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SCSL-04-16-T
(17846 - 17858).

17846

SPECIAL COURT FOR
SIERRA LEONE

Case No. SCSL-2004-16-T

Before:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde
Interim-Registrar:	Lovemore Munlo
Date filed:	2 February 2006

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

PUBLIC VERSION

KANU – DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTIONS FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 98

Office of the Prosecutor:
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SPECIAL COURT FOR SIERRA LEONE
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1. The Kanu Defence hereby files a public version of its "Kanu – Defence Reply to Prosecution Response to Defence Motions for Judgment of Acquittal Pursuant to Rule 98," ("**Reply**") which confidential version was filed on 27 January 2006. The Defence initially decided to file the Reply confidentially, because the underlying "Prosecution Response to Defence Motions for Judgment of Acquittal Pursuant to Rule 98" ("**Response**") was filed confidentially, while at the same time the Defence referred in several instances to witness statements mentioned in the Response.

2. On 27 January, the Prosecution filed a public version of its Response, with redactions to protect the identity of some of its witnesses. The Defence, after receiving that document, verified the Prosecution's sources mentioned in the Reply with the redactions made in the Prosecution Response. One may observe that nothing of the information embedded in the Defence Reply was redacted in the Prosecution Response. It is for this reason that the Defence deems it in the public interest to re-file its Reply publicly, without any redactions.

Respectfully submitted,
this 2nd day of February 2006

Geert-Jan Alexander Knoops

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I INTRODUCTION

1. The Defence herewith files its "Public Version Kanu – Defence Reply to Prosecution Response to Defence Motions for Judgment of Acquittal Pursuant to Rule 98" ("**Kanu Reply**") to the "Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98" of 23 January 2006 ("**Prosecution Response**").

II LEGAL ARGUMENT

2.1 Locations for Which No Evidence Has Been Presented

2. The Prosecution in paras. 7 and 393 of its Response acknowledged that it did not present any evidence of crime base in certain locations. However, it states that the Trial Chamber is not required to strike these from the Indictment.[1]
3. The CDF Trial Chamber in the 'Decision on Motions for Judgment of Acquittal Pursuant to Rule 98' decided that there was no case to answer for the accused with respect to locations for which no evidence had been presented during the Prosecution case, and thus decided to strike those locations from the Indictment.[2] Also, the ICTY Appeals Chamber does not differentiate between a charge of the Indictment and locations specified therein for the applicability of Rule 98.[3]
4. Additionally, the Defence submits 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 prejudice to the Prosecution.
5. For these reasons, the Defence submits that locations for which no crime base has been presented during the Prosecution case, be struck from the Indictment.

[1] Prosecution Response, para. 11.
[2] Trial Chamber I, Case No. SCSL-2004-14-T-473, 21 October 2005, section VII – Disposition, under 2).
[3] *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Judgment, 5 July 2001, paras. 35-38.

2.2 Locations with Similar Names

6. On several occasions in its Response the Prosecution seems to assert that different names such as Mamboma and Mamoma[4], Willifeh and Wollifeh[5], Mandaha and Mandaya[6], Wendedu and Wondedu[7] refer to the same villages. The Defence submits that this is not the case. As evidenced for instance by the linguistic confusion in the Transcript of 11 April 2005, p. 23 line 5 ff. and more in particular p. 74, lines 28-29 (the villages Braima and Blama are confused), names of villages throughout the country or district can be almost identical, but still different places. The Prosecution has adduced no (geographic) 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 exact the same village name should be struck from the Indictment.

2.3 Greatest Responsibility Requirement

2.3.1 Greatest Responsibility: Element of 'No Case to Answer'

7. In paragraph 14 of its Prosecution Response, the Prosecution refutes that a Trial Chamber should not be able to convict an accused, in the absence of proof of bearing the greatest responsibility, and that this is a matter for the Appeals Chamber to be determined. The Defence respectfully holds that the CDF Trial Chamber already ruled on this matter in March 2004, and held that "the issue of personal jurisdiction is a jurisdictional requirement."[8] The Prosecution omitted to appeal from this Decision, hence it is fair to say that the Prosecution acquiesced in this ruling.[9]

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[4] Paras. 118, 271 and 272 Prosecution Response, and para. 43 Indictment.
[5] Paras. 118, 276 and 277 Prosecution Response, and para. 45 Indictment.
[6] Paras. 304 and 305 Prosecution Response, and para. 54 Indictment.
[7] Prosecution Response, para. 359.
[8] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT-26, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana," 3 March 2004, para. 27.
[9] In its Prosecution Response, the Prosecution itself indicates on several occasions that the fact that the CDF Trial Chamber ruled on some issue creates jurisprudence; it even does so in this same para. 14, where the Prosecution Response mentions the "practice of Trial Chamber I is a precedent." Yet, it is the Defence submission that this constitutes no binding precedent to other cases. In addition, by not appealing from CDF Trial Chamber decisions, the Prosecution – which is one organ as opposed to the Defence – acquiesces in such decision, whilst the same cannot be said from the Defence, which is not one single organ, but consists of many different defence teams with (potentially) different interests.

8. For these reasons, the jurisdictional requirement of greatest responsibility falls within the scope of Rule 98, as being part and parcel of a no case to answer application before the Special Court. In the absence of proof that this requirement has been met in the instant case, the Indictment against the third Accused should accordingly be dismissed.

2.4 Modes of Liability

2.4.1 Planning and Ordering

9. The interpretation of the Prosecution in para. 23 of its Response fails to indicate any authorities which justify a deviation from Brdjanin Trial Chamber definition of planning.[10] Clearly, at the minimum, some link with the alleged crime is required to be convicted of planning, instigating or ordering a crime.
10. In this regard, the Prosecution relies in para. 24 on an alleged statement by Colonel Iron, to the extent that "the possibility of violations occurring during military operations is always present." Yet, this reliance cannot support the Prosecution's thesis for the following two reasons:
    - (i) Colonel Iron was prohibited to testify during trial about the crimes within the Indictment as this issue fell outside his competence and goes to the ultimate issue.[11]
    - (ii) Secondly, such general observation cannot adduce evidence of the existence of "a higher likelihood." Otherwise, acceptance of such argument virtually amounts to a form of strict liability, since in this view, every military would potentially incur criminal responsibility, merely because of his participation in a military operation.

2.4.2 Three Categories of JCE

11. Already in March 2004, the Defence in its Pre-Trial Brief[12] indicated that the Prosecution should, according to ICTY case law, inform the Accused of "the nature of the participation

[10] *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, para. 537.
[11] See Transcript 12 October 2005, p. 42 (line 25) – p. 43 (line 25).
[12] Thus, from March 2004 onwards, the Prosecution failed to specify its reliance on one of the three categories, and moreover, did not inform the Defence that it would rely on all three of them.

by the accused in that [joint criminal] enterprise."[13] In this same document, the Defence indicated that "the case law of the ICTY relies upon the obligation of the Prosecutor to opt for the exact category [of JCE] it will pursue at trial, such option facilitates respect for the principle of legal certainty and fair trial rights of the Accused."[14]

12. Yet, such clear option has, until so far, never been made by the Prosecution, and only in the Prosecution Response (para. 27), it submits that it would be clear that all three categories of JCE are meant to be embedded in the Indictment. However, this is not correct since para. 34 of the Indictment only refers to "actions within the JCE or were a reasonably foreseeable consequence of the joint criminal enterprise." No option for the exact category of JCE was specified, and now that the Prosecution explicitly admits to rely on all three categories of JCE, it has failed to comply with its obligation as set forth by the ICTY case law.

13. This failure is reinforced by the ruling of the *Krnojelac* Trial Chamber, which held that the Prosecution was not allowed to extend the interpretation of the Indictment in its Pre-Trial Brief from a basic form of JCE 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."[15]

14. As a result of these prosecutorial failures to properly and timely opt for the exact category of JCE as form of liability, the Defence application should be granted in that the liability form of JCE should be dismissed.

2.4.3 Elements of JCE

15. In para. 33 of the Prosecution Response, 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."[16] However, the Prosecution's case clearly showed that the alleged common aim, if at all present – *quod non*, clearly changed. When the AFRC came into being in May 1997, its

[13] *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16 under (d); also referred to in Kanu – Defense Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b), Case No. SCSL-2004-16-PT-39, (**"Defence Pre-Trial Brief"**), para. 18.
[14] Defence Pre-Trial Brief, para. 15.
[15] *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002, para. 86.
[16] Footnote omitted.

alleged aim was to "gain and exercise political power and control over the territory of Sierra Leone." However, when the AFRC government was ousted by ECOMOG in February 1998, it fell apart into separate groups, with clearly separate aims and objectives, if at all, which objectives did not match with the initial alleged common design. The ICTY Trial Chamber in *Prosecutor v. Blagojevic and Jokic* ruled that if the "objective is fundamentally different in nature and scope from the common plan or design to which the participants originally agreed,"[17] 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 natural and foreseeable consequence of the original enterprise. No proof has been adduced for this situation.

16. The reasoning of the Prosecution in para. 281 cannot justify the conclusion that a reasonable trier of fact could convict Mr. Kanu's for the counts without any further specification thereof.

2.5 Elements of Crime: Pillage

17. In para. 109, the Prosecution Response asserts that burning should be equated to, or at least fall under, the concept of appropriation, which is an element of pillage. The Defence contests this statement. The *mens rea* for burning is different from the *mens rea* for appropriation of property. The Prosecution argument that "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," is artificial and thus negates the fact that burning is legally different from the crime of pillage, both as to the *mens rea* as well as the *actus reus*. The objective of appropriation is future possession of the object, whilst the objective of burning is destruction thereof.

18. The fact that the actions described in the Indictment and allegedly evidenced by Prosecution witnesses amount to "a seriousness which raises it above the level of an offence under national law" does not mean that the Prosecution can circumvent the Special Court Statute by extending the application thereof to crimes which are not criminalized under the Statute. Burning as a war crime has not been charged, nor does the Statute provide for that.

19. The Prosecution assertion in para. 111 that Article 3 should be considered as a *lex specialis* of Article 5 of the Statute, is moot. The elements of both crimes are different and Article 5 does not overlap the elements of Article 3. Again, the fact that Trial Chamber I did not rule

[17] Case No. IT-02-60-T, Judgement, 17 January 2005, para. 700.

on this does not create a binding precedent. *Stare decisis* cannot be based on the fact that the Defence and Judges left an argument open in another case.

20. The alternative argument, that the Trial Chamber reclassify the offence, set out in para. 113, violates the fundamental principle that an independent judge cannot in all fairness amend an Indictment, when it concerns a change into a count with a different *mens rea* and *actus reus*, which crime is by the way not covered by the Statute, after the closure of the Prosecution case. The reference to the *Kupreskic* Trial Chamber decision is therefore moot. This decision provides an example of a genocide charge which can be changed into the crime of killing as a war crime, because genocide embraces all elements of killing as a war crime, so that the Defence is not prejudiced by such a change.

III FACTUAL ARGUMENT

21. First of all, as a preliminary remark, the Defence emphasizes that the Prosecution repeatedly suggests that "[t]he Kanu Motion makes no submission with respect to this crime base. Accordingly the Prosecution assumes that the Third Accused accepts that there is sufficient evidence against him (...)."[18] Needless to say, the Defence submits that it does oppose the Prosecution evidence, but that the question whether the evidence is reliable and probative should be discussed at a later stage in the proceedings. This argument also goes for legal arguments made by the Prosecution in its Response, such as in respect to the terrorism charge.

3.1 Counts 4 and 5

22. **Bo District** – in para. 121 the Prosecution submits that "the evidence is also clear that those responsible for the attack on Gerihun reported directly to the Supreme Council", although the witness statements that are mentioned by Prosecution to proof that there was reporting to the Supreme Council do not mention any reporting to (a member of) the Supreme Council.[19]

23. **Kono District** – the Prosecution submits that there is evidence that the AFRC troops engaged in fighting with the civilian population at Mortema. However, the witness supposedly

[18] Prosecution Response, para. 364.

[19] See para. 121 Prosecution Response, and the referral in footnotes 268 and 269 to TF1-054, TT 19 April 2005, pp.92-93 and TF1-334, TT 17 May 2005, pp. 2-8.

providing the evidence on this matter[20] states that "there was heavy fighting between the forces [AFRC] and the CDF", and thus does not mention any fighting with the *civilian population*, or any unlawful killings under Counts 4 and 5. The Defence therefore reiterates that no evidence has been produced supporting that the acts as alleged in counts 4 and 5 were committed in Mortema by either the RUF or AFRC during the indicted period.

24. Witness TF1-072, presented by the Prosecution as giving evidence on unlawful killings in Gbaima, does not produce any evidence supporting that acts as alleged in counts 4 and 5 were committed in Gbaima.[21]

25. **Bombali District** – the Prosecution states that "In Karina the Third Accused participated in an incident where girls were locked in a house and burnt to death", yet, the evidence presented to support this statement does not mention any participation or presence of the Third Accused in this incident.[22]

26. **Port Loko District** – the evidence of witnesses TF1-320 and TF1-253 presented by the Prosecution on the unlawful killing in Manaarma – this is the spelling of the Indictment, whilst the Prosecution writes in its Response both Manarma and Mamarma – refers to incidents in (Thombo) Manarma or Manarrma. As submitted before, because of the similarity of the names of many Sierra Leonean villages, without further proof, different villages are meant. Therefore, no evidence has been presented by the Prosecution that unlawful killing occurred at the indicted location Manaarma.

3.2 Count 6

27. **Kono District** – the Prosecution mentions that the Defence stated that no evidence was provided that rape occurred in Wondedu. However, it does not accept nor refute this statement, so that the Prosecution in fact acquiesces to this.

28. Furthermore, although the Prosecution mentions some incidents of rape in the Kono District, it has not provided evidence that hundreds of women and girls were raped, and, in addition, 'that this was common practice amongst the soldiers.[23]

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[20] Footnote 547 Prosecution Response: Witness, TF1-114, TT 14 July 2005, p.124.
[21] Para. 278 and footnote 549 Prosecution Response.
[22] Para. 287 and footnote 565 Prosecution Response.
[23] Paras. 296 and 297 Prosecution Response.

29. **Koinadugu District** – the Prosecution submits that the Third Accused was responsible for the fate of the women in Mansofinia, but does not provide any evidence that rapes occurred in Mansofinia.[24]

3.3 Counts 8-11

30. The Prosecution submits that "Witness TF1-209 was told by the Third Accused that he had been slitting the bellies of pregnant women".[25] However, Witness TF1-209 only testified that the Third Accused told her that 'they' were slitting bellies, and thus, according to the Witness, the Third Accused did not tell her that he himself was slitting bellies. This therefore constitutes no evidence capable of supporting a conviction.

3.4 Count 13

31. **Kono District** – the Defence holds that the putting of ten girls in a vehicle by soldiers in Wendedu, after which they were driven away, forms no evidence that enslavement occurred in Wondedu, as is held by the Prosecution in par. 359 of its Response.
32. **Port Loko District** – the Prosecution refers to alleged evidence for enslavement in Sumbuya in par. 372. However, it fails to present any evidence regarding enslavement in Tendakum or Nonkoba.

3.5 Count 14

33. **Kono District** – the evidence referred to in par. 384 of the Prosecution Response cannot sustain the Prosecution's allegation that 'there is evidence that the Third Accused was present during the destruction of Gandorhun'.
34. **Freetown and Western Area** – the Defence submission that there is no evidence of looting in Calaba Town, Fourah Bay, Upgun or Pademba Road, is not refuted by the Prosecution submission in para. 387. To the contrary, it has presented no evidence of looting at these locations. As indicated above, the reference of the Prosecution in this regard to the alleged

[24] Para. 302 Prosecution Response.
[25] Paras. 332 and 340 Prosecution Response.

burning cannot serve as evidentiary substitute for proof of looting, neither can it substitute the lack of evidence for the pillage charge.

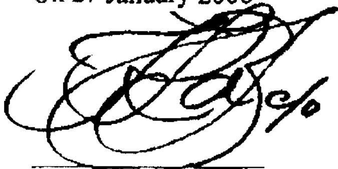
3.6 Prosecution Annex A

35. Lastly, the Defence observes that the Prosecution's Annex A is inaccurate, or at least incomplete in that the Prosecution text of the Response does not coincide with Annex A, in that it omits with regard to counts 8 and 9 the following villages: Tombodu (Kono district), and Mandaha (Bombali district).

IV CONCLUSION AND PRAYER

36. The Defence respectfully prays that the honorable Trial Chamber will dismiss the Prosecution arguments as laid down in its Prosecution Response, and will grant the 'Joint Legal Part of the Defence Motion for Judgment of Acquittal under Rule 98' and the 'Kanu – Factual Part Defence Motion for Judgment of Acquittal under Rule 98.'

Respectfully submitted,
On 27 January 2006



Geert-Jan Alexander Knoops

LIST OF AUTHORITIES

Special Court Documents:

- *Prosecutor v. Brima et al.*, Kanu – Defence Reply to Prosecution Response to Defence Motions for Judgment of Acquittal Pursuant to Rule 98, Case No. SCSL-2004-16-T-444, 13 December 2005.
- *Prosecutor v. Brima et al.*, Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, Case No. SCSL-2004-16-T-445, 13 December 2005.
- *Prosecutor v. Brima et al.*, Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, Case No. SCSL-2004-16-T-458, 23 January 2006.
- *Prosecutor v. Norman et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, Case No. SCSL-2004-14-T-473, 21 October 2005; relevant section: Section VII – Disposition, under 2).
- *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT-26, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, Case No. SCSL-2004-14-PT-26, 3 March 2004, relevant section: para. 27.
- *Prosecutor v. Brima et al.*, Transcript 12 October 2005, p. 42 (line 25) – p. 43 (line 25).
- *Prosecutor v. Brima et al.*, Kanu – Defense Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b), Case No. SCSL-2004-16-PT-39, relevant section: paras. 15-18.

ICTY Case Law:

- *Prosecutor v. Jelisic*, Judgment, Case No. IT-95-10-A, 5 July 2001 (URL address: http://www.un.org/icty/jelisic/appeal/judgement/jel-aj010705.pdf), relevant sections: paras. 35-38.
- *Prosecutor v. Brdjanin*, Judgment, Case No. IT-99-36-T, 1 September 2004 (URL address: http://www.un.org/icty/brdjanin/trialc/judgement/brd-tj040901e.pdf), relevant section: para. 537.
- *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Decision on Form of Second Amended Indictment, 11 May 2000 (URL address: http://www.un.org/icty/krnojelac/trialc2/decision-e/00511FI212948.htm), relevant section: para. 16 under (d).
- *Prosecutor v. Krnojelac*, Judgment, 15 March 2002, Case No. IT-97-25-T (URL address: http://www.un.org/icty/krnojelac/trialc2/judgement/krn-tj020315e.pdf), relevant section: para. 86.
- *Prosecutor v. Blagojevic and Jokic*, Judgement, Case No. IT-02-60-T, 17 January 2005 (URL address: http://www.un.org/icty/blagojevic/trialc/judgement/bla-050117e.pdf), relevant section: para. 700.