

2006

The Applicability Of Article 3 Common To The Geneva Conventions To The Prosecution Of The Armed Forces Revolutionary Council

Kelly Sheahen

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Sheahen, Kelly, "The Applicability Of Article 3 Common To The Geneva Conventions To The Prosecution Of The Armed Forces Revolutionary Council" (2006). *War Crimes Memoranda*. 140.
https://scholarlycommons.law.case.edu/war_crimes_memos/140

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB**

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
OF THE SPECIAL COURT FOR SIERRA LEONE**

**ISSUE: THE APPLICABILITY OF ARTICLE 3 COMMON TO THE GENEVA
CONVENTIONS TO THE PROSECUTION OF THE ARMED FORCES
REVOLUTIONARY COUNCIL**

**Prepared by Kelly Sheahen
Fall 2006**

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS.....

A. Issue.....

B. Summary of Conclusions

1. Article 3 common to the Geneva Conventions is deliberately undefined, to protect the greatest number of victims of internal armed conflicts

2. Article 3 common to the Geneva Conventions is incorporated appropriately in the Statute of the Special Court for Sierra Leone, and its application to Defendant's case is proper.

II. FACTUAL BACKGROUND

A. The indictment of the Special Court for Sierra Leone

B. A Brief History of the ARmed Forces Revolutionary Council

C. The Named Defendants

III. LEGAL DISCUSSION

A. Common Article 3 of the Geneva Conventions: History, Development and Applications

1. The Red Cross and Article 3

2. *Travaux Preparatoires*

B. Common Article 3, Customary International Law and *Opinio Juris*

C. Additional Protocol II and Common Article 3

D. The AFRC and Common Article 3

1. The AFRC Hostilities were an armed conflict

2. The AFRC hostilities were of a non-international character

3. The AFRC hostilities took place within the territory of a State party

4. Specific violations of Common Article 3 in the AFRC hostilities

E. The interpretation of Common Article 3 Proposed by the AFRC

F. Defenses

1. Mistake of Law

2. *Tu Quoque*

G. Individual Criminal Responsibility under Common article 3

IV. CONCLUSION

INDEX OF AUTHORITIES

TREATIES, STATUTES AND OTHER INTERNATIONAL INSTRUMENTS

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31
2. Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85
3. Geneva Convention Relative to the protection of Civilian persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287
4. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 238
5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”), 1125 U.N.T.S. 609, *entered into force* Dec. 7 1978
6. Statute of the Special Court for Sierra Leone
7. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999
8. Abuja Ceasefire Agreement between the Government of Sierra Leone and the Revolutionary United Front, November 20, 2000
9. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153
10. Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, U.N. Res. 955
11. Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, U.N. Res. 827
12. Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179
13. Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/Conf. 183/0 (1998)

UNITED NATIONS RESOLUTIONS AND DOCUMENTS

14. Third Report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/189, March 7, 2000
15. Fifth Report to the Secretary-General on the United Nation Mission in Sierra Leone, S/2000/751, July 31, 2000
16. Sixth report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/832, Aug. 24, 2000
17. Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/1055,
18. Eighth report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/1199, Dec. 15. 2000

COURT AND TRIBUNAL CASES

18. Prosecutor v. Dusko Tadic, IT-95-1-T Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995)
16. Prosecutor v. Galic, IT-98-29 (1998) Judgment, Trial Chamber (date)
19. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, Trial Chamber (2 September 1998)
20. Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-96-_-T, Judgment, Trial Chamber, (May 21, 1999) para. 156-158, 597-598
21. Prosecutor v. Rutaganda, Case No. ICTR-96-_-T, Judgment, Trial Chamber (date)
22. Prosecutor v. Musema, Case No. ICTR-96-13-4-T, Judgment, Trial Chamber (2000)
23. Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, (Indictment) Case no. SCSL-2004-16-PT
24. Abella v. Argentina, Case no. 11.137, Report No. 55.97, Inter-Am. C. H. R. (1997)
25. Hamdan v. Rumsfeld, 548 U.S. ____ (2006)
26. Nicaragua v. United States 25 I.L.M. 1023 (1986)

BOOKS

30. M. CHERIF BASSIOUNI, JIMMY GURULE, JORDAN J. PAUST, MICHAEL SCHARF, SHARON A. WILLIAMS AND BRUCE ZAGARIS (EDS.), *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (1996)
31. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* (2003)
32. GUENAEL MATTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* (2005)
33. MICHAEL P. SCHARF, *BALKAN JUSTICE* (1997)
34. WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (2006)

JOURNALS AND LAW REVIEW ARTICLES

35. Babafemi Akinrade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 Notre Dame J. L. Ethics & Pub. Pol'y 391 (2001)
36. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. (1998)
39. James E. Bond, *Internal Conflict and Article 3 of the Geneva Conventions*, 48 Denv. L. J. 263 (1971-1972)
38. John Cerone, *The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice*, 8 ILSA J. Int'l & Comp. L. 379 (2000-2002)
37. David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. 37 (1979)
35. Joyce A. C. Gutierrez, *The Geneva Conventions of 1949*, 26 Brit Y. B. Int'l L. 294 (1949)
38. Laura R. Hall and Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L. J. 287 (2003)
35. Charles Lysaught, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 Am. U. L. Rev. 9 (1983-1984)
35. McGregor
39. Theodor Meron, *International Criminalization of Internal Atrocities*, in HUMANITARIAN LAW (Judith Gardam ed., 1999)
35. Richards

35. Alfred P. Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, 21 Int'l & Comp. L. Q. 472 (1972)

40. Michael P. Scharf, *The Special Court of Sierra Leone*, AMERICAN SOCIETY OF INTERNATIONAL LAW (October 2000)

44. Jean S. Pictet, ed., *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958)

45. Elies van Sliedreg, *Defences in International Criminal Law* (2003), reprinted for the International War Crimes Research Lab

MISCELLANY

45. *Alex Tamba Brima*, TRIAL WATCH (2006), available at <http://www.trial-ch.org>

44. *Background Note: Sierra Leone*, THE UNITED STATES DEPARTMENT OF STATE (2006), available at <http://www.state.gov/r/pa/ei/bgn/5475.htm>

45. *Brima Bazzy Kamara*, TRIAL WATCH (2006), available at <http://www.trial-ch.org>

43. *Completion Strategy*, THE SPECIAL COURT FOR SIERRA LEONE (2005), available at http://www.s-sl.org/Documents/completion_strategy.pdf

45. *From the Battle of Solferino to the Eve of the First World War*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2005), available at <http://www.icirc.org>

45. *The Geneva Conventions, the Core of International Humanitarian Law*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2006), available at: <http://www.icrc.org/>

45. *Introduction to the Convention for the Amelioration of the Condition of the Wounded and the Sick 6 July 1906*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2005), available at: <http://www.icrc.org/ihl.nsf/INTRO/>

45. *Introduction to the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2005), available at: <http://www.icrc.org/ihl.nsf/INTRO/>

45. *Introduction to the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2005) available at: <http://www.icrc.org/ihl.nsf/INTRO/>

45. *Santigie Borbor Kanu*, TRIAL WATCH (2006), available at <http://www.trial-ch.org>

44. *Sierra Leone, A Disastrous Set-Back for Human Rights*, AMNESTY INTERNATIONAL (1997), available at <http://web.amnesty.org>

45. *Sierra Leone Yearly Report 1997*, AMNESTY INTERNATIONAL (1997), available at <http://web.amnesty.org>

45. *Sierra Leone Yearly Report 1998*, AMNESTY INTERNATIONAL (1998), available at <http://web.amnesty.org>

45. *Sierra Leone Yearly Report 1999*, AMNESTY INTERNATIONAL (1999), available at <http://web.amnesty.org>

42. U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, *Law of War Handbook 144* (2004)

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue*

* This issue was raised by one of the AFRC defense counsel in his opening statement: "Common Article 3 applies only if the hostile action directed against a legal government is of a collective nature and consists of a minimum of organization." Please comment on the accuracy and scope of the argument.

Article 3 common to the Geneva Conventions¹ is one of the few provisions ensuring the protection of civilians during times of internal armed conflict. While treaty law rarely is concerned with civil wars and other intra-state conflicts, the drafters of the Geneva Convention considered it necessary to establish the minimum threshold of belligerency for the sake of defining human rights violations in internal armed conflicts.² Article 3 has been the subject of controversy due to its arguably vague language. In fact, the Armed Forces Revolutionary Council (hereinafter “AFRC”) has challenged the applicability of Article 3, arguing that Article 3 is relevant only when the conflict is directed against a legal government, is of a collective nature, and consists of a minimum amount of organization. This memorandum reflects on the history of Article 3 and attempts to reconcile scholarly and jurisprudential interpretations of Article 3 with the facts informing the AFRC’s case to address whether Article 3 is an appropriate element of the AFRC’s prosecution.

B. Summary of Conclusions

1. Article 3 common to the Geneva Conventions is deliberately undefined, to protect the greatest number of victims of internal armed conflicts.

¹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the protection of Civilian persons in Time of War (Geneva Convention No. III), Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. IV), Aug. 12, 1949, 75 U.N.T.S. 238. [Reproduced in accompanying notebooks at Tabs 1, 2, 3 and 4, respectively.]

See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), 1125 U.N.T.S. 3, *entered into force* Dec. 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”), 1125 U.N.T.S. 609, *entered into force* Dec. 7 1978. [Reproduced in accompanying notebooks at Tabs 5 and 6, respectively.]

² *Commentary to Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, INTERNATIONAL COMMISSION FOR THE RED CROSS, *available at* <http://www.icrc.org/ihl.nsf> (follow “Commentaries” hyperlink; then follow “Article 3” hyperlink). [reproduced at the accompanying notebooks at Tab 7]

The delegates to the Geneva Conventions painstakingly chose the wording of Article 3. The Geneva Conventions went through several drafts and a great deal of discussion.³ While some delegates proposed guidelines to define phrases like “internal armed conflict,”⁴ none were ever adopted. This measure was taken intentionally to protect as many people as possible,⁵ and Article 3, now incorporated into customary international law,⁶ is widely believed to indicate the absolute minimum standard of protected human rights violations.⁷

2. Article 3 common to the Geneva Conventions is incorporated appropriately in the Statute of the Special Court for Sierra Leone, and its application to Defendant’s case is proper.

The International Criminal Tribunal for Rwanda (hereinafter the “ICTR”) was the first of the international tribunals to codify Article 3 in the statute used by the court.⁸ Since the Special Court for Sierra Leone (hereinafter the “Special Court”) faces similar issues as an international prosecution of conflicts that occurred within one state’s national

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Prosecutor v. Dusko Tadic, IT-95-1-T Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (1995) [reproduced in the accompanying notebooks at Tab 8]

⁷ Tadic, *supra* note 6; Hamdan v. Rumsfeld, 548 U.S. ____ (2006) [reproduced in the accompanying notebooks at Tab 9]; David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT’L L. 37 (1979) [reproduced in the accompanying notebooks at Tab 10]; INTERNATIONAL COMMISSION FOR THE RED CROSS, *supra* note 2. [reproduced in the accompanying notebooks at Tab 7]

⁸ Statute of the International Criminal Tribunal for Rwanda, (1994) [reproduced in the accompanying notebooks at Tab 11]

boundaries, the Special Court followed suit with its statute.⁹ Included in Defendant's indictment is Article 3(d) of the Statute of the Special Court which criminalizes violations of Article 3 common to the Geneva Conventions.¹⁰ This charge is properly applied to Defendant's case, as the Court will likely find that the charges alleged against the AFRC fit into even a narrow, conservative definition of Article 3, regardless of the disorganized nature of the conflict.

II. FACTUAL BACKGROUND

A. The Indictment of The Special Court for Sierra Leone

Three top-ranking members of the Armed Forces Revolutionary Council are the named defendants for the prosecution against the AFRC. Major Johnny Paul Koroma of the AFRC, who allegedly led the *coup d'etat* on the democratically elected government of President Ahmad Tejan Kabbah on May 25, 1997, was reported dead before he could be indicted.¹¹ The United Nations and the Special Court consider Koroma's whereabouts to be unknown, and there are ongoing efforts to apprehend him.¹²

The three AFRC defendants, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, are charged with 14 counts of crimes against humanity, violations of Common Article 3, and other serious violations of international law in violation of

⁹ The Statute for the Special Court for Sierra Leone, U.N. SCR 1315 (August 14, 2000). [reproduced in the accompanying notebooks at Tab 12]

¹⁰ Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, (Indictment) Case no. SCSL-2004-16-PT [reproduced in the accompanying notebooks at Tab 13]; The Statute for the Special Court for Sierra Leone, *supra* at note 9.

¹¹ *Background Note: Sierra Leone*, THE UNITED STATES DEPARTMENT OF STATE (2006), available at <http://www.state.gov/r/pa/ei/bgn/5475.htm> [reproduced in the accompanying notebooks at Tab 14]

¹² *Completion Strategy*, THE SPECIAL COURT FOR SIERRA LEONE (2005), available at <http://www.sc-sl.org/Documents/completionstrategy.pdf>. [reproduced in the accompanying notebooks at Tab 15]

Articles 2, 3 and 4 of the Special Court Statute.¹³ Previously, all three of the named defendants were officers in the Sierra Leone Army (hereinafter the “SLA”), which provided many of the members of the AFRC.¹⁴ As leaders in the AFRC, the defendants allegedly presided over the country after seizing power in the May 1997 coup and led attacks against civilians, including attacks in the Koinadugu and Bombali Districts in 1998 and the attack on Freetown of January 6, 1999.¹⁵ The indictment alleges that the defendants acted in concert with Charles Taylor, Johnny Paul Koroma, and the named defendants in the case against the Revolutionary United Front (hereinafter the “RUF”) to take control of Sierra Leone, and particularly the diamond mining areas of Sierra Leone.

B. A Brief History of the Armed Forces Revolutionary Council

A vicious civil war loomed over Sierra Leone for most of the 1990s. Child soldiers, mutilated limbs and slogans carved into the chests of victims became the emblems of the hostilities. Two-thirds of the population was displaced, and six hundred thousand citizens fled to other countries.¹⁶

The AFRC came into being in early 1997, when the SLA, the government army, staged a mutiny against the new democratic government, opening the maximum-security jail and releasing army detainees, including Johnny Paul Koroma. In response, President Tejan Kabbah fled the country and halted army food supplies. The SLA and Koroma

¹³ Special Court Statute, *supra* at note 9 [reproduced in the accompanying notebooks at Tab 12], Indictment, *supra* at note 10. [reproduced in the accompanying notebooks at Tab 13]

¹⁴ Indictment, *supra* at note 10, Sierra Leone, A Distastrous Set-Back for Human Rights, Amnesty International (1997), available at <http://web.amnesty.org/library/> (follow “1997” hyperlink; then follow “Sierra Leone” hyperlink). [reproduced in accompanying notebooks at Tab 16]

¹⁵ *Id.*

¹⁶ John Cerone, “The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice” 8 *ILSA J. Int’l & Comp. L.* 379, 380 (2001-2002) [reproduced in accompanying notebooks at Tab 17]

invited RUF forces to come out of hiding to form a new government junta called the AFRC.¹⁷ The 1997 attack against Freetown was characterized by violent human rights abuses, including arbitrary killings, mutilations, rape, abduction and torture. Amnesty International reported in 1997 that it was difficult to ascertain who was more responsible, the government army or the RUF,¹⁸ probably since the RUF and the SLA had more or less joined forces, now calling themselves the AFRC. For ten months, the AFRC controlled Freetown, until an intervention force of primarily Nigerian troops drove them out in February 1998. With financial and weapons resources replenished from the many months of access to the national armories, the AFRC retreated into smaller communities outside of the grasp of the intervention forces. President Kabbah returned and the international community considered Sierra Leone to be somewhat stable.¹⁹

It was not. During 1998, the AFRC/RUF was responsible for “Operation No Living Thing”²⁰ in which several thousand Sierra Leoneans were killed or attacked. Amnesty International’s eyewitnesses reported hundreds of bodies lying dead or gravely wounded in the brush after the AFRC/RUF swept through villages. Between April and early May 1998, the Freetown hospital was flooded with patients seeking medical help for mutilation: on one day alone, four people came in with both arms severed off, and 23 came in with only one arm. Hands, fingers and ears were also reportedly cut off by

¹⁷ Richards [reproduced in the accompanying notebooks at Tab 18, McGregor [reproduced in the accompanying notebooks at Tab 19], THE UNITED STATES DEPARTMENT OF STATE, *supra* at note 11 [reproduced in the accompanying notebooks at Tab 14], Babafemi Akinrinade, “International Humanitarian Law and the Conflict in Sierra Leone” 15 *Notre Dame J.L. Ethics & Pub. Pol’y* 391, 400 (2001) [reproduced in the accompanying notebooks at Tab 20]

¹⁸ *Sierra Leone Yearly Report 1997*, AMNESTY INTERNATIONAL (1997), available at: <http://www.amnesty.org/ailib/aireport/ar97/> [reproduced in the accompanying notebooks at Tab 21]

¹⁹ McGregor *supra* at note 17 at 486-487; Richards, *supra* at note 17, at 45

²⁰ Footnote. Cite this.

machetes. All of the victims were civilians – farmers, housewives, merchants and students. Between April and July of 1998, the hospital had treated nearly 300 victims for mutilations, gunshot wounds and amputations. One fifth of those treated were children. Moreover, the people who were treated at the hospital in Freetown represent only a fraction of the people who were dismembered, tortured, mutilated and otherwise wounded who could not make it to the hospital. Refugees fled the northern and eastern districts in Sierra Leone; Guinea reported taking in over 100 refugees, half of them deliberately mutilated. Whole villages in the northern and eastern districts were attacked, citizens tortured, killed and brutalized, and the structures burned to the ground. Mothers watched their infants thrown into rivers and children witnessed the torture and mutilation of their parents. Everyone who could not run away from the AFRC/RUF was attacked, raped or murdered.²¹

The AFRC/RUF launched another attack against Freetown in January 1999, this time managing to drive out the Nigerian intervention forces, and, in so doing, committing atrocities against civilians great enough to bring Sierra Leone back into the eye of the international community.²² The property damage alone left as many as 20,000 people homeless.²³ Unarmed civilians were “arbitrarily killed, mutilated, raped and abducted” according to Amnesty International reports. Medical reports put the number of killing at 6,000, and while most killings were arbitrary, journalists, government officials, lawyers,

²¹ *Sierra Leone 1998 – A Year of Atrocities Against Civilians*, AMNESTY INTERNATIONAL YEARLY REPORTS, (1998) available at: <http://web.amnesty.org/library/index/> (follow the “Sierra Leone” hyperlink, then follow the “1998” hyperlink). [reproduced in accompanying notebooks at Tab 22]

²² Akinrinade, *supra* at note 17, at 401

²³ *Sierra Leone Yearly Report 1999*, AMNESTY INTERNATIONAL (1999), available at: http://www.amnestyusa.org/countries/sierra_leone/ (follow “1999” hyperlink). [reproduced in the accompanying notebooks at Tab 23]

human rights workers, prison officials and police officers were targeted. Freetown hospitals reported that over 500 people required surgery for mutilation, including severed limbs. Women and girls were rounded up and raped in public, and it is estimated that 90% of women who were abducted were raped. Men, women and children were abducted from Freetown. The men and boys were “recruited” into the AFRC/RUF armies, the women and girls were held as sexual slaves and forced to take on domestic tasks. There were as many as 4,000 children reported missing from Freetown after the January attack, most presumed abducted.²⁴ After terrorizing the city, the AFRC/RUF withdrew back into the rural areas of Sierra Leone, and continued committing atrocities along the way. Towns east of Freetown reported similar abuses.²⁵

In July 1999, the RUF and the government of Sierra Leone signed the Lome Peace agreement, which excluded the AFRC almost entirely, but for token references.²⁶ The Lome Peace Agreement made the RUF a political party and gave government roles overseeing peace and reconstruction to Foday Sankoh, the leader of the RUF, and to Johnny Paul Komora.²⁷ Implementation of the treaty was sluggish, and doubts that the RUF was not committed to the peace process were confirmed when, in less than a year, the AFRC/RUF took up arms once more, this time against the United Nations’ peacekeeping force, UNAMSIL. Trying to embarrass the United Nations and provoke

²⁴ *Id.*

²⁵ Richards, *supra* at note 17; AMNESTY INTERNATIONAL, *supra* at note 22

²⁶ Lome Peace Accord, Sierra Leone-R.U.F., May 25, 1999, available at: <http://www.sierra-leone.org/lomeaccord.html>, Third Report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/189, March 7, 2000 [reproduced in accompanying notebooks at Tabs 24 and 14, respectively]

²⁷ AMNESTY INTERNATIONAL, *supra* at note 22

the UNAMSIL soldiers, the RUF and the AFRC terrorized the country for most of 2000. Finally, in November 2000, Sierra Leone and the RUF signed the Abuja Ceasefire Agreement.²⁸ Since then, Sierra Leone and the United Nations have made progress toward peace in Sierra Leone and justice for the victims of the years of bloodshed.²⁹

C. The Named Defendants

Alex Tamba Brima and Brima Bazzy Kamara were both staff sergeants in the SLA. Santigie Borbor Kanu was a sergeant in the SLA. Allegedly, all three men were among the 17 soldiers who staged the coup d'état, ousting President Kabbah from power in 1997, and subsequently, Alex Tamba Brima and Brima Bazzy Kamara were appointed by Johnny Paul Koroma to the positions of Public Liaison Officers of the new AFRC government, and all three men were given memberships on the AFRC Supreme Council. In 1998, when the AFRC retreated from its seat of power in Freetown, it is alleged that Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu led the AFRC/RUF forces in the northern Kono district, and they are suspected of leading ARFC/RUF operations in various other districts in northern and eastern Sierra Leone. The purpose of these operations, referred to as "Operation No Living Thing" and described in some detail above, was to terrorize the citizenry of Sierra Leone and to punish their supposed support of President Kabbah. In the January 1999 attack against Freetown, allegedly Alex Tamba Brima was commander-in-chief leading the attack on the ground, and Brima

²⁸ Abuja Ceasefire Agreement, Sierra Leone-R.U.F., July 7, 1999, available at: <http://www.sc-sl.org/abujaagreement.html> [reproduced in accompanying notebooks at Tab 25]. *See also* Eighth report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/1199, Dec. 15, 2000 [reproduced in accompanying notebook at Tab ___]

²⁹ Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/1055, Nov. 7, 2000 (reproduced in accompanying notebook at Tab ___)

Bazzy Kamara and Santigie Borbor Kanu were likewise commanders during the attack. It is thought that all three men consistently held leadership positions within the AFRC.³⁰

III. LEGAL DISCUSSION

A. Common Article 3 of the Geneva Conventions: History, Development and Application

1. The Red Cross and Common Article 3

At the urging of the International Committee of the Red Cross (hereinafter the “ICRC”), the first Geneva Conventions were signed in 1864 by a handful of European states. The Geneva Convention for the Amelioration of the Condition of the Wounded in the Armies in the Field marked the birth of modern international humanitarian law.³¹ In 1906, the first Geneva Convention was revisited and more specific terms were added.³² The 1906 version remained in force until 1929, when in the wake of the First World War, the delegates added the Geneva Convention Relative to the Treatment of Prisoners of War. In 1949, after World War II, State parties again met, this time to update The

³⁰ *Alex Tamba Brima*, TRIAL WATCH (2006), available at: http://www.trial-ch.org/en/trial-watch/profile/db/facts/alex-tamba_brima_214.html [reproduced in accompanying notebooks at Tab 26]; *Brima Bazzy Kamara*, TRIAL WATCH (2006), available at: http://www.trial-ch.org/en/trial-watch/profile/db/facts/brima-bazzy_kamara_213.html [reproduced in accompany notebooks at Tab 27]; *Santigie Borbor Kanu*, TRIAL WATCH (2006), available at: http://www.trial-ch.org/en/trial-watch/profile/db/facts/santigie-borbor_kanu_209.html [reproduced in accompanying notebooks at Tab 28].

TRIAL Watch “is an Association under Swiss law founded in June 2002. It is apolitical and non-confessional. Its principal goals are in the fight against impunity for the perpetrators accomplices and instigators of genocide, war crimes, crimes against humanity and acts of torture. TRIAL will go to court and defend the interests of the victims of such acts before the Swiss courts and the International Criminal Tribunal.”

³¹ Joyce A.C. Gutteridge, “The Geneva Conventions of 1949” 26 *Brit. Y.B. Int’l L.* 294 (1949) [reproduced in accompanying notebooks at Tab 29]; *From the Battle of Solferino to the Eve of the First World War*, International Commission for the Red Cross (2006), available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNVP> [reproduced in the accompanying notebooks at Tab 30]

³² *Introduction to the Convention for the Amelioration of the Condition of the Wounded and the Sick 6 July 1906*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2005), available at: <http://www.icrc.org/ihl.nsf/INTRO/> (follow “Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906, Introduction” hyperlink) [reproduced in the accompanying notebooks at Tab 31]

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter the “First Geneva Convention”), the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter the “Second Geneva Convention”) which originated in 1907,³³ the Convention Relative to the Treatment of Prisoners of War (hereinafter the “Third Geneva Convention”) and the Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter the “Fourth Geneva Convention”) which in its previous incarnation had been a series of resolutions.³⁴ In the years following the Second World War, these four treaties were signed by nearly every nation in the world.³⁵

Horrified at the atrocities committed during World War II and at the vulnerability of civilians in wartime without laws of war to protect them, the ICRC solicited support for the inclusion of Article 3.³⁶ The ICRC was persuasive, since the drafters considered it of utmost importance to distinguish between soldiers and those who were unarmed, to the extent that the Common Article 3 set of protections created for civilians in wartime was

³³ *Introduction to the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2005), available at: <http://www.icrc.org/ihl.nsf/INTRO/> (follow “Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Introduction” hyperlink) [reproduced in the accompanying notebooks at Tab 32]

³⁴ *Introduction to the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2005) available at: <http://www.icrc.org/ihl.nsf/INTRO/> (follow “Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, introduction” hyperlink”) [reproduced in the accompanying notebook at Tab 33]

³⁵ *The Geneva Conventions, the Core of International Humanitarian Law*, INTERNATIONAL COMMISSION FOR THE RED CROSS (2006), available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions> [reproduced in the accompanying notebooks at Tab 34]

³⁶ David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT’L L. 37, 37 (1979) [reproduced in the accompanying notebooks at Tab 35]

repeated in each of the Conventions.³⁷ Article 3, as included in the four Conventions, is far more expansive than its predecessors, in large part because the drafters had witnessed during World War II what can happen when there is no rule of law to protect civilians.

Common Article 3 stands apart from the other provisions of the Conventions in that it does not address conflicts between States.³⁸ While the Conventions primarily are focused on protecting soldiers and noncombatants in traditional inter-state wartime, Common Article 3 extends the reach of the Conventions to conflicts within states – an unprecedented move in international treaty law making and a clear step toward insistence that the individual’s human rights take precedence over State affiliation. It is unsurprising that the ICRC would be concerned with the health and safety of the individual. It is incredible that the ICRC successfully suggested to the States’ delegates that protecting the human rights of the individual was of such great consequence that the drafters were able to look beyond the traditional rules of treaty making – that treaties should govern only inter-state actions – to include a provision that would protect all people in all conflicts.³⁹

2. *Travaux Préparatoires*⁴⁰

However, in order for the various state parties to agree to this revolutionary concept, the ICRC and the drafters faced a challenge in trying to draft a statute that would be sufficiently broad to meet the human rights needs of victims of war, and would be

³⁷ Geneva Conventions I, II, III and IV, Art.3, *supra* at note 1 [reproduced in the accompanying notebooks at Tabs 1, 2, 3 and 4, respectively]

³⁸ Elder, 38, *supra* at note 34

³⁹ *Id.*

⁴⁰ Legislative history for treaty negotiations is commonly described with the French “*travaux préparatoires*.”

acceptable to the delegates. Few countries would accept a provision that made them responsible for the people of another country. For example, when the ICRC first suggested the concept for Common Article 3 at the 1912 ICRC Conference, it was not even discussed.⁴¹ No one was interested in taking care of another state's unfortunates. By 1921, after watching the Spanish Civil War, a resolution was passed that applied the laws of war to civil wars. The resolution detailed the specific role the ICRC had in providing aid in these internal conflicts. The resolution was not the same as a Convention, but it gave the ICRC the leverage to compel soldiers in civil wars to respect the Geneva Conventions. A subsequent 1939 resolution strengthened the 1921 effort, and an effort in 1946 to add the resolution to the Geneva Conventions was taken seriously, though the language of the suggested provision was diluted significantly. Still, by 1949, the delegates at the Geneva Conference were ready to accept this as part of the Geneva Conventions.

The language of Article 3 was widely debated. The Article saw several drafts. The drafters were principally concerned with getting too involved with intra-state politics and extending the protective rules of international conflicts to civil wars, which are not governed by the rules of international law. However, most supported the Article, citing the cruelty of civil war, "the absurdity of branding all violent dissidence as common criminality" when frequently civil wars were rebellions against governments, and the actual behavior in a civil war that is not different from that of an inter-state war.⁴² A

⁴¹ *Commentary to Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, INTERNATIONAL COMMISSION FOR THE RED CROSS, available at <http://www.icrc.org/ihl.nsf> (follow "Commentaries" hyperlink; then follow "Article 3" hyperlink). [reproduced at the accompanying notebooks at Tab 7]

committee was formed at the Diplomatic Conference that would take into account the previous incarnations of the Article, as well as proposals from the participating States.⁴³

The proposals all emphasized different criteria for applicability.

The French proposal, for example, wanted to limit the Article only to cases of an organized military force. The Spanish proposal extended applicability to “insurgents organized as militia,”⁴⁴ while the United States advocated for applicability only when the insurgents “purport[ed] to have the characteristics of a State,”⁴⁵ and the Australian proposal required recognition from the *de jure* government that the insurgents were belligerents or from the United Nations that the insurgents were a threat to international peace.⁴⁶

The language of the final draft of Common Article 3 eventually was culled in large part from the Italian proposal.⁴⁷ The Italian proposal was preferred as it restated clearly the principles of international humanitarian law, and as it did not require formal

⁴² Elder, 44 *supra* at 34 [reproduced in the accompanying notebooks at Tab 35]. See also James E. Bond, *Internal Conflict and Article 3 of the Geneva Conventions*, 48 DENV. L.J. 263 (1971-1972) [reproduced in the accompanying notebooks at Tab 36] See also Gutteridge, *supra* at note 29 [reproduced in the accompanying notebooks at Tab 29]

⁴³ Elder, 44 *supra* at 34.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Elder, 45 *supra* at note 34 [reproduced in the accompanying notebooks at Tab 35]

⁴⁷ Elder, 45-46 *supra* at note 34.

The Italian proposal reads as follows: “The High Contracting Parties, conscious of their obligation to come to an agreement in order to protect civilian populations from the horrors of war, undertake to respect the principles of human rights which ay constitute the safeguard of civilization and, in particular, to apply, at any time and in all places, the rules given hereunder:

- (1) Individuals shall be protected against any violation to their life and limb.
- (2) The taking of hostages is prohibited.
- (3) Executions may be carried out only if prior judgment has been passes by regularly constituted court, furnished with the judicial safeguards that civilized peoples recognize to be indispensable.
- (4) Torture of any kind is strictly prohibited.

These rules, which constitute the basis of universal humanitarian law, shall be respected without prejudice to the special stipulations provided for in the present Convention in favour of protected persons.”

status as criteria for applicability, meaning that the Article would apply as the minimum standard for humanitarian protection in all conflicts.⁴⁸ The committee approved of the Italian proposal because it stood alone and apart from the rest of the Conventions, yet synthesized the principles of the Conventions. There would be no confusion whether or not Article 3 applied in international conflicts or non-international conflicts – it would always apply.⁴⁹

Article 3 common to all four Geneva Conventions was decided upon thus:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

⁴⁸ Elder, 46 *supra* at note 34

⁴⁹ *Commentary to Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, INTERNATIONAL COMMISSION FOR THE RED CROSS, available at <http://www.icrc.org/ihl.nsf> (follow “Commentaries” hyperlink; then follow “Article 3” hyperlink). [reproduced at the accompanying notebooks at Tab 7]

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

At the Diplomatic Conference, the delegates decided to leave out a description of an internal conflict to give Article 3 the greatest possible breadth.⁵⁰ Not everyone was entirely satisfied with this approach, and many countries offered explanations of what they would consider a non-international conflict. Some States were concerned that Article 3 would recognize isolated acts of banditry as the province of international law, and that petty criminals would be held to the standards of the Geneva Conventions.⁵¹ Others wanted to be sure that the Article was broad enough to include rebels rising up against their government. The Swiss representative argued that there was nothing on the face of the Article implying that it would apply to individual crimes; that in the case of an “armed conflict” there must in fact be an armed conflict, not one instance of violence. The Swiss representative defined the ambiguity as: “an armed conflict, as understood in this provision, implies some form of organization among the Parties to the conflict.”⁵² Notwithstanding the Swiss assessment, the language of the Article was unchanged, and the phrase “armed conflict,” in particular, remains undefined in Common Article 3.

The ICRC Commentaries also note that Article 3 has a self-policing quality as well. Who would risk the international shame of claiming that Article 3 does not apply, in order to justify killing and torturing civilians?⁵³ On the other hand, a regime interested solely in quashing its opposition also is not necessarily looking for international allies.⁵⁴

⁵⁰ Elder, 53 *supra* at note 34 [reproduced in the accompanying notebooks at Tab 35]

⁵¹ Elder, 51 *supra* at note 34

⁵² Elder, 52 *supra* at note 34, quoting *II B Final Record of the Diplomatic Conference at Geneva of 1949* at 101-102 (1951). [reproduced in the accompanying notebooks at 35]

B. Common Article 3, Customary International Law and *Opinio Juris*

Common Article 3 has been accepted as a part of customary international law. It has been codified in the Rome Statute of the International Criminal Court, and in the Statute for the International Criminal Tribunal for Rwanda, and, most importantly, in the Statute of the Special Court for Sierra Leone.⁵⁵ In fact, in the Security Council’s report establishing the Special Court for Sierra Leone, the Security Council noted “violations of Common Article 3 of the Geneva Conventions . . . have long been considered customary international law.”⁵⁶ Common Article 3 has been enforced as customary law in judgments from the International Court of Justice,⁵⁷ the ICTY and the ICTR,⁵⁸ and in domestic courts.⁵⁹

Not only Common Article 3, but, indeed, the “Law of Geneva,” that is, the principles of the four Geneva Conventions, is widely accepted as customary international

⁵³ *Id.*

⁵⁴ Alfred P. Rubin *The Status of Rebels Under the Geneva Conventions of 1949* 21 Int’l & Comp. L.Q. 472 at 429 (1972) [reproduced in the accompanying notebooks at Tab 37]

⁵⁵ Special Court Statute, *supra* at note 9; Statute of the International Criminal Tribunal for Rwanda, *supra* note 8; Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, U.N. Res. 827; Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179; Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/Conf. 183/0 (1998) [reproduced in the accompanying notebooks at Tabs 12, 11, 38, 39 and 40, respectively]

⁵⁶ United Nations Document S/2000/915 4 October 2000 [reproduced in the accompanying notebooks at Tab 41]

⁵⁷ *Nicaragua v. United States* 25 I.L.M. 1023 (1986) [reproduced in the accompanying notebooks at Tab 42]

⁵⁸ *Tadic*, *supra* at note 6; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, Trial Chamber (1998). [reproduced in the accompanying notebooks at Tabs 8 and 43, respectively]

⁵⁹ *Kadic v. Karadzic* 70 F.3d 232 (1995) ; *Hamdan*, *supra* at note 7 [reproduced in the accompanying notebooks at Tabs 44 and 9, respectively]

law.⁶⁰ As a majority of States have ratified them,⁶¹ and since the Conventions are widely followed, the Conventions have become customary law, binding even on those few States that have not ratified the Conventions. Sierra Leone, moreover, is a party to the Geneva Conventions, and ratified them in 1965.⁶²

Most criminal statutes created for international courts have codified Common Article 3, proving its prominence in customary international law. The Rome Statute of the International Criminal Court uses language virtually identical to that of Common Article 3 in Article 8, Section 2(c), and in fact directly refers to Common Article 3 as the basis for the rule.⁶³ The Statute of the International Criminal Tribunal for Rwanda also explicitly cites Common Article 3 in Article 4 of its statute.⁶⁴ Article 3 of the Statute of the Special Court for Sierra Leone also invokes Common Article 3 and it even expands on the violations that will apply to Common Article 3.⁶⁵ The Statute of the Special Court for Sierra Leone, respecting the principle of *nullem crimen sine lege*,⁶⁶ only includes as

⁶⁰ M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities* 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998). [reproduced in the accompanying notebooks at Tab 45] See also Theodor Meron, *The Continuing Role of Custom in the Formation of International Law*, 90 AM. J. INT'L L. 238 (1996), and Theodor Meron, *The Geneva Conventions as Customary Law* 81 AM. J. INT'L L. 348 (1987) [reproduced in the accompanying notebooks at Tabs 46 and 47, respectively]

⁶¹ The website for the International Commission for the Red Cross notes over 190 countries have ratified the four Geneva Conventions. A complete roster of the ratifying States is available at: <http://www.icrc.org/ihl.nsf/> (follow "Geneva Conventions hyperlink, then follow "State parties" hyperlink). [reproduced in the accompanying notebooks at Tab 48]

⁶² *Id.*

⁶³ Rome Statute, *supra* at note 53, [reproduced in the accompanying notebooks at Tab 40]

⁶⁴ Rwanda statute, *supra* at note 53 [reproduced in the accompanying notebooks at Tab 38]

⁶⁵ Special Court statute, *supra* at note 10 [reproduced in the accompanying notebooks at Tab 12]

⁶⁶ *Nullem crimen sine lege* is Latin for "No crime without law." The principle is meant to protect the accused from arbitrary accusations.

crimes clear violations of customary international law or principles taken from international instruments to which Sierra Leone is a party.⁶⁷

Moreover, when Common Article 3 has come up for judicial review, judges have held that it is customary law. In the judgment of *Nicaragua v. United States*, one of the first international cases to opine on Common Article 3, the International Court of Justice declared Common Article 3 to be customary law, holding “these rules . . . constitute a minimum yardstick” of humanity.⁶⁸ The International Court of Justice went on to say in the *Nicaragua* judgment that the rules of Common Article 3 were so basic that they applied to all armed conflicts, regardless of international or non-international status.⁶⁹ Although some scholars have criticized this decision as being based on aspirations and not actual practice⁷⁰ and as being too broad to provide any clarity,⁷¹ the *Nicaragua* judgment has influenced *opinio juris* greatly since then. More recently, the Supreme Court of the United States recognized Common Article 3 as customary international law in their decision in *Hamdan v. Rumsfeld*, holding that Common Article 3 ensures the rights of those labeled as enemy combatants at Guantanamo Bay.⁷²

⁶⁷ Cerone, *supra* at note 16 [reproduced in the accompanying notebooks at Tab 17]

⁶⁸ *Nicaragua*, *supra* at note 55 [reproduced in the accompanying notebooks at Tab 42] For a discussion of this case within the context of the Geneva Conventions as customary law, see Meron, *supra* at note 58 [reproduced in the accompanying notebooks at Tab 47]

⁶⁹ *Id.*

⁷⁰ Meron, *supra* at note 58 [reproduced in the accompanying notebooks at Tab 47]

⁷¹ Bassiouni, *supra* at note 58, [reproduced in the accompanying notebooks at Tab 45]

⁷² *Hamdan*, *supra* at note 7 [reproduced in the accompanying notebooks at Tab 9]. Previously, a United States district court held that Common Article 3 represented the minimum standard of protection for civilians in civil wartime in *Kadic v. Karadzic*, a case brought in the United States by the victims of the

When challenged, the *ad hoc* international criminal tribunals have upheld Common Article 3 as an accepted tenet of customary international law. The decisions of the *ad hoc* tribunals are regarded as great authority and are the primary persuasive precedent for other international tribunals, including the Special Court for Sierra Leone;⁷³ however, those decisions are not necessarily binding on the Special Court. Initially, it was unclear whether Common Article 3 violations were prohibited under customary international law.⁷⁴ Certainly, when the question came before the ICTY, which, unlike the Rome Statute and the ICTR statute, did not include a provision criminalizing violations of Common Article 3, the court had to consider whether internal armed conflicts could be defined as war crimes at all. The court decided in *Prosecutor v. Dusko Tadic* that not only do the Geneva Conventions represent customary international law, but the Common Article 3 is to be applied to all armed conflicts, regardless of its international or non-international character.⁷⁵ Afraid that jurists were losing sight of human beings in the debate over international conflict versus internal conflict, the *Tadic* court decided that it was in keeping with the purpose of the Geneva conventions to eliminate the distinction between internal and international conflicts, and on appeal, this was upheld as an “authoritative interpretation” of Common Article 3.⁷⁶ The court addressed the issues again in the *Celebici* case, in which it used no uncertain terms to

atrocities committed in Bosnia under the Alien Tort Claims Act. *See Kadic, supra* at note 57 [reproduced in the accompanying notebook at Tab 44]

⁷³ Guenael Mattraux, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS (2005) [reproduced in the accompanying notebooks at Tab 49]

⁷⁴ *Id.*

⁷⁵ *Tadic, supra* at note 6 [reproduced in the accompanying notebooks at Tab 8]

⁷⁶ *Id.* Michael P. Scharf, Balkan Justice (1997) [reproduced in the accompanying notebooks at Tab 50]

uphold the customary nature of Common Article 3.⁷⁷ The court in *Celebici*, so convinced of the fundamental nature of the law of Common Article 3, not only affirmed that it applied to international and internal armed conflicts, but that it represented the absolute minimum standard “of protection to persons who are in the middle of an armed conflict but are not taking any active part in the hostilities.”⁷⁸

In Rwanda, where the statute for the ICTR explicitly criminalizes violations of Common Article 3, the court in the *Akayesu*, *Rutaganda*, and the *Kayishema and Ruzindana* decisions held that Common Article 3 is customary law.⁷⁹ Indeed, the ICTR Statute was designed with customary law in mind; to be as fair as possible, and for the sake of the legitimacy of the tribunal, the ICTR statute includes only those offenses

⁷⁷ “It is indisputable that Common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognized humanitarian principles. These principles were codified in Common article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts...These rules may thus be considered as the ‘quintessence’ of the humanitarian rules found in the Geneva Conventions as a whole.” Prosecutor v. Delalic, Mucic, Delic and Landzo ICTY-96-21-A, Judgment, Appeals Chamber (1996) [reproduced in the accompanying notebooks at Tab 51] See also par. 150 of *Celebici*: “It is both legally and morally untenable that the rules contained in Common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of Common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber’s view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader.”

⁷⁸ *Id.*

⁷⁹ *Akayesu*, supra at note 56 [reproduced in the accompanying notebook at Tab 43]; Prosecutor v. Kayishema and Ruzindana, ICTR-96--T, Judgment, Trial Chamber (1999) [reproduced in the accompanying notebook at Tab 52]; Prosecutor v. Rutaganda, Case No. ICTR-96--T, Judgment, Trial Chamber (1999) [reproduced in the accompanying notebook at Tab 53]

which are clear violations of international criminal law.⁸⁰ The Special Court Statute followed this model as well. The *Akayesu* decision further noted that the penal codes of most States “have criminalized acts which if committed during internal armed conflict, would constitute a violation of Common Article 3”⁸¹ demonstrating by the widespread acceptance of the principles of Common Article 3 that it has become customary law.

C. Additional Protocol II and Common Article 3

The Additional Protocols to the Geneva Conventions of 1949 were added in 1977, nearly 30 years after the original. Common Article 3 and Additional Protocol II are often linked in international law scholarship as both treaties address non-international conflicts. Despite this trend, the two treaties are separate, complementary bodies that are not meant to influence or change the other.⁸² Additional Protocol II set out to clarify the concept of non-international armed conflict without limiting the breadth and applicability of Common Article 3.⁸³ Additional Protocol II, as international criminal courts have pointed out, has only “elaborated and extended the protections of the Geneva Conventions.”⁸⁴ The ICRC’s own commentaries assert that Additional Protocol II was conceived as an independent instrument to avoid “undercutting the scope of Article 3

⁸⁰ Mettreaux, *supra*, at note 73 [reproduced in the accompanying notebook at Tab 49]

⁸¹ *Akayesu*, *supra* at note 56 [reproduced in the accompanying notebook at Tab 43]

⁸² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”), 1125 U.N.T.S. 609 (1978) [reproduced in the accompanying notebooks at Tab 54]

Article 1 states that the Protocol “develops and supplements Article 3 common to the Geneva Conventions...without modifying its existing conditions of application.”

⁸³ Charles Lysaght *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments* 33 AM. U. L. REV. 9, 9 (1983-1984) [reproduced in the accompanying notebooks at Tab 55]

⁸⁴ *Prosecutor v. Galic*, IT-98-29 (1998) Judgment, Trial Chamber [reproduced at Tab 56]

itself” and that “Common Article 3 retains a separate existence.”⁸⁵ When considering Common Article 3, then, it is important to confuse neither the scope of applicability of Common Article 3 nor the class of people protected by Common Article 3 with those articulated in Additional Protocol II.

D. The AFRC and Common Article 3

1. The AFRC hostilities were an armed conflict

Of the scant requirements for Common Article 3 applicability, the first is that the event in question was in fact an armed conflict. Though this paper has addressed the difficulty in defining “armed conflict,” it has not yet settled on a formula. Article 3 itself uses the language “armed conflict” but without explaining what level of organization, continuity, force or success is necessary to qualify as an armed conflict.⁸⁶ Since internal conflicts can “range from riots or insurrections through guerilla movements to civil wars or even mushroom into international conflicts”⁸⁷ legal scholars have tried to define “armed conflict” by limiting the cases in which it is applicable. To attempt to limit the meaning of “armed conflict” is outside of the purpose of the Article, however, and the following section will address various recent interpretations of “armed conflict,” as well as discussing why interpreting the phrase is inconsistent with the goals of the Geneva Conventions.

In order to determine if the AFRC campaigns constituted an armed conflict, we have to look at the legal standard set by jurists, scholars and governments, as well as the

⁸⁵ INTERNATIONAL COMMISSION FOR THE RED CROSS, *supra* at note 32 [reproduced at the accompanying notebooks at Tab 33]

⁸⁶ Alfred P. Rubin, *The Status of Rebels Under the Geneva Conventions of 1949* 21 INT’L & COMP. L.Q. 472 AT 484 (1972) [reproduced in the accompanying notebooks at Tab 57]

⁸⁷ Bond, *supra* at note 40 [reproduced in the accompanying notebooks at Tab 36]

legislative history and purpose of the Article, while keeping in mind that the Special Court for Sierra Leone is not legally bound by any of those standards. The legislative history of Article 3 is discussed extensively above,⁸⁸ although it is worth reiterating that Common Article 3 went through numerous drafts, and many of those drafts were specifically concerned with defining “armed conflict.” The challenge was to find a definition that each country found non-threatening, and in the end, the delegates gave up trying to define “armed conflict.” Instead, they decided to list which most egregious human rights could not be violated under any circumstance of internal violence. The committee reports reveal that the delegates generally thought Common Article 3 applied to belligerencies, civil wars and insurgencies, but not to bandits or riots.⁸⁹

The purpose of Common Article 3 is to limit the amount of suffering in wartime, particularly for those uninvolved with the conflict.⁹⁰ Any question about applying Common Article 3 must be mindful of this purpose. While military necessity will sometimes allow for terror tactics, military necessity cannot authorize human rights violations,⁹¹ and it is those most essential human rights that Common Article 3 seeks to ensure.

Recent jurisprudence has all but defined “armed conflict” as an armed confrontation between two or more States, between a State and another body, between a State and a rebel faction, or between two such factions within a State.⁹² In the *Tadic* case

⁸⁸ *Supra* at section III

⁸⁹ Bond, *supra* at note 40 [reproduced in the accompanying notebooks at Tab 36]

⁹⁰ *Id.* at 240

⁹¹ *Id.* at 274

of the ICTY, the Appellate Chamber defined armed conflict as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁹³ The ICTR has relied on this definition in subsequent cases such as *Musema*, in which the Trial Chamber defined internal armed conflict as “the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single state.”⁹⁴ In *Rutaganda*, the ICTR further defined armed conflict as a conflict similar to that of internal conflicts, but taking place within a single state.⁹⁵ In *Akayesu*, an “evaluation test” of the level and extent of violence and atrocities was necessary to apply Common Article 3.⁹⁶ No decision has exactly pinpointed when a violent campaign turns into an armed conflict, but many suggest that the more brutal the conflict, the more likely it is that Common Article 3 will apply.

Other judicial interpretations of Common Article 3 uphold the standard that it applies in cases of extreme brutality and human rights violations, regardless of the official status of the participants. The Inter-American Court of Human Rights held that an attack that lasted only 30 hours, between national armed forces and a group of 42

⁹² *Id.* at 276. See also H. Victor Conde, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY (1999)

⁹³ Prosecutor v. Dusko Tadic, IT-99-1-A, Judgment, Appellate Chamber (1999) [reproduced in the accompanying notebooks at Tab 58]

⁹⁴ Prosecutor v. Musema, Case No. ICTR096-13-A, Judgment, Trial Chamber (2000) [reproduced in the accompanying notebooks at Tab 59]

⁹⁵ *Rutaganda*, *supra* at note 79 [reproduced in the accompanying notebook at Tab 53]

⁹⁶ *Akayesu*, *supra* at note 56 [reproduced in the accompanying notebook at Tab 43]

armed civilians constituted a Common Article 3 violation.⁹⁷ The Inter-American Court held that Common Article 3 exists for the protection of civilians, and will be invoked in the event an armed conflict infringes on the basic human rights of civilians.⁹⁸

Nowhere in the language of Common Article 3 is the term “armed conflict” strictly defined, and, according to the legislative history, this was done purposefully. For the sake of continued adherence and effectiveness, the Article must encompass an array of conflicts.⁹⁹ The subsequent commentaries on the Geneva Conventions agree that Common Article 3 was deliberately left undefined, ensuring that the Article would appeal to as many governments as possible and would apply to as many armed conflicts as necessary to ensure that the human rights of civilians and other *hors de combat* are not violated.¹⁰⁰ Although definitions like those proffered by the other *ad hoc* tribunals are useful, persuasive authority, they are not controlling. Ultimately, the Special Court must decide whether the AFRC’s brutalities are the kind of human rights violations Common Article 3 was meant to protect.

The ICRC has set forth in its Commentaries four factors for determining whether Article 3 is applicable in an internal armed conflict. First, the ICRC proposed that if the insurgency would be classified as a belligerent – that the party in revolt against the *de jure* government had an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting the Convention –

⁹⁷ Juan Carlos Abella v. Argentina, Case 11.137, Report No. 55/97, Inter-Am. C. H. R. (1997) [reproduced in the accompanying notebook at Tab ___]

⁹⁸ *Id.* at paragraph 177

⁹⁹ Rubin, *supra* at note 86 [reproduced in the accompanying notebooks at Tab 57]

¹⁰⁰ INTERNATIONAL COMMISSION FOR THE RED CROSS, *supra* at note 32 [reproduced at the accompanying notebooks at Tab 33]

Article 3 should apply. Second, if the *de jure* government has organized its military against that of the insurgents, Article 3 should apply. Third, if the conflict has been brought to the attention of the United Nations, Article 3 should apply. Fourth, if the insurgents have an organization claiming the characteristics of a state and are exercising authority over the territories under its control, Article 3 should apply. The Commentaries make it clear that these factors are neither exhaustive nor obligatory. If none apply, Article 3 can still apply, the scope of Article 3 being “as wide as possible.”¹⁰¹

In the case of the AFRC, the hostilities most assuredly can be characterized as an armed conflict, as opposed to an internal disturbance, a riot or a demonstration, as the AFRC was organized under military command and was able to continue military operations over the course of a few years.¹⁰² The United Nations reported that the conditions in Sierra Leone “resemble[d] civil war.”¹⁰³ The AFRC was a rebel faction fighting against the State and the supporters of the State. The AFRC was organized under the rule of Johnny Paul Komora and other AFRC and RUF leaders. The AFRC was well-armed and it had the manpower and the resources to wage a brutally violent campaign against the government and citizenry of Sierra Leone for years.¹⁰⁴ That the AFRC was in fact organized and that they were armed indicates that applying Common Article 3 is proper.

¹⁰¹ Elder, 52 *supra* at note 34, quoting *II B Final Record of the Diplomatic Conference at Geneva of 1949* at 101-102 (1951). [reproduced in the accompanying notebooks at 35]

¹⁰² Akinrindae [reproduced in the accompanying notebooks at Tab 58]

¹⁰³ Fifth Report to the Secretary-General on the United Nation Mission in Sierra Leone, S/2000/751, July 31, 2000 [reproduced in the accompanying notebooks at Tab 14]

¹⁰⁴ Sixth report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/832, Aug. 24, 2000 [reproduced in the accompanying notebooks at Tab ___]

2. The AFRC hostilities were of a non-international character

The second requirement for Common Article 3 applicability is that the conflict be of a non-international character. For the most part, the war in Sierra Leone took place among Sierra Leonean citizens, within the territory of Sierra Leone. Toward the end of the conflict, the AFRC fought against the Nigerian army who had taken over Freetown and against UNAMSIL. However, in the absence of any state formally at war with Sierra Leone, the conflict must be described as non-international.¹⁰⁵

3. The AFRC hostilities took place in the territory of a State party

The final element that the ARFC hostilities must meet for Common Article 3 to apply is that the hostilities took place within a State that had ratified the Geneva Conventions. Sierra Leone ratified the Geneva Conventions in 1965.¹⁰⁶ The AFRC's attacks were contained within the territory of Sierra Leone. The AFRC conflict clearly meets the final element.

4. Specific Violations of Common Article 3 in the AFRC conflict

The entirety of the civil war in Sierra Leone was characterized by human rights violations of the most egregious sort. Every party to the conflict, not just the AFRC, has been accused of violating the laws of war.¹⁰⁷ The AFRC/RUF forces unquestionably committed the majority of the atrocious crimes, however. The bloodshed has been extreme. Nearly half of the population was displaced, and at least 50,000 people were killed, while another 100,000 were mutilated.¹⁰⁸ Despite the customary nature of

¹⁰⁵ *Id.* at 411

¹⁰⁶ INTERNATIONAL COMMISSION FOR THE RED CROSS, *supra* at note 32 [reproduced at the accompanying notebooks at Tab 33]

¹⁰⁷ Akinrindae, *supra* at note 100 [reproduced in the accompanying notebooks at Tab 58]

Common Article 3, from the outset of this conflict there were violations of basic human rights laws, including executions of prisoners, noncombatants and unarmed civilians, instances of torture, and many rapes, abductions, beatings, illegal searches, arbitrary arrests, and mutilations, all clearly prohibited by Common Article 3.

Throughout 1998, the AFRC/RUF increased the level of violations to a grotesque level in undertaking “Operation No Living Thing,” a brutal assault against the civilian population of Sierra Leone. As the AFRC/RUF moved throughout the country, they cut off the fingers, noses, ears, hands, arms and legs of those unwilling or unable to fight or to provide for them. They maimed, decapitated, burned alive, shot or inflicted machete wounds on civilians, and abducted missionaries and aid workers, raiding aid vehicles in the process. They abducted civilians, using them as sexual slaves, human shields and forced laborers. Boys were rounded up and “recruited”, given guns and drugs and told to be soldiers. Girls and women were raped as a terror tactic. AFRC/RUF soldiers forced abductees to kill or commit atrocities against their family members, or to choose from a list of limbs which they would like to have cut off.¹⁰⁹

During the 1999 attack on Freetown, AFRC/RUF forces burned entire parts of the city to the ground, and nearby cities and villages were similarly destroyed. AFRC/RUF soldiers continued to murder and maim civilians, and engaged in “systematic, organized and widespread sexual violence against girls and women, including individual and gang rape, with girls less than 17 years of age being the specific targets. Some were held in

¹⁰⁸ *Id.* at 426

¹⁰⁹ Akinrindae, *supra* at note 100 [reproduced in the accompanying notebooks at Tab 58]

sexual slavery after being ‘married’ to rebel combatants.”¹¹⁰ Between 5,000 and 6,500 combatants and civilians were killed in the attack on Freetown alone.¹¹¹

Common Article 3 expressly prohibits “murder of all kinds, mutilation, cruel treatment and torture”¹¹² and the crimes committed by members of the AFRC again and again during their three year reign of terror perfectly fit that bill. Common Article 3 forbids taking civilian hostages.¹¹³ The AFRC abducted thousands of men, women and children. Common Article 3 criminalizes “outrages upon personal dignity, in particular, humiliating and degrading treatment.”¹¹⁴ Surely carving “AFRC” onto the foreheads and chests of villagers and raping women in front of their families constitutes “outrages upon personal dignity.” The Article finally provides that there shall be no extrajudicial killings.¹¹⁵ During the AFRC’s campaign, people were captured and killed at will, with no reason or meaning other than to provoke terror.

The AFRC clearly violated the minimum standard for human rights violations provided for in Common Article 3. The amount of violence unleashed in Sierra Leone by the AFRC was cruel, brutal, and made no distinction between combatant and civilian. The AFRC “punished” Sierra Leoneans for what they perceived to be support of the lawfully elected government, and terrorized the entire country.

¹¹⁰ *Id.* at 433

¹¹¹ *Id.*

¹¹² Geneva Conventions I, II, III and IV, Article 3 (1) (a) (1949)

¹¹³ Geneva Conventions I, II, III and IV, Article 3 (1) (b) (1949)

¹¹⁴ Geneva Conventions I, II, III and IV, Article 3 (1) (c) (1949)

¹¹⁵ Geneva Conventions I, II, III and IV, Article 3 (1) (d) (1949)

B. The Interpretation of Common Article 3 Proposed by the Armed Forces Revolutionary Council

To the extent that the Special Court for Sierra Leone is bound by the precedent of the *ad hoc* international criminal tribunals,¹¹⁶ the AFRC is correct in asserting that “Common Article 3 applies only if the hostile action directed against a legal government is of a collective nature and consists of a minimum amount of organization.” Many judgments have held that some organization of hostilities is required for Common Article 3 to apply, and legal scholars have tended to uphold that view.

The AFRC argue that Common Article 3 does not apply to them because they were not organized. Despite the disordered nature of the takeover of Freetown in 1997, the AFRC was organized under a common leader, Johnny Paul Koroma. They were organized under a name, the AFRC. The AFRC was organized with an agenda of ousting the existing government and terrorizing civilians into obeying their lawless rule. The armed soldiers who stormed Freetown with the goal of getting rid of President Kabbah were organized in their efforts. The subsequent campaigns around the country to quash dissenting voices and to terrorize civilians were an organized effort, and the 1999 attack on Freetown to expel the Nigerian forces was an organized strike. The AFRC was organized.

Some definitions of armed conflict do not take the amount of organization into account. In the *Akayesu* decision of the ICTR, for example, the court held that an armed conflict was any aggression organized to a greater or lesser extent.¹¹⁷ In general, though,

¹¹⁶ There is nothing to suggest that the Special Court for Sierra Leone is bound by the precedents established by the ICTY or the ICTR. Those judicial decisions are useful and informative, but the Special Court is not bound to them in any way.

legal scholars of international humanitarian law are of the opinion that Common Article 3 applies in situations of open armed conflict between two parties that are at least relatively organized.¹¹⁸ For example, the United Kingdom Ministry of Defence also uses the definition “organized armed forces” when describing when a violent campaign becomes an “armed conflict.”¹¹⁹ The AFRC defense may be correct that some amount of organization is required for application of Common Article 3, but the facts of the case also show that there was more than minimal organization.

E. Defenses

1. Mistake of Law

Regarding the application of Common Article 3, one of the few defenses available to the AFRC defendants is a mistake of law defense. The AFRC could argue that they did not realize they would be held to the laws of Geneva because they are not a state. Since a layman might not realize that a violent rebel group would be held to the same standards as a State where human rights violations were at issue, it’s possible that the AFRC could argue likewise.¹²⁰ This argument holds little muster. As addressed exhaustively above, Common Article 3 is part of customary international law and the principles of Common Article 3 have been incorporated into other international

¹¹⁷ Akayesu, *supra* at note 56 [reproduced in the accompanying notebook at Tab 43]

¹¹⁸ Akinrindae, *supra* at note 100 [reproduced in the accompanying notebooks at Tab 58]

¹¹⁹ UK Ministry of Defence Handbook, see also: U.S. Army Judge Advocate General’s Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) [reproduced in the accompanying notebooks at Tabs 59 and 60, respectively]

¹²⁰ Elies van Sliedregt, *Defences in International Criminal Law* (2003), reprinted for the War Crimes Research Lab [reproduced in the accompanying notebooks at Tab 61]

instruments to which Sierra Leone is a party, such as the African Charter.¹²¹ Even a layman with no concept of international law must be aware that to kill, rape, maim, torture and abduct innocents is a crime. The drafters of the Statute for the Special Court for Sierra Leone were careful to codify as offenses only those which were accepted as customary international law or those offenses which were prohibited under treaties to which Sierra Leone is a party,¹²² so there could be no doubt that those indicted were aware of the criminality of their conducts. The AFRC defendants will be unsuccessful in the argument that they did not realize Common Article 3 would apply to them.

2. Tu Quoque¹²³

The AFRC also may try to argue *tu quoque*, that their opponents resorted to the same bloody tactics. The AFRC may argue that the government and the Nigerian forces in Sierra Leone also violated Common Article 3, and that the civil war was characterized by lawless violence. While this may be true, the *tu quoque* defense should not succeed. That the AFRC's adversaries were at times equally violent will not validate or defend the AFRC's war crimes violations. Simply stated, one party's wrong does not make another party right.¹²⁴ The ICTY rejected the *tu quoque* defense in the *Kupreskic* judgment. The court held that the Nuremberg trials had already declared the defense invalid.¹²⁵ For the

¹²¹ The African Charter (1986) [reproduced in the accompanying notebooks at Tab 62]. Sierra Leone ratified the African charter in 1983.

¹²² Cerone, *supra* at note 16 [reproduced in accompanying notebooks at Tab 17]

¹²³ Tu quoque is Latin for "you also."

¹²⁴ van Sliedregt, *supra* at note 120 [reproduced in the accompanying notebooks at Tab 61]

¹²⁵ *Id.*

same reasons, if the AFRC defends its Common Article 3 allegations with a *tu quoque* defense, it will not prevail.

F. Individual Criminal Responsibility and Common Article 3

Although Common Article 3 constitutes an uncertain plane for individual criminal responsibility, the named defendants likely will be held individually criminally responsible for violations of Common Article 3. The court in *Akayesu* held that “it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.”¹²⁶ The *Tadic* decision held that individual criminal responsibility is applicable in cases where customary international law has been violated, and set forth the following test to determine when individual criminal responsibility comes into play:

1. Clear intent on the part of the international community to criminalize the conduct;
2. The fact that such conduct may be said to be contrary to elementary considerations of humanity;
3. The general condemnation of such breaches;
4. The fact that substantive justice and equity require that such conduct should be regarded as criminal; and
5. The fact that there have been a number of undertakings to punish certain actions.¹²⁷

In the AFRC’s case, the crimes for which they are accused are clear violations of customary international law. There is no doubt that the international community intended to criminalize extrajudicial killings. There is no doubt that mutilations, severed legs, arms, ears, hands, noses and fingers, that “AFRC” carved in the chests of victims, is

¹²⁶ *Akayesu*, *supra* at note 56 [reproduced in the accompanying notebook at Tab 43]

¹²⁷ *Tadic*, *supra* at note 6 [reproduced in the accompanying notebooks at Tab 8]

contrary to elementary considerations of humanity. There is no doubt that rape and sexual slavery are generally condemned breaches of human rights law. There is no doubt that justice and equity require that kidnapping, abducting and recruiting children into armies be regarded as criminal conduct. And there is no doubt that there have been undertakings to prosecute these kinds of crimes – the ICTY and the ICTR are modern examples, but the world has been prosecuting these crimes since Nuremberg.¹²⁸ The named defendants, all commanders in the AFRC, gave the orders. If the Special Court can prosecute only a limited number of people, officers like the defendants, not the child foot soldiers under their commands, are the men to prosecute.

IV. CONCLUSION

Article 3 is common to all four Geneva Conventions because it expresses the principles that guide the Conventions. It sets the tone for human rights protections. It is applicable in all circumstances and to all people. It is clear in its assertion of what will not be tolerated. It has been accepted by the majority of the world as the absolute minimum threshold of protected human rights. Its rules are imperative.

Whether or not the AFRC considers itself organized, the facts remain that a group of people calling themselves the AFRC staged a coup on the democratically elected government. A group of people calling themselves the AFRC forcibly took control of entire regions of Sierra Leone and declared to those people that the AFRC was the new law. A group of people calling themselves the AFRC used their “new law” to justify killing, torturing, raping and maiming those with no ties to or interests in the conflict.

Article 3 was written to protect those victims of the AFRC.

¹²⁸ van Sliedregt, *supra* at note 120 [reproduced in the accompanying notebooks at Tab 61]