilian population, as crimes against humanity.

The crime of other forms of sexual violence has been addressed in the ICTR, which has held that sexual violence is any act of a sexual nature that is committed on a person under circumstances that are coercive.[132] In addition, the crime of other forms of sexual violence is comprehensively addressed in the Elements of Crimes of the ICC.

h) Crime against humanity of persecution

The elements of the crime against humanity of persecution are:[133]

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the

identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, or religious grounds.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The crime of persecution is premised on the discriminatory intent of the perpetrator. Thus both acts enumerated in article 2 of the Special Court Statute as well as other acts can constitute persecution when they are carried out against a particular group on prohibited discriminatory grounds, namely on political, racial, ethnic or religious grounds. Indeed, the ICTY has characterised persecution as follows:

> "Persecution is grounded in discrimination. It is based on the notion that people who share ethnic, racial or religious bonds different to those of the dominant group are to be treated as inferior to the latter. In the crime of persecution, this discriminatory intent is aggressively achieved by grossly and systematically trampling upon the fundamental human rights of the victim group."[134]

An analysis of the individual events that occurred across the whole of Sierra Leone shows very clearly that the same patterns were employed time and again throughout the country and throughout the conflict.

The material element of persecution as a crime against humanity, in addition to the requirement that the acts be carried out on discriminatory grounds, is that there is a gross or blatant denial of a fundamental right laid down in customary international law or conventional law, reaching the same level of gravity as other enumerated acts.[135] The acts that constitute persecution need not themselves be physical acts and must be evaluated in context by looking at their overall cumulative effects,[136] rather than the effect of one specific act. Indeed, it is a requirement that the *effect* of the acts be discriminatory; discriminatory intent is not itself sufficient to warrant characterising an act as persecution, the act must also have discriminatory consequences.[137]

The question of which grounds are prohibited is not a closed issue and customary international law has developed to the extent where, in addition to those grounds listed in article 2(h) of the Special Court Statute, the following grounds are also prohibited: cultural, gender and other grounds that are universally recognised as impermissible under international law.[138] The restriction of the grounds in the Statute of the Special Court can therefore be seen as a jurisdictional limitation only, similar to the requirement of a nexus with an armed conflict in the ICTY Statute[139] and the requirement that the attack itself be committed on discriminatory grounds in the ICTR Statute.[140]

Early jurisprudence of the ICTY and ICTR considered the question of whether discriminatory intent was required for *all crimes against humanity,*[141] not just for persecution. The Trial Chambers initially adopted the position that not only did the attack have to be carried out on discriminatory grounds[142] but that each of the enumerated acts also had to be committed with discriminatory intent to constitute a crime against humanity. However, the Appeals Chamber of both the ICTY[143] and the ICTR[144] overturned this position, holding that the perpetrator did not have to have discriminatory intent each time an act constituting a crime against humanity was committed, in part because this would render the crime of persecution redundant.

i) Crime against humanity of other inhumane acts

The elements of the crime against humanity of inhumane acts are:[145]

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character, i.e. in terms of gravity and nature, similar to any other act referred to in article 2.
3. The perpetrator was aware of the factual circumstances that established the character of the act.[146]
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

This is a "catch-all" provision that covers all other acts of similar gravity that are not enumerated in article 2. The International Law Commission has noted the impossibility of listing all the various acts that may fall within this category of crimes against humanity, stating that it includes "acts of similar gravity that are intended to cause and in fact actually cause injury to a human being in terms of physical or mental integrity, health or human dignity".[147] This has been followed in the Statutes of the ICTY and ICTR and in the Elements of Crimes of the ICC, which provides greater guidance as to what may constitute an inhumane act.

There must be some nexus between the act and the suffering of the victim, which does not necessarily require physical injury to the victim as such. Mental injury consequent on witnessing acts committed against other people may constitute an inhumane act where the perpetrator intended to inflict suffering on the victim or knew such suffering was likely to occur and was reckless as to whether that suffering would result.[148]

4.(d) Crimes Against Humanity (Article 2): The facts

The accusation of having committed a crime against humanity is a very serious one; indeed, it could be said that it is the most serious crime over which the Special Court has jurisdiction. In order for an act to be considered a crime against humanity, there is no need that it occur in the context of or be associated with an armed conflict of any type. Rather, what needs to be demonstrated is that the prohibited act was committed as part of a widespread or systematic attack against a civilian population and that the accused knew of the broader context in which his or her act is committed.

An analysis of the individual events that occurred across the whole of Sierra Leone shows very clearly that the same patterns were employed time and again throughout the country and throughout the conflict. In order for satisfy the contextual elements for crimes against humanity, there must be a widespread or systematic attack against the civilian population.[149] An attack against the civilian population is different from an armed attack or a military attack; in fact, as noted, the existence of an armed conflict is not an element of crimes against humanity. Rather, an attack consists of prohibited acts being committed against a civilian population on a widespread or systematic basis.

For the purposes of this report, the conflict has been analysed according to patterns of conduct and patterns of attack over time and over geographical space, based on a strict application of the law to the facts. The attacks have therefore been identified based on whether similar conduct was occurring at the same time in different locations, at different times in the same location, or against a large number of victims at

different times in different locations; such attacks satisfy either the widespread or systematic requirement, or both. In identifying such attacks, this report errs on the side of caution: there are a number of other potential attacks that took place during the conflict in Sierra Leone that have not been included in this discussion because the facts as analysed in this report do not necessarily yield the level of certainty about the widespread or systematic nature of the attack required to sustain a criminal conviction.

The information gathered for this report reveals that there were two general attacks against the civilian population: one by the RUF and one by the CDF. A series of more specific attacks was also committed by each faction within the context of those broader attacks. In the case of the other fighting factions, it was not possible to identify general attacks against a civilian population stretching over a period of years. The West Side Boys committed an attack against the civilian population during the period spanning late 1998 to early 1999. In the case of the SLA, there were clearly a number of specific attacks committed against the civilian population between 1991 and 1996. However, for ECOMOG, it was not possible to identify any attack committed against the civilian population on a widespread or systematic basis, although there are numerous incidents of specific acts being committed against civilians, which are examined in the section on war crimes.

The selection of the specific attacks for analysis has been undertaken on the basis of the proportion of attacks committed by each faction. An examination of the conflict as a whole reveals the commission of 33 discrete widespread or systematic attacks against a civilian population:[150] 21 committed by the RUF and their allies; eight committed by the SLA; three committed by the CDF and one committed by the West Side Boys. Accordingly, the legal analysis below reflects the fact that more crimes were committed by the RUF without absolving the members of any other fighting faction of responsibility for the crimes that they committed. Similarly, the description of specific crimes in the various categories of crimes against humanity are not exhaustive of all the crimes committed during a particular attack, but are highlighted as representative examples of the types of crimes that were committed.[151]

4.(d)(i) Crimes Against Humanity Committed by members of the RUF, the RUF/NPFL and the RUF/AFRC

The RUF, joined by the NPFL between 1991 and 1993 and the AFRC from 1997 onwards, committed a general attack against the civilian population lasting from 1991 until 2000. This attack was both widespread, in that it took place on a large scale and with a multiplicity of victims, and systematic, in that it constituted an organised pattern of conduct. That there was a policy to attack the civilian population is clearly demonstrated by the targeting of civilians in virtually every month in every District in which the RUF or their allies had a presence, particularly during military advances and retreats, but also when military manoeuvres were not being undertaken. Those instances in which there was relative calm usually represent periods during which the RUF was regrouping and rearming or periods during which the population had fled. During the period spanning from 1991 to 2000, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the RUF/NPFL, RUF and RUF/AFRC committed the following crimes against humanity:

1. **Murder**, for the intentional and reckless killings of thousands of civilians;
2. **Extermination**, for several mass killing events, namely the gathering of hundreds of civilians at

different times in different locations to be shot or hacked to death;

3. **Enslavement**, for the abduction of thousands of civilians and their use as porters, cooks, food-gatherers, domestic work, construction work and for similar purposes;[152]
4. **Rape**, for the rape of hundreds of women and girls, including girls aged below 14, for sexual slavery, namely the abduction of hundreds of women and girls as "wives", for sexual violence, including numerous incidents of sexual abuse and sexual assault, including forcing people to have sex with members of their own families;
5. **Imprisonment**, for the arrest and detention of hundreds of civilians, who were held for weeks without charge;
6. **Torture**, for the infliction of pain and suffering on people under RUF/NPFL, RUF and RUF/AFRC custody and control, including severe beatings and floggings, dripping melted plastic or rubber into people's eyes and onto people's bodies and a range of other equally grave acts;
7. **Other inhumane acts**, for the variety of severe acts of violence committed against civilians throughout the attack, including mutilation, amputation, beatings, floggings and a range of other similar acts as well as for the effect on the population of cannibalism, drinking blood, displaying internal organs and severed heads at checkpoints, parading severed heads around villages and forcing civilians to sing and dance at gunpoint in celebration of the actions of the RUF/NPFL, the RUF and the RUF/AFRC.

Within that general attack, there were a series of specific attacks committed against the civilian population. Of the 21 identified attacks committed against the civilian population,[153] six will be discussed below as being representative of the types of actions carried out by the RUF/NPFL, the RUF and the RUF/AFRC throughout the conflict. It should, however, be emphasised that the selection of these attacks is in no way intended to reflect any judgment about the relative importance of the attacks not selected for further exploration.

a) The RUF/NPFL attack from March to July 1991

In March 1991, the RUF/NPFL entered Sierra Leone from Liberia, arriving first in Kailahun and Pujehun Districts and spreading across Bonthe, Bo, Kenema and Kono Districts before being gradually pushed back in early August. During that time, the pattern of conduct employed by the RUF/NPFL reveals a clear policy to direct attacks against the civilian population, as evidenced by the abduction, killing, sexual assault, massive burning of houses and countless other actions inflicted on civilians. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the RUF/NPFL committed the following crimes against humanity:

1. **Murder**, for the numerous intentional and reckless killings of civilians, including the killing of 100 people in Pujehun District in July 1991 and the killing of 62 people in Kailahun District in June 1991;
2. **Enslavement**, for the abduction of hundreds of civilians and their use as porters, guides, food-gatherers and similar purposes, including the abduction of 800 civilians to work in farms in Kailahun District in July 1991;
3. **Imprisonment**, for the detention of children who refused to be conscripted in Kailahun District in May 1991;
4. **Torture**, for the numerous beatings administered to people under the control of the RUF, for the dripping of rubber or plastic

That there was a policy to attack the civilian population is clearly demonstrated by the targeting of civilians in virtually every month in every District in which the RUF or their allies had a presence.

into people's eyes in Bonthe District in May 1991 and for tying a man up under the sun for one week in Bo District in May 1991;

5. **Rape**, for the rape and sexual assault of dozens of women, including the rape of a 10-year-old girl in Kailahun District in May 1991, and for sexual slavery, namely the abduction of women as "wives";
6. **Other inhumane acts**, for ordering people to dance while women were being raped in Pujehun District in June 1991 and for the effect on the population of frequent acts of cannibalism.

b) The "TAP" operation: April 1992 to May 1993

From April 1992 to May 1993, successive groups of NPFL forces committed an ongoing attack against the civilian population, which was striking in terms of the similarity of the conduct employed, including cannibalism, and the brutality inflicted on civilian men, women and children in the areas of Kailahun District over which the RUF/ NPFL forces exercised control. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the NPFL committed the following crimes against humanity:

1. **Murder**, for the intentional killing of scores of people, including people who tried to escape, people who were abducted for use as porters and people selected for their large size in Penguia Chiefdom in May 1992;
2. **Enslavement**, for the abduction of dozens of people for use as porters;
3. **Torture**, for the infliction of severe pain and suffering on people under RUF control, including the severe cutting of people's flesh and dripping melted plastic or rubber into people's eyes in Luawa Chiefdom;
4. **Rape**, for the rape of dozens of women, including young girls, and often by multiple assailants, including the rape of women by multiple assailants in Penguia Chiefdom in May 1992 and the rape of a woman in Kissi Teng Chiefdom in February 1993;
5. **Other inhumane acts**, for cooking people alive, pounding a baby in a mortar and for the effect on the population of frequent acts of cannibalism, including the people who had been selected for their large size in Penguia Chiefdom in May 1992.

c) RUF attack between December 1994 and May 1995

From the end of 1994, the RUF had consolidated its control over Kailahun, Pujehun and Kenema Districts. From there, they expanded across Bo, Bonthe, Moyamba and Port Loko Districts in a clear push towards Freetown, which culminated in April 1995 in attacks on settlements in the Western Area. Throughout this westward expansion and their subsequent retreat on being repelled from the Western Area, the RUF engaged in an attack on the civilian population in towns through which they passed. This attack was both widespread, in that it affected a large area of the country and a large number of victims, and systematic, in terms of the remarkable similarity among the acts carried out across these Districts. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the RUF committed the following crimes against humanity:

1. **Murder,** for the intentional and reckless killing of thousands of people, including the killing of dozens of civilians at an IDP camp in Bo District in 1994;
2. **Enslavement**, for the abduction of hundreds of people for use as porters, food-gatherers and cooks;

***Rape*, for the rape of hundreds of women and girls, including girls aged below 14, for sexual slavery, namely the abduction of hundreds of women and girls as "wives", for sexual violence, including numerous incidents of sexual abuse and sexual assault.**

3. **Rape**, for the rape of scores of women and girls, for sexual slavery, namely the abduction of women as "wives" and for sexual violence, including forcing people to have sex with their own family members;
4. **Torture**, for beatings and other acts inflicting pain and suffering on people under RUF control, including dripping melted plastic in people's eyes,
5. **Other inhumane acts**, including amputation of limbs, branding people with hot irons and carving words on their bodies with razor blades.

d) *RUF attack on Bonthe District: 1995*

Throughout 1995, the RUF were progressively taking firm control of Bonthe District; their arrival in towns across the District was accompanied by severe brutality against civilians and the deposing and replacement of traditional authorities. The attack was carried out in a systematic manner, in that it was clearly conducted according to an organised plan. From January to November, not a month passed without significant violations being committed against the civilian population. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the RUF committed the following crimes against humanity:

1. **Murder**, for the intentional or reckless killing of hundreds of civilians, including the killing of 300 people in Tihun (Sogbini Chiefdom) in February;
2. **Extermination**, for rounding up thousands of civilians from many different places and killing hundreds of them in Bauya Junction (Kpanda Kemo Chiefdom) in October;
3. **Enslavement**, for abducting civilians and forcing them to work, including as food-gatherers, cooks and porters;
4. **Rape**, for the rape of scores of women and girls, including the rape of young girls in front of their parents, for sexual slavery, namely the abduction of women as "wives" and for sexual violence, including forcing people to have sex with their own family members;
5. **Other inhumane acts**, for the amputation of limbs, for the effect on the population of leaving mutilated corpses on the road, for severe beatings and for pouring petrol over a man and setting him on fire.

e) *RUF/AFRC Attack in May and June 1997*

On 25 May 1997, the AFRC staged a military coup, and were joined in power soon after by the RUF, thereby establishing a presence in areas previously held by the SLA. Between the end of May and the middle of June, the RUF/AFRC staged a sharp and brutal attack against the civilian population across the country that would affect every District to greater and lesser degrees. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the RUF/AFRC committed the following crimes against humanity:

1. **Murder**, for the intentional or reckless killing of hundreds of civilians, including reprisal killings against civilians for failing to be "sufficiently supportive", the killing of civilians deemed to be "enemy collaborators" and civilians who refused to work;
2. **Enslavement**, for the use of civilians as food-gatherers, cooks and porters;
3. **Imprisonment**, for the arbitrary arrest and detention without charge of dozens of journalists, lawyers and civil society activists;
4. **Torture**, for the infliction of severe pain and suffering on people detained by the RUF/AFRC, including severe beatings;

***Other inhumane acts*, for the variety of severe acts of violence committed against civilians throughout the attack, including mutilation, amputation, beatings, floggings and a range of other similar acts.**

5. **Rape**, for the rape and sexual abuse of dozens of women, including young girls, and the padlocking of women's genital areas in Pujehun District;
6. **Other inhumane acts**, for the mutilation of several civilians, the amputation of one or more of their limbs, the effect on the population of displaying people's intestines at checkpoints and forcing people under gunpoint to dance and sing in support of the RUF/AFRC.

f) RUF/AFRC Attack from December 1998 to January 1999

From December 1998, the RUF/AFRC orchestrated a campaign to retake Freetown, moving from various Districts, particularly in the north, towards the Western Area. As they advanced, as well as during their retreat, the RUF/AFRC implemented a systematic attack against the civilian population that reached its peak during the invasion and brief occupation of parts of Freetown. This attack was striking particularly in terms of the sheer number of acts committed against the population and the destruction wrought in such a short period of time. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the RUF/AFRC committed the following crimes against humanity:

1. **Murder**, for the intentional or reckless killing of hundreds of civilians, including alleged "enemy collaborators" and the killing of 27 people in a market place in Bombali District in January 1999;
2. **Enslavement**, for the abduction of hundreds of civilians for their use as porters and cooks;
3. **Torture**, for the regular and severe beatings administered to people under the control of the RUF/AFRC, including one man who was beaten for 24 hours and then buried alive in Bombali District in January 1999;
4. **Rape**, for the rape of dozens of women and girls;
5. **Other inhumane treatment**, for forcing people at gunpoint to dance and sing in support of the RUF/AFRC in Freetown's East End in January 1999, for the mutilation of dozens of civilians, including carving words onto their bodies, and the amputation of one or more of their limbs.

Imprisonment, for the arrest and detention of hundreds of civilians, who were held for weeks without charge.

4.(d)(ii) Crimes Against Humanity Committed by members of the West Side Boys

The West Side Boys committed an attack against the civilian population in Port Loko District lasting from October 1998 to April 1999 across Koya and Maforki Chiefdoms.[154] This attack was both widespread, in that it took place on a large scale and with a multiplicity of victims, and systematic, in that it was an organised pattern of conduct. The facts clearly demonstrate that there was a policy to commit such an attack, with civilians being targeted for a variety of reasons. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the West Side Boys committed the following crimes against humanity:

1. **Murder**, for the killing of dozens of civilians, including the killing of two civilians by hanging and the public execution of 20 civilians and the burning of 73 civilians in a house in April 1999;
2. **Enslavement**, for the abduction of civilians for their use as porters;[155]
3. **Rape**, for the rape of dozens of women and girls and for sexual violence, including forcing people to have sex with their own family members
4. **Other inhumane acts**, for the mutilation of several civilians, including carving words onto their bodies.

4.(d)(iii) Crimes Against Humanity Committed by members of the SLA

While there was no general attack spanning a number of years, the SLA committed a number of specific widespread or systematic attacks at different periods between 1991 and 1996 that reveal a policy to commit an attack against a civilian population, generally for the purposes of reprisals, abducting civilians for the purposes of mining or other work and to obtain property. Of the eight identified attacks committed against the civilian population, two will be discussed below as being representative of the types of actions carried out by the SLA.[156] It should, however, be emphasised that the selection of these attacks is in no way intended to reflect any judgment about the relative importance of the attacks not selected for further exploration.

a) SLA attack from January to April 1992

As the SLA started gaining successes over RUF/NPFL forces across Pujehun and Kailahun Districts, they progressively and rapidly launched attacks on civilians. Beginning by targeting civilians they arbitrarily labelled as RUF/NPFL "collaborators", often in the areas they had retaken from the hands of RUF/NPFL forces, the SLA soon expanded these activities to encompass the entire civilian population in those areas. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the SLA committed the following crimes against humanity:

1. **Murder**, for the intentional or reckless killing of hundreds of civilians, including the killing of alleged "collaborators" at Makibi Bridge in Pujehun Town and the tying up of alleged collaborators and throwing them off the Yonni Bridge (Kpaka Chiefdom, Pujehun District) in early 1992;
2. **Enslavement**, for the use of civilians under SLA control for work, including breaking down houses and uprooting cocoa and coffee plantations in Kangama (Kissi Teng Chiefdom, Kailahun District) and as food-gatherers in Pujehun District in early 1992;
3. **Deportation**, for the use of radical measures such as setting fire to houses as part of a clear action to evict civilians from an area in Pujehun District in early 1992;
4. **Rape**, for the rape of several women, including the rape of a woman in Makpele Chiefdom (Pujehun District) in early 1992, and for other acts of sexual violence;
5. **Other inhumane acts**, for the amputation of ears and hands, the plucking out of eyeballs and for putting civilians in a bag that was then set on fire in Kpanga Krim Chiefdom (Pujehun District) in early 1992.

The SLA committed a number of specific widespread or systematic attacks at different periods between 1991 and 1996 that reveal a policy to commit an attack against a civilian population.

b*) SLA attack in Kenema District from March to July 1994*

Between March and July 1994, while RUF forces were continuing expanding their operations in the District, SLA forces together with members of ULIMO-J conducted an attack against the civilian population in the area remaining under their control. The widespread or systematic nature of the attack is evidenced by the numerous acts of violence committed against civilians across different chiefdoms. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the SLA committed the following crimes against humanity:

1. **Murder**, for the intentional or reckless killing of dozens of civilians, including those alleged to be RUF "collaborators" and those they accused of not respecting their "orders", including the killing of 12 young people from Damawuro and the killing of a man in Blama (Small Bo Chiefdom) in March;

2. **Imprisonment**, for detaining an alleged RUF "collaborator" in a cell in Blama in March and for detaining civilians in a guardroom for some days in Blama;
3. **Enslavement**, for the forceful use of civilians to work at mining sites in the Tongo Field area;
4. **Rape**, for sexual slavery, namely the abduction of women as "wives" and for sexual violence committed against several women and girls.

4.(d)(iv) Crimes Against Humanity Committed by members of the CDF

The CDF committed a general attack against the civilian population lasting from January 1996 until October 1999. This attack was both widespread, in that it took place on a large scale and with a multiplicity of victims, and systematic, in that it was an organised pattern of conduct. The facts clearly demonstrate that there was a policy to commit such an attack, with civilians being targeted for a variety of reasons; reprisals against civilians for having cooperated with the RUF were systematic and particularly brutal throughout this period. During this period, in addition to the war crimes and other crimes within the jurisdiction of the Court that were committed, members of the CDF committed the following crimes against humanity:

The CDF committed a general attack against the civilian population lasting from January 1996 until October 1999… The facts clearly demonstrate that there was a policy to commit such an attack, with civilians being targeted for a variety of reasons.

1. **Murder**, for the intentional or reckless killing of hundreds of civilians, including civilians arbitrarily labelled as "RUF collaborators";
2. **Enslavement**, for the use of civilians under their control to harvest food for the CDF in Tonkolili District in October 1999;
3. **Imprisonment**, for the detention without charge of people in cells and cages, particularly at checkpoints;
4. **Torture**, for the use of "FM ropes",[157] beatings, dripping melted plastic on people and other acts inflicting pain and suffering on people under the control of the CDF;
5. **Rape**, for sexual slavery, namely forcing women to become "wives", and for sexual violence committed against women;
6. **Other inhumane acts**, for the effect on the civilian population of acts of cannibalism and displaying internal organs at checkpoints.

Within that general attack, there were a series of specific attacks committed against the civilian population. Of the three identified attacks committed against the civilian population, one will be discussed below as being representative of the types of actions carried out by the CDF.[158] It should, however, be emphasised that the selection of these attacks is in no way intended to reflect any judgment about the relative importance of the attacks not selected for further exploration.

CDF Attack from November 1997 to May 1998

During this period, the CDF engaged RUF/AFRC forces throughout the Southern Province, repelling them from most of the areas previously under their control. The CDF actions in those areas demonstrate a clear pattern of violent activities directed against civilians, in particular against suspected RUF/AFRC "collaborators", leading to the infliction of severe physical violence and the draconian regulation of every aspect of civilian life. During this period, in addition to the war crimes and other crimes under the jurisdiction of the Court that were committed, members of the CDF committed the following crimes against humanity:

1. **Murder**, for the intentional and reckless killing of dozens of civilians, including the killing of alleged RUF/AFRC "collaborators" in Bonthe Town in February 1998;
2. **Imprisonment**, for the detention of civilians in cells or specially

designed cages, including the detention in a cell for two days of civilians in Bonthe Town in February 1998, the detention of civilians in a cage at Baiama Junction (Bo District) in February 1998 and in Kwellu (Moyamba District) in December 1997;

3. **Torture**, for the infliction of severe physical and mental violence, notably by the use of cages and FM ropes across the Southern Province, including tying up suspected collaborators with an FM rope, beating them and locking them up in Blama (Kenema District) in February 1998;
4. **Rape**, for the use of three women as sex slaves in Makpele Chiefdom (Pujehun District) in January 1998;
5. **Other inhumane acts**, for the effect on the population of frequent acts of cannibalism, including the decapitation of a civilian and the drinking of his blood in Nomo Chiefdom (Kenema District) in December 1997.

4.(e) Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 3): The law

Article 3 of the Statute of the Special Court for Sierra Leone reads as follows:

> "The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:
> (a) Violence to life, health and physical or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) Collective punishments;
> (c) Taking of hostages;
> (d) Acts of terrorism;
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) Pillage;
> (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
> (h) Threats to commit any of the foregoing acts."

The four Geneva Conventions of 1949 were, as noted, concerned mainly with international armed conflicts, that is, conflicts involving two or more States. The Geneva Conventions were expanded on in 1977 with the adoption of the two Additional Protocols, the first of which was also concerned with international armed conflicts. However, article 3 common to the Geneva Conventions, which has been described as a "treaty in miniature", contains the minimum set of protections applicable in any armed conflict.[159] Additional Protocol II expands on common article 3 to specify in more detail the protections that apply during a non-international armed conflict.

In order for these norms to become applicable, they must have been in force at the time of the alleged commission of the crimes, whether through customary international law or because the State in question had ratified these instruments and, as such, was bound by these provisions. In respect of the first possibility,[160] it is clear that common article 3 has the status of customary international law;[161] indeed, most States have criminalised the acts listed in common article 3 within their domestic penal codes. Additional Protocol II as a whole is generally not regarded as having the status of customary international law, but article 4(2) relating to fundamental

guarantees both reaffirms and supplements common article 3 and, as such, has the status of customary international law.[162]

Nevertheless, in order not to offend the principle of *nullum crimen sine lege,*[163] it is not sufficient simply to show that these instruments had the status of customary international law at the time the alleged crimes were committed. It must also be established that the violation of those norms attracted individual criminal responsibility: the ICTY Appeals Chamber has found that customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general rules and principles, in particular Additional Protocol II.[164]

4.(e)(i) Contextual elements of violations of common article 3 and Additional Protocol II

Once it is established that these instruments were in force, there are two sets of elements that need to be met, one of which can be described as "contextual" elements, the other of which are the elements of the acts enumerated in article 3 of the Statute of the Special Court. The contextual elements are as follows:

1. The applicability of common article 3 and Additional Protocol II must be established.
2. The personal jurisdiction (relating to victims and perpetrators) and the geographical jurisdiction must be met.
3. There must be a nexus between the act constituting the crime and the armed conflict.
4. The act constituting the crime must be a serious violation.

1. Applicability of common article 3 and Additional Protocol II

Both common article 3 and Additional Protocol II contain conditions of applicability that must be considered in order to determine whether or not they apply at a particular location or during a particular time. As noted, the inclusion of these crimes within the Statute of the Special Court is not in itself sufficient to conclude that these instruments apply to the situation in Sierra Leone, nor is it sufficient to establish that the instruments were in force at the time in question.

Common article 3 applies during any armed conflict,[165] thereby ruling out its application during internal disturbances and tensions. Whether an armed conflict exists or not[166] must be determined on an evaluation of the intensity and organisation of the parties to the conflict; indeed, the *Tadic* decision refers to "protracted armed violence".[167]

The situations to which Additional Protocol II will apply are more limited than those to which common article 3 will apply.[168] It is worth noting that while Additional Protocol II develops and supplements common article 3, the more restrictive conditions of its applicability are not automatically extended to common article 3, which continues to apply during any armed conflict. In order for Additional Protocol II to apply, the following elements must be satisfied:

a) An armed conflict is occurring between the armed forces of a State and dissident armed forces or other organised groups.
b) The dissident armed forces or other organised groups were under responsible command.
c) The dissident armed forces or other organised groups exercised control over territory such that they were able to carry out sustained and concerted military operations.
d) The dissident armed forces or other organised groups are able to implement Additional Protocol II.

a) An armed conflict is occurring between the armed forces of a State and dissident armed forces or other organised groups

The jurisprudence of the international criminal tribunals refers to the fact that "armed forces", namely those fighting on

behalf of the State, covers all armed forces described in national legislation.[169] It is unclear whether this would cover armed forces fighting on behalf of the State that are not so described in national legislation but are established as a result of some other procedure. In the absence of a decision on this matter, it is submitted that a test similar to that in *Tadic* related to forces under the control of a foreign power could be adopted to determine whether armed forces are fighting on behalf of the State on whose territory the conflict is being fought.[170] The test could therefore be: overall control of an armed group or individuals by the State; specific instructions to an armed group or individuals by the State; and actual behaviour of an armed group or individuals, irrespective of any specific instructions.[171]

b) The dissident armed forces or other organised groups were under responsible command

This requirement refers to the degree of organisation of the groups, namely that they were able to carry out military operations and that they were able to impose discipline in the name of the *de facto* authority,[172] although it does not imply that there needs to be a hierarchical system identical to that employed by the armed forces of a State.

c) The dissident armed forces or other organised groups exercised control over territory such that they were able to carry out sustained and concerted military operations

While the previous requirement refers to the command ability of the groups, this requirement considers whether the military operations actually carried out were continuous and planned. This requires that the groups in fact dominate part of the territory that is no longer under government control.[173]

d) The dissident armed forces or other organised groups are able to implement Additional Protocol II

This refers to the degree of organisation of the dissident armed forces or other organised group, such that they can carry out obligations under Additional Protocol II, which includes matters such as searching for sick, shipwrecked or wounded personnel and providing them with medical care and attention.[174]

2. Personal and geographical jurisdiction

a) Personal jurisdiction: Perpetrators

Anybody who commits a violation of common article 3 or Additional Protocol II can be held accountable; there is no category of persons to whom these provisions cannot apply. The early jurisprudence of the ICTR focused on whether there were certain criteria that needed to be satisfied in order for an accused to fall within the required personal jurisdiction for perpetrators. Thus the Trial Chamber in *Akayesu,* while recognising that this should not be interpreted restrictively and that civilians could be held liable for violations of common article 3 and Additional Protocol II, applied a "public official" test to determine whether a person could be held liable. According to this test, if a person was not a combatant, they could be held liable only if they were public officials or agents or exercised some public authority such that they were mandated and expected to support or fulfil the war effort.[175]

Anybody who commits a violation of common article 3 or Additional Protocol II can be held accountable; there is no category of persons to whom these provisions cannot apply.

However, this was overturned by the Appeals Chamber, who held that this test was not supported either by the language of the Statute nor customary international law. Considering that the core of common article 3 is the protection of victims, which implies effective punishment of perpetrators,[176] the Appeals Chamber held that common article 3 and Additional Protocol II are applicable to everyone.[177] As such, the existence of a special link or relationship between the accused and the armed forces of a State is not a pre-condition for the applicability of these instruments.[178]

b) Personal jurisdiction: victims

Common article 3 and Additional Protocol II are concerned primarily with the protection of civilians, namely people who do not bear arms. Thus common article 3 refers to persons who are taking no active part in hostilities, including members of the armed forces who have laid down their arms and those who are placed *hors de combat,* namely those who are no longer fighting due to injury or some other similar incapacity, whereas Additional Protocol II refers to those persons who do not take a direct part in hostilities or who have ceased to take a direct part in hostilities.

Common article 3 and Additional Protocol II protect all civilians as well as those people who have ceased to take a direct part in hostilities.

To take a "direct part" in hostilities means to undertake acts of war that, by their nature or purpose, are likely to cause actual harm to personnel or equipment of the enemy armed forces.[179] Should a civilian undertake such acts, they would lose their right to protection as civilians and could thereby fall within the class of combatants, thus becoming legitimate military targets.

The central question in this respect is, therefore, whether the alleged victim was taking a direct part in hostilities at the time of the alleged offence. If they were not, then they fall within that class of persons protected by common article 3 and Additional Protocol II. As such, it must be determined on a case-by-case basis whether a victim has the status of a civilian and, as such, whether the provisions of common article 3 and Additional Protocol II apply.

c) Geographical jurisdiction

The geographical jurisdiction refers to the geographical territory within which common article 3 and Additional Protocol II apply. As noted, international humanitarian law applies across the territory affected by the conflict from the moment hostilities commence until there is general conclusion of peace or, in the case of internal armed conflicts, a peaceful settlement is reached.[180] Customary international law, as reflected in the jurisprudence of the Tribunals, makes it clear that the application of the law is not confined to the narrow geographical scope of the actual theatre of combat operations. Rather, international humanitarian law applies throughout the territory affected by the conflict whether or not actual combat is taking place in parts of the territory under the control of a party to the conflict.[181]

In addition, international humanitarian law also has a temporal scope, namely from the commencement of hostilities until the conclusion of peace or the reaching of a peaceful settlement. Customary international law, as reflected in the jurisprudence of the Tribunals, also requires that the temporal factor not be given a restrictive interpretation. As such, there only needs to be some kind of nexus between the act and the conflict, but not that the act itself occurs during the midst of battle.[182]

3. Nexus between the crime and the conflict

There must be some kind of link between the crime and the armed conflict, whether it be "closely related",[183] "in conjunction with",[184] or – more reflective of customary law – "in the context of or associated with".[185] This requirement stems from the fact that international humanitarian law, concerned as it is with law during an armed conflict, does not protect persons against crimes unrelated to the conflict,[186] which should be dealt with by other means.

The ICTY Appeals Chamber has addressed this issue in *Kunarac,* holding that an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his or her decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, establishing that the perpetrator

acted in furtherance of or under the guise of the armed conflict would be sufficient to conclude that the acts were closely related to the armed conflict. In determining whether or not an act is sufficiently related to the armed conflict, the Appeals Chamber suggested a number of factors that may assist in making that factual determination: the fact that the perpetrator 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 was committed as part of or in the context of the perpetrator's official duties.[187]

4. The violation must be serious

The chapeau of article 3 of the Statute of the Special Court gives the Special Court jurisdiction over "serious violations" of common article 3 and Additional Protocol II. Broadly speaking, the requirement that it be 'serious' refers to "the breach of a rule protecting important values involving grave consequences for the victim".[188] The jurisprudence of the Tribunals makes it clear that violations of the fundamental guarantees related to the protection of victims during an armed conflict are, by their very nature, considered to be serious.[189]

4.(e)(ii) Elements of enumerated acts constituting violations of common article 3 and Additional Protocol II

For the most part, the elements of the crimes constituting violations of common article 3 and Additional Protocol II mirror the elements required for crimes against humanity. This has been explicitly stated, for example, for murder,[190] torture[191] and rape[192] and it is reasonable to predict that the same approach would be adopted for other crimes. There are, however, some crimes within common article 3 and Additional Protocol II that have no direct counterpart within crimes against humanity, which are discussed briefly below.

a) Mutilation

The elements of the war crime of mutilation are:[193]

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

b) Cruel Treatment

The elements of the war crime of cruel treatment are:[194]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
3. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

c) Taking of hostages

The elements of the war crime of taking hostages are:[195]

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international

organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

d) Outrages on personal dignity, including degrading and humiliating treatment

The elements of the war crime of outrages on personal dignity are:[196]

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The Elements of Crimes of the ICC explicitly states that "persons" can include dead people, going on to say: "It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim."[197]

The ICTR has interpreted "humiliating and degrading" treatment as treatment designed to subvert the self regard of the victims.[198] The ICTY held that rape could amount to an outrage on personal dignity and therefore could be covered by this provision.[199] In *Aleksovski,* the ICTY held that the use of detainees as human shields or trench diggers, beatings and the constant fear of being robbed or beaten could constitute outrages upon personal dignity.[200]

e) Indecent assault

The elements of the war crime of indecent assault are:[201]

1. The accused inflicted pain or injury on the victim or victims.
2. The act inflicting pain or injury was sexual in nature and was committed by coercion, force, threat or intimidation.
3. The act was non-consensual.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

f) Pillage

The elements of the war crime of pillage are:[202]

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The crime of pillage encompasses isolated acts of looting committed by individual soldiers for private gain as well as organised forms of the seizure of property, for example as part of a

systematic economic exploitation of occupied territory. However, as indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging.[203]

4.(f) Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 3): The facts

Certain conditions must be met before common article 3 and Additional Protocol II will apply. For common article 3, the condition is the existence of an armed conflict. As stated, there was an armed conflict occurring on the territory of Sierra Leone from March 1991 until 18 January 2002. As such, common article 3 applied throughout that time across the whole territory. For Additional Protocol II, the conditions centre around the degree of organisation of the armed forces against whom the State's armed forces are fighting. While it is not intended to go into this issue for each of the fighting factions, the analysis of the non-State fighting factions involved in the conflict of Sierra Leone clearly reveals that these conditions are met, in that at any given point during the conflict, dissident or other armed groups were organised, were under responsible command, exercised control over the territory such that they were able to carry out sustained and concerted military operations and were able to implement Additional Protocol II.

Given that, the provisions of common article 3 and Additional Protocol II applied throughout the territory of Sierra Leone throughout the conflict, whether or not actual combat was taking place. Therefore, although there were lulls in the fighting at different times in different places throughout Sierra Leone, IHL continued to apply in those places as well as those areas where fighting was occurring until the end of the conflict as a whole.

Aside from these, there are other contextual elements that need to be established in order for an act to constitute a violation of common article 3 and Additional Protocol II, namely that the victims are civilians, the violation is serious and that there is a nexus between the act and the armed conflict. These contextual elements were taken into account in describing the crimes listed below;[204] for example, murder of a civilian has been included whereas murder of a combatant during a battle has not been included. Similarly, acts that could otherwise amount to a violation of the law but were not committed "in the context of or associated with" the armed conflict have not been included.

In every military action there is the requirement of proportionality, such that a military commander must weigh the military advantage to be gained as against civilian casualties. There is also the requirement that a distinction be made between legitimate and non-legitimate targets, which is highlighted by the prohibition on indiscriminate firing. In Sierra Leone, there were many instances of significant civilian deaths that resulted from what appeared to be predominantly military actions and it is not possible to determine to the requisite degree of certainty whether the military attack was proportional or what was the intended target. In those cases where it is possible to make that determination, this report characterises such deaths as murders.

In every military action there is a requirement of proportionality, such that a military commander must weigh the military advantage to be gained as against civilian casualties. There is also the requirement that a distinction be made between legitimate and non-legitimate targets.

4(f)(i) Violations of common article 3 and Additional Protocol II by members of the RUF, the RUF/NPFL and the RUF/AFRC

During the armed conflict in Sierra Leone, in addition to the crimes against humanity and other crimes within the jurisdiction of the Court that were committed, the following war crimes were committed:[205]

1. **Violence to life, health and physical or mental well-being of persons, in particular—**
   (a) **Murder**, for the intentional or reckless killing of tens of

thousands of civilians for a variety of reasons, including for allegedly "collaborating" with forces aligned against the RUF movement, for supporting the elected Government and for failing to show sufficient support for the RUF movement, which was often determined on an arbitrary basis, and by a variety of means, including decapitations, disembowelling pregnant women and throwing babies into the bush or into burning houses, and by using a variety of weapons, including shooting people, hacking people to death with bladed weapons and by locking people in houses that were then set on fire;

(b) **Torture**, for the infliction of severe pain and suffering on people under the custody or control of the RUF and their allies for the purposes of inflicting punishment or obtaining information, including by the means outlined below;

(c) **Mutilation**, for the hundreds of mutilations, amputation of limbs, the carving of words into people's skin with razor blades and other similar acts;

(d) **Corporal punishment**, for the beating and flogging of tens of thousands of civilians;

as well as for several other acts that inflicted violence to the life, health and physical or mental well-being of persons, including the frequent instances of the infliction of severe pain and suffering by means such as the dripping of melted plastic into people's eyes and onto their bodies, setting people on fire, forcing people to lie on the ground and stare at the sun, cutting off people's genital organs and a variety of other similar acts;

2. **Collective punishments**, for the arbitrary infliction of various degrees of punishment as reprisal actions for real or imagined wrongs on groups of civilians, such as the retaliatory killing of 100 people and the burning of 200 houses in Kailahun District in March 1992;

3. **Taking of hostages,** for the abduction of civilians, their continued detention under threat of death or personal injury and thereby using the detainees as a bargaining tool to achieve various aims with third parties;

4. **Outrages upon personal dignity, in particular—**

(a) humiliating and degrading treatment, for the severe humiliation, degradation and violation of the dignity of tens of thousands of civilians, including by forcing traditional authorities and elders to sit on the floor,[206] by forcing adults to "frog jump" or "pump", for shaving the heads of female abductees, by decapitating, mutilating and displaying corpses, severed body parts and internal organs in public places, by frequent acts of cannibalism, including the drinking of blood,[207] by forcing men to watch the rape of their wives, by forcing parents to watch the rape of their children, by gambling on the sex of a baby who has yet to be born and settling the bet by disembowelling the mother, for the use of detainees as human shields in a few cases and by keeping the civilian population in constant fear of being robbed, beaten,

***Collective punishments*, for the arbitrary infliction of various degrees of punishment as reprisal actions for real or imagined wrongs on groups of civilians, such as the retaliatory killing of 100 people and the burning of 200 houses in Kailahun District in March 1992.**

abducted, having their children abducted and having their houses burnt down and for a variety of other similar acts;

(b) **rape**, for the rape, often by multiple assailants, of hundreds[208] of women and young girls, including girls as young as 10 and including the rape of women and girls who had been abducted as "wives";

(c) **any form of indecent assault**, for sexual violence committed against thousands of civilians, including children, and for forcing people to have sex with members of their own families;

5. **Pillage**, for the stealing of personal property including food, domestic animals, cooking utensils, money and valuable items from hundreds of thousands of civilians in villages and towns and at checkpoints, for the stealing of personal property from civilian residences and for the stealing of property from other buildings, including companies, organisations, churches and others, none of which was justified by military necessity;

6. **The passing of sentences and the carrying out of executions without due process**, for the capture and execution of hundreds of civilians on varied grounds, in particular on the accusation of being a member, collaborator or relative of one of the other fighting forces, and for the infliction of often severe punishment for real or imagined wrongs, such as stealing or adultery, without any form of trial;

7. **Threats to commit any of the foregoing acts**, for the daily threats meted out to civilians wherever the RUF, RUF/NPFL or RUF/AFRC had a presence to kill them, steal their property, beat them and commit a variety of other brutal actions against them.

4.(f)(ii) Violations of common article 3 and Additional Protocol II by members of the West Side Boys

During the armed conflict in Sierra Leone, in addition to the crimes against humanity and other crimes within the jurisdiction of the Court that were committed, members of the West Side Boys committed the following war crimes:

1. **Violence to life, health and physical or mental well-being of persons, in particular—**

   (a) **Murder**, for the intentional or reckless killing of hundreds of civilians;

   (b) **Torture**, for the infliction of pain and suffering on people under the control of the West Side Boys, including beatings;

   (c) **Mutilation**, for various acts of mutilating civilians, including the carving of words into people's skin with razor blades;

   (d) **Corporal punishment**, for the frequent instances of beating and flogging civilians;

2. **Collective punishments**, for reprisal killings and other punishments inflicted in retaliation for military defeats suffered by the West Side Boys;

3. **Taking of hostages**, for the capture of 40 UNOMSIL, ECOMOG and civil society workers, under the threat of continued detention, in August 1999 for the purpose of securing the release of the AFRC leader from RUF custody and for the capture of United Kingdom military personnel in August 2000, under threat of continued detention, for the purpose of seeking their integration into the SLA, the release of detained

***Pillage*, for the stealing of personal property including food, domestic animals, cooking utensils, money and valuable items from hundreds of thousands of civilians in villages and towns and at checkpoints, for the stealing of personal property from civilian residences, none of which was justified by military necessity.**

members of the West Side Boys and a review of the Lomé Peace Agreement;

4. **Outrages upon personal dignity, in particular—**
   (a) **rape**, for the rape of scores of women;
   (b) **any form of indecent assault**, for sexual violence committed against hundreds of civilians, including children, and for forcing people to have sex with members of their own families;
3. **Pillage**, for the stealing of property from thousands of civilians, including at checkpoints and from civilian residences, none of which was justified by military necessity.

***humiliating and degrading treatment*, for the severe humiliation, degradation and violation of the dignity of hundreds of civilians, including by forcing adults to "frog jump" or "pump", by forcing men to watch the rape of their wives and by keeping civilians in constant fear of being robbed or beaten by the armed forces that were supposed to be providing them with protection.**

4.(f)(iii) Violations of common article 3 and Additional Protocol II by members of the SLA

During the armed conflict in Sierra Leone, in addition to the crimes against humanity and other crimes within the jurisdiction of the Court that were committed, members of the SLA committed the following war crimes:[209]

1. **Violence to life, health and physical or mental well-being of persons, in particular—**
   (a) **Murder**, for the intentional or reckless killing of hundreds of civilians for a variety of reasons, mainly for "collaborating" with the enemy, which was often determined on an arbitrary basis;
   (b) **Torture**, for the infliction of serious pain and suffering on people under the custody or control of the SLA for the purposes of inflicting punishment or obtaining information;
   (c) **Corporal punishment**, for the beating and flogging of hundreds of civilians, including traditional and local authorities;
2. **Collective punishments**, for the targeting of towns and villages **suspected** of being supportive of the RUF and the consequent infliction of punishment on them, including the burning of property and the bombing of a prison;
3. **Outrages upon personal dignity, in particular—**
   (a) **humiliating and degrading treatment,** for the severe humiliation, degradation and violation of the dignity of hundreds of civilians, including by forcing adults to "frog jump" or "pump", by forcing men to watch the rape of their wives and by keeping civilians in constant fear of being robbed or beaten by the armed forces that were supposed to be providing them with protection;
   (b) **rape**,[210] for the rape of scores of women and girls;
3. **Pillage**, for the stealing of property including food from thousands of civilians, including at checkpoints and from civilian residences, none of which was justified by military necessity;
4. **The passing of sentences and the carrying out of executions without due process**, for the capture and execution of hundreds of civilians accused of being "collaborators" often on an arbitrary basis, including having come from an RUF-held area, without any form of trial.

4.(f)(iv) Violations of common article 3 and Additional Protocol II by members of the CDF

During the armed conflict in Sierra Leone, in addition to the crimes against

humanity and other crimes within the jurisdiction of the Court that were committed, members of the CDF committed the following war crimes:

1. **Violence to life, health and physical or mental well-being of persons, in particular—**
   (a) **Murder**, for the intentional or reckless killing of hundreds of civilians, mainly people suspected of being members, relatives or collaborators of the RUF and their allies;
   (b) **Torture**, for the infliction of pain and suffering on people under the control of the CDF, including the common use of FM ropes, detaining people in cages made of sharp sticks, pouring hot ashes on people and other similar acts;
   (c) **Mutilation**, for various acts of mutilating civilians, including the cutting off and chewing of a woman's ear in Moyamba District;
   (d) **Corporal punishment**, for the frequent instances of beating and flogging civilians, including traditional and local authorities;
2. **Collective punishments**, for the targeting of towns and **villages** suspected of being supportive of the RUF and their allies and the consequent infliction of punishment on them, including the burning of property and the execution of inhabitants;
3. **Outrages upon personal dignity, in particular—**
   (a) **humiliating and degrading treatment**, including forcing adults to "frog jump" or "pump", the decapitation and mutilation of corpses, targeting the traditional and local authorities and keeping the civilian population in constant fear of being physically violated;
   (b) **rape**, for the rape of scores of women;
3. **Pillage**, for the stealing of property from thousands of civilians, in particular at checkpoints, none of which was justified by military necessity;
4. **The passing of sentences and the carrying out of executions without due process**, for the capture and execution of suspected RUF members and collaborators without any form of trial;
5. **Threats to commit any of the foregoing acts**, including threatening to kill people and use their bodies as roadblocks in Port Loko District in March 1999.

4(f)(v) Violations of common article 3 and Additional Protocol II by members of ECOMOG

During the armed conflict in Sierra Leone, in addition to the other crimes within the jurisdiction of the Court that were committed, members of ECOMOG committed the following war crimes:

1. **Violence to life, health and physical or mental well-being of persons, in particular—**
   (a) **Murder**, for the intentional or reckless killing of hundreds of civilians, including the killing of 100 alleged RUF supporters in Kailahun District in May 1998 and killings that occurred as a result of the artillery and aerial bombardment of market places and other heavily populated civilian areas;[211]
   (b) **Corporal punishment**, for the frequent instances of beating and flogging civilians;
2. **Pillage**, for the stealing of property from thousands of civilians, often at checkpoints, none of which was justified by military necessity.

***Torture*, for the infliction of pain and suffering on people under the control of the CDF, including the common use of FM ropes, detaining people in cages made of sharp sticks, pouring hot ashes on people and other similar acts.**

4.(g) Other serious violations of international humanitarian law (Article 4): The law

Article 4 of the Statute of the Special Court reads as follows:

> "The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:
> (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
> (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
> (c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."

These provisions give the Special Court jurisdiction over additional crimes under international humanitarian law that have achieved the status of customary international law, including the imposition of individual criminal responsibility for their violation. They are also all included in the Rome Statute of the ICC both for conflicts of an international nature[212] and for conflicts that are not international in nature.[213] As these crimes were not included in the Statutes of the ICTY or ICTR, there is no jurisprudence directly on these provisions and the only authoritative pronouncement on the elements of the crimes comes from the Elements of Crimes of the ICC and in the writings of eminent jurists.

a) Intentionally directing attacks against the civilian population

The elements of the crime of intentionally directing attacks against the civilian population are:[214]

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The crime of intentionally directing attacks against the civilian population confirms the fundamental and long-standing distinction between combatants and civilians[215] and the prohibition on intentionally directing attacks against the latter.

b) Intentionally directing attacks against personnel and objects of humanitarian and peacekeeping missions

The elements of the crime of intentionally directing attacks against personnel and objects of humanitarian and peacekeeping missions are:[216]

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.

4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The crime of intentionally directing attacks against personnel and objects of humanitarian and peacekeeping missions also recognises the fundamental distinction between civilians and combatants.[217] This provision is explicitly directed towards such missions in recognition of the need to extend special protection to them in light of their nature and purpose.[218]

These missions will only be entitled to such protection so long as they retain their civilian character, that is, provided that they do not take a direct part in hostilities, which has been defined as undertaking acts of war that, by their nature or purpose, are likely to cause actual harm to personnel or equipment of the enemy armed forces.[219] These provisions expressly do not apply to "United Nations operations authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations, in which any of the personnel are engaged as combatants against armed forces and to which the law of international armed conflict applies".[220]

c) The recruitment and use of child soldiers

The elements of the war crime of the recruitment and use of child soldiers are:[221]

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group[222] or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities, is a war crime under all conditions, whether the child is recruited into national armed forces or armed groups, whether the conflict is international or non-international and whether the child is coerced or has volunteered. This crime was first included in Additional Protocol II, article 4(3)(c) and subsequently in other instruments, including the Convention on the Rights of the Child 1989, article 38(3) and the Rome Statute for the ICC, article 8(2)(e)(vii).[223] An examination of State practice and *opinio juris* in this area, which is beyond the scope of the current report, demonstrates that the act of conscription, enlistment and use of child soldiers is a crime under customary international law.[224]

Conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities, is a war crime under all conditions, whether the child is recruited into national armed forces or armed groups, whether the conflict is international or non-international and whether the child is coerced or has volunteered.

4.(h) Other serious violations of international humanitarian law (Article 4): The facts

As noted, there was an armed conflict in Sierra Leone that began in March 1991 and continued until January 2002. As such, IHL – including the crimes listed in article 4 of the Statute of the Special Court – applied across the whole territory of Sierra Leone for that time

period both in those places where actual combat was not taking place as well as those areas where fighting was occurring.

In respect of the crime of intentionally directing attacks against peacekeeping personnel, it should be recalled that the Rome Statute of the ICC reflects customary international law in limiting the crime to intentional attacks against personnel and objects "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict". The critical question is, therefore, whether UNAMSIL military peacekeepers had civilian status or whether they were combatants. UNAMSIL was established by the Security Council acting under Chapter VII of the Charter,[225] authorising the use of force in certain circumstances, which gives rise to the *prima facie conclusion* that they were combatants, rather than civilians.[226] It is therefore submitted that UNAMSIL peacekeepers did not have civilian status, at least not to the level of certainty required to sustain a criminal conviction. As such, this report considers that the elements of this crime are not made out in relation to various actions against UNAMSIL peacekeepers.

The critical question is whether UNAMSIL military peacekeepers had civilian status or whether they were combatants.

4.(h)(i) Other serious violations of international humanitarian law committed by members of the RUF/NPFL, RUF and RUF/AFRC

During the armed conflict in Sierra Leone, in addition to the crimes against humanity and other crimes within the jurisdiction of the Court that were committed, members of the RUF/NPFL, RUF and RUF/AFRC committed the following serious violations of international humanitarian law:

1. **Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities**, for the general and specific attacks committed against the civilian population as outlined above and the attacks against individual civilians not taking a direct part in hostilities as outlined above;
2. **Intentionally directing attacks against humanitarian and peacekeeping personnel, installations, material, units or vehicles, for the attacks committed against humanitarian personnel and objects**, specifically the abduction of personnel of the International Committee of the Red Cross (ICRC), Médecins Sans Frontières (MSF) and World Health Organisation (WHO) and the stealing of property from the United Nations Higher Commissioner for Refugees (UNHCR) at the IDP camp in Bo and Pujehun Districts;
3. **Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities**, for the abduction of tens of thousands of children[227] under the age of 15 years, some being as young as 10 at the time of their abduction, conscripting them into the RUF/NPFL, RUF and RUF/AFRC forces and using them to participate actively in hostilities and in the commission of crimes under international humanitarian law as members of the regular forces and as members of "Small Boy Units" and "Small Girl Units".

4.(h).(ii) Other serious violations of international humanitarian law committed by members of the West Side Boys

During the armed conflict in Sierra Leone, in addition to the crimes against humanity and other crimes within the jurisdiction of the Court that were committed, members of the West Side Boys committed the following serious violations of international humanitarian law:

1. **Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,** for the specific attack against the civilian population as outlined above and for attacks against individual civilians not taking a direct part in hostilities as outlined above;
2. **Intentionally directing attacks against humanitarian and peacekeeping personnel, installations, material, units or vehicles**, for the abduction of 40 UNOMSIL and civil society workers in August 1999.[228]

4.(h).(iii) Other serious violations of international humanitarian law committed by members of the SLA

During the armed conflict in Sierra Leone, in addition to the crimes against humanity and other crimes within the jurisdiction of the Court that were committed, the following war crimes were committed

1. **Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,** for the specific attacks against the civilian population as outlined above and for attacks against individual civilians not taking a direct part in hostilities as outlined above;
2. **Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities**, for using children under the age of 15 to carry arms and ammunition to the warfront in Pujehun District in January 1992.

4.(h)(iv) Other serious violations of international humanitarian law committed by members of the CDF

During the armed conflict in Sierra Leone, in addition to the crimes against humanity and other crimes within the jurisdiction of the Court that were committed, members of the CDF committed the following serious violations of international humanitarian law:

1. **Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,** for the general and specific attacks against a civilian population as outlined above and for attacks against individual civilians not taking a direct part in hostilities as outlined above;
2. **Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities**, for the initiation of boys aged under 15 in Kenema in May 1997, the use of children aged as young as 13 in hostilities in Kenema in 1999, the initiation of children aged below 15 in Pujehun District in late 1997, the use of children aged under 15 as spies and soldiers in Pujehun District in February 1998 and the conscription of children and their use as soldiers in Kailahun in May 1998.

Intentionally directing attacks against humanitarian and peacekeeping personnel, installations, material, units or vehicles, for the abduction of 40 UNOMSIL and civil society workers in August 1999.

4.(h)(v) Other serious violations of international humanitarian law committed by members of ECOMOG

During the armed conflict in Sierra Leone, in addition to the war crimes that were committed, members of ECOMOG committed the following serious violations of international humanitarian law:

1. **Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities**, for attacks against individual civilians not taking a direct part in hostilities as outlined above.

4.(i) Crimes under Sierra Leonean law (Article 5): the law

Article 5 of the Statute of the Special Court reads as follows:

> "The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:
> (a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):
> (i) Abusing a girl under 13 years of age, contrary to section 6;
> (ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;
> (iii) Abduction of a girl for immoral purposes, contrary to section 12.
> (b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
> (i) Setting fire to dwelling - houses, any person being therein, contrary to section 2;
> (ii) Setting fire to public buildings, contrary to sections 5 and 6;
> (iii) Setting fire to other buildings, contrary to section 6."

The crimes under Sierra Leone law were selected to cover specific situations that were considered to be either unregulated or inadequately regulated under international law.

Security Council Resolution 1315 (2000) explicitly refers to Sierra Leonean law as being among the provisions over which the Special Court should have jurisdiction. The provisions were selected to cover specific situations that were "considered to be either unregulated or inadequately regulated under international law."[229] The elements of these crimes are governed by Sierra Leone Statute and case law[230] and, as such, do not require any connection with an armed conflict.

a) Abuse of girls

The provisions of the *Prevention of Cruelty to Children Act, 1926* listed in the Statute of the Special Court are designed to protect girls under the age of 16 from sexual abuse and exploitation. They vary in terms of the ages of the children they protect, from under 13 in the case of section 6, through between 13 and 14 in the case of section 7, to under 16 in the case of section 12. The different crimes are considered to have different levels of seriousness and entail different penalties under Sierra Leone law, from 15 years in the case of section 6, which is a felony, to 2 years in the case of sections 7 and 12, which are misdemeanours.

The elements for the crimes under sections 6 and 7 are that the accused "unlawfully and carnally" knew and abused a girl within the stated ages. The elements for section 12 are that the accused took or caused to be taken an unmarried girl under the age of 16 out of the possession of and against the will of her father or mother or any other person having lawful charge of her.

There are two possible defences to the crimes under these provisions. First, 'belief of age' is a defence to the charge: thus if the accused can prove that he had reasonable cause to believe the victim was of or over the required age, this will be a complete defence.[231] In addition, in keeping with the common law applicable in Sierra Leone related to these types of crimes,[232] if the accused can show that the victim was his wife, particularly under the customary law of Sierra Leone, this will also be a defence.[233] However, consent of the girl is no defence to the crime, as lack of consent is not an element of the crime.

b) Wanton destruction of property

These provisions only cover setting fire to specific buildings, namely dwelling houses, public buildings and "other" buildings, which include any type of building not explicitly mentioned elsewhere in the *Malicious Damage Act, 1867*.[234] It should, however, be emphasised that setting fire to a house will only fall within the jurisdiction of the

Special Court should a person actually be inside, due to the elements of section 2 of the *Malicious Damage Act, 1867*.[235] Furthermore, the Statute of the Special Court does not incorporate the other provisions of the *Malicious Damage Act, 1867, thereby excluding setting fire to buildings other than those listed* above and excluding other types of damage to all buildings.

An essential element of this crime is that there was actual burning, no matter how slight, of some part of the building or property in respect of which the charge is laid.[236] Each of the crimes listed in article 5(b) constitute a felony under Sierra Leone law, with penalties ranging from 14 years (section 6), through 16 years (section 5) to life imprisonment (section 2).

The mental element is that the act must be committed "unlawfully and maliciously" in order to constitute an offence. In this instance, "malice" does not mean malevolence or ill will, but refers instead to the intention of the accused. The mental element is therefore that the accused either intended to do the act, without just cause or excuse,[237] or was reckless and foresaw or ought to have foreseen the result, even if that result was not necessarily intended.[238]

4.(j) Crimes under Sierra Leonean law (Article 5): the facts

Sierra Leone law applied throughout the territory of Sierra Leone throughout the time period covered by the conflict, without the need to prove any contextual elements such as those applicable to crimes against humanity (a widespread or systematic attack against a civilian population) or violations of common article 3 and Additional Protocol II and other serious violations of international humanitarian law (the existence of an armed conflict). It should, however, be noted that an amnesty applies in relation to crimes committed before 7 July 1999,[239] so that those crimes cannot be prosecuted in the national courts of Sierra Leone or before the Special Court. Nevertheless, this report characterises acts as crimes where the elements of the crimes are met, irrespective of whether they can be prosecuted or not.

One of the signature acts committed during the conflict in Sierra Leone was the widespread burning of residential houses. While this is a crime under Sierra Leone law,[240] it is not a crime over which the Special Court has jurisdiction: the Special Court is limited to those circumstances in which a person is inside the house at the time it is burnt. Similarly, while wanton destruction of property is a crime under international law, it is not a crime over which the Special Court has jurisdiction. Therefore, while there is evidence of the burning of hundreds of thousands of houses – effectively destroying the lives of hundreds of thousands of people – this in itself is not a crime that can be prosecuted before the Special Court.

4.(j)(i) Crimes under Sierra Leone law committed by members of the RUF/NPFL, RUF and RUF/AFRC

During the armed conflict in Sierra Leone, in addition to the crimes against humanity, war crimes and other crimes within the jurisdiction of the Court that were committed, members of the RUF/NPFL, RUF and RUF/AFRC committed the following crimes under Sierra Leone law:

1. **Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926**, for the rape of scores of girls aged under 13 years, with some aged as young as 10, the rape of girls aged between 13 and 14 years and the abduction of girls aged under 16 years for their use as "wives";[241]
2. **Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861**, for the burning of people in residential premises, including locking people inside houses before setting fire to them, and for

***Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926*, for the rape of scores of girls aged under 14 years, with some aged as young as 10, and the abduction of girls aged under 16 years for their use as "wives".**

the burning of public buildings, including schools, courthouses and other buildings;

4.(j)(ii) Crimes under Sierra Leone law committed by members of the West Side Boys

During the armed conflict in Sierra Leone, in addition to the crimes against humanity, war crimes and other crimes within the jurisdiction of the Court that were committed, members of the West Side Boys committed the following crimes under Sierra Leone law:

1. **Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861,** for the burning of people in residential premises, in particular the locking of 73 people in a house prior to it being set on fire in April 1999.

***Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861*, for the burning of people in residential premises, in particular the locking of 73 people in a house prior to it being set on fire in April 1999.**

5. TEMPORAL JURISDICTION OF THE SPECIAL COURT (ARTICLE 1(1))

The Statute of the Special Court for Sierra Leone states that its temporal jurisdiction runs from 30 November 1996 to a future date as yet undetermined.[242] This date was selected on the basis of three considerations during the negotiations:

a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded;
b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and
c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.

Three different dates were discussed in this context:

a) 30 November 1996 (i.e., the date of the failed Abidjan Peace Accords);
b) 25 May 1997 (i.e., when the AFRC launched its coup d'état against the government of Sierra Leone); and
c) 6 January 1999 (i.e., when the AFRC and RUF launched their attack on Freetown).

The date of 25 May 1997 was rejected as having too many political overtones, while 6 January 1999 was rejected as giving the impression of favouring Freetown over the provinces. The date of 30 November 1996 was therefore considered the most appropriate, as it represented the first time the fighting factions had attempted to reach a peaceful settlement of the conflict. Additionally, it was considered to encompass the most serious crimes committed in the provinces, thereby ensuring the Court would not be too 'Freetown-centred'. Sierra Leone and the United Nations therefore agreed that this would be a suitable starting date for the Court. It has to be queried whether these reasons provide sufficient justification for setting a start date for the Court that is halfway through the conflict, a compromise criticized by Sierra Leoneans from all along the social, political and professional spectrum.[243] The perception in Sierra Leone is that the Statute unjustly favours Freetown over the provinces, as the November 1996 date corresponds to the time when the capital first became a target of attack. For the provinces, the conflict has generally been one long, continuous experience from the beginning of the 1990's, whereas Freetown witnessed intermittent, although extreme, episodes of violence only from the mid-1990's onwards.

Following consultations with civil society groups and others, the Government of Sierra Leone sought to alter the date so as to give the Court temporal jurisdiction over the whole of the conflict in Sierra Leone, i.e. commencing in 1991. This

was sought both to provide greater recognition to the situation in the provinces throughout the war, as well as to be more faithful to the tenets of IHL, which applies from the commencement of a conflict rather than at an arbitrarily-set date midway through the conflict.[244] However, the general feeling within the United Nations was that this issue should not be reopened, lest 'delicate' balances achieved during the negotiations be upset, thereby requiring the re-opening of other aspects of the Statute or Agreement. In addition, the United Nations considered that an extension of the Court's temporal jurisdiction would increase the burden on the Prosecutor and the Court to an unacceptable level. The United Nations also maintained that the Prosecutor would in any event also be relying on evidence relating to events before 1996 (provided it is relevant to cases before the Court), therefore crimes committed prior to 1996 would not necessarily be excluded from consideration by the Court.[245] In order to avoid further delay, the Government therefore withdrew its request, while still maintaining the legitimacy of the reasons behind making it.[246]

Another factor to be considered when examining the Special Court's temporal jurisdiction is the amnesty granted under the Lomé Peace Agreement of 7 July 1999. The UN Secretary-General denied that this would act as any bar to the determination of the start-date of the Special Court's jurisdiction, reasoning that the "United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."[247] In addition, he reiterated the disclaimer issued by his Special Representative for Sierra Leone at the time of the signing of the Lomé Peace Agreement to the effect that "the amnesty provisions contained in article XI of the Agreement ('absolute and free pardon') shall not apply to international crimes and other serious violations of international humanitarian law."[248] However, the Statute acknowledges that amnesties will be valid in respect of the included provisions of Sierra Leone law.[249] This makes for a situation in which the Special Court will be able to hear violations of international humanitarian law committed since 30 November 1996 but only hear violations of the Sierra Leone provisions committed from the date of the signing of the Lomé Peace Agreement, namely 7 July 1999, in effect creating a dual start-date for the Special Court's temporal jurisdiction.

As noted, international humanitarian law begins to apply from the moment hostilities commence until such time as there is a conclusion of peace or a peaceful settlement is reached. Thus international humanitarian law applied across the territory of Sierra Leone from 1991, the date that hostilities first commenced. As such, this report looks at the time period of the whole of the conflict, from 1991 until 2002, when considering what violations of international humanitarian law and Sierra Leonean law were committed in Sierra Leone during the conflict.

For the provinces, the conflict has generally been one long, continuous experience from the beginning of the 1990's, whereas Freetown witnessed intermittent, although extreme, episodes of violence only from the mid-1990's onwards.

6. Personal Jurisdiction of the Special Court (Article 1(1))

Security Council Resolution 1315 (2000) states that the Special Court should have jurisdiction over those who bear the "greatest responsibility" for crimes committed within Sierra Leone. This was understood to be a limitation on the number of accused who would be tried, according to their command authority and the gravity and scale of crimes committed. The UN Secretary-General's report recommended this be altered to "those most responsible" in order to widen the potential pool of defendants before the Special Court.[250] However,

the Security Council refused to accept this change, preferring instead to remain consistent with the wording of Resolution 1315 (2000).[251] Therefore, the Statute retains the wording of "those who bear the greatest responsibility". It should be emphasised that article 1 contains no other limitations on personal jurisdiction, in particular it does not limit jurisdiction based on nationality, political affiliation or official position.

Article 1 also specifically refers to the ability of the Special Court to try peacekeepers who otherwise satisfy the requirements of the personal jurisdiction. Article 1 basically replicates what is found in most Status of Forces Agreements, namely those agreements between troop-contributing and troop-receiving States. According to these types of agreements, the primary responsibility for prosecuting peacekeepers for crimes committed on the territory of the recipient State remains with the sending State. Article 1 contains an exception to this principle, whereby it may be possible to try peacekeepers before the Special Court if the sending State is unwilling or unable genuinely to investigate or prosecute peacekeepers for crimes committed in Sierra Leone. The Special Court may hear such cases upon receiving authorisation from the Security Council,[252] which may act on the proposal of any State.[253]

The personal jurisdiction limitation of bearing the "greatest responsibility" always made it unlikely that children aged below 15 at the time of the alleged commission of the crime would be prosecuted before the Special Court.

The aspect of the Special Court that has, perhaps, provoked the most public debate is its position vis-à-vis accused below the ages of 18 at the time of the alleged commission of the crimes. Pursuant to article 7 of the Statute, the Special Court shall have no jurisdiction over persons under the age of 15 at the time of the alleged commission of the crime but persons between the ages of 15 and 18 at the time of alleged commission of the crime may be brought before the Special Court,[254] although the Prosecutor is directed to have resort to alternative truth and reconciliation mechanisms, where appropriate. If convicted, juvenile offenders may not be sentenced to imprisonment, instead the Special Court may order a variety of correctional care. Nevertheless, the personal jurisdiction limitation of bearing the "greatest responsibility" always made it unlikely that children aged below 15 at the time of the alleged commission of the crime would be prosecuted before the Special Court; more recently, the Prosecutor of the Special Court has stated publicly that no child will be prosecuted before the Special Court.[255]

7. Individual Criminal Responsibility (Article 6)

7.(a) Direct criminal responsibility

Following well-established principles of customary international law, article 6 of the Statute states that any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 shall be individually responsible for the crime. The accused does not necessarily have to be a member of the armed forces in order to attract liability; civilians, for example, can also be held criminally responsible for violations of the laws of war.[256] Criminal responsibility for the crimes contained in article 5, namely those under Sierra Leonean law, falls to be determined by the relevant laws of Sierra Leone.

The fact that the accused was acting under the orders of a Government or superior does not relieve the individual of his or her criminal responsibility, although – according to general principles of law as well as the Statute – it may be taken into account in mitigation of sentence. According to these principles of liability, if a commander orders that certain acts be committed, he or she would bear direct responsibility for those acts, as the Statute specifically refers to 'ordering'

that the act be committed as a basis for liability.

7.(b) Command responsibility

The laws of war also impose what is known as "command responsibility", referring to the principle by which a superior will be responsible for the acts of subordinates under his or her control.[257] This concept, which is longstanding in military hierarchies,[258] has also become a well-established principle in customary international law, particularly following its development at the Nuremberg, Tokyo and post-Nuremberg Trials.

Command responsibility is concerned with being in a position of command, namely that the commander is in a certain relationship towards his or her subordinates, rather than actually giving commands. Thus the commander will be responsible for any acts of his or her subordinate, irrespective of whether the commander actually issued an order to commit such acts. If a command is actually given, as noted, the commander will bear direct responsibility for acts carried out pursuant to that command. The theory of command responsibility as been described by the ICTY as follows:

> "The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability ... the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act. As is most clearly evidenced in the case of military commanders … international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute."[259]

This type of responsibility is applicable in two situations: first, where the superior knew or ought to have known the acts were about to be committed or were being committed and did nothing to stop their commission. Second, where the superior knew that such acts had been committed and failed to punish those responsible for their commission. The ICTY Trial Chamber has described the relevant elements for the imposition of command responsibility in the following way: (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.[260] As with direct responsibility, command responsibility is not limited to military personnel but extends also to civilian commanders. It is also worth emphasising that the principle of command responsibility does not limit or extinguish the individual criminal responsibility of the subordinates for the acts they have committed.

Command responsibility applies during any armed conflict, both international and non-international in nature. The ICTY Appeals Chamber addressed this issue recently, stating that, "the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander; that only goes to the characteristics of the particular crime and not to the responsibility of the commander. The basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force."[261]