



Sierra Leone Court Monitoring Programme

Justice Bankole Thompson's Opinion in the CDF Case: A Summary and Analysis

SLCMP's Essay Series on Criminal Justice

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About the SLCMP

The Sierra Leone Court Monitoring Programme (SLCMP) is an independent initiative by Sierra Leonean civil society. It was established in the aftermath of Sierra Leone's decade-long civil war, of which the lack of access to justice was one of the root causes. Its primary objective is to ensure judicial accountability and integrity. On the eve of the war, only the few political elites, their cohorts and the wealthy had access to justice depriving the poor who constituted majority of Sierra Leoneans. 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.

At its inception in June 2004, the SLCMP was called the Special Court Monitoring Programme since it primarily monitored 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, the SLCMP established regional offices in Bo and Makeni to monitor trials in the provinces. Currently, monitors are assigned to a range of criminal proceedings, including proceedings in the juvenile courts, the magistrate courts, and the High Court. Gender and juvenile issues form a core of its programme's activities. 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. The Programme also monitors other governmental institutions that promote accountability such as the Anti Corruption Commission (ACC), and the implementation of the recommendations of the Truth and Reconciliation Commission (TRC) Report.

The Importance of Court Monitoring

There is no doubt that the two judicial systems (national courts and the Special Court), the Anti Corruption Commission, and implementation of the TRC recommendations are central to the post-conflict reconstruction of Sierra Leone. Thus the SLCMP firmly believes that it is fundamental to provide feedback on their work so as to enhance their capabilities and maximize the impact of their work on the people of Sierra Leone, especially those in smaller communities. Furthermore, without public awareness of the shortcomings of these institutions, they can be easily ignored or obscured. Public awareness, however, will not only promote public discourse but will also engender reform, especially in the national institutions. The SLCMP firmly believes that ensuring accountability will enhance the integrity of the judiciary. Improved judicial integrity will encourage people to use the judiciary to settle their disputes instead of using extra-judicial means such as violent confrontation. Since lack of access to justice was one of the underlying causes of Sierra Leone's decade-long conflict, encouraging Sierra Leoneans to use the judiciary in this way is a vital step in rebuilding after the war and ensuring lasting peace in the future.

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.

Summary of the Dissent Opinion

On 2 August 2007, Trial Chamber 1 delivered its judgment in the trials of Moinina Fofana and Allieu Kondewa, two alleged leaders of the Civil Defence Force (CDF). While the Chamber unanimously acquitted Fofana on four of the eight counts charged and Kondewa on three, only a majority of the Chamber found the accused guilty on four and five counts respectively.ⁱ Justice Bankole Thompson dissented on all guilty findings and entered a “Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute.”ⁱⁱ

Justice Thompson begins Part 1 by noting that two factors inspired his dissenting opinion: the “awesome responsibility” assigned to judges in international criminal tribunals due to the complex cases, and the recognition that reasonable judges can examine the same evidence and reach different conclusions.ⁱⁱⁱ Thompson frames the issue of guilt as a question of determining “where legitimate collective defensive action in an armed conflict ends and where joint criminal enterprise begins.”^{iv} This framing seems to consider the guilt or innocence of the CDF en masse and in terms of the legitimacy of their military action; it appears not to acknowledge that forces fighting for a legitimate purpose might still violate international law or that guilt should be assessed based on specific actions by individual actors.

Thompson first disagrees with the majority’s assigning undue legal significance to factual findings about Kamajor initiation rituals, ritual cannibalism and ritual killings, particularly its findings that use initiation rituals “as a basis for the tribunal to pronounce on the permissibility or legality of initiation either as a cultural imperative for membership in the Kamajor society or as a prerequisite for military training for combat purposes in the context of said society.”^v

Thompson then states that he also disagrees with the judgement because a defendant has a right to legal defences, even if he did not raise those defences during his trial, and the majority does not consider these defences.^{vi} Thompson expounds on this point by citing legal scholars who have asserted the rights of defendants to legal defences in criminal tribunals.^{vii} He also cites the prevalence of the right to a legal defence in municipal criminal law and argues that to have a different rule in international criminal law would “give rise to the spectre of crimes against humanity and war crimes being essentially crimes of strict liability or absolute prohibition, giving the criminal judicial process a profile reminiscent of the discredited English Court of the Star Chamber.”^{viii} He indicates he will return to this issue later in the dissent.

Thompson turns to alleged defects in the form of the indictment in Part 2. He concurs with the majority’s dismissal of Fofana’s argument that the Prosecution pleaded the indictment without sufficient specificity. He then discusses a “grave irregularity” in paragraph 28 of the indictment, charging the defendants with acts of terrorism and collective punishments (Counts 6 and 7).^{ix} Thompson asserts that since paragraph 28 incorporates by reference the crimes charged in Counts 1 through 5, each of Counts 6 and 7 effectively charges each Accused with six separate offences. ^xAccording to Thompson,

this creates a “penumbra of uncertainty” about which specific charges the Accused must defend and thus violates “the rule against duplicity, multiplicity or uncertainty.”^{xi}

In Part 3, Thompson next endorses the majority opinion’s narration of the background to the conflict and its political context.^{xii}

In Part 4, he similarly agrees with the majority’s reasoning that establishes the Court’s jurisdiction over the case, law governing the crimes charged and law governing the forms of liability, with the exception of certain aspects of joint criminal enterprise (JCE).^{xiii} While he agrees that JCE was a form of liability in customary international law when the alleged crimes were committed and that Article 6(1) of the Statute incorporates it by implication as a form of liability, he disagrees with the “rather uncritical adoption of existing jurisprudence on the subject.”^{xiv} After briefly outlining existing law on JCE, he presents three criticisms of the third type of JCE, which holds an individual liable for a third party’s criminal acts that were not part of the joint criminal enterprise, but were a foreseeable consequence.^{xv} Thompson asserts a) that the scope of liability under this type of JCE liability is unclear; b) that it is equally unclear how to interpret “foreseeability” and c) that it is unclear how to determine the effect of category three liability on the due process concerns that an individual may only be charged with crimes based on his or her individual conduct and conscious choice.^{xvi} Finally, he emphasizes that JCE is a mode of liability, rather than a substantive charge like conspiracy, and is therefore a form of accomplice liability.^{xvii}

In Part Five, Thompson discusses the principles that guided the Trial Chamber in assessing the evidence presented. He notes first that the Chamber must follow the Court’s Statute and Rules of Evidence and Procedure.^{xviii} These include Rule 89, which states that the Chamber should attach no precedential value to national rules of evidence, but should apply rules that “best favour a fair determination of the matter before it.”^{xix} According to Thompson, the Chamber also remembered that it must assess both whether the criminal act occurred and whether the Accused bore criminal responsibility in order to assess guilt.^{xx} Pursuant to Article 17(3), the Chamber presumed the innocence of the Accused and made sure to put the burden of proof beyond a reasonable doubt on the Prosecution.^{xxi} In assessing the guilt of the Accused, the Chamber kept in mind the three modes of liability charged: individual criminal responsibility pursuant to Article 6(1), JCE, and command responsibility pursuant to Article 6(3).^{xxii} In determining whether the Prosecution discharged its burden, the Chamber considered alternative explanations other than the Accused’s guilt, following the principle from *Prosecutor v. Delalic*, an ICTY case.^{xxiii} Consistent with the Statute, it drew no conclusions from the decision of both Accused not to testify.^{xxiv}

Thompson then shifted his focus to how the Chamber evaluated evidence. In assessing witnesses evidence, it weighed a) their knowledge of the facts, b) their demeanor; c) their conduct and d) their character. In assessing their credibility, it evaluated a) their knowledge of the facts, b) their disinterestedness, c) their integrity, d) their veracity, and e) their motivation to speak truthfully.^{xxv} In weighing the probative value of testimony, it considered a) internal consistency and detail, b) strength under cross-examination, c)

consistency with prior statements, d) consistency with other witnesses and evidence and e) potential motives.^{xxxvi} The Chambers gave greater weight to evidence given orally in court than statements made out of court before trial. A single witness's testimony did not require corroboration, but the Chamber would approach such evidence with caution, particularly when given by so-called "insider witnesses."^{xxxvii} While it did admit hearsay evidence, it considered the inability to cross-examine the maker of the statement in assessing the statement's probative value. Similarly, while it exercised flexibility in admitting documentary evidence, it still individually evaluated its probative value.^{xxxviii} While circumstantial evidence could establish a defendant's guilt, the Prosecution must still satisfy its evidentiary burden.^{xxxix} Finally, the Chamber assessed the admissibility of expert evidence by a) whether the topic was appropriate for expert testimony, b) that the expert evidence is relevant to the Chamber's decision, c) that the expert possesses the necessary expertise and credentials in the field, d) that the underlying reason and methodology is valid, and e) that the expert is independent. In weighing the probative value, it considered a) that the expert could not draw conclusions as to guilt or innocence, b) that the expert could not assess the credibility or utility of witnesses, c) that the expert could not make his or her own findings of fact, d) that the Chamber was not bound to accept the expert's findings and e) that the Chamber assessed expert testimony's probative value by the expert's professional competence, methods and reasoning and credibility.^{xxx}

In Part Six, Thompson endorses the majority's findings of fact, with his stated reservation about its findings on initiation rituals.^{xxxi} He also endorses the majority's findings of factual guilt; in other words, he accepts that the Accused committed the acts that form the basis of the charges and the majority's guilty findings.^{xxxii}

In Part Seven, he distinguishes between factual and legal guilt, emphasizing that while an Accused may have committed the criminal act, he or she may not be legally guilty.^{xxxiii} He notes that a key element of legal guilt is intent.^{xxxiv} Thompson endorses the Trial Chamber's not guilty findings on Counts 1, 3, 6, and 8 for Fofanah and Counts 1, 3 and 6 for Kondewa.^{xxxv}

In Part Eight, Thompson discusses possible defences to the charges he asserts were raised by the evidence, but were not argued by either Accused. He states that two principles guide his reasoning: a) that the Prosecution must prove both that the Accused committed the criminal act (*actus reas*) and that he acted with the requisite mental state (*mens rea*) and b) even if the Accused acted with the requisite *mens rea*, his conduct might still be justifiable or excusable.^{xxxvi} In contrast with the majority, he finds that the evidence raises two defences: necessity and the doctrine of *salus civis suprema lex est*.^{xxxvii} He claims, without citing any cases, that it is established in national legal systems that a judge must consider possible legal defences even if not raised by any party, and therefore he will follow that rule in this international criminal tribunal.^{xxxviii}

In explaining the necessity defence, Thompson asserts that it applies because the CDF fought for the restoration of President Kabbah's democratically elected government and "the preservation of democratic rule is a vital interest worth protecting at all costs."^{xxxix}

To justify the existence of a necessity defence in international criminal law, he cites philosophers such as Emmanuel Kant and Aristotle, and the Canadian Law Reform Commission.^{xli} In outlining the substance of the defense, he looks to English, Canadian and U.S. law and identifies what he claims are the two key principles of the defence based on this municipal case law: “that necessity is a defence to criminal liability” and that “whether a defence of necessity succeeds or not will depend upon the particular facts and circumstances of each case.”^{xlii} Based on these principles, he determines that in the context of the war “fighting for the restoration of democracy and constitutional legitimacy...overwhelmingly compell[ed] disobedience to a supranational regime of proscriptive norms.”^{xliii}

Analysis of the Dissenting Opinion

This summary, however, fails to establish elements of a necessity defence in international law. While the two principles he outlines may be true based on the law from these three legal systems, Thompson does not explain why these legal systems can represent all national legal systems, or argue that this defence has been established as customary international law. Nor does he discuss principles that restrict its application or scope, even though such restrictions exist in national legal systems. At common law in the United States, for example, a necessity defence only succeeds under six conditions: a) the actor is faced with clear and imminent danger; b) there is a direct causal relation between the defendant’s action and the harm to be averted; c) there is no effective legal way to avert the harm; d) the harm the actor will cause by violating the law is less serious than the harm he seeks to avoid; e) lawmakers have not anticipated the choice of evils and determined the balance to be against it; and f) the actor cannot have caused the situation which forced him to engage in criminal conduct.^{xliiii} In general, this means that the necessity defence is not as simple as the choice of the lesser of two evils. In particular, the judge in this case would have to believe that the specific actor was faced with a clear and imminent danger when he or she acted – difficult to establish when the Accused voluntarily attacked a village, for example – and that there was a direct causal relationship between the Accused’s specific action and the particular harm to be averted. Thompson’s reasoning, however, negates the need for such a causal link. The version of the defence he presents in paragraph 88, for instance, simply states that “[w]here the evil sought to be avoided by the criminal act is greater than the act would cause, the actor is permitted to choose the criminal act.”^{xliiv} Moreover, it seems unlikely that such a causal relationship could be established between torturing civilians or conscripting child soldiers and preventing a specific act of violence by the AFRC/RUF. Perhaps most importantly, the defence is specific, not general. Thus the general validity of the CDF and its goals and the general illegitimacy or criminality of the AFRC/RUF do not justify or excuse specific criminal conduct by members of the CDF; those could only be justified or excused by specific, imminent threats of harm by members of the AFRC/RUF, and only then when the harm caused by a member of the CDF met all the other conditions of the necessity defence. While the Trial Chamber should not necessarily be guided by U.S. law in particular, Thompson ignores any and all national restrictions on the applicability and use of the necessity defence.

The major flaw in Thompson's reasoning, however, is that in stating that the preservation of democratic rule justified the crimes he admits the Accused committed, Thompson conflates the worthiness of the CDF's goal with an excuse for individual criminal acts that may not (and, in some instances, clearly did not) advance that goal. For example, he explains that he reaches the conclusion that the Accused should not be held criminally liable on the grounds that the CDF responded to a real emergency that threatened the state, that "acquiescence in the violent overthrow of the lawful government could certainly not have been a reasonable alternative," and that "fighting for the restoration of the law and democratically elected government to power was indeed vital to the survival of the State of Sierra Leone."^{xlv} This reasoning might justify the CDF's armed struggle. It may even justify or excuse the CDF's causing civilians deaths as military necessities. It does not, however, excuse or justify members of the CDF committing war crimes or explain why those acts were necessary for the CDF to achieve its goals. Indeed, that international law deems certain acts illegal even during armed struggle indicates that they cannot be justified by the validity of the underlying conflict.^{xlvi} Thompson's reasoning thus contradicts established international law and provides a blanket excuse for any act of criminal violence committed by the CDF.

While Thompson does cite two cases from the International Court of Justice to establish that a necessity defence exists in international law, these cases fail to establish by themselves that such a defence exists. The cases he cites are the *Gabcikovo-Nagymaros Project Case* between Hungary and Slovakia and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.^{xlvii} Neither case was a criminal case. Thompson thus applies a concept about the balancing of harms from civil cases to a criminal case without explanation or justification, even though criminal law frequently imposes stricter and more burdensome standards. Moreover, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was an advisory opinion issued without a case in controversy, again indicating that different standards might apply. At the very least Thompson should explain why these opinions should apply to this criminal case, especially since ICJ opinions are not binding or even persuasive precedent for the Special Court for Sierra Leone.

Thompson's second defence suffers from flaws similar to the first. He labels his second defence *Salus civis suprema lex est* or "the safety of the state is the supreme law."^{xlviii} Thompson cites Kant, Salmon and one Sierra Leonean case to establish the supreme importance of the state, and then concludes that the evidence "points irresistibly to the conclusion" that CDF efforts aimed to protect the state, which was threatened by rebellion.^{xlix} He does not, however, explain how this principle excuses war crimes. Nor does he explain what constitute the substance elements of the evidence, when it applies, why it applies to this case or, most importantly, why it excuses or justifies any specific acts of violence by any specific members of the CDF. As framed by Thompson, this defence seems to generate a kind of group innocence for the CDF: any individual defendant who fights as part of the CDF would be legally not guilty of any specific act of violence because his group fought to protect the state regardless of whether the individual act of violence was necessary to protect the state or in fact did protect the state or if the state itself was worth protecting. In so reasoning, Justice Thompson violates the principle

of individual criminal responsibility, and effectively issues a *carte blanche* for members of legitimate fighting forces engaged in legitimate conflicts to commit war crimes. Moreover, since Justice Thompson excuses war crimes committed by members of the CDF on the grounds that they fought for “the State of Sierra Leone”ⁱ rather than because they fought for the good of its people, this defence would excuse any war crimes committed by members of a force fighting to preserve any state. It could thus excuse soldiers who torture civilians during a conflict when a dictatorial state is threatened by a rebellion of an ethnic group the state has tried to cleanse, or a democratic movement that threatens the dictator’s power and whose leaders the state has imprisoned without trial.

Finally, as discussed, the Geneva Conventions, Optional Protocol II and the International Covenant on the Rights of the Child reject the argument that the validity of the conflict justifies or excuses the war crimes for which the Accused were convicted. The international community has already balanced the harms and rejected Thompson’s reasoning. Unsurprisingly, Thompson does not cite a single case in any national or international system applying this defence.ⁱⁱ Thompson thus creates a defence without demonstrating its basis in law and applies it in a way contrary to international law.

In his conclusion in Part Nine, Thompson criticises the Prosecution for presenting a case he claims was built on “guilt by association, requiring attribution of culpability to the entire Kamajor society for atrocities committed by some or rogue Kamajors.”ⁱⁱⁱ He also implies that even if the Accused committed crimes and are legally guilty, they should not be charged: “I entertain more than serious doubts whether in the context of the uniquely peculiar facts and circumstances of this case a tribunal should hold liable persons who volunteered to take up arms and risk their lives and those of their families...their transgressions of the law notwithstanding.”ⁱⁱⁱⁱ The rule of law and equality under the law, however, require that the law apply to all people, regardless of background, status or past accomplishment. Thompson’s dissent thus suggests that the Court violate these basic principles of jurisprudence and treat the Accused as above or immune to the law because they fought as members of the CDF.

In Part Ten, he outlines how he would dispose of the charges, finding each Accused not guilty on all counts.^{liv}

Notes

ⁱ The Trial Chamber convicted Fofana of Count 2, Violence to life, health and physical or mental well-being, in particular murder, a violation of Article 3 Common to the Geneva Conventions; Count 4, Violence to life, health and physical or mental well-being, in particular cruel treatment, a violation of Article 3 Common to the Geneva Conventions; Count 5, Pillage, a violation of Article 3 Common to the Geneva Conventions; and Count 7, Collective Punishments, a violation of Article 3 Common to the Geneva Conventions. Kondewa was convicted of Count 8, Enlisting children under the age of 15 into armed forces or groups or using them to participate actively in hostilities, in addition to Counts 2, 4, 5, and 7.

ⁱⁱ Article 18 of the Statue of the Special Court for Sierra Leone reads: “The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be

delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.”

- iii *See* Prosecutor v. Norman, Fofanah and Kondewa, Judgement, “Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute,” SCSL Trial Chamber I, at para. 1, Case No. SCSL-04-14-J (August 2, 2007) (hereinafter “Thompson dissent”).
- iv Thompson dissent, at para. 2.
- v Thompson dissent, at para. 3.
- vi *See* Thompson dissent, at para. 4.
- vii Specifically, he cites Gerhard Werle, *Principles of International Criminal Law*, (The Hague: T.M.C. Asser Press, 2005) and Margaret McAuliffe de Guzman, “Commentary on the Rome Statute,” in Otto Triffterer, ed., as cited in Geert-Jan G.J. Kooops, *Defenses in Contemporary International Criminal Law*, (New York: Transnational Publishers, Inc, 2001) p. 31.
- viii Thompson dissent, at para. 7. This comment seems odd and somewhat inappropriate given that “strict liability” generally refers to crimes that do not require any type intent or mens rea; the crimes charged at the Special Court do require the Prosecution to prove intent, at least as one of the chapeau elements. Moreover while modern human rights activists would object to the Star Chamber on the grounds that it did not allow a legal defence, they would likely also point to the fact that it was secret, that it could punish so-called “crimes” that did not violate any statute, and that defendants were not permitted lawyers, juries, appeals or witnesses. None of these practices exist at the SCSL.
- ix *See* Thompson dissent, at para. 5.
- x *See* Thompson dissent, at para. 5.
- xi Thompson dissent, at para. 5.
- xii *See* Thompson dissent, at para. 18.
- xiii *See* Thompson dissent, at paras. 20-22.
- xiv Thompson dissent, at para. 24.
- xv Prosecutor v. Tadic, Judgement, ICTY Appeals Chamber, at para. 228, Case No. IT-94-1-A (July 15, 1999).
- xvi *See* Thompson dissent, at para. 28.
- xvii *See* Thompson dissent, at para. 29.
- xviii *See* Thompson dissent, at para. 34.
- xix Rule 89, Rules of Evidence and Procedure of the Special Court for Sierra Leone.
- xx *See* Thompson dissent, at para. 36, 37.
- xxi *See See* Thompson dissent, at para. 38.
- xxii *See* Thompson dissent, at para. 39.
- xxiii *See* Thompson dissent, at para. 40.
- xxiv *See* Thompson dissent, at para. 42.
- xxv *See* Thompson dissent, at para. 43.
- xxvi *See* Thompson dissent, at para. 43.
- xxvii *See* Thompson dissent, at para. 47.
- xxviii *See* Thompson dissent, at para. 48.
- xxix *See* Thompson dissent, at para. 51.
- xxx *See* Thompson dissent, at para. 52, 53.
- xxxi *See* Thompson dissent, at para. 56.
- xxxii *See* Thompson dissent, at para. 57.
- xxxiii *See* Thompson dissent, at para. 59.
- xxxiv *See* Thompson dissent, at para. 59.
- xxxv *See* Thompson dissent, at para. 60.
- xxxvi *See* Thompson dissent, at para. 63.
- xxxvii *See* Thompson dissent, at para. 65.
- xxxviii *See* Thompson dissent, at para. 67.
- xxxix Thompson dissent, at para. 69.
- xl *See* Thompson dissent, at paras. 72-74.
- xli Thompson dissent, at paras. 77-81.

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- ^{xlii} Thompson dissent, para. At 92.
- ^{xliii} As Justice Thompson notes in paragraph 87, some jurisdictions also do not permit the defence to be raised in homicide cases.
- ^{xliv} Thompson dissent, at para. 88.
- ^{xliv} Thompson dissent, at para. 98.
- ^{xlvi} In U.S. law, this would violate the requirement that the legislature not have already considered the balance of evils and decided the other way. In this case, customary international criminal law has already decided that war crimes cannot be justified by the purposes of the underlying conflict. While no legislature operates, the acts charged have labeled illegal by agreement in the Geneva Conventions, Optional Protocol II and other international agreements.
- ^{xlvii} See Thompson dissent, at para. 84.
- ^{xlviii} See Thompson dissent, at para. 93.
- ^{xlix} Thompson dissent, at para. 97.
- ^l Thompson dissent, at para. 97.
- ^{li} This is not to say that no such cases exist, though, if they did, it seems likely Thompson would cite them.
- ^{lii} Thompson dissent, at para. 99.
- ^{liii} Thompson dissent, at para. 101.
- ^{liv} Thompson dissent, para. 104.

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