SCSL-04-16-T
(17890 - 17991)

17890

469

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Mr. Lovemore Munlo
Date:	31 March 2006

PROSECUTOR	**Against**	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-T)

DECISION ON DEFENCE MOTIONS FOR JUDGEMENT OF ACQUITTAL PURSUANT TO RULE 98

Office of the Prosecutor:
Christopher Staker
James C. Johnson
Lesley Taylor
Karim Agha
Nina Jorgenson
James R. Hodes
Marco Bundi

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

CONTENTS

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Richard Lussick, presiding, Justice Teresa Doherty and Justice Julia Sebutinde;

SEISED of the Joint Legal Part of the Defence Motion for Judgement of Acquittal Under Rule 98 filed on 13 December 2005 ("Joint Legal Part"); the Brima Motion For Acquittal Pursuant to Rule 98 filed on 12 December 2005 ("Brima Motion"); the Defence Motion for Judgement of Acquittal of the Second Accused, Brima Bazzy Kamara filed on 12 December 2005 ("Kamara Motion") and the Kanu Factual Part Defence Motion for Judgement of Acquittal Under Rule 98 filed on 13 December 2005 ("Kanu Motion");

NOTING the Prosecution Response to Defence Motions For Judgement of Acquittal Pursuant to Rule 98, filed on 23 January 2006 ("Response");

NOTING the Joint Legal Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, filed on 30 January 2006 ("Joint Defence Reply"); the Brima Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, filed on 30 January 2006 ("Brima Reply"); the Kamara Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, filed on 30 January 2006 ("Kamara Reply"); and the Confidential Kanu Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, filed on 27 January 2006 ("Kanu Reply");

MINDFUL of the Scheduling Order on Filing of a Motion for Judgement of Acquittal issued by the Trial Chamber on 30 September 2005;[1]

MINDFUL of the provisions of the Statute of the Special Court for Sierra Leone ("the Statute"), in particular Articles 1, 2, 3, 4, 5, 6 thereof and the provisions of the Rules of Procedure and Evidence of the Special Court ("the Rules"), in particular Rule 98 as amended on 14 May 2005;

MINDFUL of the provisions of international instruments on International Humanitarian Law relating to armed conflict, war crimes and crimes against humanity;

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules.

I. PROCEDURAL BACKGROUND

1. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, the three Accused persons in this case, are jointly indicted and tried on a fourteen-Count Indictment that alleges offences relating to Crimes Against Humanity, Violations of Article 3 Common to the Geneva Conventions and to Additional Protocol II and other Serious Violations of International Humanitarian Law, in

---

[1] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Scheduling Order on Filing of a Motion for Judgement of Acquittal, 30 September 2005. ["Scheduling Order"]

violation of Articles 2, 3, and 4 of the Statute of the Special Court for Sierra Leone.[2]

2. Following indications that each of the Defence teams intended to file a motion for Judgement of Acquittal at the close of the case for the Prosecution, the Trial Chamber on 30 September 2005 issued a Scheduling Order containing guidelines for the filing of a Motion for Judgement of Acquittal pursuant to Rule 98 of the Rules.[3]

3. The Prosecution formally closed its case on 21 November 2005 after calling fifty-nine witnesses including three expert witnesses, and tendering 80 exhibits in evidence.

4. Following the closure of the case for the Prosecution, the Defence filed the Brima Motion and the Kamara Motion on 12 December 2005 within the time prescribed by the Trial Chamber. The Kamara Motion exceeded the page limit prescribed in the Scheduling Order by one and a half pages. The Kanu Motion and the Joint Legal Part were filed on 13 December 2005 outside that time. In its *Decision on Urgent Defence Request Under Rule 54 With Respect to Filing of Motion for Acquittal*[4] the Trial Chamber accepted the late filing of both the Kanu Motion and the Joint Legal Part in the interests of justice.

5. Similarly, in the interests of justice the Trial Chamber accepts the pleadings in the Kamara Motion. We would however, point out the correct procedure for correcting or curing a deficient filing and insist that in future, the Court Management Section should strictly comply with this procedure rather than accepting the deficient filing as they did in this case. Article 11 of the Practice Direction on Filing of Documents Before the Special Court for Sierra Leone provides as follows:

> **"Article 11- Deficient Submissions**
>
> (A) The Court Management Section shall be responsible for verifying compliance with the requirements laid down in Articles 4 to 9 of this Practice direction.
>
> (B) The Court Management Section shall inform the Party, State, organisation or person who submitted a deficient document of the deficiency and request that it be corrected. The Court Management Section shall file the document only after the mistakes have been corrected. If the corrected document is filed outside the time limits set out in the Rules as a result of the deficiency, such document shall be filed in accordance with Article 12 of this Practice Direction." [Emphasis added]

II. APPLICABLE STANDARD UNDER RULE 98 OF THE RULES

6. Rule 98 of the Rules, as amended on 14 May 2005, provides as follows:

---

[2] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Further Amended Consolidated Indictment, 18 February 2005. ["Indictment"]

[3] Scheduling Order *supra* note 1.

[4] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Decision on Urgent Defence Request under Rule 54 with Respect to Filing of Motion for Acquittal, 19 January 2006.

"Motion for Judgment of Acquittal

If after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts."

7. This provision is similar to the equivalent Rule 98bis of the ICTY Rules, as amended on 8 December 2004, which reads:

"Motion for Judgement of Acquittal

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction."

8. In our view, there is no contextual difference between "no evidence capable of supporting a conviction" and "evidence insufficient to sustain a conviction", which was the wording used in the ICTY Rule 98*bis* (B) prior to the above-mentioned amendment (and is still the wording used in ICTR Rule 98*bis*), and in respect of which a considerable body of jurisprudence has been developed. The plainer language of the amended form of the Rule leaves no doubt that what must be considered by the Trial Chamber is not the reliability or credibility of the evidence, but merely its capability of supporting a conviction. If one possible view of the facts might support a conviction, then the Trial Chamber cannot enter a judgement of acquittal.

9. The ICTY Trial Chamber in *Oric* stated that "the last amendment to Rule 98bis does not in any way change the standard of review to be applied by the Trial Chamber in its Rule 98bis exercise which therefore remains that set out and repeatedly applied by these Trial Chambers, set out in the *Jelisic Appeal Judgement*."[5]

10. In the following passage from the *Jelisic Appeal Judgement*, the ICTY Appeals Chamber enunciated the applicable standard of proof, which has since been applied by numerous international tribunals.[6]

"The reference in Rule 98bis to a situation in which 'evidence is insufficient to sustain a conviction' means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the Delalic appeal judgement, where it said: "[t]he test to be applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but

---

[5] *Prosecutor v. Oric*, ICTY IT-03-68, Oral Judgement, Transcripts, 8 June 2005, p. 8983.

[6] See for example *Prosecutor v. Simic et al.*, ICTY IT-95-9-T, Written Reasons for Decision on Motions for Acquittal, 11 October 2002, para. 8; *Prosecutor v. Naletelic and Martinovic*, ICTY IT-98-34-T, Decision on Motion for Acquittal, 28 February 2002, para. 10; *Prosecutor v. Galic*, ICTY IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002, para. 10.

> whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt."[7]

11. With regard to the need for the Trial Chamber to assume that the prosecution evidence is true for the purpose of making a determination under the Rule, it was said in *Bagasora*[8] that: "In assessing whether there is sufficient evidence upon which a reasonable trier of fact could, at the end of the trial, enter a conviction, the Chamber must 'assume that the prosecution's evidence [is] entitled to credence unless incapable of belief'.[9] Accordingly, the object of the inquiry under Rule 98bis is not to make determinations of fact having weighed the credibility and reliability of the evidence; rather, it is simply to determine whether the evidence – assuming that it is true – could not possibly sustain a finding of guilt beyond reasonable doubt. That will only be the case where there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief. To be incapable of belief, the evidence must be obviously incredible or unreliable; the Chamber should not be drawn into fine assessments of credibility or reliability. Needless to say, a finding that the evidence is not obviously incredible does not foreclose the Chamber, at the end of the trial, from finding that the evidence is, in fact, neither credible nor reliable."

12. In applying the above-mentioned test, it is not necessary under the Rule for the Trial Chamber to inquire into the sufficiency of the evidence in relation to each paragraph of the indictment. There is no need, at the Rule 98 stage, to examine whether each paragraph of the Indictment is supported by the Prosecution evidence. Rather, the evidence should be examined in relation to the counts. Rule 98 requires the Trial Chamber to determine only whether "there is no evidence capable of supporting a conviction on one or more counts of the indictment" and to enter a "judgment of acquittal on those counts".[10]

13. It is important to stress, as was done by the Trial Chamber in *Milosevic*, that,

> "a ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge; that is so because the standard for determining sufficiency is not evidence on which a tribunal should convict, but evidence on which it could convict. Thus if, following a ruling that there is sufficient evidence to sustain a conviction on a particular charge, the Accused calls no evidence, it is perfectly possible for the Trial Chamber to acquit the Accused of that charge if, at

---

[7] *Prosecutor v. Jelisic*, ICTY IT-95-10-A, Judgement, 5 July 2001, ["*Jelisic* Appeal Chamber Judgement"], para. 37.

[8] *Prosecutor v. Bagasora et al.*, ICTR 98-41-T, Decision on Motion for Judgement of Acquittal, 2 February 2005, para. 6. ["*Bagasora* Decision on Motion for Judgement of Acquittal"]

[9] *Jelisic* Appeal Chamber Judgement, *supra* note 7, para. 55.

[10] See *Bagasora* Decision on Motion for Judgement of Acquittal, *supra* note 8, para. 8; *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 20 August 2002, para. 17; *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, ["*Nahimana* Reasons for Oral Decision 17 September 2002"], para. 16; *Prosecutor v. Rwamakuba*, ICTR-98-44C-R98bis, Decision on Defence Motion for Judgement of Acquittal, 28 October 2005, paras. 8, 14, 15.

the end of the case, it is not satisfied of his guilt beyond reasonable doubt."[11]

14. The essential function of the Rule was stated by the ICTY in the cases of *Strugar* and *Hadzihasanovic*. The Trial Chambers observed as follows:

> "It is worth noting the extent and frequency to which Rule 98bis has come to be relied on in proceedings before this Tribunal, and the prevailing tendency for Rule 98bis motions to involve much delay, lengthy submissions, and therefore an extensive analysis of evidentiary issues in decisions. This appears to be in contrast to the position typically found in common law jurisdictions from which the procedure is derived, While Rule 98bis is an important procedural safeguard, the object and proper operation of the Rule should not be lost sight of. Its essential function is to separate out and bring to an end only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is merely weak".[12]

15. The factual findings in this Decision in relation to the 14 counts in the Indictment are reached using the above-mentioned Rule 98 standard, namely, whether there is evidence, if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.

III. LOCATIONS IN THE INDICTMENT OVER WHICH THE DEFENCE HAS RAISED ISSUE

Locations in respect of which the Prosecution led no evidence:

16. In their various submissions Defence Counsel for the three accused, cited a number of locations in the Indictment in respect of which the Prosecution failed to adduce any evidence of the crimes alleged to have been committed at those locations.[13]

17. The Prosecution while conceding that it has not led evidence with respect to all geographic locations pleaded at the sub-District level in the Indictment and in particular in relation to the locations listed in Annex A to the Prosecution Response, argued that it is not necessary to do so in

---

[11] *Prosecutor v. Slobodan Milosevic*, ICTY IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, ["*Milosevic* Decision on Motion for Judgement of Acquittal"], para. 13 (6).

[12] *Prosecutor v. Strugar*, ICTY IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98*bis*, 21 June 2004, ["*Strugar* Decision on Motion for Judgement of Acquittal"], para. 20; *Prosecutor v. Hadzihasanovic and Kubura*, ICTY IT-01-47-T, Decision on Motions for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, 27 September 2004, ["*Hadzihasanovic* Decision on Motions for Acquittal"], para. 20.

[13] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Brima Motion For Acquittal Pursuant to Rule 98, 12 December 2005, ["Brima Motion"], para.44; *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Kanu Factual Part Defence Motion for Judgement of Acquittal Under Rule 98, 13 December 2005, ["Kanu Motion"], paras. 13, 15, 16, 18, 21, 34, 36, 38, 42, 46, 47, 59, 78, 79, 80, 82, 83, 88, 91, 93, 96, 97, 99 and 100; *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Joint Legal Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, ["Joint Defence Reply"], paras. 8 and 9; *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Confidential Kanu Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, 27 January 2006, ["Kanu Reply"], paras. 3, 4 and 5.

order to prove each particular Count. The Prosecution submitted that "where a single count in the Indictment charges an Accused with criminal responsibility in respect of more than one incident, the Trial Chamber is not required to make a determination of whether there is sufficient evidence to sustain a conviction for each separate paragraph of, or location in the Indictment".[14] The Prosecution argued further that it need not prove every particular set out in the Indictment and that it had led evidence of each count which was sufficient for a reasonable tribunal of fact to convict the three Accused.[15]

18. The Defence disputed this argument on the basis that the Prosecution is required to prove every particular set out in the Indictment so as to enable the Accused to defend themselves. Relying on the position adopted by the respective Tribunals in the cases of *Prosecutor v. Sam Hinga Norman et al.*,[16] and *Prosecutor v. Jelisic*[17], Defence Counsel argued that the Trial Chamber is duty bound under Rule 98 of the Rules, to enter a Judgment of Acquittal in favour of each of the accused in respect of each of those locations and to strike the locations from the Indictment and that, "omitting to strike these particular locations from the Indictment at this stage of the proceedings would put the Defence in the peculiar position of adducing evidence to refute the charges thereto, whilst no evidence has been presented by the Prosecution that anything did happen there. This would unquestionably lead to a delay in the procedure; whilst striking them from the Indictment would not result in any public prejudice to the Prosecution."[18]

19. We note that when citing locations where the various criminal acts are alleged to have taken place the language used in the particulars of the Indictment is not exhaustive and often uses the preposition "including" when referring to those locations.[19] Given the "widespread" nature of the alleged crimes, it would in our view, be impracticable for the Indictment to name exhaustively every single location throughout the territory of Sierra Leone where these criminal acts allegedly took place. We do not understand the Indictment to be limited to only those villages or locations named in the particulars. Clearly the Prosecution may (as indeed it has done in some instances) adduce evidence of alleged crimes in other villages not specified in the Indictment, in order to demonstrate the "widespread or systematic" nature of the attack on the civilian population.

20. We note that the locations specified in Annex A to the Prosecution Response are all within Districts named in the Counts in question. We also note that in all cases, the Prosecution has led evidence in relation to all the other locations specified in the Indictment. In some instances evidence was led in relation to villages or locations that were not specified in the Indictment but which are located within the Districts pleaded. Ultimately, the Trial Chamber will take all this evidence into account in determining whether or not the Prosecution evidence in relation to each Count is capable of supporting a conviction against the accused on that count.

---

[14] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Prosecution Response to Defence Motions For Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, ["Response"], para. 7.
[15] *Ibid.*, para. 393.
[16] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-473, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, ["Norman Judgement of Acquittal"].
[17] *Jelisic* Appeal Chamber Judgement, *supra* note 7, paras. 35-38.
[18] Kanu Reply *supra* note 13, para.4; Joint Defence Reply, *supra* note 13, paras. 8-9.
[19] See Indictment *supra* note 2, paras. 42-79.

21. The Trial Chamber is further of the view that under Rule 98, we are required to determine the evidence in relation to the counts of the Indictment, and to enter a judgement of acquittal, if appropriate, on a count – not on an item of particulars. We do not consider that we are empowered by Rule 98 to break a Count down to its particulars supplied in the Indictment and then to enter a judgement of acquittal in respect of any particular which has not been proved; nor would it be practical to do so. We note the Prosecution concessions with regard to various locations for which no evidence was adduced and, in our view, that is sufficient to cover the situation.

22. The present case is not one in which the Accused can say that without a judgement of acquittal in respect of the said locations they are incapable of knowing which of the various heads of liability initially alleged they need no longer contest. We do not think that the Defence can seriously claim that, without a formal judgement of acquittal being entered in respect of the contested locations, it would be put in the position of having to lead evidence to refute the charges when there was no evidence "*that anything did happen there*". Why would any party to a criminal proceeding think it necessary to lead evidence to refute something that never happened? It goes without saying that the Defence will not be expected to call evidence concerning locations about which no evidence has been given.

Locations the names of which are spelt differently:

23. In a related issue, Defence Counsel for the accused Kanu submitted that,

> "On several occasions in its Response, the Prosecution seems to assert that different names such as Mambona and Mamoma, Willifeh and Wollifeh, Mandaha and Mandaya, Wendedu and Wondedu refer to the same villages. The Defence submits that this is not the case...names of villages throughout the country or district can be almost identical, but still different places. The Prosecution has adduced no geographical evidence supporting its allegation that such names which are similar , but not identical, refer to the same location. Therefore, locations without supporting evidence referring to exactly the same village name should be struck from the Indictment."[20]

24. We note that Counsel raised this as a new issue in the Kanu Reply thereby technically denying the Prosecution an opportunity to respond thereto. This is a practice this Trial Chamber has consistently discouraged.

25. Regarding this submission, we do not consider striking out the names of these locations to be an appropriate or desirable remedy. We are mindful of the fact that due to the variety of vernacular languages and dialects generally spoken in Sierra Leone and particularly by the Prosecution witnesses in this case, the names of some locations were sometimes pronounced and/or spelt differently, depending on the dialect spoken by the witness. At other times, some of the witnesses were illiterate and could not spell the names of certain locations. In the latter case the Trial Chamber often resorted to the phonetic spelling of such a location. In our view, the Defence had ample opportunity to raise any doubts about evidence relating to a given location through cross-examination of the Prosecution witnesses.

---

[20] Kanu Reply *supra* note 13, para. 6.

IV. THE "GREATEST RESPONSIBILITY" REQUIREMENT

Applicable Law:

26. Article 1 of the Statute makes provisions for the Competence of the Special Court in the following terms:

> **"Article 1- Competence of the Special Court**
>
> 1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."

27. Article 15.1. of the Statute places the responsibility for prosecuting the persons mentioned in Article 1.1. on the Prosecutor. Article 15.1. states:

> "The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source."

Submissions:

28. The Defence argued that the specific reference to "*...persons who bear the greatest responsibility ...*" in Article 1(1) and Article 15 of the Statute amounts to a limitation on the Court's jurisdiction as to which persons may or may not be prosecuted and creates an evidentiary burden to be satisfied by the Prosecution at the stage of a Motion for Judgement of Acquittal brought under Rule 98. The Defence submitted that this wording amounts to a more limited personal jurisdiction which superseded a broader formulation of "*persons most responsible*" suggested by the Secretary General.[21] The Defence further submitted that the Prosecution has not adduced evidence fulfilling the greatest responsibility requirement because "*the evidence introduces the existence of genuine prominent individuals bearing greatest responsibility, other than the Accused.*"[22]

---

[21] *Letter of 22 December 2000 from the President of the Security Council to the Secretary General*, S/2000/1234, para. 1 which rejects the Secretary General's recommendation as per *Report of the Secretary General on the Establishment of an SCSL*, 4 October 2000, S/2000/915, para. 30.

[22] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Joint Legal Part of the Defence Motion for Judgement of Acquittal Under Rule 98, 13 December 2005, ["Joint Legal Part"], para. 18.

29. The Prosecution disputed that the "greatest responsibility" formulation amounts to a jurisdictional threshold and contends that the question of whether or not an Accused is one of the persons who bear the greatest responsibility for the said violations should be determined after all the evidence has been heard and is not an issue correctly addressed at the Rule 98 stage.[23] In the alternative, the Prosecution submitted that on the evidence presently before the Trial Chamber, a reasonable tribunal of fact could find that each of the Accused is amongst those bearing the greatest responsibility for serious violations of international humanitarian law in Sierra Leone since 30 November 1996.[24]

Deliberations:

30. The same jurisdictional issue was brought before Trial Chamber I by way of a preliminary motion under Rule 72. Trial Chamber I found that

> "the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted." [25]

Trial Chamber I went on to conclude that

> "in the ultimate analysis, whether or not in actuality the Accused is one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law and Sierra Leonean law is an evidentiary matter to be determined at the trial stage."[26]

31. In the present case, no preliminary motion was filed under Rule 72 in relation to the jurisdictional issue. We are of the view that the question of whether the reference to "*persons who bear the greatest responsibility*" creates a jurisdictional requirement rather than a prosecutorial discretion, is not a matter that is within the scope of Rule 98 and we will not consider it here. However, we can at this stage consider the category of persons contemplated by Article 1.1. and whether there is evidence according to the Rule 98 standard that would place any of the Accused within that category.

32. The "most responsible" formulation suggested by the Secretary General of the United Nations was rejected by the Security Council, which insisted instead upon the "greatest responsibility" formulation. Subsequently, the Secretary General expressed the following view on the persons encompassed by Article1.1.:

> "Members of the Council expressed preference for the language contained in Security Council resolution 1315 (2000) extending the personal jurisdiction of the Court to "persons who bear

---

[23] Response, *supra* note 14, para. 13 and 14.
[24] *Ibid.*, at para. 15.
[25] *Prosecutor v. Norman*, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on behalf of the Accused Fofana, SCSL-04-14-PT, 3 March 2004. ["*Norman* Decision on Lack of Personal Jurisdiction"], para. 27.
[26] *Ibid.*, para. 44.

> the greatest responsibility", thus limiting the focus of the Special Court to those who played a leadership role. However, the wording of subparagraph (a) of Article 1 of the draft Statute, as proposed by the Security Council, does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls initially to the prosecutor and ultimately to the Special Court itself. Any such determination will have to be reconciled with an eventual prosecution of juveniles and members of a peacekeeping operation, even if such prosecutions are unlikely.
>
> Among those who bear the greatest responsibility for the crimes falling within the jurisdiction of the Special Court, particular mention is made of "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone". It is my understanding that, following from paragraph 2 above, the words "those leaders who...threaten the establishment of and implementation of the peace process" do not describe an element of the crime, but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy. Consequently, the commission of any of the statutory crimes without necessarily threatening the establishment and implementation of the peace process would not detract from the international criminal responsibility otherwise entailed for the accused." [27] [emphasis added]

33. This opinion of the Secretary General was approved by the Security Council, as is shown in the following letter from the President of the Security Council:

> "The members of the Council share your analysis of the importance and role of the phrase "*persons who bear the greatest responsibility*". The members of the Council, moreover, share your view that the words beginning with "*those leaders who ...*" are intended as guidance to the Prosecutor in determining his or her prosecutorial strategy." [28]

34. Thus, the standard as understood by the Secretary General and the Security Council, and accepted by the Government of Sierra Leone, includes, at a minimum, political and military leaders and implies an even broader range of individuals. This standard is in keeping with the wording of Article 1.1. of the Statute, which states that the Special Court shall have the power to prosecute

> "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." [emphasis added]

35. The use of the word "including" implies that the category of "persons who bear the greatest responsibility" is by no means limited to "those leaders.." and that there may be other persons who fall into that category.

---

[27] *Letter Dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council*, S/2001/40, 12 January 2001. ["Secretary General letter to Security Council 12 January 2001"]

[28] *Letter dated 31 January 2001 from the President of the Security Council Addressed to the Secretary-General*, 31 January 2001, S/2001/95.

36. Even children between 15 and 18 years of age are not excluded from the potentially broad scope of Article 1.1. Article 7 of the Statute gives the Special Court jurisdiction to prosecute children in this age group. Moreover, in his letter to the President of the Security Council dated 12 January 2001, the Secretary General expressed his belief that,

> "Any such determination of ["persons who bear the greatest responsibility"] will have to be reconciled with an eventual prosecution of juveniles and members of a peacekeeping operation, even if such prosecutions are unlikely."[29]

37. Thus, although children accused of serious crimes may fall within the category of persons who bear "*the greatest responsibility*", it would perhaps be at the lower end of the spectrum.

Findings:

38. The evidence of the Prosecution is discussed in detail in other sections of this decision. Having examined that evidence, we find that there is evidence, if believed, capable of establishing not only that the Accused Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borgor Kanu were all senior members of the AFRC, but that, during the periods alleged in the Indictment, they were all implicated in serious crimes committed in 7 of the 11 districts of Sierra Leone.

39. Given the potentially broad scope of Article 1.1. of the Statute discussed above, we find that there is evidence, if believed, that is capable of placing each of the three accused in the category of "persons who bear the greatest responsibility" for the crimes charged in the Indictment. The fact that there may be evidence indicating the existence of persons who bear "the greatest responsibility" other than the Accused, does not eliminate the possibility that the Accused may also be among those who "bear the greatest responsibility".

V. ELEMENTS OF CRIMES AGAINST HUMANITY PURSUANT TO ARTICLE 2 OF THE STATUTE

40. The crimes alleged in Count 3 (Extermination), Count 4 (Murder), Count 6 (Rape), Count 7 (Sexual slavery and any other form of sexual violence), Count 8 (Other inhumane acts), Count 11 (Other inhumane acts) and Count 13 (Enslavement) of the Indictment are proscribed and punishable under Article 2 of the Statute as "crimes against humanity". Article 2 of the Statute which confers jurisdiction upon the Special Court to try certain offences as crimes against humanity provides as follows:

"Article 2: Crimes against humanity:

---

[29] Secretary General letter to Security Council 12 January 2001, *supra* note 27, at para. 2. The Secretary General goes on to discuss other matters related to prosecution of juveniles including the suggestion of an amended version of article 7 which retains the principle of juvenile prosecution but which omits the potential for prosecution of children below the age of 15.

The Special Court shall have power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture
g. Rape, sexual slavery, enforced prostitution; forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial, ethnic or religious grounds;
i. Other inhumane acts."

41. Although the Statute does not define the term "crimes against humanity", Article 2 thereof restricts the jurisdiction of the Special Court to offences committed "as part of a widespread or systematic attack against any civilian population". However, Article 2 of the Statute differs from similar provisions found in the governing statutes of other International Tribunals. Notably, Article 2 does not specifically require such crime to have been committed "during armed conflict" (unlike its ICTY counterpart[30]), or "on national, political, ethnic, racial or religious grounds" (unlike its ICTR counterpart[31]), or with the perpetrator's "knowledge of the attack" (unlike its ICC counterpart[32]). While recognising that the jurisprudence emanating from the various International Tribunals regarding crimes against humanity is as varied as their respective Statutes[33] and that it should be carefully applied taking into account the differences, the Trial Chamber endorses the view recently expressed by Trial Chamber I of the Special Court in *Prosecutor v. Sam Hinga Norman et. al.* that under the Statute of the Special Court for Sierra Leone, a crime against humanity is committed where the perpetrator commits one or more of the offences stipulated in Article 2 knowing that it is part of a widespread or systematic attack against a civilian population[34].

42. The Trial Chamber endorses the following contextual elements of crimes against humanity pursuant to Article 2 of the Statute, namely:

(a) **There must be an attack:**

An attack in this context is not synonymous with "an armed conflict"[35] or "a military attack" as

---

[30] ICTY Statute, Article 5.
[31] ICTR Statute, Article 3.
[32] ICC Statute, Article 7. See also United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2000/15, Section 5.
[33] *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001, ["*Akayesu* Appeals Chamber Judgement"] paras.460 - 469; *Prosecutor v. Tadic*, ICTY IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, ["*Tadic* Appeals Chamber Judgement"] paras.248, 251; *Prosecutor v. Brdjanin*, ICTY IT-99-36-T, Judgement, 1 September 2004, ["*Brdjanin* Trial Chamber Judgement"] para.130; *Prosecutor v. Kunarac, Kovac & Vikovic*, ICTY IT-96-23-A, Judgement, Appeals Chamber, 15 June 2002, ["*Kunarac* Appeals Chamber Judgement"] paras. 85-100, 102-104, 336.
[34] Norman Judgement of Acquittal, *supra* note 16, para. 55.
[35] *Tadic* Appeals Chamber Judgement, *supra* note 33, para. 251.

defined in international humanitarian law.[36] Instead it refers to a campaign, operation or course of conduct directed against a civilian population and encompasses any mistreatment of the civilian population. The attack need not involve military forces or armed hostilities[37] and may even be non-violent in nature.[38]

(b) **The attack must be widespread or systematic:**

The requirement that the attack must be either widespread or systematic is disjunctive and proof that the attack occurred either on a widespread basis or in a systematic manner is sufficient to exclude isolated or random acts.[39] It is not necessary that each act which occurs within the attack should itself be widespread or systematic. It is sufficient that the act or various acts form part of an attack upon the civilian population that is either "widespread" or "systematic".[40] While isolated or random acts unrelated to the attack are usually excluded from the definition of crimes against humanity, a single act perpetrated in the context of a widespread or systematic attack upon a civilian population is sufficient to bestow individual criminal liability upon the perpetrator. Similarly, a perpetrator need not commit numerous offences to be held liable for crimes against humanity.[41] In the context of crimes against humanity, International Tribunals have defined the term "widespread" to denote "massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed at multiple victims"; and the term "systematic" to denote "organised action following a regular pattern and carried out pursuant to a pre-conceived plan or policy, whether formalised or not."[42]

(c) **The attack must be directed against a civilian population:**

The term "civilian population" has been widely defined to include not only civilians in the ordinary and strict sense of the term, but all persons who have taken no active part in the hostilities, or are no longer doing so, including members of the armed forces who laid down their arms and persons placed *hors de combat* by sickness, wounds, detention or any other reason.[43] The targeted population must be predominantly civilian in nature and the presence of a number of non-civilians in their midst does not change the civilian character of that population.[44] The term "directed against" connotes that the civilian population must be the

---

[36] Article 49(1) of the Additional Protocol I defines "attacks" within the military context as "*acts of violence against the adversary, whether in offence or defence.*"

[37] *Kunarac* Appeals Chamber Judgement, *supra* note 33, paras. 16-20.

[38] *Akayesu* Appeals Chamber Judgement, *supra* note 33, para. 581.

[39] *Prosecutor v. Tadic*, ICTY IT-94-1-T, Trial Chamber Judgement, 7 May 1997, ["*Tadic* Trial Chamber Judgement"] para. 646.

[40] *Kunarac* Appeals Chamber Judgement, *supra* note 33, para.96-7.

[41] *Tadic* Trial Chamber Judgement, *supra* note 39, para.649.

[42] *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber Judgement, 2 September 1998, ["*Akayesu* Trial Chamber Judgement"], para. 580; *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Trial Chamber Judgement, 21 May 1999, ["*Kayishema & Ruzindana* Judgement"], para. 123; *Kunarac* Appeals Chamber Judgement, *supra* note 33, para.94; *Tadic* Trial Chamber Judgement, *supra* note 39, para. 648.

[43] *Akayesu* Appeals Chamber Judgement, *supra* note 33, para. 582; *Tadic* Appeals Chamber Judgement, *supra* note 33, paras. 637-638.

[44] *Tadic* Appeals Chamber Judgement, *supra* note 33, paras. 644.

primary object of the attack and in determining whether or not an attack is so directed the Trial Chamber should consider, *inter alia*, the means and methods used in the course of the attack, the status and number of the victims, the nature of the crimes committed in course of the attack, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[45]

(d) **The acts of the accused must be part of the attack:**

In order for the offence to amount to a crime against humanity, there must be a sufficient nexus between the unlawful acts of the perpetrator and the attack.[46] Although this nexus depends on the factual circumstances of each case, reliable indicia of a nexus include the similarities between the perpetrator's acts and the acts occurring within the attack; the nature of the events and circumstances surrounding the perpetrator's acts; the temporal and geographic proximity of the perpetrator's acts with the attack; and the nature and extent of the perpetrator's knowledge of the attack when he commits the acts.[47]

(e) **The accused must have knowledge that his acts constitute part of a widespread or systematic attack directed against a civilian population:**

The *mens rea* or mental requisite for crimes against humanity is that the perpetrator of the offence must be aware that a widespread or systematic attack on the civilian population is taking place and that his action is part of this attack.[48] However, the perpetrator need not have been aware of the details of the pre-conceived plan or policy when he committed the offence and need not have intended to support the regime carrying out the attack on the civilian population.[49] The Trial Chamber adopts the above elements and supporting jurisprudence.

VI. ELEMENTS OF VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II PURSUANT TO ARTICLE 3 OF THE STATUTE

43. The alleged crimes contained in Counts 1 (Acts of Terrorism), 2 (Collective Punishments), 5 (Violence to life, health and physical or mental well-being of persons, in particular murder), 9 (Outrages upon personal dignity), 10 (Violence to life, health and physical or mental well-being of persons, in particular mutilation), and 14 (Pillage) of the Indictment are charged under Article 3 of the Statute of the Special Court for Sierra Leone, which confers jurisdiction upon the Special Court to try certain offences as violations of Article 3 Common to the Geneva Conventions and of

---

[45] *Kunarac* Appeals Chamber Judgement, *supra* note 33, para.91.
[46] *Akayesu* Trial Chamber Judgement, *supra* note 42, para. 579
[47] *Tadic* Appeals Chamber Judgement, *supra* note 33, paras. 632.
[48] *Kunarac* Appeals Chamber Judgement, *supra* note 33, para. 121; *Prosecutor v. Kayishema and Ruzindana*, supra note 42, paras. 133-134; *Tadic* Appeals Chamber Judgement, *supra* note 33, para. 255.
[49] *Prosecutor v. Blaskic*, ICTY IT-95-14-T, Trial Chamber Judgement, 3 March 2000, ["*Blaskic* Judgement"], paras. 254-257.

Additional Protocol II. Article 3 of the Statute provides as follows:

> **"Article 3: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II**
>
> The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of Article 3 Common to the Geneva Conventions of 12 August 1949 for the Protection of War victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:
>
> a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> b. Collective punishments;
> c. Taking of hostages;
> d. Acts of terrorism;
> e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> f. Pillage;
> g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples; and
> h. Threats to commit any of the foregoing acts."

44. The Trial Chamber endorses the following contextual elements of Violations of Article 3 Common to the Geneva Convention and of Additional Protocol II pursuant to Article 3 of the Statute, namely:

(a) **There must have been an armed conflict whether internal or international in character, at the time the offences were allegedly committed:**

Although Article 3 Common to the Geneva Conventions is expressed to apply to armed conflicts "not of an international character", the distinction between internal armed conflicts and international conflicts is "no longer of great relevance in relation to the crimes articulated in Article 3 of the Statute."[50] The Appeals Chamber of the ICTY has ruled that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[51] The armed conflict "need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed".[52]

---

[50] See *Prosecutor v. Fofana*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of Armed Conflict, Appeals Chamber, 25 May 2004, ["*Fofana* Appeals Chamber Decision on Lack of Jurisdiction Materiae; Nature of Armed Conflict"], at para. 25.

[51] See *Prosecutor v. Tadic*, ICTY IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ["*Tadic* Appeals Chamber Decision on Interlocutory Appeal on Jurisdiction"], at para. 70.

[52] *Kunarac* Appeals Chamber Judgement, *supra* note 33, at para. 58.

(b) **There must be a nexus between the armed conflict and the alleged offence:**[53]

The nexus requirement is satisfied where the perpetrator "acted in furtherance of or under the guise of the armed conflict." Factors to be considered in this regard include, *inter alia*, "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; [and] the fact that the act may be said to serve the ultimate goal of a military campaign."[54]

(c) **The victims were not directly taking part in the hostilities at the time of the alleged violation:**[55]

Common Article 3 applies to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause", and Additional Protocol II similarly treats the class of non-combatants as "all persons who do not take a direct part or who have ceased to take part in hostilities".[56]

VII. ELEMENTS OF OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW PURSUANT TO ARTICLE 4 OF THE STATUTE

45. The alleged crimes contained in Count 12 (Use of Child Soldiers) of the Indictment are charged under Article 4 of the Statute of the Special Court for Sierra Leone as Other Serious Violations of International Humanitarian Law. Article 4 of the Statute provides as follows:

"Article 4: Other Serious Violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled the protection of given to civilians or civilian objects under the international law of armed conflict;
c. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."

---

[53] See *Strugar* Decision on Motion for Judgement of Acquittal, *supra* note 12, at para. 24; *Bagasora* Decision on Motion for Judgement of Acquittal, *supra* note 8, at para. 36.
[54] See *Bagasora* Decision on Motion for Judgement of Acquittal, *supra* note 8, at para. 36; *Kunarac* Appeals Chamber Judgement, *supra* note 33, para. 59.
[55] See *Bagasora* Decision on Motion for Judgement of Acquittal, *supra* note 8, para. 36; *Prosecutor v. Ntagerura et al.*, ICTR 99-46-T, Judgement, 25 February 2004, para. 766; *Prosecutor v. Semanza*, ICTR 97-20-T, Judgement, 15 May 2003, para. 354-371, 512.
[56] Common Article 3.1. of the Geneva Conventions; See Norman Judgement of Acquittal, *supra* note 16, para. 70.

46. The serious violations of international humanitarian law listed in Article 4 of the Statute possess the same chapeau requirements as war crimes (See the previous section, "Elements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II" paragraph 44 (a) to (c)).

VIII. REVIEW OF THE COUNTS AND ISSUES RAISED

1. Counts 1 and 2: Terrorising the Civilian Population and Collective Punishment

Introduction:

47. The Indictment alleges that members of the AFRC/RUF subordinate to and/or acting in concert with Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu committed the crimes charged in Counts 3 through14of the Indictment (Counts 3 - 5 allege unlawful killings, Counts 6 - 9: Sexual Violence, Counts 10 - 11: Physical Violence, Count 12: Use of Child Soldiers, Count 13: Abductions and Forced Labour, Count 14: Looting and Burning) "as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population. The AFRC/RUF also committed the crimes to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF".

48. The Indictment charges that, by their acts or omissions in relation to these events, all three Accused, pursuant to Article 6.1. and/ or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged in Counts 1 (Acts of Terrorism, Article 3(d) of the Statute) and 2 (Collective Punishments, Article 3(b) of the Statute). Articles 6.1 and 6.3. of the Statute provide as follows:

> **"Article 6: Individual Criminal Responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime;
>
> 2. [...]
>
> 3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

1.1. Count 1: Acts of Terrorism (Article 3.d. of the Statute)

Elements of the crime:

49. We adopt the definition formulated by Trial Chamber I of "acts of terrorism" within the meaning of Article 3(d) of the Statute. The definition, which seems to have been accepted by both the

Defence and the Prosecution,[57] is in the following terms:

> "The crime of Acts of Terrorism is comprised of the elements constitutive of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II as well as the following specific elements:
>
> (a) Acts or threats of violence directed against protected persons or their property.
>
> (b) The offender wilfully made protected persons or their property the object of those acts and threats of violence.
>
> (c) The acts or threats of violence were committed with the primary purpose of spreading terror among protected persons."[58]

Submissions:

Joint Legal Part

50. The Joint Defence submitted that, at the least, the Prosecution had failed to submit proof of elements 2 and 3 of the above-mentioned definition.[59]

Brima Motion

51. Counsel for Brima did not specifically respond to this Count nor to Count 2, but submitted generally that there was no evidence to prove any individual criminal responsibility nor any command responsibility on the part of Brima.

Kamara Motion

52. Counsel for Kamara submitted that the Prosecution evidence is insufficient to support Counts 1 and 2. It was also submitted on behalf of Kamara that, in relation to Counts 1 and 2, the Prosecution has made it impossible for him to understand the nature and cause of the specific charges brought against him because the Prosecution has used the same facts and evidence "to hold him criminally and individually responsible for the alleged conduct attributed to him, as well as for the alleged acts of his subordinates and/or purported AFRC/RUF alliance in this regard".

Prosecution Response

53. The Prosecution, in submitting that the Joint Defence submission should be rejected, referred to the evidence of various witnesses describing "how they suffered at the hands of the AFRC" and indicating "the widespread nature of the attacks" and showing "the primary purpose of spreading terror amongst protected persons who were not involved in any hostilities."[60]

54. In answer to the Brima and Kamara Motions, the Prosecution submitted that the evidence relied upon to prove Counts 1 and 2 variously relates to the remaining Counts 3 to 14, and the

---

[57] See Joint Legal Part, *supra* note 22, paras. 49-51, Response, *supra* note 14, para. 79.
[58] Norman Judgement of Acquittal, *supra* note 16, para. 112.
[59] Joint Legal Part, *supra* note 22, para. 51.
[60] Response, *supra* note 14, paras. 79-84.

evidence adduced therein. Based on the evidence showing the criminal responsibility of Brima for Counts 3 to 14, "which also serves as a basis for the *actus reus* and *mens rea* for Counts 1 and 2", a reasonable tribunal of fact could conclude that there was sufficient evidence to convict Brima on Counts 1 and 2.

55. With regard to Kamara's claim that the Prosecution had made it impossible for him to understand the nature of the specific charges brought against him in Counts 1 and 2, the Prosecution submitted that any allegation of a defect in the form of the indictment should have been raised by preliminary motion under Rule 72 before commencement of the trial, and that a motion under Rule 98 was not the place to raise such a question.

Brima Reply

56. Brima denied that there was sufficient evidence to convict him on Counts 1 and 2.[61]

Kamara Reply

57. Counsel for Kamara submitted that the Prosecution arguments confer guilt on Kamara on Counts 1 and 2 for allegedly being present at a meeting at Kamagbengbe, but that his mere presence at the meeting (which is denied) is insufficient to convict him of those crimes.[62]

Kanu Reply

58. Counsel for Kanu did not specifically reply to the Prosecution Response in relation to this Count.

Findings:

59. Kamara's complaint that the Prosecution has relied on the same facts and evidence as a basis for criminal liability under both Article 6.1. and Article 6.3. of the Statute is an objection based on alleged defects in the form of the indictment and should have been raised by way of preliminary motion under Rule 72. It is beyond the scope of Rule 98 and not something we are prepared to consider here.

60. While we would agree with Counsel for Kamara that mere presence at a meeting is not sufficient, of itself, to confer guilt, we find that there is evidence which, if believed, not only establishes Kamara's presence at the meeting in Kamagbengbe, but is also capable of supporting a conviction against him for the crimes resulting from the attack on Karina, which was planned at that meeting.[63]

61. Having considered the available evidence, we find that there is evidence, if believed, sufficient to satisfy a reasonable tribunal of fact beyond reasonable doubt of the guilt of each of the Accused

---

[61] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Brima Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, 30 January 2006 ["Brima Reply"], para. 1.
[62] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Kamara Reply to Prosecution Response to Defence Motions For Judgement of Acquittal, 30 January 2006, ["Kamara Reply"], para. 1.
[63] Witness TF1-334, Transcript 23 May 2005, pp. 56-59.

Brima, Kamara and Kanu for the crime of Acts of Terrorism as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3.d. of the Statute. Accordingly, we are satisfied that, pursuant to Rule 98, the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 1 of the Indictment.[64]

1.2. Count 2: Collective Punishments (Article 3(b) of the Statute)

Elements of the crime:

62. Again, there seems to be no dispute between the parties regarding the definition of the crime of collective punishments formulated by Trial Chamber I[65], and we adopt that definition. Trial Chamber I was of the view that the elements of the crimes were:

1. The constitutive elements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II;
2. A punishment imposed upon protected persons for acts that they have not committed; and
3. The intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishment.

Submissions:

Joint Legal Part

63. The Joint Defence submitted that the Prosecution failed to adduce any "concrete" evidence against the accused Kanu. The Defence further submitted that there was no evidence to prove that members of the AFRC or RUF or "of those organizations acting in concert with Kanu" had committed collective punishments. In addition, the Joint Defence argued that there was no evidence "that the Accused would have done so while holding a position of superior responsibility and exercising effective control over them in relation to this crime".[66]

Kanu Motion

64. Counsel for Kanu argued that the Indictment does not state any specific area in the country where these crimes would have been committed, nor does it mention any specific time frame other than "the general frame of the Indictment, i.e. after 30 November 1996".

65. It was also submitted that there had been no evidence that Kanu bore any individual criminal responsibility for this crime, nor had there been any evidence of any superior responsibility or joint

---

[64] The following references to the evidence are by no means exhaustive: Witness TF1-023, Transcript 10 March 2005, pp. 36-37; Witness TF1-122, Transcript 24 June 2005, pp. 32-33; Witness TF1-033, Transcript 11 July 2005, pp. 60-62; Witness TF1-094, Transcript 13 July 2005, pp. 40-41; Witness TF1-167, Transcript 15 September 2005, pp.53-54; Witness TF1-167, Transcript 16 September 2005, pp. 42-44, pp. 53-54, pp. 64-65; Witness TF1-334, Transcript 17 May 2005, Transcript 23 May 2005, Transcript 14 June 2005, Transcript 15 June 2005.

[65] See Norman Judgement of Acquittal, *supra* note 16, para. 118; Joint Legal Part, *supra* note 22, para. 53; Response, *supra* note 14, para. 85.

[66] See Joint Legal Part, *supra* note 22, para. 54.

criminal enterprise.[67]

Prosecution Response

66. The Prosecution submitted that the evidence relied upon to prove Counts 1 and 2 variously relates to some or all of the remaining Counts 3 to 14 inclusive and that accordingly, issues as to time frame and location are answered by the specificity of paragraphs 42 to 79 inclusive of the Indictment (which set out the remaining Counts 3 to 14).[68]

67. In addition, the Prosecution submitted that, contrary to the Defence assertions, there is sufficient evidence of collective punishments, including evidence of superior responsibility for the crime. As an example, the Prosecution referred to the evidence of Witness TF1-334, recounting an incident in which the Accused Brima ordered a company commander to shoot some civilians. The same witness testified to a meeting in Kamagbengbe at which the Accused Brima, in the presence of the other two Accused Kamara and Kanu, ordered the destruction of Karina.[69]

68. In challenging the submissions made on behalf of Kanu, the Prosecution pointed out that there is the evidence of Witness TF1-167 to show that Kanu was present when orders for collective punishments were given by the Accused Brima that the village of Karina be destroyed and people killed since it was the home town of President Kabbah.[70]

69. The Prosecution concluded with the submission that there is evidence on the basis of which a reasonable tribunal of fact could conclude that the Accused Kanu was criminally responsible pursuant to Articles 6.1. and/or 6.3. of the Statute for collective punishments.[71]

Findings:

70. Having applied the Rule 98 standard in our consideration of the available evidence, we find that there is evidence, if believed, sufficient to satisfy a reasonable tribunal of fact beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu of the crime of Collective Punishments as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3.b. of the Statute. Accordingly, pursuant to Rule 98, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 2 of the Indictment.[72]

---

[67] Kanu Motion *supra* note 13, paras. 4-6.
[68] Response, *supra* note 14, para. 86.
[69] *Ibid.*, para. 87.
[70] Response, *supra* note 14, para. 268.
[71] Response, *supra* note 14, paras. 266-269.
[72] The following references to the evidence are by no means exhaustive: Witness TF1-023, Transcript 9 March 2005, p. 37; Witness TF1-098, Transcript 5 April 2005, pp. 39-41; Witness TF1-278, Transcript 6 April 2005, p. 9; Witness TF1-084, Transcript 6 April 2005, p. 39; Witness TF1-227, Transcript 8 April 2005, pp. 102-103; Witness TF1-021, Transcript 15 April 2005, p. 28; Witness TF1-334, Transcript 20 May 2005, pp. 12-13, Transcript 23 May 2005, p. 68-69, Transcript 14 June, pp. 66-67, p. 84, p. 97; Witness TF1-122, Transcript 24 June 2005, p. 33; Witness TF1-157, Transcript 25 July 2005, p. 5, Transcript 26 September 2005 p. 9; Witness TF1-167, Transcript 15 September 2005, pp.43, 53-54.

2. Counts 3, 4 and 5: Crimes Relating to Unlawful Killings

Introduction:

71. The Indictment alleges that members of the AFRC/RUF subordinate to and/or acting in concert with the accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, carried out "unlawful killings that routinely occurred through shooting, burning or hacking to death of victims" in various locations in the territory of Sierra Leone, including Bo District between 1to 30 June 1997[73]; Kenema District between 25 May 1997 and about 19 February 1998[74]; Kono and Kailahun Districts between 14 February 1998 and 30 June 1998[75]; Koinadugu District between 14 February 1998 and 30 September 1998[76]; Bombali District between 1 May 1998 and 30 November 1998[77]; Freetown and the Western Area between 6 January 1999 and 28 February 1999[78]; and Port Loko District between February and April 1999[79].

72. In particular, the Indictment alleges that by their acts or omissions in relation to these events, each of the accused persons Brima Kamara and Kanu is individually criminally responsible pursuant to Article 6.1 and/or 6.3 of the Statute, for the crime against humanity of Extermination, punishable under Article 2 b. of the Statute (*Count 3*); in addition to or in the alternative, the crime against humanity of Murder, punishable under Article 2 a. of the Statute" (*Count 4*), and in addition to or in the alternative, Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a. of the Statute (*Count 5*).

2.1. Count 3: Extermination (Article 2.b. of the Statute)

Elements of the Crime:

73. Extermination as a crime against humanity has been defined in international humanitarian law as "the intentional mass killing or destruction of part of a population as part of a widespread or systematic attack upon a civilian population."[80] The Trial Chamber endorses the view expressed by the ICTR that a perpetrator may be guilty of the crime of Extermination if he kills or destroys one

---

[73] Indictment *supra* note 2, para. 43.
[74] *Ibid.*, para. 44.
[75] *Ibid.*, paras. 45-46.
[76] *Ibid.*, para. 47.
[77] *Ibid.*, para. 48.
[78] *Ibid.*, para. 49.
[79] *Ibid.*, para. 50.
[80] *Akayesu* Trial Chamber Judgement, *supra* note 42, paras. 590-592; *Kayishema & Ruzindana* Judgement, *supra* note 42 paras. 137-147; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Chamber Judgement, 6 December 1999, ["*Rutaganda* Judgement"] paras. 82-84; *Prosecutor v. Krstic*, ICTY IT-98-33-T, Trial Chamber Judgement, 2 August 2001, ["*Krstic* Judgement"], para. 503.

individual as long as that killing of that individual is part of a mass killing event;[81] and that unlike the crime of Genocide, the crime of Extermination does not require a discriminatory intent.[82] The Trial Chamber adopts the following elements of the crime against humanity of Extermination as charged under Count 3 of the Indictment, namely that-

(a) The perpetrator intentionally caused the death or destruction of one or more persons by any means including the infliction of conditions of life calculated to bring about the destruction of a numerically significant part of a population;

(b) The killing or destruction constituted part of a mass killing of members of a civilian population;

(c) The mass killing or destruction was part of a widespread or systematic attack directed against a civilian population; and

(d) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.

2.2. Count 4: Murder (Article 2.a. of the Statute)

Elements of the crime:

74. Murder as a crime against humanity has been defined in international humanitarian law as "the intentional killing of a person as part of a widespread or systematic attack upon a civilian population."[83] The Trial Chamber adopts the following elements of the crime against humanity of Murder as charged under Count 4, namely that-

(a) The perpetrator by his acts or omission caused the death of a person or persons;

(b) The perpetrator had the intention to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death;

(c) The murder was committed as part of a widespread or systematic attack directed against a civilian population; and

(d) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.

2.3. Count 5: Murder (Article 3.a. of the Statute)

---

[81] *Kayishema & Ruzindana* Judgement, *supra* note 42, para. 147.
[82] *Krstic* Judgement, *supra*, note 80, para. 500.
[83] *Akayesu* Trial Chamber Judgement, *supra* note 42, paras. 589-590; *Kayishema & Ruzindana* Judgement, *supra* note 42, para. 140; *Rutaganda* Judgement, *supra* note 80, paras. 79-81; *Krstic* Judgement, *supra*, note 80, paras. 484-485.

Elements of the crime:

75. Murder as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II has been defined in international humanitarian law as "the wilful killing of a person or persons protected under the Geneva Conventions of 1949 and Additional Protocol II during an armed conflict." [84] International law permits killing or wounding in military conflicts so long as the rules of international humanitarian law are complied with. The four Geneva Conventions and Additional Protocol II proscribe the killing or wounding of persons taking no active part in the hostilities, including the wounded or sick (Article 13 of Geneva Conventions I &II); prisoners of war or persons who have fallen into enemy hands (Article 4(A) of Geneva Convention III); those who find themselves in the hands of a hostile party to the conflict or in the territory it controls (Article 4(1) of Geneva Convention IV); and members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause (Article 3(1) common to Geneva Conventions I to IV and Article 4 (1) Additional Protocol II). Thus while Article 3 of the Statute of the Special Court does not articulate the elements of each war crime, these crimes must be construed in light of the international humanitarian law and jurisprudence interpreting the various provisions of the Geneva Conventions as well as the peculiar circumstances of the Sierra Leonean conflict.

76. As earlier observed, although the above rules were originally applicable to international conflict, International Tribunals have adapted them to take into account new realities including inter-ethnic, inter-religious and other intra-state conflicts "between government authorities and organised armed groups or between such groups".[85] The Appeals Chamber of the Special Court has ruled that the same rules are equally applicable to internal armed conflicts such as the Sierra Leonean conflict. The Appeals Chamber observed that

> "The distinction is no longer of great relevance in relation to the crimes articulated in Article 3 of the Statute as these crimes are prohibited in all conflicts. Crimes during internal armed conflict form part of the broader category of crimes during international armed conflict. In respect of Article 3 therefore, the Court need only be satisfied that an armed conflict existed and that the alleged violations were related to the armed conflict."[86]

77. The Trial Chamber adopts the following elements of the crime of Murder as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II, as charged under Count 5, namely that-

(a) The perpetrator inflicted grievous bodily harm upon the victim in the reasonable knowledge that such bodily harm would likely result in death;

(b) The perpetrator's acts or omission resulted in the death of the victim;

---

[84] Article 3 Common of the Geneva Conventions I, II, III and IV of 1949.

[85] *Tadic* Appeals Chamber Judgement, *supra* note 33, para. 166; *Prosecutor v. Aleksovski*, ICTY IT-95-14/1-A, Appeals Chamber Judgement, 24 March 2000, para. 151; *Tadic* Appeals Chamber Decision on Interlocutory Appeal on Jurisdiction, *supra* note 51, para. 70.

[86] *Fofana* Appeals Chamber Decision on Lack of Jurisdiction Materiae; Nature of Armed Conflict, *supra* note 50, para. 25.

(c) The victim was a person protected under one or more of the Geneva Conventions of 1949 or was not taking an active part in the hostilities at the time of the alleged violation;

(d) The violation took place in the context of and was associated with an armed conflict; and

(e) The perpetrator was aware of the factual circumstances that established the protected status of the victim.

78. Individual criminal responsibility for the crimes under Counts 3,4 and 5 is established by evidence showing that the perpetrator (or his subordinate with the superior's knowledge) planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the above crimes in the Districts of Bo, Kenema, Kono, Kailahun, Koinadugu, Bombali, Freetown and Western Area and Port Loko as charged in paragraphs 42 to 50 of the Indictment.[87] For purposes of this Judgement, the Trial Chamber must determine pursuant to Rule 98 of the Rules whether or not the Prosecution evidence adduced is capable of supporting a conviction against each of the three accused persons on Count 3 (Extermination) and/or Count 4 (Murder) and/or Count 5 (Murder).

2.4. Submissions for Counts 3, 4 and 5

Joint Legal Part

79. The Defence jointly submitted that the accused persons should be acquitted on all Counts alleging "crimes against humanity", on the grounds that the Prosecution has failed to prove to the required standard two of the chapeau elements, namely that *(a)* attacks on the population were widespread or systematic, and *(b)* that the alleged offences were committed as part of the attack. [88] Counsel relied on the procedure adopted by the ICTR and ICTY in the cases of *Prosecutor v. Ferdinand Nahimana et al.*[89] and *Prosecutor v. Dusko Sikirica et al.*[90]respectively. [91]

Brima Motion

80. In addition to the joint Defence submissions, Counsel for the accused Brima submitted that his client should be acquitted in respect of Count 3 of the Indictment (*Extermination*) as the Prosecution has failed to prove any of the elements of that offence to the required standard. In particular the Prosecution failed to prove *(a)* that a particular population was targeted, and *(b)* that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.[92]

81. Counsel for Brima argued with respect to the crime of Murder, that the Prosecution failed to

---

[87] Article 6 (1) and (3) of the SCSL Statute.
[88] Joint Legal Part, *supra* note 22, paras. 42-47.
[89] *Nahimana* Reasons for Oral Decision 17 September 2002 *supra* note 10, para. 19.
[90] *Prosecutor v. Sikirica et al.*, ICTY IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001, para. 9.
[91] Joint Legal Part, paras. 42 and 43
[92] Brima Motion *supra* note 13, paras. 20-25.

prove that "the victims were persons taking no active part in the hostilities".[93] In support of this argument Counsel cited the elements of the war crime of Murder adopted by Trial Chamber I in the case of *Prosecutor v. Norman et al.*[94]

82. Regarding the various locations where the unlawful killings are alleged to have taken place and mentioned in paragraphs 43 to 50 of the Indictment, Counsel submitted in relation to-

(a) *Bo* District, that the Prosecution failed to prove that any of the crimes alleged in Counts 3, 4 and 5 of the Indictment was committed in Tikonko, Telu, Sembehun, Gerihun, and Mamboma.[95] In addition, the Prosecution failed to adduce any evidence of an attack generally by the AFRC or particularly by Brima in that District or to link Brima to the activities of the RUF in Bo.[96] Furthermore the evidence of Prosecution Witnesses TF1-004, TF1-053, TF1-054 in this regard is contradictory and unreliable;[97]

(b) *Kenema* District, that the Prosecution failed to prove that Brima was individually criminally responsible for crimes allegedly committed in that District or that persons under his command or control took part in the alleged crimes, during the period alleged in the Indictment. The evidence of Prosecution Witnesses TF1-122, TF1-045, TF1-062 and TF1-167 in this regard is contradictory and unreliable and shows instead, that members of the RUF were in control of Kenema District during the alleged period and were responsible for the commission of the alleged crimes in that District; [98]

(c) *Kono* District, that the Prosecution failed to prove that Brima or the AFRC were in command and control of Kono District after the ECOMOG intervention, or to link Brima or the AFRC to any of the atrocities committed in Kono. The evidence of Prosecution Witnesses TF1-167, TF1-033, TF1-334, TF1-045 and TF1-072 in this regard is contradictory, uncorroborated and unreliable and shows instead, that members of the RUF were responsible for the commission of the alleged crimes in that District during the period alleged in the Indictment.[99] In addition, the Prosecution failed to prove that any of the crimes alleged in Counts 3, 4 and 5 of the Indictment was committed in Foindu, Willifeh, Mortema or Biaya;[100]

(d) *Kailahun* District, that the Prosecution failed to prove that Brima or the AFRC were in command and control of the perpetrators in Kailahun District during the period alleged in the Indictment, or that they were linked to the commission of the alleged crimes in that District. The evidence of Prosecution Witnesses TF1-045, TF1-167, TF1-334 and TF1-113 shows instead, that members of the RUF were in control of Kailahun District during the alleged period and were responsible for the commission of the alleged offences in that

---

[93] *Ibid.*, para. 26.
[94] Norman Judgement of Acquittal, *supra* note 16, para. 72.
[95] Brima Motion *supra* note 13, para. 27.
[96] *Ibid.*, paras. 34-35.
[97] *Ibid.*, paras. 27-35.
[98] *Ibid.*, paras. 36-40.
[99] *Ibid.*, paras. 41-49.
[100] *Ibid.*, para. 44.

District;[101]

(e) *Koinadugu* District, that the Prosecution failed to prove that Brima was individually criminally responsible for crimes allegedly committed there or that persons under his command or control took part in the alleged crimes in that District, for the duration of the war. The evidence of Prosecution Witnesses TF1-310 and TF1-167 shows instead, that members of the RUF were in control of Kailahun District during the alleged period and were responsible for the commission of the alleged offences in that District;[102]

(f) *Bombali* District, that the Prosecution failed to prove that Brima was individually criminally responsible for crimes allegedly committed in that District. The evidence of Prosecution Witnesses TF1-157, TF1-167 and TF1-334 relating to crimes allegedly committed in that District is insufficient, contradictory and unreliable;[103]

(g) *Freetown and Western Area*, that the evidence of Prosecution Witness TF1-021 relating to crimes allegedly committed there is insufficient, contradictory and unreliable and shows that members of the RUF were responsible for the commission of the alleged offences in that District.[104]

Kamara Motion

83. In addition to the joint Defence submissions, Counsel for the accused Kamara submitted that his client should be acquitted in respect of Counts 3, 4 and 5 of the Indictment because the Prosecution failed to prove any of the elements of those offences to the required standard.[105] Regarding the various locations where the offences are alleged to have taken place and mentioned in paragraphs 43 to 50 of the Indictment, Counsel submitted in relation to-

(a) *Bo* District, that the Prosecution failed to prove that Kamara was in Bo during the period alleged in the Indictment or that persons under his command, authority or direction, took part in the alleged crimes there. The evidence of Prosecution Witnesses TF1-004, TF1-053, TF1-054 shows instead, that members of the RUF were responsible for the alleged killings in Bo during the alleged period;[106]

(b) *Kenema* District, that the Prosecution failed to prove that Kamara was in Kenema during the period alleged in the Indictment or that persons under his command, authority or direction, participated in the commission of the alleged crimes there. The evidence of Prosecution Witnesses TF1-122, TF1-045 and TF1-062 in this regard shows instead, that members of the RUF were in control of the Eastern Province and were responsible for the

---

[101] *Ibid.*, paras. 50-53.
[102] *Ibid.*, paras. 54-56.
[103] *Ibid.*, para. 57.
[104] *Ibid.*, para. 58.
[105] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Defence Motion for Judgement of Acquittal of the Second Accused, Brima Bazzy Kamara, 12 December 2005 ["Kamara Motion"], paras. 50-51.
[106] *Ibid*, paras. 20.1-20.3.

alleged killings in Kenema District during the alleged period; [107]

(c) *Kono* District, that the Prosecution failed to prove that either Kamara or persons under his command, authority or direction, participated in the commission of alleged crimes there. While Prosecution Witnesses TF1-019, TF1-072, TF1-074, TF1-076, TF1-198, TF1-206, TF1-216, and TF1-217 did not refer to Kamara at all in their testimonies, the evidence of Prosecution Witnesses TF1-033, TF1-167 and TF1-334 in this regard is insufficient, contradictory and unreliable.[108]

(d) *Kailahun* District, that the Prosecution failed to prove that Kamara was in Kailahun during the period alleged in the Indictment or that persons under his command, authority or direction, participated in the commission of the alleged crimes there. The evidence of Prosecution Witnesses TF1-045, TF1-114 and TF1-113 shows instead, that members of the RUF were in control of Kailahun District during the alleged period and were responsible for the alleged killings there;[109]

(e) *Koinadugu* District, that the Prosecution failed to prove that either Kamara or persons under his command, authority or direction, participated in the commission of alleged crimes there. While Prosecution Witnesses TF1-094, TF1-133, TF1-147, TF1-209 and TF1-310 did not refer to Kamara at all in their testimonies, the evidence of Prosecution Witnesses TF1-033, TF1-153, TF1-167, TF1-334 and TF1-184 in this regard is insufficient and does not implicate Kamara or persons under his command, authority or direction in the alleged killings in that District;[110]

(f) *Bombali* District, that the Prosecution failed to prove that either Kamara or persons under his command, authority or direction, participated in the commission of alleged crimes there. While Prosecution Witnesses TF1-055, TF1-157, TF1-158, TF1-179, TF1-180, TF1-199 and TF1-267 did not mention Kamara at all in their testimonies, the evidence of Prosecution Witnesses TF1-033, TF1-153, TF1-167, TF1-184 and TF1-334 in this regard is contradictory and unreliable and does not implicate Kamara or persons under his command, authority or direction in the alleged killings in that District;[111]

(g) *Freetown and Western Area*, that the Prosecution failed to prove that either Kamara or persons under his command, authority or direction, participated in the commission of alleged crimes there. While Prosecution Witnesses TF1-021, TF1-024, TF1-083, TF1-084, TF1-085, TF1-098, TF1-104, TF1-169, TF1-277 and TF1-278 did not mention Kamara at all in their testimonies, the evidence of Prosecution Witnesses TF1-023, TF1-045, TF1-153, TF1-167, TF1-184, TF1-227, TF1-334 and Mr. Gibril Massaquoi in this regard is insufficient, contradictory and unreliable and does not implicate Kamara or persons under his command,

---

[107] *Ibid*, paras. 20.4-20.6.
[108] *Ibid*, paras. 20.7-20.9.
[109] *Ibid*, paras. 20.10-20.12.
[110] *Ibid*, paras. 20.13-20.15.
[111] *Ibid*, paras. 20.16-20.18.

authority or direction in the alleged killings in that District.[112]

(h) *Port Loko* District, that the Prosecution failed to prove that either Kamara or persons under his command, authority or direction, participated in the commission of alleged crimes there. While Prosecution Witnesses TF1-021, TF1-024, TF1-083, TF1-084, TF1-085, TF1-098, TF1-104, TF1-169, TF1-277 and TF1-278 did not mention Kamara at all in their testimonies, the evidence of Prosecution Witnesses TF1-023, TF1-045, TF1-153, TF1-167, TF1-184, TF1-227, TF1-334 and Mr. Gibril Massaquoi in this regard is unreliable and does not implicate Kamara or persons under his command, authority or direction in the alleged killings in that District. The Prosecution also failed to prove that Kamara participated in a joint criminal enterprise with any person or group of persons in Port Loko District.[113]

Kanu Motion

84. In addition to the joint Defence submissions, Counsel for the accused Kanu submitted that his client should be acquitted on the grounds that the Prosecution failed to prove that Kanu is one of the persons who "bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law", as required by Article 1.1 of the Statute.[114]

85. Counsel submitted that Kanu should be acquitted in respect of Counts 3 of the Indictment (*Extermination*), because the Prosecution failed to prove to the required standard *(a)* two of the essential elements of the crime of Extermination namely, "mass destruction" and "a plan to bring about the destruction of part of a population", and *(b)* Kanu's participation individually or as a commander or as a participant in a joint criminal enterprise, in the crime of Extermination.[115]

86. Counsel submitted that Kanu should be acquitted in respect of Counts 4 and 5 of the Indictment because the Prosecution failed to prove that Kanu bears any individual criminal responsibility for the alleged crimes through direct participation or through superior responsibility or through a joint criminal enterprise as required by Article 6 of the Statute.[116]

87. Regarding the various locations where offences under Counts 4 and 5 are alleged to have taken place and mentioned in paragraphs 43 to 50 of the Indictment, Counsel submitted in relation to-

(a) *Bo* District, that the Prosecution failed to prove that Kanu was present in that District and in particular in Tinkoko, Telu, Sembehun, Gerihun and Mamboma, during the period alleged in the Indictment; or that such crimes were in fact committed Telu and Sembehun; or that he bears any individual criminal responsibility for the alleged crimes as a commander or as a participant in a joint criminal enterprise;[117]

---

[112] *Ibid*, paras. 20.19-20.21.
[113] *Ibid*, paras. 20.22-20.24.
[114] Kanu Motion *supra* note 13, paras. 1-4.
[115] *Ibid*, paras. 7-11.
[116] *Ibid*, paras. 12-30.
[117] *Ibid*, paras. 12-13.

(b) *Kenema* District, that the Prosecution failed to prove that Kanu was present in that District or in Kenema Town during the period alleged in the Indictment or that he bears any individual criminal responsibility for the alleged crimes as a commander or as a participant in a joint criminal enterprise;[118]

(c) *Kono* District, that the Prosecution failed to prove that either the RUF or the AFRC committed any of the crimes alleged under Counts 4 and 5 in Foindu, Wollifeh, Mortema and Biaya during the alleged period; or that hundreds of people were in fact killed in Kono District; or that Kanu bears any individual criminal responsibility for the alleged crimes as a commander or as a participant in a joint criminal enterprise;[119]

(d) *Kailahun* District, that the Prosecution has failed to prove that Kanu was present in that District during the period alleged in the Indictment; or that the crime of Murder was in fact committed in Kailahun; or that he bears any individual criminal responsibility for the alleged crimes as a commander or as a participant in a joint criminal enterprise;[120]

(e) *Koinadugu* District, that the Prosecution failed to prove that Kanu was present in Heremakono, Kumalu/Kamalu, Katombo and Fadugu during the period alleged in the Indictment; or that he directly participated in the commission of the alleged crimes in that District; or that he bears any individual criminal responsibility as a commander or as a participant in a joint criminal enterprise;[121]

(f) *Bombali* District, that the Prosecution failed to prove that Kanu was present in Bonyoyo/Bornoya and Mafabu during the period alleged in the Indictment; or that he directly participated in the commission of the alleged crimes in that District; or that he bears any individual criminal responsibility as a commander or as a participant in a joint criminal enterprise.[122]

Prosecution Response

88. Counsel for the Prosecution submitted that the Prosecution evidence is sufficient to enable a reasonable tribunal of fact to conclude that all the chapeau elements of crimes against humanity alleged in Counts 3, 4, 7, 8, 11 and 13 of the Indictment have been established.[123] With regard to Count 3 of the Indictment, the Prosecution maintained that it has adduced sufficient evidence showing that the three accused persons are criminally responsible for acts of extermination committed as part of a widespread and systematic attack against a civilian population in Karina, Tombodu, Kukuna, Madina, Mange Bureh and Lunsar Town.[124] With regard to Counts 4 and 5 of the Indictment, the Prosecution submitted that it has sufficiently proved the requisite elements of

---

[118] *Ibid.*, paras. 14-15.
[119] *Ibid.*, paras. 16-19.
[120] *Ibid.*, paras. 20-21.
[121] *Ibid.*, paras. 22-23.
[122] *Ibid.*, paras. 24-25.
[123] Response, *supra* note 14, paras. 73-78.
[124] *Ibid.*, paras. 88-90, 270.

those crimes.[125]

89. While conceding that the Prosecution led no evidence of unlawful killings in the following villages, namely, Telu, Sembehun and Mamoma in *Bo* District; Foindu, Wollifeh and Biaya in *Kono* District; Heremakono, Kumalu, Katombo and Kamadugu in *Koinadugu* District; Mafabu in *Bombali* District and Tendakum in *Port Loko* District, Counsel for the Prosecution maintained that the Prosecution evidence of "widespread or systematic" killings of civilians in respect of all other locations mentioned in paragraphs 43-50 of the Indictment,[126] and in respect of other villages in these Districts not specifically pleaded in the Indictment[127] is capable of sustaining a conviction under Counts 3,4 and 5 against each of the accused persons, and that the weight, credibility and/or reliability of that evidence is irrelevant at this stage.[128]

90. Regarding the various locations mentioned in paragraphs 43 to 50 of the Indictment where offences under Counts 3, 4 and 5 are alleged to have taken place, Counsel for the Prosecution submitted in relation to-

(a) *Bo and Kenema* Districts, that the Prosecution adduced sufficient evidence showing that the alleged crimes took place soon after the AFRC/RUF Junta Government took over power; that perpetrators comprising members of the RUF and AFRC committed the alleged crimes against civilians in furtherance of a joint criminal enterprise; that perpetrators of the alleged crimes reported directly to the Supreme Council; and that as members of the ruling AFRC/RUF Junta and Supreme Council, each of the three accused persons was a participant in the joint criminal enterprise and is criminally responsible under Article 6 (1) and (3) of the Statute for the alleged crimes in those Districts;[129]

(b) *Kono* District, that the Prosecution adduced sufficient evidence showing that after the ECOMOG intervention (the time of the alleged crimes), Brima was in Kono and gave orders to his subordinates in Tombodu for the abduction, amputation and killing of civilians and that he had knowledge of crimes committed by his subordinates during "Operation Spare No Soul" and "Operation No Living Thing"; that in addition to the villages pleaded in the Indictment, unlawful killings took place at Yardu Sandu, Gbiama, Wordu, Koidu Buma, Koidu Geiya, Bomboafoidu, Penduma and Paema; that Kamara was in charge of collecting arms and bringing them back to Superman; that he had knowledge of the unlawful killings by his subordinates that took place in Kono District; and that the perpetrators carried out the alleged crimes in furtherance of a joint criminal enterprise in respect of which each of the three accused persons participated and is criminally responsible under Article 6 (1) and (3) of the Statute;[130]

(c) *Kailahun and Koinadugu* Districts, that the Prosecution adduced sufficient evidence

---

[125] *Ibid.*, para. 91.
[126] *Ibid.*, para. 118.
[127] *Ibid.*, paras. 127, 134, 138, 140, 278.
[128] *Ibid.*, para. 121.
[129] *Ibid.*, paras. 119-125, 200-203, 271-275.
[130] *Ibid.*, paras. 126-129, 204-206, 276-279.

showing that in addition to the villages pleaded in the Indictment, unlawful killings took place at Bamukura, Yemadugu and Yiffin; that perpetrators comprising members of the RUF and AFRC committed the alleged crimes there in furtherance of a joint criminal enterprise in respect of which each of the three accused persons participated and is criminally responsible under Article 6 (1) and (3) of the Statute;[131]

(d) *Bombali* District, that the Prosecution adduced sufficient evidence showing that Brima, in the presence of Kamara ordered and/or participated in the unlawful killing of civilians in Bumbuna, Kamagbengbe, Mandaha, Foroh Loko, Camp Rosos and Karina; that Kamara and Kanu participated in burning civilians to death in Karina; and that RUF/AFRC Junta troops committed the alleged crimes there in furtherance of a joint criminal enterprise in respect of which each of the three accused persons participated and is criminally responsible under Article 6 (1) and (3) of the Statute;[132]

(e) *Freetown and the Western Area*, that the Prosecution adduced sufficient evidence showing that Brima was in command of the troops that invaded Freetown and that he ordered the unlawful killing of civilians in the presence of Kamara and Kanu; that Kamara participated in some of those killings; and that the perpetrators committed the alleged crimes there in furtherance of a joint criminal enterprise in respect of which each of the three accused persons participated and is criminally responsible under Article 6 (1) and (3) of the Statute;[133]

(f) *Port Loko* District, that the Prosecution adduced sufficient evidence showing that each of the three accused persons is criminally responsible pursuant to Article 6 (1) and (3) of the Statute for crimes committed in that District; that Kamara commanded the AFRC troops that withdrew from Freetown and ordered them to commit the alleged crimes in the Westside Jungle, Mamah Town and Manarma; and that Kanu was present in Sumbuya and ordered the killings in Sumbuya, Masiaka and Gbinti Town.[134]

Joint Defence Reply

91. Defence Counsel for Brima and Kamara reiterated that the Prosecution is under a legal obligation to prove every particular as set out in the Indictment and that where the Prosecution has conceded failure to adduce evidence of crimes having been committed in certain locations specified in the Indictment, the accused persons should be acquitted on those counts.[135]

Brima Reply

92. Counsel for the accused Brima submitted that the Prosecution has failed to adduce any evidence that Brima personally committed any of the alleged crimes or that he exercised any control over the perpetrators of the alleged crimes in the Districts of *Bo, Kenema, Kono, Kailahun* and *Bombali*,

---

[131] *Ibid.*, paras. 130-136, 207-210, 280-284.
[132] *Ibid.*, paras. 137-141, 211-214, 285-287.
[133] *Ibid.*, paras. 142-144, 215-216, 288.
[134] *Ibid.*, paras. 145, 217-222, 289-291.
[135] Joint Defence Reply, *supra* note 13, paras. 8-9.

and that in any event, the Prosecution evidence implicating Brima is contradictory and unreliable.[136]

Kamara Reply

93. Counsel for the accused Kamara submitted that the Prosecution has failed to prove that Kamara directly or indirectly participated in the commission of the alleged crimes in *Kono* and *Koinadugu* Districts and in the *Freetown and Western Area*; and that in any event, the Prosecution evidence implicating Kamara is contradictory and unreliable.[137]

Kanu Reply

94. Counsel for the accused Kanu reiterated that the Prosecution is under a legal obligation to prove every particular as set out in the Indictment and that where the Prosecution has conceded having led no evidence of crimes having been committed in certain locations specified in the Indictment, the Trial Chamber should strike those locations from the Indictment.[138] Similarly, where a Prosecution witness has given evidence relating to a location whose names differs phonetically from the name specified in the Indictment the latter names should be struck from the Indictment as the Prosecution has failed to prove that the two names refer to the same location.[139] Counsel reiterated that the Prosecution evidence implicating Kanu in the unlawful killing of civilians in the Districts of *Bo, Kono, Bombali* and *Port Loko* is insufficient and unreliable.[140]

2.5. Findings for Counts 3, 4 and 5

General findings:

95. The Defence argued that the elements of the crimes of Murder and Extermination as crimes against humanity overlap, to the prejudice of the Defence Case. While we agree that some of the elements of the crime of Extermination overlap those of the crime of Murder, the two crimes against humanity are not identical. As stated above, the single element that distinguishes the former from the latter is that in the case of Extermination, the murder (whether of one or more persons) "*constitutes part of a mass killing of members of a civilian population*". Given that the two crimes are essentially different and are charged concurrently as well as in the alternative under Counts 3 and 4 of the Indictment, we find no merit in the Defence claim of prejudice.

96. Regarding the Defence submission that the Trial Chamber ought to strike from the Indictment the names of certain villages in respect of which the Prosecution has failed to adduce any evidence of crimes having been committed or whose names are spelled differently in the Indictment from similar locations given by the witnesses, we note that the Prosecution indeed conceded that no evidence of crime was led with regard to certain locations named in the Indictment. These include

---

[136] Brima Reply, *supra* note 61, paras. 2-10.
[137] Kamara Reply, *supra* note 62, paras. 2-4.
[138] Kanu Reply *supra* note 13, paras. 2-5.
[139] *Ibid.*, paras. 6, 26.
[140] *Ibid.*, paras. 22-26.

Telu, Sembehun and Mamoma in *Bo* District; Foindu, Wollifeh and Biaya in *Kono* District; Heremakono, Kumalu, Katombo and Kamadugu in *Koinadugu* District; Mafabu in *Bombali* District and Tendakum in *Port Loko* District. In light of the Prosecution evidence referred to below, we find no merit in the Defence objections and refer to our earlier views contained in Part III of this Decision.

97. Regarding the Defence submission that some of the Prosecution witnesses were contradictory and/or unreliable, the Trial Chamber can only reiterate its earlier view, namely, that the object of the inquiry under Rule 98 is not to make determinations of fact having weighed the credibility and reliability of the evidence; and that rather, it is simply to determine whether the evidence – assuming that it is true – could not possibly sustain a conviction on one or more counts.

Findings with regard to Count 3 (Extermination):

98. The Trial Chamber finds that there is evidence, if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt, of the guilt of each of the accused Brima, Kamara and Kanu, with respect to the mass killings that took place during the periods alleged in the Indictment at various locations including[141] Tikonko Town[142] and Gerihun[143] in *Bo* District; at Manarma[144], Mammah Town[145], Mile Thirty-Eight[146], Songo[147], Nonkoba[148], Gberibana[149], Makolo[150], Masimera,[151] Lunsar Town[152] in *Port Loko* District; at Freetown[153], Kissy[154], Thomas Place[155] and Fourah Bay Area[156] in *Freetown and Western Area*; at Koidu Geya[157], Koidu Buma[158], Paema[159], Penduma[160], Tombodu[161], Koidu Town[162], and Buedu[163] in *Kono* District; at Gbendembu[164], Karina[165],

---

[141] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record. See also Prosecution Exhibit 57.
[142] Witness TF1-004, Transcript 23 June 2005, pp. 12-15, pp. 17-31, pp. 56-57.
[143] Witnesses TF1-053, Transcript 18 April 2005, pp. 105-111; Witness TF1-054, Transcript 19 April 2005, pp. 92-94.
[144] Witness TF1-320, Transcript 8 April 2005, pp. 14-16.
[145] Witness TF1-334, Transcript 15 June 2005, pp. 20-21.
[146] Witness TF1-023, Transcript 10 March 2005, pp. 36-37.
[147] Witness TF1-277, Transcript 11 April 2005, pp. 30-31; Witness TF1-253, Transcript 15 April 2005, p. 102-103; Witness TF1-334, Transcript 15 June 2005, pp. 20-21.
[148] Witness TF1-256, Transcript 14 April 2005, pp. 72-77, pp. 82-85.
[149] Witness TF1-334, Transcript 15 June 2005, pp. 27-30.
[150] Witness TF1-334, Transcript 15 June 2005, pp. 38-40.
[151] Witness TF1-256, Transcript 14 April 2005, pp. 47-48.
[152] Witness TF1-033, Transcript 11 July 2005, p. 45.
[153] Witnesses TF1-024, Transcript 7 March 2005, p. 46; Witness TF1-021, Transcript 15 April 2005, pp. 25-28; Witness TF1-334, Transcript 14 June 2005, pp. 43-45, pp. 72-73, pp. 84-89, pp. 96-97; Witness TF1-084, Transcript 6 April 2005, pp. 40- 44; Witness TF1-104, Transcript 30 June 2005, pp. 25-29.
[154] Witnesses TF1-083, Transcript 8 April 2005, pp. 69-70; Witness TF1-021, Transcript 15 April 2005, pp. 25-28, pp. 29-33, p. 45; Witness TF1-334, Transcript 14 June 2005, pp. 83-89; Witness TF1-227, Transcript 8 April 2005, p. 95.
[155] Witness TF1-227, Transcript 8 April 2005, p. 95.
[156] Witness TF1-334, Transcript 14 June 2005, pp 66-67.
[157] Witness TF1-334, Transcript 20 May 2005, pp.22-23.
[158] Witness TF1-334, Transcript 20 May 2005, p. 22-23.
[159] Witness TF1-216, Transcript 27 June 2005, pp. 88-89.
[160] Witness TF1-217, Transcript 17 October 2005, pp. 17-22.

Gberemantmatank (Eddie Town)[166], Rosos[167], Bat Mise, near Camp Rosos[168], Bornoya[169] in *Bombali* District; Kenema Town[170] and Tongo Field[171] in *Kenema* District; Kailahun Town[172] in *Kailahun* District, and Freetown[173] in the *Freetown and Western Area*,[174] as part of a widespread or systematic attack upon a civilian population.

99. The Trial Chamber accordingly finds that there is evidence capable of supporting a conviction against each of the accused Brima, Kamara and Kanu for the crime against humanity of Extermination pursuant to Article 2.b. of the Statute, as charged under Count 3 of the Indictment.

Findings with regard to Count 4 (Murder):

100. The Trial Chamber finds that there is evidence, if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt, of the guilt of each of the Accused Brima, Kamara and Kanu, with respect to the murders that took place during the periods alleged in the Indictment, at various locations including[175] Gerihun[176], Tikonko[177] in *Bo* District; Kenema Town[178]and Tongo Field[179] in *Kenema* District; Koidu Geiya[180], Paema[181], Yardu Sando[182], Wordu[183], Koidu Town[184] Tombodu[185]and Penduma[186] in *Kono* District; at Kailahun Town[187] in *Kailahun* District; at Yiffin[188],

---

[161] Witness TF1-334, Transcript 20 May 2005, pp. 11-15; Witness TF1-216, Transcript 27 June 2005, pp. 91-93; TF1-033, Transcript 11 July 2005, pp. 10-12; TF1-167, Transcript 15 September 2005, pp. 44-45.
[162] Witness TF1-217, Transcript 17 October 2005, pp. 13-14.
[163] Witness TF1-113, Transcript 18 July 2005, pp. 89-90.
[164] Witness TF1-033, Transcript 11 July 2003, p. 33.
[165] Witness TF1-334, Transcript 23 May 2005, pp 65-69; Witness TF1-055, Transcript 12 July 2005, pp. 132-138, pp. 142; Witness TF1-058, Transcript 14 July 2005, pp. 76-85; Witness TF1-033, Transcript 12 July 2005, pp. 80-84; Witness TF1-167, Transcript 15 September 2005, pp. 54-58.
[166] Witness TF1-033, Transcript 11 July 2005, p. 32.
[167] Witness TF1-033, Transcript 11 July 2005, pp. 23-25.
[168] See confidential Exhibit P.15.
[169] Witness TF1-157, Transcript 22 July 2005, pp. 56-61.
[170] Witness TF1-122, Transcript 24 June 2005, pp. 35-49.
[171] Witness TF1-062, Transcript 27 June 2005, pp. 12-13.
[172] Witness TF1-113, Transcript 18 July 2005, pp 87-90, pp. 115-116.
[173] Witnesses TF1-098, 5 April 2005, p 42; TF1-084, 6 April 2005, pp 40-46; TF1-085, 7 May 2005, pp 17-25; TF1-083, 8 April 2005, pp 69-70; TF1-227, 8 April 2005, pp 95-101; TF1-021, 15 April 2005, pp 25-28; TF1-334, 14 June 2005, pp 72-73, 83-89 and 95-97, TF1-104, 30 June 2005, pp 25-29.
[174] In addition, Prosecution Exhibits P.46, P.58 and P.66 contain documentary evidence of mass killings of civilians in the *Freetown and Western Area*.
[175] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record.
[176] WitnessTF1-053 , Transcript 18 April 2005, pp. 105-111;Witness TF1-054, Transcript 19 April 2005, pp. 89-94.
[177] Witness TF1-004, Transcript 23 April 2005, pp. 17-27.
[178] Witness TF1-122, Transcript 24 June 2005, pp. 35-49.
[179] Witness TF1-062, Transcript 27 June 2005, pp. 12-13.
[180] Witness TF1-334, Transcript 20 May 2005, pp. 22-26.
[181] Witness TF1-216, Transcript 27 June 2005, pp. 88-89.
[182] Witness TF1-019, Transcript 30 June 2005, pp. 91-94.
[183] Witness TF1-072, Transcript 1 July 2005, pp. 10-11.
[184] Witness TF1-217, Transcript 17 October 2005, pp. 13-14.
[185] Witness TF1-167, Transcript 15 September 2005, p. 45.
[186] Witness TF1-217, Transcript 17 October 2005, pp. 17-23.

Kabala[189], Fadugu[190]and Bamukura[191], in *Koinadugu* District; Kamagbengbe[192], Tonkoba[193], Karina[194], Rosos[195], Mandaha/Mateboi[196], Bornoya[197], Rotu[198], Batkanu[199], Dariya[200], Mayombo[201] and Madina Loko[202] in *Bombali* District,[203] as part of a widespread or systematic attack upon a civilian population.

101. The Trial Chamber accordingly finds that there is evidence capable of supporting a conviction against each of the accused Brima, Kamara and Kanu for the crime against humanity of Murder pursuant to Article 2.a. of the Statute as charged under Count 4 of the Indictment.

Findings with regard to Count 5 (Murder):

102. The Trial Chamber finds that there is evidence, if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt, of the guilt of each of the accused Brima, Kamara and Kanu, with respect to the murders that took place during the periods alleged in the Indictment, at various locations including[204] Makolo[205] in *Port Loko* District; Kenema Town[206] and Tongo Field[207] in *Kenema* District; Jagbwema Fiama[208], Koidu Buma[209], Wendedu/Wondedu[210] in *Kono* District; Kabala[211], Kurubola[212] and Koidu Town[213] in *Koinadugu* District; Bumbuna[214], Mandaha[215], Foroh Loko[216] and Gbendembu[217] in *Bombali* District; Freetown[218], Waterloo[219], in the *Freetown and Western*

---

[187] Witness TF1-113, Transcript 18 July 2005, pp. 87-90.
[188] Witness TF1-310, Transcript 5 July 2005, pp. 65-67, pp. 70-71.
[189] Witness TF1-209, Transcript 7 July 2005, pp. 31-36.
[190] Witness TF1-167, Transcript 6 October 2005, p. 77-78.
[191] Witness TF1-094, Transcript 13 July 2005, pp. 25, 27
[192] Witness TF1-334, Transcript 23 May 2005, pp. 54-56
[193] Witness TF1-180, Transcript 8 July 2005, pp. 5-7.
[194] Witness TF1-055, Transcript 12 July 2005, pp. 132-138; Witness TF1-158, Transcript 26 July 2005, pp. 36-37.
[195] Witness TF1-157, Transcript 25 July 2005, pp. 7-10.
[196] Witness TF1-157, Transcript 22 July 2005, pp. 81-84.
[197] Witness TF1-158, Transcript 26 July 2005, pp. 34-35; TF1-156, Transcript 26 September 2005, pp. 35-40.
[198] Witness TF1-267, Transcript 26 July 2005, pp. 104-105.
[199] Witness TF1-179, Transcript 27 July 2005, pp. 34-35, p. 44.
[200] Witness TF1-156, Transcript 26 September 2005, p. 45.
[201] Witness TF1-156, Transcript 26 September 2005, p. 46.
[202] Witness TF1-167, Transcript 6 October 2005, pp. 71-72.
[203] In addition, Prosecution 54 contains documentary evidence of unlawful killings of civilians around the villages of Karina, Makeni and Kamalu in *Bombali* District.
[204] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record.
[205] Witness TF1-334, Transcript 15 June 2005, pp. 38-40.
[206] Witness TF1-122, Transcript 24 June 2005, pp. 19-23.
[207] Witness TF1-062, Transcript 27 June 2005, pp. 12-13.
[208] Witness TF1-334, Transcript 20 May 2005, pp. 28-30.
[209] Witness TF1-334, Transcript 20 May 2005, p. 23.
[210] Witness TF1-217, Transcript 17 October 2005, pp. 12-13.
[211] Witness TF1-167, Transcript 6 October 2005, pp. 87-88.
[212] Witness TF1-184, Transcript 27 September 2005, pp.17-18.
[213] Witness TF1-217, Transcript 17 October 2005, pp. 13-14.
[214] Witness TF1-334, Transcript 23 May 2005, pp. 50-52.
[215] Witness TF1-334, Transcript 23 May 2005, pp. 77-79.
[216] Witness TF1-334, Transcript 23 May 2005, pp. 85-86.
[217] Witness TF1-033, Transcript 11 July 2005, p. 34.

Area.[220]

103. The Trial Chamber accordingly finds that there is evidence capable of supporting a conviction against each of the accused Brima, Kamara and Kanu for the crime of Murder as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II, pursuant to Article 3.a. of the Statute, as charged under Count 5 of the Indictment.

3. Counts 6, 7, 8 and 9: Crimes Relating To Sexual Violence

Introduction

104. The Indictment alleges that members of the AFRC/RUF committed widespread sexual violence against civilian women and girls including brutal rapes, often by multiple rapists, forced "marriages", and acts of sexual violence including abduction of women and girls and use as sex slaves and/or forced into 'marriages' and/or subjected to other forms of sexual violence. The 'wives' were forced to perform a number of conjugal duties under coercion by their 'husbands'. The sexual violence against women and girls occurred between 14 February 1998 and 30 June 1998 in Kono District, between 14 February 1998 and 30 September 1998 in Koinadugu District, between about 1 May 1998 and 31(sic) November 1998 in Bombali District, at all times relevant to the Indictment in Kailahun district, between 6 January 1999 and 28 February 1999 in Freetown and Western Area and between February 1999 and April 1999 in Port Loko District.

105. The Indictment charges that, by their acts or omissions in relation to these events, pursuant to Article 6.1 and, or alternatively Article 6.3 of the Statute, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu are individually criminally responsible for the crimes alleged in Counts 6 (Rape, a crime against humanity punishable under Article 2.g of the Statute), Count 7 (Sexual Slavery and any other form of Sexual Violence, a crime against humanity punishable under Article 2.g of the Statute), Count 8 (Other Inhumane Act, a crime against humanity punishable under Article 2.i of the Statute), and, in addition to or in the alternative, Count 9 (Outrages upon Personal Dignity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.e of the Statute).

3.1. Count 6: Rape (Article 2.g of the Statute)

---

[218] Witness TF1-024, Transcript 7 March 2005, pp. 47-48; Witness TF1-098, Transcript 5 April 2005, pp. 41-43; Witness TF1-085, Transcript 7 April 2005, pp. 19-20, pp. 22-24; Witness TF1-083, Transcript 8 April 2005, pp. 49, pp. 67-68; TF1-227, Transcript 11 April 2005, pp. 13-15; Witness TF1-334, Transcript 14 June 2005, pp. 22-24, pp. 43-45, pp. 64-65, pp. 97-98; Witness TF1-104, Transcript 30 June 2005, pp. 23-24; Witness TF1-169, Transcript 7 July 2005, pp. 22-24 and 60-64; Witness TF1-033, Transcript 11 July 2005, pp. 63-64; Witness TF1-167, Transcript 16 September 2005, pp. 43-44, pp. 47-48; Witness TF1-153, Transcript 22 September 2005, p. 100; Witness TF1-153, Transcript 23 September 2005, pp. 21-24.

[219] Witness TF1-277, Transcript 8 March 2005, pp. 50-51.

[220] In addition, Prosecution Exhibits 46 and 66 contain documentary evidence of unlawful killings of non-combatants in the *Freetown and Western Area.*

Elements of the crime:

106. We endorse the following definition of rape as affirmed by the ICTY Appeal Chamber in *Kunarac*[221]:

> "the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight:
>
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
>
> where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.
>
> The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."

107. In affirming this definition the ICTY Appeals Chamber emphasized that "[f]orce or threat of force provides clear evidence of non-consent, but force is not an element per se of rape" and there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.[222]

108. The definition of rape as a crime against humanity is therefore the above definition where the crime of rape is committed as part of a widespread or systematic attack against any civilian population, plus the other constitutive elements of crimes against humanity as set out in paragraphs 40 to 42 above.

3.2. Count 7: Sexual Slavery and Any Other Form of Sexual Violence (Article 2.g. of the Statute)

Elements of Sexual Slavery:

109. The elements of the crime of sexual slavery within the meaning of Article 2.g of the Statute are:

(1) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

---

[221] *Kunarac* Appeals Chamber Judgement, *supra* note 33, para. 127.
[222] *Ibid.*, paras.129-130.

(2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

(3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

(4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population[223].

Elements of Any Other Form of Sexual Violence:

110. The elements of crimes amounting to any other form of sexual violence within the meaning of Article 2.g of the Statute are:

(1) The perpetrator committed an act of a sexual nature against one or more persons or caused such persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person or person's incapacity to give genuine consent.

(2) Such conduct was of a gravity comparable to the acts referred to in Art 2.g of the Statute.

(3) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

(4) The conduct was committed as part of a widespread or systematic attack directed against any civilian population.

(5) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against any civilian population.[224]

111. The Statute does not define "any other form of sexual violence". However, the question was addressed by the Trial Chamber in *Kvocka*, which came to the conclusion that: "sexual violence is broader than rape and includes such crimes as sexual slavery or molestation"[225] and "would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization' and other similar forms of violence."[226]

---

[223] Article 7(1) (g)-2 of the Elements of Crimes adopted by the Preparatory Commission for the International Criminal Court cited in Joint Legal Part, *supra* note 22, para 69.
[224] Article 7(1) (g)-6 of the Elements of Crimes adopted by the Preparatory Commission for the International Criminal Court.
[225] *Prosecutor v. Kvocka*, ICTY IT-98-30/1-T, Trial Chamber Judgement, at para.180.
[226] *Ibid.*, at footnote 343.

3.3. Count 8: Other Inhumane Act (Article 2.i of the Statute)

Elements of the crime:

112. The elements of the crime against humanity of "other inhumane acts" are discussed under Count 11 infra.[227]

3.4. Count 9: Outrages Upon Personal Dignity (Article 3.e. of the Statute)

Elements of the crime:

113. We agree with what was said by the ICTY Trial Chamber in *Kunarac*[228] that,

> "the offence of outrages upon personal dignity requires
>
> (i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and
>
> (ii) that he knew that the act or omission could have that effect."

114. The Appeals Chamber in *Kunarac*[229] went on to hold that an outrage upon personal dignity is constituted by "an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity."

115. We therefore consider that the elements of the crime of outrages upon personal dignity within the meaning of Article 3.e. of the Statute of the Special Court for Sierra Leone are:

1. The constitutive elements of violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.
2. The accused committed an outrage upon the personal dignity of the victim.
3. The humiliation and degradation was so serious as to be generally considered as an outrage upon personal dignity.
4. The accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.
5. The accused knew that the act or omission could have such an effect.

116. This definition is assisted by Article 3.e. of the Statute, which prescribes some of the acts

---

[227] See paras. 173-174.
[228] *Prosecutor v. Kunarac et al.*, ICTY IT-96-23-T & IT-96-23/1-T, Judgement, ["*Kunarac* Judgement"], para. 514.
[229] *Kunarac* Appeals Chamber Judgement, *supra* note 33, para. 165.

constituting outrages upon personal dignity, viz. humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault.

3.5. Submissions for Counts 6, 7, 8 and 9

Joint Legal

117. The Joint Defence submitted that the Prosecution failed to adduce any evidence to sustain a conviction for rape, sexual slavery or any other form of sexual violence, nor had it established the elements of the crime of "other inhumane act".[230]

118. The separate submissions made by Counsel for each Accused can be briefly summarized as follows:

Brima

119. The Prosecution failed to adduce evidence that Brima raped, or ordered the rape of, any person, or that he knew or should have known that rape was being committed by members of the AFRC.[231] In Kono District, the evidence of certain witnesses was uncorroborated and there was no evidence that sexual abuse was widespread[232], whereas in Koinadugu District there was no evidence against Brima of any acts or omissions in relation to sexual violence,[233] nor was there evidence that he could have acted to prevent sexual violence in that District. As regards the Bombali District, the evidence of Witness TF1-334 gave very little detail and did not mention the presence of any commander in the District.[234]

Kamara

120. Kamara was mentioned in the evidence as being present in Kono, Koinadugu and Bombali Districts, but the Prosecution failed to show that he was involved in the commission of any form of sexual violence or that persons under his command, if any, took part in the alleged incidents.[235] On the other hand, there was no evidence that Kamara was in Kailahun District at the relevant time. Furthermore, Kailahun was under the control of the RUF and there was no evidence that Kamara, or anyone under his control was involved in the alleged crimes in any part of that district.[236]

121. Although Kamara was allegedly present in various parts of Freetown and the Western Area, the evidence failed to show that he was involved in the commission of the crimes alleged. There was little or no evidence that Kamara, who was lawfully married, had extra-marital affairs or that he engaged in any sexual violence. In this regard, the evidence of Witness TF1-334 was weak, uncorroborated and inadequate. Equally, there was no evidence that persons under Kamara's

---

[230] Supra paras. 67, 71 and 73.
[231] Brima Motion *supra* note 13, para 61
[232] *Ibid.*, para 62-63
[233] Brima Motion *supra* note 13, para 65.
[234] *Ibid.*, para 68.
[235] Kamara Motion, *supra* note 105, para 30.3.
[236] *Ibid.*, para 30.12.

command, if any, took part in the incidents alleged.[237]

122. Similarly, although Kamara was allegedly present the Port Loko District, the evidence failed to show that he was involved in the commission of offences of sexual violence. In particular, the evidence of witness TF1-334 was "weak, isolated, uncorroborated and tainted with ill-motive".[238] Further, there was no evidence that persons under his command, if any, took part in the incidents alleged, nor was there evidence to show that he participated in a joint criminal enterprise.

Kanu

123. The Prosecution did not present any evidence to support the crime of rape or of sexual slavery of *hundreds* of women and girls, or any evidence of inhumane acts or outrages upon human dignity at AFRC/RUF camps such as Superman camp, Kissi-town (or Kissy Town), Tomendeh, Fokoiya, Wondedu, Tombodu or Kissi-town (or Kissi Town) in the Kono District; or in Hemakono in the Koinadugu Distric), or in Mandaha in the Bombali District.[239]

124. Nor was there any evidence of rape or sexual slavery or outrages against personal dignity in Kailahun District by the AFRC/RUF at any time relevant to the Indictment.[240] Alternatively, there was no evidence showing that Kanu bore individual criminal responsibility for the crime of sexual slavery, nor was there any mention of his presence in Kailahun District.[241] Similarly, there was no evidence that Kanu bore any form of individual criminal responsibility for the crime of rape in Freetown and the Western Area, nor that "*hundreds* of women and girls were subjected to sexual slavery"[242] throughout the area. There was also no evidence that Kanu bore any form of criminal responsibility for the crime of sexual slavery or any other form of sexual violence in Port Loko District.[243]

125. In conclusion, no evidence was adduced to show that Kanu bore superior responsibility or had been involved in a joint criminal enterprise, or bore any other form of individual criminal responsibility pursuant to Articles 6.1. or 6.3. of the Statute for the crimes of rape, sexual slavery, other forms of sexual violence or outrages upon human dignity in any of the districts cited in the Indictment.[244]

Prosecution Response

126. The submissions of the Prosecution in response to the Defence submissions are briefly summarized as follows:

127. The evidence showed that in addition to the regularly described forms of sexual and gender specific violence frequently suffered by women in conflict situations, Sierra Leonean women were forced into

---

[237] *Ibid.*, 30.15.
[238] *Ibid.*, para 30.18.
[239] Kanu Motion, *supra* note 13, paras. 31,34, 36 and 59.
[240] *Ibid.*, paras 38 and 49
[241] *Ibid.*, para 59
[242] *Ibid.*, para 49
[243] *Ibid.*, para 50
[244] Kanu Motion *supra* note 13, para. 33, 35, 37 40-46, 52-54,61.

marriages and thus were involuntarily converted into becoming what has commonly been referred to as "bush wives"[245] There was evidence in this regard of the widespread and systematic nature of the attack and the awareness of the Accused of the circumstances establishing the gravity of the conduct.[246]

128. The Joint Defence Motion made no submission as to the evidence led with respect to the elements of the crime of outrages against personal dignity".[247]

129. In regard to the Brima submissions, the Prosecution accepted that no evidence of sexual violence had been led with respect to the villages of Tombendeh, Fokoiya, Superman Camp/Kissi TownCamp, Kissi Town, Tombodu (Kono District); Heremakono (Koinadugu District) or Mandaha (Bombali District) but submitted that there is sufficient evidence in relation to all other locations pleaded.[248]

130. In relation to the Kono District, evidence of sexual violence given by witnesses who were unable to name the group responsible, could still incriminate Brima in circumstances where there was other evidence showing the presence of Junta troops in that area.[249] Further, the evidence of sexual violence in Kono was part of a pattern that was repeated throughout Sierra Leone wherever Junta troops were present. The evidence was of rapes by soldiers during attacks on villages, rape being the modus operandi of such attacks.[250] Consequently, Brima was guilty of the counts charged in respect of Kono.

131. In the Koinadugu and Bombali Districts, there was evidence of rape, sexual slavery, women being stripped naked on the orders of Brima, and of many of these women being handed to the Accused Kanu following the attack.[251]

132. The Brima Motion made no submission in respect to the crime bases of Kailahun District, Freetown and Western Area, and Port Loko District, and therefore it was assumed that Brima accepted the sufficiency of the evidence with respect to them.[252]

133. As regards the Kamara submissions, there was clear evidence that during the time that Kamara acted as commander in the Kono District, the crimes outlined in Counts 6 to 9 were committed by AFRC/RUF troops, "entailing the responsibility of the Second Accused".[253]

134. Furthermore, there was evidence that Kamara was present in the Koinadugu District during the period stated in the indictment, particularly in Kabala Town. The evidence of Witness TF1-153 was that Kamara failed to respond to complaints that men under his command raped a civilian. Witness TF1-209 testified that she was raped by two members of the Junta forces, and that many

---

[245] Response, *supra* note 14, para. 96
[246] *Ibid.*, para. 98.
[247] *Ibid.*, para. 99.
[248] *Ibid.*, para 146.
[249] *Ibid.*, para. 150.
[250] *Ibid.*, para. 151.
[251] *Ibid.*, para 160.
[252] *Ibid.*, para 161.
[253] *Ibid.*, para.225.

other women and girls, some as young as 9 years were raped, and that armed soldiers committed acts of sexual violence against them. Witness TF1-133 gave evidence of acts of sexual slavery and forced marriage in the district. The evidence therefore showed that rape and sexual violence were carried out by AFRC soldiers in Koinadugu District, and that Kamara was part of a joint criminal enterprise with those soldiers and others".[254]

135. The evidence also established the widespread and systematic nature of sexual violence in the Bombali District. For instance, there was the evidence of witness TF1-334 that in Karina, soldiers under the command of Kamara forcibly raped and captured female civilians.[255]

136. There was also the evidence of Witness TF1-144 that in Kailahun District AFRC soldiers had raped women and tried to force them into marriage, and that no Junta commander ever interfered. There was also expert evidence that forced marriage was practised in Kailahun.[256]

137. In Freetown and the Western Area there was evidence that rapes were committed at State House, that women and girls were abducted for sexual purposes during the retreat from Freetown by Kamara and his troops, and that women were forced into 'marriages' with rebel soldiers.[257]

138. Witness TF1-334 testified that in Port Loko, Kamara raped a woman after ordering that she be beaten and locked in a rice box.[258]

139. With regard to the Kanu submissions, while it was accepted that no evidence of sexual violence had been led in respect of the villages of Tomendeh, Fokoiya, SupermanCamp/Kissi Town Camp, Kissi Town in Kono District, there was sufficient evidence in relation to all other locations.

140. As to the Defence submission that no evidence that hundreds of women and girls were raped in the Kono District, Witness TF1-217 gave evidence "indicating mass rape in Koidu Town" and Witness TF1-133 testified to the capture and rape of female civilians in Kumala. This evidence "indicates that this was a common practice amongst soldiers and as a consequence hundreds of women were in fact raped at numerous locations in Kono District at the material time."[259]

141. While it was conceded that no evidence was led of rape in Heremakono in Koinadugu District, there was sufficient evidence of rape in all other locations in that District. Further, the accused Kanu was Chief of Staff in Mansofinia and had responsibility for the fate of the women there.[260] Kanu was also a member of the Supreme Council in the AFRC/RUF Junta, which made him a leadership figure within the body that governed the country at that time.[261]

142. Evidence had been presented that over 200 incidences of rape occurred in the Bombali District between about 1 May and 31(sic) November 1998. There was evidence to show that in the

---

[254] *Ibid.*, paras. 227, 229.
[255] *Ibid.*, paras 231 and 232.
[256] *Ibid.*, para. 234.
[257] *Ibid.*, para. 238.
[258] *Ibid.*, para 240.
[259] *Ibid.*, para 297.
[260] *Ibid.*, para 302.
[261] *Ibid.*, para. 303.

town of Port Loko, Kanu disregarded a law that rebels should not rape civilians. Further, there was evidence that Kanu had total control of all women in Rosos.[262]

143. There was also evidence of reports of rape in the Kailahun District and evidence that Kanu bore superior responsibility and participated in a joint criminal enterprise.[263]

144. With regard to Freetown and the Western Area, there was evidence of rapes committed at State House, including by Kanu himself. Captured women and girls were brought to State House and were forced to have sex with the soldiers. Kanu was present and knew or had reason to know that women and children were being raped. In fact, there was evidence that the most beautiful women were reserved for him. Also, there was evidence that Kanu led soldiers from Wellington to Allen Town, and that soldiers were seen raping women and children.[264]

145. In relation to the Kailahun District, and to Freetown and the Western Area, there was evidence of sexual slavery and other forms of sexual violence upon which a reasonable trier of fact could convict Kanu on the basis of his participation in a joint criminal enterprise.[265]

146. Furthermore, with respect to the Districts of Kono, Koinadugu, Bombali and Port Loko, the evidence was sufficient for a reasonable trier of fact to convict Kanu for the crime of sexual slavery and sexual violence pursuant to Article 6.1. and Article 6.3. of the Statute. In particular, in Port Loko in 1999, Kanu was present in Masiaka, where he held a position of high command, when rape and other forms of sexual violence were committed by rebel soldiers against civilians.[266]

147. In respect to Counts 8 and 9, a reasonable trier of fact could convict Kanu on the basis of his participation in a joint criminal enterprise in relation to all Districts mentioned in the Indictment.[267]

148. The Prosecution accepted that no evidence of sexual violence had been led with respect to the following villages: Tomendeh, Fokoiya or Superman Camp/Kissi Town Camp (Kono District); Heremakono (Koinadugu District).[268]

149. The Prosecution disputed the submission in the Kanu Motion that, in relation to Counts 8 and 9, there was no evidence with respect to the Kono District, Koinadugu District, Bomabali District and Kailahun District, of the criminal responsibility of Kanu under Articles 6.1. and 6.3. The Prosecution stated that in the Koinadugu District, Witness TF1-209 was told by Kanu that he had been slitting the bellies of pregnant women and that the witness, who had been raped, was lucky that her belly had not been slit. Further, there was the evidence that in Bombali, Kanu disregarded a law that rebels should not rape civilians, and in Freetown Kanu amputated limbs and ordered others to do the same. Regarding the remaining districts, the Prosecution relied on the evidence of joint

---

[262] *Ibid.*, para. 307.
[263] *Ibid.*, paras. 311, 312.
[264] *Ibid.*, paras. 314, 315.
[265] *Ibid.*, para. 317-320.
[266] *Ibid.*, para.323.
[267] *Ibid.*, para.327.
[268] *Ibid.*, para. 293 and 300.

criminal enterprise.[269]

Brima Reply

150. Counsel for Brima replied that the Prosecution has to prove the accused's actions were directly or indirectly part of a widespread and systematic sexual attack on the civilian population, and concluded that the Prosecution "has not led any evidence to prove that the First Accused in (sic) criminally liable for sexual violence against the civilian population." [270]

151. In relation to the Kono District, Counsel for Brima argued that it was important for a witness to identify whether the perpetrators were from the AFRC or RUF, because the two groups had different commands, and Brima could not be responsible for "acts committed by the RUF."[271] It was also submitted that only one witness testified that Brima was indirectly involved in sexual violence, but that evidence was not corroborated.

152. With respect to the Koinadugu District, Counsel for Brima submitted that the evidence showed that the perpetrators were controlled by persons superior in command to Brima.[272]

Kamara Reply

153. Counsel for Kamara submitted that it was clear from the evidence that Kamara was not in command in the Kono District and cannot be criminally responsible for the crimes committed there.[273]

154. With respect to the crimes alleged to have been committed in Koinadugu District, Counsel for Kamara submitted that the evidence of Witness TF1-153 was contradictory and based on hearsay, whereas other witnesses did not mention Kamara's presence there at all. It was further submitted that there was no evidence that Kamara took part in crimes of sexual violence or that he was part of a joint criminal enterprise.[274]

Kanu Reply

155. Counsel for Kanu, referring to the Kono District, submitted that the Prosecution had neither accepted nor refuted the Defence statement that there was no evidence of rape at Wondedu and therefore the Prosecution must be taken to acquiesce to it.[275] Counsel for Kanu also re-stated that the Prosecution had not provided evidence that hundreds of women and girls were raped in the Kono District or that this was a common practice amongst the soldiers.[276]

156. Referring to the Koinadugu District, Counsel for Kanu submitted that the Prosecution has not

---

[269] *Ibid.*, para. 332.
[270] Brima Reply, *supra* note 61, para. 11.
[271] *Ibid.*, paras 11 and 12.
[272] *Ibid.*, para. 13.
[273] Kamara Reply, *supra* note 62, para. 5.
[274] *Ibid.*, para. 6.
[275] Kanu Reply *supra* note 13, para. 27.
[276] *Ibid.*, para. 28.

provided evidence of rapes in Monsafinia.[277]

157. Under the heading Counts 8 - 11, Counsel for Kanu argued that Witness TF1-209 was told by Kanu only that "they" were slitting the bellies of pregnant women, not that he himself was slitting bellies; therefore there was no evidence capable of supporting a conviction.[278]

3.6. Findings for Counts 6, 7, 8 and 9

Findings for Count 6 (Rape):

158. As stated above, it is not the function of the Trial Chamber under Rule 98 to make determinations of fact having weighed the credibility and reliability of the evidence. Hence submissions that the evidence lacks corroboration, or is contradictory and uncorroborated, are not appropriate under Rule 98.

159. We note that the Prosecution has conceded that there was no evidence of rape in respect of the following locations pleaded in the indictment: Tomendeh, Fokoiya, Superman Camp/Kissi Town Camp, Kissi Town or Tombodu (Kono District); Heremakono (Koinadugu District); or Mandaha (Bombali District).

160. However, we find that there is other evidence[279] with respect to the to the Districts of Kono,[280] Koinadugu,[281] Bombali[282], Kailahun,[283] Freetown and Western area[284] and Port Loko[285] and in exhibits[286] upon which, if believed, a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu for the crime of rape as a crime against humanity pursuant to Article 2.g of the Statute. Accordingly, we are satisfied that the evidence

---

[277] *Ibid.*, para 29.
[278] *Ibid.*, para. 30.
[279] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record.
[280] Witness TF1-334, Transcript 20 May 2005, p. 7; Witness TF1-076, Transcript 27 June 2005, pp. 105-106, Witness TF1-198, Transcript 28 June 2005, p. 12; Witness TF1-206, Transcript 28 June 2005, p. 96; Witness TF1-019, Transcript 30 June 2005, pp. 81-82, pp. 90-91; Witness TF1-033, Transcripts 11 July 2005, p.14; Witness TF1-114, Transcripts 14 July 2005, p. 131; Witness TF1-217, Transcripts 17 October 2005, p. 5, pp. 22-23, pp. 30-31.
[281] Witness TF1-209, Transcript 7 July 2005, pp. 31-23; Witness TF1-133, Transcript 7 July 2005, pp. 91-92, p. 98; Witness TF1-094, Transcript 13 July 2005, p.29; Witness TF1-153, Transcript 22 September 2005, p. 33; Witness TF1-199, Transcript 6 October 2005, p. 89.
[282] Witness TF1-334, Transcript 23 May 2005, p. 71; Witness TF1-033, Transcript 11 July 2005, p. 19; Witness TF1-269, Transcript 14 July 2005, p. 44; Witness TF1-267, Transcript 27 July 2005, p. 6.
[283] Witness TF1-114, Transcript 14 July 2005, p. 131; Witness TF1-045, Transcript 19 July 2005, pp. 85-86.
[284] Witness TF1-024, Transcript 7 March 2005, pp. 49-50; Witness TF1-023, Transcript 9 March 2005, p.51; Witness TF1-085, Transcript 7 April 2005, pp. 18-19; Witness TF1-083, Transcript 8 April 2005, p. 52; Witness TF1-227, Transcript 11 April 2005, p. 13; Witness TF1-334, Transcript 14 June 2005, pp. 25-26; Witness TF1-169, Transcript 6 July 2005, p. 60; Witness TF1-153, Transcript 23 September 2005, pp. 9-10.
[285] Witness TF1-085, Transcript 7 April 2005, pp. 40-41; Witness TF1-085, Transcript 14 April 2005, pp. 91, 98; Witness TF1-334, Transcript 15 June 2005, pp. 53-55.
[286] Prosecution Exhibit 25; Prosecution Exhibit 26; Prosecution Exhibit 52; Prosecution Exhibit 53, Prosecution Exhibit 58; Prosecution Exhibit 67, Prosecution Exhibit 66; Prosecution Exhibit 51; Prosecution Exhibit 46; Prosecution Exhibit 66.

is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 6 of the Indictment.

Findings for Count 7 (Sexual Slavery and Any Other Form of Sexual Violence):

161. We note that the Prosecution has conceded that it has not led evidence in respect of the following locations pleaded in the indictment: Tomendeh, Fokoiya, Superman Camp/Kissi Town Camp, Kissi Town or Tombodu (Kono District); Heremakono (Koinadugu District); or Mandaha (Bombali District).

162. However, we find that there is other evidence[287] with respect to the Districts of Kono,[288] Koinadugu,[289] Bombali,[290] Kailahun,[291] Freetown and Western area[292] and Port Loko[293] and in exhibits[294] upon which, if believed, a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu for the crime of sexual slavery as a crime against humanity pursuant to Art 2.g of the Statute. Accordingly, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 7 of the Indictment.

163. Having found that there is evidence capable of supporting a conviction on Count 7, we are not required under Rule 98 make any further examination of the evidence relating to this Count. However, in order to avoid any confusion, we consider it appropriate to state our view on whether or not there are facts relating to the crime referred to as "any other form of sexual violence" which are also capable of supporting a conviction on Count 7.

164. Accordingly, having examined the available evidence[295], we further find that there is other evidence with respect to the to the Districts of Kono,[296] Koinadugu[297], Bombali[298], Kailahun[299],

---

[287] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record.
[288] Witness TF1-334, Transcript 20 May 2005, p. 5, p. 7; Witness TF1-033, Transcript 11 July 2005, p. 14; Witness TF1-217, Transcript 17 October 2005, p.5, pp. 22-23, p. 25 p. 30-31; Witness TF1-114, Transcript 14 July 2005, p. 131.
[289] Witness TF1- 209, Transcript 7 July 2005, p. 37-39; Witness TF1-133, Transcript 7 July 2005, p. 92, p. 98, pp. 105-108; Witness TF1-094, Transcript 13 July 2005, pp. 29, 30.
[290] Witness TF1-334, Transcript 23 May 2005, pp. 76, 77.
[291] Witness TF1-045, Transcript 19 July 2005, pp. 85, 86.
[292] Witness TF1-023, Transcript 9 March 2005, p. 51; Witness TF1-085, Transcript 7 April 2005, pp. 27-28; Witness TF1-334, Transcript 15 June 2005, pp. 2-4.
[293] Witness TF1-085, Transcript 7 April 2005, p. 41; Witness TF1-083, Transcript 8 April 2005, p. 63; Witness TF1-282, Transcript 13 April 2005, pp. 17-18; Witness TF1-256, Transcript 14 April 2005, p. 98.
[294] Prosecution Exhibit 25; Prosecution Exhibit 26; Prosecution Exhibit 52; Prosecution Exhibit 53; Prosecution Exhibit 58; Prosecution Exhibit 67; Prosecution Exhibit 66; Prosecution Exhibit 51; Prosecution Exhibit 32.
[295] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record.
[296] Witness TF1-334, Transcript 20 May 2005, pp. 5,7; Witness TF1-033, Transcript 11 July 2005, p. 14; Witness TF1-217, Transcript 17 October 2005, pp. 5, 11, 22-23, 25, 30-31; Witness TF1-114, Transcript 14 July 2005, p. 131.
[297] Witness TF1-209, Transcript 7 July 2005, pp. 37-9; Witness TF1-133, Transcript 7 July 2005, pp. 89-92, 97-101, 105-108; TF1-094, Transcript 13 July 2005, pp. 29-30.
[298] Witness TF1-334, Transcript 23 May 2005, pp. 72, 76, 77.
[299] Witness TF1-114, Transcript 14 July 2005, p. 131; Witness TF1-045, Transcript 19 July 2005, pp. 85-86.

Freetown and Western Area[300] and Port Loko[301] and in exhibits[302] upon which, if believed, a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu for the crime referred to as "any other form of sexual violence" as a crime against humanity pursuant to Art 2.g of the Statute. Accordingly, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 7 of the Indictment.[303]

Findings for Count 8 (Any Other Inhumane Acts):

165. "Other inhumane acts" is a residual category of crimes against humanity that encompasses acts not specifically enumerated in Articles 2.a. to h. of the Statute. As held by Trial Chamber 1, "in the light of the separate and distinct residual category of sexual offences under Article 2(g), it is impermissible to allege acts of sexual violence (other than rape, sexual slavery, enforced prostitution, forced pregnancy) under Article 2(i) since 'other inhumane acts', even if residual, must logically be restrictively interpreted as covering only acts of a non-sexual nature amounting to an affront to human dignity."[304]We consider that there is evidence which falls within that category relating to the abductions of women and girls and forcing them to submit to 'marital' relationships and to perform various conjugal duties.

166. The acts described in such evidence[305] took place in the Districts of Kono,[306] Koinadugu,[307] Bombali[308], Kailahun,[309] Freetown and Western Area[310] and Port Loko[311] and is also referred to in

---

[300] Witness TF1-023, Transcript 9 March 2005, pp. 44-47, 51; Witness TF1-085, Transcript 7 April 2005, pp. 21, 27-28; Witness TF1-334, Transcript 14 June 2005, p 120-121, Transcript 15 June 2005, pp. 2-7, 14-16; Witness TF1-081, Transcript 4 July 2005, p. 11.

[301] Witness TF1-085, Transcript 7 April 2005, pp. 33, 35-38, 41; Witness TF1-083, Transcript 8 April 2005, p. 63; Witness TF1-282, Transcript 13 April 2005, pp. 17-18; Witness TF1-256, Transcript 14 April 2005, p. 98.

[302] Prosecution Exhibit 25; Prosecution Exhibit 26; Prosecution Exhibit 52; Prosecution Exhibit 53; Prosecution Exhibit 58; Prosecution Exhibit 67; Prosecution Exhibit 66; Prosecution Exhibit 51; Prosecution Exhibit 46, Prosecution Exhibit 32.

[303] Prosecution Exhibit 25; Prosecution Exhibit 26; Prosecution Exhibit 52; Prosecution Exhibit 53; Prosecution Exhibit 58; Prosecution Exhibit 67; Prosecution Exhibit 66; Prosecution Exhibit 51; Prosecution Exhibit 28, Prosecution Exhibit 32.

[304] *Prosecutor v. Norman et al.*, SCSL-04-14PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para.19(iii).

[305] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record.

[306] Witness TFI-334, Transcript 20 May 2005, p. 5; Witness Zainab Bangura, Transcript 3 October 2005; Witness Zainab Bangura, Transcript 4 October 2005.

[307] Witness TF1-209, Transcript 7 July 2005, p. 36; TF1-133, 7 July 2005, p. 82, 83; Witness TF1-094, Transcript 13 July 2005, p. 8; Witness Zainab Bangura, Transcript 3 October 2005; Witness Zainab Bangura, Transcript 4 October 2005.

[308] Witness TF1-334, Transcript 23 May 2005, pp. 75, 76; Witness Zainab Bangura, Transcript 3 October 2005; Witness Zainab Bangura, Transcript 4 October 2005.

[309] Witness TF1-045, Transcript 19 July 2005, pp. 85-86; Witness Zainab Bangura, Transcript 3 October 2005; Witness Zainab Bangura, Transcript 4 October 2005.

[310] Witness TF1-023, Transcript 9 March 2005, pp. 30-33; Witness TF1 334, Transcript 15 June 2005, pp. 5, 14; Witness TF1 334, Transcript 14 June 2005, p. 25, p. 114; Witness TF1-081, Transcript 4 July 2005, p. 10.

[311] Witness TF1-083, Transcript 8 April 2005, p. 68; Witness TF1-256, Transcript 14 April 2005, p. 98.

exhibits.[312] Applying the Rule 98 standard, we find that upon such evidence a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu for the crime of other inhumane acts as a crime against humanity pursuant to Art 2.i of the Statute. Accordingly, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 8 of the Indictment.

Findings for Count 9 (Outrages Upon Personal Dignity):

167. The crimes charged under Counts 6 to 8 as crimes against humanity are charged cumulatively or in the alternative under Count 9 as war crimes, that is, as violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.e. of the Statute. As such, the constitutive elements of war crimes require that there be a nexus to an armed conflict and that the victims of the crimes be protected persons in the sense that that they were not directly taking part in the hostilities at the time of the alleged crimes.

168. We are satisfied that there is evidence, if believed, that the crimes described in Counts 6 to 8 were committed in the course of an armed conflict against victims who were not directly taking part in the hostilities. We have already found that there is evidence, if believed, capable of supporting a conviction on Counts 6 to 8. Based on the evidence found under Counts 6 to 8, we further find that there is evidence upon which, if believed, a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu for the crime of outrages upon personal dignity, as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3.e. of the Statute. Accordingly, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 9 of the Indictment.

169. We are not required at this stage to decide whether a crime was committed in the context of a widespread or systematic attack against any civilian population or in relation to an armed conflict against protected persons.

4. Counts 10 And 11: Crimes Relating To Physical Violence

Introduction:

170. The Indictment alleges that members of the AFRC/RUF subordinate to and/or acting in concert with the accused Alex Tamba Brima, Brima Bazzy Kamara and Santigi Borbor Kanu committed widespread physical violence, including mutilations, against the civilian population in various locations in the territory of Sierra Leone including Kono District[313] between14 February 1998 and 30 June 1998; Kenema District[314] between 25 May 1997 and about 19 February 1998;

---

[312] Prosecution Exhibit 52; Prosecution Exhibit 53; Prosecution Exhibit 58; Prosecution Exhibit 46; Prosecution Exhibit 28.
[313] Indictment *supra* note 2, para.59.
[314] *Ibid.*, para.60.

Koinadugu District[315] between 14 February 1998 and 30 September 1998; Bombali District[316] between 1 May 1998 and 30 November 1998; Freetown and the Western Area[317] between 6 January 1999 and 28 February 1999; and Port Loko District[318] between February and April 1999.

171. In particular, the Indictment alleges that by their acts or omissions in relation to these events, each of the accused persons Brima Kamara and Kanu is individually criminally responsible pursuant to Article 6.1 and/or 6.3 of the Statute, for the crime of Violence to life, health and physical or mental well-being of persons, in particular mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a. of the Statute (*Count 10*) and in addition to or in the alternative, the crime against humanity of 'other inhumane acts' punishable under Article 2 i. of the Statute (*Count 11*).

4.1. Count 10: Mutilation (Article 3.a. of the Statute)

Elements of the crime:

172. Mutilation as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II occurs where the perpetrator intentionally cause death or seriously endangers the physical or mental health of a person by permanently disabling or disfiguring or removing an organ or appendage of that person, during an international or internal armed conflict. The Trial Chamber adopts the following elements of the crime of Mutilation as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II, as charged under Count 10, namely that,

(a) The perpetrator subjected the victim to mutilation, in particular by permanently disfiguring the victim, or by permanently disabling or removing an organ or appendage of the victim;

(b) The perpetrator's conduct caused death or seriously endangered the physical or mental health of the victim;

(c) The perpetrator's conduct was neither justified by the medical, dental or hospital treatment of the victim, nor carried out in the victim's interest;

(d) The victim was a person protected under one or more of the Geneva Conventions of 1949 or was not taking an active part in the hostilities at the time of the alleged violation;

(e) The violation took place in the context of and was associated with an armed conflict; and

(f) The perpetrator was aware of the factual circumstances that established the protected status of the victim.

---

[315] *Ibid.*, para.61.
[316] *Ibid.*, para.62.
[317] *Ibid.*, para.63.
[318] *Ibid.*, para.64.

4.2. Count 11: Other Inhumane Acts (Article 2.i. of the Statute)

Elements of the crime:

173. Various International Criminal Tribunals have described the phrase "Other inhumane acts" as a residual category of crimes against humanity that encompasses acts not specifically enumerated but which are similar to in gravity or severity (but not necessarily of the same genus as) those specifically listed in their respective Statutes.[319] In other words, such acts must have caused great suffering or serious injury to the physical or mental health or human dignity of the victim[320] and must have been committed *as part of a widespread or systematic attack upon a civilian population.*[321] Acts such as mutilation, severe beatings, forced disappearances, forced prostitution have been held to constitute "other inhumane acts".[322] In the case of the Special Court for Sierra Leone, the phrase "other inhumane acts" refers to those violations not expressly listed in Article 2 a. to h. of the Statute, but which are similar in gravity to those listed in that Article and which were committed as part of a widespread or systematic attack upon a civilian population.[323]

174. The Trial Chamber adopts the following elements of the crime against humanity of "other inhumane acts" as charged under Count 11, namely that-

(a) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;

(b) The act was of a gravity similar to the acts referred to in Article 2 a. to h. of the Statute;

(c) The perpetrator was aware of the factual circumstances that established the character or gravity of the act;

(d) The act was committed as part of a widespread or systematic attack directed against a civilian population; and

(e) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.

175. Individual criminal responsibility for each of the above crimes is established by evidence showing that the perpetrator (or his subordinate with the superior's knowledge) planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the above crimes in the Districts of Kenema, Kono, Koinadugu, Bombali, Freetown and Western Area

---

[319] *Blaskic* Judgement, *supra* note 49, para.239-244; *Kayishema & Ruzindana* Judgement, *supra* note 42, para.149.
[320] *Tadic* Trial Chamber Judgement, *supra* note 39, paras. 728-729.
[321] *Prosecutor v. Kordic and Cerkez*, ICTY IT-95-14/2-T, Judgement, 26 February 2001, ["*Kordic* Judgement"], paras.269-272; *Tadic* Trial Chamber Judgement, *supra* note 39, paras.729-730; *Prosecutor v. Zoran Kupreskic et al*, ICTY IT-95-16-T, Judgement, 14 January 2000, ["*Kupreskic* Judgement"] para.566; *Kayishema & Ruzindana* Judgement, *supra* note 42, paras.149-154; *Norman* Judgement of Acquittal, *supra* note 16, para.93.
[322] *Kupreskic* Judgement, *ibid.*, para. 566.
[323] *Norman* Judgement of Acquittal, *supra* note 16, para. 93.

and Port Loko as charged in paragraphs 58 to 64 of the Indictment.[324] For purposes of this Judgement, the Trial Chamber must determine pursuant to Rule 98 of the Rules whether or not the Prosecution evidence adduced is capable of supporting a conviction against each of the three accused persons on Count 10 (Mutilation) and/or Count 11 (Other inhumane acts).

4.3. Submissions for Counts 10 and 11

Joint Legal Part

176. The Defence jointly submitted that the Prosecution has failed to prove to the required standard, the essential elements of the crimes under Count 10 or Count 11.

Brima Motion

177. In addition to the joint Defence submissions, Counsel for the accused Brima submitted that his client should be acquitted in respect of Counts 10 and 11 of the Indictment as the Prosecution has failed to adduce any evidence to show that Brima or persons under his command, authority or direction, took part in the alleged physical violence in *Kono* District, *Kenema* Town and District, *Kailahun* District and *Eastern Province*. Instead, the evidence of Prosecution Witnesses TF1-072, TF1-074, TF1-198 and TF1-206 points to members of the RUF as being responsible for the alleged physical violence.[325]

Kamara Motion

178. In addition to the joint Defence submissions, Counsel for the accused Kamara submitted that his client should be acquitted in respect of Counts 10 and 11 of the Indictment as the Prosecution has failed to adduce any evidence to show that Kamara or persons under his command, authority or direction, took part in the alleged physical violence. Instead, the evidence of Prosecution Witnesses TF1-062, TF1-122, TF1-045, TF1-072, TF1-216 and TF1-206 pointed to members of the RUF as being responsible for the alleged physical violence.[326]

Kanu Motion

179. In addition to the joint Defence submissions, Counsel for the accused Kanu submitted that his client should be acquitted in respect of Counts 10 and 11 of the Indictment as the Prosecution adduced no evidence of Kanu's presence in the Districts of *Bo*, *Kenema* and *Kailahun* during the periods alleged in the Indictment, nor of his alleged criminal liability under Articles 6 (1) or 6 (3) of the Statute in those Districts.[327] Counsel further submitted in relation to-

(a) *Kono* District, that the Prosecution adduced no evidence of the alleged crimes having been committed in the villages of Kaima/Kayima or Wondedu, nor of Kanu's presence in those

---

[324] Article 6(1) and (3) of the SCSL Statute.
[325] Brima Motion *supra* note 13, paras.69-75.
[326] Kamara Motion, *supra* note 105, paras.36-37.
[327] Kanu Motion *supra* note 13, para.73.

villages, nor of his participation in the alleged crimes elsewhere in that District;[328]

(b) *Kenema* District, that the Prosecution adduced no evidence of the alleged beatings or mistreatment of civilians in custody as alleged;[329]

(c) *Koinadugu* District, that the Prosecution adduced no evidence of Kanu's presence in the village of Konkoba/ Kontoba during the period alleged in the Indictment, nor of his participation in the alleged crimes elsewhere in that District;[330]

(d) *Bombali* District, that the Prosecution adduced no evidence of Kanu's presence in the villages of Lohondi, Malama and Mamaka during the period alleged in the Indictment, nor of his participation in the alleged crimes elsewhere in that District;[331]

(e) *Port Loko* District, that the Prosecution failed to specify in the Indictment the names of villages where the alleged crimes took place and adduced no evidence of Kanu's participation in the alleged crimes.[332]

Prosecution Response

180. The Prosecution conceded that it led no evidence of the crimes charged under Counts 10 and 11 having been committed in the villages of Konkoba in *Koinadugu* District, Lohondi, Malam and Mamaka in *Bombali* District. The Prosecution maintained however, that the evidence of the alleged crimes adduced in respect of all the other Districts specified in the Indictment, proves all the elements of the crimes to the required standard and is capable of supporting a conviction under Counts 10 and 11 against each of the accused Brima, Kamara and Kanu.[333]

181. The Prosecution submitted in relation to the charge of "other inhumane acts" (Count 11) that the Prosecution evidence sufficiently demonstrates the mutilations and other forms of physical violence were carried out by the Junta troops as part of the widespread attack upon the civilian population throughout the territory of Sierra Leone, and that these crimes were committed pursuant to a regular pattern and preconceived plan to terrorise the civilian population and "punish" them for their perceived sympathy towards the ECOMOG troops or towards President Kabbah. The evidence further demonstrates that each of the three accused persons had knowledge of the general context in which their acts occurred and of the nexus between those acts and the context.[334]

182. Regarding the various locations mentioned in paragraphs 59 to 64 of the Indictment where offences under Counts 10 and 11 are alleged to have taken place, the Prosecution submitted in relation to-

(a) *Kono* District, that the evidence of Prosecution Witnesses including TF1-085, TF1-074,

---

[328] *Ibid*, paras.62-63 and 74.
[329] *Ibid*, paras.64-66.
[330] *Ibid*, paras.67-68.
[331] *Ibid.* paras.69-70.
[332] *Ibid.* paras.71-72.
[333] Response, *supra* note 14, para.100.
[334] *Ibid.*, paras. 25-55, 76-78 and 101.

TF1-072, TF1-198, TF1-216, TF1-206, TF1-334, TF1-167, TF1-272 and TF1-045 demonstrates that the physical violence against civilians in this District, including amputations and the carving of the letters "AFRC" and "RUF" into the bodies of civilians, was part of a consistent pattern of criminal behaviour by the Junta troops to punish civilians for their betrayal of the Junta and perceived support of the ECOMOG troops and President Kabbah. The Prosecution evidence further demonstrates that the AFRC and RUF were working together in a joint criminal enterprise to establish Kono District as a Junta stronghold and that by virtue of their leadership positions and membership in the ruling AFRC/RUF Junta and Supreme Council, each of the three accused persons was a participant in the joint criminal enterprise and is criminally responsible under Article 6 (1) and/or (3) of the Statute for the alleged crimes in that District;[335]

(b) *Kenema* and *Koinadugu* Districts, that the evidence of Prosecution Witnesses including TF1-122 and TF1-209 demonstrates that the crimes charged under Counts 10 and 11 were carried out in these Districts by members of the AFRC/RUF during the period of the Junta Government and that by virtue of their leadership positions and membership in the ruling AFRC/RUF Junta and Supreme Council, each of the three accused persons was a participant in the joint criminal enterprise and is criminally responsible under Article 6 (1) and/or (3) of the Statute for the alleged crimes in those Districts; [336]

(c) *Bombali* District, that the evidence of Prosecution Witnesses including TF1-153, TF1-157, TF1-334, TF1-033, TF1-158, TF1-167 and TF1-199 demonstrates that Brima ordered the commission of the alleged crimes, while Kamara and Kanu commanded the troops that committed the alleged crimes in that District. Furthermore the evidence shows that by virtue of their leadership positions and membership in the ruling AFRC/RUF Junta and Supreme Council, each of the three accused persons was a participant in the joint criminal enterprise and is criminally responsible under Article 6 (1) and/or (3) of the Statute for the alleged crimes in that District;[337]

(d) *Freetown and Western Area*, that while Brima and Kanu did not contest the sufficiency of the Prosecution evidence relating to the crimes charged under Counts 10 and 11, that the evidence of Prosecution Witnesses including TF1-334, TF1-167 implicates each of the three accused persons in the commission of the alleged crimes and as a participant in the joint criminal enterprise;[338]

(e) *Port Loko* District, that the evidence of Prosecution Witnesses including TF1-023, TF1-253, TF1-167, TF1-085 and TF1-334 demonstrates that the physical violence against civilians, including amputations was part of a widespread or systematic attack upon the civilian population by the Junta troops to punish civilians for their perceived betrayal of the Junta and sympathy towards the ECOMOG troops and to President Kabbah. Consequently, as members of the ruling AFRC/RUF Junta and Supreme Council, each of the three accused persons was

---

[335] *Ibid.*, paras. 25-55,163-167, 244-246 and 334-335.
[336] *Ibid.*, paras.25-55, 169, 247-249 and 336-341.
[337] *Ibid.*, paras.25-55, 170, 250-252 and 342-344.
[338] *Ibid.*, paras.25-55, 143-145, 170, 253-254 and 345.

a participant in the joint criminal enterprise and is criminally responsible under Article 6 (1) and (3) of the Statute for the alleged crimes in that District.[339]

Brima Reply

183. Counsel for the accused Brima reiterated submissions in relation to Counts 10 and 11 that the Prosecution has failed to adduce any evidence that Brima was personally involved in the commission of the alleged crimes or that he exercised any control over the perpetrators of the alleged crimes in the Districts of *Kenema* and *Kono*.[340]

Kamara Reply

184. Counsel for the accused Kamara reiterated submissions in relation to Counts 10 and 11 that the Prosecution has failed to adduce sufficient evidence of Kamara's criminal liability under Articles 6(1) and/or 6(3) of the Statute for crimes allegedly committed in *Kono* District.[341]

Kanu Reply

185. Counsel for the accused Kanu reiterated submissions in relation to Counts 10 and 11 that the Prosecution evidence is insufficient and incapable of sustaining a conviction against Kanu in respect of these two Counts.[342]

4.4. Findings for Counts 10 and 11

General findings:

186. Regarding the Defence submission that the Trial Chamber ought to strike from the Indictment the names of certain villages in respect of which the Prosecution has failed to adduce any evidence of crimes having been committed or whose names are spelled differently in the Indictment from similar locations given by the witnesses, we note that the Prosecution indeed conceded that no evidence of crime was led with regard to certain locations named in the Indictment. These include Konkoba (or Kontoba) in *Koinadugu* District; Lohondi, Malam and Mamaka in *Bombali* District. In light of the Prosecution evidence referred to below, we find no merit in the Defence objections and refer to our earlier views contained in Part III of this Decision.

Findings with regard to Count 10 (Mutilation):

187. The Trial Chamber finds that there is evidence, if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt, of the guilt of each of the accused Brima, Kamara and Kanu, with respect to the mutilations (including amputations of limbs and ears) that took place during the periods alleged in the Indictment at various locations including[343] Tombodu,[344] Small

---

[339] *Ibid.*, paras.25-55, 170, 255-256 and 346-349.
[340] Brima Reply, *supra* note 61, paras.14-15.
[341] Kamara Reply, *supra* note 62, para.7.
[342] Kanu Reply *supra* note 13, para. 30.
[343] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record. In addition the evidence of Witness TF1-272 given on 4 July 2005 refers to a large number of civilian victims of

Sefadu[345] Bombafoidu,[346] Yaya,[347] Manikala,[348] Penduma[349] in *Kono* District;[350] Kabala[351] in *Koinadugu* District;[352] Karina,[353] Gbendembu,[354] Gbomsamba,[355] Rosos,[356] Kathanta and Dareha,[357] Kamagbo,[358] Mayogbo,[359] Mabaka,[360] Batkanu,[361] Mateboi,[362] Bornoya,[363] Madogbo,[364] Madina Loko[365] in *Bombali* District;[366] Masiaka,[367] Manarma,[368] Mamamah,[369] Mile Thirty-Eight,[370] in *Port Loko* District;[371] Allen Town,[372] Kissy,[373] Mammy Yoko,[374] Parsonage Street[375] and Freetown[376] in the *Freetown and the Western*

---

amputations, failed amputations, broken limbs, dismembering of ears, lips and fingers, suffered as a result of a widespread attack on the civilian population in the Districts of *Kono, Kenema, Kailahun, Koinadugu, Bombali, Port Loko* as well as *Freetown* and the *Western Area*. See also Prosecution Exhibits SCSL/ERN/P26; SCSL/ERN/P54, SCSL/ERN/P57 and SCSL/ERN/P58.

[344] Witness TF1-334, 20 May 2005, pp 6-7, 11-15, 17-18; TF1-216, 27 June 2005, pp 92-95; TF1-072 1 July 2005, pp 15, 19; TF1-076, 27 June 2005, p 103; TF1-206, 28 June 2005, pp 98-104, 107-109.

[345] Witnesses TF1-198, 28 June 2005, pp 14-15; TF1-217, 17 October 2005, pp 17-27.

[346] Witness TF1-206, 28 June 2005, pp 102-104, 107-109.

[347] Witness TF1-033, 11 July 2005, p 14.

[348] Witness TF1-217, 17 October 2005, p 17.

[349] Witness TF1-217, 17 October 2005, pp 23-26.

[350] In addition, Prosecution Exhibits P26 and P51 contain documentary evidence of amputations committed on civilians in the villages of Njamaia, Sewafe, Koidu, Yifin, Alikalia , Bakedou, Ngandahun, Waimayma, Tombodu and Saiama in *Kono* District.

[351] Witnesses TF1-199, 6 October 2005, p 88.

[352] In addition, Prosecution Exhibit P51 contain documentary evidence of amputations committed on civilians in the villages of Gbenekoro and Serekolia in *Koinadugu* District.

[353] Witnesses TF1-334, 23 May 2005, pp 69-71; TF1-058, 14 July 2005, pp 75, 81-86; TF1-058, 14 July 2005, pp 73-75, 92-94; TF1-157, 22 July 2005, p 75; TF1-199, 6 October 2005, pp 75-76.

[354] Witnesses TF1-334, 23 May 2005, pp 81-84; TF1-167, 15 September 2005, p 83.

[355] Witness TF1-334, 24 May 2005, pp 5-12.

[356] Witness TF1-269, 14 July 2005, pp 41-43.

[357] Witness TF1-058, 14 July 2005, pp 96-98.

[358] Witness TF1-157, 22 July 2005, p 68.

[359] Witness TF1-157, 22 July 2005, p 71.

[360] Witness TF1-157, 22 July 2005, p 80.

[361] Witness TF1-179, 27 July 2005, pp 40-41.

[362] Witness TF1-167, 15 September 2005, pp 60-63.

[363] Witness TF1-156, 26 September 2005, pp 35, 38-39.

[364] Witness TF1-156, 26 September 2005, p 45.

[365] Witness TF1-199, 6 October 2005, p 73.

[366] In addition, Prosecution Exhibit P54 contains documentary evidence of amputations carried out on civilians around the villages of Karina, Fadugu and Makeni in *Bombali* District.

[367] Witness TF1-085, 7 April 2005, pp 43-44.

[368] Witness TF1-320, 8 April 2005, pp 13-15.

[369] Witness TF1-227, 11 April 2005, pp 31-32.

[370] Witness TF1-227, 11 April 2005, p 34.

[371] See also the evidence of Witness TF1-167, 15 September 2005, pp 75-77.

[372] Witness TF1-023, 9 March 2005, pp 36-37.

[373] Witnesses TF1-098, 5 April 2005, pp 39-42; TF1-084, 6 April 2005, pp 38-43; TF1-167, 16 September 2005, pp 53-55; TF1-153, 23 September 2005, pp 18-19.

[374] Witness TF1-098, 5 April 2005, p 42.

[375] Witness TF1-278, 6 April 2005, pp 4-9.

[376] Witnesses TF1-084, 6 April 2005, pp 43-44; TF1-085, 7 April 2005, pp 7, 17, 25; TF1-083, 8 April 2005, pp 64-65, 66-67; TF1-227, 8 April 2005, pp 101-103; TF1-334, 14 June 2005, pp 68-71, 81-82, 83-87; TF1-104, 30 June 2005, pp 9-11.

Area.[377]

188. The Trial Chamber accordingly finds that there is evidence capable of supporting a conviction against each of the accused Brima, Kamara and Kanu for the crime of Mutilation as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II pursuant to Article 3.a. of the Statute, as charged under Count 10 of the Indictment.

Findings with regard to Count 11 (Other inhumane acts):

189. The Trial Chamber finds that there is evidence, if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt, of the guilt of each of the accused Brima, Kamara and Kanu, with respect to 'other inhumane acts' (including cannibalism, maiming, burning, carving or tattooing of the letters AFRC/RUF, disembowelment and grievous wounding of victims) during the periods alleged in the Indictment at various locations including[378] Koidu Geya,[379] Bomboafoidu,[380] Foendor,[381] Kayima,[382] Koidu[383] in *Kono* District; Kenema Town[384] in *Kenema* District; Rosos[385] in Bombali District; Kumala/Kumalu[386] in *Koinadugu* District, Masiaka[387] in *Port Loko* District and Freetown.[388]

190. Accordingly, the Trial Chamber finds that there is evidence capable of supporting a conviction against each of the accused Brima, Kamara and Kanu for the crime against humanity of 'Other inhumane acts' pursuant to Article 2.i. of the Statute, as charged under Count 11 of the Indictment.

5. Count 12: Crimes Relating to Child Soldiers

Introduction:

191. The Accused are charged in Count 12 with the crime of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in

---

[377] In addition Prosecution Exhibits P46 and P66 contain documentary evidence of amputations committed on civilians in the *Freetown and Western Area.*

[378] The evidence referred to in this paragraph is by no means exhaustive of all the evidence available on the record. In addition the evidence of Witness TF1-272 given on 4 July 2005 refers to a large number of civilian victims of amputations, failed amputations, broken limbs, dismembering of ears, lips and fingers, suffered as a result of a widespread attack on the civilian population in the Districts of *Kono, Kenema, Kailahun, Koinadugu, Bombali* as well as *Freetown* and the *Western Area.* See also Prosecution Exhibits P26 and P54.

[379] Witness TF1-334, Transcript 20 May 2005, pp 23-26.

[380] Witness TF1-206, Transcript 28 June 2005, pp 98-100.

[381] Witness TF1-076, Transcript 27 June 2005, pp 104-105.

[382] Witness TF1-074, Transcript 5 July 2005, pp 16-18, 33-34, Prosecution Exhibit P27.

[383] Witness TF1-217, Transcript 17 October 2005, pp 4-5.

[384] Witness TF1-122, Transcript 24 June 2005, pp 33-34.

[385] Witness TF1-269, Transcript Transcript 14 July 2005, pp 42-43.

[386] Witness TF1-133, Transcript 7 July 2005, pp 89-90.

[387] Witness TF1-085, Transcript 7 April 2005, pp 43-44.

[388] Witness TF1-104, 30 June 2005, pp 9-11, 22-24.

hostilities, a serious violation of international humanitarian law punishable under Article 4.c of the Statute. The Indictment alleges that at all relevant times throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters.

192. The Indictment charges that, by their acts or omissions in relation to these events, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu pursuant Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the said crimes.

Elements of the Crime:

193. Article 4.c. of the Statute states:

> The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:
>
> > c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

194. We endorse the finding of Trial Chamber I that the elements of the crime are as follows:

i. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities;
ii. Such person or persons were under the age of 15 years;
iii. The perpetrator knew or should have known that such person or persons were under the age of 15 years;
iv. The conduct took place in the context of and was associated with an armed conflict.
v. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. [389]

195. In addition to these elements, there are the other constitutive elements of Article 4 crimes mentioned earlier.

Submissions:

Brima Motion

196. Counsel for Brima submitted that there was no evidence that Brima individually or in concert with others ordered the abduction of children or their use as soldiers; the evidence suggested that the victims were either under the control of other people, or that the identification of the accused was mistaken, or that the evidence was unreliable.[390]

---

[389] See *Norman* Judgement of Acquittal, *supra* note 16, para. 124.
[390] Brima Motion, *supra* note 13, para. 76-82.

Kamara Motion

197. Counsel for Kamara submitted that there were "difficulties in appreciating the proofs of the evidence [...] to do with age verification" and "the knowledge by the Accused that the child was under the stipulated age." Counsel concluded that there was no reference to Kamara in any of the evidence led by the Prosecution.[391]

Kanu Motion

198. Counsel for submitted that the evidence did not suggest any evidentiary link to Kanu:

> "[at] the least with respect to the charge of "routinely conscripting, enlisting or using boys and girls under the age of 15 to participate in active hostilities". In this regard a clear distinction should be made between said actions on the one hand and alleged training of individuals in locations."[392]

199. Counsel added that the word " routinely" formed an integral part of the indictment and "no evidence has been adduced for this element on part of Accused Kanu".

Prosecution Response

200. The Prosecution submitted that there was evidence that Brima knew that children were being used. According to the Prosecution, there was evidence that children were trained in camps in Kono and Rosos when Brima was present, and that muster parades of Small Boy Units were held in front of him. Brima also distributed children who had been abducted to various commanders.[393] Moreover, Brima gave command of the 4th. Battalion, which had about 13 Small Boy Units to Witness TF1-167.[394] The Prosecution further submitted that the same evidence also implicated Kamara.

201. Referring to Kanu's submissions, the Prosecution stated that the use of the word 'routinely' in an indictment did not elevate it to the status of an element of the offence and that it went to the degree of culpability rather than to criminal liability[395]. The Prosecution added that the evidence of witnesses TF1-334 and TF1-167 showed that Kanu was in charge of training children at Camp Rosos and had five or ten children under his command at Benguema[396]

Brima Reply

202. Counsel for Brima stated that he "stands by the arguments put forward" in submissions and "maintains (the accused Brima) bears no criminal responsibility in respect of the factual allegations enumerated in count 12"[397]

---

[391] Kamara Motion, *supra* note 105 para. 41.
[392] Kanu Motion *supra* note 13, para 76.
[393] Prosecution Response, para. 177.
[394] *Ibid.*
[395] *Ibid.*, para. 351.
[396] *Ibid.*, para. 352.
[397] Brima Reply, *supra* note 61, para. 16.

Kamara Reply

203. Counsel for Kamara restated his earlier submission that the Prosecution had failed to produce any evidence that Kamara had participated in the crimes.[398]

Kanu Reply

204. Counsel for the accused Kanu did not make any reply to this count.

Findings:

205. We find that there is evidence upon which, if believed, a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the accused Brima, Kamara and Kanu for the crime of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities as a serious violation of international humanitarian law pursuant to Article 4.c. of the Statute. Accordingly, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu under Count 12 or the Indictment.[399]

6. Count 13: Abductions and Forced Labour

Introduction:

206. Count 13 alleges the crime of enslavement by abductions and forced labour, not sexual slavery. Although sexual slavery can lead to a conviction for enslavement, the crime of sexual slavery has been charged separately under Count 7 and is dealt with elsewhere in this Decision.

207. The Accused are charged under Count 13 with enslavement, a crime against humanity, punishable under Article 2.c. of the Statute, in that "[at] all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour. Forced labour included domestic labour and use as diamond miners."

208. The Indictment alleges that the abductions and forced labour included the districts of *Kenema, Kono, Koinadugu, Bombali, Kailahun, Freetown and the Western Area* and *Port Loko*. It is alleged that the

---

[398] Kamara Reply, *supra* note 62, para. 8.

[399] Witness TF1-024, Transcripts, 7 March 2005, p. 77; Witness TF1-023, Transcript 9 March 2005, p. 35; Witness TF1-085, Transcript 7 April 2005, p. 49; Witness TF1-227, Transcript 11 April 2005, pp. 20, 21, p. 75; Witness TF1-282, Transcript 14 April 2005, p. 30; Witness TF1-334, Transcript 20 May 2005, p. 6; Witness TF1-334, 23 May 2005, p. 74; Witness TF1-334, 24 May 2005, Transcript pp. 17, 18, pp. 23, 24; Witness TF1-334, 14 June 2005, p. 122; Witness TF1-334, 15 June 2005, pp. 14, 16, 17; Witness TF1-334, Transcript 27 June 2005, p. 34; Witness TF1-206, Transcript 28 June 2005, p. 91; Witness TF1-133, Transcript 7 July 2005, pp. 95, 96, pp. 111, 112; Witness TF1-180, Transcript 8 July 2005, pp. 9, 10, 11, 12, pp. 15, 16; Witness TF1-094, Transcript 13 July 2005, pp. 32, 33; Witness TF1-158, Transcript 26 July 2005, pp. 39, 40, 41, pp. 44, 45, 46; Witness TF1-167, Transcript 15 September 2005, p. 64, 65, 66, 67;Witness TF1-199, Transcript 6 October 2005, p. 74, pp. 83, 84, 85, 86, pp. 89, 90, 91, 92, pp. 98, 99; Prosecution Exhibit No. P 33; Prosecution Exhibit No. P 52; Prosecution Exhibit No. P 66; Prosecution Exhibit No. P 36; Prosecution Exhibit No. P 46; Prosecution Exhibit No. P 54; Prosecution Exhibit No. P 55; Prosecution Exhibit No. P 68; Prosecution Exhibit No. P.62, p. 16496.

Accused, by their acts or omissions in relation to these events, pursuant to Article.6.1 and, or alternatively, Article.6.3 of the Statute, are individually criminally responsible for the said crimes.

Elements of the crime:

209. In *Kunarac*, the ICTY Trial Chamber held that "enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person"[400] (*actus reus*), while the *mens rea* of the violation consists in the intentional exercise of such powers".[401]

210. The *Kunarac* Trial Chamber held that "[u]nder this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."[402]

211. The ICTY Appeals Chamber further clarified this definition by finding that "lack of consent" is not an element of the crime of enslavement, although it may be a significant issue in terms of evidence of the status of the alleged victim.[403]

212. The definition set forth in *Kunarac* was later reiterated in *Krnojelav*, in which it was stated that enslavement as a crime against humanity was the "exercise of any or all of the powers attaching to the right of ownership over a person. The *actus reus* of enslavement is the exercise of those powers, and the *mens rea* is the intentional exercise of such powers."[404]

213. In *Krnojelav*, the allegations concerned enslavement for the purpose of forced labour.[405] It was held by the Chamber that to establish forced labour constituting enslavement, the Prosecutor must demonstrate that "the Accused (or persons for whose actions he is criminally responsible) forced the detainees to work, that he (or they) exercised any or all of the powers attaching to the right of ownership over them, and that he (or they) exercised those powers intentionally."[406]

214. The ICC Preparatory Commission Elements of Crimes, designed to assist ICC judges in their interpretation and application of the subject matter articles of the Rome Statute, sets forth the

---

[400] *Kunarac* Judgement, *supra* note 228, para. 540.
[401] *Ibid.*
[402] *Ibid.*, para. 542.
[403] *Kunarac* Appeals Chamber Judgement, *supra* note 33, at para. 120.
[404] *Prosecutor v. Krnojelav*, ICTY IT-97-25, Judgement, 15 March 2002, at para. 350.
[405] *Ibid.*, para. 357.
[406] *Ibid.*, para. 358.

following version of the elements of the crime of enslavement:

1. "The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[407]

215. It can be seen that this definition incorporates the definition given in *Kunarac* with the common elements of crimes against humanity. As such, we find that it is the correct definition to apply to the crime of enslavement charged under Article 2.c. of the Statute.

Submissions:

Joint Legal Part

216. The Joint Defence submitted that the evidence "falls short in proving all three elements". It was argued by the Joint Defence that the factors adopted by the Appeals Chamber in *Kunarac* have not been established, i.e. "control over someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".[408] The Joint Defence claimed that since these factors had not been established by the Prosecution, the Motion for Acquittal should be granted as to Count 13.[409]

Brima Motion

217. Counsel for Brima submitted that the Prosecution had failed to adduce sufficient evidence of abductions and forced mining in the Kenema District. It argued that the evidence given by Witness TF1-045, a former RUF combatant, about mining in Tongo Field in the Kenema District was unreliable. Further, Witness TF1-122 demonstrated that he had no knowledge of what had happened at Tongo except for what he had been told, and his evidence was also unreliable.[410]

Kamara Motion

218. Counsel for Kamara submitted that the Prosecution did not lead any direct or indirect evidence against Kamara to prove the offence of enslavement in both Kenema and Kailahun Districts. It was further submitted that Kamara was never present in the said Districts during the period alleged in the Indictment. Also, there was mention of Kamara being allegedly present in "Koinadugu District, in particular Kabala Town, Bombali, Port Loko and Kono Districts respectively as well as Freetown and the Western Area during the period above stated", but the evidence does not indicate that

---

[407] Rodney Dixon and Karim Khan, *Archbold International Criminal Courts Practice Procedure & Evidence* (London: Sweet and Maxwell, 2003), para. A3-011; John Jones and Steven Powles, *International Criminal Practice, 3rd Edition* (Oxford: Oxford University Press, 2003), para. 4.2.587.
[408] *Kunarac* Appeals Chamber Judgement, *supra* note 33, para 19.
[409] Joint Legal Part, *supra* note 22, para. 81.
[410] Brima Motion *supra* note 13, paras. 83-85.

Kamara was directly or otherwise involved in the commission of the stated crimes.[411]

Kanu Motion

219. With respect to the crimes of enslavement alleged to have occurred in the locations named in the Indictment, Counsel for Kanu submitted in relation to-

(a) *Kenema* District, that there was no evidence of Kanu's individual criminal responsibility for the crime of enslavement in this District. The evidence was that Kanu was not even present in the District during the whole of the indictment period;

(b) *Kono* District that there was no evidence of domestic labour and mining in Tombodu between 14 February 1998 and January 2000 and no evidence of enslavement in Tomendeh or Wondedu between 14 February 1998 and January 2000;

(c) *Koinadugu* District, that there was no evidence of enslavement in Heremakono or Kamadugu between 14 February and 30 September 1998. Also, there was no evidence of abduction in Koinadugu (town) in the same period;

(d) *Kailahun* District, that there was no evidence that Kanu had any individual criminal responsibility for the crime of enslavement in this District, nor that he was even present in the District during the whole of the indictment period;

(e) *Freetown and Western Area*, that there was no evidence of abduction of civilians, including children, and their use as forced labour at Peacock Farm in the Western Area;

(f) *Port Loko* District, that there was no evidence of enslavement in about the month of February 1999. In the alternative, there was no evidence that Kanu had any individual criminal responsibility for enslavement in this District. The evidence does not mention any involvement by Kanu in enslavement, nor through the committing, planning, instigating, aiding and abetting, nor the ordering of this crime;

(g) *All Districts*, there was no evidence that Kanu would have borne any superior responsibility or been involved in a joint criminal enterprise.[412]

Prosecution Response

220. In response to the Joint Defence Motion, the Prosecution submitted that the indicia of enslavement form a consistent pattern in the evidence, which shows that civilians were routinely abducted to carry looted goods, perform domestic work, go on food-finding missions mine diamonds and participate in military training. The Prosecution submitted that this pattern demonstrated the widespread and systematic nature of this crime and was evidence from which the knowledge and

---

[411] Kamara Motion, *supra* note 105, paras. 43-47.
[412] Kanu Motion *supra* note 13, para. 77-90.

complicity of the three Accused persons may be inferred.[413]

221. In response to Brima, the Prosecution submitted that, according to Witness TF1-045, about 300-500 people mined under AFRC control in 1997 and that "[t]he indicia of enslavement were present whenever a 'government work day' was announced". The Prosecution argued that the evidence of Witness TF1-045 regarding "the capture at gunpoint, undressing and lining up of civilians at the mining area and the beating and serious torture of civilians refusing to mine is echoed in the evidence of Witness TF1-062", and that the evidence of both of these witnesses is corroborated by the evidence of Witness TF1-122.

222. As regards the Kono District, Koindadugu District, Bombali District, Kailahun District, Freetown and the Western Area, Port Loko District, the Prosecution assumed, since the Brima Motion made no submissions with respect to these districts, that Brima accepted the sufficiency of the evidence in relation thereto.[414]

223. In its reply to Kamara, the Prosecution submitted that there was evidence of the Junta's modus operandi whereby villages were attacked and civilians abducted and forced to become fighters, and/or carry goods, and/or perform domestic tasks. Also, in the Kono and Kenema Districts there was evidence to suggest that civilians were forced to work in mines supervised by Junta troops. The Prosecution argued that Kamara bore criminal responsibility for these crimes as an active participant as a commander and/or participated in the joint criminal enterprise given his membership in the Supreme Council and his leadership and/or command position with the AFRC. It was further submitted that in some cases Kamara perpetrated the crimes directly.[415]

224. In answer to the Kanu Defence Motion, the Prosecution submitted in relation to-

(a) *Kenema* District, that there was evidence of abductions in Fadugu in Kenema. On the basis of Kanu's participation in a joint criminal enterprise, a reasonable tribunal of fact could convict him for crimes committed in the Kenema District in respect of Count 13;

(b) *Kono* District, that The Prosecution accepted that there was no evidence with respect to Tomendeh. However, it submitted that there was evidence with respect to Tombodu and Wondedu. The Prosecution submitted that at Wondedu (or Wendedu), Witness TF1-217 was threatened with death if he did not allow his sister to be taken by Junta soldiers, after which she was put in a vehicle with 10 other young girls and driven away. The Prosecution further submitted that on the basis of Kanu's participation in a joint criminal enterprise, there was evidence on which a reasonable tribunal of fact could convict him on crimes committed in Kono District in respect of Count 13;

(c) *Koinadugu* District, that the Prosecution accepted that there was no evidence with respect to Kamadugu and Heremakono. It submitted, however, that there was

---

[413] Response, *supra* note 14, para. 106.
[414] See *ibid.*, paras. 179-182.
[415] *Ibid.*, paras. 259-261.

evidence in respect of Koinadugu Town and that, on the basis of Kanu's participation in a joint criminal enterprise, a reasonable tribunal of fact could convict him for crimes committed in the Koinadugu District in respect of Count 13;

(d) *Bombali* District, that since the Kanu Motion makes no submission with respect to the Bombali District, the Prosecution assumed that Kanu accepted that there was sufficient evidence against him with respect to this District;

(e) *Kailahun* District, that the Prosecution submitted that there was evidence that would enable a reasonable tribunal of fact to convict Kanu for crimes committed in this District in respect of Count 13 on the basis of his participation in a joint criminal enterprise;

(f) *Freetown and the Western Area*, that the Prosecution accepted that there was no evidence with respect to Peacock Farm, but contested the assertion that there was no evidence of superior responsibility or of participation in a joint criminal enterprise in relation to Kanu in this location. The Prosecution submitted that there was evidence that would enable a reasonable tribunal of fact to convict Kanu on the basis of his participation in a joint criminal enterprise and also by virtue of his position as a commander pursuant to Article 6(3) of the Statute;[416]

(g) *Port Loko* District, that The Prosecution submitted that, contrary to what was stated in the Kanu Motion, there was evidence that Kanu ordered a group of civilians to walk to Sumbuya in a line with a rebel in front of and behind each civilian. The Prosecution contended that there was evidence on which a reasonable trier of fact could convict Kanu for crimes committed in Freetown and the Western Area on the basis of his participation in a joint criminal enterprise and also by virtue of his position as a commander pursuant to Article 6(3) of the Statute;[417]

(h) *All Districts mentioned in the Indictment for Count 13*, that the Prosecution submitted that, based on the evidence, a reasonable tribunal of fact could convict Kanu of enslavement for all the indicted districts on the basis of his participation in a joint criminal enterprise as well as on the basis of his position of superior authority pursuant to Article 6(3) of the Statute.[418]

Joint Defence Reply

225. The Joint Defence submitted that in Count 13, "the Prosecution lacks probative and substantiate (sic) evidence to prove its case. The Prosecution relies on the fact that the Accused held a leadership position in the AFRC/RUF and was an integral member of the Supreme Council and is therefore guilty on the basis of joint criminal enterprise. The Prosecution failed to lead evidence of

---

[416] *Ibid.*, paras. 368-370.
[417] *Ibid.*, paras. 371-373.
[418] See *ibid.*, paras. 355-375.

material fact that the conduct of the accused makes him jointly responsible for the crimes charged."[419]

226. We note that although the Joint Defence Reply has been filed on behalf of two of the Accused – Brima and Kamara – the reply quoted in the above paragraph speaks of "Accused" in the singular. We will assume that Counsel for Brima and Kamara meant the submission to apply to both of the Accused.

Brima Reply

227. Counsel for Brima submitted that there was no evidence to show that Brima was liable for the crime of enslavement in Kenema.[420] Counsel argued that the deputy-chairman SAJ Musa was in charge, while Witness TF1-114 was responsible for implementing the law and punishing.

Kamara Reply

228. Counsel for Kamara submitted that in relation to Counts 12, 13 and 14, the Prosecution failed to adduce any evidence to show that Kamara participated directly or indirectly in the crimes and thus, the Prosecution had failed to prove that Kamara bore any criminal responsibility for the alleged crimes.[421]

Kanu Reply

229. Counsel for Kanu submitted in relation to Kono District that the fact that soldiers put 10 girls in a vehicle at Wendedu and drove them away is not evidence of enslavement. Counsel submitted in relation to Port Loko District that although the Prosecution referred in its Response to enslavement in Sumbuya, it failed to present any evidence of enslavement in Tendakum or Nonkoba.[422]

Findings:

230. The submissions by the Brima Defence that the evidence or witnesses TF1-045 and TF1-122 was unreliable are not appropriate under Rule 98. In dealing with a motion under Rule 98, the Trial Chamber does not consider questions of credibility or reliability. Those are matters which should be left to the end of the case.[423]

231. We do not agree with the Brima Defence that there is no evidence against Brima for enslavement in Kenema. There is evidence, if believed, that the AFRC had armed children, including

---

[419] Joint Defence Reply, *supra* note 13, para.19.
[420] Brima Reply, *supra* note 61, para.17; Count 13 of the Indictment *supra* note 2, para. 67, alleges that: "Between about 1 August 1997 and about 31 January 1998, AFRC/RUF forced an unknown number of civilians living in the District to mine for diamonds at Cyborg Pit in Tongo Field."
[421] Kamara Reply, *supra* note 62, para. 8.
[422] Kanu Reply *supra* note 13, paras.31, 32; The Indictment *supra* note 2, under Count 13, para. 73, alleges that "AFRC/RUF forces also abducted and used as forced labour civilians from various locations in the Port Loko District, including Tendakum and Nonkoba."
[423] *Prosecutor v. Kordic & Cerkez*, ICTY IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para.28.

little boys, guarding mines in Cyborg Pit;[424] that diamond miners were beaten if they refused to work and were forced to hand over diamonds to the AFRC/RUF;[425] and that the AFRC forced civilians to work the mines at Tongo Field;[426] they were taken there under armed guard and beaten, tortured and even killed if they refused to mine.[427] That evidence, if accepted, is capable of establishing Brima's responsibility for those crimes under Articles 6.1. and 6.3.

232. There is similar, and other, evidence against the accused Kamara and Kanu in the evidence already referred to, which, if believed, would be capable of proving their responsibility under Articles 6.1. and/or 6.3. of the Statute for the crimes charged in Count 13.

233. With regard to the Kanu Defence's argument that the fact that soldiers at Wendedu drove away 10 girls in a vehicle[428] is not evidence of enslavement, we are of the view that, standing alone it is not, but when considered together with the other evidence available to prove the count, it can indeed be evidence of enslavement, if believed.

234. The Kanu Defence submitted that there was no evidence of enslavement at Tendakum or Nonkoba in the Port Loko District. On our examination of the evidence, this submission appears to be correct in regard to Tendakum. However, there was evidence of enslavement at Nonkoba. Witness TF1-256 testified that sometime in 1999 he and his family were in a group of 55 people captured by soldiers and held in a garden about half a mile from Nonkoba. There were already about 100 captives from Koya. The soldiers gave the witness work to do. At Nonkoba the witness and others were stripped down to their pants and locked in the guardroom and later in a small box. They were not told why. [429]

235. The Indictment, in paragraph 73 of Count 13, alleges that "AFRC/RUF forces also abducted and used as forced labour civilians from **various locations** [in] the Port Loko District, **including** Tendakum and Nonkoba." [Emphasis added]. So the absence of evidence in relation to Tendakum does not invalidate the allegation in the Indictment with respect to the Port Loko District. While there is no evidence with regard to Tendakum which the Accused would be required to answer, the evidence adduced in relation to Sumbuya[430] is in keeping with the allegations in Count 13, even though it was not referred to by name.

236. We note that the Prosecution has conceded that there was no evidence of enslavement in respect of the following locations pleaded in the Indictment: Tomendeh (Kono District)[431], Kamadugu and Heremakono (Koinadugu District)[432], Peacock Farm (Freetown and the Western

---

[424] Witness TF1-062, Transcript 27 June 2005, pp. 34, 35.
[425] Witness TF1-062, Transcript 27 June 2005, pp. 32, 33.
[426] Witness TF1-122, Transcript 24 June 2005, p. 72; Witness TF1-062, Transcript 27 June 2005, pp. 23, 24, 26, 27, 30, 31; Witness TF1-045, Transcript 19 July 2005, pp. 48, 55.
[427] Witness TF1-045, Transcript 19 July 2005, pp. 49, 50, 51, 52 55; Witness TF1-062, Transcript 27 June 2005, pp. 27, 34.
[428] Witness TF1-217, Transcript 17 October 2005 p. 11.
[429] Witness TF1-256, Transcript 14 April 2005, pp.49-57, 68-70.
[430] Witness TF1-282, Transcript 13 April 2005, pp. 7,9,15,31,32; Witness TF1-033, Transcript 11 July 2005, p. 48, 110, 111.
[431] Response, *supra* note 14, para. 359.
[432] *Ibid.*, para. 362.

Area)[433].

237. However, we find that there is other evidence with respect to the Districts of Kenema[434] Kono[435], Koinadugu[436], Bombali[437], Kailahun[438], Freetown and the Western Area[439], Port Loko[440], upon which, if believed, a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu for the crime of Enslavement as a crime against humanity pursuant to Article 2.c. of the Statute as charged under Count 13 of the Indictment. Accordingly, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 13 of the Indictment.

7. Count 14: Crimes Relating to Burning and Looting

Introduction:

238. The Accused are charged in Count 14 with the crime of Pillage, a violation of Article 3

---

[433] *Ibid.*, para. 368.

[434] Witness TF1-062, Transcript 27 June 2005, pp.23,24,32,33; Witness TF1-045, Transcript 19 July 2005, pp.48-52,55.

[435] Witness TF1-334, Transcript 20 May 2005, p. 4; Witness TF1-216, Transcript 27 June 2005, pp. 90,97; Witness TF1-198, Transcript 28 June 2005, pp.6,13; TF1-206, 28 June 2005, pp. 90; Witness TF1-072, Transcript 1 July 2005, pp.9,10; Witness TF1-074, 5 July 2005, pp.12,13,29,30, 52,54, 55, 56,-57, Witness TF1-033, Transcript 11 July 2005, pp.9,10,12,13; Witness TF1-085, Transcript 7 April 2005, p.50, Transcript 20 May 2005 pp. 4,5.

[436] Witness TF1-334, Transcript 23 May 2005, p.17, Witness TF1-209, 7 July 2005, pp 36,37,77; Witness TF1-133, Transcript 7 July 2005, pp. 82, 83, 84, 85, 96, 97, 102, 105, 106, 107, 109, 111; Witness TF1-094, Transcript 13 July 2005, pp. 28, 29, 32, 33, Witness TF1-167,Transcript 15 September 2005, pp. 58, 59, 64, 65, 66; Witness TF1-199, Transcript 6 October 2005, p.90; Witness TF1-153, Transcript 22 September 2005, pp. 47, 48, 49, 50, 51.

[437] Witness TF1-334, Transcript 23 May 2005, pp. 72,73, 84; Transcript 24 May 2005, pp. 23, 24, 25, 26, 27, 28, 29, 30, 31; Witness TF1-180, Transcript 8 July 2005, pp.7,8; Witness TF1-058, Transcript 14 July 2005, pp. 64, 65, 66, 87; Witness TF1-157, Transcript 22 July 2005, pp.62, 63, 64, 65, 66, 67, 70, 71, 72, 76, 77, 78, 86, 104, 106, 107, 108, Transcript 25 July 2005, pp. 3, 4, 5, 9, 10, 16, Transcript 26 September2005, pp.6,7,8,9,22; Witness TF1-158, Transcript 25 July 2005, pp. 3, 4, 5, 9, 10, 16; Transcript 26 July 2005 pp. 32, 33, 35, 36, 38, 39, 41, 42, 43; Witness TF1-167, Transcript 15 September 2005 pp. 58, 59, 61, 63, 64, 65; Witness TF1-156, Transcript 26 September 2005, p.45; Witness TF1-180, Transcript 8 July 2005 pp. 7, 8, 9; Witness TF1-055, Transcript 12 July 2005 pp. 136, 137; Witness TF1-199, Transcript 6 October 2005 pp. 71, 73, 76.

[438] TF1-114, 14 July 2005, p.129; TF1-045, 19 July 2005, pp.85,86; Witness TF1-113, Transcript 18 July 2005, pp. 84, 85,86.

[439] Witness TF1-024, Transcript 7 March 2005, pp. 43, 44, 49, 50, 51; Witness TF1-023, Transcript 9 March 2005, pp.30, 31, 32, 33, 34, 35, 37, 38; Witness TF1-084, Transcript 6 April 2005, p.40; Witness TF1-085, Transcript 7 April 2005, pp. 11, 12, 15, 22, 35, 49; Witness TF1-227, Transcript 8 April 2005, pp.96, 97, 98, 99, 100, Transcript 11 April 2005, pp. 5,6,9,10,11; Witness TF1-334, Transcript 13 June 2005 pp. 97, 98; Transcript14 June 2005, pp. 25,62, 63, 64,78,79,103,104,114, 115, 116, 118, 119, 120, 121; Transcript 15 June 2005, pp. 3, 13, 14, 15; Witness TF1-104 30 June 2005 p. 17; Witness TF1-081, 4 July 2005, pp.10,11; Witness TF1-094, 13 July 2005, pp.40,41; Witness TF1-157, Transcript 25 July 2005 p. 25; Transcript 26 September 2005, pp.22, 23,24; Witness TF1-167, 15 September2005, pp. 21, 52, 53; Witness TF1-153 23 September 2005 pp. 9, 13.

[440] Witness TF1-085, Transcript 7 April 2005, pp. 49, 50 ; Witness TF1-320, Transcript 8 April 2005, pp. 13,18; Witness TF1-277, Transcript 11 April 2005, pp. 25, 42, 43, 44; Witness TF1-334, Transcript 15 June 2005, pp.21,22,31; Witness TF1-167, Transcript 16 September 2005, pp.70,72.

common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute. It is charged that "At all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property". This looting and burning is alleged to have included the Districts of Bo, Koinadugu, Kono, Bombali, Freetown and the Western Area.

239. It is further alleged that by their acts or omissions in relation to these events, each of the three Accused are individually criminally responsible for the crime of Pillage pursuant to Article 6.1. and /or Article 6.3. of the Statute.

7.1. Count 14: Pillage (Article 3.f. of the Statute)

Elements of the crime:

240. Trial Chamber I was of the opinion that the crime of pillage included the following constitutive elements:

(1) "The perpetrator appropriated private or public property;
(2) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
(3) The appropriation was without the consent of the owner."[441]

Additional to this definition are the constitutive elements of Common Article 3 crimes mentioned earlier.

241. That definition of the crime of pillage is apparently based on the ICC Preparatory Commission Elements of Crimes.[442] The Commission included the words "private or personal use" in the elements of the crime of pillage to exclude the possibility that appropriations justified by military necessity might fall within the definition. Nevertheless, the definition is framed to apply to a broad range of situations. As was stated by Trial Chamber I, "the ICTY in the case of *Celebici* noted that 'plunder' should be understood as encompassing acts traditionally described as 'pillage', and that pillage extends to cases of 'organised' and 'systematic' seizure of property from protected persons as well as to 'acts of looting committed by individual soldiers for their private gain'".[443]

242. Inclusion of the element of "private or personal use" in the definition appears to be at variance with *Celebici*, since it may not include 'organized' and 'systematic' seizure of property. It is therefore our view that the requirement of "private or personal use" is unduly restrictive and ought not to be an element of the crime of pillage.

243. Accordingly, we conclude that the crime of pillage within the meaning of Article 3.f. of the Statute is comprised of the elements constitutive of Common Article 3 crimes, together with the

---

[441] See *Norman* Judgement of Acquittal, *supra* note 16, para. 102.
[442] Report of the Preparatory Commission for the International Criminal Court Addendum: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2(2000).
[443] See *Norman* Judgement of Acquittal, *supra* note 16, para. 102; and, *Prosecutor v. Delalic et al.*, ICTY IT-96-21-T, Judgement, 16 November 1998, ["*Delalic* Judgement"], para. 590.

following specific elements:

1. The perpetrator appropriated property.
2. The appropriation was without the consent of the owner.
3. The perpetrator intended to deprive the owner of the property.

Submissions:

Joint Legal

244. The primary Joint Defence submission was that burning does not "fulfil the elements of pillage", since pillage requires appropriation, whereas burning does not. The Joint Defence claimed that this argument is strengthened when Article 5.b. of the Statute is considered (Article 5.b. provides for the Special Court to have the power to prosecute persons under the Malicious Damage Act, 1861, which provides for offences relating to the wanton destruction of property, such as setting fire to dwelling-houses, public buildings and other buildings).

245. However, the Joint Defence submitted in the alternative that if the Trial Chamber finds that burning is an element of pillage, then each Defence team would rely on its separate submissions on the facts. The Joint Defence submitted that the conclusion was justified, whether based on the present submissions or the separate submissions on the facts by each Defence team, that there was no evidence to support this Count.[444]

Brima Motion

246. Counsel for Brima submitted that there was insufficient evidence that Brima ordered looting and burning as alleged. There was no evidence that Brima bore any individual criminal responsibility, nor any superior responsibility, nor that he participated in a joint criminal enterprise.[445]

Kamara Motion

247. Counsel for Kamara submitted that the evidence was insufficient to support the charge of pillage against Kamara in respect of the districts named in Count 14.[446]

Kanu Motion

248. Counsel for Kanu submitted in relation to-

(a) *Bo* District, that there was no evidence of looting or burning in Telu, Sembehun, or Mamboma between 1 and 30 June 1997, and no evidence of looting in Tikonko during the same period._It was further submitted that there was no evidence that Kanu bore any form of individual criminal responsibility for pillage in Bo and was not even there during the Indictment period;

(b) *Koinadugu District,* that there was no evidence that Kanu bore any form of individual

---

[444] Joint Legal Part, *supra* note 22, paras. 82-88.
[445] Brima Motion *supra* note 13, paras. 86-92.
[446] Kamara Motion, *supra* note 105, paras. 48-52.

criminal responsibility for pillage in this District. Further, there was no evidence of looting or burning in Heremakono and Kamadugu between 14 February and 30 September 1998, nor any evidence of looting in Fadugu during that period;

(c) *Kono District*, that there was no evidence that Kanu bore any form of individual criminal responsibility for pillage in this District, and no evidence of any burning or looting in Foindu between 14 February and 30 June 1998;

(d) *Freetown and the Western Area*, that there was no evidence of looting in Calaba Town, Fourah Bay, Upgun area, or Pademba Road between 6 January and 28 February 1999;

(e) *All Districts mentioned in Count 14*, that there was no evidence that Kanu bore superior responsibility, nor that he participated in a joint criminal enterprise.[447]

Prosecution Response

249. In reply to the Joint Defence submission, the Prosecution submitted that destroying property by burning, "as part of a series of acts involving ruthless plundering to remove anything of value followed by the total removal of the value of the buildings themselves, falls within the concept of 'wilful and unlawful appropriation of property.'"[448] The Prosecution argued that 'appropriation' does not exclude the act of burning, because "before third party property can be burnt it must be appropriated in the sense that the owner is no longer in control of his property. Moreover, the violent nature of pillage reflects the broader range of appropriation of property, including property appropriated for the mere purpose of depriving the owner of that property."[449]

250. The Prosecution also challenged the Defence submission regarding the scope of Article 5. The Prosecution argument was that "the offence under Sierra Leonean law refers only to 'wanton destruction of property under the Malicious Damage Act' and does not cover war crimes." Accordingly, where the acts in question amount to war crimes, "Article 3 of the Statute, as *lex specialis*, prevails over the general law of wanton destruction of property."

251. The Prosecution submitted in the alternative that if "burning" had been incorrectly pleaded as "pillage", the Trial Chamber had the power to reclassify the offence.[450]

252. In regard to Brima's submissions, the Prosecution conceded that it had not led evidence with respect to Telu, Sembehun, Mamboma in *Bo* District, Heremakono and Kamadugu in *Koinadugu* District, Foindu in *Kono* District and Pademba Road in *Freetown*.[451] The Prosecution submitted however, that there was sufficient evidence for a reasonable tribunal of fact to find Brima guilty. There was evidence from which it could be inferred that Brima had knowledge that Junta troops

---

[447] Kanu Motion *supra* note 13, paras. 91-103.
[448] Response, *supra* note 14, para.109, citing *Prosecutor v. Naletilic and Martinovic*, ICTY IT-98-34-T, Judgement, 31 March 2003, para. 612.
[449] *Ibid.*, para. 109.
[450] *Ibid.*, paras. 107-115.
[451] *Ibid.*, para. 184.

engaged in looting and that it was reasonably foreseeable that looting would be carried out by Junta soldiers in the jungle. There was evidence of Brima's participation in a joint criminal enterprise and of his command responsibility.

253. Responding to Brima's submissions, the Prosecution submitted in relation to-

(a) *Bo District*, that the attacks on Bo District occurred during the time of the AFRC government;

(b) *Koinadugu District*, that there was evidence that burning and looting were part of the modus operandi of attacks on civilians, which occurred in many villages;

(c) *Kono District*, that Koidu Town was burned under the supervision of Kamara in the presence of Brima. Brima and Kamara participated in the burning. Other villages were also burned;

(d) *Bombali District*, that Brima ordered the burning of villages. He ordered that the town of Karina should be burned and was present when it was burned and looted;

(e) *Freetown and the Western Area*, that the evidence of targeted burning was overwhelming. Brima ordered all police stations to be burned and ordered the burning of Freetown. He participated in the burning of Fourah Bay. There was also evidence of looting in Wellington, Kissy and Thunderhill.[452]

254. In regard to Kamara's submissions, the Prosecution noted that Kamara was simply making a general assertion that there was insufficient evidence of Kamara's criminal liability. However, the Prosecution contended that there was evidence establishing the criminal liability of Kamara for looting and burning. The Prosecution referred to evidence of various incidents, including one where Kamara and his troops completely looted Lunsar and removed a safe from a bank in Makeni.[453]

255. Responding to Kanu's submissions, the Prosecution submitted in relation to-

(a) *Bo District*, that it had not led evidence with respect to Telu, Sembehun and Mamboma. However, it submitted that reasonable tribunal of fact could convict Kanu for crimes committed in the Bo District on the basis of his participation in a joint criminal enterprise;

(b) *Koinadugu District*, that it had not led evidence with respect to Heremakono and Kamadugu. However, it submitted that there is evidence that the burning of houses and the taking of property were part of the modus operandi of attacks on civilians which occurred in many villages and that Kanu was present during most of the attacks;

(c) *Kono District*, that it led no evidence with respect to Foindu. However, there was evidence that Sewafe was burned down in the presence of senior commanders, and

---

[452] *Ibid.*, paras. 183-196.
[453] *Ibid.*, paras. 262,263.

Koidu Town, Tombodu, Yengema, Bumpe, Jagbwema Fiama and Yomandu were also burned down. There was evidence that Kanu was present during the destruction of Gandorhun;

(d) *Bombali District*, that since the Kanu Motion made no submission on the Bombali District, the Prosecution assumed that Kanu accepted the sufficiency of the evidence against him with respect to this District;

(e) *Freetown and the Western Area*, that there was evidence of burning in Pademba Road, Calaba Town, Fourah Bay and Upgun and also evidence of looting in the Presidential Office and Kingtom. There was also evidence that Kanu participated in the burning of Calaba Town and reported back to Brima, ordered the burning of houses in Pademba Road, commanded a group sent to burn homes at Ross Road, and directly committed acts of burning homes and property. There was also evidence of looting in Wellington, Kissy and Thunderhill.[454]

Joint Defence Reply

256. The Joint Defence did not make any specific reply to the Prosecution's Response in relation to Count 14.

Brima Reply

257. The Brima Defence submitted that the Prosecution has not stated what common plan was shared, who formed the joint enterprise, "to indicate with certitude that the looting was reasonably foreseeable to the First Accused." The Brima Defence added that Johnny Paul Koroma and Mosquito, who were superior in command to Brima, engineered the looting, so Brima cannot be said to bear the greatest responsibility for the crimes.[455]

Kamara Reply

258. Counsel for Kamara submitted that in relation to Counts 12, 13 and 14, the Prosecution failed to adduce any evidence to show that Kamara participated directly or indirectly in the crimes and thus the Prosecution had failed to prove that Kamara bore any criminal responsibility for the alleged crimes.[456]

Kanu Reply

259. Counsel for Kanu submitted that the evidence referred to by the Prosecution does not support the allegation that Kanu was present at the destruction of Gandorhun in Kono District.

260. The Kanu Defence submitted that the Prosecution has not refuted that there was no evidence of looting in Calaba Town, Fourah Bay, Upgun, or Pademba Road in Freetown and the Western Area. Although the Prosecution alleged that there was evidence of burning in those locations, the

---

[454] *Ibid.*, paras. 376-390.
[455] Brima Reply, *supra* note 61, para. 18.
[456] Kamara Reply, *supra* note 62, para. 8.

Kanu Defence contended that "burning" is not evidence of looting, and it cannot substitute for the lack of evidence on the pillage charge.[457]

Findings:

261. We note that the Prosecution has conceded that it has not led evidence in respect of the following locations pleaded in the Indictment: Villages of Telu, Sembehun, Mamboma (Bo District), Heremakono, Kamadugu (Koinadugu District), Foindu (Kono District)[458], and - with regard to the Accused Brima - Pademba Road (Freetown)[459].

7.2. Destruction by Burning of Civilian Property:

262. Upon examination of the available evidence, we find that there is evidence, if believed, that is capable of implicating each of the Accused in the destruction of civilian property by burning.[460] However, what we are called upon by the parties to decide is whether or not acts of destruction of civilian property by burning fall within the definition of "pillage". The Defence contends that it does not, whereas the Prosecution argues that the allegation of destruction by burning of civilian property has been correctly brought as pillage under Count 14.

263. In determining this issue, there are a number of possibilities to consider. For instance, it may be the case that such a charge is more appropriately brought under Article 3.b. of the Statute (*Collective Punishments*), or under Article 3.d. (*Acts of Terrorism*), or perhaps under Article 4(a) (*Attacks against the civilian population*).

264. It may also be the case that such a crime could be charged under Article 3 of the Statute as a violation of Additional Protocol II, even though it is not among the offences mentioned in Article 3. Article 3 of the Statute is concerned with violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. These violations are expressed to "include" the offences enumerated there, implying that the enumerated offences are not an exhaustive list of the possible violations. In *Tadic* the ICTY Appeals Chamber held that it had jurisdiction over several crimes that are not mentioned in its Statute.[461] It was of the view that the crimes mentioned in Article 3 of the ICTY Statute were merely illustrative, since Article 3 - before enumerating the violations - provides that they 'shall include but not be limited to' the list of offences.

265. Article 13(1) of Additional Protocol II states that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations." The ICTY Trial Chamber in *Hadzihasanovic*, elaborating on the history of this provision, stated that the

---

[457] Kanu Reply *supra* note 13, paras. 33, 34.
[458] Response, *supra* note 14, paras. 7, 184, 376, 379, 382, Annex A..
[459] *Ibid.*, para. 184.
[460] For example Witness TF1-167, Transcript 15 September 2005, p. 58; Witness TF1-334, Transcript 23 May 2005, pp. 39-42; Witness TF1-334, Transcript 20 May 2005, pp. 19-22; Witness TF1-334, Transcript 23 May 2005, pp. 56-59; Witness TF1-334, Transcript 14 June 2005, pp. 66, 67.
[461] *Tadic* Appeals Chamber Decision on Interlocutory Appeal on Jurisdiction, *supra* note 51, para. 87.

> "history of the diplomatic negotiations leading to the adoption of Protocol II demonstrates that, at the beginning of the negotiations, inserting a specific provision on the general protection of civilian property had been envisaged. That article was removed in order to simplify the proposed texts. However, the Commentary of the International Committee of the Red Cross on Article 13 states that securing general protection of the civilian population in conformity with this Article is 'based on the general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or an internal one.' The principle of duplicity and the principle of proportionality are among these principles. These principles imply that attacks against dwellings, schools and other buildings occupied by civilians are prohibited unless the buildings have become legitimate military objectives."[462]

Citing distinguished academic authors in this field, the ICTY concluded that the "protection of civilian property may therefore be the necessary corollary to the protection of the civilian population in certain cases."[463]

266. This decision accords with the jurisprudence of the ICTY that has held, referring to the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, that "deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law."[464]

267. Given the jurisprudence of the ICTY, it is arguable that the protection of civilian property is a necessary corollary to the protection of the civilian population referred to in established customary international law and provided for in Article 13(1) of Protocol II. Thus the conclusion may be justified that the Special Court has jurisdiction under both Sierra Leonean law (under Article 5 of the Statute) and international law to prosecute persons who have committed offences relating to the destruction of property by burning.

268. We are of the view that it is more appropriate to defer a final decision on this issue until the end of the trial. For the purpose of Rule 98, even if the evidence of burning is put aside completely, we are satisfied that there is other evidence capable of supporting a conviction on Count 14.

7.3. Looting

269. Notwithstanding the Defence argument that "burning" as alleged in Count 14 is not an element of pillage, there is no dispute between the parties that "appropriation" includes the act of looting. Even allowing for the concession made by the Prosecution in respect of locations for which no evidence was led, we find that there is evidence[465] of looting with respect to the Districts of Bo[466], Koinadugu[467], Kono[468], Bombali[469], and Freetown and the Western Area[470] upon which, if believed, a

---

[462] *Hadzihasanovic* Decision on Motions for Acquittal, *supra* note 12, para. 98.
[463] *Ibid.*, para. 98, citing Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *New Rules for Victims of Armed Conflicts*, (The Hague/Boston/London: 1982), pp. 670, 676-677.
[464] *Kupreskic* Judgement, *supra* note 321, para. 521.
[465] The references to the evidence in this paragraph are by no means exhaustive.
[466] Witness TF1-054, Transcript 19 April 2005, pp. 84, 85.
[467] Witness TF1-153, Transcripts 22 September 2005, pp. 33, 34, 35, 36, pp. 49, 50; Witness TF1-199, Transcript 6 October 2005, p. 79, p. 88, p. 90.
[468] Witness TF1-074, Transcript 5 July 2005, pp. 12, 13; Witness TF1-217, Transcript 17 October 2005, p. 5.

reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of each of the Accused Brima, Kamara and Kanu for the crime of pillage as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3.f. of the Statute. Accordingly, pursuant to Rule 98, we are satisfied that the evidence is capable of supporting a conviction against each of the Accused Brima, Kamara and Kanu on Count 14 of the Indictment.

IX. INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER THE STATUTE

Introduction:

270. The Indictment cumulatively charges each of the Accused, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu for the crimes in Counts 1 through 14 under different modes of liability. These are:

(a) Individual criminal responsibility pursuant to Article 6.1. of the Statute in that:

(i) each Accused planned, instigated, ordered, or committed the said crimes, or

(ii) each Accused otherwise aided and abetted in the planning, preparation, or execution of the said crimes, or

(iii) the said crimes were within a joint criminal enterprise, or were a reasonably foreseeable consequence of the joint criminal enterprise, in which each Accused participated.[471]

(b) In addition, or alternatively, individual criminal responsibility pursuant to Article 6.3. of the Statute for the crimes committed by their subordinates whilst each of the Accused was holding a position of authority.

271. In reviewing the evidence adduced by the Prosecution in relation to each of the 14 Counts, the Trial Chamber has applied the test of whether there is evidence – if believed – upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. In other words, the Rule 98 standard for determining the sufficiency is not evidence on which a tribunal should convict, but evidence on which it could convict.[472]

272. We have confined our deliberations to specific issues raised by the Joint Defence and by

---

[469] Witness TF1-334, 23 May 2005, p. 72; Witness TF1-334, Transcript 14 July 2005, p. 49; Witness TF1-269, Transcript p. 49; Witness TF1-058, Transcript 14 July 2005, p. 64, p. 88; Witness TF1-158, Transcript 22 July 2005, p. 62, p. 75, 76, pp. 84, 85, p. 87; Witness TF1-158, Transcript 26 July 2005, pp. 32, 33; Witness TF1-167, Transcripts 15 September 2005, p. 30; Witness TF1-199, Transcript 6 October 2005, pp. 70, 72, 76.

[470] Witness TF1-024, Transcript 8 March 2005, pp. 25; Witness TF1-084, Transcript 6 April 2005, p. 38; Witness TF1-085, Transcript 7 April 2005, p. 15; Witness TF1-083, Transcript 8 April 2005, p. 59; Witness TF1-021, Transcript 15 April 2005, p. 34; Witness TF1-334, Transcript 14 June 2005, p. 24, 26; Witness TF1-334, Transcript 13 June 2005, p. 103.

[471] Indictment, para. 35.

[472] See paras. 6-15 above.

Counsel for each Accused in support of their Motions. Where no such issues have been raised, we have not come to any conclusions nor made any findings. Submissions made by the Defence on individual criminal responsibility relating to a specific count in the Indictment have been addressed by the Trial Chamber under the relevant count, rather than under one or more of the forms of criminal conduct which are discussed in this section.

273. We stress once again that, pursuant to Rule 98, a ruling that there is evidence capable of supporting a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge.[473]

274. In our findings which follow, we have considered all of the available evidence, and we have repeated some - but not all - of the references to such evidence which were mentioned in relation to the individual counts in the Indictment.

8. Individual Criminal Responsibility under Article 6.1 of the Statute

275. Article 6.1. of the Statute lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute.[474] Articles 6.1. provides:

> *A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.*

276. The Trial Chamber in the ICTY case of *Kordic*[475] made the following observations on the object of the ICTY equivalent to Article 6.1. (that is, Article 7 (1) of the International Statute):

> "The principle that an individual may be held criminally responsible for planning, assisting, participating or aiding and abetting in the commission of a crime is firmly based in customary international law . Article 7(1) reflects the principle of criminal law that criminal liability does not attach solely to individuals who physically commit a crime but may also extend to those who participate in and contribute to a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability. The various forms of liability listed in Article 7(1) may be divided between principal perpetrators and accomplices. Article7(1) may thus be regarded as intending to ensure that all those who either engage directly in the perpetration of a crime under the Statute, or otherwise contribute to its perpetration, are held accountable."

8.1. Committing

277. An individual can be said to have "committed" a crime when he or she physically perpetrates

---

[473] See para. 13 above.

[474] See Prosecutor v. Mitar Vasiljevic, ICTY IT-98-32-A, Judgement (AC), 25 February 2004, ["*Vasiljevic* Appeal Judgement"], para. 95.

[475] *Kordic* Judgement, *supra* note 321, para. 373.

the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law.[476] There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence.[477]

Submissions:

Joint Legal Part

278. The Joint Defence submitted that "committing' refers to physically participating in a crime, directly or indirectly, or failing to act when such duty exists, coupled with the requisite knowledge."[478]

279. The Defence argued that the ICTY Appeals Chamber in the Blaskic Appeal Judgement stated that the *mens rea* for crimes against humanity required "knowledge on the part of the accused that there is an attack on the civilian population as well as knowledge that this act is part thereof"[479] and that therefore the standard is not whether the accused "knowingly took the risk of participating in the implementation of the (purported) ideology, policy or plan underlying the alleged crimes against humanity."[480] The Joint Defence contends that no reasonable tribunal of fact could find that the evidence of the Prosecution has shown that "either three Accused" had this knowledge, beyond this mere "taking of risk".[481]

Brima Motion

280. Counsel for Brima submitted that the Prosecution failed to prove that Brima bears any individual criminal responsibility under Article 6.1. for any of the charges against him.

Prosecution Response

281. In response, the Prosecution agreed that in the Blaskic Appeal Judgement, the ICTY Appeals Chamber held that the *mens rea* applicable to crimes against humanity requires knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof. In keeping with that *mens rea*, the Prosecution submitted that a reasonable trier of fact could conclude on the basis of the evidence that all three Accused had knowledge that there was an attack on the civilian population, as well as knowledge that their acts were part thereof.[482]

Findings:

282. We do not agree with the Joint Defence submission that there is no evidence to the Rule 98

---

[476] *Tadic* Appeals Chamber Judgement, *supra* note 33, para. 188.
[477] See *Kunarac* Judgement, *supra* note 228, para. 390.
[478] Joint Legal Part, *supra* note 22, para. 23, citing *Prosecutor v. Tadic*, ICTY IT-94-1-A, Judgement, 15 July 1999, para. 188.
[479] *Prosecutor v. Blaskic*, ICTY IT-95-14-T-A, Judgement, Appeals Chamber, 29 July 2004, ["*Blaskic* Appeal Judgement"], para. 126.
[480] *Ibid.* para. 257, cited by Defence in Joint Legal Part, *supra* note 22, para. 23.
[481] Joint Legal Part, *supra* note 22, para. 24.
[482] Response, *supra* note 14, paras. 16-18.

standard of "knowledge" on the part of the three Accused. There is evidence[483] that the accused Brima committed crimes in the districts named in the indictment.[484] Equally there is evidence in this regard implicating the accused Kamara[485] and Kanu.[486]

283. Accordingly, we are satisfied that there is evidence upon which, if believed, a reasonable tribunal of fact could hold beyond reasonable doubt that all three Accused were aware that a widespread or systematic attack on the civilian population was taking place and that their actions were part of the attack.

8.2. Planning

284. "Planning" implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[487] The *actus reus* requires that the accused, alone or together with others, designed the criminal conduct constituting the crimes charged. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[488] The *mens rea* requires that the accused acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime.[489]

285. Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime.[490]

Submissions:

Joint Legal Part

286. The Joint Defence, relying on a passage from the *Brdjanin* Trial Judgement[491], submitted that responsibility for planning a crime only incurs if it is demonstrated that the Accused "substantially (was) involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance." The Defence contended that the Prosecution

---

[483] The references to the evidence in this paragraph are by no means exhaustive.
[484] Witness TF1-334, Transcript 23 May 2005, p. 69; Witness TF1-334, Transcript 14 June 2005, pp. 22, 23, 26, 64 66, 67; Witness TF1-334, Transcript 15 June 2005, pp. 2-3; Witness TF1-153, Transcript 23 September 2005, p. 21, p. 25.
[485] Witness TF1-334, Transcript 15 May 2005 p. 3, p. 25, p. 55; Witness TF1-334, Transcript 14 May 2005, p. 83; Witness TF1-334, Transcript 17 May 2005, p. 81; Witness TF1-334, Transcript 14 June 2005, p. 26.
[486] Witness TF1-277, Transcript 8 March 2005, p. 50; Witness TF1-227, Transcript 11 April 2005, p. 21; Witness TF1-282, Transcript 14 April 2005, p. 13; Witness TF1-334, Transcript 14 June 2005, p. 67, p. 69, p.83, p. 100; Witness TF1-334, Transcript 15 June 2005, p. 3; Witness TF1-167, Transcript 15 September 2005, p. 56.
[487] *Brdjanin* Trial Chamber Judgement, *supra* note 33, para. 268; *Prosecutor v. Stakic*, ICTY IT-97-24-T, Judgement, 31 July 2003, para. 443; *Krstic* Judgement, *supra*, note 80, para. 601.
[488] *Prosecutor v. Kordic and Cerkez*, ICTY IT-95-14/2 A, Judgement, Appeals Chamber, 17 December 2004, ["*Kordic* Appeals Judgement"], para. 26.
[489] *Ibid.*, paras. 29, 31.
[490] *Kordic* Judgement, *supra* note 321, para. 386.
[491] *Brdjanin* Trial Chamber Judgement, *supra* note 33, para. 357

has not adduced any evidence of planning in this sense.[492]

Prosecution Response

287. The Prosecution pointed out in its submissions that the Joint Defence Motion expresses the Defence's views on "planning" and "ordering", "but do not themselves challenge any of the counts in the Indictment."[493]

288. The Prosecution submitted that the statement of the Trial Chamber in *Brdjanin* cited by the Defence was made in the context of a case where the accused did not physically perpetrate any of the crimes established, "and may be seen as a conservative definition of planning". The Prosecution cited further from the same passage in *Brdjanin* that this "knowledge requirement should not, however, be understood to mean that the Accused would have to be intimate with every detail of the acts committed by the physical perpetrators".[494]

Kanu Reply

289. The Kanu Reply claimed that the Prosecution has failed to indicate any authorities which justify a deviation from the Brdjanin Trial Chamber definition of planning.[495]

Findings:

290. Our view of the passage from the *Brdjanin* Trial Judgement upon which the Joint Defence relies is that the Chamber there was referring to the particular circumstances of an accused in that case. It held that, since the accused did not physically perpetrate the crimes which had been committed, he could only be held responsible for planning them if it were shown that, by being involved at the preparatory stage of the crimes in the concrete form they took, he had the required knowledge that there was a likelihood that a crime would be committed. The Chamber found that although the accused had supported a 'Strategic Plan', he had participated in its implementation merely by virtue of his authority as President of the ARK Crisis Staff and his public utterances. The evidence was insufficient to prove that the accused was involved in the immediate preparation of the *concrete* (as distinct from abstract) crimes.

291. In other words, the prosecution in that case was unable to demonstrate that the accused had been involved in any planning which had substantially contributed to the crimes committed. We do not think that that decision is a departure from the definition of "planning" we have stated above.

292. Applying the Rule 98 standard, the Trial Chamber is satisfied that there is evidence[496] upon which, if believed, a reasonable tribunal of fact could find beyond reasonable doubt that each of the

---

[492] Joint Legal Part, *supra* note 22, para. 27.
[493] Response, *supra* note 14, para. 22.
[494] *Ibid.*, para. 23.
[495] Kanu Reply *supra* note 13, para. 9.
[496] The references to the evidence in this paragraph are by no means exhaustive.

three Accused Brima[497], Kamara[498] and Kanu[499]planned the crimes charged in the Indictment in Counts 1 through 14 at both the preparatory and execution phases, that the crimes were actually committed and that each of the Accused intended the crimes to be committed.

8.3. Instigating

293. "Instigating" means prompting another to commit an offence.[500] Both acts and omissions may constitute instigating, which covers express as well as implied conduct.[501] A nexus between the instigation and the perpetration must be proved, but it is not necessary to demonstrate that the crime would not have been perpetrated without the involvement of the accused.[502] The *actus reus* requires that the accused prompted another person to commit the offence[503] and that the instigation was a factor substantially contributing to the conduct of the other person(s) committing the crime.[504] The *mens rea* requires that the accused acted with direct intent or with the awareness of the substantial likelihood that a crime would be committed in the execution of that instigation.[505]

294. The Joint Defence have made no submissions on this form of criminal conduct. Having noted this, the Prosecution has consequently not addressed the issue.[506]

8.4. Ordering

295. Responsibility for ordering requires proof that a person in a position of authority uses that authority to instruct another to commit an offence.[507] A formal superior/subordinate relationship between the accused and the perpetrator is not required.[508] It is sufficient that the accused possessed the authority to order the commission of an offence and that such authority can be reasonably implied.[509] There is no requirement that the order be given in writing or in any particular form, and

---

[497] Witness TF1-334, Transcript 23 May 2005, p. 56, 57; Witness TF1-334, Transcript 24 May 2005, p. 30, p. 46, p. 62, 63; Witness TF1-334, Transcript 25 May 2005, 39, 40; Witness TF1-334, Transcript 13 June 2005, p. 100; Witness TF1-334, Transcript 14 June 2005, p. 47, 48, p. 53, p. 62, 63, p. 66, p. 78, p. 84; Witness TF1-167, Transcript 16 September 2005, pp. 40, 41; Witness TF1-153, Transcript 22 September 2005, p. 94, 95; Witness TF1-153, Transcript 23 September 2005, pp. 28, 29.

[498] Witness TF1-334, Transcript 24 May 2005, p. 46, 47; Witness TF1-334, Transcript 14 June 2005, p. 47, p. 62, pp. 78, 79, pp. 82, 83, 84, 85, pp. 96, 97; Witness TF1-167, Transcript 23 September 2005, p. 18.

[499] Witness TF1-334, Transcript 23 May 2005, p. 76; Witness TF1-334, Transcript 24 May 2005, pp. 62, 63; Witness TF1-334, Transcript 14 June 2005, p. 47, p. 62, pp. 66, 67, pp. 78, 79, pp. 82, 83, 84, 85, pp. 96, 97.

[500] *Akayesu* Trial Chamber Judgement, *supra* note 42, para. 482.

[501] *Brdjanin* Trial Chamber Judgement, *supra* note 33, para. 269.

[502] *Ibid.*, para. 269.

[503] *Kordic* Appeals Judgement, *supra* note 488, para. 27.

[504] *Ibid.*, para. 27.

[505] *Ibid.*, paras.29, 32.

[506] See Response, *supra* note 14, para. 22.

[507] *Krstic* Judgement, *supra*, note 80, para. 601; see also *Brdjanin* Trial Chamber Judgement, *supra* note 33, para. 270.

[508] *Kordic* Appeals Judgement, *supra* note 488, para. 28.

[509] *Kordic* Judgement, *supra* note 321, para. 388; *Akayesu* Trial Chamber Judgement, *supra* note 42, para. 483.

the existence of an order may be proven through circumstantial evidence.[510] It is not necessary for the order to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. What is important is the commander's *mens rea*, not that of the subordinate executing the order.[511]

296. The *actus reus* of "ordering" requires that the accused, as a person in a position of authority, instructed another person to commit an offence.[512] The *mens rea* requires that the accused acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime would be committed in the execution of that order.[513]

Submissions:

Joint Legal Part

297. The Joint Defence submitted that the Prosecution has not adduced any evidence of "ordering". It argued that the *mens rea* for ordering must require that the Accused had an "awareness of a higher likelihood of risk and a volitional element must incorporated (sic) in the legal standard."[514]Any lesser standard could amount to a form of strict liability, as there is always a possibility that violations could occur during the course of military operations.[515] The Joint Defence contends that these observations are relevant to the present case "now that it is the Prosecution's assertion, based upon the testimony of Colonel Iron that the AFRC qualifies as a regular army."[516]

Prosecution Response

298. In response, the Prosecution observed that the Defence has expressed its views on aspects of the elements of "ordering" but has not challenged any of the counts in the Indictment.[517]

299. The Prosecution did not dispute the definition of the requisite *mens rea* stated by the Defence. However, it submitted that, contrary to the argument of the Defence, the evidence establishes a volitional element and a direct link between the relevant orders and the commission of crimes, as well as a pattern of conduct from which the requisite direct intent may be inferred.[518]

Findings:

300. We are is satisfied on the basis of the evidence[519] available, if believed, that a reasonable

---

[510] *Blaskic* Judgement, *supra* note 49, para. 281.
[511] *Blaskic* Judgement, *supra* note 49, para. 282; *Kordic* Judgement, *supra* note 321, para. 388.
[512] *Kordic* Appeals Judgement, *supra* note 488, para. 28.
[513] *Ibid.*, paras. 29, 30.
[514] *Blaskic* Appeal Judgement, *supra* note 479, para. 42, cited in the Joint Legal Part, *supra* note 22, para. 28.
[515] *Ibid.*, para. 41, cited in the Joint Legal Part, *supra* note 22, para, 28.
[516] Joint Legal Part, *supra* note 22, para. 28.
[517] Response, *supra* note 14, para. 22.
[518] *Ibid.*, para. 24.
[519] The references to the evidence in this paragraph are by no means exhaustive.

tribunal of fact could find beyond reasonable doubt that all three Accused Brima[520], Kamara[521] and Kanu[522], possessed the authority to give orders, that their orders were in fact implemented by other individuals and that they knowingly and wilfully used their positions of authority to order those individuals to commit the crimes charged in the Indictment in Counts 1 through 14.

8.5. Aiding and Abetting

301. The *actus reus* of "aiding and abetting" requires that the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime.[523]

302. The *mens rea* requires that the accused knew that his acts would assist the commission of the crime by the perpetrator or he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would *probably* be committed, including the one actually committed.[524]

Submissions:

Joint Legal Part

303. In relation to "aiding and abetting" the Joint Defence made a similar submission to that made under "Committing" above, that is, that no reasonable tribunal of fact could find that the three Accused had the knowledge required for the *mens rea*, beyond a mere "taking of risk".[525] According to the Joint Defence, "the *actus reus* of aiding and abetting requires that the accused intend to contribute to the commission of the offence; it requires 'practical assistance, encouragement, or moral support

---

[520] Witness TF1-024, Transcript 7 March 2005, p. 50; Witness TF1-334, Transcript 23 May 2005, p. 16, p. 42, p. 53, pp. 56, 57, 58, p. 67, p. 74, p. 79, p. 83, pp. 85, 86, pp. 92, 93, p. 104; Witness TF1-334, Transcript 24 May 2005, p. 3, pp. 9, 10; Witness TF1-334, Transcript 13 June 2005, p. 101, pp. 110, 111, p. 118; Witness TF1-334, Transcript 14 June 2005, p. 5, p. 29, p. 32, p. 47, p. 53, p. 62, p. 66, 67, p. 78, pp. p. 83, 84, p. 97, p. 100, pp. 118, 119; Witness TF1-334, Transcript 15 June 2005, p. 15; Witness TF1-033, Transcript 11 July 2005, p. 11, p. 12, p. 14, p. 19, p. 23, p. 25, pp. 33, 34, pp. 61, 62; Witness TF1-158, Transcript 26 July 2005, p. 38; Witness TF1-167, Transcript 16 September 2005, pp. 16, 17, pp. 42, 43, pp. 53, 54; Witness TF1-153, Transcript 22 September 2005, pp. 76; Witness TF1-153, Transcript 23 September 2005, p. 24, p. 28.

[521] Witness TF1-023, Transcript 10 March 2005, p. 36; Witness TF1-334, Transcript 15 June 2005, p. 11, p. 21, p. 20, 21, p. 23, p. 25, p. 28, p. 32, p. 35; Witness TF1-334, Transcript 20 May 2005, p. 7; Witness TF1-334, Transcript 23 May 2005, p. 66; Witness TF1-167, Transcript 16 September 2005, pp. 64, 65, 66.

[522] Witness TF1-085, Transcript 7 April 2005, pp. 28, 23, 31; Witness TF1-227, Transcript 11 April 2005, p. 9, 10; Witness TF1-282, Transcript 14 April 2005, p. 4; Witness TF1-334, Transcript 24 May 2005, p. 49; Witness TF1-334, Transcript 13 June 2005, p. 39; Witness TF1-334, Transcript 14 June 2005, p. 68, p. 89; Witness TF1-167, Transcript 16 September 2005, p. 16, p. 53.

[523] *Blaskic* Appeal Judgement, *supra* note 479, para. 46.

[524] *Ibid.*, para. 50.

[525] Joint Legal Part, *supra* note 22, para. 25.

which has a substantial effect on the perpetration of the crime' ".[526] The Joint Defence contended that even if the evidence for the Prosecution indicates that the Accused were present at certain alleged crimes scenes, "presence alone at the scene of a crime is not conclusive of aiding and abetting, unless it is shown to have a significant legitimizing effect on the principal".[527]

Prosecution Response

304. The Prosecution submitted that the statement by the Joint Defence regarding the required *actus reus* is incorrect. The Prosecution argued that the intent of the accused relates to the *mens rea* for the offence, not the *actus reus*. The Prosecution maintained that the *mens rea* of aiding and abetting does not require that the accused intend to contribute to the commission of the offence in the sense of sharing the *mens rea* of the crime.[528]

305. In addition, the Prosecution, while agreeing with the Joint Defence that the presence of the accused at the scene of the crime is not conclusive, submitted that it is equally true that presence at the scene of a crime is also not a prerequisite for aiding and abetting. Further, in the present case the evidence extends well beyond mere presence, and "in any event, the presence of a superior at the scene of a crime can be perceived as an important *indicium* of encouragement or support."[529]

Findings:

306. We reject the Joint Defence submission regarding the *actus reus* required for aiding and abetting. We hold that the correct *actus reus* is that which we have stated above.

307. The Trial Chamber is satisfied that there is evidence,[530] if believed, that each of the three Accused Brima[531], Kamara[532] and Kanu[533] aided and abetted in the planning, preparation or execution of the crimes charged in Counts 1 through 14 of the Indictment. The relevant evidence, if believed, suggests that each of the three Accused facilitated and assisted in the commission of the said crimes and encouraged and gave moral support to the physical perpetrators thereof,[534] and that their contribution to the commission of these crimes was substantial. The evidence also establishes, if believed, that each of the three Accused knew that the principal offenders intended to commit the

---

[526] Joint Legal Part, *supra* note 22, para. 25, citing *Prosecutor v. Furundzija*, ICTY IT-95-17/1-T, Judgement, 10 December 1998, paras. 235, 249; *Akayesu* Trial Chamber Judgement, *supra* note 42, para. 484.
[527] Joint Legal Part, *supra* note 22, para. 25, citing *Prosecutor v. Kunarac et al.*, ICTY IT-96-23-T, Judgement, 22 February 2001, para. 393.
[528] Response, *supra* note 14, para. 20.
[529] *Ibid.*, para. 21.
[530] Witness TF1-334, Transcript 14 June 2005, p. 64-5; Witness TF1-334, Transcript 24 May 2005, pp. 30, 63; Witness TF1-153, Transcript 23 September 2005, pp. 13-14.
[531] Witness TF1-334, Transcript 14 June 2005, p. 64-5; Witness TF1-334, Transcript 24 May 2005, pp. 30, 63; Witness TF1-153, Transcript 23 September 2005, pp. 13-14.
[532] Witness TF1-334, Transcript 14 June 2005, p. 64-5; Witness TF1-334, Transcript 24 May 2005, pp. 30, 63; Witness TF1-153, Transcript 23 September 2005, pp. 13-14.
[533] Witness TF1-334, Transcript 14 June 2005, p. 64-5; Witness TF1-334, Transcript 24 May 2005, pp. 30, 63; Witness TF1-153, Transcript 23 September 2005, pp. 13-14.
[534] Witness TF1-334, Transcript 14 June 2005, p. 64-5; Witness TF1-334, Transcript 24 May 2005, pp. 30, 63; Witness TF1-153, Transcript 23 September 2005, pp. 13-14.

said crimes and that his acts assisted the principal offenders in the commission of the said crimes.[535]

9. Individual Criminal Responsibility by Participation in a Joint Criminal Enterprise

308. Article 6.1. does not make explicit reference to "joint criminal enterprise". However, the Appeals Chamber of the ICTY has previously held that participation in a joint criminal enterprise is a form of liability which existed in customary international law at the time (that is in 1992), and that such participation is a form of "commission" under (the equivalent provision to) Article 6.1. of the Statute.[536]

309. Three categories of joint criminal enterprise have been identified by the ICTY Appeals Chamber in *Tadic*.[537]

> 1. "The "basic" form, in which all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention.
> 2. The "systemic" form, which is a variant of the basic form characterised by the existence of an organised system of ill-treatment, for example, concentration camps in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.
> 3. The "extended" form, which concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose."

310. The *actus reus* of the participant in a joint criminal enterprise is common to each of the three above categories and comprises the following three elements: First, a plurality of persons is required. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. Third, the participation of the accused in the common purpose is required.[538]

311. The *mens rea* differs according to the category of joint criminal enterprise. The different *mens rea* are as follows:

1. "Basic" form: the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).[539]
2. "Systemic" form: personal knowledge of the system of ill-treatment, and the intent to further it.[540]

---

[535] Witness TF1-334, Transcript 14 June 2005, p. 64-5; Witness TF1-334, Transcript 24 May 2005, pp. 30, 63; Witness TF1-153, Transcript 23 September 2005, pp. 13-14.
[536] See *Tadic* Appeals Chamber Judgement, *supra* note 33, para. 188 and 226; *Vasiljevic* Appeal Judgement, *supra* note 474, para. 95-99.
[537] See *Tadic* Appeals Chamber Judgement, *supra* note 33, paras 195-226.
[538] *Ibid.*, para.227; see also *Vasiljevic* Appeal Judgement, *supra* note 474, para. 100.
[539] *Tadic* Appeals Chamber Judgement, *supra* note 33, paras. 196, 228.
[540] *Ibid.*, paras. 202, 220 and 228.

3. "Extended" form: the intention to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk".[541]

Submissions:

Joint Legal Part

312. The Joint Defence argued that the Indictment does not make clear which category of joint criminal enterprise is alleged, although it is probably the third category.[542] As regards the first category, the Joint Defence submitted that *mens rea* has not been established.[543] The Joint Defence also submitted that the Prosecution has not met the criteria required for the third category[544] and has failed to prove the existence of a common plan.[545]

Prosecution

313. The Prosecution submitted in response that the Indictment clearly alleges all three categories of joint criminal enterprise[546]and that the evidential requirements in relation to these categories have been met.[547]

Joint Legal Reply

314. Counsel for Brima and Kamara submitted that although the Prosecution claims that the Indictment alleges all three categories of joint criminal enterprise, "it is of considerable importance for both the Trial Chamber and the accused to know with some precision from the indictment whether any particular crime charged is alleged by the prosecution to fall within the object of the enterprise or to go beyond that object".[548] Counsel for the two Accused argued that the Prosecution has not given specific evidence as to what crimes fell within the joint criminal enterprise or which ones were reasonably foreseeable. They contended that the "Prosecution has chosen not to articulate the specific aspects of the accused individuals' behaviour that links them to an alleged joint criminal enterprise."[549]

315. Counsel for Brima and Kamara made the further submission that the Prosecution has failed to

---

[541] *Ibid.*, para.228; see also paras. 204, 220; see also *Vasiljevic* Appeal Judgement, *supra* note 474, para.101.
[542] Joint Legal Part, *supra* note 22, para. 29.
[543] *Ibid.*, para. 31.
[544] *Ibid.*, para. 32.
[545] *Ibid.*, para. 33.
[546] Response, *supra* note 14, para. 27.
[547] *Ibid.*, paras.29-54.
[548] Joint Defence Reply, *supra* note 13, para. 16, citing *Prosecution v. Brdanin and Talic*, ICTY IT-96-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 39.
[549] Joint Defence Reply, *supra* note 13, para. 17.

"establish the common criminal intent that existed amongst the members of the Supreme Council[550] to commit the said crimes as alleged in the indictment or that the crimes were reasonably foreseeable by the Accused from the joint enterprise of the Supreme Council."[551]

Kanu Reply

316. Counsel for Kanu submitted that the Prosecution has never opted for the exact category of joint criminal enterprise it will pursue at trial. Counsel says that although the Prosecution claims that all three categories of joint criminal enterprise are clearly alleged in the Indictment, this is not correct since paragraph 34 of the Indictment only refers to "actions within the JCE or were a reasonably foreseeable consequence of the joint criminal enterprise", but no option for the exact category of joint criminal enterprise was specified.[552]

317. Counsel for Kanu also relied on the ruling in *Krnojelac* that the Prosecution was not allowed to extend the interpretation of the Indictment in its Pre-Trial Brief from a basic form of joint criminal enterprise to an extended one and that "it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise liability with respect to any of the crimes alleged in the Indictment in the absence of such an amendment to the Indictment to plead it expressly".[553]

318. Counsel for Kanu submitted that because of the failure by the Prosecution to opt for the exact category of joint criminal enterprise as a form of liability, the Defence application should be granted in that "the liability form of JCE should be dismissed."[554]

319. Another argument put forward by Counsel for Kanu is in relation to paragraph 33 of the Prosecution Response, in which it is asserted that "[t]here is no requirement that the plurality of persons be organized in a military, political or administrative structure and membership in the enterprise may be fluid so long as the common aim remains constant." However, Counsel for Kanu submitted that if there was a common aim it clearly changed. According to Counsel for Kanu, the original aim of the AFRC was changed when it was ousted by ECOMOG in February 1998 and split into separate groups, each with separate aims and objectives different from the initial alleged common design. Counsel relied on *Blagojevic*[555], where it was held that if the "objective is fundamentally different in nature and scope from the common plan or design to which the participants originally agreed", and any escalation of the original objective occurs, this must either be agreed to if a person is to incur criminal responsibility under the JCE concept or that escalation must be a natural and foreseeable consequence of the original enterprise. Counsel for Kanu submitted that "No proof has been adduced for this situation".[556]

320. The last submission by Counsel for Kanu was in relation to the crime of extermination,

---

[550] See Response, *supra* note 14, para. 35.
[551] Joint Defence Reply, *supra* note 13, para. 18.
[552] Kanu Reply *supra* note 13, para. 12.
[553] *Ibid.*, para. 13, citing *Prosecutor v. Krnojelac*, ICTY IT-97-25-T, Judgement, 15 March 2002, para. 86.
[554] *Ibid.*, para. 14.
[555] *Prosecutor v. Blagojevic and Jokic*, ICTY IT-02-60-T, Judgement, 17 January 2005, para. 700.
[556] Kanu Reply *supra* note 13, para. 15.

charged in Count 3. With reference to the Kailahun District, it was submitted that no reasonable tribunal of fact could convict Kanu of participating in a joint criminal enterprise "without any further specification thereof."[557]

Findings:

321. The Prosecution claimed that the Indictment clearly alleges all three categories of joint criminal enterprise whereas the Defence says that it does not. Counsel for Kanu, relying on *Kmojelac*, argues that the Prosecution is not permitted to extend the interpretation of the Indictment in its Pre-Trial Brief from a basic form of joint criminal enterprise to an extended one. We do not think that the Prosecution has done so.

322. We have perused the Prosecution's Pre-Trial Brief and noted the following:

(i) In paragraph 1, the Prosecutor states that the Pre-Trial Brief is submitted "to provide a preliminary indication as to the factual allegations and the points of law and legal issues pertinent to the case against all three accused persons."

(ii) It is recited in paragraph 124 that: "All three accused in this case entered pleas of not guilty to all crimes which they are charged, thereby placing every element of the crime in issue."

(iii) In Section F – "Criminal Responsibility Under Articles 6(1) and 6(3)" – "Modes of Participation Explained" – the Prosecution deals with: a. Planning, Instigating and Ordering, b. Committing, c. Aiding and Abetting, d. "Aiding and Abetting" vs. "Joint Criminal Enterprise".

(iv) Under "Joint Criminal Enterprise – Categories", paragraph 209 states:

> Three different categories of joint criminal enterprise have been recognised:
>
> a. *Same criminal intention* – cases where each member voluntarily participates in one aspect of the common design and intends the resulting crimes.
> b. *Acting pursuant to concerted plan* - cases where there exists an organised system to commit the alleged crimes and where the accused actively participates in its enforcement; is aware of its nature; and, intends to further its purpose. This *mens rea* may be inferred from the position of authority of the accused within the system. Existence of a formal or informal agreement between the members is not required; nor is their presence at the time or place of the crime.
> c. *Foreseeable conduct outside the common design* – cases involving a common criminal plan where one of the participants commits a crime which is outside the common plan, but nevertheless a natural and foreseeable consequence of its execution. Such a non-envisaged crime is considered foreseeable when the participants, although not intending this result, were able to predict it and regardless continued to participate in the plan.[558]

323. We have quoted from the Prosecution's Pre-Trial Brief merely to show that the three categories of joint criminal enterprise have been specified there, and not just the basic form. However, whether

---

[557] *Ibid.*, para.16.

[558] We have not repeated here the authorities cited by the Prosecution.

the Indictment has been sufficiently pleaded or is defective in form is not a matter which falls within the scope of Rule 98. 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. Regarding the Joint Defence submission that the Indictment does not make it clear which form of joint criminal enterprise is alleged, we can only observe that the procedure under Rule 72 is designed to enable an accused to obtain further information in order to fully understand the nature of the charges brought against him.

324. In regard to the argument put forward by Counsel for Kanu in relation to paragraph 33 of the Prosecution's Response, no basis has been established for the assertion that the common aim changed in that the AFRC "fell apart into separate groups with clearly separate aims and objectives, if at all, which did not match with the initial alleged common design". Counsel for Kanu has not referred us to any specific evidence which would support that submission. We therefore find the submission without merit.

325. For the purposes of Rule 98, the Trial Chamber is satisfied that a reasonable tribunal of fact could, on the basis of the evidence[559] before it, if believed, find beyond reasonable doubt that each of the three Accused and other persons identified in the Indictment[560] participated in a joint criminal enterprise to commit the crimes charged in the Indictment in Counts 1 through 14.[561]

326. The evidence referred to, if believed, is capable of establishing all three categories of joint criminal enterprise. However, the Trial Chamber will not at this stage make a final determination as to the precise basis of liability of each Accused for participation in a joint criminal enterprise, or whether an Accused ought to be acquitted of an alternative basis of liability. A determination as to the liability of each Accused depends to a certain extent on issues of fact and the weight to be attached to certain evidence, which calls for an assessment of the credibility and reliability of that evidence. These are issues which do not arise for determination until the judgment phase.[562]

---

[559] The references to the evidence in this paragraph are by no means exhaustive.

[560] See Indictment *supra* note 2, para.33.

[561] Witness TF1-334, Transcript 16 May 2005, pp. 44-45, pp. 56-57; Witness TF1-334, Transcript 17 May 2005, p. 22, p. 24, p. 53-54, p. 56, p. 57, pp. 58-59, pp.72-74, pp.74-75, pp 80-81, p. 83, pp.84-85, p.86-87, pp.92-94, pp.100-102, pp.102-103, pp. 103-105, pp. 107-108, p.112, pp. 113-115, p. 117; Witness TF1-334,Transcript 18 May 2005, pp. 4-6, pp. 15-19, p. 21, p. 25, pp. 29-30; pp. 33-34, Witness TF1-334, Transcript 19 May 2005, p. 4, pp. 4-7, pp. 7-10, 16-1, 23-26, pp. 31-47; Witness TF1-334, Transcript 20 May 2005, pp. 7-11, pp. 17-18, pp. 23-26, pp. 27-28, pp. 28-30, pp. 44-51, pp. 51-53, Witness TF1-334, Transcript 24 May 2005, pp. 51-56, pp. 105-107; Witness TF1-334, Transcript 25 May 2005, pp. 5-10, pp. 53-56; Witness TF1-334, Transcript 13 June 2005, pp. 88-89, pp. 91-92; Witness TF1-334, Transcript 14 June 2005, pp. 48-49, pp. 53-55, pp. 108-112; Witness TF1-334, Transcript 15 June 2005, pp. 17-20, pp. 22-24, pp. 35-38, pp. 42-49; Witness TF1-122, Transcript 24 June 2005, pp. 7-9, pp. 9-12, pp. 15-16, pp. 18-23, pp. 26-28, pp. 32-33, pp. 35-49, pp. 63-67, pp. 71-72; Witness TF1-062, Transcript 27 June 2005, p. 15, pp. 20-22, p. 23, pp. 36-37; Witness TF1-019 Transcript 30 June 2005, pp. 85-87, p. 117, pp. 90-95; Witness TF1-074, Transcript 5 July 2005, pp. 11-12, pp. 48-51; Witness TF1-113, Transcript 18 July 2005, p. 80, pp. 89-90, p. 94; Witness TF1-045, Transcript 19 July 2005, pp. 30-31, pp. 33-34, pp. 36-37, pp. 38-40, p. 53, p. 55, pp. 57-60, pp. 81-82, pp. 93-94, pp. 95-97, pp. 102-104; Witness TF1-157, Transcript 25 June 2005, p. 10, p. 16; Witness TF1-167, Transcript 15 September 2005, p. 23; Witness TF1-153, Transcript 22 September 2005, pp. 49-50, pp. 42-45, p. 94; Witness TF1-199, Transcript 6 October 2005, pp. 69-71, p. 81, pp. 83-85, pp. 85-88; Witness TF1-217, Transcript 17 October 2005, pp. 4-5, pp. 7-9, pp. 13-14.

[562] *Milosevic* Decision on Motion for Judgement of Acquittal, *supra* note 11, para. 293.

JR2

10. Individual Criminal Responsibility under Article 6.3 of the Statute

327. In addition, or alternatively, the Indictment charges pursuant to Article 6.3. of the Statute that the Accused, while holding positions of superior responsibility and exercising effective control over their subordinates, are each individually criminally responsible for the said crimes in that each Accused is responsible for the criminal acts of his subordinates which he knew or had reason to know that the subordinate was about to commit or had done so and which each Accused failed to take the necessary and reasonable measures to prevent or to punish the perpetrators thereof.[563]

328. Article 6.3. of the Statute provides:

> *The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*

As is evident from its terms, there is a three-pronged test for liability pursuant to Article 6.3., which is as follows:

1. the existence of a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime;
2. the accused knew or had reason to know that the crime was about to be or had been committed; and
3. the accused failed to take the necessary and reasonable measure to prevent the crime or punish the perpetrator thereof.[564]

Submissions:

Joint Legal Part

329. The Joint Defence submitted that the Prosecution has failed to provide evidence that any of the Accused can be held liable under Article 6.3. of the Statute.[565] According to the Joint Defence, none of the Accused held the position or influence required to establish effective control over the acts of his subordinates. The Joint Defence referred to the expert evidence of Colonel Iron and claim that it fails to establish effective command and control on the part of the three Accused.[566]

Brima

330. It was submitted on behalf of Brima that no evidence has been adduced to prove that Brima had superior responsibility and that the Prosecution has failed to establish the three necessary

---

[563] Indictment *supra* note 2, para. 36.
[564] See also *Delalic* Judgement, *supra* note 443, para. 346.
[565] Joint Legal Part, *supra* note 22, para. 36.
[566] *Ibid.*, paras. 37 and 38.

JR.

elements.

Prosecution

331. The Prosecution replied that the evidence taken as a whole shows that each of the three Accused exercised effective control over his subordinates. The Prosecution disputed that the evidence of Colonel Iron fails to establish effective control. The Prosecution then went on to refer to various pieces of evidence which, it claimed, prove superior responsibility. It also referred to evidence which it said demonstrates that all three Accused had both actual and constructive knowledge of the crimes alleged in the Indictment. Further, the Prosecution submitted that the evidence referred to shows that all three Accused persons failed to use their power to prevent or punish the crimes committed by their subordinates.[567]

Findings:

332. The Trial Chamber is satisfied that there is evidence,[568] if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt that the Accused, Brima[569], Kamara[570] and Kanu[571] are each responsible pursuant to Article 6.3. of the Statute for the crimes charged in the Indictment in Counts 1 through 14. There is evidence that each of the Accused held positions of authority, exercised effective control over subordinates, knew or had reason to know that subordinates were about to commit or had committed the said crimes and failed to prevent those crimes or to punish the perpetrators thereof.

---

[567] Response, *supra* note 14, paras. 61-72.

[568] The references to the evidence in this paragraph are by no means exhaustive.

[569] Witness TF1-024, Transcript 7 March 2005, pp. 45-46, p. 51; Witness TF1-023, Transcript 10 March 2005, p. 30, 31; Witness TF1-334, Transcript 16 May 2005, p. 21, p. 75; Witness TF1-334, Transcript 17 May 2005, pp. 52-53; Witness TF1-334, Transcript 19 May 2005, pp. 7-9, pp. 14-15; Witness TF1-334, Transcript 20 May 2005, pp. 27-28, pp. 40-41, pp. 85-107; Witness TF1-334, Transcript 23 May 2005, pp. 6-8, pp. 26-39, pp. 39-42, pp. 56-59, p. 67; Witness TF1-334, Transcript 24 May 2005, p. 3, p. 30, pp. 45-46, pp. 87-105; Witness TF1-334, Transcript 25 May 2005, p. 5, p. 48, pp. 50-51, pp. 53-56; Witness TF1-334, Transcript 13 June 2005, pp. 3-4, pp. 57-87, pp. 92-93, pp. 117-118; Witness TF1-334, Transcript 14 June 2005, pp. 5-7, pp. 19-22, pp. 82-83, pp. 83-87, pp. 88-89, pp. 95-97, pp. 99-100, pp. 108-112; Witness TF1-334, Transcript 15 June 2005, pp. 16-17; Witness TF1-033, Transcript 11 July 2005, p. 6, pp. 10-12, pp. 12-13, p. 14, pp. 20-21, pp. 23-24, pp. 24-25, p. 32, p. 32, p. 44, p. 45, p. 60, p. 61; Witness TF1-045, Transcript 19 July 2005, p. 53.

[570] Witness 023, Transcript 10 March 2005, p. 33, p. 36; TF1-334, Transcript 19 May 2005, p. 37, p. 50; Witness TF1-334, Transcript 25 May 2005, p. 50; Witness TF1-334, Transcript 23 May 2005, p. 6, p. 61, pp. 107, 108, 109; Witness TF1-334, Transcript 20 May 2005, p. 8, p. 17, pp. 31, 32, p. 82; Witness TF1-334, Transcript 13 June 2005, p. 6, p. 13, p. 26, pp. 58, 59; Witness TF1-334, Transcript 19 May 2005, p. 7, p. 16, p. 26; Witness TF1-334, Transcript 18 May 2005, p. 23, 24; Witness TF1-334, Transcript 16 May 2005, pp. 74, 75; Witness TF1-334, Transcript 15 June 2005, p. 25, pp. 32, 33, pp. 42, 43; Witness TF1-334, Transcript 14 June 2005, p. 26; Witness TF1-167, Transcript 16 September 2005, p. 70, pp. 64, 65, 66, p. 76; Witness TF1-153, Transcript 22 September 2005, p. 33, p. 36.

[571] Witness TF1-085, Transcript 7 April 2005, pp. 32, 38, 69; Witness TF1-227, Transcript 11 April 2005, pp. 8, 25; Witness TF1-282, Transcript 13 April 2005, pp. 14-15, p. 21; Witness TF1-334, Transcripts 13 June 2005, p. 39; Witness TF1-334, Transcripts 23 May 2005, p. 24, 72; Witness TF1-334, Transcripts 24 May 2005, pp. 24, 62; Witness TF1-158, Transcripts 26 July 2005, p. 38; Witness TF1-167, Transcripts 16 September 2005, p. 17, p. 53.

X. DISPOSITION

FOR THE FOREGOING REASONS THE TRIAL CHAMBER DISMISSES the Joint Legal Part Defence Motion for Judgement of Acquittal Under Rule 98, the Brima - Motion for Acquittal Pursuant to Rule 98, the Brima Bazzy Kamara Defence Motion for Judgement of Acquittal of the Second Accused – Brima Bazzy Kamara, and the Kanu – Factual Part Defence Motion for Judgement of Acquittal Under Rule 98 in their entirety.

Honourable Justice Julia Sebutinde appends a Separate Concurring Opinion to this Unanimous Decision.

Done at Freetown this 31th day of March 2006.

Justice Teresa Doherty

Justice Richard Lussick
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

SEPARATE CONCURRING OPINION OF HON. JUSTICE JULIA SEBUTINDE

I. INTRODUCTION

1. Let me begin by stating that I agree in the main with the unanimous Decision of the Trial Chamber on the Defence Motions for Judgement of Acquittal Pursuant to Rule 98 of the Rules (herein referred to as the "unanimous Decision").

2. I unreservedly endorse the Trial Chamber's findings therein with regard to the legal standard applicable to a Rule 98 Motion; the law and evidence relating to the various crimes charged in the Indictment and the Trial Chamber's disposition with regard to each of the Defence Motions. I do however, feel compelled to comment on two areas which are incidental to the issues raised in the unanimous Decision. The two areas concern Count 7 and Count 8 of the Indictment. Although none of the parties have raised these issues, I feel compelled in the interest of justice to comment on them in this Opinion.

II. COUNT 7 OFFENDS THE RULE AGAINST DUPLICITY

3. It is a generally accepted practice in International Tribunals for an Indictment to charge several crimes (whether cumulatively or alternatively) as long as those crimes are based upon common facts.[572] Indeed Rule 49 of the Rules of Procedure and Evidence of the Special Court permits the joining of two or more crimes in one indictment "*if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.*" However, care must be taken to ensure that the joining of crimes in an indictment is not done in a manner that does not offend the rule against multiplicity, duplicity, uncertainty or vagueness, and that is not likely to embarrass or prejudice the accused person or violate his right under Article 17 (4) a. of the Statute "*to be informed of the nature and cause of the charge against him*". In other words, each offence or crime must be clearly and unambiguously charged in a separate count of the Indictment to enable the accused to respond thereto separately. This Opinion is not concerned with the Prosecution's right to charge the accused persons with multiple counts. Rather it concerns the rights of the accused persons to know precisely and in an unambiguous manner, the nature of the charge or charges against him in the Indictment.

4. A count is said to be defective or "bad for duplicity" when it charges or subsumes more than one offence. *Archbold on Criminal Pleading, Evidence and Practice* writes-

> "The Indictment must not be double, that is to say, no one count of the Indictment should charge the Defendant with having committed two or more separate offences. Duplicity in a count is a matter of form, not evidence."[573]

5. In this case, Count 7 of the Indictment which falls under the general heading "Sexual

---

[572] Examples include the *Prosecutor v. Delalic et al*, Case No. IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998.

[573] *Archbold on Criminal Pleading, Evidence and Practice*, 43rd Edition, Volume I, page 46, paragraph 1-57. See also Jones and Powles on *International Criminal Practice*, 3rd Edition, paragraphs 8.2.5-8.2.7.

Violence" charges each of the accused persons Brima, Kamara and Kanu as follows:

> "**Count 7:** Sexual Slavery and any other form of sexual violence, a crime against humanity punishable under Article 2.g of the Statute". [Emphasis added]

6. On the face of it, Count 7 appears to charge the accused with a single crime against humanity entitled "*Sexual Slavery and any other form of sexual violence, a crime against humanity punishable under Article 2.g of the Statute*". I am not aware that such a crime in fact, exists under International Humanitarian law. In reality, Count 7 in its current form encapsulates two separate and distinct crimes, namely the crime against humanity of sexual slavery and the crime against humanity of sexual violence. In essence, what the Prosecution has done is to charge the accused persons with the two distinct crimes against humanity in one count thereby offending the rule against multiplicity, duplicity, uncertainty or vagueness.

7. Both crimes against humanity (sexual slavery and other form of sexual violence) are born out of the provisions of Article 2.g. of the Statute which provides as follows:

> "**Article 2: Crimes Against Humanity.**
>
> The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: ...
>
> g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;..." [Emphasis added.]

8. Clearly, Article 2. g. of the Statute encapsulates five distinct categories of sexual offences (underlined above), each of which is comprised of separate and distinct elements. It is clear that the legislative intent behind the statutory formula "*any other form of sexual violence*" was to create a separate and specific residuary category of sexual crimes of the same kind as those enumerated in Article 2.g. (*i.e.* acts of sexual violence other than rape, sexual slavery, enforced prostitution and enforced pregnancy). In this regard my interpretation of the phrase is supported by the decision of Trial Chamber I in the case of the *Prosecutor v. Sam Hinga Norman et al.*[574] There is no doubt that in the unanimous Decision at paragraphs 109-111 the Trial Chamber identified two distinct offences charged under Count 7, namely the crime against humanity of sexual slavery and the crime against humanity of sexual violence and found at paragraph 161-164 that "*there is evidence if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt, of the guilt of each of the accused Brima, Kamara and Kanu*", of both the crime against humanity of sexual slavery and the crime against humanity of sexual violence. This is precisely the kind of duplicitous and prejudicial situation that could prejudice a fair trial of the accused persons if left uncorrected. It is my considered opinion that in its current form Count 7 is duplex and defective in as far as it does not enable the accused persons to know precisely which of the two crimes (sexual slavery or sexual violence) they should be defending themselves against.

---

[574] *Prosecutor v. Sam Hinga Norman et al.*, Case No. SCSL-04-14-PT, Reasoned Majority decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 19.

9. I do not think that Count 7 is incurably defective. In my opinion the defect could be cured by an amendment pursuant to Rule 50 of the Rules that splits the Offences into two separate counts. In my view, such a procedure would not unduly delay the trial, nor would it prejudice the accused persons since it would not necessitate the introduction of any new evidence of which they are not already aware and would in fact be in the interests of justice .

III. COUNT 8 IS REDUNDANT

10. As the Indictment currently stands, both counts 8 and 11 of the Indictment charge the accused persons with the crime against humanity of "other inhumane acts". Whilst fully recognising the Prosecution's prerogative to determine the choice of charges to be included in an indictment, it is my considered opinion that in this case, Count 11 is sufficient to cover any alleged incidents of "other inhumane acts" envisaged under the Indictment. In my view, all sex-related or gender crimes envisaged in the Indictment are adequately covered by Counts 6, 7 and/or 9 of the Indictment and should not be charged under the general regime of "other inhumane acts." Later on in this Opinion I shall endeavour to demonstrate why this is so. For ease of reference the relevant part of the Indictment containing Counts 6 to 9 is produced below:

> "...By their acts or omissions in relation to these events, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, pursuant to Article 6.1. and or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:
>
> **Count 6**: Rape, a crime against humanity, punishable under Article 2.g. of the Statute; And
>
> **Count 7**: Sexual slavery and any other form of sexual violence, a crime against humanity, punishable under Article 2.g. of the Statute; And
>
> **Count 8**: Other Inhumane act, a crime against humanity, punishable under Article 2.i. of the Statute;
>
> In addition to or in the Alternative:
>
> **Count 9**: Outrages upon personal dignity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.e. of the Statute."

The Historical Perspective

11. It will be recalled that in February 2004 the Prosecution successfully applied for and was granted leave by Trial Chamber I to amend the Consolidated Indictment in this case to add a new Count 8 entitled "*the crime against humanity of other inhumane acts*" to cater for alleged acts of Forced Marriage[575]. The Prosecution further sought to amend the Consolidated Indictment *inter alia*, by making "corrections and/or modifications to the other counts including the expansion of time periods, an additional location for all counts related to sexual violence

---

[575] *Prosecutor v. Alex Tamba Brima, et al.*, Case No. SCSL-04-16-PT, Trial Chamber Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, para. 58.

crimes, and the change of spellings of certain place names."[576] In granting its leave, Trial Chamber I observed-

> "In the present motion, the Prosecution is seeking our leave to amend the already existing consolidated indictment on which the proceedings are now based, in order to add one more count, and one count only, based on Forced Marriage. The question to be addressed in these circumstances is whether this additional count or offence as the case is, is new in terms of its being a complete novelty in the arsenal of all the counts that constitute the entire consolidated indictment.
>
> Our immediate reflection on this issue that we have raised is that the count related to forced marriage which the prosecution is seeking our leave to add to the consolidated indictment is as much sexual, indeed, a gender offence as those that were included in the initial individual indictments and that feature in the current consolidated indictment on which this application to amend is based.
>
> We would like to say here that Forced Marriage is in fact what we would like to classify as a 'kindred offence' to those that exist in the indictment in the view of the commonality of the ingredients needed to prove offences of this nature....."[577] [emphasis added]

12. From the above quotation, it is clear that in their assessment, Trial Chamber I classified the phenomenon of "Forced Marriage" within the context of the Sierra Leonean conflict as a sexual or gender crime akin to rape, sexual slavery or sexual violence. The Prosecution in fact went ahead and introduced the present Count 8 and related amendments in the Indictment in a bid to cover acts of "forced marriage".

13. Notwithstanding the above, in a subsequent decision in which the Prosecution sought leave to introduce new evidence of 'Forced Marriages' under the crime against humanity of "other inhumane acts" (rather than as evidence of a sexual or gender crime)[578], Trial Chamber I considered and rejected the proposition that sexual offences including 'forced marriages', do fall in the broad category of "other inhumane acts"[579]. Trial Chamber I found *inter alia*, that-

> "...the particulars embodied in the Consolidated Indictment in respect of Counts 3 and 4 cannot be validly interpreted to be of an inclusive nature and as not excluding the broad range of unlawful acts which can lead to serious physical and mental harm, especially having regard to the formula "*and any other form of sexual violence*" in Article 2.g. [of the Statute] creating a separate specific residual category of sexual violence, of the same kind as rape, sexual slavery, enforced prostitution and forced pregnancy.
>
> In light of the separate and distinct residual category of sexual offences under Article 2.g., it is impermissible to allege acts of sexual violence (other than rape, sexual slavery, enforced

---

[576] *Ibid.*, para. 8.
[577] *Ibid.*, paras. 50-51.
[578] In an earlier motion, Trial Chamber I had denied a Prosecution leave to amend the indictment to include sex crimes. In the absence of a count embodying crimes of a sexual nature, the Prosecution sought to lead evidence of "forced marriages" under "other inhumane acts".
[579] *Prosecutor v. Sam Hinga Norman et. al*, Case No. SCSL-04-14-PT, Trial Chamber, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005.

prostitution and forced pregnancy) under Article 2.i. since "other inhumane acts", even if residual, must logically be restrictively interpreted as covering only those acts of a non-sexual nature amounting to an affront to human dignity.

The clear legislative intent behind the statutory formula "*any other form of sexual violence*" in Article 2.g. is the creation of a category of offences of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged as "other inhumane acts" offends against the rule against multiplicity and uncertainty...."[580]

14. I am strongly persuaded by the above decisions of Trial Chamber I in holding that view that the acts of "forced marriage" that occurred within the context of the Sierra Leonean conflict, are in fact a form of sexual violence pursuant to Article 2.g. of the Statute and could equally qualify as a form of sexual slavery pursuant to Article 2.g. of the Statute. In an Indictment such as the present one, that charges specific sexual crimes including rape, sexual slavery and other forms of sexual violence pursuant to Article 2.g. of the Statute, I am not persuaded that acts of "forced marriage" which are clearly sexual in nature, can be properly charged under the general regime of "other inhumane acts" pursuant to Article 2.i. of the Statute. It is my considered opinion that given the evidence on record, all alleged sex-related acts covered by the Indictment (including "forced marriage") can and should be properly accommodated under Counts 6, 7, and 9 of the Indictment. In my opinion, any alleged acts or offences that are of a residual, non-sexual nature and that could arguably be contained under the general regime of "other inhumane acts" do not belong under the part of the Indictment entitled "COUNTS 6-9: SEXUAL VIOLENCE". They could more appropriately be dealt with either under Count 11 or any other counts in the Indictment that address violence to life, health and physical or mental well-being of victims. Accordingly, I find that Count 8 is redundant and would recommend that it be struck out in favour of retaining only one count of "other inhumane acts" under Count 11. This, in my view, would be in the interest of justice and of judicial economy.

Done at Freetown, Sierra Leone, this 31st day of March 2006.

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

[580] *Ibid.*, para 19 (iii).