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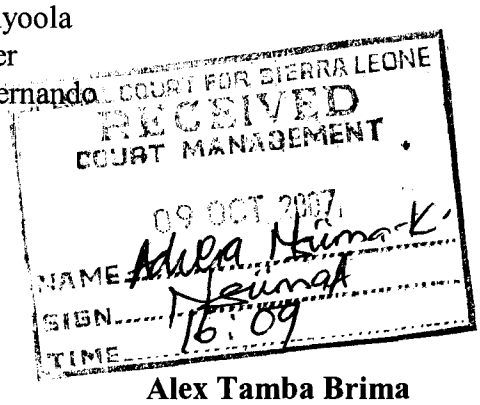
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando

Registrar: Mr. Herman Von Hebel

Date filed: 9 October 2007



THE PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL-04-16-A

PUBLIC
REPLY BRIEF OF THE PROSECUTION

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1. Introduction

1.1 Pursuant to Rule 113 of the Rules of Procedure and Evidence, the Prosecution files this Reply Brief to:

(1) the "Brima Response to Prosecution Appeal Brief" (the "**Brima Response Brief**"),[1] filed on behalf of Alex Tamba Brima ("**Brima**");

(2) the "Kamara Response to Prosecution Appeal Brief" (the "**Kamara Response Brief**"), filed on behalf of Brima Bazzy Kamara ("**Kamara**");[2] and

(3) "Respondent's Submissions—Kanu Defence" (the "**Kanu Response Brief**"), filed on behalf of Santigie Borbor Kanu ("**Kanu**").[3]

1.2 The Prosecution's submissions in support of its Grounds of Appeal are set out comprehensively in the Prosecution Appeal Brief,[4] and the Prosecution relies on all of those submissions. In this Reply Brief, the Prosecution only addresses specific points raised in the Defence Response Briefs that warrant further submissions in reply. This Reply Brief does not address submissions in the Defence Response Briefs which are already adequately addressed in the Prosecution Appeal Brief, or which merely disagree with the submissions in the Prosecution Appeal Brief. Where the Prosecution omits to address particular paragraphs or points in the Defence Response Briefs, this in no way implies that the Prosecution makes any concession to the Defence arguments, but merely indicates that the Prosecution relies on the arguments in the Prosecution Appeal Brief in relation to the point in question.

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[1] SCSL-16-660, "Brima Response to Prosecution Appeal Brief", 4 October 2007 ("***Brima* Response Brief**").

[2] SCSL-16-657, "Kamara Response to Prosecution Appeal Brief", 4 October 2007 ("***Kamara* Response Brief**").

[3] SCSL-16-658, "Respondent's Submissions—Kanu Defence", 4 October 2007 ("***Kanu* Response Brief**").

[4] SCSL-16-648, "Appeal Brief of the Prosecution", 13 September 2007 ("**Prosecution Appeal Brief**").

2. Prosecution's First Ground of Appeal: Failure of the Trial Chamber to find all three Accused criminally responsible under Article 6(1) and Article 6(3) for all crimes committed in Bombali District and Freetown and the Western Area

A. Introduction

2.1 Paragraphs 17-30 of the Prosecution Appeal Brief set out the relevant findings of the Trial Chamber in respect of the AFRC campaign in Bombali District and Freetown and the Western Area, which is referred to in the Prosecution Appeal Brief as the "**Bombali-Freetown Campaign**". The Trial Chamber found that during the course of this campaign, massive crimes were committed by the AFRC troops in a systematic manner, involving a "typical *modus operandi*".[5]

2.2 The Prosecution position is that the Trial Chamber found, or alternatively, that the only conclusion open to any reasonable trier of fact on the Trial Chamber's findings and the evidence that it accepted is, that the systematic crimes committed by AFRC troops during the Bombali-Freetown Campaign were an integral part of the plan for the Bombali-Freetown Campaign, and were committed in execution of the Bombali-Freetown Campaign.[6] As the Prosecution Appeal Brief observes, on the findings of the Trial Chamber, the AFRC (or at least Brima), called this campaign "Operation Spare No Soul".[7]

2.3 Paragraphs 31-50 of the Prosecution Appeal Brief set out what in the Prosecution's submission are the errors made by the Trial Chamber in its approach to evaluating the evidence of the individual responsibility of Brima, Kamara and Kanu under Article 6(1) of the Statute for the crimes committed by AFRC forces during this campaign. The Prosecution submission is that "the

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[5] See in particular, **Prosecution Appeal Brief**, esp. paras. 17-30.
[6] **Prosecution Appeal Brief**, esp. para. 30.
[7] **Prosecution Appeal Brief**, para. 30, referring to **Trial Chamber's Judgement**, para. 1693.

approach of the Trial Chamber involved a rather myopic examination of individual incidents and individual modes of liability under Article 6(1), in which the Trial Chamber only found an Accused individually responsible under Article 6(1) in cases where there was ***direct*** evidence relating specifically to a ***particular*** Article 6(1) mode of liability of a particular Accused in respect of a ***specific*** crime or incident".[8] The Prosecution submits that the Trial Chamber should instead have determined each of the factual issues in this case on the basis of all of the evidence in the case as a whole, and on the basis of all of the conduct of the Accused as a whole.

2.4 The Prosecution submits that it is well established that in determining whether the guilt of an accused has been established beyond a reasonable doubt, and indeed, in determining any factual issue, the Trial Chamber is required to consider the totality of the evidence in the case.[9] The Prosecution submits that the approach taken by the Trial Chamber to the evaluation of the evidence, described in paragraphs 31-50 of the Prosecution Appeal Brief, was wrong in law. As the ICTY Appeal Chamber said for instance in the *Stakić* Appeal Judgement:

> The Appeals Chamber agrees with the Prosecution that the Trial Chamber's compartmentalised mode of analysis obscured the proper inquiry. Rather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state.[10]

2.5 In particular, it is not the case that an accused can only be convicted where there is *direct* evidence of each of the elements of the crime. In a given case, some or

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[8] **Prosecution Appeal Brief**, para. 34 (emphasis added).

[9] See, for instance, ***Mpambara* Trial Judgement**, para. 42: "The Chamber has accordingly been mindful of the totality of the evidence and, where necessary, has explicitly analyzed the cumulative effect of relevant evidence. The Chamber has also in some respects been presented with a circumstantial case, which 'consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him'". See also, ***Čelebici* Trial Judgement**, para. 458

[10] ***Stakić* Appeal Judgement**, para. 55. (However, the Appeals Chamber found that the approach taken by the Trial Chamber in that particular case did not ultimately have any effect on its conclusion.)

all of the elements of a crime may be established circumstantially on the basis of the evidence in the case as a whole.[11]

2.6 Thus, for instance, where an accused is charged with murder, the fact of a victim's death can be inferred circumstantially from all of the evidence presented.[12] Where an accused is charged with planning a crime, the existence of a plan can be proved by circumstantial evidence.[13] Where an accused is charged with ordering a crime, the existence of an order may be proven circumstantially and there is no requirement to adduce direct evidence that the order was given.[14] Where an accused is charged on the basis of joint criminal enterprise liability, the existence of such a common plan, design or purpose may be established by circumstantial evidence, and may be inferred from all the evidence.[15] Where an accused is charged with aiding and abetting a crime, it is sufficient that the accused's presence can be inferred by circumstantial evidence to have been knowing and to have had a direct and substantial effect on the commission of the illegal act.[16] Where an accused is charged with superior responsibility under Article 6(3) of the Statute, the accused's actual knowledge of crimes committed by subordinates may be established by way of circumstantial evidence.[17] In general, the fact that an accused possessed the

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[11] See ***Brđanin* Appeal Judgement**, paras. 12-13, 25, 337; ***Gacumbitsi* Appeal Judgement**, paras. 72, 115 ("it is also permissible to rely on circumstantial evidence to prove material facts"); ***Kamuhanda* Appeal Judgement**, para. 241 ("nothing prevents a conviction being based on circumstantial evidence"); ***Ntakirutimana* Appeal Judgement**, para. 262; ***Naletilić and Martinović* Appeal Judgement**, paras. 491-538.

[12] ***Kvočka* Appeal Judgement**, para. 260; ***Krnojelac* Trial Judgement**, para. 326; ***Brđanin* Trial Judgement**, para. 326; ***Kordić and Čerkez* Trial Judgement**, para. 377.

[13] ***Naletilić and Martinović* Trial Judgement**, para. 59; ***Kamuhanda* Trial Judgement**, para. 592.

[14] ***Kamuhanda* Appeal Judgement**, para. 76; ***Strugar* Trial Judgement**, para. 331; ***Kordić and Čerkez* Trial Chamber's Judgement**, para. 388; ***Blaškić* Trial Judgement**, para. 281; ***Naletilić and Martinović* Trial Judgement**, para. 61; ***Limaj* Trial Judgement**, para. 515.

[15] ***Furundžija* Appeal Judgement**, para. 119; ***Krnojelac* Appeal Judgement**, paras. 81, 96; **Tadić Judgement in Sentencing Appeals**, para. 227; Prosecutor v. *Milutinović et. al*, IT-99-37-AR72, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise", **("Milutinović JCE Decision")** Appeals Chamber, 21 May 2003, paras. 23, 26; **Stakić Trial Judgement**, para. 443; ***Blagojević and Jokić* Trial Judgement**, para. 699; ***Tadić* Trial Judgement**, para. 227; ***Simić* Trial Judgement**, para. 158; ***Vasiljević* Trial Judgement**, paras. 66, 109; ***Krnojelac* Trial Judgement**, para. 80, footnote 236; ***Brđanin* Trial Judgement**, para. 263.

[16] ***Tadić* Trial Judgement**, paras. 689-692, also paras. 678-687.

[17] ***Čelebići* Appeal Judgement**, paras 239, 241; ***Bagilishema* Appeal Judgement**, para. 37; ***Čelebići* Trial Judgement**, paras 383, 386; ***Kordić and Čerkez* Trial Judgement**, para. 427; *Krnojelac* Trial Judgement, para. 94; ***Naletilić and Martinović* Trial Judgement**, para. 61; **Trial Chamber's**

requisite *mens rea* for a crime may be inferred circumstantially from all of the evidence in the case.[18]

2.7 It is accepted that where a Trial Chamber is presented with evidence of the guilt of an accused that is in whole or in part circumstantial, the guilt of the accused must be the only reasonable conclusion available from that evidence.[19] The ICTY Appeals Chamber has said that:

> A Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime (as defined with respect to the relevant mode of liability) beyond a reasonable doubt. This standard applies whether the evidence evaluated is direct or circumstantial. Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such instances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven.[20]

2.8 The Prosecution accepts that in accordance with general principles concerning the standards of review on appeal, where the Prosecution on appeal challenges a *failure* by the Trial Chamber to draw particular inferences from the totality of the evidence in the case, the Prosecution must establish that this inference is the only inference that could be drawn by any reasonable trier of fact from the findings of the Trial Chamber and/or the evidence that was before the Trial Chamber.

2.9 The Prosecution submits that for the reasons given in the Prosecution Appeal Brief, the only conclusion that any reasonable trier of fact could have reached on the basis of the Trial Chamber's own findings, and/or the evidence accepted

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Judgement, para. 71; ***Galić* Trial Judgement**, para. 174; ***Brđanin* Trial Judgement**, para. 278; ***Strugar* Trial Judgement**, para. 368; ***Halilović* Trial Judgement**, para. 66; ***Limaj* Trial Judgement**, para. 524; ***Hadžihasanović* Trial Judgement**, para. 94; ***Bagilishema* Trial Judgement**, para. 46; ***Kajelijeli* Trial Judgement**, para. 778; ***Aleksovski* Trial Judgement**, para. 80; ***Blaškić* Trial Judgement,** para. 307; ***Kamuhanda* Trial Judgement**, para. 609; these Judgements indicate that the position of authority of the superior over the subordinate is a significant indication in itself that the superior knew of crimes committed by his subordinates.

[18] ***Brđanin* Trial Judgement**, para. 387; ***Mpambara* Trial Judgement**, para. 8; ***Kamuhanda* Trial Judgement**, para. 625.

[19] ***Mpambara* Trial Judgement**, para. 42; ***Krajišnik* Trial Judgement**, para. 1196.

[20] ***Stakić* Appeal Judgement**, para. 219. Also ***Mpambara* Trial Judgement**, footnote 64 and accompanying text.

by the Trial Chamber in making those findings, and/or the evidence in the case as a whole, is that all three Accused in this case are responsible under Article 6(1) of the Statute for planning, ordering, instigating, and/or otherwise aiding and abetting all of the crimes committed by AFRC forces during the Bombali-Freetown Campaign.

2.10 The Prosecution submits, in general, that the submissions made in the Response Briefs of Brima, Kamara and Kanu, advocate the adoption of a similar approach to the evaluation of the evidence to that which was adopted by the Trial Chamber, described in paragraphs 31-50 of the Prosecution Appeal Brief. For the reasons given above, and in the Prosecution Appeal Brief, that approach is wrong in law, and the submissions in the Defence Response Briefs should accordingly be rejected.

B. Reply to the Brima Response Brief

2.11 Paragraphs 4 and 5 of the Brima Response Brief argue that on the findings of the Trial Chamber and the evidence, the stated purpose of the Bombali-Freetown Campaign was to "restore the Sierra Leone army" and that there is no evidence that one of the aims of the meeting in Koinadugu District between SAJ Musa and AFRC commanders (the "**Krubola meeting**")[21] was to plan the commission of crimes.

2.12 The Prosecution submits that even if the ultimate aim of the Bombali-Freetown Campaign was to "restore the Sierra Leone army" (a matter contested by the Prosecution[22]), this does not mean that there was no plan to commit crimes in order to achieve that aim. Even if there is no *direct* evidence of a plan having

[21] That is, the meeting referred to in footnote 45 of the Prosecution Appeal Brief. This meeting is referred to below as the "**Krubola meeting**".

[22] The Prosecution position is that the systematic commission of crimes in the Bombali-Freetown Campaign was part of the joint criminal enterprise between certain members of the AFRC and certain members of the RUF, the common plan, purpose or design of which was to carry out a campaign of terrorising and collectively punishing the civilian population of Sierra Leone through the commission of crimes within the jurisdiction of the Special Court, in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone by those members of the joint criminal enterprise: see Prosecution Appeal Brief, para. 391.

been made by one or more persons to commit crimes during the Bombali-Freetown campaign, the Prosecution submits, for the reasons given in the Prosecution Appeal Brief and in this Reply Brief, that the only conclusion open to any reasonable trier of fact is that there was such a plan. It is not material to the guilt of the Accused whether the plan was to conduct a systematic campaign of crimes in order to restore the Sierra Leone army, or to conduct a systematic campaign of crimes in order to gain and exercise political power and control over the territory of Sierra Leone by members of the joint criminal enterprise that included members of the AFRC and RUF.[23]

2.13 Paragraphs 4 to 10 of the Brima Response Brief argue generally that there is no evidence that any such plan to commit crimes was formulated at the Krubola meeting, and that there is no evidence that Brima was involved in any such plan. The Prosecution submits that it is immaterial whether the plan was in fact formulated at that meeting or elsewhere, provided that the only reasonable conclusion on the totality of the evidence is that the plan was made and that Brima was one of the planners. Reference is made to paragraphs 2.20 to 2.21 and 2.31 to 2.37 below.

2.14 At the Manofinia Address given by Brima immediately prior to the commencement of the Bombali-Freetown Campaign, Brima announced the launch of "Operation Spare No Soul" and gave a general order for the commission of crimes by AFRC forces during the campaign that was about to commence.[24] The Prosecution submits that no reasonable trier of fact could conclude that Brima spontaneously formulated the plan for the commission of these crimes while giving the Mansofinia Address (although even if this were the case, he would still be guilty of planning these crimes, since crimes can be planned within the meaning of Article 6(1) of the Statute by a single person[25]). The Prosecution submits that the only reasonable inference that could be drawn by any reasonable trier of fact is that the commission of crimes was an integral part of the Bombali-Freetown Campaign, and must have been formulated at the

[23] In this respect, see the Prosecution submissions in respect of the Prosecution's Fourth Ground of Appeal.
[24] See **Prosecution Appeal Brief**, para. 28.
[25] **Trial Chamber's Judgement**, para. 765, and the authorities there cited.

Krubola meeting at which the plan for the Bombali-Freetown Campaign was made. However, even if it could be suggested that the plan for the crimes might not have necessarily been formulated at this specific meeting, it is submitted that the only conclusion open to any reasonable trier of fact is that the plan for the commission of the crimes had been formulated by the time that Brima gave the Mansofinia Address announcing the plan to the AFRC troops, and that, for the reasons given in paragraphs 51-75 of the Prosecution Appeal Brief, Brima was one of those who participated substantially in the planning.

2.15 Paragraphs 11-15 of the Brima Response Brief merely assert that the Prosecution's arguments that Brima was responsible for ordering, instigating and aiding and abetting the crimes in question should be rejected, without giving any arguments at all. The Prosecution relies on the arguments in paragraphs 76-94 of its Appeal Brief in this respect.

2.16 Paragraph 17 of the Brima Response Brief acknowledges that the Trial Chamber should have found Brima liable under Article 6(3) for the three enslavement crimes, but the Prosecution presumes that this is a typographical error in the Brima Response Brief. Paragraphs 16-18 of the Brima Response Brief contain no arguments of substance, and the Prosecution relies on its arguments in paragraphs 161 to 169 of the Prosecution Appeal Brief in this respect.

C. Reply to the Kamara Response Brief

2.17 In reply to paragraphs 4 to 7 of the Kamara Response Brief, the Prosecution refers to its submissions in paragraphs 2.11 to 2.14 above, and paragraphs 2.31 to 2.37 below.

2.18 Paragraphs 8-10 of the Kamara Response Brief argue generally that there were no findings of the Trial Chamber and no evidence that Kamara was involved in the planning of the crimes.

2.19 Paragraph 8 of the Kamara Response Brief argues that the Trial Chamber made no finding that Kamara attended the meeting of senior commanders at

Kamagbengbe, at which the attack on Karina was discussed.[26] In fact, the Trial Chamber made no finding that Kamara did not attend the meeting, but merely that the witness who testified about the meeting did not name the commanders who were present. On the other hand, at paragraph 379 of the Trial Chamber's Judgement, the Trial Chamber expressly found that Kamara attended the Krubola meeting at which the Bombali-Freetown Campaign as a whole was planned.

2.20 The Prosecution submits that it is immaterial whether Kamara was present at the Kamagbengbe meeting (although on the findings of the Trial Chamber, he may well have been). The Prosecution submits that in order to be responsible under Article 6(1) for "planning" a crime, it is not necessary to establish that the plan was formulated at a single, specific meeting, or that the accused was present at such a meeting. Where there is a plan for the commission of crimes on a large scale, the planning may be formulated over a period of time. Planning implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[27] In other words, planning may be ongoing throughout the different phases of preparation and execution. Thus, it need not be established that the Accused was necessary involved in every aspect of the planning of a large scale crime. The Prosecution submits that the Trial Chamber correctly rejected the Defence argument that responsibility for planning a crime only arises when an accused is "substantially involved at the preparatory stage of the crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance."[28] In the case of large scale crimes, different persons may be involved in different aspects of the planning, or may contribute at different phases of the planning. It is submitted that it is only necessary to establish that the Accused's participation in the planning is substantial (which may include, for instance, endorsing a plan

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[26] See Trial Chamber's Judgement, paras. 886 and 1917.

[27] See Prosecution Appeal Brief, footnote 131 and accompanying text, and the authorities there cited; ***Blaškić* Trial Judgement**, para. 279; ***Galić* Trial Judgement**, para. 168; ***Kordić and Čerkez* Trial Judgement**, para. 386.

[28] **Trial Chamber's Judgement**, para. 768.

proposed by another),[29] and that the planning was a factor substantially contributing to the criminal conduct.[30]

2.21 Whether or not the plan to commit systematic crimes was specifically formulated at the Krubola meeting or elsewhere, for the reasons given in paragraphs 95 to 112 of the Prosecution Appeal Brief, and the reasons given above, it is submitted that the only conclusion open to a reasonable trier of fact is that the plan for the commission of crimes during the Bombali-Freetown Campaign had been formulated by the time that Brima gave the Mansofinia Address announcing the plan to the AFRC troops, and that, for the reasons given in paragraphs 95-112 of the Prosecution Appeal Brief, Kamara was one of those who participated substantially in the planning, including the continuing planning throughout the course of the Bombali-Freetown Campaign.

2.22 Paragraphs 11-14 of the Kamara Response Brief argue that there is no evidence that Kamara ordered any of the crimes in the Bombali-Freetown Campaign other than the killing of five girls in Karina. That is not correct. Paragraphs 473 and 1947 of the Trial Chamber's Judgement find that Kamara directly ordered the burning of houses in Freetown. The Trial Chamber found, correctly it is submitted, that the *actus reus* of "ordering" under Article 6(1) of the Statute requires that a person in a position of authority uses that authority to instruct another person to commit an offence, that the order need not be given in writing or in any particular form, that the order need not be given directly to the perpetrator, and that the existence of the order may be proved through circumstantial evidence.[31]

2.23 Contrary to what is suggested in paragraph 12 of the Kamara Response Brief, the Prosecution is not suggesting that Kamara is somehow only vicariously liable for Brima's acts of ordering crimes. The Trial Chamber found that in Bombali District, a superior-subordinate relationship existed between Kamara

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[29] **Trial Chamber's Judgement,** para. 765, referring to ***Bagilishema* Trial Judgement**, para. 30; ***Mpambara* Trial Judgement**, para. 20; ***Kamuhanda* Trial Judgement**, para. 592.

[30] **Trial Chamber's Judgement**, paras. 766 and 768 and the authorities there cited

[31] **Trial Chamber's Judgement**, para. 772 and the authorities there cited. See also See also ***Kordić* Trial Judgement,** para. 388.

and the AFRC troops,[32] and that he had effective control over the troops under his command.[33] It further found that in Freetown, he had both a *de jure* position of authority and the *de facto* ability to effectively control the troops under his command.[34] The Prosecution submits that on the basis of the findings of the Trial Chamber referred to in the Prosecution Appeal Brief, in particular, the findings in paragraphs 100, 102, 103, 105, 107-109, and 113-116 of the Prosecution Appeal Brief, the only conclusion open to any reasonable trier of fact is that Kamara used his superior authority to instruct AFRC troops to comply with the general orders given by Brima in the Mansofinia Address and the Orugu address, as well as more specific orders given by Brima, in addition to the specific orders given by Kamara himself. This conclusion is based on findings of the Trial Chamber that are *circumstantial* rather than direct, and it is submitted that it is the only conclusion open to any reasonable trier of fact.

2.24 In reply to paragraphs 15 to 18 and 19 to 21 of the Kamara Response Brief, the Prosecution relies on its submissions in paragraphs 117 to 120 and 121 to 127 of the Prosecution Appeal Brief. These paragraphs of the Kamara Response Brief submit that the Prosecution's arguments that Kamara was responsible for instigating and aiding and abetting the crimes in question should be rejected, but without giving any substantive arguments at all. In arguing that there is "no evidence" that Kamara instigated or aided and abetted the crimes, Kamara relies on the approach to the evaluation of the evidence taken by the Trial Chamber, which the Prosecution submits was erroneous in law.[35] It is, however, conceded that TF1-033 did not testify that Kamara was present when Brima congratulated AFRC troops on the killing of civilians at Gbendembu,[36] but this has no significant effect on the Prosecution's argument. The Prosecution Appeal Brief refers to other findings of the Trial Chamber that Kamara was present when Brima gave orders to commit crimes,[37] and his presence on such occasions, in

[32] **Trial Chamber's Judgement**, para. 1927.
[33] **Trial Chamber's Judgement**, para. 1926.
[34] **Trial Chamber's Judgement**, para. 1948.
[35] See paragraphs 2.4 to 2.10 above.
[36] Cf. **Prosecution Appeal Brief**, para. 119.
[37] **Prosecution Appeal Brief**, footnote 248 and accompanying text.

the context of the other matters referred to in paragraphs 119 to 120 of the Prosecution Appeal Brief, contributed significantly to the creation and maintenance of the ensuing climate of criminality referred to in paragraph 120 of the Prosecution Appeal Brief.

2.25 Paragraphs 23-24 of the Kamara Response Brief contain no arguments of substance, and the Prosecution relies on its arguments in paragraphs 173-177 of the Prosecution Appeal Brief in this respect.

D. Reply to the Kanu Response Brief

2.26 Paragraphs 1.11 to 1.13 of the Kanu Response Brief argue that the Prosecution's "single overall plan hypothesis" (as Kanu calls it) is legally untenable, as it is tantamount to imposing collective responsibility on all AFRC members as a group, while in international criminal law, culpability is personal. Kanu thereby misstates the Prosecution position. The Prosecution does not contest that criminal culpability is personal and objective and that collective responsibility is not permissible. The contentions of the Prosecution are based on these very principles. The modes of liability other than "committing" set out in Article 6(1) of the Statute allow criminal responsibility to be attributed to an accused for a crime physically committed by another person, on the basis that the accused planned, ordered, instigated, or aided and abetted, the commission of the crime. It is noted that the mode of liability of "aiding and abetting" in Article 6(1) extends, according to the express wording of Article 6(1), to aiding and abetting in the *planning or preparation* of a crime, as well as aiding and abetting in the *execution* of a crime.[38] For the reasons given in the Prosecution Appeal Brief in respect of its First Ground of Appeal, the elements of those other modes of liability were satisfied in this case in relation to all three Accused, in respect of the Bombali District Crimes and the Freetown and Western Area crimes.

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[38] Article 6(1) states this expressly. See also **Trial Chamber's Judgement**, footnote 1501 and accompanying text, and the authorities there cited.

2.27 For the reasons given in paragraphs 36-38 of the Prosecution Appeal Brief, it is possible, for the purposes of Article 6(1) of the Statute, for a person to plan, order, instigate or aid and abet a large scale campaign of crimes. Where this occurs, that person can be held responsible under Article 6(1) for all of the crimes committed in that campaign pursuant to the accused's plan, order or instigation, or all of the crimes in the campaign as a whole that the accused aided and abetted, without the need to prove that the Accused specifically and directly planned, ordered or instigated each of the individual crimes in question. It is always a question of fact whether an accused did in fact plan, order, instigate, or aid and abet, the entire campaign of crimes, and this must be proved beyond a reasonable doubt in relation to each accused.

2.28 The Prosecution is well aware of the cardinal principles of criminal law regarding individual criminal responsibility, and the Prosecution never suggested that *all* AFRC members were responsible under Article 6(1) for all of the crimes committed in the Bombali-Freetown Campaign. Indeed, some AFRC members participating in the campaign may have been responsible for none of the crimes. The Prosecution submission is that the only conclusion open to any reasonable trier of fact, based on the Trial Chamber's own findings, is that in the case of the Bombali-Freetown Campaign, the criminal responsibility of Brima, Kamara and Kanu for planning, ordering, instigating, or aiding and abetting, the entire campaign of crimes *is* established beyond a reasonable doubt.

2.29 Paragraphs 1.14 to 1.19 of the Kanu Response Brief generally advocate the adoption of a similar approach to the evaluation of the evidence to that which was adopted by the Trial Chamber. For the reasons given above, that approach is wrong in law, and the submissions in the Kanu Response Brief should accordingly be rejected. For the reasons given above, and in paragraphs 23 to 30 of the Prosecution Appeal Brief, the Prosecution submits that the only conclusion open to any reasonable trier of fact *based on the totality of the Trial Chamber's own findings* was that there was such a single overall plan.

2.30 Contrary to what is suggested in paragraph 1.15 of the Kanu Response Brief, there is no authority for Kanu's contention that "extra caution" must be exercised in assessing the individual responsibility of an accused for planning, ordering, instigating or aiding and abetting crimes committed by irregular forces. Kanu argues that this conclusion follows by way of "parity of reasoning" from two ICTY judgements at the Trial Chamber level. However, those authorities dealt with the issue of superior responsibility under Article 6(3), rather than Article 6(1) responsibility. Even if it is the case that it is more difficult to establish superior authority in the case of an irregular force than in the case of a regular military organization (a point that does not arise for decision here), this is irrelevant to any issue of Article 6(1) responsibility. Where an accused plans, orders, instigates or aids and abets a crime, it will frequently be the case that the accused has no superior authority over the physical perpetrator, and it is immaterial to Article 6(1) responsibility whether or not such superior responsibility exists. Furthermore where an accused orders a crime, although a position of authority is required, *no* formal superior-subordinate relationship between the accused and the perpetrator is necessary; it is sufficient that the accused possessed the authority to order the commission of an offence and that such authority can be reasonably inferred.[39]

2.31 Paragraphs 1.18 to 1.19 of the Kanu Response Brief argue that there is no evidence that the plan to commit crimes during the Bombali-Freetown Campaign (if one existed) was formulated at the Krubola meeting. Kanu advances the hypothesis that the Krubola meeting was concerned with military planning of the campaign only, and that there is no evidence that the commission of any crimes was planned at this meeting. Kanu's hypothesis is that the Bombali-Freetown Campaign was planned as a purely military operation, and the crimes committed during that campaign were independent of that military plan.

2.32 The Prosecution submits that this argument must be rejected. The Prosecution reiterates it submissions in paragraphs 17-30 of the Prosecution Appeal Brief

[39] **Trial Chamber's Judgement** para. 772 and the authorities there cited.

that the only conclusion open to any reasonable trier of fact is that the crimes committed during the Bombali-Freetown Campaign were part of an overall plan. This follows in particular from the scale on which the crimes were committed, the systematic manner in which they were committed, and the fact that they involved a "typical *modus operandi*". Furthermore, the Prosecution submits that the only conclusion open to any reasonable trier of fact is that this plan had been formulated by the time that Brima gave the Mansofinia Address, announcing the launch of "Operation Spare No Soul".

2.33 The Prosecution submits that the only conclusion open to any reasonable trier of fact is that this plan was formulated at the Krubola meeting, where the plan for the Bombali-Freetown Campaign was made. However, even if the Appeals Chamber were to find that this is not the only conclusion open to a reasonable trier of fact, that would not undermine this Prosecution Ground of Appeal. The issue in this appeal is not whether SAJ Musa himself was one of those who planned the campaign of crimes (he was not one of the accused in this case), or whether the plan for the commission of systematic crimes as part of the Bombali-Freetown Campaign was specifically formulated at the Krubola meeting. Rather, the question is whether there *was* a plan for the commission of systematic crimes as part of the Bombali-Freetown Campaign, and if so, whether Brima, Kamara and Kanu were amongst those who participated substantially in the planning.[40] For the reasons given above, and in paragraphs 23-30 of the Prosecution Appeal Brief, the only conclusion open to any reasonable trier of fact is that there *was* such a plan, and that it had been formulated by the time that Brima gave the Mansofinia Address as the Bombali-Freetown Campaign was commencing. For the reasons given in the Prosecution Appeal Brief, and the reasons given above, the only conclusion open to any reasonable trier of fact is that Brima, Kamara and Kanu *were* amongst those who participated substantially in the planning. Even if there were a reasonable possibility that SAJ Musa was not part of that plan, and even if that plan was

[40] As to the point that the Accused need only have *participated substantially* in the planning, see paragraph 2.20 above.

not formulated specifically at the Krubola meeting, there *was* a plan, and Brima, Kamara and Kanu were, or were amongst those who were, substantially involved in the planning.

2.34 It is also recalled in this context that the Trial Chamber found that Kanu himself planned, organized and implemented the system to abduct and enslave civilians, that he reiterated Brima's orders to commit crimes (including Brima's general order given in the Orugu address that Freetown should be looted and burned down and that anyone who opposed the AFRC troops should be killed), that he led troops on tactical operations in which crimes were committed, and that he personally committed numerous crimes.[41] It is not possible for Kanu to suggest, as he does in paragraphs 1.20 to 1.23 of the Kanu Response Brief, that the crimes were the result alone of the personal influence of Brima, and that he had nothing to do with them.

2.35 In support of Kanu's hypothesis that there was no overall plan for the commission of crimes as part of the Bombali-Freetown Campaign, paragraphs 1.20 to 1.23 of the Kanu Response Brief refer to the Trial Chamber's finding[42] that from the time that SAJ Musa took over command of the AFRC troops from Brima in Colonel Eddie town until SAJ Musa's death shortly before the Freetown invasion (after which Brima resumed command), there was little evidence that the troops attacked civilians. From this, Kanu seeks to argue that the commission of crimes was not an integral part of the Bombali-Freetown campaign, but rather, that these crimes were instigated by Brima independently of the Bombali-Freetown Campaign, during the periods that he was in command.

2.36 The Prosecution submits that this argument should also be rejected. First, the Trial Chamber found that after the AFRC troops under the command of Brima left Koinadugu District to embark on the Bombali-Freetown Campaign, other AFRC troops under the command of SAJ Musa initially remained in Koinadugu District, and that there was significant evidence that these latter troops were

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[41] See **Prosecution Appeal Brief**, paras. 137-138 and 141-143 for references. As to the Orugu Address, see paragraph 29 of the Prosecution Appeal Brief.

[42] **Trial Chamber's Judgement**, para. 198.

involved in the commission of crimes there.[43] This undermines Kanu's argument that the systematic commission of crimes was not part of the overall plan of the AFRC at the time that the Bombali-Freetown Campaign commenced, and that these crimes were the result of the influence of Brima alone. Furthermore, the Trial Chamber did not find that *no crimes were committed* during the Bombali-Freetown Campaign from the time that SAJ Musa assumed command until the time of his death. Rather, the Trial Chamber found that *little evidence was adduced* that the AFRC troops targeted civilians during this period.[44] The fact that little evidence was adduced of crimes being committed between Colonel Eddie Town until the time of SAJ Musa's death does not disprove the plan. It could mean that SAJ Musa partly suspended the plan to commit systematic crimes against civilians, and that after his death Brima fully reinstituted this plan. Alternatively, the fact that civilians were apparently less often targeted by the AFRC at this point in time could have been for the simple reason that the AFRC were preoccupied with military engagements: the Trial Chamber found that in this period, the AFRC troops "withstood frequent attacks by ECOMOG".[45] However, it remains the case that whatever the explanation, the findings of the Trial Chamber regarding the scale on which the crimes were committed, and the fact that they involved a "typical *modus operandi*", all lead inexorably to the conclusion that the crimes were committed pursuant to a plan, and for the reasons given in the Prosecution's Appeal Brief, the only conclusion open to any reasonable trier of fact is that Brima, Kamara and Kanu were substantially involved in the planning.

2.37 As to paragraph 1.23 of the Kanu Response Brief, it is submitted that it is trite law that the Trial Chamber must determine factual issues on the basis of the totality of the evidence in the case,[46] and there is no basis for Kanu's assertion that it would "defeat the course of justice" to do so. For the reasons given above and in the Prosecution Appeal Brief, the systematic crimes committed

[43] **Trial Chamber's Judgement**, para. 195.
[44] **Trial Chamber's Judgement**, para. 198.
[45] **Trial Chamber's Judgement,** para. 198.
[46] See paragraph 2.5 above.

during the Bombali-Freetown Campaign cannot be explained away as "an historical accident". The Prosecution does not suggest that *all* AFRC members were involved in the planning of these crimes, but that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Brima, Kamara and Kanu were.

2.38 Paragraphs 1.26 to 1.32 of the Kanu Response Brief argue that it is not open to the Appeals Chamber to correct a typographical error in the Trial Chamber's Judgement. The Prosecution does not, as such, request the Appeals Chamber to do so. The Prosecution requests the Appeals Chamber to find that on the basis of the findings of fact in the Trial Chamber's Judgement, Kanu is as a matter of law individually responsible under Article 6(3) for crimes committed in Freetown, as well as other crimes committed in the Western Area. The conclusion of the Trial Chamber that Kanu was responsible for crimes committed in the "Western Area", rather than "Freetown and the Western Area", may or may not have been a typographical error. Furthermore, as Freetown is in the Western Area of Sierra Leone, on a plain reading, Kanu has been convicted under Article 6(3) of the crimes committed in Freetown. As the Kanu Response Brief points out,[47] paragraph 95 of the Sentencing Judgement appears to confirm this. Contrary to what the Kanu Response Brief suggests, there is no rule that an issue such as this can only be dealt with by way of a motion for clarification to the Trial Chamber itself.

2.39 Paragraphs 1.33 to 1.39 of the Kanu Response Brief, in response to paragraphs 183-188 of the Prosecution Appeal Brief, rely solely on the submissions in Kanu's Appeal Brief in support of Kanu's Sixth Ground of Appeal. In reply, the Prosecution relies on its submissions in the Prosecution Response Brief, in response to Kanu's Sixth Ground of Appeal, as well as paragraphs 183 to 188 of the Prosecution Appeal Brief.

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[47] ***Kanu* Response Brief**, para. 1.32.

3. Prosecution's Second Ground of Appeal: The Trial Chamber's omission to make findings on crimes in certain locations

A. Reply to the Brima Response Brief

3.1 Paragraphs 22 to 29 of the Brima Response Brief raise no arguments of substance, and raise no point that has not been addressed in the Prosecution Appeal Brief. The Prosecution relies on its submissions in paragraphs 198 to 225 of the Prosecution Appeal Brief. The Prosecution merely notes that contrary to what paragraph 24 of the Brima Response Brief appears to suggest, the decision of Trial Chamber I on the *Sesay* preliminary motion[48] did *not* state that evidence of crimes not specifically pleaded in the Indictment could only be taken into account for the purposes of proving the chapeau requirements of Articles 2, 3 and 4 of the Statute. It is clear from the *Sesay* decision that the Trial Chamber ruled that the Accused could be found individually responsible for crimes committed in locations not specifically pleaded in the Indictment.

3.2 Paragraphs 30 to 40 of the Brima Response Brief similarly raise no arguments of substance. The Prosecution relies on its submissions in paragraphs 226 to 234 of the Prosecution Appeal Brief. It is noted that Brima does not address in any detail the Prosecution's argument that the Defence was given adequate notice of locations of crimes through other means, such as the Pre-Trial Brief, Supplemental Pre-Trial Brief, and opening arguments. Brima does not provide any reasons why such information did not give sufficient notice to the Defence.

B. Reply to the Kamara Response Brief

3.3 Paragraphs 25 to 26 and 29 to 41 of the Kamara Response Brief are materially identical to paragraphs 22 to 40 of the Brima Response Brief. The Prosecution

[48] *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-PT-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", ("***Sesay* Preliminary Motion Decision**"), Trial Chamber, 13 October 2003.

relies on paragraphs 198 to 234 of the Prosecution Appeal Brief and its response in paragraphs 3.1 to 3.2 above to the Brima submissions.

C. Reply to the Kanu Response Brief

3.4 In relation to paragraphs 2.8 to 2.15 of the Kanu Response Brief, the Prosecution relies on paragraphs 198 to 225 of the Prosecution Appeal Brief. In reply to paragraph 2.14 of the Kanu Response Brief, it is added that the Prosecution Appeal Brief expressly relies on ICTY and ICTR case law on this issue.

3.5 In respect of paragraph 2.16 of the Kanu Response Brief, which seeks to summarise the Prosecution position on the issue of waiver, some clarification of the Prosecution position is required.

3.6 The Prosecution acknowledged in its Appeal Brief that Kamara and Kanu filed preliminary motions alleging that that the Indictment was defective in failing to plead locations with sufficient specificity.[49] The Trial Chamber I rejected those preliminary motions. The Prosecution acknowledges that the Defence *would be* entitled, in this post-judgement appeal, to challenge the decisions of the Trial Chamber I rejecting those preliminary motions. The Prosecution does not suggest that any principle of waiver or estoppel would prevent the Defence from doing so.[50] However, in this case, the Defence for Kamara and Kanu have *not* sought to appeal against those decisions of Trial Chamber I. This is presumably for the reason that the Defence considered that no prejudice was caused to the Defence by the decisions of Trial Chamber I, given that Trial Chamber II decided in the Trial Chamber's Judgement not to consider evidence of crimes committed in locations not specifically pleaded in the Indictment except for the purposes of proving the chapeau requirements of Articles 2, 3 and 4 of the Statute.

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[49] **Prosecution Appeal Brief,** paras. 201-204.

[50] The position is different in the case of Brima, who did not file a preliminary motion alleging defects in the form of the Indictment within the applicable time limit, and whose preliminary motion (which was rejected by the Trial Chamber on the ground that it was filed out of time) did not in any event allege that the Indictment was defective in the way that it pleaded locations of crimes: see Prosecution Appeal Brief, para. 205.

3.7 However, the Prosecution submits that even if the Defence for Kamara or Kanu *had* challenged on appeal the decisions of Trial Chamber I, the Defence appeal should have been rejected on its merits, on the ground that the Indictment was *not* defectively pleaded. The Prosecution's submissions in this respect are contained in paragraphs 212 to 225 of the Prosecution's Appeal Brief.

3.8 The Prosecution position, as set out in its Appeal Brief is that, according to the jurisprudence of the Special Court (see paragraph 212 of the Prosecution Appeal Brief) and the other *ad hoc* Tribunals (see paragraph 220 of the Prosecution Appeal Brief), where crimes on a very large scale are alleged, and particularly where the accused was not personally present, the principle of specificity is respected when locations of crimes are pleaded the way they were in the present case. The sheer scale of the alleged crimes makes it impracticable to do it otherwise.[51] However, where an indictment does not plead the precise details of all locations of alleged crimes, the defence may apply for appropriate relief where evidence is presented of crimes committed in locations not specifically pleaded in the indictment. The measures that the defence could seek, and which the Trial Chamber could grant if it considered this necessary to prevent prejudice to the defence, would include an adjournment, or even the exclusion of the evidence in question.[52] On the basis that the Indictment was not defectively pleaded, the onus was therefore on the Defence to move the Trial Chamber for such relief as and when it considered the need for such relief arose. The Prosecution position is that as the Defence made no such motions during the trial seeking such relief, the Defence has waived its right to argue now on appeal that it was prejudiced by its own failure to request such relief, or by the Trial Chamber's failure to grant such relief.[53]

3.9 Paragraphs 2.19 and 2.20 refer to two cases at the Trial Chamber level, in which it is said that the *Trial* Chamber declined to consider evidence of matters not pleaded in the Indictment. The Prosecution submits that the decision of the

[51] **Prosecution Appeal Brief**, para. 220.
[52] **Prosecution Appeal Brief**, para. 222.
[53] **Prosecution Appeal Brief**, para. 223.

ICTR *Appeals* Chamber in the *Niyitegeka* Appeal Judgement[54] quoted in paragraph 49 of the Trial Chamber's Judgement is a correct statement of the law as applicable to the issue in this ground of appeal. Paragraph 2.18 of the Kanu Appeal Brief notes that in *Niyitegeka*, the Appeals Chamber indicated that even where the Defence fails to object at trial, the Defence is not entirely foreclosed from raising a defect in the Indictment for the first time on appeal.[55] This principle is not relevant here because the Prosecution argues that the Indictment was not defective. In any event, for the reasons given in paragraphs 211 and 545-546 of the Prosecution Appeal Brief, and paragraphs 3.6 to 3.8 above, given the Defence failure to object, the burden is on the Defence to establish that its ability to prepare the defence was actually materially impaired by the alleged lack of notice.[56]

3.10 Paragraphs 2.23 to 2.30 of the Kanu Response Brief argue that any defects in the Indictment in this case were not cured, and that the Defence did in fact suffer prejudice from the lack of notice. Kanu argues, relying on two decisions of the ICTY and ICTR Appeals Chamber, that not all defects in the indictment will necessarily be cured by timely, clear and consistent information provided by the Prosecution. First of all, the Prosecution reiterates that, in the present instance, there was no defect of the Indictment. However, even if the defect in the indictment was admitted, the Prosecution submits that, contrary to what

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[54] ***Niyitegeka* Appeal Judgement**, para. 199. See also *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", ("***Bagosora* 18 September 2006 Appeal Decision**"), Appeals Chamber, 18 September 2006, para. 42

[55] ***Niyitegeka* Appeal Judgement**, para. 200, reads: "The importance of the accused's right to be informed of the charges against him under Article 20(4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case."

[56] This is also consistent with the decision cited at paragraph 2.17 of the Kanu Response Brief: *Bagosora*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 4.

Kanu seems to imply at paragraph 30 of his Response, there was no "radical transformation" of the Indictment by the way the Prosecution's case was led and pleaded. In any event, given that the Kanu Defence failed to object to the evidence in question at the time that it was adduced, the burden is now on Kanu to establish that his ability to prepare the defence was actually materially impaired by the alleged lack of notice, notwithstanding the timely, clear and consistent information provided by the Prosecution.[57] Kanu cannot discharge this burden simply by claiming that "the nature and magnitude of the defects in the Indictment were such that they could not be cured without prejudicing him" and that Kanu "in most instances, had to guess the exact location in respect of which a particular crime related".[58] This type of generalized submission is a complete negation of the duty imposed on Defence counsel, affirmed in the case law of the ICTR Appeals Chamber, to raise objections in a timely manner. Given that the burden is on Kanu, the Defence for Kanu must give, in relation to each crime in each location where the Defence did not object to the evidence adduced, a reasonable explanation of why the Defence did not object, and an explanation of exactly how the Defence was prejudiced by the admission of that evidence. In cases where the Defence was given notice of the location in the Prosecution Pre-Trial Brief or Supplementary Pre-Trial Brief, the Defence clearly cannot allege that the prejudice was the same as in a case, for instance, where no prior notice was given to the Defence. The Kanu Response Brief does not look at the details of the nature of the notice given in relation to each of the various locations. Even in cases where no prior notice was given, in view of the Defence failure to object, prejudice to the Defence cannot simply be assumed. Kanu's generalized submission does not establish any prejudice to the Defence, and it should be rejected.

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[57] ***Niyitegeka*** **Appeal Judgement**, paras. 199-200; ***Bagosora*** **18 September 2006 Appeal Decision**, para. 42

[58] ***Kanu*** **Response Brief**, para. 2.28.

4. Prosecution's Third Ground of Appeal: Failure of the Trial Chamber to find Kamara individually responsible under Article 6(1) and Article 6(3) for all crimes committed in Port Loko District

4.1 Only the Kamara Response Brief responds to this Prosecution Ground of Appeal.

4.2 Paragraphs 72 to 75 of the Kamara Response Brief argues that the guilt of Kamara under Article 6(3) of the Statute for the Port Loko District crimes is not the only conclusion open to a reasonable trier of fact, and that an alternative conclusion is that the Witness George Johnson ("Junior Lion") was responsible for these crimes under Article 6(3). This submission should be rejected. The Trial Chamber did find that George Johnson held a position of authority over the AFRC troops in Port Loko District at the time.[59] However, it found that Kamara was the overall commander of those troops.[60] It is clearly established that more than one commander can be individually responsible for the same crimes—for instance, where soldiers in a military unit commit crimes, both the commander of the unit and the deputy commander of the unit, as well as the commander's own superiors, may all be individually responsible for the crimes under Article 6(3), provided that all the elements of Article 6(3) are satisfied. For the reasons given in the Prosecution Appeal Brief, especially at paragraphs 297 to 305, the requirements of Article 6(3) were satisfied in relation to Kamara.

4.3 In response to paragraphs 76 and 77 of the Kamara Response Brief, the Prosecution notes that if its Third Ground of Appeal is upheld, the result is that Kamara satisfies the elements of both Article 6(1) and Article 6(3) in respect of the crimes committed by the "West Side Boys" in Port Loko District. In these circumstances, it is acknowledged that his formal conviction for these crimes should be under Article 6(1) only, with the additional Article 6(3) responsibility being taken into account in sentencing. The Prosecution further relies in this

[59] **Trial Chamber's Judgement**, para. 1960.
[60] **Trial Chamber's Judgement**, para. 1958.

respect on its submissions in relation to its Ninth Ground of Appeal, in particular paragraphs 706-707 of the Prosecution Appeal Brief.

4.4 In relation to paragraphs 78-80 of the Kamara Appeal Brief, the Prosecution submits that these contain nothing of substance, and the Prosecution relies on the submissions in 313-329 of the Prosecution Appeal Brief. In an appeal concerning an alleged error of fact, Kamara cannot simply incorporate by reference submission that he made before the Trial Chamber.[61]

4.5 As to paragraph 82 of the Kamara Response Brief, the Prosecution position is *not* that the mere fact of Kamara's conviction under Article 6(3) is "suggestive" of his individual responsibility under Article 6(1). The basis for Kamara's Article 6(1) responsibility is set out fully and clearly in the Prosecution Appeal Brief.

4.6 In paragraph 84 of the Kamara Response Brief, Kamara concedes that "the attack on the Lady whose stomach was split open was carried out against her as she was alleged to have been supporting forces hostile to the AFRC troops". This supports the Prosecution contention that the primary purpose of this killing, and the killing of other civilians, was to spread terror and to impose collective punishments. The Prosecution refers in this respect to paragraphs 1568-1573 and 1609-1612 of the Trial Chamber's Judgement, in which it found that crimes against civilians in Bombali District and Freetown and the Western Area was to spread terror and to impose collective punishments, due to the fact that that these civilians were deliberately targeted because they were perceived to be supporting opponents of the AFRC.

5. Prosecution's Fourth Ground of Appeal: The Trial Chamber's decision not to consider joint criminal enterprise liability

[61] See ***Kamara* Response Brief**, footnote 66, referring to ***Kamara's* Rule 98 submissions**.

A. Reply to the Brima Response Brief

5.1 As to paragraph 48 of the Brima Response Brief, it is not the Prosecution position that the Trial Chamber completely lacks any jurisdiction to redecide an earlier interlocutory decision in the case. The Prosecution position is that the Trial Chamber, before doing so, must give notice to the parties and afford the parties an opportunity to persuade the Trial Chamber of the correctness of the earlier decision. The Prosecution refers to the submissions in paragraphs 356 to 371 of the Prosecution Appeal Brief.

5.2 The Prosecution does not understand the argument in paragraphs 49-50 of the Brima Response Brief. The Prosecution refers again to the submissions in paragraphs 356 to 371 of the Prosecution Appeal Brief. The Prosecution acknowledged in paragraphs 357 to 360 of the Prosecution Appeal Brief that the Defence did allege in preliminary motions that joint criminal enterprise was defectively pleaded, and that the Defence did subsequently allege again that joint criminal enterprise liability was defectively pleaded at the Rule 98 stage and in its final trial arguments. However, the Trial Chamber never gave any indication that it was in any way minded to reconsider the earlier interlocutory decisions rejecting the preliminary motions. The Prosecution position is that it is not required to consider earlier interlocutory decision in a case to be reopened merely because the Defence claims in a subsequent submission that they were wrongly decided. If the Prosecution was required to do this, the Defence would be able to continuously relitigate every interlocutory decision of the Trial Chamber throughout the course of the trial.

5.3 As regards paragraphs 51 to 56 of the Brima Response Brief, the Prosecution submits that the Trial Chamber *is* required to give notice to the parties that it is reopening an earlier interlocutory decision, and that the Trial Chamber must before reconsidering the earlier decision give the parties an opportunity to address arguments to the Trial Chamber on the matter. It is no answer to say that the Defence raised the issue and that the Prosecution could have responded to the Defence. Unless and until the Trial Chamber indicates to the parties that

it will be reconsidering an earlier interlocutory decision, the Prosecution is not required to respond to Defence suggestions that earlier interlocutory decisions were wrongly decided. Once a matter has been settled by an interlocutory decision of the Trial Chamber, the matter must be regarded as finally settled (subject to any appellate proceedings), unless and until the Trial Chamber indicates that the earlier decision is reopened. The Prosecution refers to paragraphs 356 to 371 of the Prosecution Appeal Brief, in particular paragraphs 369 to 370.

5.4 Paragraph 54 of the Brima Response Brief argues that it was impossible for Brima to apply earlier to reopen the pre-trial decision on the alleged defective pleading of joint criminal enterprise due to the "vagueness of the indictment". This argument is unsupported, and difficult to comprehend.

5.5 As to paragraphs 57 to 59 of the Brima Response Brief, the Prosecution submits that it is indeed possible to plead both the basic and the extended form of joint criminal enterprise liability in the alternative in the same indictment. For instance, in the *Kvočka* case, even though the Prosecution had not even pleaded joint criminal enterprise liability in the indictment, the ICTY Appeals Chamber held that this defect had been cured by timely, clear and consistent notice to the Defence, and then proceeded to consider both the basic and the extended forms.[62] As a general proposition, the Prosecution may rely upon alternative cases, so that if the Trial Chamber does not accept the Prosecution's principal case, the Prosecution can rely on the alternative case.[63] It is common practice in international criminal tribunals for the Prosecution to plead multiple modes of liability in the alternative in an indictment, and this is clearly permissible. There is no reason in logic or principle why an indictment cannot plead both the basic and the extended forms of joint criminal enterprise liability in the alternative. In the Indictment in this case, both were expressly pleaded.

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[62] ***Kvočka* Appeal Judgement**, paras. 36-54 (finding that the failure to plead joint criminal enterprise liability had been cured by subsequent notice) and paras. 85-86 (indicating that both the basic and extended forms of joint criminal enterprise liability could be considered in the circumstances, although the extended form was not established on the evidence).

[63] See, the authorities cited in paragraph 376 of the **Prosecution Appeal Brief**, and, for instance, *Prosecutor* v. *Brđanin and Talić*, IT-99-36-PT, "Decision on Form of Third Amended Indictment", (***Brđanin and Talić* Amended Indictment Decision**) Trial Chamber, 21 September 2001, para. 22.

5.6 In relation to the two paragraphs numbered 60 in the Brima Response Brief, the Prosecution relies on the submissions in paragraphs 397 to 404 of the Prosecution Appeal Brief, read in conjunction with paragraphs 380 to 396. It is submitted that it is clearly pleaded in the indictment that members of the AFRC began participating in a joint criminal enterprise with members of the RUF some time between 25 May 1997 and 1 June 1997, that the joint criminal enterprise continued to exist until at least about April 1999, which was the last date material to the Indictment, and that it was alleged that the purpose of the enterprise was criminal throughout this period.

5.7 As to paragraphs 61 to 69 of the Brima Response Brief, it is submitted that the Indictment in this case made perfectly clear the criminal means by which the ultimate objective was to be achieved. Reference is made to paragraphs 380 to 396 of the Prosecution Appeal Brief, and in particular, paragraphs 390-391.

5.8 As regards paragraphs 70-73 of the Brima Response Brief, the Prosecution relies again on the submissions in paragraphs 397 to 404 of the Prosecution Appeal Brief, read in conjunction with paragraphs 380 to 396. It is not the Prosecution's case that the common purpose of the joint criminal enterprise as pleaded in the Indictment changed over time.

5.9 Paragraphs 74 to 77 of the Brima Response Brief merely deal with the elements of joint criminal enterprise liability. In this respect, the Prosecution refers to the remedy requested by the Prosecution in relation to this Ground of Appeal, in paragraphs 438 to 444 of the Prosecution Appeal Brief.

B. Reply to the Kamara Response Brief

5.10 The submissions in paragraphs 86 to 123 of the Kamara Response Brief in relation to the Prosecution's Fourth Ground of Appeal are materially identical to paragraphs 41 to 77 of the Brima Response Brief. The Prosecution repeats its submissions in reply to the Brima Response Brief.

C. Reply to the Kanu Response Brief

5.11 As to paragraph 4.1 of the Kanu Response Brief, the Prosecution notes that the Indictment in this case expressly pleaded both the basic and the extended forms of joint criminal enterprise liability.

5.12 As to paragraph 4.2 of the Kanu Response Brief, the alleged defects in the pleading of joint criminal enterprise liability had been settled at the pre-trial stage. Trial Chamber I had given decisions rejecting the Kamara and Kanu motions alleging the defective pleading of joint criminal enterprise liability, and Trial Chamber II had refused to allow Brima to file such a motion out of time. Unless and until the Trial Chamber expressly decided to reopen those interlocutory decisions, the matter was, for the purposes of the proceedings before the Trial Chamber, settled.

5.13 Paragraph 4.3 of the Kanu Response Brief suggests that even if the Trial Chamber had considered joint criminal enterprise liability, it may have found that it was not proved on the evidence. In this respect, the Prosecution refers to the remedy requested by the Prosecution in relation to this Ground of Appeal, in paragraphs 438 to 444 of the Prosecution Appeal Brief.

5.14 As to paragraphs 4.4 to 4.6 of the Kanu Response Brief, the Prosecution refers to paragraph 5.1 above.

5.15 In respect of paragraphs 4.7 to 4.9, 4.12 and 4.18 of the Kanu Response Brief, the Prosecution refers to paragraph 5.3 above, and to paragraphs 356 to 371 of the Prosecution Appeal Brief, in particular paragraphs 369 to 370. The Prosecution denies that it was afforded an adequate opportunity to argue before Trial Chamber II that joint criminal enterprise liability had not been defectively pleaded. Paragraph 4.8 of the Kanu Response Brief quotes paragraph 323 of the Rule 98 Decision, but omits to mention that the Trial Chamber said in that paragraph of the Rule 98 Decision that "A challenge to the form of the Indictment should have been raised in a preliminary motion under Rule 72. We will not make any findings on the issue in the present decision."[64] The Trial

[64] **Rule 98 Decision**, para. 323.

Chamber never suggested in the Rule 98 Decision that it would reopen the issue at the stage of final trial arguments. Nor did the Trial Chamber give any indication during the final trial arguments that it was going to reconsider the earlier interlocutory decisions. The Prosecution could not at any stage have anticipated that it would.

5.16 As to paragraph 4.10 of the Kanu Response Brief, the Prosecution denies that it "could not state" at the final trial arguments which category of joint criminal enterprise liability was relied upon because the Prosecution "was not sure". From a reading of the transcript it is evident that the Trial Chamber was under no doubt that the Prosecution was relying on both the first and third categories of joint criminal enterprise, and that the question from the Bench was directed solely to the issue of whether the Prosecution was relying also on the second category. The answer by the Prosecution was to the effect that the first and second categories of joint criminal enterprise liability are essentially variants of the same "basic" form, that the case law distinguishing between them as though they were separate forms of liability was "a bit artificial", and that the real issue was therefore not whether the Prosecution was relying on the first or second category. The Prosecution submitted that the question was whether it is clear, "looking at all of the evidence as a whole, ... that all of these crimes were committed as part of a single common plan, design, or purpose in which the three accused participated", that it was not necessary "to find an expressed agreement between the three accused to establish that", and that whether the joint criminal enterprise liability exists will be a matter to be determined on the evidence as a whole. The Prosecution had earlier dealt at some length in its submissions with what is normally termed the second category of joint criminal enterprise liability, and made it clear that this was applicable in this case.[65].

5.17 As to paragraph 4.11 of the Kanu Response Brief, the Prosecution repeats that the extended form of joint criminal enterprise liability was expressly pleaded in the Indictment in this case.

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[65] Transcript, 7 December 2006, pp. 73-74.

5.18 In respect of paragraphs 4.13 to 4.17 of the Kanu Response Brief, it is submitted that the issue in this Ground of Appeal is the adequacy of the pleading of joint criminal enterprise liability. For the reasons given in the Prosecution Appeal Brief, it is submitted that it was not defectively pleaded. The differences between different modes of liability (such as joint criminal enterprise liability and aiding and abetting), and the question whether other modes of liability were adequately pleaded, are not material to the determination of this Ground of Appeal.

5.19 In respect of the first of the two paragraphs numbered 4.20 in the Kanu Response Brief, the Prosecution refers to paragraph 5.4 above.

5.20 In respect of paragraphs 4.19 to 4.29 of the Kanu Response Brief generally, the Prosecution submits that the Indictment did plead with sufficient particularity the matters that it was required to plead in relation to joint criminal enterprise liability, for the reasons given in paragraphs 380 to 396 of the Prosecution Appeal Brief. For the reasons there given, the Indictment also clearly pleaded a common purpose that is inherently criminal.

5.21 In respect of paragraphs 4.25, 4.28 and 4.29 of the Kanu Response Brief, the Prosecution repeats again that the Indictment in this case expressly pleaded both the basic and the extended forms of joint criminal enterprise liability.

5.22 As to paragraphs 4.30 to 4.33 of the Kanu Response Brief, the Prosecution notes that the Defence agrees that even if the Indictment was defective in its pleading of joint criminal enterprise liability (which the Prosecution submits it was not), that defect could be cured by the subsequent provision of timely, consistent and clear notice by the Prosecution. The *Kvočka* case is an example of where this occurred.[66] For the reasons given in paragraphs 413 to 425 of the Prosecution Appeal Brief, it is submitted that even if there were any defects in the Indictment in this respect, they were subsequently cured.

5.23 As to paragraph 4.34 of the Kanu Response Brief, the Prosecution submits that even if the burden were on the Prosecution to establish that the Indictment was not defectively pleaded in this respect, the Prosecution has discharged that

[66] See **Prosecution Appeal Brief**, para. 414; ***Kvočka* Appeal Judgement**, paras. 36-54.

burden. However, in view of the matters in paragraphs 356 to 371 of the Prosecution Appeal Brief, the Prosecution does not accept that it has the burden of proof in this appeal in relation to this issue.

5.24 In respect of paragraph 4.35 of the Kanu Response Brief, the Prosecution submits that it is not requesting a "second bite at the cherry". The remedy sought by the Prosecution in paragraphs 426 to 444 of the Prosecution Appeal Brief would be normal and natural consequences of a successful Prosecution appeal in this type of situation.

6. Prosecution's Fifth Ground of Appeal: The Trial Chamber's failure to find all three Accused individually responsible on Counts 1 and 2 of the Indictment in respect of the three enslavement crimes

A. Reply to the Brima and Kamara Response Briefs

6.1 The submissions in the Brima and Kamara Response Briefs in respect of this Ground of Appeal are addressed fully in paragraphs 445 to 526 of the Prosecution Appeal Brief.

B. Reply to the Kanu Response Brief

6.2 As to paragraphs 5.8 to 5.16 of the Kanu Response Brief, the Prosecution denies that it is seeking to turn a "special intent" crime into a "general intent" crime. The Defence appears to assume that any conduct that satisfies the elements of the crime of acts of terrorism will also necessarily satisfy the elements of another crime under international law (such as murder). Kanu's argument therefore appears to be that it is only when such conduct is committed with the special intent of spreading terror that a general intent crime (such as murder) will also constitute the special intent crime of acts of terrorism.

6.3 The Prosecution notes, first of all, that it will not always be the case that conduct satisfying the elements of acts of terrorism will also satisfy the elements of another crime under international law. An example is given in paragraph 470 of the Prosecution Appeal Brief (threats to annihilate a civilian population).

6.4 The Prosecution notes, secondly, that the Prosecution does not claim (as Kanu seems to suggest) that the conduct in question need not be specifically intended to spread terror. Paragraphs 460 to 490 of the Prosecution Appeal Brief, dealing with the *mens rea* for acts of terror, speaks of acts specifically intended to spread terror, and the words "specifically intended" are in italics in paragraphs 469, 473 and 477 of the Prosecution Appeal Brief. It is difficult to see how Kanu could suggest that the Prosecution position would "render *special intent* irrelevant to the crime of terrorism".[67] This issue in this appeal is not whether specific intent is required for acts of terrorism. The question is whether the intention to spread terror must in and of itself be the single predominant or ultimate aim of the conduct in question. For the reasons given in the Prosecution Appeal Brief, it is submitted that the answer to this question is in the negative.

6.5 In respect of paragraphs 5.13 to 5.27 of the Kanu Response Brief generally, the Prosecution submits that the only conclusion open to any reasonable trier of fact in this case was that the enslavement crimes satisfied the elements of acts of terrorism, for the reasons given in paragraphs 491 to 516 of the Prosecution Appeal Brief. The Defence suggestion that the crimes of enslavement were merely coincidentally perpetrated at the same time as a campaign of terror, without forming part of that campaign of terror, is not a conclusion that is open to any reasonable trier of fact in view of the other findings of the Trial Chamber in this case. The Prosecution does not suggest that the mere fact that two crimes involving violence occur at the same time means that there is terrorism.[68] Rather, the Prosecution submits that on the basis of the specific findings of the

[67] ***Kanu* Response Brief**, para. 5.12.
[68] Compare ***Kanu* Response Brief**, para. 5.19.

Trial Chamber in this case, the only conclusion open is that there was a campaign of terror, and that the enslavement crimes formed part of it.

6.6 As regards paragraphs 5.32 to 5.35 of the Kanu Appeal Brief, the Kanu submissions fails to appreciate that the *fact of being enslaved* was itself the collective punishment imposed on the civilian population. It is no answer to suggest that not all enslaved civilians were beaten or mistreated. All of those who were enslaved were thereby collectively punished, for the reasons given in paragraphs 517 to 525 of the Prosecution Appeal Brief.

7. Prosecution's Sixth Ground of Appeal: The Trial Chamber's dismissal of Count 7 on grounds of duplicity

A. Reply to the Brima Response Brief

7.1 Paragraph 99 of the Brima Response Brief concedes that "It could be argued from the Trial Judgement and the Prosecution Appeal the Trial Chamber did not give the Prosecution an opportunity to fully address this issue". In paragraph 98 of the Brima Response Briefs, there is also an acknowledgement of why the Prosecution should have been given an opportunity to address this issue fully. However, paragraphs 100 to 105 of the Brima Response Brief seek to distinguish other cases, and suggest that the Prosecution could have sought to amend the Indictment after Judge Sebutinde gave her dissenting opinion in the Rule 98 Decision, and argue that the Defence was prejudiced by the Prosecution's failure to amend the Indictment.

7.2 The Prosecution submits that the other cases are not distinguishable. The Prosecution submits that it is an elementary principle of justice, reflected in the ICTR and ICTY Appeals Chamber decisions in the *Cyangugu* and *Jelisić* cases, that the Trial Chamber is always under a duty to hear a party whose rights will be affected before making a decision adverse to that party.[69] The submissions

[69] **Prosecution Appeal Brief**, paras. 536 to 546.

in the Brima and Kamara Response Briefs in respect of this Ground of Appeal are addressed fully in paragraphs 445-526 of the Prosecution Appeal Brief. For the reasons given in paragraphs 542 to 545 of the Prosecution Appeal Brief, there was no onus on the Prosecution to take any action after the Rule 98 Decision was given, and the Prosecution was not given a reasonable opportunity to be heard on this issue. For the reasons given in paragraphs 555 to 559 of the Prosecution Appeal Brief, the Defence suffered no prejudice as a result of the way that the Indictment was pleaded in this respect.

7.3 In relation to the remainder of Brima's submissions in respect of this Ground of Appeal, the Prosecution relies on the submissions in the Prosecution Appeal Brief. It is emphasised again that there has been no demonstration, apart from mere assertion, as to how the Defence was allegedly prejudiced by the way that Count 7 was pleaded. The Defence Response Briefs also do not address the Prosecution argument that the suggestion by Judge Sebutinde in the Rule 98 Decision as to how the Indictment could be amended would have been no more than the purest of mere technical formalities.

B. Reply to the Kamara Response Brief

7.4 The submissions in paragraphs 137 to 162 of the Kamara Response Brief in relation to the Prosecution's Fourth Ground of Appeal are materially identical to paragraphs 91 to 116 of the Brima Response Brief. The Prosecution repeats its submissions in reply to the Brima Response Brief.

C. Reply to the Kanu Response Brief

7.5 The submissions in the Kanu Response Brief do not provide an answer to the submissions in the Prosecution Appeal Brief. In particular, Kanu does not address the Prosecution's arguments that it was clear from the way Count 7 was pleaded what Kanu was charged with, that the amendment suggested by Judge

Sebutinde would have been no more than the purest of mere technical formalities, and that no prejudice to the Defence has been demonstrated.

7.6 Paragraphs 6.9, 6.10 and 6.13 of the Kanu Response Brief assert that Kanu was prejudiced by the alleged duplicitous pleading, without stating how he was prejudiced. Paragraph 6.10 of the Kanu Response Brief states that Kanu had objected to the form of the Indictment at the pre-trial stage, but omits to mention that none of the Defence teams ever suggested that Count 7 was badly pleaded until this issue was raised by Judge Sebutinde at the Rule 98 stage, and even then, the Defence only raised the issue in their final trial arguments. Paragraph 6.10 of the Kanu Response Brief suggests that it is not necessary for the Defence to show prejudice. In effect, Kanu argues that even where there has been no prejudice at all, an accused can escape conviction by pointing out technical flaws in the drafting of the indictment at the stage of final trial arguments that were never raised at the pre-trial stage. That cannot be accepted.

7.7 Paragraphs 6.14 to 6.16 of the Kanu Appeal Brief argue that the defect could not be cured other than by an amendment to the Indictment. For the reasons given in paragraph 542 of the Prosecution Appeal Brief, there was no onus on the Prosecution to take steps to amend the Indictment after the Rule 98 Decision. The Defence never raised any objection to the way in which Count 7 was pleaded until final trial arguments. If the Defence had a problem with the way in which Count 7 was pleaded, this should have been raised at the pre-trial stage, or at least, if this was not possible for some reason, at the earliest opportunity thereafter. In the absence of any explanation of why the Defence did not raise this issue earlier, and in the absence of any demonstration of prejudice to the Defence apart from mere assertions to this effect, Kanu's arguments are unsustainable.

8. Prosecution's Seventh Ground of Appeal: The Trial Chamber's Dismissal of Count 8 for Redundancy

A. Reply to the Brima Response

8.1 Paragraph 118 of the Brima Response Brief apparently suggests that even if forced marriage is an "other inhumane act" for the purposes of Article 2(i) of the Statute of the Special Court, Count 8 was nevertheless redundant because the criminal conduct encompassed within that Count was already fully encompassed within the charge of sexual slavery.[70] The Prosecution submits that that is not the case, for the reasons given in paragraphs 612-616 of the Prosecution Appeal Brief: forced marriage and sexual slavery have distinct elements.

8.2 Furthermore, and in any event, even if this were not the case, Count 8 cannot have been made redundant by Count 9. Count 8 charged forced marriage as a crime against humanity; Count 9 charged sexual slavery as a war crime of outrages upon human dignity. It is well established that an accused can be convicted cumulatively, in respect of the same conduct, of both a crime against humanity and a war crime.[71]

8.3 Paragraphs 119 to 129 of the Brima Response Brief argue that the crime against humanity of other inhumane acts (Article 2(i) of the Statute) does not include any crimes of a sexual nature because all crimes of a sexual nature are comprehensively encompassed within Article 2(g) of the Statute, which includes "any other form of sexual violence". This argument is dealt with in paragraphs 588 to 597 of the Prosecution Appeal Brief. Furthermore, for the reasons given in paragraphs 602 to 627 of the Prosecution Appeal Brief, forced marriage need not involve any conduct of a sexual nature, and need not involve any violence. This argument must therefore be rejected.

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[70] The ***Brima* Appeal Brief** suggests that Count 8 was redundant because the conduct encompassed by it was subsumed by the charge of sexual slavery in Count 7. However, Count 7 was dismissed by the Trial Chamber for duplicity, a matter that is the subject of the Prosecution's Sixth Ground of Appeal. Given that Count 7 was dismissed by the Trial Chamber for duplicity, Count 7 could hardly make Count 8 redundant.

[71] See **Trial Chamber's Judgement**, para. 2107; **Prosecution Appeal Brief**, paras. 531, 637-638.

B. Reply to the Kamara Response Brief

8.4 The submissions in paragraphs 163 to 177 of the Kamara Response Brief in relation to the Prosecution's Fourth Ground of Appeal are materially identical to paragraphs 117 to 131 of the Brima Response Brief. The Prosecution repeats its submissions in reply to the Brima Response Brief.

C. Reply to the Kanu Response Brief

8.5 The Prosecution notes that Kanu concedes that the Trial Chamber "conceptually erred ... in law" in holding that "other inhumane acts" under Article 2(i) of the Statute cannot include crimes of a sexual nature.[72]

8.6 As the Prosecution understands it, the Kanu Response Brief argues, essentially, that the question whether an accused can be convicted of the crime against humanity of "other inhumane acts" in respect of forced marriage does not depend on the question of whether or not forced marriage, as a matter of law, falls within the definition of "other inhumane acts". Rather, Kanu argues that this is a question of the particular facts and evidence in a given case. Kanu argues that "other inhumane acts" is a residual category of crimes, and that it can only be applied where the particular conduct of the accused in a given case rises to the level of "other inhumane acts" but does not fall under any other provision of Article 2. Thus, although in another case an accused might, depending on the circumstances, be convicted of forced marriage as an "other inhumane act", in this case the Accused could not be, since all of their relevant conduct was on the particular facts of this case subsumed under the crime against humanity of sexual slavery, in Article 2(g).

8.7 The Kanu argument appears to be that if particular conduct of an accused charged under Article 2(i) *could* have been charged under another provision of Article 2, but was not, the accused must be acquitted, on the ground that Article

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[72] ***Kanu* Appeal Brief**, para. 7.11. See also at para. 7.21 (conceding that the Trial Chamber "erred in its conceptual articulation of the category of 'other inhumane acts' as a crime against humanity).

2(i) only includes conduct that is incapable of being charged under another provision of Article 2.

8.8 The case law does not support this proposition. For instance, in the *Stakić* case, the ICTY Appeals Chamber held that acts of forcible transfer may be sufficiently serious as to amount to "other inhumane acts",[73] and that the Trial Chamber should have entered a conviction for other inhumane acts in respect of certain acts of forcible transfer that were established on the evidence.[74] The Appeals Chamber in that case then went on to consider whether the accused in that case could be convicted cumulatively, in respect of the same acts of forcible transfer, of both the crime against humanity of other inhumane acts and the crime against humanity of persecution. The Appeals Chamber said:

> The crime of persecutions requires a materially distinct element to be proven that is not present as an element in the crime of other inhumane acts, namely proof that an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate. The crime of other inhumane acts requires proof of a materially distinct element that is not required to be proven in establishing the crime of persecutions – namely proof of an act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. Therefore, cumulative convictions are permissible for the crimes of other inhumane acts as a crime against humanity under Article 5(i) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute.[75]

8.9 Thus, the ICTY Appeals Chamber expressly found that an accused can be convicted of other inhumane acts not only where the conduct in question *could* have been charged as a different crime against humanity, but even where the accused *was* in fact charged, and *convicted of*, another crime against humanity in respect of that same conduct.

8.10 The question in this case is therefore not whether Kanu could have been charged with sexual slavery under Article 2(g) of the Statute in respect of the conduct in question. Rather the question is whether forced marriage falls within

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[73] ***Stakić* Appeal Judgement**, para. 317.
[74] ***Stakić* Appeal Judgement**, para. 321.
[75] ***Stakić* Appeal Judgement**, para. 362.

the definition of other inhumane acts for the purposes of Article 2(i) of the Statute, and if so, whether the elements of that crime were established in this case. If so, Kanu (and the other Accused in this case) can be convicted of forced marriage as an other inhumane act under Article 2(i). If that conduct also satisfies the elements of sexual slavery under Article 2(g) of the Statute, then Kanu and the other Accused could also be convicted of sexual slavery in respect of the same conduct (assuming that the Prosecution succeeds in its Sixth Ground of Appeal and that Count 7 is therefore reinstated), as both crimes have materially distinct elements.[76] Furthermore, the Accused can also be convicted in respect of the same conduct as a war crime of "outrages upon personal dignity" under Count 9 of the Indictment, which is a war crime rather than a crime against humanity.[77]

8.11 In fact, the convictions for sexual slavery on the one hand, and forced marriage as an "other inhumane act" on the other, would not rest on exactly the same conduct and facts, since the two crimes do not have identical elements.

8.12 The Kanu Response Brief argues that the distinction drawn by the Prosecution between forced marriage and sexual slavery is "rather abstract, if not artificial".[78] The Prosecution denies that this is the case. Paragraphs 602 to 627 of the Prosecution Appeal Brief set out the distinction between the two crimes. Paragraphs 608 to 610 of the Prosecution Appeal Brief also provide examples of the long standing international concerns at the problem of forced marriages in armed conflict.

8.13 Paragraphs 722 to 723 of the Kanu Response Brief argue that at the times material to the Indictment, forced marriage had not yet crystallized in customary international law as a distinct crime against humanity of other inhumane acts.

8.14 The Prosecution submits that it is not necessary to establish that "forced marriage" was expressly recognized in customary international law as "an other inhumane act" at the time of the conduct in question. The imposition of such a requirement would defeat the very purpose of the inclusion of the category of

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[76] **Prosecution Appeal Brief**, paras. 641-644.
[77] See **Prosecution Appeal Brief**, paras. 531, 637-638.
[78] ***Kanu* Response Brief**, para. 7.18.

"other inhumane acts". As submitted in paragraph 594 of the Prosecution Appeal Brief, the category of other inhumane acts was "deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated [since an] exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition".[79] The categories of crimes against humanity are therefore not closed,[80] and the crimes within this category need not have been previously expressly identified under customary international law at the time that they were committed.

8.15 This does not mean that the existence of this category of crimes violates the principle of *nullum crimen sine lege*. The case law establishes that it does not.[81] The Prosecution refers to paragraphs 604 to 607 of the Prosecution Appeal Brief. The elements of the crime against humanity of other inhumane acts are settled.[82] The question is not whether forced marriage was expressly recognized or identified as falling within the definition of other inhumane acts at the time material to the Indictment. Rather, the question is whether the acts of forced marriage that occurred in this case satisfied the elements of "other inhumane acts", which was a crime existing and settled at the time material to the Indictment. For the reasons given in the Prosecution Appeal Brief, it is submitted that these acts did satisfy these elements.

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[79] ***Kordić* Appeal Judgement**, para 117; ***Kupreškić* Trial Judgement**, para. 563.

[80] See ***Stakić* Appeal Judgement**, paras 315 and 316; ***Kordić* Trial Judgement**, para 269; ***Galić* Trial Judgement** para 152; ***Naletilić and Martinović* Trial Judgement**, para 247; ***Vasiljević* Trial Judgement**, para 234; ***Kvočka* Trial Judgement**, para 206; ***Kordić* Trial Judgement**, para 269; ***Kupreškić* Trial Judgement**, para 563; ***Jelisić* Trial Judgement**, para 52; and ***Kayishema* Trial Judgement**, para 150.

[81] ***Stakić* Appeal Judgement**, paras 315-316 and the other authorities there cited.

[82] See **Prosecution Appeal Brief**, paras 592-593.

9. Prosecution's Eighth Ground of Appeal: The Trial Chamber's treatment of Count 11

A. Reply to the Brima and Kamara Response Briefs

9.1 The Brima and Kamara Response Briefs deal with the Prosecution's Eighth Ground of Appeal in their submissions on the Prosecution's Sixth Ground of Appeal, to which the Prosecution has already replied above. The Prosecution relies on its submissions in the Prosecution Appeal Brief in support of its Eighth Ground of Appeal, and merely emphasizes, in reply to the arguments in the Brima and Kamara Response Briefs, that none of the parties or the Trial Chamber ever suggested at any time during the proceedings that Count 11 was defectively pleaded, that the Prosecution was never given the opportunity to address this issue, and that apart from mere assertion, it has not been established that any prejudice to the Defence whatsoever was caused by the way that Count 11 was pleaded.

B. Reply to the Kanu Response Brief

9.2 Kanu concedes that the Trial Chamber erred in the manner claimed by the Prosecution, and that Kanu can be convicted on Count 11 as well as Count 10 in respect of the mutilations for which he was found to be individually responsible. Kanu merely argues that such a revision to the Trial Chamber's Judgement should not lead to an increase in Kanu's sentence. This submission by Kanu is dealt with in Section 11 of this Reply Brief below.

10. Prosecution's Ninth Ground of Appeal: The Trial Chamber's approach to cumulative convictions under Article 6(1) and Article 6(3) of the Statute

A. Reply to the Brima Response Brief

10.1 The Prosecution takes issue with Brima's analogy with the *Orić* case.

10.2 In the *Orić* case, the accused was charged under both Article 7(1) and Article 7(3) of the ICTY Statute [= Special Court Statute, Article 6(1) and Article 6(3)] for wanton destruction of cities, towns and villages not justified by military necessity. The Article 7(1) responsibility and the Article 7(3) responsibility were charged in different counts. The Trial Chamber found that the elements of both Counts were proved by the Prosecution, but that both counts related to the same principal crime on basically the same facts.[83] The Trial Chamber said:

> ... if the accused's conduct fulfils the elements both of commission or of participation according to Article 7(1) of the Statute and of superior criminal responsibility according to Article 7(3) of the Statute with regard to the same principal crime on basically the same facts, regardless of whether indicted in the same or in different counts, the accused will be convicted only under the heading of Article 7(1) of the Statute in terms of the more comprehensive wrongdoing. Second, however, as the final sentence should reflect the totality of the culpable conduct.[84]

10.3 That is entirely consistent with the position of the Prosecution. The Prosecution submits that the position is that it is open to a Trial Chamber, in its discretion, to adopt the approach that:

— where the accused is found to satisfy the elements of both Article 6(1) and Article 6(3) with regard to the *same principal crime on basically the same facts*, regardless of whether indicted in the same or in different counts, the accused will be convicted only under Article 6(1) of the Statute in terms of the more comprehensive wrongdoing, but the additional Article 6(3) responsibility will be taken into account in sentencing; and

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[83] See ***Orić* Trial Judgement**, paras. 339-343.
[84] ***Orić* Trial Judgement**, para. 343.

— where the accused is found to satisfy the elements of Article 6(1) in respect of one crime based on certain facts (e.g., an incident of murder), and to satisfy the elements of Article 6(3) in respect of the same or a different crime based on different facts (e.g., a separate incident of murder), the accused should be convicted under Article 6(1) in respect of the former, and under Article 6(3) in respect of the latter, regardless of whether the two sets of facts are pleaded in the same or different counts.

10.4 The Prosecution submits that it is evident that if the two separate incidents of murder in the second example above were pleaded in two separate counts, the Accused would be convicted on the first count under Article 6(1) and on the second count under Article 6(3). The fact that the two separate incidents are pleaded in a single count should not affect this result. If the two incidents in this example are pleaded in a single count, the accused should in this example be convicted on that single count under both Article 6(1) and Article 6(3), in order to reflect the different modes of liability for the *separate* crimes based on *different* facts that are encompassed within that count. The Article 6(1) conviction on that count would reflect the accused's individual responsibility for the first incident; and the Article 6(3) conviction on that same count would reflect the accused's individual responsibility for the second incident. To convict the accused on that one count under Article 6(1) only would mean that the conviction entered would fail to reflect at all the accused's individual responsibility for the second incident.

10.5 In short, the convictions entered by a Trial Chamber should not depend on whether different modes of liability for the same crime are pleaded in one count or two, or whether different crimes are pleaded in one count or two. It is open to a Trial Chamber to adopt the approach that an accused will not be convicted under both Article 6(1) and Article 6(3) in respect of the *same conduct* (but to take the additional Article 6(3) responsibility into account in sentencing). However, where responsibility under Article 6(1) and Article 6(3) relates to *different* conduct, the convictions formally entered should record the fact that the Accused was guilty under two separate modes of liability in respect of the

two different sets of conduct, whether they are pleaded in one count or two (see further the reply to Kanu's submissions on this ground of appeal).

10.6 The solution advocated in paragraph 135 of the Brima Response Brief would have the opposite effect. The Prosecution submits that it is unprincipled and illogical.

B. Reply to the Kamara Response Brief

10.7 The submissions in paragraphs 178 to 187 of the Kamara Response Brief in relation to the Prosecution's Fourth Ground of Appeal are materially identical to paragraphs 132 to 142 of the Brima Response Brief. The Prosecution repeats its submissions in reply to the Brima Response Brief.

C. Reply to the Kanu Response Brief

10.8 Paragraphs 9.6 to 9.9 of the Kanu Response Brief argue that if this Prosecution Ground of Appeal is allowed, it should not result in any increase in Kanu's sentence. This argument is dealt with in Section 11 of this Response Brief below.

10.9 Paragraph 9.10 of the Kanu Response Brief argues that the law on cumulative convictions under Article 6(1) and Article 6(3) is not yet settled. The Prosecution agrees to the extent of noting that in paragraphs 686 to 687 of the Prosecution Appeal Brief, it is argued that a Trial Chamber does in fact have the discretion to convict an accused under both Article 6(1) and Article 6(3) in respect of the same conduct. Paragraph 9.11 of the Kanu Response Brief acknowledges this.

10.10 The Prosecution accepts that the Trial Chamber has the discretion to adopt the approach that the Trial Chamber in principle purported to take in this case. Under this approach, where an accused is found to satisfy the elements of both Article 6(1) and Article 6(3) in respect of the *same* conduct, a conviction is

entered under Article 6(1) only, with the additional Article 6(3) responsibility being taken into account in sentencing.

10.11 The Prosecution submits, however, that where an accused satisfies the elements of Article 6(1) only in respect of certain conduct, and the elements of Article 6(3) only in respect of *separate* conduct, the Trial Chamber errs in law, or commits a procedural error, if it enters a sentence that fails completely to reflect the individual responsibility of the accused in respect of the latter. Contrary to what is suggested in paragraph 9.11 of the Kanu Response Brief, such a result would not "reflect the overall culpability of the Accused".

10.12 Contrary to what is asserted in paragraphs 9.13 to 9.16 of the Kanu Appeal Brief, the Prosecution is not merely challenging the way in which the Trial Chamber exercised its discretion. The Prosecution submits that the Trial Chamber's discretion was exercised on the basis of an erroneous understanding of the law, and was therefore an error of law or a procedural error. The Trial Chamber took the view that it could convict an accused on an *entire count* under Article 6(1) only, even though the crimes encompassed within that count included certain crimes for which the accused was found to be individually responsible under Article 6(3) only. The Prosecution submits that this is incorrect in law. Alternatively, the Prosecution submits that because the Trial Chamber in taking this view brought about a result that was unreasonable, there was a discernible error in the exercise of the Trial Chamber's discretion.[85] This is because the result reached by the Trial Chamber fails completely to reflect the individual responsibility of the accused in respect of certain crimes and does not reflect the overall culpability of the Accused.

10.13 As to paragraph 9.17 of the Kanu Response Brief, it is submitted that this error of the Trial Chamber does invalidate the Trial Chamber's decision, for the reasons given. Whether or not recording an additional conviction under Article 6(3) in respect of certain counts would lead to an increase in sentence (as to which see Part 11 below), the result in this case is that the convictions formally entered by the Trial Chamber do not fully reflect the findings in the Trial

[85] **Prosecution Appeal Brief**, para. 702.

Chamber's Judgement in respect of the individual responsibility of the Accused. On the logic of the Kanu Response Brief, the Trial Chamber could have entered a formal conviction on only one of the counts, but have taken the Accused's responsibility for the crimes in the other counts into account in sentencing. The Prosecution submits that this cannot be correct. Where the Trial Chamber finds an accused guilty on a given number of counts, the disposition of the judgement must record formal convictions on all of those counts, and any failure to do so is an error invalidating the judgement. The Prosecution further submits that where an accused is found individually responsible for a certain crime under Article 6(3) only, the disposition of the Trial Chamber's judgement must formally record a conviction for that crime. It cannot be said that the accused's responsibility for such a crime is somehow reflected in a conviction in respect of separate crimes under Article 6(1). In short, the Prosecution submits that it is a legal error invalidating the judgement if the judgement does not formally record convictions for all of the crimes of which the Trial Chamber has found the accused to be guilty.

10.14 Paragraphs 9.19 and 9.20 of the Kanu Response Brief argue that there are no precedents in international criminal law dealing with this particular situation. That may be so. It may be that the Appeals Chamber of the Special Court is deciding this question for the first time. The Prosecution submits that if this is so, the Appeals Chamber should determine the question in accordance with logic and principle. It is submitted that this leads to the conclusion contended for by the Prosecution.

11. Submissions regarding sentences

11.1 Various paragraphs in all three Response Briefs argue that even if the Prosecution's Grounds of Appeal are allowed, this should not lead to an increase in the sentences imposed on the Accused.

11.2 For instance, paragraph 9.9 of the Kanu Response Brief argues that it is an "erroneous belief that the mere entry of additional cumulative convictions

would necessarily result in an increase in penalty imposed", and that "Case law on the point indicates that the issue is not so much a question of the number of convictions entered as it is about ensuring that the penalty imposed reflects the overall culpability of the offender so that it is both just and appropriate".

11.3 The Prosecution accepts this as a matter of principle. The addition of cumulative convictions will not *necessarily* result in an increase in penalty, but it may well do so. The question is whether the additional cumulative convictions have in fact increased the overall culpability of the offender, so that an increase in sentence is both just and appropriate.

11.4 The Prosecution has addressed this issue in its Response Brief, in response to Kanu's Eighth Ground of Appeal.[86] The Prosecution accepts that a convicted person cannot be punished more than once in respect of the same conduct. However, conduct that satisfies the elements of more than one crime within the jurisdiction of the Special Court is graver than conduct which satisfies the elements of only one crime, and this should be reflected in sentencing.[87] Similarly, conduct that satisfies the elements of more than one mode of liability is graver than conduct which satisfies the elements of only one mode of liability, and this should be reflected in sentencing. It is generally accepted that where the conduct of an accused satisfies more than one mode of liability in respect of a single crime, the accused may be convicted on one mode of liability, with the other modes of liability being taken into account in sentencing.[88] Permissible multiple convictions must be taken into account properly in the overall assessment of the *totality* of the culpable conduct, to reflect the gravity of the offences and the overall culpability of the offender.

11.5 This is not to say that a person convicted of more than one crime in respect of the same conduct should receive a sentence that is the combined total of the individual sentences that would have been imposed in respect of each of those

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[86] See **Prosecution Response Brief**, paras. 3.52-3.53.

[87] **Prosecution's Sentencing Brief**, para. 85. This is reinforced by the fact that consecutive sentences in case of cumulative charges and convictions appear to be possible, See **Jones and Powles**, para. 8.3.15: "The Chamber would only have had to clarify the matter if it had wished to impose consecutive sentences under Rule 101 (C), since that would only appear to be permissible where charges are cumulative."

[88] See **Prosecution Appeal Brief**, paras. 45-49.

crimes considered in isolation. However, in determining the appropriate sentence in respect of that conduct, the Trial Chamber should take into account that the conduct in question satisfied the elements of more than one crime, or more than one mode of liability, within the jurisdiction of the Special Court.

11.6 The Prosecution submits that following the determination of all of the grounds of appeal of all of the parties in this case, it will be a matter for the Appeals Chamber (or the Trial Chamber, if the matter is remitted to the Trial Chamber) to determine to what extent the overall criminal responsibility of each Accused differs from the overall criminal responsibility of that Accused as found in the Trial Chamber's Judgement, and to determine whether this difference in overall criminal responsibility requires an amendment of the sentence.

11.7 It is however submitted that if all of the Grounds of Appeal of the Prosecution are upheld, this will very significantly increase the overall totality of the culpable conduct of each Accused, and it is submitted that this should lead to a significant increase in sentence.

12. Conclusion

12.1 For the reasons given in the Prosecution Appeal Brief, and the reasons above, all of the Prosecution's Grounds of Appeal should be allowed.

Filed in Freetown,
9 October 2007
For the Prosecution,

Christopher Staker
Deputy Prosecutor

APPENDIX

LIST OF CITED AUTHORITIES AND DOCUMENTS

1. Documents in this Case

(i) Decisions, Orders and Judgements

Rule 98 Decision	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16-469, "Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98" Trial Chamber, 31 March 2006
Sentencing Judgement	*Prosecutor v. Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* , SCSL-04-16-T-624, "Sentencing Judgement", Trial Chamber, 19 July 2007
Trial Chamber's Judgement	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007, as revised pursuant to the Corrigendum issued by the Trial Chamber on 19 July 2007 (SCSL-16-T-628, Registry page nos. 23675-23678)

(ii) Other documents

***Brima* Appeal Brief**	Prosecutor v. *Brima, Kamara, Kanu*, SCSL-16A-650, "Brima Final Appeal Brief, 13 September 2007
***Brima* Response Brief**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16A-660, "Brima Response to Prosecution Appeal Brief", 4 October 2007
***Kamara* Appeal Brief**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16A-649, "Kamara Appeal Brief", 13 September 2007
***Kamara* Response Brief**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-16A-657, "Kamara Response to Prosecution Appeal Brief", 4 October 2007
***Kanu* Appeal Brief**	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-16A-647, "Kanu's Submissions to Grounds of Appeal", 13 September 2007

***Kanu* Response Brief**	*Prosecutor v. Brima, Kamara, Kanu,* SCSL-16-658, "Respondent's Submissions—Kanu Defence", 4 October 2007
Prosecution Appeal Brief	Prosecutor v. *Brima, Kamara, Kanu,* SCSL-16A-648, "Appeal Brief of the Prosecution", 13 September 2007
Prosecution Response Brief	Prosecutor v. *Brima, Kamara, Kanu,* SCSL-16A-659, " Public Response Brief of the Prosecution", 4 October 2007

2. Other SCSL Case Law and Documents

***Sesay* Preliminary Motion Decision**	Prosecutor v. *Issa Hassan Sesay,* SCSL-2003-05-PT-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment" Trial Chamber, 13 October 2003.

3. ICTY Case Law and Documents

***Aleksovski* Trial Judgement**	*Prosecutor v. Aleksovski*, IT-95-14/1-T, "Judgement", Trial Chamber, 25 June 1999 http://www.un.org/icty/aleksovski/trialc/judgement/index.htm
***Blagojević and Jokić* Trial Judgement**	*Prosecutor v Blagojević and Jokić,* IT-02-60-T, "Judgement", 17 January 2005 http://www.un.org/icty/blagojevic/trialc/judgement/index.htm
***Blaškić* Appeal Judgement**	*Prosecutor v. Blaškić,* IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 http://www.un.org/icty/blaskic/appeal/judgement/index.htm
***Blaškić* Trial Judgement**	*Prosecutor v. Blaškić,* IT-95-14-T, "Judgement", Trial Chamber, 3 March 2000 http://www.un.org/icty/blaskic/trialc1/judgement/index.htm
***Brđanin and Talić* Amended Indictment Decision**	*Prosecutor* v. *Brđanin and Talić,* IT-99-36-PT, "Decision on Form of Third Amended Indictment", Trial Chamber, 21 September 2001 (Attached as annex)
***Brđanin* Appeal Judgement**	Prosecutor v. *Brdjanin,* IT-99-36, "Judgement", Appeals Chamber, 3 April 2007

	http://www.un.org/icty/brdjanin/appeal/judgement/brd-aj070403-e.pdf
***Brđanin* Trial Judgement**	*Prosecutor v. Brđanin*, IT-99-36-T, "Judgement", Trial Chamber, 1 September 2004 http://www.un.org/icty/brdjanin/trialc/judgement/index.htm
***Čelebići* Appeal Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 http://www.un.org/icty/celebici/appeal/judgement/index.htm
***Čelebići* Trial Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, "Judgement", Trial Chamber, 16 November 1998 http://www.un.org/icty/celebici/trialc2/judgement/index.htm
***Furundžija* Appeal Judgement**	*Prosecutor v. Furundžija,* IT-95-17/1, "Judgement", Appeals Chamber, 21 July 2000 http://www.un.org/icty/furundzija/appeal/judgement/index.htm
***Galić* Trial Judgement**	*Prosecutor v. Galić,* IT-98-29-T, "Judgement and Opinion", Trial Chamber, 5 December 2003 http://www.un.org/icty/galic/trialc/judgement/index.htm
***Hadžihasanović* Trial Judgement**	*Prosecutor v. Hadzihasanović et al.*, IT-01-47, "Judgement", Trial Chamber, 15 March 2006 http://www.un.org/icty/hadzihas/trialc/judgement/had-judg060315e.pdf
***Halilović* Trial Judgement**	*Prosecutor v. Halilović,* IT-01-48-T, "Judgement", Trial Chamber, 16 November 2005 http://www.un.org/icty/halilovic/trialc/judgement/index.htm
***Jelisić* Trial Judgement**	*Prosecutor v. Jelisić*, IT-95-10, "Judgement", Trial Chamber, 14 December 1999 http://www.un.org/icty/jelisic/trialc1/judgement/index.htm
***Kordić* Appeal Judgement**	Prosecutor v. *Kordić and Čerkez*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004 http://www.un.org/icty/kordic/appeal/judgement/index.htm
***Kordić* Trial Judgement**	Prosecutor v. *Kordić and Čerkez*, IT-95-14/2, "Judgement", Trial Chamber, 26 February 2001 http://www.un.org/icty/kordic/trialc/judgement/index.htm
***Krnojelac* Appeal Judgement**	*Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003

	http://www.un.org/icty/krnojelac/appeal/judgement/index.htm
***Krajisnik* Trial Judgement**	*Prosecutor v. Krajisnik and Plavsić*, IT-00-39-T, "Judgement," Trial Chamber, 27 September 2006 http://www.un.org/icty/krajisnik/trialc/judgement/kra-jud060927e.pdf
***Krnojelac* Appeal Judgment**	*Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003 http://www.un.org/icty/krnojelac/appeal/judgement/index.htm
***Krnojelac* Trial Judgment**	*Prosecutor v. Krnojelac*, IT-97-25-T, "Judgement", Trial Chamber, 15 March 2002 http://www.un.org/icty/krnojelac/trialc2/judgement/index.htm
***Kupreškić* Trial Judgement**	*Prosecutor v. Kupreškić et al.*, IT-95-16-T "Judgement", Trial Chamber, 14 January 2000 http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm
***Kvočka* Appeal Judgement**	*Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement" Appeals Chamber, 28 February 2005 http://www.un.org/icty/ Kvočka /appeal/judgement/index.htm
***Kvočka* Trial Judgement**	*Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement" Trial Chamber, 2 November 2001 http://www.un.org/icty/kvocka/trialc/judgement/index.htm
***Limaj* Trial Judgement**	*Prosecutor v. Limaj et al.*, IT-03-66-T, "Judgement", Trial Chamber, 30 November 2005. http://www.un.org/icty/limaj/trialc/judgement/index.htm
***Milutinović* JCE Decision**	Prosecutor v. Milutinović, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Appeals Chamber, 21 May 2003 http://www.un.org/icty/milutinovic/appeal/decision-e/030521.pdf
***Naletilić and Martinović* Appeal Judgement**	*Prosecutor v. Naletilić and Martinović*, IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006 http://www.un.org/icty/naletilic/appeal/judgement/index.htm
***Naletilić and Martinović* Trial Judgement**	*Prosecutor v. Naletilić and Martinović*, IT-98-34-T, "Judgement", Trial Chamber, 31 March 2003 http://www.un.org/icty/naletilic/trialc/judgement/index.htm
Orić	*Prosecutor v. Orić*, IT-03-68-A, "Judgement" 30 June 2006

Trial Judgement	http://www.un.org/icty/oric/trialc/judgement/ori-jud060630e.pdf
***Simić* Trial Judgement**	Prosecutor v. *Simić*, IT-95-9, "Judgement", Trial Chamber, 17 October 2003 http://www.un.org/icty/simic/trialc3/judgement/index1.htm
***Stakić* Appeal Judgement**	Prosecutor v. *Stakić*, IT-97-24-A, "Judgement" Appeals Chamber, 22 March 2006 http://www.un.org/icty/stakic/appeal/judgement/index.htm
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***Strugar* Trial Judgement**	Prosecutor v. *Strugar*, IT-01-42-T, "Judgement", Trial Chamber, 31 January 2005 http://www.un.org/icty/strugar/trialc1/judgement/index2.htm
***Tadić* Judgement in Sentencing Appeals**	*Prosecutor v. Tadić*, IT-94-1-A, "Judgement in Sentencing Appeals", Appeals Chamber, 26 January 2000 http://www.un.org/icty/tadic/appeal/judgement/index_2.htm
***Tadić* Trial Judgement**	*Prosecutor v. Tadić*, IT-94-1-T, "Opinion and Judgement", Trial Chamber, 7 May 1997 http://www.un.org/icty/tadic/trialc2/judgement/index.htm
***Vasiljević* Appeal Judgement**	*Prosecutor v. Vasiljević*, IT-98-32-A, "Judgement", Appeal Chamber, 25 February 2004 http://www.un.org/icty/vasiljevic/appeal/judgement/index.htm

4. ICTR Case Law and Documents

***Bagilishema* Appeal Judgement**	Prosecutor v. *Bagilishema*, ICTR-95-1A-A, "Judgement", Appeals Chamber, 3 July 2002 http://69.94.11.53/ENGLISH/cases/Bagilishema/decisions/030702.htm
***Bagilishema* Trial Judgement**	Prosecutor v. *Bagilishema*, ICTR-95-1A-T, "Judgement", Trial Chamber, 3 July 2002

	http://69.94.11.53/ENGLISH/cases/Bagilishema/judgement.htm
***Bagosora* 18 September 2006 Appeal Decision**	Prosecutor v. *Bagosora et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", Appeals Chamber, 18 September 2006 http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/180906.htm
***Gacumbitsi* Appeal Judgement**	Prosecutor v. *Gacumbitsi*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006 http://69.94.11.53/ENGLISH/cases/Gachumbitsi/judgement/judgement_appeals_070706.pdf
***Kajelijeli* Trial Judgement**	Prosecutor v. *Kajelijeli,* ICTR-98-44A, "Judgement and Sentence", Trial Chamber, 1 December 2003 http://69.94.11.53/ENGLISH/cases/Kajelijeli/judgement/031201-TC2-J-ICTR-98-44A-T-JUDGEMENT%20AND%20SENTENCE-EN_.pdf
***Kambanda* Appeal Judgement**	*Kamuhanda* v. Prosecutor, ICTR-99-54-A, "Judgement", Appeals Chamber, 19 September 2005 http://69.94.11.53/ENGLISH/cases/Kamuhanda/judgement/Appeals%20Judgement/Kamuhanda190905.pdf
***Kamuhanda* Judgement**	Prosecutor v. *Kamuhanda*, ICTR-95-54A-T, "Judgement", Trial Chamber, 22 January 2004 http://69.94.11.53/ENGLISH/cases/Kamuhanda/judgement/220104.htm
***Kayishema* Trial Judgement**	Prosecutor v. *Kayishema,* ICTR-95-1-T, "Judgement and Sentence", Trial Chamber, 21 May 1999 http://69.94.11.53/ENGLISH/cases/KayRuz/judgement.htm
***Mpambara* Trial Judgement**	Prosecutor v. *Mpambara,* ICTR-01-65-T "Judgement", Trial Chamber, 12 September 2006 http://69.94.11.53/ENGLISH/cases/Mpambara/judgement/120906.pdf

***Niyitegeka* Appeal Judgement**	Prosecutor v. *Niyitegeka,* ICTR-96-14-A, "Judgement", Appeals Chamber, 9 July 2004 http://69.94.11.53/ENGLISH/cases/Niyitegeka/judgement/NIYITEGEKA%20APPEAL%20JUDGEMENT.doc
***Ntakirutimana* Appeal Judgment**	Prosecutor v. *Ntakirutimana,* ICTR-96-10-A and ICTR-96-17-A, "Judgement", Appeals Chamber, 13 December 2004 http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/judgement/Arret/Index.htm

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Jones and Powles	John R.W.D. **Jones** and Steven **Powles**, *International Criminal Practice*, Oxford University Press, 2003 (See **Annex C** of Prosecution Response Brief filed on 4 October 2007).

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case: IT-99-36-PT

Date: 21 September 2001

Original: English

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar: Mr Hans Holthuis

Decision of: 21 September 2001

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIĆ

DECISION ON FORM OF THIRD AMENDED INDICTMENT

The Office of the Prosecutor:

Ms Joanna Korner
Mr Andrew Cayley
Mr Nicolas Koumjian
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brđanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talić

1. The prosecution has now filed the fourth version of its indictment in this case.[1] This was in response to the decision of the Trial Chamber in relation to the third version, in which a number of defects in its form were demonstrated.[2] The accused Momir Talić ("Talić") has now filed an objection to the form of the Current Indictment.[3]

2. The prosecution did not at first file a response to that Motion,[4] but did so – when reminded – some days late.[5] Talić has pointed out that no request has been made by the prosecution for any extension of time,[6] but he does not suggest that the Trial Chamber should for that reason ignore the Response which was filed. In any event, as the English translation of the Motion was filed during the Tribunal's official court recess, sufficient good cause has been shown for recognising this Response as having been validly filed. Although courtesy demands that the prosecution should at least have complied with the terms of Rule 127 of the Tribunal's Rules of Procedure and Evidence ("Rules") by seeking such an order by way of motion, the Response is recognised as having been validly filed.

3. There have now been a large number of decisions given in which the nature of these proceedings, and of the charges laid, has been fully explained. It is unnecessary to repeat what has already been said. The Current Indictment has not altered the charges laid, nor has it significantly added to the material facts pleaded. It is convenient, therefore, to turn to the issues raised by Talić in his Motion.

4. In the June 2001 Decision, the Trial Chamber made the following order:[7]

> The prosecution, if such be its case, is ordered to plead expressly that Momir Talić is criminally responsible for the crimes committed by units of the 1st Krajina Corps outside its geographical area of responsibility, upon the basis that he was in effective control of those units when they did so, and to identify with sufficient detail the areas outside that geographical area where, it is alleged, the units of the 1st Krajina Corps committed such crimes.

The background to that order is discussed at pars 15-17 of that Decision.

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1 Third Amended Indictment, 16 July 2001 ("Current Indictment").
2 Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("26 June 2001 Decision").
3 Preliminary Motion Based on the Defects in the Form of the Indictment of 16 July 2001, 30 July 2001 ("Motion").
4 The English translation was filed on 16 August 2001, so that the time for a response expired on 30 August 2001: Order for Filing Motions, 31 Aug 1999, as varied by the Decision on Motion to Translate Procedural Documents into French, 16 Dec 1999, par 5.
5 Prosecution's Response to "Preliminary Motion Based on the Defects in the Form of the Indictment of 16 July 2001" Filed by the Accused Momir Talić, 4 Sept 2001 ("Response").
6 Memorandum on the Prosecutor's Response of 4 September 2001, 6 Sept 2001, par 3.
7 26 July 2001 Decision, par 81(2).

5. In the Current Indictment, the prosecution has pleaded that Talić, as Commander of the 1st Krajina Corps, directly or through other identified classes of persons commanded all units of that Corps and units attached to it, that he directly controlled the work of the Corps Command and that he was responsible for the overall state and conduct of the Corps.[8] The area defined as the geographical area of the Corps' responsibility is alleged to have "evolved" in 1992. All but two of the municipalities which formed the ARK as defined in par 4 of the indictment are alleged to have fallen directly within that area of responsibility of the Corps, or to have been included within that area as it expanded in 1992 or to have been municipalities where units of the Corp operated in 1992.[9] Three particular additional municipalities are identified as places where the Corps operated during 1992 and as being outside that defined geographical area of the responsibility of the Corps (Bosanska Krupa, Bosanski Novi and Ključ).[10] The indictment alleges that Talić, as the Commander of the JNA 5th Corps/1st Krajina Corps and as a member of the ARK Crisis Staff, used forces under his command, in co-ordination at times with police, paramilitary units, forces from other JNA/VRS Corps, and other civilian bodies, to carry out a plan to establish and secure a Serb state and to separate the ethnic communities in Bosnia and Herzegovina.[11] Talić is also alleged to have been personally responsible for ensuring that units under his command respected and applied the rules of international law governing the conduct of warfare.

6. Talić complains in his Motion that the Current Indictment still remains insufficiently precise. Although Talić accepts that he may be criminally responsible in his capacity as Commander of the 1st Krajina Corps for acts of individuals over whom he had effective control, irrespective of where the acts were committed, he claims that the indictment seeks to make him responsible for crimes "supposed to have been committed outside *his* area of responsibility".[12] That is not a correct interpretation of the indictment. The allegation is that the 1st Krajina Corps acted outside the area defined as *its* geographical area of responsibility, but it is also specifically alleged that Talić was responsible for those acts. Sufficient particularity is provided for that allegation in the passages from the Current Indictment to which reference is made in par 5, *supra*.

7. Talić also complains that the Current Indictment has merely alleged that the crimes were committed by the "Bosnian Serb forces", defined (in par 8) as the army, the paramilitaries, the

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[8] Current Indictment, par 20.
[9] *Ibid*, par 23.
[10] *Ibid*, par 23.1.
[11] *Ibid*, par 24.
[12] Motion, par I.1. (The emphasis has been added.)

territorial defence, the police units and the civilians armed by those forces, and that it does not state which units committed which crimes in the three additional municipalities in which the Corps is alleged to have operated,[13] or when each such municipality fell within the area of responsibility of the 1st Krajina Corps.[14]

8. The prosecution, however, seeks to make Talić responsible for these crimes not only as the Commander of the 1st Krajina Corp but also as a member of the ARK Crisis Staff. Whether or not it has sufficiently identified in the Current Indictment the basis upon which he is alleged to be responsible as a member of the ARK Crisis Staff for actions done as a result of its decisions is the subject of a separate complaint, to be dealt with shortly. If the prosecution succeeds in demonstrating this second basis of responsibility, it would appear to demonstrate the responsibility of Talić for not only the acts of the 1st Krajina Corps but also for those of the other "Bosnian Serb forces". If the prosecution does not succeed in demonstrating this second basis of responsibility, it may well be unable to demonstrate his responsibility for the acts of the other "Bosnian Serb forces".[15] That is a problem which may arise at the trial, but it does not give rise to a defect in the *form* of the indictment. If the information which Talić seeks is not apparent from the witness statements made available by the prosecution to the accused in accordance with Rule 66(A), his remedy is to request the prosecution to supply particulars of the statements upon which it relies to prove the specific material facts in question. If the prosecution's response to that request is unsatisfactory, then and only then, he may seek an order from the Trial Chamber that such particulars be supplied.[16]

9. The complaints in relation to the prosecution's response to the order made in par 81(2) of the 26 July 2001 Decision are rejected.

10. The Trial Chamber also made this order in that Decision:[17]

> The prosecution is ordered to identify with some precision in its indictment the basis or bases upon which it seeks to make Momir Talić criminally responsible as a member of the Crisis Staff of the Autonomous Region of Krajina.

The background to this order is discussed at pars 20-21 of that Decision. It was pointed out that, if the prosecution case was limited (as it appeared then to be) to the fact that Talić merely

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[13] *Ibid*, par I.1.
[14] *Ibid*, par I.2.
[15] 26 June 2001 Decision, par 20.
[16] Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb 2001, par 50; 26 June 2001 Decision, par 19.
[17] 26 June 2001 Decision, par 81(3).

implemented the policies of the ARK Crisis Staff as the Commander of the 1st Krajina Corps, there may well be a problem for the prosecution in establishing the responsibility of Talić for crimes committed by persons who were not under his authority as such Commander. It was also pointed out that, if it were part of the prosecution case that Talić participated in the decisions of the ARK Crisis Staff, this is a material fact which must be pleaded expressly.[18]

11. The prosecution has claimed that its response to this order is to be found in par 20.1 of the Current Indictment.[19] There is no allegation in par 20.1 that Talić participated in the decisions of the ARK Crisis Staff, so that (in these circumstances) both Talić and the Trial Chamber should have been entitled to assume that the prosecution either cannot establish that fact or does not intend to lead any evidence of that fact.

12. Paragraph 20.1 states:

> 20.1 As Commander of the 1st Krajina Corps, General Momir Talić's membership of the ARK Crisis Staff and his implementation of its decisions aided and abetted the fulfillment of its policies.

It is difficult to understand what was meant by this paragraph as a matter of ordinary English usage. The most that can be made out of it is that Talić's membership of the ARK Crisis Staff and his implementation of its policies as the Commander of the 1st Krajina Corps aided and abetted the ARK Crisis Staff in the fulfillment of its policies. Such a statement gives no clear idea of the basis upon which the prosecution seeks to make Talić criminally responsible *as a member of the ARK Crisis Staff,* as opposed to as the Commander of the 1st Krajina Corps. It is ambiguous in many ways:

(i) Is the initial clause "As Commander of the 1st Krajina Corps" intended to govern both Talić's membership of the ARK Crisis Staff and his implementation of its decisions?

(ii) Is it to be established that he implemented its decisions otherwise than as the Commander of the 1st Krajina Corps?

(iii) Is it being alleged that Talić's membership of the ARK Crisis Staff, without more, made him *individually* responsible for actions taken to implement its decisions by persons other than members of the 1st Krajina Corps?

Paragraph 20.1 provides no answer to the problems as to just how Talić is alleged to be responsible for the acts of persons who were not under his authority as the Commander of the 1st Krajina Corps. An indictment cannot be permitted to contain so many unanswered ambiguities, to be resolved at

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[18] *Ibid*, par 20.

[19] Document accompanying the Current Indictment, 16 July 2001, par 3.

the trial only according to how the prosecution's case may turn out in the course of the evidence. An accused person is entitled to know in advance of the trial the nature of the case he has to meet. The Current Indictment manifestly does not satisfy that entitlement upon this issue.

12. An attempt was made at the recent Status Conference to elicit from the prosecution's Senior Trial Attorney just what the prosecution case is to be in relation to this issue. Notwithstanding the failure of the prosecution to comply with the order, made in the 26 June 2001 Decision, to plead as a material fact that Talić participated in the decisions of the ARK Crisis Staff if that were part of the prosecution case, it was stated by counsel that Talić did attend some meetings of the Crisis Staff and that, if he were not present, other members of his staff attended (presumably in his place).[20] Counsel was unable to state whether it was part of the prosecution case that Talić implemented any of the decisions of the ARK Crisis Staff otherwise than as the Commander of the 1st Krajina Corps,[21] but she offered this statement of the prosecution case:[22]

> [...] our case will be that in order for the regional Crisis Staff in the autonomous region of Krajina to have the full authority, it required to have on its committee, as it were – one put it that way – on the Crisis Staff, the man in command of the armed forces for that area, and that by joining the ARK Crisis Staff, Talić lent his authority to that of the Crisis Staff as a whole.

She pointed out that Talić did not remove himself from the Crisis Staff or not attend.[23] She added:[24]

> We rely on his membership to add weight to it [the ARK Crisis Staff], but then assisting in carrying out the decisions which required military involvement.

And again:[25]

> Membership of this particular governmental body [ARK Crisis Staff] gave it – it was because it contained all the leading, as it were, figures from all walks of life, gave it the authority to have its decisions carried out.

And finally:[26]

> [Talić] Allowed his name to be used to give weight to the decisions which were then carried out, and therefore allied himself with those decisions.

13. Counsel obviously had some difficulty in formulating the prosecution's case, and it may be that it could be more clearly expressed after some greater thought is given to it. The Trial Chamber makes it clear once more that it regards a statement of the basis or bases upon which the prosecution

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[20] Status Conference, 6 Sept 2001, Transcript p 361.
[21] *Ibid*, p 363.
[22] *Ibid*, p 363.
[23] *Ibid*, p 364.
[24] *Ibid*, p 364.
[25] *Ibid*, p 365.
[26] *Ibid*, p 365.

seeks to make Talić criminally responsible as a member of the Crisis Staff of the Autonomous Region of Krajina as a material fact which *must* be pleaded in the indictment. The prosecution is directed once more to plead such a statement in the indictment, so that the issue at the trial is a clear one. If the prosecution does not do so this time, it will be called upon to show cause why the whole of its case relating to Talić's membership of that Crisis Staff should not be struck out.

14. Talić asserts that mere membership of a Crisis Staff is neutral. He says that the body was of a type adopted throughout Bosnia for organising the various territories when a crisis arose, and that such membership becomes relevant only where it can be demonstrated that he was responsible in some way for the policies which it laid down.[27] This is the same point as that raised by the Trial Chamber in the 20 February Decision, and it should largely be answered by the amendments ordered to be made to the Current Indictment. Whether or not the prosecution case as outlined at the recent Status Conference would be sufficient in law to establish Talić's individual responsibility is not a suitable issue to be determined in an objection to the *form* of the indictment.

15. After two unsuccessful attempts to plead its common purpose case, the prosecution has finally settled upon a case in which the criminal object of the joint criminal enterprise is alleged to be the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian State by the commission of all the crimes charged in the indictment except the second count (complicity in genocide) – although it does include the first count (genocide).[28] Counsel for the prosecution suggested that the logic of the inclusion of one but not the other of the counts involving genocide is that there cannot be a common purpose to be complicit in genocide.[29] Whatever one may make of that explanation, if there be an illogicality its existence does not, in this present case, provide a defect as to the *form* of the indictment.

16. The 26 June 2001 Decision required the prosecution, in the event that it relied upon *any* of the crimes charged in the indictment as falling within the object of the joint criminal enterprise, to plead that the accused had the state of mind required for that crime.[30] The prosecution asserts that it has complied with that order by the inclusion of pars 27.1-27.4 of the Current Indictment, which incorporate pars 17-26. Paragraph 27.1 contains this very general statement:

> The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Count 1 and Counts 3 to 12 inclusive. **Radoslav**

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[27] Motion, par II.
[28] Current Indictment, par 27.1.
[29] Status Conference, 6 Sept 2001, Transcript p 367.
[30] 26 June 2001 Decision, par 81(4)(b).

> **BRĐANIN** and **Momir TALIĆ** and the other participants in the joint criminal enterprise each shared the intent and state of mind required for the commission of each of these crimes.

Talić complains that this is not a compliance with the order which was made.[31] He says that the indictment must charge him, for example, as having the specific intention to destroy in whole or in part a national, ethnical, racial or religious group as such, in support of the common purpose to commit genocide.[32]

17. Counsel for the prosecution first responded by asserting that the jurisprudence of the Tribunal permits the prosecution to plead only the material facts without reference to the state of mind required for any particular crime.[33] She did not identify the decision upon which she relied, but there was no appeal by the prosecution against the order made by this Trial Chamber that it plead that the accused had the state of mind required for each of the crimes which are alleged to fall within the common purpose.[34] Then counsel asserted that the prosecution had indeed pleaded such a state of mind in par 36 of the Current Indictment. The relevant part of that paragraph is in the following terms:

> [...] **Radoslav BRĐANIN** and **Momir TALIĆ** acting individually or in concert with each other and also with others in the Bosnian Serb leadership, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a campaign designed to destroy Bosnian Muslims and Bosnian Croats, in whole or in part, as national, ethnical, racial or religious groups, as such [...]

The reference to the "*campaign* being *designed* to destroy [etc]" is not necessarily an allegation that Talić had the relevant intention, although this may be yet another illustration of poor pleading. The prosecution would have perhaps been wiser to point to par 28 (in the "General Allegations" section), which states:

> All acts or omissions charged as Genocide or Complicity in Genocide, were committed with intent to destroy, in whole or in part, Bosnian Muslims and Bosnian Croats, a national, ethnical or religious group, as such.

One problem here is that par 28 is not incorporated by reference in par 27.1. Another is that it does not unequivocally state that Talić had this intention, as the prosecution was ordered to state.

18. Whatever one may think of these references to the genocide count, there is no identification anywhere of the state of mind required for the other crimes which are alleged to have fallen within

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[31] Motion, pars III.5-6.

[32] *Ibid*, pars III.5-6. See *Prosecutor v Jelisić*, Case IT-95-10-A, Judgment, 5 July 2001, pars 44-45.

[33] Status Conference, 6 Sept 2001, Transcript p 368.

[34] It would seem that counsel was referring to *Prosecutor v Kordić*, Case IT-95-14/2-PT, Decision on Defence Application for Bill of Particulars, 2 Mar 1999, par 8. But, where the state of mind is an ingredient of the crime to be proved, that state of mind is itself a material fact, and it must be pleaded. The issue is discussed in the 26 June 2001 Decision, at par 33.

the common purpose. For example, a discriminatory intent is an indispensable ingredient for the crime of persecution (Count 3),[35] but such an allegation is nowhere to be found in relation to Talić in the Current Indictment.[36] Another example is in relation to wilful killing (Count 5), where the act causing the death of the victim must be shown to have been done with an intention (a) to kill, or (b) to inflict grievous bodily harm, or (c) to inflict serious injury in the reasonable knowledge that such act or omission was likely to cause death.[37] That allegation is nowhere to be found in the Current Indictment either. It is unnecessary to multiply the examples further.

19. The very general allegation in par 27.1 is not sufficient. The prosecution must plead in terms the relevant state of mind required for each crime alleged to fall within the object of the joint criminal enterprise. The absence of such a material fact in relation to each of the crimes alleged to have fallen within the common purpose (other than, perhaps, genocide) is no mere technicality, and Talić is entitled to complain of the failure by the prosecution to comply with the order which was made. Although the facts and circumstances upon which the prosecution relies to establish such a state of mind are matters of evidence, and therefore need not be pleaded,[38] the state of mind itself is a material fact, and it *must* be pleaded.[39]

20. The prosecution has not complied with the order made by the Trial Chamber that it plead that the accused had the state of mind required for each of the crimes charged which are alleged to fall within the common purpose. Talić objects to the prosecution being given another chance to plead the indictment properly.[40] However, this Tribunal does not exist to punish a party's non-cooperation, even a party's recalcitrance such as the prosecution has been exhibiting in this case. The Tribunal exists in order to administer justice, and it must endeavour to do what is proper to ensure that the cases of *all* parties may be put forward – provided, of course, that the conduct of the

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[35] *Prosecutor v Tadić*, Case IT-94-1-A, Judgment [on Conviction Appeal], 15 July 1999, par 305.

[36] Paragraph 29 of the Current Indictment alleges: "All acts and omissions charged as Crimes against humanity were part of a widespread or systematic attack directed against the Bosnian Muslim and Bosnian Croat civilian populations of Bosnia and Herzegovina." This suffers from the same defects as the allegation in par 28: see par 17 of the text of this Decision, *supra*.

[37] There is no difference of consequence between the crimes of wilful killing and murder: *Prosecutor v Delalić et al* Case IT-96-31-T, Judgment, 16 Nov 1998, par 433. Many decisions of this Tribunal and of the ICTR have adopted a definition of murder which requires only one or two of these three states of mind. The relevant states of mind have nevertheless been expressed in this way, sometimes in differing terms but to substantially the same effect, in these decisions: *Prosecutor v Akayesu*, Judgment, Case ICTR-96-4-T, 2 Sept 1998, par 589; *Prosecutor v Delalić et al*, pars 424, 433-435, 439; *Prosecutor v Kayishema & Ruzindana*, Case ICTR-95-1-T, 21 May 1999, par 140; *Prosecutor v Rutaganda*, Case ICTR-96-3-T, 6 Dec 1999, par 80; *Prosecutor v Jelisić*, Judgment, Case IT-95-10-T, 14 Dec 1999, par 35; *Prosecutor v Musema*, Case ICTR-96-13-T, 27 Jan 2000, par 215; *Prosecutor v Blaškić*, Judgment, Case IT-95-14-T, 3 Mar 2000, pars 153, 181; *Prosecutor v Krstić*, Case IT-98-33-T, Judgment, 2 Aug 2001, par 485.

[38] 26 June Decision, par 33.

[39] *Ibid*, par 33.

[40] Motion, par V.

offending party does not, by that conduct, prejudice the other party. If the prosecution now does what it has been ordered to do, without further avoidance of its responsibilities, the accused are not prejudiced. However, if by reason of the failure of the prosecution once more to comply with the orders of the Trial Chamber in relation to the form of the indictment, the accused lose the benefit of the trial date fixed for January 2002, the prosecution cannot continue to be uncooperative with impunity. As stated at the recent Status Conference, if the trial does not commence in January, there is not presently another trial date available until September 2002. In those circumstances, it may become necessary for the Trial Chamber to take steps in order to avoid an abuse of the Tribunal's procedures.

21. Next, Talić complains that the Current Indictment is confused.[41] He points out that, in addition to pleading that all of the crimes charged (other than that in Count 2) fell within the object of the joint criminal enterprise, the prosecution has also pleaded:

(i) that the crimes charged in Counts 3 to 7 inclusive and Counts 10-12 inclusive "were also the natural and foreseeable consequences" of the acts upon which it relies for Counts 8 and 9 (which allege deportation, as a crime against humanity, and forcible transfer, as an inhumane act also amounting to a crime against humanity);[42]

(ii) that the accused were aware that these crimes were the possible consequence of those acts;[43] and

(iii) that, despite their awareness of the possible consequences, the two accused knowingly and wilfully participated in the joint criminal enterprise.[44]

Talić says, in effect, that the same crimes cannot both fall within the object of the joint criminal enterprise and go beyond the object of that enterprise but nevertheless be natural and foreseeable consequences of that enterprise.[45]

22. As a proposition of law, the proposition for which Talić contends would appear to be correct. There is, however, nothing to stop the prosecution from relying upon alternative cases, so that, if the Trial Chamber does not accept its principal case that the two accused intended the crimes charged in Counts 3 to 7 inclusive and Counts 10-12 inclusive (that is, a Category 1 joint criminal enterprise case), the prosecution relies in the alternative upon a case that the two accused intended the crimes charged in Counts 8 and 9 (as a Category 1 joint criminal enterprise case) and upon the

[41] *Ibid*, par III.7.
[42] Current Indictment, par 27.3.
[43] *Ibid*, par 27.3.
[44] *Ibid*, par 27.4.
[45] Motion, par III.7.

other counts as a Category 3 joint criminal enterprise case. The prosecution is in error to say (in par 27.3) that these were cumulative bases for criminal responsibility, but it may certainly rely upon them in the alternative. The indictment must be amended to make this clear.

23. There are other complaints made by Talić in relation to the form of the Current Indictment, but these are either repetitions of previous complaints which have earlier been rejected by the Trial Chamber or of such a nature that they do not warrant separate consideration.

Disposition

24. Accordingly, the prosecution is ordered:

(1) to plead as a material fact in the indictment a statement of the basis or bases upon which it seeks to make Momir Talić criminally responsible as a member of the Crisis Staff of the Autonomous Region of Krajina otherwise than by carrying out its decisions as the Commander of the 1st Krajina Corps;[46]

(2) to plead as a material fact that the accused had the relevant state of mind required for each crime alleged to fall within the object of the joint criminal enterprise, and to do so in terms;[47] and

(3) to make clear that the case put in par 27.3 is an alternative, not a cumulative, case.[48]

The amended indictment is to be filed within fourteen days of the date of this order.

Warning

25. Rule 72 gives to an accused thirty days in which to file a preliminary motion challenging the form of the indictment. Because the trial is presently fixed to commence in January 2002, if either of the accused seek to challenge the form of the new indictment to be filed by the prosecution as a result of this present decision, it is suggested that he does so with some expedition, and that he does not wait until that thirty day period is about to expire. If he does wait, complaints about the lateness of the indictment being settled will not be sympathetically received.

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[46] Paragraph 13, *supra*.
[47] Paragraphs 19-20, *supra*.
[48] Paragraph 22, *supra*.

Done in English and French, the English text being authoritative.

Dated this 21st day of September 2001,
At The Hague,
The Netherlands.

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]