HUMAN RIGHTS WATCH

Human Rights Watch Memorandum

Political Considerations in Sentence Mitigation for Serious Violations of the Laws of War before International Criminal Tribunals[1]

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[1] This memorandum is co-authored by the International Justice Program at Human Rights Watch and attorneys at Weil, Gotshal & Manges, LLP, who provided extensive and much appreciated *pro bono* assistance in the research, analysis, and drafting.

I. Introduction

On March 12 and 13, the Appeals Chamber of the Special Court for Sierra Leone will hold hearings on appeals against the convictions and sentencing of Moinina Fofana and Allieu Kondewa. These individuals were convicted on several counts of serious violations of international humanitarian law in connection with acts that they had committed, or had been responsible for, while members of the government-backed Civil Defence Forces (CDF) during Sierra Leone's decade-long conflict. The upcoming hearings will raise a very important issue for the enforcement of international humanitarian law: whether applicable international legal standards allow factors such as political motivations and the party to the conflict for which a perpetrator fought to serve as a basis for mitigation in sentencing.[1]

The Trial Chamber found defendants Fofana and Kondewa guilty of extremely brutal acts of violence against civilians. This included mutilation and the targeting and deliberate killing of unarmed and innocent civilians, many of them women and children. Despite these findings, the Trial Chamber also held that the fact that the men were deemed to be acting in defense of democracy and "defeated . . . the rebellion" was a basis for mitigation in sentencing.[2]

Human Rights Watch believes that the relative legitimacy of political goals of the perpetrators and the successful attainment of these goals are not legitimate mitigating factors in sentencing under international law for the most serious crimes against the civilian population. All parties to armed conflict must abide by the same rules and must be subject to the same punishment when those rules are violated regardless of their political motives or ultimate victory in waging war. To hold otherwise tends to legitimize the very criminal acts against which international humanitarian law seeks to protect and conflicts with a fundamental goal of that law: to protect those persons not taking part in the hostilities. To find less worthy of

[1] A number of other issues are raised in appeals made by both the Office of the Prosecutor and Kondewa. See "Oral Arguments in CDF Appeal," Special Court for Sierra Leone Press Alert, March 4, 2008.

[2] *Prosecutor v. Fofana and Kondewa*, Special Court for Sierra Leone, Case No. SCSL-04-14-T, Sentencing Judgment (Trial Chamber I), October 9, 2007 (hereinafter "Fofana and Kondewa Sentencing Judgment"). The Office of the Prosecutor has appealed these as bases for mitigation in sentencing. Human Rights Watch applied for leave to file an *amicus curiae* brief in the prosecution appeal. This request was denied on January 21, 2008.

punishment atrocities against civilians committed while in pursuit of the alleged "right" cause sets a dangerous precedent which risks undermining the accountability and potential deterrent role of prosecutions and thereby diminishing civilian protection.

This memorandum details: (1) the background on the establishment of the Special Court and the judgment against Fofana and Kondewa; (2) the irrelevance of political motives under international humanitarian law, including for the purposes of mitigation in sentencing; and (3) that the consideration of political motives for mitigation conflicts with the sentencing objectives, purposes, and jurisprudence of international criminal tribunals.

II. Background

A. Origin and mandate of the Special Court

In response to the extremely brutal conflict in Sierra Leone, which began in 1991, and to a request for assistance from the Sierra Leonean president, the Security Council asked the Secretary-General to negotiate with the Government of Sierra Leone to form the Special Court for Sierra Leone.[3] While the president's request focused on acts by one of the armed groups, the Revolutionary United Front,[4] the Security Council did not distinguish between the different parties to the conflict; the council emphasized instead the general need to bring those responsible for serious violations of international humanitarian law to justice.[5] As explained in the Secretary-General's report on establishing the Special Court in 2000, the court's

[3] United Nations Security Council, Resolution 1315 (2000), S/RES/1315 (2000), http://www.un.org/Docs/scres/2000/sc2000.htm (accessed March 10, 2008).

[4] United Nations, Letter from President of Sierra Leone to the Secretary-General (2000), S/2000/786, Annex.

[5] Security Council Resolution 1315. The reasons provided by the Security Council included: "Reaffirming the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law." (Emphasis in original.)

envisioned jurisdiction did not encompass determinations as to which side was right in waging war, but rather the brutal practices by all parties to the conflict.[6]

The resulting Special Court statute confirmed the Special Court's mandate to assess the actions of all sides, providing "the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[7] In accordance with the court's mandate, the Special Court has initiated cases against accused associated with all major warring factions in the conflict.

B. The trial, convictions, and sentencing of Fofana and Kondewa

Following testimony from more than one hundred witnesses, the Trial Chamber found Moinina Fofana and Allieu Kondewa guilty of very serious and multiple violations of international humanitarian law. The Chamber found the men responsible for acts of a "barbaric," "brutal," and "very serious" nature and that many of the offenses were committed "on a large scale."[8] As indicative of the "brutality" of crimes, the Chamber cited the commission of mutilations, targeting and deliberate killing of unarmed and innocent civilians, many of them women and children, and the "gruesome murder" of women "who had sticks inserted and forced into their genitals until they came out of their mouths."[9]

In accordance with the Special Court's statute and rules of procedure and evidence, the Trial Chamber analyzed aggravating and mitigating circumstances before rendering sentences. One of the categories of mitigating circumstances that the Trial Chamber considered was "prevailing circumstances operating at the time of the

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[6] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, http://www.un.org/Docs/sc/reports/2000/sgrepoo.htm (accessed March 10, 2008), para. 12 ("The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages.").

[7] Statute of the Special Court for Sierra Leone (SCSL Statute), January 16, 2002, http://www.sc-sl.org/Documents/scsl-statute.html (accessed March 10, 2008), art. 1.

[8] See Fofana and Kondewa Sentencing Judgment, paras. 45-58.

[9] Ibid.

commission of the crimes, and the motive of the Accused."[10] In this regard, the Trial Chamber distinguished international precedent regarding mitigating circumstances,[11] stating:

> [T]here is an important factual and contextual difference and distinction that the Chamber would like to draw[;] . . . the acts of the Accused and those of the CDF/Kamajors for which they have respectively been found guilty, did not emanate from a resolve to destabilise the established Constitutional Order. Rather, and on the contrary, the CDF/Kamajors was a fighting force that was mobilised and was implicated in the conflict in Sierra Leone to support a legitimate cause which . . . was to restore the democratically elected Government of President Kabbah . . . .[12]

The Trial Chamber found that the men bore criminal responsibility for "atrocities" against "disarrayed Sierra Leoneans including children fleeing for their lives," but stated:

> [A]lthough the commission of these crimes transcends acceptable limits, albeit in defending a cause that is palpably just and defendable, such as acting in defence of constitutionality by engaging in a struggle or a fight that was geared towards restoration of the ousted democratically elected Government of President Kabbah, it certainly, in such circumstances, constitutes a mitigating circumstance in favor of the two Accused Persons.[13]

The Trial Chamber further found that:

> [T]he crimes for which the Chamber has convicted them are grave and very serious, but what, in a sense, atones for this vice is the fact that

[10] Ibid., para. 40.

[11] Ibid., paras. 41 and 82.

[12] Ibid., para. 82 and 83.

[13] Ibid., para. 86.

> the CDF/Kamajor fighting forces of the Accused Persons, backed and legitimised by the Internationally deployed force, the ECOMOG, defeated and prevailed over the rebellion of the AFRC that ousted the legitimate Government.[14]

III. Political Motives in Fighting a War Are Irrelevant Under International Humanitarian Law, Including for the Purposes of Mitigation in Sentencing

To accept as mitigation that the perpetrators were on the "right" side of the conflict defies a well-settled principle of international humanitarian law that all parties to a conflict are bound by and must be treated equally under the law. In addition, the decision undercuts international humanitarian law's fundamental purpose: the protection of all people not taking part in fighting.

International criminal tribunals have broad discretion in reaching their sentencing decisions, including in determining the appropriate mitigating considerations and their application to individual cases. However, this broad discretion is not without limits. Mitigating a perpetrator's sentence based on factors that are inconsistent with respect for and enforcement of international humanitarian law, the purposes of sentencing and mitigation, and the mandate of the court cannot be a valid exercise of discretion, however broad.[15]

International law regulates two separate aspects of the conduct of armed conflicts. *Jus ad bellum* ("justice to war") regulates the justifiable reasons for engaging in armed conflict. *Jus in bello* ("justice in war") or international humanitarian law regulates the conduct of hostilities once armed conflict has begun. These are two fundamentally distinct obligations.[16] Indeed, commentators explain that:

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[14] Ibid., para. 87.

[15] Recognizing the Trial Chamber's broad discretion to determine an appropriate sentence, Human Rights Watch takes no view on the length of actual sentences imposed by the Trial Chamber.

[16] See, for example, François Bugnion, *Jus Ad Bellum, Jus In Bello And Non-International Armed Conflicts*, *Yearbook of International Humanitarian Law*, vol. 6 (2003), http://icrc.org/web/eng/siteengo.nsf/htmlall/francois-bugnion-article-150306?(accessed March 10, 2008), pp. 167-198.

> The fact that a state has a right and necessity to use force has not . . . been accepted as an excuse for a failure to comply with the obligations of international humanitarian law.[17]

Similarly put:

> Whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done . . . . The rules of International Law apply to war *from whatever cause it originates.*[18]

Any other proposition defeats limits on the measures that can be employed during such conflicts.

The Geneva Conventions of August 12, 1949 confirm the requirement that international humanitarian law applies equally to all parties. The preamble to Protocol I to the Geneva Conventions relating to victims of international armed conflicts expressly excludes consideration of "causes" of the parties:

> [T]he Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts.[19]

In its authoritative Commentary to Protocol I, the International Committee of the Red Cross explains:

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[17] Christopher Greenwood, *Essays on War In International Law* (London: Cameron May, 2006), p. 292.

[18] Lassa Oppenheim and Ronald F. Roxburgh, *International Law: A Treatise* (New York: The Law Exchange, 2006). (Emphasis in original).

[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, preamble.

> The fact of being the aggressor or the victim of aggression, of espousing a just or an unjust cause, does not absolve anyone from his obligations nor deprive anyone of the guarantees laid down by humanitarian law, even though it may be relevant and have an effect in other fields of international law.[20]

Protocol II to the Geneva Conventions relating to the protection of victims of non-international armed conflicts further confirms that the obligations of international humanitarian law apply not only in international conflicts, but also to non-international conflicts.[21] Indeed, Protocol II is applicable to all belligerent parties, regardless of the political motive for their fight:

> These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.[22]

Just as political motive cannot be a defense to crimes against international humanitarian law, it cannot be available for mitigation in sentencing for such crimes. At the basis of international humanitarian law's rejection of political motivation as a defense for crimes is the "principle of humanity [which] insists on respect for the victims of war in all circumstances, irrespective of the side to which they belong."[23] Allowing mitigation of a sentence because the aggressor was on "the right side" of a conflict flies in the face of this basic principle and provides substantially the

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[20] Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, http://www.icrc.org/ihl.nsf/WebPrint/470-750002-COM?OpenDocument (accessed March 10, 2008).

[21] 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 December 7, 1978, art. 1, ("This Protocol . . . shall apply to all armed conflicts which are not covered by Article 1 of . . . Protocol I . . . and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.")

[22] Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, http://www.icrc.org/ihl.nsf/COM/475-760003?OpenDocument (accessed March 10, 2008).

[23] François Bugnion, "Just Wars, Wars of Aggression and International Humanitarian Law," *International Review of the Red Cross*, vol. 84 (2002), http://www.icrc.org/Web/Eng/siteengo.nsf/htmlall/5FLCT4/$File/bugnion%20ang%20.pdf (accessed March 10, 2008), pp. 541.

identical harms envisaged from permitting the defense of necessity and "just motives," or justification for criminal acts. The atrocities for which the perpetrators were found guilty cannot be more "just" for having been committed in the name of democracy.

As the Special Court itself stated in *Prosecutor v. Brima, Kamara & Kanu*, "sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody."[24] As such, globally accepted laws and rules cannot apply less strictly to armed forces deemed to be fighting in support of democracy.

The issue of whether political justification should be a mitigating factor in sentencing is parallel to the defense of "necessity," raised to justify why the perpetrators committed their crimes. However, the Special Court in this context has been clear:

> [V]alidating the defence of Necessity in International Criminal Law would create a justification for what offenders may term and plead as a 'just cause' or a 'just war' even though serious violations of International Humanitarian Law would have been committed. This, we observe, would negate the resolve and determination of the International Community to combat these crimes which have the common characteristics of being heinous, gruesome or degrading of innocent victims or of the civilian population that it intends to protect.[25]

This argument applies equally to the role of "necessity" or "political justification" in the determination of sentence.

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[24] *Prosecutor v. Brima, Kamara, and Kanu*, SCSL, Case No. SCSL-2004-16-A, Sentencing Judgment (Trial Chamber II, affirmed on appeal), July 19, 2007, para. 16.

[25] Fofana and Kondewa Sentencing Judgment, paras. 78-79.

IV. Consideration of Political Justification as a Mitigating Factor Conflicts with the Sentencing Objectives, Purposes, and Jurisprudence of International Criminal Tribunals

The statute of the Special Court,[26] the statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR),[27] and the sentencing judgments at the ICTY and ICTR[28] require sentencing considerations to focus on the individual circumstances of the accused in relationship to the gravity of the crime. Mitigation considerations thus have focused on the individual's conduct during and after the acts (*e.g.*, assisting victims, cooperation with the prosecution), personal circumstances as they relate to level of responsibility (*e.g.*, young age, subordinate rank), and other personal circumstances that call for mercy (*e.g.*, ill-health).[29]

Considerations that are of a broader nature, such as circumstances intrinsic to armed conflicts in general, have been repeatedly rejected as mitigating factors. As explained by the Appeals Chamber of the ICTY in *Prosecutor v. Blaskic*:

> [A] finding that a 'chaotic' context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone. Conflict is by its nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian law. While the circumstances in Central Bosnia in 1993 were chaotic, the Appeals chamber sees neither merit nor logic in recognizing the mere context

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[26] Statue of the Special Court for Sierra Leone, arts. 6, 19(2); see also Rules of Procedure and Evidence, Special Court for Sierra Leone, amended May 2006, http://www.sc-sl.org/scsl-procedure.html (accessed July 26, 2006), rule 101(b).

[27] Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), SC Res. 827, UN Doc. S/RES/827 (1993), as amended, www.un.org/icty/legaldoc-e/basic/statut/statute-febo6-e.pdf (accessed March 10, 2008), art. 24; Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), SC Res. 955, UN Doc. S/RES/955 (1994), as amended, http://69.94.11.53/ENGLISH/basicdocs/statute.html (accessed March 10, 2008), art. 23.

[28] See, for example, *Prosecutor v. Delalic* ("*Celebici Appeal Judgment*"), ICTY, Case No. IT-96-21-A, Sentencing Judgment (Appeals Chamber), February 20, 2001, para. 717 ("Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime. To achieve this goal, Trial Chambers are obliged to consider both aggravating and mitigating circumstances relating to an individual accused.").

[29] See, for example, *Prosecutor v. Brima, Kamara, and Kanu*, Sentencing Judgment, para. 25.

> of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants.[30]

Similarly, the perceived merits of a group's political motivations for taking up arms cannot be a mitigating factor in an individual's sentencing. Such considerations do not relate to the particular circumstances of the individual accused; instead, these type of considerations attempt to judge the conflict in its entirety. Therefore, political motivations for taking up arms are not the type of individual circumstances relevant for mitigation of punishment.

While a multitude of mitigating factors have been identified by international tribunals, it is unprecedented in international tribunal jurisprudence to permit political motivation of a perpetrator to be treated as a mitigating factor. For example, the Appeals Chamber of the ICTY rejected a perpetrator's efforts to submit his motive as a mitigating factor.[31] In that case, the perpetrator Dario Kordic had appealed his sentence on the basis that his primary motivation "was to assist his community."[32] The ICTY rejected the argument holding that his motivation was irrelevant in light of the grievous offenses with which he was charged.[33] In addition, when issuing a sentence de novo to Kordic's co-defendant, the Appeals Chamber explained:

> The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a "just cause." Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of

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[30] *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14-A, Sentencing Judgment (Appeals Chamber), July 29, 2004, para. 711. See also *Prosecutor v. Cesic*, ICTY, Case No. IT-95-10/1-S, Sentencing Judgment (Trial Chamber), March 11, 2004, para. 93 ("It would be inconsistent with the concept of the crimes under Articles 3 and 5 of the Statute to accept anguish experienced in any armed conflict as a mitigating factor.").

[31] See *Prosecutor v. Kordic & Cerekz*, ICTY, Case No. IT-95-14/2-A, Judgment (Appeals Chamber), December 17, 2004 (The Trial Chamber was correct to decline to consider motivation "to assist [defendant's] community" as a mitigating factor.).

[32] Ibid., paras. 1046-1047.

[33] Ibid., para. 1047.

war the laws are silent) in relation to the crimes under the International Tribunal's jurisdiction.[34]

Similarly, when the ICTR was asked to consider the purportedly "good" motive of a perpetrator in mitigation, it found that the perpetrator's motive underscored the egregious nature of his crimes.[35] The ICTR considered that being "motivated by his sense of patriotism and the need he perceived for equity" did not mitigate for the harm caused.[36]

More generally, important objectives of sentencing by international criminal tribunals include retribution and deterrence. Mitigation on the basis of political motives hinders, however, rather than promotes these goals. This is because imposing lesser sentences for war crimes and crimes against humanity on the basis of the goal for which the crimes were committed provides tacit legitimacy as opposed to condemnation of conduct. Such legitimacy will not send a signal against the commission of such conduct in the future. Moreover, each party in any conflict will likely believe in the legitimacy of its own cause. A rule that allows mitigation for "a legitimate cause" creates a real risk that potential war criminals from all sides would expect a reduced punishment (if any) for criminal acts. Any deterrence, therefore, would be significantly undermined. Finally, mitigation of punishment based on an after-the-fact determination of which party was "right" promotes the likelihood or the appearance of "victor's justice."

V. Conclusion

The political goals, motivation, or justification for joining a party to a conflict, however worthy, and the success in achieving those goals cannot be a basis for mitigation of punishment for serious violations of international humanitarian law. Such considerations for the purposes of mitigation are without precedent in

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[34] Ibid., para. 1082.

[35] *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, ICTR, Case No. ICTR-99-52-T, Judgment and Sentence (Trial Chamber), December 3, 2003.

[36] Ibid., para. 1099.

international law, undermine respect for the law that international tribunals are mandated to enforce, and go against ensuring the protection of civilians.