

The CDF Appeals Decision: How the ‘Reasons for Fighting’ are Relevant to Adjudicating Violations of International Humanitarian Law



Essay Series on Criminal Justice
September 2008

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**For the
Sierra Leone Court Monitoring Programme**

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About SLCMP

The Sierra Leone Court Monitoring Programme (SLCMP) is an independent Sierra Leonean organization dedicated to ensuring accountability in the justice sector, and redress for victims of the atrocities of the conflict in Sierra Leone. It was established in the aftermath of the decade-long civil war, wherein the lack of access to justice was identified as one of the root causes. Its primary objective is to ensure judicial accountability and integrity. SLCMP monitors the UN backed Special Court for Sierra Leone, the domestic courts, the Anti corruption Commission and follow-up on the implementation of the recommendations of the Truth and Reconciliation Commission. As Sierra Leone still grapples with the consolidation of the peace, it is essential to enhance the rule of law and the administration of justice both at the formal and informal levels.

Formerly called the Special Court Monitoring Programme, the SLCMP was established in May 2004 to exclusively monitor trial proceedings at the Special Court. Based on its experience in monitoring trials and its reports on those proceedings, the SLCMP started monitoring trials in the domestic courts in Freetown the capital in September 2005. One year later, it established regional offices in Bo and Makeni in the provinces. Currently, monitors are assigned to a range of criminal and civil proceedings at all levels of the court systems including local courts, magistrate courts and the High Court. Gender and juvenile issues form a core of its programme activities. The SLCMP has also been engaged in advocating for both institutional and legislative reforms as most of the laws in Sierra Leone are obsolete and cannot address the present day challenges of post-conflict Sierra Leone. Furthermore, the SLCMP conducts extensive outreach activities through a variety of outlets including the radio, its newsletter, community town hall meetings, and its website on the issues monitored in court. Through the same outlets, the SLCMP also communicates feedback it has received from the communities to the various authorities concerned.

About the CDF Trial

The Special Court for Sierra Leone (SCSL) issued an indictment against the three accused persons of the Civil Defence Forces (CDF), Sam Hinga Norman, former Deputy Defence Minister and later Minister of Internal Affairs; Moinina Fofana, alleged to be the National Director of the CDF; and Allieu Kondewa, alleged to be the High Priest of the CDF between March and June 2003. The indictment include 8-counts for crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (commonly known as war crimes), and other serious violations of international humanitarian law.

Sam Hinga Norman being the First accused made his initial appearance at the temporary courthouse on Bonthe Island on 15 March 2003. Mr. Norman pleaded not guilty to all charges against him. Messrs. Fofana and Kondewa, Second and Third accused respectively also pleaded not guilty to all the charges against them when they were arraigned before the Court at the temporary courthouse on July 1, 2003.

The specifics of the charges include:

Unlawful killings

1. Murder *1

2. Violence to life, health and physical or mental well-being of persons, in particular murder *2

Physical violence and mental suffering

3. Inhumane acts *1

4. Violence to life, health and physical or mental well-being of persons, in particular cruel treatment *2

Looting and burning

5. Pillage *2

Terrorizing the civilian population and collective punishments

6. Acts of terrorism *2

7. Collective punishments *2

Use of child soldiers

8. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities *3

Key:

*1 = Crimes Against Humanity

*2 = Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (war crimes)

*3 = Other serious violation of international humanitarian law

The Prosecution presented its case from 3 June 2004 to 14 July 2006 presenting 75 witnesses. From 19 January to 18 October 2006, the Defence presented 44 witnesses. Closing arguments were made from 28-30 November 2006. Following that, First accused Hinga Norman was

hospitalized in Dakar to undergo a surgery. Unfortunately, he passed away on 22 February 2007 in Dakar. On 20 July 2007, the Court issued its judgement and Fofana was found guilty on Counts 2, 4, 5 and 7. Kondewa is found guilty on Counts 2, 4, 5, 7 and 8. The case against Hinga Norman was dropped since he is deceased. The Trial Chamber sentenced Fofana to 6 years and Kondewa to 8 years.

The Appeals phase– Second Accused Moinina Fofana and Third Accused Allieu Kondewa- was concluded on 28 May 2008. The Appeals Chamber re-sentenced Fofana to 15 years as opposed to the original 6 year term and Kondewa to 20 years as opposed to the original 8. Mr. Fofana never appealed his original sentence. Kondewa appealed but in either case, it was the Prosecution's appeal for higher sentences that was ruled upon. The convicts are still at the Special Court premises in Sierra Leone.

Introduction

One of the most controversial aspects of the Civilian Defense Forces (CDF) trial before the Special Court for Sierra Leone (SCSL) has been whether and how the idea of a ‘just cause’ is relevant to the prosecution of international criminal law violations. The idea that the CDF were fighting for a ‘just cause’ – namely the restoration of the democratically elected government of President Tejan Kabbah – has been raised as a defense to the crimes committed, as material to establishing the elements of the crimes charged, and as a mitigating factor in sentencing decisions. Some argue that the idea of a ‘just cause’ has absolutely no place in adjudicating crimes under international humanitarian law, which does and should apply equally to all parties to a conflict regardless of their reasons for fighting. Others argue that claims of a ‘just cause’ are relevant to establishing the nature of the crimes committed and as a mitigating factor in sentencing decisions. Both the Majority Opinion in the CDF Appeal Judgment¹ and the Honourable Justice George Gelaga King’s dissenting opinion² adopt a different approach and attempt to differentiate between claims of a ‘just cause’ and the reasons a group has for fighting. In doing so, both opinions help illuminate how the ‘reasons for fighting,’ regardless of the perceived justness of the cause, may be legally and evidentially relevant to adjudicating international crimes. While claims of a ‘just cause’ imply that a party was fighting for a legitimate purpose, or on the ‘right’ side, references to a party’s ‘reasons for fighting’ do not imply such a normative judgment, and instead are merely descriptive of the end goal or objective of a party.

Given that the idea of a ‘just cause’ is often viewed as a divisive political issue, it might make sense for internationalized criminal tribunals to absolutely prohibit such considerations from entering into judicial proceedings. To be sure, claims of a ‘just cause’ do not provide an excuse for violations of international humanitarian or criminal law. If one looks at the underlying tenants of Just War Theory, as propounded by 16th and 17th century philosophers, a just cause only provides a group with an excuse to resort to war as such. In fact, one of the defining elements of a Just War was that the party must fight the war ‘justly’ – that is, abide by the laws of war, which today would include international humanitarian and criminal law. While in principle claims to a ‘just cause’ have no place in determining whether or not parties to a conflict

¹ See Prosecutor v. Fofanah and Kondewa, Judgment, SCSL Appeals Chamber, Case No. SCSL-04-14-A (May 28, 2008) [hereinafter CDF Appeal Judgment].

² See Prosecutor v. Fofanah and Kondewa, Judgment, “Partially Dissenting Opinion of Hon. Justice George Gelaga King,” SCSL Appeals Chamber, Case No. SCSL-04-14-A (May 28, 2008) [hereinafter King’s Dissenting Opinion].

are permitted to violate the laws of war, the ‘reasons for fighting’ themselves may sometimes be evidentially material to establishing the requisite elements of crimes against humanity, completely apart from the ‘justness’ of these reasons. This paper will provide a brief summary and analysis of the CDF Appeal Judgment and Justice King’s dissenting opinion, paying particular attention to how the ‘reasons for fighting’ may be separated from considerations of ‘just cause,’ their legal relevance in charges that the CDF committed crimes against humanity and their use as a mitigating factor in sentencing decisions.

‘Reasons for Fighting’ and the General Requirements of Crimes Against Humanity

The CDF Trial Judgment entered verdicts of not guilty for both accused, Moinina Fofana and Allieu Kondewa, for Counts 1 and 3, charging crimes against humanity of murder and other inhumane acts.³ A majority of the Appeals Chamber, with Justice George Gelaga King and Justice Jon Kamanda partially dissenting, reversed these decisions and entered guilty verdicts for both counts. The Statute of the SCSL defines crimes against humanity as the commission of “crimes as part of a widespread or systematic attack against any civilian population.”⁴ Thus in order to establish the commission of a crime against humanity (CAH), the Prosecution needed to prove beyond a reasonable doubt, *inter alia*, that attacks by the CDF and the Kamajors were directed “against any civilian population.” This is one of the general or ‘chapeau’ requirements for crimes against humanity that must be proven in addition to the actual commission of the specific crime, i.e. murder.⁵ The Trial Chamber found that the Prosecution had not established this requirement beyond reasonable doubt, based on evidence that attacks by the CDF and the Kamajors were directed against rebel forces, specifically the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC), and the Prosecution’s admission that the CDF and the Kamajors “fought for the restoration of democracy.”⁶

On its first ground of appeal, the Prosecution submitted that the Trial Chamber had erred in both law and fact in not finding this general requirement of an attack directed against any civilian population.⁷ The Prosecution first submitted that the Trial Chamber erred as a matter of law in

³ See Prosecutor v. Norman, Fofanah and Kondewa, Judgment, SCSL Trial Chamber I, Case No. SCSL-04-14-J (August 2, 2007) [hereinafter CDF Trial Judgment].

⁴ See the Statute of the Special Court for Sierra Leone, Article 2.

⁵ See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd Ed. (Oxford: Oxford University Press, 2001), pp. 58-79.

⁶ CDF Trial Judgment, para. 693.

⁷ Prosecution Appeal Brief, para. 2.5.

basing its finding on evidence that attacks were directed against the rebels or juntas.⁸ The Prosecution argued the Trial Chamber effectively adopted the view that, as a matter of law, an attack cannot be directed against a civilian population if there are civilian casualties during an attack against opposing military forces. The Prosecution further argued the Trial Chamber erred as a matter of law in finding that the CDF ‘fought for the restoration of democracy,’ because this is not and should not be a material consideration in determining whether or not crimes against humanity were committed, given that international humanitarian law applies equally to all parties to a conflict.⁹ To this end, the Prosecution submitted that a distinction must be drawn between the *purpose* and the *target* of the attack, and that the purpose – i.e. fighting for the restoration of democracy – is not relevant to ascertaining the target – i.e. a civilian population.

In its Response Brief, the Defense for Fofana maintained that the CDF attacks were never directed against the civilian population but against military targets, and that many acts of the Kamajors were isolated, random and unauthorized by the CDF.¹⁰ In addition, the Defense submitted that the CDF’s policy was never to terrorize civilians, since this would be contrary to protecting civilians from rebel forces, the main purpose behind the establishment of the CDF.¹¹ The Defense counsel for Kondewa submitted that the finding that the CDF fought to restore the democratically elected government is in fact relevant to establishing that the civilian population was not the specific or primary target of the attacks.¹² This argument implies that the reasons for fighting, which sometimes may unfortunately be portrayed as a ‘just cause,’ should have legal importance for establishing or disproving the necessary context for crimes against humanity. Kondewa’s defense essentially argued that the existence of a plan or policy – which is often established through evidence of a party’s ‘reasons for fighting’ or their objective – has been found relevant to proving that an attack *was* directed against a civilian population in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹³ For this reason, it should also be evidentially relevant to proving that an attack *was not* directed primarily against a civilian population. The Defense’s argument is subtle and one must be careful not to place too much

⁸ Prosecution Appeal Brief, para. 2.16; CDF Trial Judgment, para. 693.

⁹ Prosecution Appeal Brief, para. 2.51.

¹⁰ Fofana Response Brief, para. 6. To support this, Fofana’s Defense refers to the Trial Chamber’s finding that “[a]lthough the CDF were a cohesive force under one central command, there were some fighters who acted on their own without the knowledge of central command.” Ibid., para. 7.

¹¹ Ibid., para. 16.

¹² Kondewa Response Brief, para. 1.8.

¹³ Ibid. See also, CDF Appeal Judgment, para. 241.

emphasis on how the reasons for fighting can help establish the *absence* rather than the *presence* of a particular policy. Nevertheless, it highlights the fact that descriptive evidence of a party's reasons for fighting are evidentially relevant to elucidating the underlying objective – and thus in some cases the object or target – of a party's military operations.

If one considers in more detail the required context for the commission of crimes against humanity, one begins to see how and why the reasons for fighting are legally and evidentially relevant.¹⁴ Firstly, it is important to note that the concept of an 'attack' in the context of CAH is distinct from the concept of an attack or armed conflict in the context of war crimes. A military operation is not necessarily an attack against a civilian population even if – or because – breaches of the laws of war occur or there are heavy civilian casualties. The contextual CAH prerequisite of an 'attack' is only established to the extent that a military operation can be shown to be *aimed* or *directed* at a civilian population. More specifically, a court must determine that the attack was directed *primarily* against a civilian population, and was not just the consequence of an excessive use of military power. The CDF Trial Chamber did adopt this dictum from the ICTY Appeals Chamber¹⁵ that 'directed against' in the context of CAH implies that the civilian population is the primary object rather than an incidental target of an attack. An attack can still be considered as primarily directed against a civilian population if the court is satisfied that in pursuance of a military purpose, a party to a conflict has specifically or indiscriminately targeted the civilian population within those places over which it wished to gain military control.

However, civilian casualties do not in and of themselves render the attack as one directed 'against a civilian population' for the purposes of CAH. The question then is how a Court ascertains that an attack is directed against a civilian population, particularly if it is in pursuance of a military purpose. Here the ad hoc tribunals have largely relied on evidence of whether there is a political objective or a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, to destroy, persecute or weaken a community.¹⁶ The *Blaskic* Trial

¹⁴ For good overviews of the development of crimes against humanity and their elements, as well as pertinent judicial decisions, see Anthony Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003): 64-95; Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2002): 85-128; Guénaél Mettraux, "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda," 43 *Harvard International Law Journal* (2002): 237-316.

¹⁵ See Prosecutor v. Kunarac et al, Judgment, ICTY Appeals Chamber, Case No. IT-96-23 & IT-96-23/1-A (12 June 2002) [hereinafter *Kunarac* Appeal Judgment], para. 92. See also CDF Trial Judgment, para. 114.

¹⁶ See Prosecutor v. Tihomir Blaškić, Judgement, ICTY Trial Chamber, Case No. IT-95-14-T (3 March 2000) [hereinafter *Blaskic* Trial Judgment], paras. 203-206.

Chamber, for instance, did consider whether the attacks in question were designed to be responses to military aggression or had military objectives.¹⁷ In the context of the conflict in the former Yugoslavia and the systematic nature of attacks that were directed against specifically Muslim civilian populations, it concluded that the attacks could not have been justified by military objectives.

The ICTY has adopted a liberal interpretation of the term ‘civilian,’ which the SCSL has largely followed. For instance, the ICTY has held that ‘civilian’ includes victims who at one time bore arms, and that at a minimum the “Prosecution must show that the perpetrator could not reasonably have believed that the victim was a member of the armed forces.”¹⁸ Under customary international law, as well as the jurisprudence of the ICTY and ICTR, the victims of CAH may include military personnel or rebel forces who are *hors de combat* – who have laid down arms or are injured.¹⁹ However, the targeted population must still be predominantly civilian in nature, and non-civilians are victims because of their membership or presence within the civilian population that is targeted by the accused or the attack.

The ad hoc tribunals have also emphasized the *policy* of targeting civilian populations as an important part of the context of CAH. In fact, “[i]t is the existence of such a policy that endows the criminal act with a great dimension which warrants its punishment as a crime against humanity.”²⁰ A policy of attacks against a civilian population is one of the main aspects of proving the commission of a CAH, and is often used to establish the ‘systematic’ component of such attacks. This supports the argument that the grounds for commission or the reasons for fighting – which are often outlined within a group or organization’s official policy – are very much relevant to elucidating whether or not such a policy was intentionally targeting civilian populations or alternatively solely military targets or rebel forces. While they are not necessarily determinative, the reasons for fighting do provide evidence either supporting or undermining the contention that particular attacks were direct against a civilian population, and thus cannot automatically be discounted. Both the Majority Opinion and Justice King’s Dissenting Opinion

¹⁷ See *ibid.*, paras. 425-28, 573-79, 623-34, 676-78.

¹⁸ *Prosecutor v. Kunarac et al*, Judgment, ICTY Trial Chamber, Case No. IT-96-23-T & IT-96-23/1-T (22 February 2001) [hereinafter *Kunarac* Trial Judgment], para. 435.

¹⁹ See *Prosecutor v. Mrksic and Others (Vukovar Hospital Case)*, Judgment, ICTY Trial Chamber II, Case No. IT-95-13/1 (27 September 2007), paras. 29-32; *Blaskic* Trial Judgment, paras. 210, 216; *Prosecutor v. Kayishema and Ruzindana*, Judgment, ICTR Trial Chamber, Case No. ICTR-95-1-T (21 May 1999) [hereinafter *Kayishema* Trial Judgment], para. 127.

²⁰ *Kayishema* Trial Judgment, paras. 124-6.

recognize this, but address the distinction between a ‘just cause’ and the reasons for fighting differently, based on how they interpret the argument that the CDF were fighting for the restoration of a democratically elected government.

The Appeals Chamber, in its majority opinion, first denied the Prosecution’s argument that the Trial Chamber made its finding that the CDF fought for the restoration of democracy a decisive consideration in its judgment.²¹ Not surprisingly, it emphatically rejected the idea that fighting for the restoration of democracy could provide a justification for the commission of crimes against humanity. However, instead of attempting to differentiate between the idea of a ‘just cause’ as justification and the ‘reasons for fighting’ as material to the determination of the context of CAH, the Appeals Chamber instead decided to interpret the Trial Chamber’s judgment as not heavily relying on the finding that the CDF were fighting for the restoration of democracy. For this reason, the Appeals Chamber did not consider whether or how the finding could be material to the contextual elements of CAH. It did, however, note the argument of Kondewa’s Defense Counsel that because the reasons for fighting can be evidentially material to establishing a policy of attacking civilian populations, they should also be evidentially material to establishing the absence of such a plan.²²

The Appeals Chamber also denied the Prosecution’s alternative submission of legal error, that the Trial Chamber had rejected the possibility that civilians were targeted merely because there was evidence of attacks directed against rebel forces. The Appeals Chamber was unable to conclude that the Trial Chamber considered as a matter of law that a military attack cannot coexist with an attack directed against any civilian population.²³ Thus the Appeals Chamber did not reverse the Trial Chamber’s verdict of not guilty on the basis of the misapplication of the legal principles of CAH.

In his dissenting opinion, Justice King first considered whether the finding that the CDF was ‘fighting for the restoration of democracy’ is a material consideration in determining whether a civilian population is the primary object of an attack. While he agreed with the Prosecution’s contention that international humanitarian law applies equally to all sides of a conflict, he did not think the Trial Chamber was necessarily referring to which side of the conflict was in the right.

²¹ CDF Appeal Judgment, para. 247-9.

²² *Ibid.*, para. 241.

²³ *Ibid.*, para. 251-2.

For him, the Trial Chamber was actually referring to the fact that the object of attacks by the CDF and the Kamajors was the AFRC and the RUF, in order to restore the elected government. For Justice King, this is a relevant factor in evaluating the “totality of the evidence” to determine whether or not the attacks were primarily directed against civilians or, alternatively, rebel forces.²⁴ In particular, it is a relevant factor in determining whether the charges put forth in the Prosecution’s indictment – that the CDF was fighting to gain control of the territory and population of Sierra Leone – had been sufficiently proven.²⁵

Justice King argued that the evidence did not support these charges, given that the CDF were fighting to restore the democratically elected government and not to “gain complete control over the population of Sierra Leone.”²⁶ While he stated numerous times that the reasons for fighting were materially relevant, he did not specify how exactly they might be important in determining whether the attacks were directed against the civilian population. One could further elaborate on Justice King’s position to argue that the reasons for fighting provide evidence of the *object* of attack and not simply the *purpose* of the attack. Often, the reasons for fighting or the purpose of an attack – the very policy behind the attack that must be established to prove the systematic requirement of the CAH – will inform which objects of attack are chosen. While the two are not equivalent, they are also not mutually exclusive. The purpose of the attack can elucidate what the intended targets were, but it is not exclusively determinative of those targets.

The second issue raised by the Prosecution on appeal was whether the Trial Chamber erred as a matter of *fact* in finding the absence of attacks directed against a civilian population. In reviewing the Trial Chamber’s findings that attacks were *not* directed against any civilian population, the Appeals Chamber first noted that this conclusion was “devoid of articulation of its reasoning” and that the Trial Chamber “misdirected itself when applying the [legal] principle it had already stated, by confusing the target of the attack with the purpose of the attack. When the target of the attack is the civilian population, the purpose of that attack is immaterial.”²⁷ While this latter statement is certainly true, the Appeals Chamber put the cart before the horse. The issue before both the Trial and the Appeals Chamber was *whether* a civilian population was the target, and the *purpose* of the attack can be evidentially relevant in adducing whether this is

²⁴ King’s Dissenting Opinion, paras. 28-9.

²⁵ CDF Indictment, para. 19.

²⁶ Ibid.

²⁷ CDF Appeal Judgment, paras. 298, 300.

the case; only if and when it is found that a civilian population *was* the target, does the purpose of the attack lose its relevance and become immaterial. In other words, the purpose of the attack is material to *whether* a civilian population is the target but only becomes immaterial *when* a civilian population is the target.

The Appeals Chamber then reviewed the record with respect to each attack and found sufficient evidence of targeted attacks against civilians as a group or population. Of particular importance for the Appeals Chamber was the Trial Chamber's own finding that there were incidents when the CDF or the Kamajors committed crimes after combat operations against the AFRC had already ceased.²⁸ The Appeals Chamber thus granted the Prosecution's submission of an error of fact and reversed the acquittals on the basis of its own findings of fact. This is particularly important if one considers the rationale behind and normative desirability of appellate review of acquittals, addressed below.

Justice King dissented as to whether the attacks by the CDF and Kamajors were in fact directed against any civilian population. He disagreed with the Appeals Chamber's findings that in Tongo, Bo, Kenema and Korbondo, the Kamajors and the CDF engaged in attacks directed against the civilian population. He first considered whether attacks in these areas had a military objective, and supported the Trial Chamber's findings, for example, that these attacks were military operations against rebels in Tongo and that there were only eleven civilian casualties in Koribondo. Although this is never fully elaborated, Justice King could have further argued that such attacks cannot be considered directed against a civilian population, because they were military operations not directed against civilians *per se* (so do not satisfy the systematic or policy requirement for CAH), and the extent of civilian casualties was not sufficiently widespread to constitute a crime against humanity (under the alternative widespread requirement).

Justice King argued that the Trial Chamber looked for relevant legal authority and principles and applied those principles to the factual findings made. He thus disagreed with the Appeals Chamber's contention that the Trial Chamber's opinion is devoid of "articulation of its reasoning." He also disagreed with the Prosecution's charge that it is "apparent" from the Trial Chamber's findings that it considered, as a matter of law, that an attack is not "directed against the civilian population if civilians are attacked in the course of attacks directed against opposing

²⁸ CDF Appeal Judgment, para. 305; CDF Sentencing Judgment, para. 85.

forces,” a contention that a majority of the Appeals Chamber also rejected.²⁹ Justice King argued that this view cannot be attributed to the Trial Chamber, because it did examine the evidence and then arrived at the conclusion that the evidence did not prove beyond a reasonable doubt that the civilian population was the primary – as opposed to an incidental – object of the attack.

Justice King also did not agree with the Appeals Chamber’s view that the Trial Chamber confused “the target of the attack with the purpose of the attack.”³⁰ For Justice King, the Trial Chamber was actually saying that the Prosecution had not proven that the civilian population was the *primary object or target* of the attack, and that there was substantial evidence supporting a finding the primary object was the AFRC and its allies (a military target) and *not* the civilian population.³¹ Though Justice King never explicitly makes this point, he could have argued that while the purpose of the attack may not be determinative, it is in fact entirely relevant to establishing the target of the attack, given that the objective or purpose of a particular attack partly determines the objects or targets against which it is directed. This is especially relevant in ascertaining whether the contextual requirements for CAH – a widespread or systematic attack against any civilian population – have been established.

Justice King’s dissent partially derives from the role he argued the Appeals Chamber should adopt in reviewing findings of fact, particularly on appeals from acquittals. For Justice King, the Appeals Chamber should not usurp the Trial Chamber’s power to enter findings of fact in the first instance, because it “has not heard the evidence and it might select pieces of evidence which tend to support its findings of fact, whereas countervailing evidence may, in the circumstance, not be given the weight that the Trial Chamber, which saw and heard the witnesses, gave to it.”³² Thus the Appeals Chamber should largely defer to the Trial Chamber’s findings of fact, and it is “only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.”³³ This is particularly true when the Appeals Chamber is considering an appeal from an acquittal. While legally, under international law, an appellate court can reverse an acquittal on the basis of errors of law *and* fact, from a normative point of view one

²⁹ Prosecution Appeal Brief, para. 2.16.

³⁰ CDF Appeal Judgment, para. 304.

³¹ King’s Dissenting Opinion, para. 53.

³² *Ibid.*, para. 44.

³³ King’s Dissenting Opinion, para. 55, quoting ICTY *Delalic et al*, Appeal Judgment, para. 458.

can argue that it should be especially careful in doing so solely on the basis of errors of fact, given that this conflicts with the idea of double jeopardy in some legal systems.

While civil and common law systems differ substantially in the scope of appeals permitted, if one reviews the various proposals put forth during the drafting of the ICTY Statute, on which the SCSL Statute is largely based, only one proposal put forth by the Organization of the Islamic Conference suggested that prosecutorial appeals should be permitted on both issues of law and fact.³⁴ The majority of the proposals either suggested no basis for prosecutorial appeals, or that such appeals should be limited to reviewing errors of law. With no clear rationale or commentary, but arguably to appease all of the negotiating parties, the adopted ICTY Statute provided for a wide scope of appeal for both the prosecution and the defense. Admittedly, this supports the idea of a broad provision of ‘equality of arms.’ However, the primary justifications for appellate review in ad hoc tribunals, namely consistency of decisions and the development of law, do not usually apply to appellate review of findings of fact, given that factual decisions have little if any relevance beyond the individual case.³⁵

Common law systems generally do not allow factual review of acquittals in trials by a jury or bench trials, since this violates the presumption of innocence. Civil law systems vary depending on the structure and trial process of their lower and upper courts. One justification put forth for a broad scope of appellate review is justice in the individual case. Appellate review of factual issues in the case of reviews of convictions certainly does further the interest of justice in the individual case, given the severity of the punishment that accompanies a conviction. It is debatable whether appellate review of factual issues in the case of acquittals also furthers this interest. For example, if the appellate court reaches a different conclusion regarding the facts, this in itself might demonstrate ‘reasonable doubt,’ indicating that the prosecution has not fulfilled its burden of proof. In the ad hoc courts, an acquittal by a three-judge panel is arguably less likely to be subject to evidentiary misunderstandings than a jury verdict or a verdict by a single judge, and thus the practical need for prosecutorial appeals from acquittals on questions of fact is reduced.³⁶ In fact, if any error in interpreting or evaluating the evidence is made, it is more likely to be made by the Appeals Chamber, which is further from the record and the witnesses.

³⁴ See Mark C. Fleming, “Appellate Review in the International Criminal Tribunals,” 37 *Texas International Law Journal* (2002): 111-155, at 118-19.

³⁵ *Ibid.*, pp. 135-6.

³⁶ It should be noted that this criticism does not apply to prosecutorial appeals on issues of fact where the defendant bears the burden of proof, for instance if the Trial Chamber acquitted on the basis of an insanity defense.

One commentator has argued that the “legitimacy of the international tribunals, which relies in large part on their ability to deliver fair justice through fair procedures, could be compromised if the accused is in danger of being convicted as long as one of two chambers concludes that he is guilty. The interest in preserving justice in the individual case recommends that a conviction stand only if both chambers agree that a conviction is reasonable in light of the evidence.”³⁷ Just because Article 20 of the Statute of the SCSL provides for a broad scope of prosecutorial appeal on acquittal does not in itself normatively justify appellate review of questions of fact in the case of an acquittal and does not lessen the severity of the criticisms levied against this practice. While in the near future, a broad scope of prosecutorial appeal is likely to be retained in the ad hoc tribunals, it is an issue underpinning Justice King’s dissent in the CDF Appeal Judgment and one that deserves further consideration as international criminal procedure develops.

Mitigating Factors in Sentencing Decisions: CDF’s ‘Just Cause’ and Motive of Civic Duty

The sentencing inquiry undertaken by Trial Chambers in the ad hoc tribunals entails wide discretion and is similar to that in common law countries, where there are no fixed penalties and courts are not constrained by previous sentences that have been handed down. Instead, sanctions are purportedly tailored to fit the unique circumstances of each offence and the individual circumstances of the offender. Central to this inquiry is the principle of proportionality – that the severity of the sanction should be commensurate with the gravity of the offence.³⁸ In determining the length of a sentence, a Trial Chamber is first required to establish a penalty proportionate to the seriousness of the crime and then required to take into account any individualized aggravating and mitigating circumstances, though the ad hoc tribunals have rarely indicated the weight given to each consideration. The aggravating circumstances should be proven beyond reasonable doubt, while mitigating factors may include those not directly related to the offence and only need to be established by a balance of probabilities.³⁹

Although the tribunals have proffered a number of rationales for sentencing, their decisions rarely elaborate on how the sentences imposed will actually further these objectives. As some commentators argue, international sentencing law is so “indeterminate that sentencers are free to

³⁷ Fleming, p. 140.

³⁸ For an overview of the sentencing practices of the ad hoc tribunals, see Mirko Bagaric and John Morss, “International Sentencing Law: In Search of Justification and a Coherent Framework,” 6 *International Criminal Law Review* (2006): 191-255.

³⁹ See, for example, Prosecutor v. Dragan Nikolic, Sentencing Judgment, ICTY Trial Chamber II, Case No. IT-94-2-S (18 December 2003), para 145.

switch from one rationale to another as they choose.”⁴⁰ Another commentator has suggested that international sentencing practices may actually undermine the legitimacy of the international criminal justice system and its contribution to local or more holistic processes of transitional justice, by not adequately “relating the outcomes of international sentencing to local perceptions of justice.”⁴¹ Supporting this skepticism is the fact that it is difficult to empirically substantiate claims that international sentences do in fact contribute to the rationales often advanced, such as peace, reconciliation, retribution or deterrence. This implies that the gap between “what victims and victimised communities perceive as justice and what passes as international criminal justice” may remain.⁴² Though it is debatable whether this critique can really be generalized to all ad hoc tribunal decisions, the difficulty of relating an internationalized form of justice in the form of international sentences to the local context of Sierra Leone is particularly apparent in the diverse reactions by Sierra Leoneans to the CDF Appeals Judgment.

The Trial Chamber in the CDF case held, with Justice Bankole Thompson dissenting, that there was no defense of ‘necessity’ in international criminal law, and that ‘necessity’ could not be taken into account as a mitigating factor in sentencing. However, the Trial Chamber did consider as mitigating factors that the Defendants and the CDF/Kamajors were “fighting to support a legitimate cause which...was to restore the democratically elected government of President Kabbah,” that they fought with the support of ECOMOG, and that this “contributed immensely to re-establishing the rule of law.”⁴³ It also concluded that “the contribution of the two Accused Persons to the establishment of the much desired and awaited peace in Sierra Leone and the difficult, risky, selfless and for a very sizeable number of their CDF/Kamajors, the supreme sacrifices that they made to achieve this through a bloody conflict, is in itself a factor that stands significantly in mitigation in their favour.”⁴⁴ With regard to motive of civic duty, it found that the Defendants did not join the conflict for ‘selfish reasons’ and that they “acted from a sense of civic duty rather than for personal aggrandizement or gain.”⁴⁵

⁴⁰ Bagaric and Morss, at 208.

⁴¹ Ralph Henham, “International Sentencing in the Context of Collective Violence,” 7 *International Criminal Law Review* (2007): 449-468, at 451.

⁴² *Ibid.*, at 452.

⁴³ CDF Sentencing Judgment, paras. 79, 83, 87.

⁴⁴ *Ibid.*, para. 91.

⁴⁵ *Ibid.*, para. 94.

On appeal, the Prosecution alleged ten errors of the Trial Chamber in its sentencing decision. The Appeals Chamber gave credence to only one alleged error, that of “treating the ‘just cause’ of the Accused as a mitigating factor” and considering motive of ‘civic duty.’⁴⁶ The Prosecution submitted that the Trial Chamber effectively found that fighting on the ‘right’ side of a conflict could serve as a mitigating factor in sentencing, and that accepting the so-called ‘justness’ of the party to the conflict during mitigation would “almost certainly lead to a total disregard for humanitarian law.”⁴⁷ The Prosecution finally submitted that the Trial Chamber’s treatment of ‘motive of civic duty’ as a mitigating factor was also based on an assumption that the Defendants were fighting on the ‘right’ side of the conflict.

In response, the Defense for Fofana submitted that motives of either so-called ‘just cause’ or ‘civic duty’ are part of the factual and contextual differences that the Trial Chamber must consider in individualizing the punishment, and that the Trial Chamber didn’t consider whether the Defendant fought on the ‘right’ side of the conflict *per se*, but merely whether he had a ‘good motive.’⁴⁸ The Defense for Kondewa also submitted that because an ‘evil motive’ can be considered an aggravating factor in sentencing decisions, a ‘good motive’ can similarly be considered a mitigating factor.⁴⁹

The Appeals Chamber first noted that as a general matter, motive may be considered for sentencing purposes, although it does not constitute a defense against criminal liability. This is supported by the fact that the ICTR, to which the SCSL may refer for sentencing practices, often considers the character and motive of the accused during the conflict as a mitigating factor.⁵⁰ However, the Appeals Chamber then argued that the political motive of ‘just cause’ had no place in international criminal justice, and that international humanitarian law “specifically removes a party’s political motive and the ‘justness’ of a party’s cause from consideration.”⁵¹ While this is certainly true, political motives only have no place in international humanitarian law when considering the guilt or innocence of the accused. Though the ad hoc tribunals generally render their judgments and sentencing decisions together, for reasons of procedural efficiency,

⁴⁶ Prosecution Appeal Brief, para. 4.

⁴⁷ Prosecution Appeal Brief, para. 9.39.

⁴⁸ Fofana Response Brief, paras. 193-6.

⁴⁹ Kondewa Response Brief, paras. 9.38-9.39, citing *Blaskic* Trial Judgment, para. 785.

⁵⁰ For an overview of the sentencing practices of the ICTR, see the Human Rights Watch report on “Charging, Convicting and Sentencing” available at: http://hrw.org/reports/2004/ij/ictr/9.htm#_Toc62641623.

⁵¹ CDF Appeals Judgment, para. 530-1.

sentencing decisions are discrete and independent judgments that take into account different factors than judgments concerning the guilt or innocence of the accused.⁵²

The Appeals Chamber further argued that any motive considered by the Trial Chamber must be “consistent with sentencing purposes,” referring to those ‘legitimate’ rationales elaborated by the ICTY, which include: individual and general deterrence; retribution; public reprobation and stigmatization by the international community; and rehabilitation. The Appeals Chamber considered the primary objectives to be retribution and deterrence.⁵³ It argued that allowing mitigation for the personal motives of an accused would undermine the purposes of sentencing rather than promote them, and would implicitly legitimize the unlawful conduct.⁵⁴ In concluding, the Appeals Chamber noted that the most important consideration in sentencing is the “revulsion of mankind, represented by the international community” and not the “tolerance by a local community of the crime; or lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes.”⁵⁵ Thus, the Appeals Chamber held that the Trial Chamber erred by considering ‘just cause’ and ‘motive of civic duty’ as relevant factors in its sentencing decision, and that the Appeals Chamber had the ability to revise these sentences. Justice King dissented on both issues, arguing that the Appeals Chamber interfered with the discretion afforded to the Trial Chamber in determining the appropriate penalties.

Justice King argued that the Trial Chamber did not take into account ‘just cause’ as a mitigating factor, but rather what the Defense had in fact pleaded – that the fighting was mobilized in order to restore the democratically elected government of President Kabbah, without implying any normative evaluation about whether this end was ‘just.’⁵⁶ The Trial Chamber Justices themselves only mentioned the phrase ‘just cause’ in rejecting the defense of necessity raised by Justice Bankole Thompson in his Dissenting Opinion. Justice King thus appeared to be arguing (a) that the Defense never pleaded just cause as a mitigating factor, and thus the Trial Chamber did not consider it as such; and (b) that when the Trial Chamber considered the argument that the CDF and the Kamajors were fighting to restore the democratically elected government as a

⁵² For this argument, see Ralph Henham, “Procedural justice and human rights in international sentencing,” 4 *International Criminal Law Review* (2004): 185-210.

⁵³ *Ibid.*, para. 532.

⁵⁴ *Ibid.*, para. 534.

⁵⁵ *Ibid.*, para. 564.

⁵⁶ King’s Dissenting Opinion, para. 107.

mitigating factor, this is not equivalent to considering a ‘just cause’ argument because the Trial Chamber was considering the personal reasons for fighting held by the accused as individuals and not necessarily the political justness of the collective cause. In Justice King’s opinion, a reasonable person would conclude that the Trial Chamber took into account both the gravity of the offence and the individual circumstances of the accused, and so correctly applied Article 19 of the Statute of the SCSL.⁵⁷ For this reason, he dissented with the Majority’s view that the Trial Chamber took into consideration factors that it should not have considered in exercising its sentencing discretion, and so the Appeals Chamber did not have the right or the power to substitute its own discretion.

Conclusion

The essence of the disagreement between the majority of the Appeals Chamber and Justice King relates to whether the mitigating factors considered by the Trial Chamber were personal motives or factors, which are entirely pertinent to sentencing decisions, or collective and effectively ‘political’ motives that do not enter into determinations of penalties. One could argue that the Appeals Chamber was so concerned with preserving the appearance of impartiality and avoiding a perception of ‘victor’s justice’ that it entirely refused to consider the guilt of the CDF relative to the other parties of the conflict. It is perhaps for this reason that the CDF Appeals Sentencing Decision gave rise in some circles to the perception of a gap between ‘internationalized justice’ and ‘local justice.’ However, the fact that the Appeals Chamber strove to avoid the perception of ‘victor’s justice’ in and of itself is a laudable undertaking. Yet in doing so, the Court overlooked the fact that the SCSL is required to take into account individual factors that bear – not on the *relative* guilt or innocence of the accused – but on the extent of their punishment. While the majority of the Appeals Chamber appears to have reached an appropriate judgment in deciding that the justness of a party’s reasons for fighting is not relevant to sentencing, the personal reasons of the accused for fighting – in the descriptive sense – should bear on his or her conduct during the conflict and thus act as an individualized mitigating factor during sentencing. In the future, the ad hoc tribunals should be careful to clearly differentiate between collective political motives – such as a ‘just cause’ – and these personal political motives that bear on the conduct of the accused during the conflict.

⁵⁷ Ibid., para. 115-116.

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The publication of this essay has been financed by the Open Society Initiative for West Africa (OSIWA). The Contents of this Publication are entirely the sole responsibility of the Sierra Leone Court Monitoring Programme.



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