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SCSL-03-01-A
(6312-6974)

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding Judge
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date: 23 November 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH CONFIDENTIAL ANNEX A AND PUBLIC ANNEX B

RESPONDENT'S SUBMISSIONS OF CHARLES GHANKAY TAYLOR

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Leigh Lawrie
Mr. Christopher Santora
Ms. Kathryn Howarth
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

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I. INTRODUCTION

1. This is the Respondent's Submissions of Charles Ghankay Taylor, filed pursuant to Rule 112 of the Rules[1] and Article 20 of the Statute[2] ("Respondent's Submissions").

2. The subject-matter of these submissions are the Judgement and Sentencing Judgement rendered by Trial Chamber II of the Special Court for Sierra Leone ("Trial Chamber" or "Chamber"), respectively on 18 May 2012[3] and 30 May 2012[4] in case number SCSL-03-01-T, as well as the Prosecution Appellant's Submissions filed by the Prosecution on 1 October 2012[5] in case number SCSL-03-01-A.

3. The Chamber committed no error of law, and no error of fact occasioning any miscarriage of justice, in respect of the grounds of appeal lodged by the Prosecution. The Chamber directed itself properly in law in respect of allegations of multiple modes of liability, and committed no error of fact occasioning a miscarriage of justice in respect of its factual findings vis-à-vis the Prosecution's appeal. The Chamber acted well within the discretion legally permitted in addressing those multiples modes, and made reasonable factual findings that occasion no miscarriage of justice.[6] The factual findings underlying the Chamber's legal conclusions now being challenged by the Prosecution were based on a careful assessment of the evidence, which was complex, voluminous, and included testimony from many key characters in the relevant events, including Mr. Taylor himself.

4. The Prosecution Appellant's Submissions impermissibly repeat many of the arguments which were unsuccessful at trial, and often distort and misrepresent both the Trial Chamber's findings, and the jurisprudence relied upon. The Prosecution's Submissions, in fact, show nothing more than a disagreement with Mr. Taylor's acquittal, not that the Trial Chamber's conclusions were legally incorrect or that there were findings that could not have been reached by any reasonable chamber. The unsubstantiated nature of its claims, as well as

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[1] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012 ("Rules").
[2] Statute of the Special Court for Sierra Leone ("Statute").
[3] *Prosecutor v. Taylor,* SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Judgement"); see, also, *Prosecutor v. Taylor*, SCSL-03-01-T-1284, Corrigendum to Judgement Filed on 18 May 2012, 30 May 2012 ("Judgement Corrigendum").
[4] *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement").
[5] *Prosecutor v. Taylor*, SCSL-03-01-A-1325, Prosecution Appellant's Submissions, 1 October 2012 ("Prosecution Appellant's Submissions").
[6] Judgement, paras. 6972-6973.

the Prosecution's failure to demonstrate any error in Mr. Taylor's acquittal for allegations which were not properly pleaded, are set out below.

(i) Interlocutory Filings and Decisions

5. In compliance with paragraph 12(b) of the Practice Direction on the Structure of Grounds of Appeal before the Special Court,[7] the Defence hereby provides a list of interlocutory filings and decision relevant to the appeal in the footnote below.[8]

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[7] Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012.

[8] **Interlocutory Appeals Chamber filings and decisions:** *Prosecutor v. Taylor*, SCSL-03-01-A-1338, Decision on Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal before the Special Court, 16 October 2012; *Prosecutor v. Taylor*, SCSL-03-01-A-1-1324, Separate Opinion of Justice George Gelaga King on Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012; *Prosecutor v. Taylor*, SCSL-03-01-A-1-1323, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012; *Prosecutor v. Taylor,* SCSL-03-01-T-775, Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", 1 May 2009. **Interlocutory Trial Chamber filings and decisions:** *Prosecutor v. Taylor,* SCSL-03-01-1282, Order Authorising Court Photography on 30 May 2012, 30 May 2012; *Prosecutor v. Taylor,* SCSL-03-01-1279, Order Authorising Court Photography on 16 May 2012, 11 May 2012; *Prosecutor v. Taylor,* SCSL-03-01-T-1234, Order re: Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing, 18 March 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1193, Decision on Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 7 February 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1174, Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 28 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on Urgent and Public with Annexes A-C Defence Motion to Re-open its Case in Order to Seek Admission of Documents Relating to the Relationship Between the United States Government and the Prosecution of Charles Taylor, 28 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1143, Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 10 January 2011; *Prosecutor v. Taylor,* SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 12 November 2010; *Prosecutor v. Taylor,* SCSL-03-01-A-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information relating to DCT-032, 20 October 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 October 2010; *Prosecutor v. Taylor,* SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010; *Prosecutor v. Taylor,* SCSL-03-1-T-765, Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B), 23 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-752, Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE, 27 February 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-751, Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 27 February 2009; *Prosecutor v. Taylor*, SCSL-03-1-T-370, *Decision on Judicial Notice*, 23 March 2009; *Prosecutor v. Taylor,* SCSL-03-01-PT-249, Decision on Defence Application for Leave to Appeal the 25 April 2007 'Decision on Defence Motion Requesting Reconsideration of "Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's

(ii) Standards of Review on Appeal

6. The standards of review on appeal as laid out in Defence Appellant's Submissions[9] are incorporated here as if set out in full.[10] In addition, with regard to Prosecution appeals against acquittals on the basis of errors of fact, the Prosecution must show that, "when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated."[11]

(iii) Rule 115 of the Rules

7. Further to the notification provided in the Defence Appellant's Submissions,[12] the Defence reiterates the notice that it may present additional evidence to the Appeals Chamber pursuant to Rule 115 of the Rules. The potential additional evidence the Defence may seek to introduce could impact its arguments in respect to the responses in this Respondent's Submissions, particularly in relation to the responses to Ground One and Ground Two of the Prosecution Appellant's Submissions. Accordingly, the right to amend/vary these arguments is respectfully preserved in the event any additional evidence is admitted.

(iv) Miscellaneous

8. There are two annexes appended to the Book of Authorities to this Respondent's Submissions, both containing hard copies of excerpts from every referenced material referred to herein.[13] Confidential Annex A contains all referenced materials which are confidential, while all other hard copies are contained in Public Annex B.

9. In the Book of Authorities, the Defence has provided a list of all abbreviations and short-form citations relied upon in this Respondent's Submissions alongside the corresponding full citations.

Defence," Dated 23 January,' 22 May 2007; *Prosecutor v Taylor,* SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007.

[9] *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012; Confidential Annex A and Public Annexes B and C to *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012; and *Prosecutor v. Taylor*, SCSL-03-01-A-1348, Amended Book of Authorities to the Defence Rule 111 Submissions, 31 October 2012 ("Defence Appellant's Submissions").

[10] Defence Appellant's Submissions, paras. 8-13.

[11] *RUF* AJ, para. 33, citing *Muvunyi* First AJ, para. 10; *Mrkšić* AJ, para. 15; *Martić* AJ, para. 12.

[12] Defence Appellant's Submissions, para. 16.

[13] In compliance with paras. 15-22 of the Practice Direction on the Structure of Grounds of Appeal. See also *Prosecutor v. Taylor*, SCSL-03-01-A-1338, Decision on Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal before the Special Court, 16 October 2012.

(v) Statement of Opposition to the Prosecution Grounds of Appeal

10. The Defence opposes all four Prosecution grounds of appeal and the arguments contained therein. The arguments in support of this opposition are laid out in Part II of this Respondent's Submissions.

II. ARGUMENTS IN RESPONSE TO THE PROSECUTION APPELLANT'S SUBMISSIONS

GROUND ONE: THE TRIAL CHAMBER DID NOT ERR IN ACQUITTING MR. TAYLOR OF ORDERING

A. OVERVIEW

11. Accused before the SCSL have previously been convicted for giving orders to capture and amputate civilians;[14] strip and rape women;[15] open fire on peacekeepers,[16] abduct children;[17] attack and abduct peacekeepers;[18] and burn down a town.[19] In the present appeal, the Prosecution urges the Appeals Chamber to convict Mr. Taylor for giving instructions or advice to the RUF/AFRC leadership on five occasions.[20] These "instructions" include to "construct an airfield"[21] and "open a training base".[22]

12. In order to make this argument, the Prosecution develops a manifestly erroneous definition of ordering, which ignores key elements, and cannot be reconciled with the standard set by this Appeals Chamber, and at the *ad hoc* tribunals. The Prosecution's arguments accordingly do not substantiate its claim that to convict Mr. Taylor was the *only reasonable conclusion* available to the Trial Chamber. In fact, the Trial Chamber undertook a detailed assessment of the totality of the evidence relevant to ordering.[23] Neither this evidence, nor its subsequent findings, supports a conviction against Mr. Taylor for ordering.

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[14] *AFRC* TJ, paras. 1710-1.
[15] *AFRC* TJ, paras. 1710-1.
[16] *RUF* TJ, paras. 2249-50.
[17] *AFRC* TJ, paras. 1717-9.
[18] *RUF* TJ, paras. 2255, 2257-8.
[19] *AFRC* TJ, paras. 1710-1.
[20] Prosecution Appellant's Submissions, paras. 43-64.
[21] Prosecution Appellant's Submissions, paras. 63-4.
[22] Prosecution Appellant's Submissions, paras. 61-2.
[23] Judgement, Leadership and Command Structure, especially paras. 6774-5, 6778, 6783-4, 6786-7; para. 6973. See also, para. 6461 ("...Taylor's role *vis à vis* the RUF and later the AFRC/RUF can only be assessed by examining the entirety of the evidence. The following parts of this [Leadership and Command Structure] section are only those which have not been considered previously in the Judgement. However, in making its conclusion regarding Taylor's relationship *vis à vis* the RUF and AFRC/RUF, the Trial Chamber has considered the evidence in its entirety and all the findings made in the other parts of the Judgement.").

B. THE TRIAL CHAMBER DID NOT ERR BY RELYING ON ITS FINDING THAT MR. TAYLOR'S INSTRUCTIONS WERE "AT TIMES" NOT FOLLOWED

13. In rejecting the Prosecution's ordering case, the Trial Chamber considered that Mr. Taylor's instructions and guidance "at times were in fact not followed."[24] The Prosecution contends that this reliance was improper, and an error of law.[25] The Prosecution could only identify two instances where an instruction from Mr. Taylor was not followed by the RUF and RUF/AFRC,[26] and alleges that these two instances "should not have *barred* the Trial Chamber from finding Mr. Taylor guilty of ordering."[27] These submissions are misguided for the following reasons.

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14. First, instances of non-compliance with Mr. Taylor's instructions or guidance was just *one* factor in the Chamber's deliberation. There is no explicit indication, nor does any reasonable reading of the Judgement demonstrate, that the Chamber considered itself *barred* from finding Mr. Taylor guilty of ordering on the basis that his advice was sometimes ignored. The Prosecution's submissions accordingly mischaracterise the Chamber's findings, by erroneously casting one of the Chamber's considerations as being the decisive factor.

15. Further, a reading of the Judgement reveals that there are far more than two instances when the RUF and RUF/AFRC did not comply with Mr. Taylor's advice or guidance. A sample of six additional instances is set out below.[28] The Prosecution's assertion is based on

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[24] Judgement, para. 6973.
[25] Prosecution Appellant's Submissions, p. 8.
[26] Prosecution Appellant's Submissions, para. 19.
[27] Prosecution Appellant's Submissions, para. 21 (emphasis added).
[28] In addition to those cited by the Prosecution, examples of non-compliance include: (i) According to the "generally credible" Fayia Musa, Mr. Taylor sent Musa Cissé to Sam Bockarie to ask that Fayia Musa be released to save his life and so that the peace process could start. However, Bockarie did not comply ("Q. Now, did Mosquito follow – take [Mr. Taylor's] advice? A. I have already said it, no, he did not, because Mosquito said he would not take anybody's [advice]") (TT, Fayia Musa, 15 Apr. 2010, pp. 39136-7); (ii) According to the "generally credible" TF1-567, Mr. Taylor advised Foday Sankoh not to base himself in Freetown, but rather to remain in a more secure area, such as Kailahun. Sankoh decided to be in Freetown anyway, leading to his arrest (Judgement, para. 6358); (iii) That the RUF "forcibly disarmed and detained a group of approximately 500 UNAMSIL peacekeepers" (Judgement, para. 6399) was non-compliance with the Lomé Accord which Mr. Taylor brokered (see, for example, Exh. D-218, p. 1; Exh. D-199, pp. 35-6) and to which he contributed as one of "the most significant actors" (TT, Stephen Ellis, 18 Jan. 2008, pp. 1594-5); (iv) Mr. Taylor intervened to secure the release of a large number of UNAMSIL peacekeepers held hostage by the RUF, by instructing the RUF to release them. The RUF partially complied by releasing "some" of the peacekeepers (Judgement, para. 6364. See also, paras. 6392, 6397-8); (v) "At a meeting on 26 July 2000 at the Executive Mansion in Monrovia between the ECOWAS Heads of State, including the Accused, and an RUF delegation led by Issa Sesay, the suggestion was made that Issa Sesay should become the Interim Leader of the RUF. Sesay would not accept the appointment without it first being approved by the RUF and Foday Sankoh" (Judgement, para. 6784); (vi)

either a misreading, or a misrepresentation of the Judgement. Regardless, as the Prosecution elsewhere concedes, ordering requires proof of some position of authority that *would compel* another to commit a crime in following the accused's order.[29] This is not resolved through a strict quantitative tally of compliance versus non-compliance. The issue is whether those complying with the instructions were *compelled* by the accused's position of authority to do so. The Trial Chamber recognised this,[30] and after a thorough analysis of his relationship with the RUF/AFRC leadership,[31] did not find that Mr. Taylor had the level of authority to *compel* the RUF/AFRC to act.[32] There is no error in this approach, nor has the Prosecution demonstrated that there was.

16. In fact, this is neatly illustrated by the *Brđanin* case upon which the Prosecution erroneously attempts to rely.[33] The *Brđanin* Trial Chamber also properly considered the issue of non-compliance with instructions in determining the accused's liability for ordering.[34] However, it found that, even if some instructions were not followed, *Brđanin* possessed the authority to order on the basis that he had the power to deliver *binding* decisions on the perpetrators of the crimes.[35] In the present case, there was no such finding that Mr. Taylor could issue *binding* orders, nor that he could *compel* anyone to follow his instructions or guidance.[36] As such, he did not possess the authority to order, and his acquittal was correct in law.

17. Nor does the Prosecution substantiate its claim that had the Chamber examined whether the elements for ordering *were met at the time of the event*, it would have found Mr

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According to the "generally credible" TF1-338, in 2000, Mr. Taylor suggested sending Sam Bockarie back to be the leader of the RUF, but this suggestion was rejected by Issa Sesay (TT, TF1-338, 2 Sept. 2008, p. 15148, cited in Prosecution Final Trial Brief, para. 180).

[29] Prosecution Appellant's Submissions, para. 26. See also Judgement, para. 475, citing *Semanza* AJ, para. 361 and *Kordić and Čerkez* AJ, para. 28. The Special Court has adopted this standard in *CDF* TJ at para. 225 and in *RUF* TJ at para. 273. The same standard has also been adopted at the ICTY and ICTR. See, for example, *Boškoski & Tarčulovski* AJ at para. 164; *Milutinović* TJ (vol. 1), para. 86; *Popović* TJ, para. 1012; *Gacumbitsi* AJ at para. 182; *Setako* AJ, paras. 240-4; *Semanza* AJ, paras. 360-1; *Nizeyimana* TJ, para. 1464; *Nzabonimana* TJ, para. 1695; *Ndindiliyimana* TJ, para. 1911; *Kamuhanda* TJ, para. 594; *Hategekimana* TJ, para. 645; *Kanyarukiga* TJ, para. 620; *Gatete* TJ, para. 575.

[30] Judgement, para. 475.

[31] Judgement, Leadership and Command Structure, especially paras. 6774-5, 6778, 6783-4, 6786-7; para. 6973. See also, para. 6461.

[32] Judgement, para. 6973.

[33] Prosecution Appellant's Submissions, para. 21.

[34] *Brđanin* TJ, para. 364.

[35] *Brđanin* TJ, paras. 363-4.

[36] Judgement, Leadership and Command Structure, especially paras. 6774-5, 6778, 6783-4, 6786-7; para. 6973. See also, para. 6461.

Taylor guilty.[37] The Prosecution points to no findings that Mr. Taylor's authority increased or decreased over different periods corresponding to the five impugned instructions, unlike the accused in the cases on which it relies.[38]

C. THE TRIAL CHAMBER DID NOT ERR IN FINDING THAT MR. TAYLOR'S INSTRUCTIONS WERE "GENERALLY OF AN ADVISORY NATURE" AND ACQUITTING HIM OF ORDERING

18. In claiming that the Trial Chamber erred in characterising Mr. Taylor's instructions and guidance as generally "advisory", the Prosecution merely seeks to substitute the Chamber's interpretation of the evidence with its own by impermissibly repeating arguments from the trial phase which have been properly considered and dismissed.[39]

19. As discussed above, ordering requires proof of some position of authority that *would compel* another to commit a crime.[40] Mere proof of holding a position of authority in the abstract is insufficient.[41]

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[37] Prosecution's Appellant Submissions, paras. 21-2.
[38] Prosecution's Appellant Submissions, paras. 21-2.
[39] The ICTY Appeals Chamber recently recalled that "[a] party cannot merely repeat on appeal arguments that did not succeed in trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber." (*Gotovina* AJ, para. 14, citing *Boškoski and Tarčulovski* AJ, para. 16; *Mrkšić* AJ, para. 16, *Bagosora* AJ, para. 19.); See also *Krajisnik* AJ, para. 24.
[40] Judgement, para. 475, citing *Semanza* AJ, para. 361 and *Kordić and Čerkez* AJ, para. 28. The Special Court has adopted this standard in *CDF* TJ at para. 225 and in *RUF* TJ at para. 273. The same standard has also been adopted at the ICTY and ICTR. See, for example, *Boškoski & Tarčulovski* AJ at para. 164; *Milutinović* TJ (vol. 1), para. 86; *Popović* TJ, para. 1012; *Gacumbitsi* AJ at para. 182; *Setako* AJ, paras. 240-4; *Semanza* AJ, paras. 360-1; *Nizeyimana* TJ, para. 1464; *Nzabonimana* TJ, para. 1695; *Ndindiliyimana* TJ, para. 1911; *Kamuhanda* TJ, para. 594; *Hategekimana* TJ, para. 645; *Kanyarukiga* TJ, para. 620; *Gatete* TJ, para. 575. Footnote 43 of the Prosecution Appellant's Submissions cites to jurisprudence which used the terms "persuade" or "convince" rather than "compel". This jurisprudence stops at 2001. This is because until 2001, liability for ordering still required proof of the existence of a superior-subordinate relationship. As the jurisprudence developed to dispense with the requirement for a superior-subordinate relationship, the level of authority the accused was required to possess became higher. *Kordić & Čerkez* TJ, at para. 388, was the first to move from the requirement for the existence of a superior-subordinate relationship to the requirement that the accused possessed the "authority to order". *Semanza* TJ, at para. 382, clarified that ordering requires the accused to have a position of authority and to "[use] that authority to order – *and thus compel* – another individual, subject to that authority, to commit a crime. Criminal responsibility for ordering the commission of a crime under the Statute *implies* the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it (emphases added)." The ICTR Appeal Chamber, in *Semanza* AJ at para. 361, endorsed *Semanza* TJ's definition of ordering. Therefore, the standard of "persuade" or "convince", no longer applies, given that the "authority to order" equates to an ability to "compel". It is telling that the Prosecution appears to argue with reference to this correct standard elsewhere in its submissions. See Prosecution Appellant's Submissions, paras. 25-6, 30.
[41] The proof of a position of authority on the part of an accused that would compel another commit a crime in following the accused's order will be referred to as the "authority to order".

20. The Prosecution fails to substantiate its claim that the Chamber's own findings "make clear that Mr. Taylor gave his communications with *compelling force* by virtue of his unique position of authority over the leaders and members of the RUF, RUF/AFRC."[42] In fact, the Chamber's findings demonstrate precisely the opposite. In reality, as the Chamber correctly noted, the relationship between Mr. Taylor and the RUF and RUF/AFRC was "mainly based on common economic, political and military interests… [T]he advice and instruction of the Accused to the AFRC/RUF mainly focused on directing their attention to the diamondiferous area of Kono in order to ensure the continuation of trade, diamonds in exchange for arms and ammunition."[43] It was coincidental to this relationship that following Mr. Taylor's advice was often the best option for the RUF and RUF/AFRC – "the RUF and later the AFRC/RUF's interests were intrinsically linked to the interests of the Accused, and their relationship was defined by a synergy and complementarity of these interests."[44] As such, merely listing examples where the RUF and RUF/AFRC appeared to comply with Mr. Taylor's instructions or guidance, without reference to whether they were compelled to do so,[45] does not advance the Prosecution argument. Such examples are indeed wholly consistent with the Trial Chamber's findings that Mr. Taylor and the RUF/AFRC had mutual interests.

21. Nor is the Prosecution's assertion of a "practical necessity"[46] compelling Johnny Paul Koroma or Sam Bockarie to follow Mr. Taylor's instructions or advice supported by the Chamber's finding of nothing more than "a continuing trade relationship between the RUF and the Accused, diamonds for arms and ammunition."[47] No argument has been presented, nor did the Chamber find that either Johnny Paul Koroma or Sam Bockarie was *compelled* to maintain this trade relationship. There is no evidentiary basis for any argument that the RUF and RUF/AFRC could not have abandoned this trading relationship at any point (albeit to their detriment). The very fact that they were free to make that choice means that Mr. Taylor did not possess the authority to order. Further undermining the Prosecution's claim are repeated instances of Sam Bockarie's uncontrollable nature, and general belligerency;[48] he was hardly someone who would be easily "compelled" to follow guidance and instructions.

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[42] Prosecution Appellant's Submissions, para. 25 (emphasis added).
[43] Judgement, para. 6778.
[44] Judgement, para. 6787.
[45] Prosecution Appellant's Submissions, paras. 36-7.
[46] Prosecution Appellant's Submissions, para. 30.
[47] Judgement, para. 6783. This is challenged in Part III of the Defence Appellant's Submissions.
[48] See, for example, Judgement, para. 6782, where the Chamber found that following the Lomé Peace Accord, Sam Bockarie defied orders from Foday Sankoh to disarm, leading to violent clashes between Bockarie's men and the RUF forces loyal to Sankoh; Judgement, para. 6560, recounting Mr. Taylor's testimony, not rejected by

22. The Chamber's conclusion was based on a holistic reading of the entirety of the evidence relevant to Mr. Taylor's authority to order. Before acquitting Mr. Taylor for liability through ordering, the Chamber considered, *inter alia*, (i) the nature of the relationship between Mr. Taylor and the AFRC/RUF;[49] (ii) the nature of the relationship between Mr. Taylor and Sam Bockarie;[50] (iii) the role that Foday Sankoh envisioned with regard to Mr. Taylor;[51] and (iv) the nature of the relationship between Mr. Taylor and Johnny Paul Koroma.[52] The Prosecution arguments are nothing more than alternative interpretations of evidence which has been considered and rejected by the Trial Chamber.[53] The Prosecution has failed to demonstrate an error in the Chamber's analysis, or the exercise of the Trial Chamber's discretion.

23. Again, the fact that Johnny Paul Koroma "turned to Mr. Taylor"[54] had already been considered by the Chamber.[55] The Prosecution's selective and incomplete citation of the *Gacumbitsi* Trial Judgement does not demonstrate any error of fact or law in the Trial Chamber's reasoning.[56] In fact, the *Gacumbitsi* Trial Chamber went on to state that when the listener turns to an accused during emergencies, the words and actions of the accused "are not necessarily culpable" but can amount to forms of participation in crime that fall short of ordering.[57] The *Gacumbitsi* Trial Judgement suggests that only when an "enhanced" level of authority[58] is present, such words would be perceived as orders.[59]

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the Chamber, that Sam Bockarie was belligerent and his conduct threatened the disarmament process; TT, Fayia Musa, 15 Apr. 2010, pp. 39136-7, where the "generally credible" Fayia Musa stated that Bockarie "said he would not take anybody's [advice]".

[49] Judgement, paras. 6778, 6783 and 6787.

[50] Judgement, para. 6775.

[51] Judgement, paras. 6774-5.

[52] Judgement, paras. 6776-9, 6781, 6787.

[53] Prosecution Appellant's Submissions, paras. 28, 33 and Judgement, para. 6777; Prosecution Appellant's Submissions, paras. 33-5 and Judgement, para. 6768; Prosecution Appellant's Submissions, para. 29 and Judgement, paras. 6774-5.

[54] Prosecution Appellant's Submissions, paras. 28, 33.

[55] Judgement, para. 6777 ("Like Sankoh, Koroma turned to the Accused for advice and support and the Trial Chamber accepts that he would have consulted the Accused.")

[56] Prosecution Appellant's Submissions, para. 27.

[57] *Gacumbitsi* TJ, para. 282.

[58] *Gacumbitsi* TJ, para. 282 ("In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the *de facto* exercise of an administrative function, or even the use of threat or unlawful force.")

[59] *Gacumbitsi* TJ, para. 282 ("The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6(1) referred to above.")

24. Indeed, when one evaluates the level of authority in the cases cited by the Prosecution where accused have been convicted for ordering, Mr. Taylor's level of authority falls far short in comparison. For example, in *Gacumbitsi*, the accused was the "most influential person in the commune, with the power to take legal measures *binding* all residents."[60] In *Brđanin*, the accused was the President of the ARK Crisis Staff,[61] which rendered decisions that were implemented by municipal authorities[62] and led to crimes charged in the Indictment.[63] That Chamber noted that the "ARK Crisis Staff repeatedly stated that its decisions were *binding* on all municipalities. In addition, the municipal authorities accepted the authority of the ARK Crisis Staff to issue decisions that were directly *binding* on them."[64]

25. The Prosecution repeats that, following his arrest, Foday Sankoh instructed Sam Bockarie to take orders from Mr. Taylor.[65] However, this submission ignores the Chamber's ultimate finding that "the role Sankoh envisioned for the Accused while he was in detention was that the Accused would *guide* Bockarie, and that Bockarie should look to his *guidance*."[66] Guidance evidently falls far below the threshold of liability for ordering.

26. The Prosecution then resorts to repeating its time-worn arguments as to the deferential names the RUF and AFRC/RUF used to refer to Mr. Taylor.[67] These arguments have been resoundingly dismissed by the Chamber as being "*per se*...insufficient to establish that Taylor had *de facto* authority over the RUF."[68] Hearsay evidence that Sam Bockarie once referred to Charles Taylor as "my boss" at some point in 1998,[69] does not demonstrate that no reasonable trial chamber could have concluded that Mr. Taylor did not have the authority to *compel* Sam Bockarie follow instructions. Nor does evidence that Mr. Taylor could ask Sam Bockarie to

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[60] *Gacumbitsi* AJ, para. 184 (emphasis added).
[61] *Brđanin* TJ, para. 289.
[62] *Brđanin* TJ, paras. 300, 316.
[63] *Brđanin* TJ, paras. 256, 320.
[64] *Brđanin* TJ, para. 363 (emphasis added). See also *Strugar* TJ, para. 331 ("[Ordering] requires that at the time of the offence, an accused possessed the authority to issue binding orders to the alleged perpetrator"); *Muvunyi* First TJ, para. 467 ("Ordering under Article 6(1) requires that a person in a position of authority uses that position to issue a binding instruction to or otherwise compel another to commit a crime punishable under the Statute").
[65] Prosecution Appellant's Submissions, para. 29. This is considered by the Trial Chamber: Judgement, paras. 6774-5.
[66] Judgement, para. 6775.
[67] Prosecution Appellant's Submissions, paras. 33-5. Furthermore, these arguments are mainly repetition of arguments the Prosecution had made in its Prosecution Final Trial Brief, paras. 36, 54-60. See fn. 39 above.
[68] Judgement, para. 6768.
[69] TT, TF1-015, 8 Jan. 2008, pp. 729-30.

give him a tank.[70] Prosecution arguments that Mr. Taylor "had command over the RUF"[71] are also without merit without an explanation as to how the Chamber erred in finding, after extensive deliberations, that "the Accused was not part of the command structure."[72]

27. The Prosecution then provides a list of alleged instances of Mr. Taylor's instructions being followed by the RUF/AFRC.[73] As noted above, liability for ordering is not determined by a quantitative analysis of the number of times that instructions were followed. The Trial Chamber correctly conducted a more sophisticated analysis,[74] taking into account the particular circumstances, and the reality of the relationship between Mr. Taylor and the RUF and RUF/AFRC. Furthermore, the Prosecution elsewhere asserts that "in determining if an accused is guilty on the basis of ordering, the Trial Chamber should examine the *particular event* and determine whether the elements for ordering *were met at the time of the event.*"[75] Therefore, following its own logic, providing "manifold examples of compliance" on the part of the RUF/AFRC at various times in 1997 or 2001, does not demonstrate that Mr. Taylor had the authority to compel them to follow those instructions for which the Prosecution now seeks his conviction.

28. Accordingly, it does not matter how the Chamber then lexically characterised Mr. Taylor's communications to Johnny Paul Koroma or Sam Bockarie.[76] Whether Mr. Taylor "instructed", "told" or "communicated the imperative",[77] the Chamber's ultimate finding[78] demonstrates that Mr. Taylor did not possess authority to *compel* them to follow his instructions. The Prosecution has merely demanded that these instructions be viewed as "orders", without demonstrating any error in the Trial Chamber's approach.

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[70] Prosecution Appellant's Submissions, para. 31.
[71] Prosecution Appellant's Submissions, para. 35.
[72] Judgement, para. 6777. See also, paras. 6475-80, 6508-20, 6543-52, 6564-7, 6608-16, 6745-7, 6767-87.
[73] Prosecution Appellant's Submissions, para. 37.
[74] Judgement, paras. 6768-6787.
[75] Prosecution Appellant's Submissions, para. 21 (emphasis in original), citing *Semanza* AJ, paras. 363-4 and *Gacumbitsi* TJ, paras. 162-3.
[76] Prosecution Appellant's Submissions, para. 24.
[77] Prosecution Appellant's Submissions, para. 24.
[78] Judgement, para. 6973.

D. THE TRIAL CHAMBER ACTED WITHIN ITS DISCRETION AND DID NOT ERR IN FACT IN CONCLUDING THAT MR. TAYLOR WAS NOT RESPONSIBLE FOR ORDERING

(a) The Prosecution misconstrues the *actus reus* of ordering

29. The Prosecution does not contest the Trial Chamber's relevant factual findings, but argues that "having entered findings that establish all the requisite elements," the *only reasonable conclusion* available to the Trial Chamber was to convict Mr. Taylor of ordering.[79] The Prosecution asserts that "criminal liability for ordering attaches if:"

> - A person in a position of authority intentionally instructed another to carry out *an act or engage in an omission*; and
> - He intended or was aware of the substantial likelihood that a crime or underlying offence would be committed in carrying out his instruction.[80]

30. This definition differs wildly from that established at the SCSL and the *ad hoc* tribunals. Critically, it ignores the Prosecution's obligation to establish that (1) the accused gave an order to *commit crimes*; (2) the accused's position of authority was sufficient to *compel others* to commit a crime in following his order; and (3) the order *directly and substantially contributed* to the commission of the crime or underlying offence. By framing its arguments around its own erroneously simplistic definition, the Prosecution ignores these elements and as such does not substantiate its argument that the only reasonable conclusion was that Mr. Taylor was liable for ordering.

(1) Mr. Taylor did not give orders to commit crimes

31. The SCSL Trial and Appeals Chambers have, to date, unanimously held that the *actus reus* of ordering requires that a person in a position of authority instruct a subordinate *to commit an offence*.[81] Similarly, ICTR and ICTY jurisprudence has overwhelmingly held that ordering requires that a person in a position of authority instruct another person *to commit a*

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[79] Prosecution Appellant's Submissions, p. 19 ("The Trial Chamber erred in fact when it failed to draw the only reasonable conclusion that could be drawn from the facts found proven: that Mr. Taylor was responsible for ordering the Instructed Crimes.") See also paras. 42, 69.
[80] Prosecution Appellant's Submissions, para. 40 (emphasis added).
[81] *RUF* AJ, para. 164; *RUF* TJ, para. 273; *CDF* TJ, para. 225; *AFRC* TJ, para. 772.

crime.[82] Both the Prosecution and Defence submitted this as the correct definition at trial.[83] As such, accused before the SCSL, ICTR and ICTY have been convicted for giving criminal orders giving rise to criminal responsibility.[84]

32. The Prosecution is seeking Mr. Taylor's conviction on appeal for five instructions or pieces of advice given to the RUF/AFRC leadership.[85] It appears to characterise only one - to get to Freetown "by all means", in a "fearful" operation - as an order to *commit crimes*.[86]

33. First, whether Mr. Taylor ever said these words has been challenged on appeal.[87] However, even if this finding remains undisturbed, is it unclear how the phrases "by all means" and "fearful" constitute orders to commit particular crimes. Brđanin's statements "suggesting a campaign of retaliatory ethnicity-based murder" were not "specific enough to constitute instructions by the Accused to the physical perpetrators to commit any of the killings charged."[88] Nor were his decisions "advocating the resettlement of the non-Serb population" specific enough in their wording to constitute ordering the crimes of deportation and forcible transfer.[89] In *Milošević*, the Trial Chamber could not identify a particular order on the part of the accused to shell and snipe civilians in Sarajevo, but relied on the nature of the campaign, and the context of the command structure to find the accused liable for ordering.[90] The ICTY Appeals Chamber held that this was insufficient, finding that the Trial

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[82] **ICTR:** *Nizeyimana* TJ, para. 1464; *Nzabonimana* TJ, para. 1695; *Setako* AJ, para. 240; *Ndindiliyimana* TJ, para. 1911; *Hategekimana* TJ, para. 645; *Hategekimana* AJ, para. 67; *Kanyarukiga* TJ, para. 620; *Kalimanzira* TJ, para. 17; *Kalimanzira* AJ, para. 213; *Bagosora* TJ, para. 2008; *Seromba* TJ, para. 305; *Gacumbitsi* TJ, paras. 281, 284; *Gacumbitsi* AJ, para. 182; *Semanza* AJ, paras. 360-1; *Kamuhanda* TJ, para. 594; *Gatete* TJ, para. 575. **ICTY:** *Đorđević* TJ, para. 1871; *Boškoski and Tarčulovski* TJ, para. 400; *Boškoski and Tarčulovski* AJ, para. 160; *Krajišnik* AJ, para. 662; *Martić* TJ, para. 441; *Martić* AJ, paras. 220-3; *Dragomir Milošević* TJ, para. 957; *Galić* TJ, para. 168; *Galić* AJ, para. 176; *Brđanin* TJ, para. 270; *Limaj* TJ, para. 515; *Mrkšić* TJ, para. 550; *Kordić and Čerkez* AJ, para. 28.

[83] Prosecution Final Trial Brief, para. 602; Defence Final Trial Brief, para. 124.

[84] See, for example, *RUF* TJ, paras. 2249-50; *AFRC* TJ, para. 1775; *Boškoski & Tarčulovski* TJ, para. 577; *Boškoski & Tarčulovski* AJ, para. 161; *Nizeyimana* TJ, paras. 1519, 1524; *Setako* TJ, para. 473; *Setako* AJ, paras. 242-5; *Gacumbitsi* TJ, paras. 163, 284; *Gatete* TJ, paras. 585, 595; *Kajelijeli* TJ, para. 836; *Semanza* AJ, para. 363.

[85] Prosecution Appellant's Submissions, paras. 43-64.

[86] Prosecution Appellant's Submissions, para. 54.

[87] In relation to Mr. Taylor's alleged statements to get to Freetown "by all means" and to make the operation "fearful", see Defence Appellant's Submissions, Ground of Appeal 15. In relation to Mr. Taylor's non-criminal instructions, see Defence Appellant's Submissions, Ground of Appeal 24. See also Grounds of Appeal 1-4, including but not limited to paras. 32 and 57.

[88] *Brđanin* TJ, para. 468.

[89] *Brđanin* TJ, paras. 572-3.

[90] *Dragomir Milošević* TJ, para. 966.

Chamber did not establish beyond a reasonable doubt that Milošević "instructed his troops to perform a campaign of sniping and shelling the civilian population as such."[91]

34. Equally, even if it is accepted that Mr. Taylor said "by all means" and to make the operation "fearful", the Prosecution fails to demonstrate that the only reasonable conclusion was that Mr. Taylor gave an order to conduct anything other than a lawful military operation, let alone an order to commit "terrorism" or "sexual slavery" or "conscripting" child soldiers, or any of the eleven (11) particular and distinct crimes for which it urges the Appeals Chamber to enter a conviction.

35. The four remaining instructions are not orders to commit crimes. The orders "to capture Kono";[92] to "maintain control of Kono";[93] to "open a training base";[94] and "construct an airfield"[95] are not unlawful, nor does the Prosecution assert that they are. In order to circumvent this, the Prosecution asserts that liability can also arise if an accused orders an *act or omission*, with the intent or awareness of a substantial likelihood that a crime would be committed.[96] The Prosecution thereby departs from both its own position at trial,[97] and the standard applied at the SCSL.[98] It appears to rely on a footnote from the Judgement, which itself relies on a footnote from the *Milutinović* Trial Judgement, currently on appeal.[99]

36. In fact, this alternative phrasing of the standard for the *actus reus* of ordering appears in isolated cases at the ICTR and ICTY.[100] However, the Prosecution's interpretation is incompatible with the practice of those isolated Chambers who have referred to an *"act or omission"* standard. The *Milutinović* Trial Chamber observed that "ordering primarily applies to those who instruct others to commit crimes,"[101] and did not find the accused Lazarević or Ojdanović (who ordered the Yugoslav Army and armed non-Albanians into actions in

[91] *Dragomir Milošević* AJ, para. 267.
[92] Prosecution Appellant's Submissions, paras. 43-5, 53.
[93] Prosecution Appellant's Submissions, paras. 46-52.
[94] Prosecution Appellant's Submissions, paras. 61-2.
[95] Prosecution Appellant's Submissions, paras. 63-4.
[96] Prosecution Appellant's Submissions, paras. 40, 64.
[97] Prosecution Final Trial Brief, para. 602.
[98] *RUF* AJ, para. 164; *CDF* TJ, para. 225.
[99] Prosecution Appellant's Submissions, para. 40, relying on Judgement, fn. 1116, which quotes *Milutinović* TJ (vol. 1), fn. 94.
[100] *Nyiramasuhuko* TJ, para. 5593; *Renzaho* AJ, para. 315; *Nahimana* AJ, para. 481; *Gotovina* TJ (vol. 2), para. 1959; *Milutinović* TJ (vol. 1), fn. 94. In this regard, the Prosecution mischaracterises the import of some of the authorities it relies upon: the *Semanza, Galić, Kordić and Čerkez* Appeals Judgements actually stand for the proposition that the *actus reus* of ordering requires an instruction to commit a crime, as per footnote 82 above.
[101] *Milutinović* TJ (vol. 3), para. 920.

Kosovo) liable for ordering.[102] The *Butare* Trial Chamber found that the accused Nsabimana "ordered the transfer of the refugees from the BPO to Nyange" but that it "lack[ed] sufficient reliable evidence to determine that Nsabimana gave orders to, or otherwise directed *Interhamwe* at Nyange or anyone else, that the refugees on board the buses should be killed."[103] Similarly, the Appeals Chamber in *Renzaho,* while acknowledging that Renzaho had ordered the establishment of roadblocks in Kigali, held that "[e]ven if all [the] factors consistently show that Renzaho's actions were aimed at the killing of Tutsis at roadblocks or that he was aware of the risk that Tutsis would be killed at roadblocks, there is an insufficient basis to make the factual finding that Renzaho 'ordered' such killings."[104]

37. By analogy, the Trial Chamber reasoned that it could not find that Mr. Taylor ordered crimes when he told Bockarie to construct or re-prepare the airfield in Buedu, as it was "not satisfied that [Mr. Taylor] told Bockarie to use forced labour for this construction."[105] This reasoning is perfectly in step with the jurisprudence the Prosecution seeks to rely upon and is, contrary to the Prosecution's submission,[106] dispositive of the matter. It is evident that an identical line of reasoning would lead to the conclusion that Mr. Taylor could not have been convicted for ordering for any of the non-criminal instructions and advice he allegedly provided to the RUF/AFRC.

38. In any event, even if a lawful order could retrospectively become criminal if an accused has the requisite *mens rea*,[107] the Prosecution has failed to show that the *only reasonable conclusion* was that Mr. Taylor had an awareness of the substantial likelihood that the particular crimes would be committed in the carrying out of each of the alleged orders, for the reasons discussed in the *mens rea* section below.[108]

(2) Mr. Taylor's instructions or advice could not compel RUF/AFRC to commit crimes

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[102] *Milutinović* TJ (vol. 3), paras. 626-30, 923-30.
[103] *Nyiramasuhuko* TJ, para. 5934. As such the Chamber was unable to find Nsabimana responsible for ordering the killings: *Nyiramasuhuko* TJ, para. 5935.
[104] *Renzaho* AJ, para. 319. On this basis, the Appeals Chamber overturned the Trial Chamber's finding.
[105] Judgement, para. 4150.
[106] Prosecution Appellant's Submissions, para. 64.
[107] This is not accepted.
[108] See paragraphs 43-46 below.

39. The Prosecution's "definition" of ordering ignores another critical element. As discussed above, it not sufficient that an accused enjoys a position of authority; he must have such authority over the perpetrator as to *compel* their performance of the crime.[109] The Prosecution recognised this requirement in its Final Trial Brief,[110] which is also the standard of the SCSL,[111] and at *ad hoc* Tribunals.[112] Possessing authority in the abstract is not enough.

40. The Prosecution's definition ignores this key element. Given that the Prosecution is not asserting that Mr. Taylor's "instructions" were orders to commit crimes, it is difficult to see how any argument could be made that through advice such as to "construct an airfield", Mr. Taylor had the authority to *compel* the commission of crimes. This element of compulsion – a pre-requisite for "ordering" at the SCSL and the *ad hoc* Tribunals, does not fit within the Prosecution's erroneous "definition". In any event, the Prosecution even fails to address whether Mr. Taylor had sufficient authority to *compel* the RUF/AFRC to follow his advice. For each of the five instructions, the Prosecution simply repeats that: (a) Mr. Taylor was in a position of authority; (b) he gave an instruction; and (c) it was followed. There is no discussion of whether there was any *compulsion* on the part of the RUF/AFRC to follow Mr. Taylor's guidance; or whether (for example) they took his advice because it was in their interest "open a training base" or "take Kono"; or whether the RUF/AFRC leadership could have chosen not to ignore his guidance (as indeed the Trial Chamber at times was done).[113] Through reliance on an incomplete and incorrect definition of ordering, the Prosecution does not demonstrate any error on the part of the Trial Chamber, who correctly considered the relevant evidence as against the correct legal standard.

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[109] Judgement, para. 475 citing *Semanza* AJ, para. 361 and *Kordić and Čerkez* AJ, para. 28. The Special Court has adopted this standard in *CDF* TJ at para. 225 and in *RUF* TJ at para. 273. The same standard has also been adopted at the ICTY and ICTR. See, for example, *Boškoski & Tarčulovski* AJ at para. 164; *Milutinović* TJ (vol. 1), para. 86; *Popović* TJ, para. 1012; *Gacumbitsi* AJ at para. 182; *Setako* AJ, paras. 240-4; *Semanza* AJ, paras. 360-1; *Nizeyimana* TJ, para. 1464; *Nzabonimana* TJ, para. 1695; *Ndindiliyimana* TJ, para. 1911; *Kamuhanda* TJ, para. 594; *Hategekimana* TJ, para. 645; *Kanyarukiga* TJ, para. 620; *Gatete* TJ, para. 575.

[110] Prosecution Final Trial Brief, para. 603, citing *Boškoski & Tarčulovski* AJ, para. 164; *CDF* TJ, para. 225; *RUF* TJ, para. 273.

[111] *RUF* TJ, para. 273 ("The Chamber considers that "ordering" involves a person in a position of authority using that position to compel another to commit an offence."; *CDF* TJ, para. 225: "It is sufficient that there is proof of some position of authority on the part of the Accused that would compel another to commit a crime in compliance with the Accused's order.")

[112] See, for example, *Boškoski & Tarčulovski* AJ at para. 164; *Milutinović* TJ (vol. 1), para. 86; *Popović* TJ, para. 1012; *Gacumbitsi* AJ at para. 182; *Setako* AJ, paras. 240-4; *Semanza* AJ, paras. 360-1; *Nizeyimana* TJ, para. 1464; *Nzabonimana* TJ, para. 1695; *Ndindiliyimana* TJ, para. 1911; *Kamuhanda* TJ, para. 594; *Hategekimana* TJ, para. 645; *Kanyarukiga* TJ, para. 620; *Gatete* TJ, para. 575.

[113] Judgement, para. 6973; See also para. 15 (showing examples of non-compliance with Mr. Taylor's instructions).

(3) Mr. Taylor's instructions or advice did not directly or substantially contribute to the particular crimes

41. The third element disregarded by the Prosecution when it formulated its ordering definition is that of causality; the order must *directly and substantially* contribute to the commission of the crime.[114]

42. The Prosecution makes no submissions on whether each of the five impugned instructions or pieces of advice *substantially contributed* to the commission of the 11 distinct crimes charged. The Prosecution simply asserts "in complying or attempting to comply, [the RUF/AFRC] committed crimes."[115] Nowhere does it argue that Mr. Taylor's instructions or advice or guidance *substantially contributed* to the commission of the crimes it now seeks to impute back to him. Nor would any of the Chamber's findings support such an assertion, which would in fact be undermined by the finding that the RUF/AFRC itself committed crimes pursuant to its own "operational policy".[116] Moreover, it is worth noting that the Chamber made no findings, for example, of crimes in relation to Fitti-Fatta in connection with Mr. Taylor's "advice" to "recapture Kono".[117] Nor were there any findings of crimes in Kono during December 1998 to February 1999[118] in connection with the alleged instruction to "capture Kono".[119] Again, the Prosecution does not contest the Chamber's findings. Simply repeating at length the details of crimes committed is manifestly insufficient to demonstrate a *significant contribution* on the part of the instruction or piece of advice, which is a pre-requisite for liability through ordering.[120]

(b) The Trial Chamber's findings do not establish the requisite *mens rea*

[114] See, for example, *RUF* TJ, fn. 486, quoting *Kamuhanda* AJ, para. 75; *CDF* TJ, fn. 286, also quoting *Kamuhanda* AJ, para. 75; *Setako* AJ, para. 240; *Renzaho* AJ, para. 315; *Gacumbitsi* AJ, para. 185; *Hategekimana* AJ, para. 67; *Kamuhanda* AJ, para. 75; *Kayishema and Ruzindana* AJ, para. 186; *Nzabonimana* TJ, para. 1695; *Nyiramasuhuko* TJ, para. 5593; *Delalić* TJ, para. 326; *Tadić* TJ, para. 692; *Akayesu* TJ, para. 477.
[115] Prosecution Appellant's Submissions, para. 41.
[116] Judgement, para. 6793.
[117] Prosecution Appellant's Submissions, paras. 51-2.
[118] See Defence Appellant's Submissions, paras. 217-8.
[119] Prosecution Appellant's Submissions, paras. 53-60.
[120] Prosecution Appellant's Submissions, paras. 44, 48-50, 57-9, 61-3.

43. There is no direct evidence of Mr. Taylor's mental state when he allegedly gave the five impugned instructions. Any finding must therefore be inferred from circumstantial evidence, and be the *only reasonable* one available.

44. A conviction for ordering requires awareness of *substantial likelihood* that a *particular* crime - not just any crime - will occur in the carrying out of that order. As perhaps most clearly stated by the ICTY Appeals Chamber, a conviction for ordering *murder* required that Galić was "aware of the substantial likelihood *that murder* would be committed in the execution of his orders."[121] This is the standard that is consistently applied.[122] The likelihood of the crimes occurring must also be *substantial*. The *Blaškić* Appeals Chamber which set the applicable standard noted that:

> The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law... Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a *higher likelihood of risk* and a volitional element must be incorporated in the legal standard.[123]

As such, the *Blaškić* Appeals Chamber required an awareness of a *substantial likelihood* of the commission of a crimes on the part of those giving orders, which is the standard followed at the SCSL.[124]

45. Such findings simply don't exist in the present case. The Prosecution does not even attempt to perform this analysis for each of the five instructions for which it seeks a conviction. It merely makes generalised assertions that awareness of the RUF/AFRC

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[121] *Galić* AJ, para. 152.

[122] See, for example, *Galić* AJ para. 157: "The Appeals Chamber notes that Galić was not convicted for committing inhumane acts, but for ordering inhumane acts under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that inhumane acts would be committed in the execution of his orders"; *Blaškić* AJ, para. 166: "the correct legal standard in relation [to ordering] is that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting *that* crime. Thus, an individual who orders an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the order's execution, may be liable under Article 7(1) for the crime of persecutions." (emphasis added); *Kordić and Čerkez* AJ, para. 112: "Thus, an individual who orders, plans or instigates an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the execution of that order, plan or instigation, may be liable under Article 7(1) of the Statute for the crime of persecutions."

[123] *Blaškić* AJ, para. 41.

[124] *RUF* TJ, para. 274; *AFRC* TJ, para. 773.

"operational strategy" to commit crimes is sufficient to show that Mr. Taylor had awareness of a *substantial likelihood* that if he gave instructions such as "build an airfield" and "open a training base", crimes as diverse as terrorism, sexual slavery, and pillage would occur. Not only would no reasonable trial chamber find that the *mens rea* for ordering was satisfied, but it certainly was not the only reasonable conclusion available on the evidence. Moreover, contrary to the Prosecution's claim,[125] the Chamber only goes as far as finding that from as early as August 1997, Mr. Taylor would have "been aware of a *likelihood* that the AFRC/RUF would commit similar crimes [murder, abduction of civilians including children, rape, amputation and looting] in the future."[126] This is manifestly insufficient to demonstrate an awareness of a *substantial likelihood* that particular instructions would give rise to the particular charged crimes.

46. Mr. Taylor's acquittal for ordering is an accurate reflection of the totality of the Trial Chamber's findings; findings which have not been challenged by the Prosecution on appeal. The Chamber was well within its discretion in rejecting the Prosecution's ordering case on the basis of the evidence heard, and the Prosecution fails to substantiate its claims otherwise. The weaknesses of the Prosecution's submissions, and the overlapping subject matter, raise the question of whether this ground was simply pleaded as a fallback mode of liability should the Appeals Chamber decide to grant Mr. Taylor's appeal of the planning conviction. Any such attempt should be rejected by the Appeals Chamber as falling outside the proper scope of appellate review.[127]

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[125] Prosecution Appellant's Submissions, para. 66 ("The Trial Chamber's findings demonstrate that at all material times relating to this ground of appeal, Mr. Taylor was, at the very least, aware of the substantial likelihood that crimes would be committed in carrying out his instructions.")

[126] Judgement, para. 6882.

[127] *Gotovina* AJ, para. 153 ("In these circumstances, any attempt by the Appeals Chamber to derive inferences for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its erroneous reliance on unlawful artillery attacks, assessing the persuasiveness of this evidence, and then determining whether Markać's guilt was proved beyond reasonable doubt in relation to the elements of a different mode of liability. Such a broad-based approach to factual findings on appeal risks transforming the appeals process into a second trial.")

GROUND TWO: THE TRIAL CHAMBER DID NOT ERR IN DECLINING TO FIND LIABILITY ON THE BASIS OF INSTIGATION

A. THE TRIAL CHAMBER WAS NOT OBLIGATED, HAVING ENTERED A FINDING OF AIDING AND ABETTING, TO EXHAUSTIVELY ANALYSE INSTIGATION LIABILITY

47. The Prosecution egregiously misstates the law on convictions for multiple modes of liability. It asserts that a Trial Chamber "is obligated"[128] to enter a conviction for each and every mode of liability whose elements are fulfilled. This is false. On the contrary, a Trial Chamber should only convict according to the mode or modes that "describe the conduct of the accused *most accurately*."[129] Furthermore, a Trial Chamber is not obliged to exhaustively set out its reasons for rejecting a concurrent mode of liability.

48. The Prosecution has misconstrued the cases on which it relies. Citing to the *Milutinović* Trial Judgement, the Prosecution asserts that "in circumstances where one of the forms of liability charged which accurately describes an accused's conduct is proven, the Trial Chamber *is obligated to convict the accused based on that mode of liability*."[130] The *Milutinović* Trial Judgement, at the paragraphs cited by the Prosecution, states the contrary:

> Because the Prosecution alleges all possible forms of responsibility in respect of each charge, the Chamber *has the discretion*, and indeed the obligation, *to choose under which form or forms of responsibility to assess the evidence in respect of each Accused*. A Chamber *is not obliged* to make exhaustive factual findings on each and every charged form of responsibility, *and may opt* to examine only those that describe the conduct of the accused most accurately. Nevertheless, the Chamber is bound in the exercise of its discretion by certain guiding principles on concurrent convictions and modes of responsibility.[131]

49. On this basis, the *Milutinović* Trial Chamber declined to extensively consider instigation liability where the accused's participation was best characterized as aiding and abetting:

> The Chamber notes that it is not obliged to make exhaustive factual findings on each and every charged form of responsibility, and rather may examine only those that describe the conduct of the accused most accurately.... Recalling that a Chamber *need only address those forms of responsibility*

[128] Prosecution Appellant's Submissions, para. 78.
[129] *Milutinović* TJ (vol. 1), para. 76 (emphasis added).
[130] Prosecution Appellant's Submissions, para. 78 (emphasis added).
[131] *Milutinović* TJ (vol. 1), para. 76.

> *under Article 7(1) that describe the conduct of the accused most accurately*, the Chamber makes the general observation of the physical elements of the other forms of responsibility under Article 7(1) that planning primarily applies to those who design crimes, that instigating primarily applies to those who prompt others to commit crimes, and that ordering primarily applies to those who instruct others to commit crimes; whereas aiding and abetting applies to those who provide practical assistance, encouragement, or moral support to the perpetration of a crime. On this basis, *the Chamber does not consider that planning, instigating, or ordering most accurately describe the conduct of Ojdanić and dismisses these modes of liability to describe his individual criminal responsibility*. Accordingly, the Chamber now addresses his responsibility for aiding and abetting the commission of the crimes proved to have occurred.[132]

50. It is difficult to understand how the Prosecution could have so fundamentally misinterpreted these passages. Its submissions to the Appeals Chamber assert the opposite of what is stated in the jurisprudence cited. The *Milutinović* Trial Chamber did exactly what the Chamber did in this case: declined to extensively consider a mode of liability where another mode of liability was exhaustively considered, and upon which a conviction was based. The mischaracterization of those passages should raise serious concerns about the reliability of the Prosecution Appeal Brief as a whole.

51. *Milutinović* reflects a well-established jurisprudence. The modes of liability set out in Article 6(1) of the Statute are neither mutually exclusive, nor do they automatically require overlapping findings even where the elements of a certain mode may be satisfied. Indeed, the ICTR Appeals Chamber in *Kamuhanda* accepted that liability for both ordering and aiding and abetting had been established at trial, but nonetheless overturned the latter mode of liability on the basis that it was "based on essentially the same set of facts."[133] Trial Chambers are therefore expected to exercise discretion in determining whether there is a need to consider additional modes of liability once a conviction has been entered on the basis of one

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[132] *Milutinović* TJ (vol. 1), paras. 614, 619.

[133] *Kamuhanda* AJ, para. 77 ("The factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes. Both modes of participation form distinct categories of responsibility. In this case, however, both modes of responsibility are based on essentially the same set of facts: the Appellant "led" the attackers in the attack and he ordered the attackers to start the killings. On the facts of this case, with the Appeals Chamber disregarding the finding that the Appellant distributed weapons for the purposes of determining whether the Appellant aided and abetted the commission of the crimes, the Appeals Chamber does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting. In this case the mode of responsibility of ordering fully encapsulates the Appellant's criminal conduct at the Gikomero Parish Compound.") The Prosecution's failure to address this passage is striking given that it argues at footnote 242 that the quashing of the incitement conviction as an error of fact, at paragraph 66 of the *Kamuhanda* Appeal Judgement, did not undermine the possibility of convictions of multiple modes. It is hard to understand how the Prosecution could have made such a claim within addressing a passage just eleven paragraphs later that directly contradicts its assertion.

mode.[134] A Trial Chamber may, but is not required to, exhaustively or extensively analyse every mode of liability alleged.[135] Other possible modes of liability are frequently dismissed in just a few words, reflecting that a Chamber's factual discussion of the mode of liability that is retained implicitly addresses the other modes as well.[136]

52. The Chamber followed this well-established approach in the present case. The Chamber demonstrated it was well aware of the distinctions, as it viewed them, between the different modes of liability.[137] The Prosecution finds no fault with those definitions.[138] The Chamber then discussed extensively how it viewed the facts as supporting a conviction on the basis of aiding and abetting. This provided a more than adequate explanation as to why it considered this to be the only appropriate mode of liability. There was no further need to explain why it did not also retain liability on the basis of instigation.

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[134] *Krstić* TJ, para. 602 ("Since the Prosecution has not charged any specific head of criminal responsibility under Article 7(1) of the Statute, *it is within the discretion* of the Trial Chamber to convict the Accused under the appropriate head within the limits of the Indictment and fair notice of the charges and insofar as the evidence permits") (emphasis added); *Đorđević* TJ, para. 2194 (relying on multiple modes of liability on the basis that "*it is possible* to convict on more than one mode in relation to a crime if this better reflects the totality of the accused's conduct.... These facts *are sufficiently compelling* to also maintain the conviction of aiding and abetting, as well as the conviction for participating as a member of the JCE, in order *to fully encapsulate* the Accused's criminal conduct") (emphasis added).

[135] *Gotovina* TJ, para. 2375 ("On the basis of all the above findings and considerations, the Trial Chamber finds that Gotovina is liable pursuant to the mode of liability of JCE. Consequently, it is not necessary for the Trial Chamber to make findings on the other modes of liability alleged in the Indictment."); *Martić* TJ, para. 434 ("With regard to Counts 3 to 14, and Count 1 insofar as it relates to these counts, the Trial Chamber finds that the individual criminal responsibility of Milan Martić is one of JCE pursuant to Article 7(1) of the Statute. With regard to Counts 15 to 19, and Count 1 insofar as it relates to these counts, the Trial Chamber finds that the individual criminal responsibility of Milan Martić is one of ordering pursuant to Article 7(1) of the Statute. Other modes of liability pursuant to Article 7(1) and 7(3) of the Statute will not be considered"); *Brđanin* TJ, paras. 1051-6 (entering convictions based on one or another mode of liability for persecution without any extensive discussion beyond the matters already addressed in the factual findings).

[136] See, for example, *Gotovina* TJ, para. 2375 ("Consequently, it is not necessary for the Trial Chamber to make findings on the other modes of liability alleged in the Indictment."); *Nyiramasuhuko* TJ, paras. 6120-5 (illustrating that, having analyzed the facts, the Trial Chamber has a discretion, having found the existence of one mode of liability, to decline to exhaustively explain those modes that are rejected); *Martić* TJ, para. 434 ("the Trial Chamber finds that the individual criminal responsibility of Milan Martić is one of ordering pursuant to Article 7(1) of the Statute. Other modes of liability pursuant to Article 7(1) and 7(3) of the Statute will not be considered."); *Brđanin* TJ, paras. 1051-6; *Bagosora* TJ, paras. 2158, 2186, 2194, 2245 (convicting Bagosora, after an analysis of the relevant facts, of ordering, direct commission and/or superior responsibility in respect of certain crimes without extensive discussion of the reasons for declining find participation by way of planning, aiding and abetting or instigation); *Nchamihigo* TJ, paras. 357, 371, 374, 376 (finding that the accused instigated certain crimes through his words and actions without considering or explaining at length why it did not also enter a conviction for aiding and abetting) and 354 (finding aiding and abetting without considering or explaining at length why it did not also enter a conviction for instigation).

[137] Judgement, paras. 471-3, 482-7.

[138] Prosecution Appellant's Submissions, para. 84 ("The Trial Chamber correctly set out the *actus reus*"); para. 86 ("The Trial Chamber also correctly set out the *mens rea* for instigating.")

53. Perhaps the real purpose of the Prosecution's appeal under this ground is to reserve a back-up form of liability, should the Appeals Chamber grant Mr. Taylor's appeal in respect of aiding and abetting. The Appeals Chamber should categorically reject this attempt. As held in *Gotovina*:

> In these circumstances, any attempt by the Appeals Chamber to derive inferences for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its erroneous reliance on unlawful artillery attacks, assessing the persuasiveness of this evidence, and then determining whether Markać's guilt was proved beyond reasonable doubt in relation to the elements of a different mode of liability. Such a broad-based approach to factual findings on appeal risks transforming the appeals process into a second trial.[139]

54. The discretion conferred on the Trial Chamber to enter a conviction on the most appropriate form of participation is undergirded by sound policy considerations. The Prosecution in this case chose to adopt the blunderbuss approach of charging each and every mode of liability under Article 6(1) and 6(3). This scattershot approach places a heavy burden on both the accused and the Trial Chamber to consider each and every mode of liability in respect of each and every crime alleged in respect of each and every incident of such crime. No Trial Chamber should be required to elaborately explain its findings in respect of the modes that were not accepted where it arises from the Prosecution's own multiplicitous and expansive pleadings. Indeed, the Prosecution's own discussion of instigation in its Final Trial Brief is almost as short as that of the Chamber: just three paragraphs, with no submissions whatsoever on the alleged crimes committed in Kailahun or Kono districts in 1998.[140] The Prosecution's claim of inadequate reasoning should be estopped by its very own failure to make adequate submissions on the issue in the course of a 539-page Final Trial Brief.

55. The Chamber acted well within its discretion, and offered more than adequate reasons, in stating that "having already found that the Accused is criminally responsible for aiding and abetting ... [it] does not find that the Accused also instigated those crimes."[141] The Chamber's analysis of aiding and abetting was extensive. That discussion was, in turn, based on a lengthy, albeit deeply flawed, factual analysis. Nothing in the Trial Chamber's reasoning suggests that it considered itself legally precluded from making a finding of instigation. The language adopted is no different from that applied in many previous ICTY and ICTR cases.

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[139] *Gotovina* AJ, para. 153.
[140] Prosecution Final Trial Brief, paras. 618-20.
[141] Judgement, para. 6972.

No error of legal approach has been established, and no showing has been made that the Chamber failed to give adequate reasons or that its fact-finding occasions a miscarriage of justice. Ground 2 of the Prosecution's appeal should be rejected.

B. THE PROSECUTION'S DEFINITION OF INSTIGATION IS ERRONEOUS

56. The Prosecution fails to give due regard to the differences between instigation and aiding and abetting, veering perilously close to the claim that any finding of aiding and abetting must also constitute instigation. This is an erroneous conception of instigation.

57. The established jurisprudence of *ad hoc* tribunals demonstrates that there is an elevated element of causality in respect of instigation. Instigation requires "more than mere facilitation."[142] The content of instigation is *prompting someone to commit an offence*.[143] Exhortation or "prompting" is substantially different from supplying the means with which a crime may be committed by someone already determined to commit it. Further, instigation requires *a causal connection* between the "prompting" and the commission of the crime.[144] Merely relying on the findings which establish aiding and abetting is not enough, because aiding and abetting does not require this causal connection. At the ICTY, Đorđević was found to have aided and abetted by omission for his failure to punish MUP officials who committed crimes. The Prosecution argued that the same facts established Đorđević's liability for instigating.[145] The Trial Chamber rejected this approach. It held that there must be a "nexus between the act of instigation and the perpetration of crime," which evidently would not, in its view, necessarily always be satisfied where the action had a substantial effect on the perpetration of the crime.[146] This accords with *Orić*, where the Trial Chamber expressly held that the exhortation "has to be more than merely facilitating the commission of the principal offence, as it may suffice for aiding and abetting."[147] The *Orić* Chamber also notes that if the perpetrator is already determined to commit the crime such that any alleged exhortation could not be said to be a "substantially contributing factor," then a finding of aiding and abetting could be entered for material support whereas a finding of instigation would be

[142] *Orić* TJ, para. 271.
[143] *CDF* TJ, para. 223; *RUF* TJ, para. 271; *Orić* TJ, para. 270; *Blaškić* TJ, para. 280; *Brđanin* TJ, para. 269; *Akayesu* TJ, para. 482; *Bagilishema* AJ, para. 30.
[144] *CDF* AJ, para. 54; *RUF* TJ, para. 271; *Blaškić* TJ, para. 278; *Brđanin* TJ, para. 359; *Đorđević* TJ, para. 2168.
[145] *Đorđević* TJ, para. 2165.
[146] *Đorđević* TJ, para. 2168.
[147] *Orić* TJ, para. 271.

inappropriate.[148] In short, there are differences between the scope of aiding and abetting and instigation that explain how the former could be found without the latter necessarily arising.

58. The SCSL has adopted this approach. In the CDF case, Kondewa had been convicted by the Trial Chamber of aiding and abetting crimes in Tongo (by encouraging Kamajors at a passing out parade to commit crimes), but was acquitted of instigating those same crimes.[149] The Prosecution appealed on the basis that the findings which established the *actus reus* of aiding and abetting were sufficient to establish the *actus reus* of instigating.[150] Specifically, it argued that by proving that Kondewa's encouragement substantially contributed to the crimes, it had proved causation in respect of instigating too.[151] The Appeals Chamber accepted that the "substantial effect" elements of both aiding and abetting and instigating could be proved by the same facts.[152] However, the Chamber went on to spell out that in respect of instigating, it was necessary for the Prosecution to also prove that the "encouragement" was causally connected to the commission of crimes, in this instance by demonstrating that the soldiers Kondewa encouraged were the same soldiers who committed the crimes.[153] The Prosecution had not done so, and so its appeal was dismissed.[154]

59. Fofana was similarly convicted of aiding and abetting at trial but acquitted of instigation in respect of crimes in Tongo.[155] The Prosecution's appeal was rejected on the basis that aiding and abetting "does not require a causal connection between the act of aiding and abetting and the commission of the crime," whereas instigating does.[156] It was therefore entirely appropriate for the Trial Chamber to find that Fofana's "encouragement" may have been abetting, as it had a "substantial effect" on the military effort in which crimes were committed, but it was not instigating as it did not itself substantially contribute to the perpetration of crimes.[157]

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[148] *Orić* TJ, para. 274.
[149] *CDF* TJ, para. 736.
[150] *CDF* AJ, para. 80.
[151] *CDF* AJ, para. 80, citing *CDF* Prosecution Appeal Brief, para. 3.91.
[152] *CDF* AJ, para. 84.
[153] *CDF* AJ, para. 85.
[154] *CDF* AJ, para. 85.
[155] *CDF* AJ, para. 47.
[156] *CDF* AJ, para. 54.
[157] *CDF* AJ, para. 55.

60. The Prosecution's submissions again, through selective quotation, create a misleading impression of the SCSL's jurisprudence. As discussed above, the Prosecution quotes the *CDF* Appeal Judgement that the same facts could prove the "substantial effect" elements of both instigation and aiding and abetting.[158] The Prosecution omits the very next paragraph of the *CDF* Appeal Judgement, which confirms that instigating requires that the Prosecution must still prove the "causal link" between the "prompting" and the "commission of the crime".[159]

61. The Prosecution is therefore wrong to the extent that it claims that satisfaction of the elements of aiding and abetting, in respect of words or actions that have an encouraging effect, are necessarily tantamount to instigation. This does indeed appear to be the Prosecution's view. For example, the Prosecution argues that the *actus reus* of instigating is satisfied because "[t]he Trial Chamber found that Mr. Taylor gave 'advice and direction' on matters concerning or directly affecting the RUF and RUF/AFRC military strategy" that greatly boosted RUF/AFRC morale when conducting military operations and substantially contributed to the commission of crimes.[160] Yet the Prosecution makes no showing of how this strategy was an exhortation to commit crimes, much less was connected to the commission of crimes. This submission almost precisely echoes the argument the Prosecution made in the *CDF* Appeal against Fofana, that, as he gave advice as to military strategy which was found to have substantially contributed to the commission of crimes, he must have instigated those crimes.[161] This same argument was made, and properly rejected, in the *CDF* case.

62. Likewise in its submissions on specific events, the Prosecution simply relies on the Trial Chamber's findings that Mr. Taylor encouraged the RUF/AFRC in its military strategy to take or hold Kono,[162] to open a training base or construct an airstrip,[163] and to capture Freetown,[164] and asserts that Mr. Taylor is guilty of instigating the crimes which followed each of these events because the crimes "followed Mr. Taylor's instigation."[165] However, the Prosecution offers no evidence that Mr. Taylor encouraged the commission of any crimes or that the purported instigation caused the crimes.

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[158] Prosecution Appellant's Submissions, para. 88, citing *CDF* AJ, para. 84.
[159] *CDF* AJ, para. 85. See also *CDF* AJ, para. 54.
[160] Prosecution Appellant's Submissions, para. 88.
[161] *CDF* AJ, para. 47.
[162] Prosecution Appellant's Submissions, paras. 93-5.
[163] Prosecution Appellant's Submissions, para. 96.
[164] Prosecution Appellant's Submissions, para. 98.
[165] Prosecution Appellant's Submissions, paras. 93, 95, 97-8.

63. The Chamber's findings do not support a finding that Mr. Taylor instigated any crimes. Firstly, as outlined above, instigating requires that the accused's prompting must be "prompting to commit an offence". Yet the Chamber did not find that Mr. Taylor encouraged the RUF/AFRC to commit crimes (rather it found Mr. Taylor advised the RUF/AFRC to take certain strategic, and non-criminal, decisions). This is not surprising since it was the RUF/AFRC which "pursued a policy of committing crimes",[166] a plan in which Mr. Taylor played no part.[167] Indeed, the Judgement characterises Mr. Taylor's relationship with the RUF/AFRC as that of *quid pro quo*,[168] based on "converging and synergistic interests",[169] which were "military, not criminal".[170] Mr. Taylor's position vis-à-vis instigating, as found by the Chamber, was thus similar to that of Fofana in the *CDF* case, as found by the Appeals Chamber, in that Fofana "substantially contributed to the military effort, but not the crimes as such."[171] All the instances cited by the Prosecution simply fall under this head: advice to the RUF/AFRC to take or hold Kono,[172] to open a training base or construct an airstrip,[173] and to capture Freetown,[174] is advice "directed at the military campaign ... not ... incitement to perpetrate unlawful acts."[175]

64. None of the advice given by Mr. Taylor constituted encouragement to commit crimes. The advice given by Mr. Taylor to Bockarie to get to Freetown "by all means"[176] – as has been extensively argued in Mr. Taylor's appeal with respect to planning – is ambiguous and is more likely to refer to military means than to the commission of crimes. Likewise, the comment that Bockarie should make the operation "fearful"[177] reasonably means scaring the opposing army in terms easily understood in the region where fighters were known to fight naked, or conduct pre-battle rituals to strengthen their courage and intimidate the other side.[178] The Kamajors conducted the same ceremonies, and in this context it is relevant that neither of Mr. Taylor's comments ("by all means" and "fearful") were as explicit as the words

[166] Judgement, para. 6793.
[167] Judgement, paras. 6895-9.
[168] Judgement, para. 6898.
[169] Judgement, para. 6895.
[170] Judgement, paras. 6896-9.
[171] *CDF* AJ, para. 55.
[172] Prosecution Appellant's Submissions, paras. 93-5.
[173] Prosecution Appellant's Submissions, para. 96.
[174] Prosecution Appellant's Submissions, para. 98.
[175] *CDF* AJ, para. 56.
[176] Prosecution Appellant's Submissions, para. 98.
[177] Prosecution Appellant's Submissions, para. 98.
[178] *CDF* TJ, para. 317; Judgement, paras. 4069-94.

spoken by Fofana to the Kamajors that "any commander failing to perform accordingly and losing your ground, just decide to kill yourself there" and "destroy the soldiers finally from where they were,"[179] or those of Kondewa who said that "a rebel is a rebel; surrendered, not surrendered, they're all rebels … [t]he time for their surrender has long since been exhausted, so we don't need any surrendered rebel."[180] If neither Fofana's nor Kondewa's encouragement amounted to instigating,[181] Mr. Taylor's much more ambiguous advice, more removed from the time and place in which the crimes were committed than Fofana's or Kondewa's,[182] could never amount to instigating. As such, all the advice the Prosecution contends was instigation was properly rejected as such by the Chamber.

65. Secondly, the Appeals Chamber has already stressed the importance of proving a "causal link" between the act of prompting and the commission of crimes.[183] The Trial Chamber found no such link. As stated above, the Chamber found that the RUF/AFRC committed crimes as part of its own *modus operandi*, not as a result of any external influence.[184] Any advice Mr. Taylor offered, which was (as above) directed to non-criminal military aims, had no impact on whether crimes were committed. Take the Prosecution's claim that Mr. Taylor's advice to Bockarie to capture Kono gave rise to Operation Fitti Fatta and "resulted in the RUF and RUF/AFRC forces committing crimes."[185] Yet the Chamber found no crimes to have been committed during Fitti Fatta;[186] what crimes were committed in Kono District in mid-1998 were independent and incidental to it,[187] and therefore had nothing to do with Mr. Taylor's supposed advice. The same is true of the next attempt to take Kono in December 1998; the Chamber could not find crimes to have been committed directly as a result of this operation, but only, possibly, coinciding temporally with it, and not necessarily

[179] *CDF* AJ, para. 56.
[180] *CDF* TJ, para. 321; *CDF* AJ, para. 77.
[181] *CDF* AJ, paras. 56, 85; *CDF* TJ, para. 744.
[182] *CDF* AJ, para. 57, in which the Appeals Chamber laid importance on the separation in time and place of the act of instigation from the commission of crimes. See also, *Nahimana* AJ, para. 519, where the Chamber found that the temporal difference was sufficient to negate the impact of the encouragement.
[183] *CDF* AJ, para. 54.
[184] Judgement, para. 6793.
[185] Prosecution Appellant's Submissions, para. 95.
[186] Judgement: VII, Factual and Legal Findings on Alleged Crimes.
[187] The crimes found to have occurred in Kono in mid-1998 by the Chamber had no connection to Fitti Fatta: Judgement, paras. 676-84, 711-3, 737-47 (killings); paras. 895-8, 1080-146, 1199-201 (sexual slavery); paras. 1210-32 (physical violence); paras. 1664, 1707, 1709-10, 1735-8, 1744-7, 1752 (enslavement); paras. 1879-900 (pillage); paras. 2029, 2031 (terrorism).

in any way connected with the offensive itself.[188] Suggestively, this offensive was after Mr. Taylor supposedly told Bockarie to get to Freetown "by all means" and to make the operation "fearful", demonstrating that these messages did not prompt RUF/AFRC commanders to pursue the commission of crimes as part of the military campaign, but were instead directed to military objectives. Nor was this advice linked to the crimes committed in and around Freetown in 1999; indeed, the Chamber found that the only action the RUF/AFRC forces committed whilst in Freetown that could be linked to Mr. Taylor's giving of advice was the freeing of prisoners from Pademba Road prison (itself challenged fourth hand hearsay).[189] This lack of causation between the giving of advice and the commission of crimes is another reason why the Chamber was right to conclude that Mr. Taylor was not guilty of instigating crimes.

66. In terms of *mens rea*, the Chamber found Mr. Taylor guilty of the lesser standard of aiding and abetting, and not of the intent or knowledge necessary to sustain a conviction for instigating. Again, the Chamber found Mr. Taylor's encouragement, like that of Fofana, "was directed at the military campaign and does not include any incitement to perpetrate unlawful acts."[190] It simply did not amount to the *mens rea* requirements for instigating.

67. SCSL jurisprudence has established that the *mens rea* for instigating is that the accused must either possess an intention to provoke the commission of a crime, or knowledge that a crime would likely be provoked as a result of that instigation.[191] This is distinct from the *mens rea* of aiding and abetting, which is (at least as interpreted by the Chamber, but which is challenged by Mr. Taylor in his appeal) that the accused has knowledge that his acts assist the commission of a crime.[192] Mr. Taylor was convicted on the basis that he possessed this latter standard of *mens rea*. In particular, the Chamber reasoned that Mr. Taylor knew the RUF/AFRC's operational strategy to commit crimes,[193] and so was aware that any assistance he gave to the RUF/AFRC was assisting in the commission of crimes.[194]

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[188] Judgement, para. 1424 ("approximately December 1998"); para. 1540 ("approximately August through December 1998"); para. 1694 ("approximately December 1998 onwards"). See Defence Appellant's Submissions, Ground of Appeal 22.
[189] Judgement, paras. 3588-9, 3605.
[190] *CDF* AJ, para. 56.
[191] *CDF* TJ, para. 223; *CDF* AJ, para. 51. See also: *RUF* TJ, para. 271.
[192] See, e.g. *RUF* TJ, para. 280.
[193] Judgement, para. 6885.
[194] Judgement, para. 6949.

68. The Prosecution argues that this and similar findings by the Chamber satisfy the *mens rea* component for instigating, i.e. that Mr. Taylor's general awareness that crimes had been or were likely to be committed by the RUF/AFRC was sufficient.[195] However, the standard of awareness required for instigating is higher than this general awareness standard. Case law from the SCSL, ICTR and ICTY supports the view that the accused must be aware that it is his specific act of instigation which results in crimes being committed.

69. The most analogous case to that of Mr. Taylor's is, again, the *CDF* case. In that case, Fofana addressed the Kamajors at a passing out parade, after listening to Norman urging them to commit crimes,[196] and encouraged the same soldiers that having heard Norman's instructions they were to "perform accordingly".[197] Having listened to Norman urging the Kamajors to commit crimes, Fofana had a general awareness that crimes were likely to be committed, and indeed, this was sufficient for a finding that he possessed the *mens rea* for aiding and abetting in respect of this incident.[198] However, when it came to instigating, the Appeals Chamber found that because Fofana's words were ambiguous and not necessarily in themselves urging the Kamajors to commit crimes, it was open for the Trial Chamber to decide he lacked the *mens rea* for instigating.[199] In other words, Fofana's general awareness that the Kamajors were likely to commit crimes was insufficient to satisfy the awareness threshold of instigating because Fofana could not be said to have been aware that it was his words that specifically encouraged the Kamajors to do so.

70. The standard applied by Trial Chamber II,[200] and at the ICTY and ICTR,[201] demands that, at a minimum, the accused must know that the commission of crimes is a result of his instigation. Indeed, at the ICTY and ICTR, some cases have gone further and held that only intent, rather than an awareness of a substantial likelihood, will suffice. In *Orić* the Trial Chamber examined previous case law on the issue and determined that the standard was one of intent and awareness.[202] In *Bagilishema*, *Kordić* and *Semanza*, the respective trial chambers also held that the standard was one of intent or of intent and awareness.[203] The general thrust

[195] Prosecution Appellant's Submissions, paras. 90-1.
[196] *CDF* AJ, paras. 43-4.
[197] *CDF* AJ, para. 56.
[198] *CDF* TJ, para. 724.
[199] *CDF* AJ, para. 56.
[200] Judgement, para. 471.
[201] For example, *Kordić and Čerkez* AJ, para. 32; *Đorđević* TJ, para. 1870; *Nahimana* AJ, para. 480.
[202] *Orić* TJ, para. 277-9.
[203] *Bagilishema* TJ, para. 31; *Kordić and Čerkez* TJ, para. 387; *Semanza* TJ, para. 388.

of the jurisprudence is that the standard for *mens rea* is, at the very least, either one of intent, or awareness that the accused's instigation would likely provoke the commission of crimes. This is clearly a higher standard than the Trial Chamber's finding that Taylor possessed a general awareness that the RUF/AFRC had an operational strategy to commit crimes,[204] which as in the Fofana case, does not cross the *mens rea* threshold for instigating.

71. The Prosecution does not show how the findings it presents satisfy such *mens rea* requirements. Again, while it argues that Mr. Taylor encouraged the RUF/AFRC in its military operations, it does not demonstrate that he intended the RUF/AFRC to commit crimes or that he knew the RUF/AFRC were likely to commit crimes because of his instigation as opposed to the RUF/AFRC simply committing crimes on its own initiative. It relies on the Trial Chamber's findings that Mr. Taylor's general awareness that the RUF/AFRC were likely to commit crimes was sufficient. However, as with Fofana, this is not enough. The Prosecution's appeal must therefore be rejected.

[204] Judgement, para. 6885.

GROUND THREE: THE TRIAL CHAMBER DID NOT ERR IN DECLINING TO CONVICT MR. TAYLOR FOR CRIMES COMMITTED IN CERTAIN LOCATIONS IN FIVE DISTRICTS OF SIERRA LEONE ON THE GROUND THAT THEY FELL OUTSIDE THE SCOPE OF THE INDICTMENT

A. OVERVIEW

72. The Prosecution argues as its third ground of appeal that the Trial Chamber erred by failing to enter convictions for certain crimes that were pleaded as occurring "throughout" certain districts of Sierra Leone and "in various [unspecified] locations, including" those explicitly specified in the Indictment.[205] The Prosecution maintains that it was error to find that crimes whose locations were pleaded in this way fell outside the scope of the Indictment[206] and that the manner in which they were pleaded was tantamount to not pleading any locations.[207]

73. The Prosecution further argues that, given the sheer scale of the alleged crimes and the fact that Mr. Taylor was not charged with personal commission, the non-exhaustive pleading of locations in the Indictment was sufficient,[208] and any defects in pleading were "harmless" because Mr. Taylor "suffered no prejudice in his ability to defend himself against the allegations."[209] Further, and in the alternative, the Prosecution argues that the Trial Chamber erroneously failed to consider whether timely, clear, and consistent notice of the locations was given to Mr. Taylor through "other pre-trial communications," thereby serving to cure any defective pleading in the Indictment.[210]

74. The Prosecution's arguments are unfounded and devoid of merit. Moreover, the authorities relied upon by the Prosecution do not support the arguments for which they have been cited. Accordingly, the Defence submits that the Prosecution's third ground of appeal should be dismissed in its entirety.

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[205] Prosecution Appellant's Submissions, para. 103.
[206] Prosecution Appellant's Submissions, para. 101.
[207] Prosecution Appellant's Submissions, para. 103.
[208] Prosecution Appellant's Submissions, para. 103.
[209] Prosecution Appellant's Submissions, para. 104.
[210] Prosecution Appellant's Submissions, para. 105.

75. The Defence first responds to the Prosecution's arguments relating to the required degree of specificity for the pleading of locations in the Indictment, following which issues relating to the purported cure of any defects in pleading are addressed.

B. PLEADING THE OCCURRENCE OF CRIMES "THROUGHOUT" KAILAHUN DISTRICT OR "IN VARIOUS LOCATIONS, INCLUDING" WERE LEGALLY INSUFFICIENT TO BRING UNSPECIFIED LOCATIONS WITHIN THE PURVIEW OF THE INDICTMENT

(a) Required Degree of Specificity of an Indictment

76. The Indictment serves as the "primary accusatory instrument" in international criminal proceedings and alleged crimes must be pleaded with "sufficient detail [regarding] the essential aspect of the prosecution case."[211] Indeed, it is a fundamental right of an accused to be informed promptly and in detail of the nature and cause of the charges against him, and to have adequate time and facilities for the preparation of his defence.[212] The Defence agrees that the fundamental question in determining whether an indictment is pleaded with sufficient particularity is whether an accused has been provided with enough detail to prepare his defence.[213]

77. It is on the basis of the indictment that an accused is able to formulate his defence and, where necessary, to produce evidence that counters accusations brought by the Prosecution regarding his participation in, and criminal responsibility for, the charged acts at a certain place and at a certain time. Requiring an accused to undertake his defence without being informed of the exact nature of the charges against him infringes Mr. Taylor's right under Article 17(4)(a) of the Special Court's Statute, "[t]o be informed promptly and in detail ...of the nature and cause of the charge against him...,"[214] the infringement of which also infringes upon his right to a fair trial. The fundamental principle of the right to be informed promptly and in detail is also recognised by all major human rights instruments.[215]

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[211] *Kupreškić* AJ, para. 114; *Blaškić* AJ, para. 220.
[212] *Ntakirutimana* TJ, para. 42; *Kupreškić* AJ, para. 88. As pointed out by the Hadžihasanović Trial Chamber, this right "translates into an obligation on the Prosecution to plead the material facts underpinning the charges in the indictment", *Hadžihasanović* Decision on Form of Indictment, paras. 8-9. In so arguing, the Trial Chamber sought recourse to relevant provisions of several international human rights instruments, including Article 14 of the ICCPR and Article 6 of the ECHR.
[213] Prosecution Appellant's Submissions, para. 107. *Semanza* TJ, para. 44; *Kupreškić* AJ, para. 88.
[214] Article 17(4)(a) of the Statute. See also Art. 20(4)(a) of the ICTR Statute and Art. 21(4)(a) of the ICTY Statute.
[215] See for example: Article 14(3)(a) of the ICCPR: *In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and*

78. Furthermore, ICTY and ICTR pleading practice require an indictment to contain essential factual information as to "the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed."[216] This places an ongoing duty on the Prosecution to state the material facts underpinning the charges in the indictment.[217] As emphasized by the Trial Chamber in the *Brđanin* case: "The indictment *must* state all of the *material* facts upon which the prosecution relies to establish the charges laid" (emphasis in the original).[218] The materiality of a fact is to be determined on a case-by-case basis; relevant factors are the form of participation alleged in the indictment and the proximity of the accused to the underlying crime.[219]

79. Applicable jurisprudence recognises that the indictment has a fundamental role in criminal proceedings in identifying each of the essential factual ingredients of the crimes charged.[220] These essential factual ingredients *must be pleaded expressly*, although in some circumstances it is sufficient that they are expressed by necessary implication. As emphasised by the *Brđanin* Chamber, this rule is no "mere technicality; compliance with it is essential to enable the accused to know the nature of the case against him."[221] In this regard, the legal pre-requisites underlying a crime constitute a material fact which must thus be pleaded in the indictment.[222] "This fundamental rule of pleading, however, is *not* complied with if the pleading merely assumes the existence of the pre-requisite."[223]

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in detail in a language which he understands of the nature and cause of the charges against him; Article 6(3)(a) of the ECHR: *Everyone charged with a criminal offence has the following rights:(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;* Article 8(2)(b) of the ACHR: *During the proceedings, every person is entitled, with full equality to prior notification in detail to the accused of the charges against him.* The African Charter on Human and People's Rights does not contain a similar provision but the African Commission on Human and Peoples' Rights held in the *Media Rights* case, para. 43, that the right to a fair trial includes the requirement that persons arrested "shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them."

[216] *Krnojelac* First Decision on the Form of Indictment, para. 12, citing *Blaškić* Dismissal Decision, para. 20.

[217] *Kupreškić* AJ, para. 88.

[218] *Brđanin* Decision on Form of Indictment, para. 27 (emphasis in original).

[219] *Rutaganda* AJ, para. 301; *Ntagerura* TJ, para. 31; *Kupreškić* AJ, para. 89. See also *Karemera* Decision on the Form of Indictment, para. 17.

[220] "An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed", *Krnojelac* First Decision on the Form of Indictment, para. 12. See also *Blaškić* Dismissal Decision, para. 20.

[221] *Brđanin* Decision on Form of Indictment, para. 48. See also *Kupreškić* AJ here the ICTY Appeal Chamber stated that lack of specificity in an Indictment was not "a minor defect nor a technical imperfection. It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet", para. 122. See also *Simić* AJ, para. 74.

[222] *Hadžihasanović* Decision on Form of Indictment, para. 10.

[223] *Brđanin* Decision on Form of Indictment, para. 48 (emphasis in the original); See also *Hadžihasanović* Decision on Form of Indictment, para. 10.

(b) Limited Exceptions to the Specificity of an Indictment

(1) Clarity as to Locations Charged in the Indictment: Indirect or Secondary Perpetration and Remoteness of the Accused from the Crime Base

80. While relevant jurisprudence allows for the pleading of secondary modes of participation, such as planning and aiding and abetting with less precision than the pleading of primary and direct modes of perpetration, [224] the Prosecution "remains obliged to give all the particulars it is able to give."[225] Indeed, the obligation on the Prosecution to specify never ceases. That means the Prosecution has an ongoing obligation to identify the "particular acts" or the "particular course of conduct" of the accused which has given rise to charges in the indictment.[226] Indeed, "the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending upon how the evidence unfolds."[227]

81. In this case, it remains true that Mr. Taylor was not charged with personal commission of the charged crimes in the Indictment.[228] Nevertheless, the Prosecution was required to identify the "particular acts" or "the particular course of conduct" on the part of Mr. Taylor which forms the basis for the charges in question.[229] Using a broad context and pleading the location of the crimes charged in terms of absolute generality[230] is impermissible under applicable jurisprudence.

82. Allowing the pleading of locations of the crimes in terms of absolute generality, like the Prosecution did in this case,[231] would provide the Prosecution with the opportunity to

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[224] *Blaškić* AJ, para. 211; *Rutaganda* AJ, para. 301.
[225] *Blaškić* AJ, para. 218.
[226] *Blaškić* AJ, para. 213; *Krnojelac* First Decision on the Form of Indictment, para. 13; *Krnojelac* Second Decision on the Form of Indictment, para. 18; *Brđanin* Decision on Form of Indictment, para. 20; *Ntagerura* TJ, para. 35; *Karemera* Decision on the Form of Indictment, para. 12.
[227] *Kupreškić* AJ, para. 92. See also *Krnojelac* Second Decision on the Form of Indictment, para. 23; *Blaškić* AJ, para. 220.
[228] Prosecution Appellant's Submissions, para. 110.
[229] *Blaškić* AJ, para. 213.
[230] See Prosecution Appellant's Submissions para. 108, stating that "*every* location in Kailahun was in issue in respect of those crimes" (emphasis in original). By adopting such a general approach the Prosecution clearly failed to particularise one of the essential factual ingredients of the crimes charged, namely *where* the alleged offence occurred.
[231] See Prosecution Appellant's Submissions, para. 108, stating that "*every* location in Kailahun was in issue"; para. 112 stating that "the list of locations where these crimes occurred was not meant to be exhaustive". Pleading locations in such general terms was clearly designed to allow the Prosecution to bolster its case against

bolster its case continuously with new charges, allegations, material facts and evidence and mould it around the case as it unfolded during trial. In such circumstances it would be impossible for an accused to have a fair trial, inasmuch as it would be virtually impossible for him to prepare an effective defence. The overall approach of the *ad hoc* Tribunals has been to firmly root the requirement that all material facts be pleaded in the indictment with the accused's ability to have a fair trial. The Trial Chamber's finding that evidence concerning locations not specifically pleaded in the indictment falls outside the scope of the Indictment is, consequently, correct and fully in accord with applicable jurisprudence.

83. Drawing from the jurisprudence of the *ad hoc* tribunals, the International Criminal Court (ICC) recently declined to consider locations that were not explicitly mentioned in the charging instrument.[232] In the *Mbarushimana* case, the Chamber refused to consider locations that were not specifically mentioned in the Indictment, notwithstanding the use of the term "including" by the Prosecution. [233] Much like the Trial Chamber in this case, the *Mbarushimana* Chamber determined that the list of locations specifically named in the DCC was to be read as being exhaustive, bearing in mind fair trial principles; it, therefore, refused to review evidence relating to locations outside the scope of the DCC. This standard for evaluating the specificity of pleaded locations was applied by the *Mbarushimana* Chamber, despite the fact that the Prosecutor was seeking to charge the Suspect with the most indirect form of criminal liability recognized under the Rome Statute,[234] and despite the remoteness of the Suspect (based in Europe) from the crime base (Eastern Congo-DRC). The

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Mr. Taylor with new allegation and material facts depending on how the evidence unfolds during trial. Such an approach is impermissible in criminal proceedings.

[232] See *Mbarushimana* Decision on Confirmation of Charges, p. 149. Although the pre-trial procedure at the ICC differs from those at other international tribunals/ courts, the Pre-trial Chamber examines the charging instrument (i.e., the "Document Containing the Charges" or "DCC") in respect of its specificity with the same rationale of safeguarding the accused's rights to be informed and to be able to adequately prepare his defence. The only difference between the ICC practice, on the one hand, and those of the Special Court and *ad hoc* tribunals, on the other hand, is that the latter require the Prosecution to know its case before the start of the Trial, while the ICC requires the Prosecution to know its case before the start of the Confirmation of Charges Hearing.

[233] See *Mbarushimana* Decision on Confirmation of Charges, paras. 79-85, see in particular para. 82: "The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances."; See also *Ruto* Decision on Confirmation of Charges, at para. 99: "...Therefore, the Chamber will only assess the evidence with respect to the events that according to the Prosecutor's allegations took place in the locations explicitly referred to in the Amended DCC."

[234] Article 25(3)(d) of the Rome Statute.

Mbarushimana Chamber accepted the arguments put forth by the Defence, to the effect that the Prosecution could not reasonably be allowed to use an indictment as a "catch-all" document, leaving the Defence with the burden of guessing the material facts of the alleged crimes.[235]

(c) The "sheer-scale" doctrine

84. In some circumstances, it is sufficient that factual elements of the crimes charged in the indictment are expressed by necessary implication. In this regard, a "sheer-scale" doctrine has been recognized and applied by the *ad hoc* Tribunals as forming an exception to the specificity requirements at the ICTR and ICTY. However, this exception was been recognized as being a narrow, case-by-case exception. Indeed, and as was stated by the *Ntakirutimana* Trial Chamber: "the sheer scale of the alleged crimes *may* well make it impracticable to require a high degree of specificity."[236] More is required than an assumption of impracticability as forming the basis for the applicability of this exception; an analysis of its applicability on a case-by-case basis is required. Such an approach has been endorsed by this Appeals Chamber which has acknowledged the "narrow exception" that the sheer-scale doctrine represents.[237] Furthermore, this narrow exception allows for *non-essential* information, such as *the names of victims and exact date of the crime*, to be omitted from the indictment, as opposed to locations and places.[238]

85. Relying on the Sesay Appeals Judgement, the Prosecution argues that the Trial Chamber in this case erred in failing to follow binding jurisprudence from the RUF case on the "sheer-scale" exception to the specificity requirement.[239] Specifically, an error of law is alleged, in that the Trial Chamber failed to conclude that, in light of the sheer scale of the involved crimes, coupled with the fact that Mr. Taylor was not charged with personal commission, alleging a non-exhaustive list of locations in the Indictment was sufficient.[240] The Defence submits that the facts of both cases are distinguishable and this argument must, consequently, fail.

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[235] See *Mbarushimana* Defence Request, para. 4.
[236] *Ntakirutimana* TJ, para. 57. (emphasis added) See also *Kupreškić* AJ, para. 89.
[237] See *RUF* AJ, para. 52, emphasizing that "there is a *narrow* exception to the specificity requirement for indictment (...) *In some cases* the widespread nature and the sheer scale of crimes make it unnecessary and impracticable to require a high degree of specificity." (emphasis added) See also *AFRC* AJ, para. 41.
[238] ".. The Prosecution need not specify every single victim that has been killed or expelled," *Kupreškić* AJ, para. 90.
[239] Prosecution Appellant's Submissions, paras. 113 to 118.
[240] Prosecution Appellant's Submissions, paras. 113 to 118, especially, para. 114.

86. The difference between this case and the particular circumstances of the accused Morris Kallon in the RUF case is that Kallon's liability was pursuant to his participation in a joint criminal enterprise (JCE),[241] unlike in this case, where Mr. Taylor's liability is pursuant to aiding and abetting and planning. In the circumstances of a conviction for JCE, it might arguably be permissible to invoke and apply the sheer-scale exception to the specificity requirement, if the particular circumstances of the case so warrants; however, such a rationale cannot be sustained in the circumstances of the modes of liability for which convictions were entered in this case. The applicability of this narrow exception remains in the discretion of the Trial Chamber and should be assessed on a case-by-case basis. Accordingly, the Defence submits that the Trial Chamber correctly determined that a non-exhaustive list of locations was not sufficient to satisfy the requisite degree of specificity and thus, the Trial Chamber committed no error when it did not apply the sheer-scale exception in the instant case.

(d) Conclusion regarding defects in an Indictment and the required degree of specificity as to locations

87. In conclusion, a defective indictment is such a severe infringement of the Accused's rights that it may, "... in certain circumstances cause the Appeal Chamber to reverse a conviction."[242] In situations where material facts were not in the possession of the Prosecution before the commencement of the trial, making it naturally impossible for the Prosecution to plead those facts in the indictment, "doubt must arise as to whether it is fair to the accused for the trial to proceed."[243] In this connection, the situation where the evidence at trial turns out differently than expected "may require the indictment to be amended, an adjournment to be granted, or *certain evidence to be excluded as not being within the scope of the indictment.*"[244]

88. In this case, the Prosecution has conceded that the allegations in question are *material*[245] and yet, the Prosecution fails to adequately address the question of whether the allegations are "factually and/or legally distinct from [a basis for conviction] already alleged in the indictment."[246] Crucially, the presence or absence of new counts in an Indictment is not determinative when considering whether the Prosecution is effectively introducing new

[241] Prosecution Appellant's Submissions, paras. 113 - 114.
[242] *Kupreškić* AJ, para. 114.
[243] *Kupreškić* AJ, para. 92, citing *Krnojelac* First Decision on the Form of Indictment, para. 40.
[244] *Kupreškić* AJ, para. 92.
[245] Prosecution Appellant's Submissions, para. 121.
[246] *Halilović* Decision on Leave to Amend the Indictment, para. 30.

charges by virtue of its pleading regime.[247] Furthermore, additional material facts "factually and/or legally distinct from any already alleged in the indictment" that create a basis for conviction must be considered to be a new charge. Thus, "[w]here the evidence at trial turns out differently than expected, an amendment of the indictment may be required, an adjournment may be granted, or certain evidence may be excluded as being outside the scope of the indictment."[248]

89. On the basis of the foregoing, the Defence submits that the Prosecution's failure to expressly plead the locations in question in the Indictment resulted in defects in pleading. Accepting the Prosecution's arguments would leave the Defence with the burden of challenging the Prosecution evidence as both crime base evidence, triggering Mr. Taylor's criminal responsibility, and as evidence going to a "chapeau" element of charged crimes, such as the "widespread or systematic"[249] nature of attacks. The Defence should not reasonably be left with the burden of countering Prosecution evidence in any way it could possibly be used by or benefit the Prosecution's case. The responsibility of making a clear and consistent case in a timely fashion lies with the Prosecution. As such, the Trial Chamber did not err in fact and/ or law when it found that crimes occurring in locations not expressly pleaded in the Indictment fell outside the scope of the Indictment.

C. THE DEFENCE RAISED THE ISSUE OF EVIDENCE FALLING OUTSIDE THE TEMPORAL AND GEOGRAPHICAL SCOPE OF THE INDICTMENT AT THE PRE-TRIAL AND TRIAL PHASES OF THE CASE

90. In paragraphs 104 and 174 to 182 of its Appeal Brief the Prosecution observes that Mr. Taylor never challenged the specificity of the pleading of the locations at any stage of the proceedings, nor alleged any prejudice to his ability to defend himself. This observation is utterly incorrect.

91. Contrary to the Prosecution's argument, the Defence repeatedly objected to evidence falling outside the geographical and temporal scope of the Indictment during the proceedings

[247] See *Krnojelac* First Decision on the Form of Indictment, para. 19, stating that "[t]he Trial Chamber has obtained the impression that the prosecution may have taken the opportunity to add new charges for which leave is required... It is true, as the prosecution says, that no new counts have been added to the indictment. But that is only because of the pleading style adopted by the prosecution in this case; each count has been pleaded... in terms of absolute generality, leaving it to the material facts pleaded in respect of that count to reveal the specific details which are required... and which should, strictly, have been pleaded in the count itself."
[248] *Kupreškić* AJ, para. 92; *Blaškić* AJ, para. 220. See also, *Halilović* Decision on Leave to Amend the Indictment, para. 30; *Prlić* Decision on Leave to Amend the Indictment, para. 13;
[249] See, Article 2 of the Statute.

below. Significantly, and by way of example, the Defence expressed its concerns in its Pre-Trial Brief,[250] by raising specific objections at the time the evidence in question was sought to be introduced,[251] by filing a motion to exclude evidence falling outside the scope of the Indictment,[252] and in its Final Trial Brief. [253] Accordingly, the Prosecution's submission that the Defence sat on its rights and did not challenge the lack of specificity of the Indictment is misplaced.

92. Moreover, and irrespective of whether or not the Defence challenged the form of the Indictment during the trial proceedings, the Trial Chamber is entitled to raise the issue *proprio motu* as part of its inherent role in guaranteeing a fair trial.[254] As such, the Trial Chamber cannot be said to have erred in law when considering the issue of a defective indictment due to an absence OF objections raised by the Defence during trial proceedings.

D. TIMELY, CLEAR AND CONSISTENT NOTICE OF UNSPECIFIED LOCATIONS IN THE INDICTMENT WAS NOT GIVEN TO MR. TAYLOR BY PROSECUTION PRE-TRIAL COMMUNICATIONS

(a) Curing a defective indictment

93. The Prosecution argues that the Trial Chamber erred in law by failing to consider whether "timely, clear and consistent notice" of locations not explicitly specified in the Indictment was given to Mr. Taylor by "other pre-trial communications," so as to cure any defects in the defective Indictment.[255] "Other pre-trial communications" are said to encompass the Prosecution's Pre-Trial Brief and annexed summaries of anticipated testimony, pre-trial disclosures and, in some cases, explicit reference in the Prosecution's Opening Statement.[256] The Prosecution also maintains that any defects in pleading were "harmless" because Mr. Taylor "suffered no prejudice in his ability to defend himself against the allegations."[257]

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[250] Defence Pre-Trial Brief, paras. 9-23.
[251] See e.g. TT, TF1-334, 18 April 2008, p. 8054; TT, TF1-334, 21 April 2008, p. 8077; TT, TF1-028, 7 May 2008, p. 9148; and TT, TF1-579, 5 November 2008, p. 19798.
[252] Defence Motion to Exclude Evidence.
[253] Defence Final Trial Brief, paras. 28-46.
[254] See *Krnojelac* First Decision on the Form of Indictment, para. 18.
[255] Prosecution Appellant's Submissions, para. 105.
[256] Prosecution Appellant's Submissions, para. 105.
[257] Prosecution Appellant's Submissions, para. 104.

94. The Defence submits that established case law demonstrates the Prosecution's arguments are legally infirm and misplaced. While international case law recognizes that a defective indictment may be cured by a 'timely, clear and consistent notice,' it does so while applying a restrictive approach, and emphasizes that "in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of [a tribunal], there can only be a limited number of cases that fall within that category."[258] The Defence avers that the present case does not fall within the exception and, consequently, the Prosecution's arguments must fail.

(b) A restrictive approach limited to rare situations

95. The Prosecution at bar argues that since other pre-trial communications encompass crimes and locations outside the scope of the Indictment, Mr. Taylor was duly informed of the charges and therefore his ability to prepare his Defence was not impaired. The Prosecution relies on SCSL,[259] ICTR, and ICTY case law[260] in support of its averments, however, a closer examination of these jurisprudential sources confirms that a restrictive approach obtains, both in terms of the articulation and application the exception at issue.

96. The seminal case which forms the basis for subsequent jurisprudence on this issue is the ICTY Appeals Chamber's judgement in the *Kupreškić* case.[261] In *Kupreškić*, the Appeals Chamber stated that, "[i]f such a fundamental defect can indeed be held to be harmless in any circumstances, it would only be through demonstrating that Zoran and Mirjan Kupreškić's ability to prepare their defence was not materially impaired."[262] It concluded that neither the disclosed evidence nor the information conveyed in the Prosecution's Pre-Trial Brief and knowledge acquired during the trial, sufficiently informed the accused of the charges against

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[258] *Kupreškić* AJ, para. 114. See for a few examples, *Ntagerura* AJ, paras. 6 and 32, stating that the Prosecution's ability to cure an Indictment "is not unlimited." See, also, *Ntakirutimana* AJ, para. 125; The *Krnojelac* First Decision on the Form of Indictment, para. 15, where the Chamber stated: "*It is true that, in a limited class of case[s], less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred,* it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation." (emphasis added)

[259] See Prosecution Appellant's Submissions, at para. 120 and f.n., 340 therein, referring to the *RUF* AJ, paras. 167-168; *CDF* AJ, para. 443; *AFRC* AJ, para. 44; *AFRC* TJ, paras. 1706-1709, 1761-1764.

[260] Prosecution Appellant's Submissions, paras. 101 to 123.

[261] *Kupreškić* AJ.

[262] *Kupreškić* AJ, para. 122.

them. Accordingly, the *Kupreškić* Appeals Chamber declared that the trial was wholly unfair.[263]

97. Cases since *Kupreškić* have further restricted the exception to remedying defective indictments through "timely, clear and consistent notice" to an accused that was articulated in *Kupreškić*:

> ...that the statement made by the ICTY Appeals Chamber in *Kupreškić et al.* that "it might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused" *does not permit a Trial Chamber to consider material facts of which the accused was not adequately put on notice* (emphasis added).[264]

98. In the *AFRC* case, the Prosecution argued "that contrary to the Trial Chamber's findings, 'locations' were properly pleaded in the Indictment and that in the alternative any defects in the Indictment were cured by providing timely, clear and consistent information to the Accused..."[265] The Appeals Chamber recalled the principle established in relevant jurisprudence on the curative effect of "timely, clear and consistent notice,"[266] but rejected the Prosecution's arguments and concluded that the accused had not been duly informed of certain locations and their fair trial rights had consequently been impaired. The Appeals Chamber stated:

> The Trial Chamber's limited treatment of the evidence of crimes committed in such locations was a proper exercise of its discretion in the interest of justice, taking into account that it is the Prosecution's obligation to plead clearly material facts it intends to prove, so as to afford the Appellants a fair trial.[267]

99. As in the AFRC case, the Trial Chamber at bar refused to consider locations not explicitly pleaded in the Indictment and considered ambiguous terms, such as "including," as well as relevant Prosecution evidence or other pre-trial communications as intended only to demonstrate the widespread or systematic nature of an attack. The Defence submits that such an approach is in accord with the AFRC Appeals Judgement and the recognition of the wide discretion a trial chamber retains in this area.

100. Past cases which have recognized a cure to a defective Indictment have, for instance, included a witness statement taken together with "*unambiguous information* contained in the

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[263] *Kupreškić* AJ, para. 124.
[264] *Ntagerura* AJ, para. 67.
[265] *AFRC* AJ, para. 50.
[266] *AFRC* AJ, para. 44.
[267] *AFRC* AJ, para. 64.

Pre-Trial Brief" and its annexes";[268] a document indicating the anticipated testimony of a Prosecution witness;[269] "a chart of witnesses and the reiteration of those details by the Prosecution in its opening statement."[270] However, all of these examples relate to the material elements of a crime (as opposed to material facts underpinning a charge) and the personal responsibility of the Accused. Bearing this in mind, it becomes clear that the Prosecution's reliance on the RUF and CDF cases is misplaced.

101. In the *RUF* case, the Appeals Chamber rejected Morris Kallon's arguments regarding defects in the indictment, inasmuch as witness statements clearly indicated that witnesses would testify to Kallon's direct responsibility and individual criminal responsibility for crimes included in the Indictment. The Chamber concluded that "these statements provided sufficient timely notice of Kallon's personal commission" of the crimes,[271] since any ambiguity which may have existed in the Indictment was made unequivocal and blatant as to the Prosecution's intentions in regards to the mode of liability of the accused.

102. This case differs from the circumstances which obtained in the RUF case, insofar as the lack of specificity in this case relates to certain locations, as opposed to the personal responsibility[272] of Mr. Taylor (as was the case with Morris Kallon) or the material element of the crimes.[273] Although the locations at issue may have appeared in "other pre-trial communications" and "in *some* cases"[274] in the Prosecution Opening Statement, uncertainty as to how these locations were to be factored into the Prosecution's case persisted.

103. Indeed, the Defence had no reason to treat information included in other pre-trial communications as indicating that these locations were being advanced as part of the Indictment, rather than to prove the *chapeau* elements of crimes (e.g., their widespread or systematic nature), as the Trial Chamber itself concluded from reading the evidence, the Indictment, and other pre-trial and trial communications. *De facto*, and contrary to Prosecution's arguments "other pre-trial communications" did not cure any uncertainties arising from the Indictment since they, themselves, were neither consistent nor uniform.

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[268] *Ntakirutimana* AJ, para. 48 (emphasis added).
[269] *Gacumbitsi* AJ, para. 56.
[270] *Naletilić and Martinović* AJ, para. 45.
[271] *RUF* AJ, para. 168.
[272] *Gacumbisti* AJ, para. 56; *Ntakirutimana* AJ, para. 32.
[273] *Naletilić and Martinović* AJ, para. 45.
[274] Prosecution Appellant's Submissions, para 105.

104. The Prosecution also relies on the *CDF* Appeals Judgement, in which the Appeals Chamber recalled that: "case law at the *ad hoc* Tribunals recognizes that *in limited circumstances*, a defect in the indictment may be 'cured' if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge"[275] (emphasis added), and provided factors as guidelines that could be taken into consideration when reviewing whether an indictment was cured or not,[276] including but not limited to, "information provided in the Prosecution's pre-trial brief or its opening statement,[277] the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case."[278]

105. At issue in the *CDF* case was the Trial Chamber's refusal to admit evidence of sexual violence. However, the Appeal Chamber concluded "*that evidence of sexual violence was relevant to charges in the Indictment.*"[279] Therefore, although the Indictment may have been defective, it did contain the relevant charges and the question presented implicated whether or not the accused had notice of what the evidence of sexual violence was, not the curing of a defective indictment. The Appeal Chamber concluded that the Prosecution's Pre-trial Brief informed the accused that evidence was directed towards the crime of sexual violence.[280] Additionally, the Appeal Chamber underscored that "the right to a fair trial... cannot be violated by the introduction of *evidence relevant to any allegation in the trial proceedings*, regardless of the nature or the severity of the evidence."[281]

(c) Insufficiency of summaries of witness statement and pre-trial disclosures

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[275] *CDF* AJ, para. 443.

[276] *CDF* AJ, para. 443, citing *Simić* AJ at para. 24. In *Simić*, defective pleading by the Prosecution related to joint criminal enterprise. The Appeal Chamber found that the defective indictment was not cured by subsequent timely, clear and consistent notice and stated at para. 71: "that the Prosecution is expected to know its case before it goes to trial. An accused cannot be expected to engage in guesswork in order to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the Prosecution has failed to make its case clear." (emphasis added)

[277] *Simić* AJ, para. 24, states that in the past the ICTY Appeal Chamber reviewed the Prosecution's Pre-trial Brief and Opening Statements when considering whether sufficient notice was communicated to the Defence so as to cure a defective indictment. The Appeal Chamber refers to three appeal judgements, namely, *Kordić and Čerkez* AJ, para. 169; *Blaškić* AJ, para. 242; *Kupreškić* AJ, paras. 117-8.

[278] *CDF* AJ, para. 443.

[279] *CDF* AJ, para. 446 (emphasis added).

[280] *CDF* AJ, para. 444.

[281] *CDF* AJ, para. 446.

106. Not all witness statements communicated by the Prosecution to the Defence were used in Trial.[282] The Prosecution has an obligation to disclose material it has in its possession to the Defence in due time, but this provides no indication regarding what the Prosecution would choose to use at trial and how it would use it.[283] Significantly, witness statements served by the Prosecution pursuant to its disclosure obligations do not provide the accused with sufficient notice, and therefore they do not cure a defective indictment. In the *Brđanin* case,[284] where the question of lack of specificity touched on the use of the word "including" the Trial Chamber set there stated:

> Where... the prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence. Until such notice is given, an accused is entitled to proceed upon the basis that the details pleaded *are* the only case which he has to meet in relation to the offence or offences charged. *Notice that such evidence will be led in relation to a particular offence charged is not sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements* imposed by Rule 66(A). This necessarily follows from the obligation now imposed upon the prosecution to identify in its Pre-Trial Brief, in relation to *each* count, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused. If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its Pre-Trial Brief, specific notice must be given to the accused of that particular intention...[285]
>
> Accordingly, at this stage and until given sufficient notice that evidence will be led of additional incidents or facilities in relation to a particular offence charged, both accused are entitled to proceed upon the basis that the lists of killings and facilities *are* exhaustive in nature" (Emphasis added).[286]

107. The ICTR applied a similar approach in *Ntakirutimana*, stating that the mere service of witness statement pursuant to the Prosecution's disclosure obligations does not provide sufficient notice to the Defence.[287]

(d) Insufficiency of the Prosecution's Pre-Trial Brief in clarifying locations

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[282] See paras. 141 and 143 of the Prosecution Appellant's Submissions.
[283] See *Ntakirutimana* AJ, para. 27: "As has been previously noted, "mere service of witness statements by the Prosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial"; See also ICTY *Brđanin* Decision on Further Amended Indictment, para. 62.
[284] *Brđanin* Decision on Further Amended Indictment, para. 62.
[285] *Brđanin* Decision on Further Amended Indictment, para. 62 (emphasis added).
[286] *Brđanin* Decision on Further Amended Indictment, para. 63.
[287] *Ntakirutimana* AJ, para. 27.

108. In order for a Prosecution Pre-trial brief to provide sufficient notice so as to potentially cure a defective indictment, it has to provide clear and unambiguous information.[288]

109. Notably in this case, the Prosecution stated in the introduction to its Pre-Trial Brief that: "Given that Section II provides an overview of the case, *the Prosecution will not discuss every fact it intends to prove nor cite every source of evidence upon which it intends to rely to prove its case.*"[289] As such, and while the Prosecution's Pre-trial Brief was filed with a view to "addressing the factual and legal issues in this case,"[290] the Prosecution expressly conceded had no intention of providing unambiguous, clear, nor exhaustive information on the charges and the material facts related to alleged crimes.

110. As was noted by the *Krnojelac* Trial Chamber: "There is thus a clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery)."[291] Therefore, the adequate venue for the communication of charges by the Prosecution remains indisputably the Indictment. "It is accordingly not permissible to delay disclosure of the factual components of the offence(s) until the disclosure of the Prosecution's pre-trial brief or the service of the evidence."[292]

111. *Seromba* is a rare example of a case in which a cure to a defective indictment was permitted. The Appeals Chamber considered that the Prosecution's pre-trial brief gave the accused sufficient notice that the Prosecution's case alleged that the accused knew and agreed to the destruction of a church and that this would serve as a basis for charging him with extermination as a crime against humanity. The notice provided subsequent to the Indictment in *Seromba* was clear. It described what the facts were and how they served the Prosecution's case, or rather how the Prosecution intended to use the facts information in its case. This is far from the situation in this case, where ambiguity relating to how witness statements with locations outside the scope of the Indictment would be used, persisted.

112. In *Ntagurera*, the Prosecution argued that JCE was pleaded in its Pre-trial brief, and consistently in its closing brief, and that the Defence called 82 witnesses so it could not claim

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[288] See *CDF* AJ, para. 444 ; see also *Ntakirutimana* AJ, paras. 32, 39 and 48.
[289] See Prosecution Pre-Trial Brief, para. 2 (emphasis added).
[290] Prosecution Pre-Trial Brief, para. 1.
[291] *Krnojelac* First Decision on the Form of Indictment, para. 12.
[292] See, Wayne Jordash and Scott Martin, "Due Process and Fair Trial Rights at the Special Court for Sierra Leone," in *Leiden Journal of International Law*, 23 (2010) pp. 585-608 at page 589.

that its ability to prepare a defence was impaired.[293] The ICTR Appeals Chamber considered several issues of uncertainty in the indictment relating to JCE, personal criminal responsibility, superior responsibility and other material elements. After close examination of summaries of witness statements, the Prosecution's pre-trial brief and other communications, the Appeals Chamber concluded that in no way did these communications sufficiently notify the accused of his alleged criminal responsibility or clarify how facts stated in the witness statements related to crimes charged.[294] The Appeals Chamber, consequently, rejected the Prosecution's arguments.

113. On the basis of the foregoing, the Defence submits that the Prosecution's Pre-trial Brief did not serve to cure any defects in the Indictment regarding the pleading of locations with the requisite degree of specificity.

(e) Insufficiency of the Prosecution's Opening Statement to cure ambiguity in locations

114. In *Kordić and Čerkez*, the ICTY Appeals Chamber affirmed that in some cases the Prosecution's Opening Statement may cure a defective indictment.[295] However, it observed that:

> ...if the material facts of an accused's alleged criminal activity are not disclosed to the Defence until the trial itself, it will be difficult for the Defence *to conduct a meaningful investigation prior to the commencement of the trial* (emphasis added)[296]

Applying relevant jurisprudence, the *Kordić and Čerkez* Chamber went on to reject the argument that the Prosecution's Opening Statement cured the defective indictment. Indeed, a review of relevant jurisprudence concerning opening statements, confirms that curing a

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[293] *Ntagerura* AJ, para. 40, 41 and 114 where the Appeal Chamber stated that "[t]he Appeal Chamber stressed as follows: "The Appeal Chamber wishes to express its concern regarding the Prosecution's approach in the present case. The Appeals Chambers recalls that the indictment is the primary accusatory instrument and must plead the Prosecution case with sufficient detail. Although the Appeals Chamber allows that defects in an indictment may be "remedied" under certain circumstances, it emphasizes that this should be limited to exceptional cases...In the present case, the Appeals Chamber is disturbed by the extent to which the Prosecution seeks to rely on this exception".

[294] To state only a few examples of the ICTR Appeal Chambers in-depth analysis of Prosecution communications and whether they cure the vagueness contained in the indictment, see *Ntagerura* AJ, paras. 60, 74, 81, 100, 102 and 110.

[295] See *Kordić and Čerkez* AJ, para. 169; See also *Gacumbitsi* AJ, paras. 175-9, where the Appeal Chamber considered the Prosecution Pre-trial Brief and concluded that it did not cure the vagueness in the indictment in relation with joint criminal enterprise. It reviewed the Prosecution Opening Statement while expressing its doubts as to whether it could serve as 'timely' notice, although it conceded the ICTY Appeals Chamber has considered it in the past. The Appeal Chamber concluded that in any case the Opening Statement did not cure the vagueness of the defective Indictment.

[296] See *Ntagerura* AJ, para. 44; see also *Niyitegeka* AJ, para. 194, *Kvočka* AJ, paras. 44-5.

defective indictment by way of a Prosecution's pre-trial brief and opening statement constitutes a stringent exception.[297]

115. It remains the case that while an Opening Statement could perhaps serve to provide timely, clear and consistent notice to an accused, the sufficiency of any notice it might arguably provide in the face of a defective indictment is even more restricted than the already restricted scope of the notice and cure "other pre-trial communications" may provide. Accordingly, and for this and other reasons above, the Prosecution's arguments regarding the curative effect of its Opening Statement on any defects in the Indictment are without merit.

(f) "Holistic" and Contextual Argument

116. The Prosecution argues that its "other pre-trial communications" should be read "holistically and in context."[298] However, the Prosecution provides no legal basis for its assertion, nor does it expand further on its reasoning. The Defence, consequently, need not address this point to any substantive degree. The onus is on the Prosecution to make its case clear and legally sufficient, whether in relation to a non-defective Indictment or in respect of arguments advanced in its Brief. It is for the Prosecution to substantiate why a "holistic" reading is legally necessary and how that would have impacted the Trial Chamber's decision. The Defence submits that nowhere in the applicable jurisprudence is a holistic reading of "other pre-trial communications" mandated or made advisory. This argument is, accordingly, without merit.

117. For all of the foregoing reasons, the Prosecution's third ground of appeal is devoid of merit and should, accordingly, be dismissed.

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[297] The *Kordić and Čerkez* AJ, paras. 165-72, states that "in some instances" the Prosecution's Pre-trial Brief and the Opening Statements could provide information amounting to a cure of a defective indictment. Nevertheless, it concluded that the these communications failed to sufficiently inform the accused that forcible transfer and/or expulsion of Bosnian civilians was included in the indictment and decided that convictions could entail these charges. Finally, in the *Kupreškić* AJ, 117-9, the Appeal Chamber did review the Prosecution Pre-trial Brief and Opening Statement but once again ruled against a cure to the defective indictment.

[298] Prosecution Appellant's Submissions, para. 144.

GROUND FOUR: THE TRIAL CHAMBER DID NOT ERR IN SENTENCING AS ALLEGED BY THE PROSECUTION

A. OVERVIEW

118. The Prosecution submits that the Trial Chamber correctly set out the applicable law on general sentencing considerations,[299] but that it made two discernible errors in the exercise of its sentencing discretion by failing to give sufficient weight to its own findings on the conduct of Mr. Taylor and upon his conviction for planning. The Prosecution alleges a third error of law on the basis that the Trial Chamber automatically discounted Mr. Taylor's sentence because he was convicted of aiding and abetting. The Prosecution therefore seeks to increase Mr. Taylor's sentence from 50 to 80 years imprisonment.[300] The Prosecution has failed to establish these alleged errors in the exercise of discretion and in law. Accordingly, the Prosecution appeal with respect to sentencing should be denied in its entirety.

119. The Defence relies upon its previous submissions regarding the legal principles applicable to sentencing on appeal.[301] Further, it makes the following submissions without prejudice to its own appellate submissions on the merits which seek to overturn Mr. Taylor's convictions for aiding and abetting, planning, and its sentencing submissions which seek to reduce his current sentence of 50 years.

B. THE TRIAL CHAMBER DID NOT ERR BY FAILING TO ASSESS MR. TAYLOR'S CRIMINAL CONDUCT

120. The Prosecution does not contest that the Trial Chamber identified the correct legal test and factors to be taken into account when considering the gravity of offences:[302]

> The gravity of the offence is the primary consideration in imposing a sentence, and is the "litmus test" in determination of an appropriate sentence. The gravity of the offence is determined by assessing the inherent gravity of the crime and the criminal conduct of the accused, a determination that requires consideration of the particular circumstances of the case and the

[299] Prosecution Appellant's Submissions, para. 200.
[300] Prosecution Appellant's Submissions, Ground 4; paras. 198-200; 235-6.
[301] Defence Appellant's Submissions, para. 828-9.
[302] Prosecution Appellant's Submissions, para. 198-200.

> crimes for which the person was convicted, as well as the form and degree of participation of the Accused in the crime.[303]

121. The Prosecution alleges that the Trial Chamber committed a "discernible error" in exercising its discretion because it "failed to give sufficient weight *to its own findings* of Mr Taylor's continuing critical role in the broader, ongoing campaign of atrocities against the people of Sierra Leone."[304] The Defence submits that the Prosecution has failed to establish this discernible error.

122. All of the Prosecution's factual references in support of this allegation, and indeed all of its arguments in the sentencing appeal, are to the Trial Chamber Judgment and to specific findings in the Sentencing Judgment. This belies the allegation that the Trial Chamber did not adequately consider Mr. Taylor's conduct in sentencing. As set out in the Prosecution's own submissions, the Trial Judgment is replete with references to the conduct of Mr. Taylor.[305] This demonstrates that the Trial Chamber was fully cognisant of Mr. Taylor's conduct and gave his conduct due consideration when sentencing.[306]

123. Most importantly, there are explicit references in the Sentencing Judgement which demonstrate that the Trial Chamber considered and gave significant weight to Mr. Taylor's conduct as an important factor establishing the gravity of the offences when determining sentence.[307] The Trial Chamber expressly confirmed that it took Mr. Taylor's conduct into account in the context of the crimes and their effects. The Trial Chamber stated that in assessing the gravity of the offence, it:

> has taken into account such factors as (i) the scale and brutality of the offences committed; (ii) *the role played by the Accused in the commission of the crime*; (iii) the degree of suffering, impact or consequences of the crime for the immediate victim in terms of physical, emotional and psychological effects; (iv) the effects of the crime on relatives of the immediate victims

[303] Sentencing Judgement, para. 19. Also see paras. 9, 20-1.
[304] Prosecution Appellant's Submissions, para. 200 (emphasis added).
[305] Judgement, Parts VIII, IX.
[306] The Defence recalls and relies on its submissions of the undue weight accorded by the Trial Chamber to a number of factors: see, Defence Appellant's Submissions, Ground of Appeal 42.
[307] See Sentencing Judgement, para. 70 ("*The Accused has been found responsible for aiding and abetting as well as planning some of the most heinous and brutal crimes recorded in human history...*"); para. 71 ("In determining an appropriate sentence for the Accused, *the Trial Chamber has taken into account the tremendous suffering caused by the commission of the crimes for which the Accused is convicted of planning and aiding and abetting*, and the impact of these crimes on the victims, physically, emotionally and psychologically. *...all as a consequence of the crimes for which Mr. Taylor stands convicted of aiding and abetting and planning.*") (emphasis added). Also see Sentencing Judgement, paras. 74-7.

> and/or the broader targeted group; (v) the vulnerability and number of victims; and (vi) the length of time during which the crime continued.[308]
>
> *With respect to the assessment of the criminal conduct of the convicted person, the Trial Chamber has taken into account the mode of liability under which the Accused was convicted, as well as the nature and degree of his participation in the offence.*[309]

124. Mr. Taylor's conduct was also considered but rejected as a factor in mitigation because of the gravity of the crimes.[310] Conversely, the Trial Chamber took the leadership role of Mr. Taylor into account as an aggravating factor.[311]

125. The Defence submits that the Trial Chamber went beyond the consideration of the Mr. Taylor's conduct by impermissibly sentencing Mr. Taylor on the basis of his official status as Head of State and by repeatedly utilising the same factor (double counting) to unduly inflate his sentence.[312]

126. The Prosecution also argues that, as a matter of law and subject to the overriding consideration of gravity, senior leaders deserve a higher sentence than low-level perpetrators and that this applies equally to formal command structures as it applies to persons with authority, power or influence.[313] The Prosecution is correct that such a principle could apply to persons within the same command structure but the authorities do not support the conclusion that this principle applies to persons outside the command structure. As such this principle cannot be applied to increase the sentence of Mr. Taylor, who was not convicted as a superior or as a participant or leader in a JCE.

127. In support of its submission the Prosecution refers to the *Tadić* case which held that this principle applies to persons "in a command structure".[314] The Prosecution primarily refers to the Appeals Chamber finding in the *Musema* case which confirmed this principle by holding:

> this Appeals Chamber agrees with the jurisprudence of ICTY that *the most senior members of a command structure*, that is, the leaders and planners of a

[308] Sentencing Judgement, para. 20 (emphasis added).
[309] Sentencing Judgement, para. 21 (emphasis added).
[310] Sentencing Judgement, paras. 88, 92.
[311] Sentencing Judgement, para. 96.
[312] Defence Appellant's Submissions, paras. 840, 851-4.
[313] Prosecution Appellant's Submissions, para. 210.
[314] *Tadić* SJ, para. 56, as cited in *Musema* AJ, para. 381.

> particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out the orders.[315]

128. Musema was convicted and sentenced under *both* Article 6(1) and Article 6(3), that is, for both individual criminal responsibility and for superior responsibility.[316] The Appeals Chamber held that Musema's conduct deserved a more severe sentence precisely because he had control over his employees and therefore had the authority to take measures to prevent the commission of crimes.[317]

129. Mr. Taylor, on the other hand, had no effective control over any of the perpetrators of crimes. Consequently, Mr. Taylor was not liable as a superior under the principle of superior responsibility.[318] To consider these authorities as a basis for increasing Mr. Taylor's sentence is not supported by the jurisprudence and would also amount to punishment for a mode of liability for which he has been acquitted. Moreover, the Trial Chamber has already considered Mr. Taylor's leadership position as an aggravating factor.[319] The Prosecution's argument that Mr. Taylor's leadership role should be considered as a factor adding to the gravity of the offence[320] would constitute impermissible double counting of an aggravating factor already considered by the Trial Chamber.[321]

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[315] *Musema* AJ, para. 383. (emphasis added).
[316] See *Musema* TJ, para. 880-2. See also paras. 884-975.
[317] *Musema* TJ, paras. 1003-4 (Both the Trial and Appeal Chambers explicitly referred to the Accused's command as a factor contributing to the severity of the offences: "The Chamber recalls that it found that individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region. The Chamber is of the opinion that, *by virtue of this capacity, Musema was in a position to take reasonable measures to help in the prevention of crimes. The Chamber however finds that Musema did nothing to prevent the commission of the crimes and that he took no steps to punish the perpetrators over whom he had control.* As the Chamber found in Section 5, Musema had powers enabling him to remove, or threaten to remove, an individual from his or her position at the Gisovu Tea Factory if he or she were identified as a perpetrator of crimes punishable under the Statute") (Emphasis added.); *Musema* AJ, para. 384 ("[The Trial Chamber] found that Musema was the Director of the Gisovu Tea Factory, one of the most successful tea factories in Rwanda, and *that he exercised legal and financial control over his employees.* He personally led certain attacks, and was perceived by individuals as a figure of authority and as someone who wielded considerable power in the region, and *had powers enabling him to remove, or threaten to remove, an individual from his or her position at the tea factory.*") (Emphasis added).
[318] Judgement, para. 6985-6.
[319] Sentencing Judgement, para. 96.
[320] Prosecution Appellant's Submissions, paras. 198-200, 210.
[321] "Where a factor has already been taken into account in determining the gravity of the offence, it cannot be considered additionally as an aggravating factor and *vice versa*." Sentencing Judgement, para. 28. Also see Defence Appellant's Submissions, paras. 851-3.

C. THE TRIAL CHAMBER DID NOT ERR BY FAILING TO GIVE SUFFICIENT WEIGHT TO MR. TAYLOR'S CONVICTION FOR PLANNING

130. The Prosecution alleges that the Trial Chamber erred by failing to give sufficient weight to Mr. Taylor's conviction for planning when sentencing him.[322] This is based on the description of the planning conviction as "limited" in scope by the Trial Chamber in the Sentencing Judgment.[323] An examination of the Trial Chamber's Judgement on the planning conviction demonstrates that the Trial Chamber made extensive findings regarding this issue. In fact, the Trial Chamber made factual findings which were based on an exceptionally weak evidential basis.[324] Furthermore, the Chamber convicted and sentenced Mr. Taylor of planning attacks in relation to which no crimes were committed.[325] As such, if the Chamber erred in the exercise of its sentencing discretion, it did so by ascribing excessive weight to this conviction and not insufficient weight as alleged by the Prosecution. Importantly, the Trial Chamber *expressly* attached a significant amount of weight to the planning conviction in sentencing. For these reasons the Prosecution argument ought to be rejected by the Appeals Chamber because it has not demonstrated a discernible error in the exercise of the Trial Chamber's sentencing discretion.

131. The critical paragraph upon which the Prosecution's argument is based is the following Trial Chamber statement in the Sentencing Judgment:

> *The Trial Chamber recalls that Mr. Taylor was found not guilty of participation in a joint criminal enterprise, and not guilty of superior responsibility for the crimes committed.* A conviction on these principal or significant modes of liability might have justified the sentence of 80 years' imprisonment proposed by the Prosecution. However, the Trial Chamber considers that a sentence of 80 years would be excessive for the modes of liability on which Mr. Taylor has been convicted, taking into account the limited scope of his conviction for planning the attacks on Kono and Makeni in December 1998 and the invasion of and retreat from Freetown between December 1998 and February 1999.[326]

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[322] Prosecution Appellant's Submissions, paras. 192, 213-23.
[323] Sentencing Judgement, paras. 94, 101. Prosecution Appellant's Submissions, para. 213.
[324] See Defence Appellant's Submissions, Grounds 6-15.
[325] As discussed above in the Response to Ground 1, the Trial Chamber did not find that any crimes were committed as a result of the of the offensive to take Kono in December 1998 (See Defence Appellant's Submissions, paras. 217-8, 474, 558); Further, the Chamber heard virtually no evidence that a small contingent of RUF/AFRC forces led by Rambo Red Goat, which allegedly entered Freetown, committed crimes (See Defence Appellant's Submissions, para. 108).
[326] Sentencing Judgement, para. 94 (emphasis added). The other paragraph where the limited nature of the planning conviction is repeated states: "Although Mr. Taylor has been convicted of planning as well as aiding and abetting, his conviction for planning is limited in scope." Sentencing Judgement, para. 101.

132. In this paragraph the Trial Chamber expressly addresses the extent to which Mr. Taylor has been convicted of "principal or significant modes of liability" as compared to those principal modes of liability with which he was charged. It is factually accurate and simply clarifies the basis upon which he was convicted. The paragraph acknowledges the fundamental legal principle that Mr. Taylor cannot be sentenced for forms of liability for which he has not been convicted.

133. Mr. Taylor was charged with participation in a joint criminal enterprise, but was acquitted.[327] Mr. Taylor was charged with superior responsibly, but was acquitted.[328] He was also charged with other forms of principal liability for allegedly instigating and ordering the crimes in the indictment, but was acquitted.[329]

134. Despite being charged with all possible forms of principal liability under Article 6(1) of the SCSL Statute, the only form of principal liability with which he was convicted was planning. In this regard the Trial Chamber found that

> the Accused is criminally responsible pursuant to Article 6(1) of the Statute for planning the crimes charged in Counts 1 to 11 of the Indictment, committed by members of the RUF/AFRC and Liberian fighters in the attacks on Kono and Makeni, in the invasion of Freetown and during the retreat from Freetown, between December 1998 and February 1999.[330]

135. Mr. Taylor's conviction is limited in comparison with the other principal or significant modes of liability with which he was charged. It is also limited in temporal and geographical scope. Mr. Taylor was charged with planning all of the crimes charged in the indictment.[331] The crimes underlying the 11 charged counts spanned over a period of 61 months and 19 days, i.e. from 30 November 1996 to 18 January 2002, in named locations within six districts of Sierra Leone.[332]

136. In the Prosecution's submission, the only basis for which the planning conviction might be considered as limited in scope is a temporal one because it covers a period of three

[327] Judgement, para. 6900.
[328] Judgement, para. 6985.
[329] Judgement, paras. 6972-3.
[330] Judgement, para. 6971.
[331] Judgement, para. 14 (viii).
[332] Judgement, para. 13.

months out of an Indictment period of over five years.[333] The Prosecution seeks to discount the limited nature of the planning conviction by arguing that these three months occurred within the 18 to 24 months in which crimes were concentrated.[334] In so doing it relies upon a finding of the Sentencing Judgment. However the Prosecution has failed to point out that the Trial Chamber considered the entire time frame of the offences as well as the concentrated period (which included the three month period which was the subject of the planning conviction) as a factor which heightened the gravity of the offences,[335] and therefore the sentence of Mr. Taylor. In any event this does not serve to diminish the fact that the planning conviction is in fact limited in time and was used to increase sentence.

137. The scope of the Accused's conviction for planning is further limited geographically to Kono, Makeni and Freetown but does not extend to all of the geographical areas in which crimes were alleged and for which Mr. Taylor was charged with planning, according to the indictment.[336]

138. Accordingly, the Trial Chamber was entitled to clarify the basis upon which Mr. Taylor was convicted and sentence him on that basis. The Trial Chamber was accurate and reasonable in characterising the planning conviction as one which was limited in the context of the other forms of principal liability with which Mr. Taylor was charged. It was also limited in its temporal and geographic scope.

139. Extensive factual findings regarding the planning conviction in the Trial Judgment, demonstrate that the Trial Chamber considered the gravity of the underlying crimes and Mr. Taylor's participation in planning.[337] Most importantly, there are explicit references in the Sentencing Judgement which demonstrate that the Trial Chamber considered and gave significant weight to the planning conviction and Mr. Taylor's conduct as an important factor establishing the gravity of the offences when determining sentence.[338]

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[333] Prosecution Appellant's Submissions, para. 215.
[334] Prosecution Appellant's Submissions, para. 221; Sentencing Judgement, para. 78.
[335] Sentencing Judgement para. 78.
[336] Judgement, paras. 13-4.
[337] Judgement, paras. 6958-68. The majority of the Prosecution's appeal submissions in this regard refer to the Trial and Sentencing Judgements, which belies the allegation that the Trial Chamber did not adequately consider the planning conviction and the underlying crimes, Prosecution Appellant's Submissions, para. 216.
[338] See Sentencing Judgement, for example, para. 70 ("*The Accused has been found responsible for aiding and abetting as well as planning some of the most heinous and brutal crimes recorded in human history.* The Trial Chamber is of the view that the offences for which the Accused has been convicted – acts of terrorism, murder,

140. The final submission made by the Prosecution with respect to the planning conviction is that the Trial Chamber did not follow jurisprudence which requires that those who plan should generally receive greater sentences than those who implement the plan.[339] To this end the Prosecution invites a comparison between the 50 year sentence for Alex Tamba Brima who "implemented the plan in Freetown" and Mr. Taylor.[340]

141. The Defence agrees with the Prosecution that it is proper for the Chamber to consider the sentencing practice of the SCSL. However such consideration should be based on the findings in relevant sentencing judgments, as the Defence has set out in its Appeal Brief.[341] It should not be based on selective characterisations of these judgments.

142. As noted in the Defence Appeal Brief[342] the accused, Brima, was convicted of a wide range of offences under Articles 6(1) (committing, planning, ordering and aiding and abetting)[343] and as a superior pursuant to Article 6(3).[344] Furthermore, Brima was found to be a primary perpetrator of murders.[345] His sentence was based on numerous convictions for principal modes of liability as well as accessorial liability and superior responsibility. The crimes extended beyond the geographical scope of the Mr. Taylor's planning convictions and more importantly beyond the role, degree and from of participation of Mr. Taylor. As such, the utilisation of this sentencing example should serve to reduce Mr. Taylor's sentence and not to increase it.

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rape, sexual slavery, cruel treatment, recruitment of child soldiers, enslavement and pillage – are of the utmost gravity in terms of the scale and brutality of the offences, the suffering caused by them on victims and the families of victims, and the vulnerability and number of victims."); para. 71 (emphasis added) ("*In determining an appropriate sentence for the Accused, the Trial Chamber has taken into account the tremendous suffering caused by the commission of the crimes for which the Accused is convicted of planning and aiding and abetting, and the impact of these crimes on the victims, physically, emotionally and psychologically. .....all as a consequence of the crimes for which Mr. Taylor stands convicted of aiding and abetting and planning.*") (emphasis added). Also see Sentencing Judgement, paras. 74-7.

[339] Prosecution Appellant's Submissions, para. 223.

[340] Prosecution Appellant's Submissions, para. 223.

[341] Defence Appellant's Submissions, Ground 42, paras. 841-50.

[342] Defence Appellant's Submissions, para. 841.

[343] *AFRC* SJ, para. 41; *AFRC* TJ, paras. 1709, 1711, 1716, 1719, 1755, 1760, 1764, 1769-70, 1775-6, 1778-80, 1782-3, 1827, 1834-7.

[344] *AFRC* SJ, para. 42; *AFRC* TJ, paras. 1744, 1810.

[345] *AFRC* SJ, para. 43; *AFRC* TJ, paras. 1709, 1755, 1760, 1764.

D. THE TRIAL CHAMBER DID NOT ERR BY GIVING UNDUE CONSIDERATION TO AIDING AND ABETTING AS A FORM OF LIABILITY

143. The Prosecution argues that the Trial Chamber placed undue focus on aiding and abetting as a form of liability and insufficient weight on the significance and degree of Mr. Taylor's conduct.[346] In doing so the Prosecution asserts that the Trial Chamber failed to assess "the actual conduct, including the critical and indispensable role Mr. Taylor played in the commission of the crimes of which he stands convicted."[347] As noted above, that the Trial Chamber was fully cognisant of Mr. Taylor's conduct as evidenced by relevant findings in the Trial Judgement. Importantly, it explicitly gave significant weight to both his conduct and his convictions for both planning and aiding and abetting in the Sentencing Judgment.[348]

144. The second argument of the Prosecution is that the Trial Chamber erred in law by discounting the sentence based solely on the form of liability, by considering that any conviction based on aiding and abetting *automatically* deserves a lower sentence than convictions under joint criminal enterprise (JCE) or superior responsibility.[349]

145. These arguments must fail because the Prosecution has fundamentally misunderstood the legal and factual findings of the Sentencing Judgment regarding aiding and abetting. First, the Trial Chamber did not find that as a matter of law, aiding and abetting convictions automatically attract lower sentences. Secondly, the Trial Chamber did not discount or reduce Mr. Taylor's sentence on the basis that he was convicted of aiding and abetting, either automatically or otherwise.

146. The Trial Chamber made the following legal finding regarding sentencing for aiding and abetting:

> With respect to the assessment of the criminal conduct of the convicted person, the Trial Chamber has taken into account the mode of liability under

[346] Prosecution Appellant's Submissions, paras. 224-5.
[347] Prosecution Appellant's Submissions, paras. 199-200, 225.
[348] Sentencing Judgement, paras. 70-1, 76-7, 97. In a related submission the Prosecution asserts that the form of conduct is a lesser factor than the actual criminal conduct of the accused, Prosecution Appellant's Submissions, para. 225. In support of this proposition the Prosecution refers to its legal submissions in paras. 199-200 of the Prosecution Appellant's Submissions. However the legal authorities cited in those paragraphs do not support such a proposition. Furthermore the applicable legal principles as set out by the Trial Chamber do not support this proposition, Sentencing Judgement, para. 19.
[349] Prosecution Appellant's Submissions, para. 193, 226-7.

> which the Accused was convicted, as well as the nature and degree of his participation in the offence. In this regard, the Trial Chamber adopts the jurisprudence of ICTY and ICTR *that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation.*[350]

147. This finding is repeated twice more in exactly the same terms by the Trial Chamber in the Sentencing Judgement.[351] The Prosecution concedes that this statement of law is correct.[352] It concedes that generally aiders and abettors play a lesser role in crimes but argues that the factual findings of the Trial Chamber "make it clear that this does not apply in the present case."[353] The express and uncontested terms of the applicable legal principle set out by the Trial Chamber are clear and unambiguous. Thus the legal error alleged by the Prosecution is unfounded.

148. While accepting the legal principle enunciated by the Trial Chamber as correct, the Prosecution argues that the authorities cited by the Trial Chamber cannot be relied upon to support a reduction of sentence for aiding and abetting in the case of Mr. Taylor, because they involve low level aiders and abettors and Mr. Taylor was a leader.[354]

149. The principle that generally aiders and abettors should receive lower sentences than those convicted of principal or more direct forms of liability is not confined to low level aiders and abettors. Substantial reductions in sentences can also be applied to higher level defendants who aid and abet crimes committed over a wide geographical area and affecting numerous victims, compared to those who are principal or direct perpetrators of such crimes.

150. An important example of the application of this principle can be found in the *Krstić* case. In that case General Krstić had been found guilty at trial as a principal co-perpetrator in the commission of genocide, crimes against humanity and war crimes for the mass murder of thousands of men and boys and the persecution and mass deportation of thousands of civilian women, children and elderly persons from Srebrenica.[355] The Trial Chamber also found that

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[350] Sentencing Judgement, para. 21 (emphasis added). This principle has been consistently affirmed by the international tribunals, including the Special Court see *CDF* SJ, para. 50, fn. 89; *RUF* SJ, para. 20.
[351] Sentencing Judgement, paras. 36, 100.
[352] Prosecution Appellant's Submissions, para. 227.
[353] Prosecution Appellant's Submissions, para. 227.
[354] Prosecution Appellant's Submissions, paras. 228-9.
[355] *Krstić* TJ, paras. 617, 633, 727.

the elements of command responsibility had been fulfilled such that he had effective command of Drina Corps soldiers participating in the crimes.[356]

151. The Appeal Chamber of the ICTY expressly approved of and applied the principle that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation. The Chamber held that his sentence should be reduced by 11 years because he was found guilty as an abettor to two charges for genocide and murders, instead of as a co-perpetrator.[357] The sentence was reduced on this basis despite the fact that his conviction as a direct co-perpetrator for other mass crimes was upheld.[358] In doing so the Appeals Chamber held:

> Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the *Vasiljević* case, *aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator*. This principle has also been recognized in the ICTR and in many national jurisdictions. *While Radislav Krstić's crime is undoubtedly grave, the finding that he lacked genocidal intent significantly diminishes his responsibility. The same analysis applies to the reduction of Krstić's responsibility for the murders* as a violation of laws or customs of war committed between 13 and 19 July 1995 in Srebrenica. As such, *the revision of Krstić's conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence.*[359]

152. Accordingly, in this case the lower level of intent of a senior military commander convicted of aiding and abetting as opposed to being a direct or principal perpetrator in some crimes (while remaining a principal or direct co-perpetrator in other crimes), was a relevant factor to be considered in applying the above mentioned general principle and substantially reducing sentence.

153. Applying this reasoning to the present case, Mr. Taylor was found to have aided and abetted crimes with knowledge, but not the intent of the principal perpetrator to commit them.[360] He did not act pursuant to a common plan to terrorise the civilian population of Sierra Leone.[361] He did not command or control perpetrators.[362] Accordingly, his intent was at

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[356] In this regard the Trial Chamber held that it not enter a conviction to that effect because in its view general responsibility for the participation of his troops in the killings was sufficiently expressed in a finding of guilt under individual criminal responsibility. *Krstić* TJ, para. 652.
[357] *Krstić* AJ, paras. 266, 275. *Krstić* TJ, para. 726.
[358] *Krstić* AJ, paras. 145, 151.
[359] *Krstić* AJ, para. 266 (emphasis added).
[360] Judgement, paras. 6947-50.
[361] Judgement, paras. 6896, 6898-9.
[362] Judgement, para. 6985.

a lower level than principal perpetrators who were part of the JCE and/or who committed the crimes and of those superiors who had effective control over the perpetrators. This should have served to significantly diminish his responsibility (despite his conviction for planning) and should have resulted in a substantially lower sentence.[363] As such the Trial Chamber erred by not considering and applying this principle.

154. While the Trial Chamber correctly identified the applicable law, it declined to assess its application to facts of Mr. Taylor's case and held:

> ...the jurisprudence of this Court, as well as the ICTY and ICTR, holds that aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation. While generally, the application of this principle would indicate a sentence in this case that is lower than the sentences that have been imposed on the principal perpetrators who have been tried and convicted by this Court, the Trial Chamber considers that the special status of Mr. Taylor as a Head of State puts him in a different category of offenders for the purpose of sentencing.[364]

155. The Trial Chamber thus declined to apply this principle. It did not do so on a proper basis, that is after consideration of Mr. Taylor's conduct or intent or on the basis of comparable sentencing practice from international courts and in particular the SCSL. It rejected any reduction in sentence solely on the basis of Mr. Taylor's official status as a Head of State. In this regard the Defence submits that the Trial Chamber erred in law and consequently in the exercise of its discretion and refers the Court to its submissions on these issues.[365]

156. Despite the foregoing, the Prosecution submits that paragraph 94 of the Sentencing Judgment demonstrates that Mr. Taylor's sentence was in fact discounted because, as a matter of law, his conduct fell under aiding and abetting rather than JCE or superior responsibility.[366]

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[363] The Prosecution concludes its submissions by making an abstract comparison between the legal elements of aiding and abetting on one hand, and superior responsibility and joint criminal enterprise on the other. The aim of this analysis is unclear but appears to be aimed at showing that the contributions required for these principal or direct forms of liability may require a lower level of participation and intent than accessorial liability under aiding and abetting. Prosecution Appellant's Submissions, paras. 231-3. These submissions are moot since the Trial Chamber did not, as a matter of principle or application, find that Mr. Taylor's sentence should automatically be reduced on the basis of his conviction for accessorial liability. These submissions are also misconceived in the abstract and in particular with reference to the facts of this case and the relative intent of Mr. Taylor, as noted herein.

[364] Sentencing Judgement, para. 100.

[365] Defence Appellant's Submissions, Ground 42, paras. 839-50.

[366] Prosecution Appellant's Submissions, para. 226.

157. A plain reading of this paragraph does not support this argument. As set out above in the Defence's submissions on Mr. Taylor's planning conviction, the paragraph describes the extent to which Mr. Taylor has been convicted of "principal or significant modes of liability" as compared to those primary modes of liability with which he was charged. It does not refer, either explicitly or implicitly, to accessorial liability. It does not compare principal liability with accessorial liability as a matter of law. It does not address Mr. Taylor's accessorial liability as a matter of fact. It does not set a sentencing tariff for Mr. Taylor. It does not discount sentence for Mr. Taylor. The paragraph clarifies that Mr. Taylor was convicted of planning but not of JCE or superior responsibility, and therefore he cannot be sentenced for forms of principal liability for which he has not been convicted.

III. CONCLUSION

158. The Prosecution has identified no error of law or error of fact which occasions a miscarriage of justice and warrants upholding any of the grounds it advanced. Subject to the grounds of appeal advanced by Mr. Taylor, not referenced above in an exhaustive manner, the Trial Chamber acted within the discretion accorded to it in addressing the applicability of multiple modes of liability, and committed no error of fact in respect of its factual findings. The Prosecution's submissions demonstrate only its disagreement with the Trial Chamber's interpretation of the evidence and consequent acquittal.

159. For the foregoing reasons, Charles Taylor respectfully requests that the Appeals Chamber dismiss the Prosecution appeal of the Judgement and Sentencing Judgement.

Respectfully submitted,

Morris Anyah **Lead Counsel for** **Charles G. Taylor**	Eugene O'Sullivan Co-Counsel for Charles G. Taylor	Christopher Gosnell Co-Counsel for Charles G. Taylor	Kate Gibson Co-Counsel for Charles G. Taylor

Dated this 23rd Day of November 2012, The Hague, The Netherlands

IV. BOOK OF AUTHORITIES

1. SPECIAL COURT FOR SIERRA LEONE

A. *Legal Instruments*

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B. *Taylor* Case

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Public Annex B

Public Documents Appended to the Book of Authorities of the Respondent's Submissions of Charles Ghankay Taylor

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

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.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

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:

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.

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 recognized as indispensable by civilized peoples;
h. Threats to commit any of the foregoing acts.

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, material, 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 to the protection given to civilians or civilian objects under the international law of armed conflict;
c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

    i. Abusing a girl under 13 years of age, contrary to section 6;

    ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;

    iii. Abduction of a girl for immoral purposes, contrary to section 12.

b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;

ii. Setting fire to public buildings, contrary to sections 5 and 6;

iii. Setting fire to other buildings, contrary to section 6.

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. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

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.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:

a. The act for which he or she was tried was characterized as an ordinary crime; or
b. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
b. The Prosecutor; and
c. The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General").
b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the

Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. 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.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

a. A procedural error;
b. An error on a question of law invalidating the decision;
c. An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

a. Reconvene the Trial Chamber;
b. Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual Report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN, SIERRA LEONE

RULES OF PROCEDURE AND EVIDENCE

Amended on 7 March 2003
Amended on 1 August 2003
Amended on 30 October 2003
Amended on 14 March 2004
Amended on 29 May 2004
Amended on 14 May 2005
Amended on 13 May 2006
Amended on 24 November 2006
Amended on 14 May 2007
Amended on 19 November 2007
Amended on 28 May 2010
Amended on 16 November 2011
Amended on 31 May 2012

Part V - PRE-TRIAL PROCEEDINGS

Section 1: Indictments

Rule 47: Review of Indictment (*amended 1 August 2003*)

(A) An indictment submitted in accordance with the following procedure shall be approved by the Designated Judge.

(B) The Prosecutor, if satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court, shall prepare and submit to the Registrar an indictment for approval by the aforementioned Judge.

(C) The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

(D) The Registrar shall submit the indictment and accompanying material to the Designated Judge for review.

(E) The designated Judge shall review the indictment and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that:

(i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and

(ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment.

(F) The Designated Judge may approve or dismiss each count.

(G) If at least one count is approved, the indictment shall go forward. If no count is approved, the indictment shall be returned to the Prosecutor.

(H) Upon approval of the indictment:

(i) The Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the proceedings in accordance with these Rules.; and

(ii) The suspect shall have the status of an accused.

(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently submitting an amended indictment including that count.

the Appeals Chamber accepts his recommendation and decides to rule on the appeal solely on the written submissions of the parties.

(C) The Pre-Hearing Judge shall record the points of agreement and disagreement between the parties on matters of law and fact. In this connection, he or she may order the parties to file further written submissions with the Pre-Hearing Judge or the Appeals Chamber.

(D) The Appeals Chamber may of its own initiative exercise any of the functions of the Pre-Hearing Judge.

Rule 110: Record on Appeal *(amended 7 March 2003)*

The record on appeal shall consist of the parts of the trial record as designated by the Pre-Hearing Judge, as certified by the Registrar.

Rule 111: Appellant's Submissions *(amended 7 March 2003)*

An Appellant's submissions shall be served on the other party or parties and filed with the Registrar within twenty one days of the notice of appeal pursuant to Rule 108.

Rule 112: Respondent's Submissions *(amended 7 March 2003)*

A Respondent's submissions shall be served on the other party or parties and filed with the Registrar within fourteen days of the filing of the Appellant's submissions.

Rule 113: Submissions in Reply *(amended 7 March 2003)*

(A) An Appellant may file submissions in reply within five days after the filing of the Respondent's submissions.

(B) No further submissions may be filed except with leave of the Appeals Chamber.

Rule 114: Date of Hearing *(amended 7 March 2003 and 24 November 2006)*

(A) The date of any hearing shall be set as provided for by Rule 109(B)(ii)(b).

(B) Where the Appeals Chamber decides that there will be a hearing, the Appeals Chamber or the Pre-Hearing Judge may request the parties to limit their oral submissions to an issue or issues indicated to them in writing.

(C) The Registrar shall notify the parties accordingly.

Rule 115: Additional Evidence *(amended 13 May 2006 and 24 November 2006)*

(A) A party may apply by motion to the Pre-Hearing Judge to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. The motion shall also set out in full the reasons and supporting evidence on which the party relies to establish that the proposed additional evidence was not available to it at trial. The motion shall be served on the other party and

filed with the Registrar not later than the deadline for filing the submissions in reply. Rebuttal material may be presented by any party affected by the motion.

(B) Where the Pre-Hearing Judge finds that such additional evidence was not available at trial and is relevant and credible, he will determine if it could have been a decisive factor in reaching the decision at trial. Where it could have been such a factor, the Pre-Hearing Judge may authorise the presentation of such additional evidence and any rebuttal material.

(C) The Appeals Chamber may review the Pre-Hearing Judge's decision with or without an oral hearing.

Rule 116: Extension of Time Limits *(amended 19 November 2007)*

The Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause. Where the Appeals Chamber is seised of such a motion at a time that it is not fully constituted due to the unavailability of one of its Members for any reason, the remaining Judges of the Appeals Chamber or a Judge designated by them, may rule on the motion if satisfied that it is in the interests of justice to do so.

Rule 117: Expedited Procedure *(amended 29 May 2004)*

(A) A reference under Rule 72(E) or (F), or any appeal under Rules 46, 65, 73(B), 77 or 91 shall be heard expeditiously by a bench of at least three Appeals Chamber Judges and may be determined entirely on the basis of written submissions.

(B) All time limits and other procedural requirements not otherwise provided for in these Rules shall be fixed by a practice direction issued by the Presiding Judge.

(C) Unless as otherwise ordered, Rules 109 to 114 and 118(D) shall not apply to such procedures.

Rule 118: Judgement on Appeal *(amended 7 March 2003 and 24 November 2006)*

(A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal and any oral arguments and additional evidence that has been presented to it.

(B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

(C) In appropriate circumstances the Appeals Chamber may order that the accused be retried before the Trial Chamber concerned or another Trial Chamber.

(D) If the Appeals Chamber reverses an acquittal of an accused by the Trial Chamber on any count, the Appeals Chamber shall proceed to sentence the accused in respect of that offence.

(E) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERR A 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

PRACTICE DIRECTION ON THE STRUCTURE OF GROUNDS OF APPEAL BEFORE THE SPECIAL COURT

Adopted on 1 July 2011
Amended 23 May 2012

PREAMBLE

The President of the Special Court for Sierra Leone ("Special Court");

CONSIDERING the Statute of the Special Court ("Statute") as annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002; and in particular Article 20 of the Statute which provides that the Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on a procedural error, an error on a question of law invalidating the decision, or an error of fact which has occasioned a miscarriage of justice;

CONSIDERING the Rules of Procedure and Evidence of the Special Court ("Rules"); in particular Rules 111, 112 and 113 which deal with the procedure for filing of written submissions by the Parties in appeals from final judgement;

11. The Appellant shall maintain a respectful and decorous tone in his/her submissions.

The Respondent's Submissions

12. The opposite party ("Respondent") shall file in accordance with the Statute and the Rules a Respondent's Submission, containing the following, with the appropriate titles and in the order herein indicated:
(a) a table of contents with page references;
(b) an introduction containing a statement of the subject matter, the specific provision of the Rules pursuant to which the Respondent's Submissions is filed and the date of any interlocutory filing or decision relevant to the appeal;
(c) a statement on whether or not the ground of appeal is opposed and arguments in support thereof;

13. The statements and arguments must be set out and numbered in the same order as in the Appellant's Submissions and shall be limited to arguments made in response thereto. The Respondent shall maintain a respectful and decorous tone in his/her submissions

Submissions in Reply

14. An Appellant may file, in accordance with the Statute and the Rules, Submissions in Reply, limited to arguments in reply to the Respondent's Submissions, set out and numbered in the same order as in previous Submissions.

The Book of Authorities

15. The parties' Submissions shall be accompanied by a "Book of Authorities" setting out clearly all authorities relied upon.

16. The Book of Authorities shall be numbered consecutively and shall include a table of content describing each document, including the date and reference, a legible copy of the pages of or excerpts from every referenced material including case law, statutory and regulatory provisions from the Special Court, international tribunals and national sources to which the parties actually refer in the parties' submissions or intends to refer in the parties' oral arguments.

17. Authorities not in the official language of the Special Court shall be translated accordingly

18. A party may object to a translation by filing no later than 15 days from the filing of the Book of Authorities the translation which he/she contends is the correct translation instead of the translation challenged.

19. In the filing of the Book of Authorities, in respect of any appeal to be decided in Freetown, the parties shall be guided by Article 7 of the Practice Direction on Filing Documents before the Special Court, adopted on 27 February 2003, as amended on 16 January 2008.

20. In the filing of the Book of Authorities, in respect of any appeal to be decided in The Hague, the parties shall be guided by Article 7 of the Practice Direction on Dealing with Documents in The Hague Sub-Office, adopted on 16 January 2008 as amended on 25 April 2008.

21. The Book of Authorities shall not count towards the word and page limits set out in either the Practice Direction on Filing Documents before the Special Court or the Practice Direction on Dealing with Documents in The Hague Sub-Office.

22. Failure to file the Book of Authorities prescribed above shall not bar the Appeals Chamber from rendering a judgment, a decision or an order as it sees fit in the appeal.

Additional Evidence

23. A party applying to present additional evidence must do so by way of motion, in accordance with the Rules, stating:

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SCSL-03-01-A
(2683-2686)

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SCSL

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Pre-Hearing Judge

Registrar: Ms. Binta Mansaray

Date: 16 October 2012

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

Public

DECISION ON PROSECUTION MOTION SEEKING CLARIFICATION OF THE PRACTICE DIRECTION ON THE STRUCTURE OF GROUNDS OF APPEAL BEFORE THE SPECIAL COURT

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Leigh Lawrie
Mr. Christopher Santora
Ms. Kathryn Howarth
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny

Defence Counsel for the Accused:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
16 OCT 2012
NAME SAMUEL J. FORNAH
SIGN
TIME 09:58

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Justice Shireen Avis Fisher, Pre-Hearing Judge of the Appeals Chamber of the Special Court for Sierra Leone ("Special Court"), acting in accordance with the President's "Order Designating a Pre-Hearing Judge Pursuant to Rule 109 of the Rules of Procedure and Evidence",[1] dated 21 June 2012;

BEING SEIZED of the "Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal before the Special Court", filed before the Pre-Hearing Judge on 3 October 2012, seeking clarification as to whether paragraph 16 of the Practice Direction on the Structure of Grounds of Appeal before the Special Court supersedes Article 7 of the Practice Direction on Dealing with Documents in The Hague Sub-Office, or *vice versa*;[2]

NOTING the Defence Response to the Motion, filed on 8 October 2012 ("Response");[3]

CONSIDERING that pursuant to Rule 109(B)(i), the Pre-Hearing Judge shall take any measures related to procedural matters, including the issuing of decisions, orders and directions with a view to preparing the case for a fair and expeditious hearing;

RECALLING that during the Status Conference of 18 June 2012, the parties were reminded that "the Appeals Chamber feels very strongly that this direction [Practice Direction on the Structure of Grounds of Appeal before the Special Court] needs to be complied with...";[4]

CONSIDERING that pursuant to paragraph 29 of the Practice Direction on the Structure of Grounds of Appeal before the Special Court ("2011 Practice Direction"), it is for the Pre-Hearing Judge or the Appeals Chamber to decide whether a party has complied with the requirements laid down in this Practice Direction;

CONSIDERING FURTHER that Article 16 of the 2011 Practice Direction explicitly provides that the Book of Authorities shall include "a legible *copy of the pages of or excerpts* from *every* referenced material *including* case law, statutory and regulatory provisions *from the Special*

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[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1297, Order Designating a Pre-Hearing Judge Pursuant to Rule 109 of the Rules of Procedure and Evidence, 21 June 2012.
[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1327, Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal Before the Special Court, 3 October 2012.
[3] *Prosecutor v. Taylor*, SCSL-03-01-A-1332, Public with Confidential Annex A and Public Annex B Defence Response to Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal before the Special Court, 8 October 2012.
[4] *Prosecutor v. Taylor*, SCSL-03-01-A, Status Conference, Transcript of 18 June 2012, p. 49768.

Court, international tribunals and national sources to which the parties actually refer in the parties' submissions or intends to refer in the parties' oral arguments";[5]

RECALLING that the 2011 Practice Direction was adopted on 1 July 2011 and amended on 23 May 2012 and is, thus, later in law (*lex posteriori*) in relation to the Practice Direction on Dealing with Documents in The Hague Sub-Office, which was adopted on 16 January 2008 and amended on 25 April 2008 ("2008 Practice Direction");

RECALLING further that the aim of adopting the 2011 Practice Direction was "to establish a procedure for the structuring of grounds of appeal and written submissions in appellate proceedings before the Special Court";[6]

CONSIDERING that, in accordance with the principle of effectiveness in interpreting legislation, whereby a piece of legislation as a whole and each of its provisions are to be given effect and are designed to achieve an end, interpretation which favours Article 7 of the 2008 Practice Direction would render paragraph 16 of the 2011 Practice Direction a mere surplusage.

CONSIDERING FURTHER, however, that the Defence could have been reasonably misled by the reference, in paragraph 20 of the 2011 Practice Direction, to Article 7 of the 2008 Practice Direction;

HEREBY ORDERS:

1. That the Motion for Clarification filed by the Prosecution be considered a Motion for Compliance, filed pursuant to paragraph 29 of the 2011 Practice Direction;
2. That the Defence comply with paragraph 16 of the 2011 Practice Direction and file the amended Book of Authorities no later than 31 October 2012.

Done in The Hague, The Netherlands, this 16th day of October 2012.

[5] Emphasis added.
[6] Preamble of the Practice Direction on the Structure of Grounds of Appeal of 1 July 2011, amended 23 May 2012.

Hon. Justice Shireen Avis Fisher
Pre-Hearing Judge

[Seal of the Special Court for Sierra Leone]

1086)

SCSL-03-01-T
(30292 - 30303)

30292

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Ms. Binta Mansaray

Date: 24 September 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE MOTION TO EXCLUDE EVIDENCE FALLING OUTSIDE THE SCOPE OF THE INDICTMENT AND/ OR THE JURISDICTION OF THE SPECIAL COURT FOR SIERRA LEONE

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. This is the Defence motion to exclude evidence falling outside the scope of the Indictment and/ or the jurisdiction of the Special Court for Sierra Leone.[1]
2. The Defence submits that the Motion is timely and appropriate at this stage of the proceedings because it implicates evidentiary matters that arose on a recurring basis during the trial proceedings.[2]
3. During its case, the Prosecution has adduced a great deal of evidence which falls outside the temporal and geographical jurisdiction of the Special Court ("ex-temporal evidence" and "ex-territorial evidence"). The Defence has previously objected to such evidence, including in its Pre-trial Brief filed on 26 April 2007.[3] For example, on 18 April 2008 during the course of the oral testimony of TF1-334, defence counsel objected to evidence of crimes perpetrated on civilians in Koinadugu District on the basis that such crimes are not alleged in the Indictment.[4] The Defence has never waived its objection on this issue, and files the Motion in continuance of its objection.
4. The Defence submits that much of the ex-temporal and ex-territorial evidence adduced in the case is irrelevant to the Indictment, falls outside the jurisdiction of the Special Court and should be excluded from the Trial Chamber's consideration of the evidence in the case when it retires to consider judgment.

II. PRELIMINARY MATTERS

5. The Special Court has held that where the Defence objects to the admissibility of evidence on the basis that it falls outside the scope of the Indictment, the Defence is expected to make a specific objection at the time the evidence is sought to be

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[1] Hereinafter "the Motion". Any references to Indictment in the Motion are to *Prosecutor v. Taylor*, SCSL-03-01-PT-263, "Prosecution's Second Amended Indictment", 29 May 2007.
[2] Rule 72(B) contemplates the filing of preliminary motions based on lack of jurisdiction and Rule 72(A) mandates that such motions be brought by either party within 21 days following disclosure by the Prosecution to the Defence of all the material envisaged by Rule 66(A)(i).[2]
[3] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 April 2008, p. 8054; Trial Transcript, 21 April 2008, p. 8077; Trial Transcript, 7 May 2008, p. 9148; Trial Transcript, 5 November 2008, p. 19798. *Prosecutor v. Taylor*, SCSL-03-01-PT-229, "Rule 73*bis* Taylor Defence Pre-trial Brief", 26 April 2007, paras. 9-23 (Hereinafter "Defence Pre-trial Brief").
[4] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 April 2008, p. 8054.

introduced.[5] However, failure to do so "is not... an absolute bar to raising such a challenge on appeal".[6] Indeed, at the ICTR, the Trial Chamber in *Bizimungu* confirmed that it may deal with such matters even after the testimony has finished where the interests of justice so require.[7]

6. In the present case, the Defence did raise specific objections at the time in certain instances.[8] However, the use of ex-temporal and ex-territorial evidence by the Prosecution has been so widespread that it proved impractical for the Defence to raise the same objection at every turn. Nevertheless, the Defence's objection to the overarching inclusion of ex-temporal and ex-territorial evidence has been well-noted. Indeed, the Defence's Pre-trial Brief contained a specific section urging "the Trial Chamber to be vigilant in ensuring there is no expansion of the territorial or temporal jurisdiction of the Court via the back door".[9] There is no reason, therefore, why the Defence should be barred from raising this matter now or later on appeal.
7. In addition, it is in the interests of justice to decide on this matter even after testimony has finished, given the centrality of the ex-temporal and ex-territorial evidence to the case, as will be further outlined below.
8. It should also be noted that the Defence's objection is not solely to the form of the Indictment, since much of the ex-temporal and ex-territorial evidence adduced in this case falls outside the scope of the Indictment and the jurisdiction of the Special Court and could not have been charged in the Indictment in any event. To this end, the Defence also objects to the use of Rule 89(C) and Rule 93 by the Prosecution to incorporate evidence which falls outside of the remit of the Special Court into its case as if it were one with the evidence adduced to prove the crimes alleged in the Indictment. Under this head, in particular, the Defence has in mind the evidence relating to alleged crimes in Liberia, in the geographical sense, and to crimes which pre-date 1996, in the temporal sense. This is set out in more detail below.

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[5] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, "Trial Judgment", 2 March 2009, para. 337 (Hereinafter "RUF Trial Judgment").
[6] *Prosecutor v. Brima et al.*, SCSL-04-16-A, "Appeal Judgment", 22 February 2008, paras. 42-43.
[7] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, "Decision on Motion from Casimir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA", 23 January 2004, para. 18.
[8] Motion, para. 3, fn. 3.
[9] Defence Pre-trial Brief, para. 9.

III. APPLICABLE LAW

9. The temporal jurisdiction of the Special Court is limited to crimes which occurred within the period extending from 30 November 1996 to January 2002. The geographical jurisdiction of the Special Court is limited to crimes which occurred within the territory of the Republic of Sierra Leone.[10] In assessing the admissibility of evidence which falls outside these boundaries, the following rules are significant:

   a) Rule 89(C) provides that "A Chamber may admit any relevant evidence".[11]

   b) Rule 93 provides that "Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice".[12]

   c) Rule 95 provides that "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute".[13]

10. In addition, case-law has clarified the need to take into account the probative value and prejudicial effect of the evidence in question. In the ICTR, in the case of *Bagosora et al.*, the Appeals Chamber held that:

> "Rule 93 does not create an exception to Rule 89(C), but rather is illustrative of a specific type of evidence which may be admitted by a Trial Chamber. Rule 93 must be read in conjunction with Rule 89(C), which permits a Trial Chamber to admit any relevant evidence which it deems to have probative value. Even where pattern evidence is relevant and deemed probative, the Trial Chamber may still decide to exclude the evidence in the interests of justice when its admission could lead to unfairness in the trial proceedings, such as when the probative value of the proposed evidence is outweighed by its prejudicial effect".[14]

While the Special Court's Rule 89(C) differs from that of the ICTR and ICTY, in that the Special Court's Rule 89(C) does not explicitly provide for the probative value and prejudicial effect of the evidence in question to be considered, there is still the

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[10] Special Court for Sierra Leone, Statute, Article 1 (Hereinafter "the Statute").
[11] Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 89(C) (Hereinafter "the Rules").
[12] Rules, Rule 93(A).
[13] Rules, Rule 95.
[14] *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR93.2, "Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence", 19 December 2003, para. 13 (Hereinafter "Bagosora Appeal Decision").

requirement to do so where the effect of the evidence would infringe Rule 95.[15] One must also, of course, consider the fair trial rights of the Accused guaranteed under Article 17 of the Statute, as well as the requirement under Article 20(3) to follow, where necessary, the guidance provided by the ICTR and ICTY.

IV. ARGUMENT

11. Evidence must be relevant and not adversely prejudicial to be admissible.[16] Such relevant evidence may include evidence which falls outside the scope of the Indictment.[17] Indeed, the present Trial Chamber, in its Rule 98 Decision, took into account evidence which pre-dated the Indictment period.[18] As to what qualifies as "relevant", there is no exhaustive list, but case-law offers some guidance; for example, the Trial Chamber in the RUF case held that:

> "evidence is admissible if it bears on facts in issue, such as the role of the Accused in the RUF, the existence of a joint criminal enterprise, the RUF command structure, or the existence of *de facto* authority or control over subordinates. Evidence which provides the Chamber with background and context in which to understand the conflict or the testimony of a Witness is also admissible."[19]

12. In its oral submissions on the topic, the Prosecution has argued that evidence falling outside the scope of the Indictment is relevant on the following grounds: (a) to prove there was a widespread and systematic attack on the civilian population of Sierra Leone; (b) to show there was a coordinated campaign of terror within Sierra Leone; (c) under Rule 93 as evidence of a consistent pattern of conduct; and (d) to illustrate the Accused's *mens rea*, namely his knowledge of, awareness of and/ or intent to cause the crimes which took placing in Sierra Leone.[20]

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[15] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr Koker", 23 May 2005, para. 6.
[16] *Prosecutor v. Ngeze and Nahimana*, ICTR-99-52-A, "Decision on the Interlocutory Appeals – Separate Opinion of Judge Shahabuddeen", 5 September 2000, para. 19 (Hereinafter "Shahabuddeen Opinion"); *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003.
[17] RUF Trial Judgment, para. 482.
[18] For example, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 4 May 2009, p. 24207 (Hereinafter "Rule 98 Decision").
[19] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, "Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment", 26 June 2008, para. 11.
[20] For example, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 21 April 2008, pp. 8077-8079; Trial Transcript, 7 May 2008, pp. 9148-9149.

13. Such submissions have been accepted by the Trial Chamber as providing context of one type or another, *without being evidence on which guilt is determined.* This, of course, accords with the fundamental principle that an accused can only be convicted of crimes for which he is indicted as is illustrated in the Trial Chamber's reasoning in the AFRC case:

> "While such evidence may support proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for those crimes may be made in respect of such locations not mentioned in the indictment."[21]

14. However, there is a fine line between relevance for context and the danger that the evidence serves as the basis for a conviction, especially when one is faced with a mass of "contextual" evidence as in this case. Indeed, the Trial Chamber has already based its findings on the Rule 98 Decision in part on such "contextual" evidence.[22]

15. The Defence submits that there is so much evidence outside the scope of the Indictment at bar, that it amounts to prejudice of such a nature which far outweighs any probative value of such evidence. In that sense it contravenes both Rule 95 and Article 17.[23] In what follows, for ease of reference, the evidence has been divided into evidence which falls outside the temporal scope of the Indictment and evidence which falls outside of the geographical scope of the Indictment.

A. Evidence falling outside of the temporal scope of the Indictment

(i) Joint Criminal Enterprise

16. The Defence particularly draws attention to the problems associated with the charge of joint criminal enterprise (JCE). In its Amended Case Summary, the Prosecution made reference to a common plan between the Accused and Foday Sankoh which originated in the late 1980s, which is not merely contextual, but is a crucial element of the alleged JCE.[24] The Trial Chamber will have to determine guilt based on events which occurred up to ten years before the commencement of the Indictment period. The Defence submits that this is not within the Special Court's jurisdiction to decide.

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[21] *Prosecutor v. Brima et al.*, SCSL-04-16-T, "Trial Judgment", 20 June 2007, para. 37.
[22] Rule 98 Decision, pp. 24209-24210.
[23] Rules, Rule 95; Statute, Article 17(2).
[24] *Prosecutor v. Taylor*, SCSL-03-01-T-327, "Case Summary Accompanying the Second Amended Indictment", 3 August 2007, paras. 1-3, 42 and 44.

17. Indeed, even were the Trial Chamber merely to consider and not rule on such evidence, the Defence submits that there must be a limit to the extent to which evidence which falls outside the scope of the Indictment and/ or jurisdiction of the Special Court can be taken into consideration by the Trial Chamber in assessing the guilt of the Accused.[25] Otherwise, there is a real danger that such a sheer mass of evidence will have an impact on the Trial Chamber's findings. Indeed, it becomes so prejudicial to the Accused, that such evidence violates Rule 95, and infringes the Accused's own fair trial rights guaranteed under Article 17.

(ii) Evidence of atrocities in Liberia

18. The evidence adduced by the Prosecution concerning the Accused's alleged involvement in atrocities in Liberia has little relevance or probative force other than to blacken the Accused's reputation with the Trial Chamber; indeed, it clearly has nothing to do with the charges the Accused faces in respect of Sierra Leone.[26] Throughout the trial, the Accused has had to face such evidence being admitted via the back door that is Rule 93, despite the warning given by the Trial Chamber in *Kupreškić* that Rule 93 cannot be used to simply show the bad character of an accused.[27] The Defence submits such evidence is contrary to Rule 95, Article 17, and the jurisprudence of the international tribunals.[28]

B. Evidence falling outside of the geographical scope of the Indictment

(i) Evidence which could fall inside the scope of the Indictment but which does not

19. The Prosecution has led evidence on the commission of crimes in certain districts of Sierra Leone which does not fall within the crimes charged in the Indictment, but which nevertheless could have been pleaded within the Indictment. For example, witness TF1-334 testified to the crimes which occurred in Koinadugu District.[29]

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[25] Indeed, the Trial Chamber seems to have recognised there is a limit to the Prosecution's ability to adduce ex-temporal evidence; for instance, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 22 January 2008, pp. 1842-1845.

[26] For instance, the evidence of TF1-399: *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 12 March 2008, pp. 5913-5919.

[27] *Prosecutor v. Kupreškić et al.*, IT-95-16-T, "Decision on Evidence of Good Character of the Accused and the Defence of Tu Quoque", 17 Feburary 1999, para. 31.

[28] Bagosora Appeal Decision; Shahabuddeen Opinion; *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", 18 September 2006.

[29] See, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 April 2008, p. 8054.

Likewise, witness TF1-028 testified to crimes which occurred in Bombali District.[30] Neither district of Sierra Leone, nor the alleged crimes occurring therein were pleaded in the Indictment.

20. The Defence submits these locations should have been pleaded in the Indictment. The evidence is not merely background information: there is nothing to differentiate this evidence from evidence adduced to prove crimes occurring within districts that were expressly pleaded in the Indictment; its prejudicial effect is the same.

21. The Prosecution has argued that this additional evidence is necessary to prove: (a) there was a widespread and systematic attack on the civilian population of Sierra Leone; (b) there was a coordinated campaign of terror within Sierra Leone; and (c) the Accused's knowledge of, awareness of and/ or intent to cause the crimes which were taking placing in Sierra Leone.[31] However, such elements can easily be adduced from the crimes and locations already charged in the Indictment. The Indictment is the main charging instrument against the Accused and the means by which the Accused is notified of the charges he must face at trial. It is axiomatic that the Prosecution cannot circumvent the requirements of the Indictment by adding layer upon layer of alternative locations in which crimes were committed, without formally charging the Accused with those crimes; evidence of such ex-territorial crimes provide so little probative value and are so prejudicial to the Accused, such that they contravene both Rule 95 and Article 17.

22. To view such evidence in any other way would result in the serious danger that, uniquely among international courts, the Special Court would be seen as having permitted a Prosecutor to charge an accused with as few particulars as possible, while having held back the particulars into which the bulk of the evidence falls for admission via the back door at trial under the guise of "relevant" evidence. This may be strategic for a Prosecutor, but should not be countenanced by any reasonable tribunal.

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[30] See, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 7 May 2008, p. 9148.
[31] See above, para. 12, fn. 20.

23. For the foregoing reasons, the Defence submits that evidence of crimes committed in locations of Sierra Leone not pleaded in the Indictment should be excluded from the Trial Chamber's deliberations.

(ii) Evidence potentially falling outside the jurisdiction of the Special Court

24. The Prosecution has led evidence on the commission of crimes in territories over which the Special Court does not have the jurisdiction to rule. This particularly concerns crimes allegedly involving the Accused in Liberia, but at times expands to incorporate the Accused's alleged role in conflicts, arms-dealing and diamond-dealing throughout the African continent.

25. This evidence has been brought into the proceedings under the ambit of Rule 93. However, Rule 93 does not provide an unregulated or unrestricted route for the admission of evidence demonstrating a consistent pattern of conduct; rather, such evidence may only be admitted where it is in the interests of justice to do so. This point was raised by defence counsel on 21 April 2008.[32] Nevertheless, the Trial Chamber has on at least one occasion refused to assess the probative value of the evidence in question, despite the fact that an assessment of the interests of justice must invariably include an assessment of the probative value of the evidence against its prejudicial effect.[33]

26. The Defence submits that this ex-territorial evidence is irrelevant, contrary to the interests of justice and, in any event, adversely prejudicial to the Accused such that it contravenes both Rule 95 and Article 17. As such it should be excluded from the Trial Chamber's deliberations.

V. CONCLUSION

27. This Motion is directed squarely at ex-temporal and ex-territorial evidence led by the Prosecution during its case-in-chief. While the Defence may also have led such evidence during the Defence's case, the necessity for doing so often was directly related to rebutting Prosecution evidence. Bearing in mind that the Defence has no burden of proof and never has an obligation to put forth a case, whether or not the

[32] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 21 April 2008, pp. 8079-8080.
[33] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 5 November 2008, p. 19800.

Defence has led such evidence is immaterial and of no consequence to the relief being sought herein vis-à-vis Prosecution evidence.

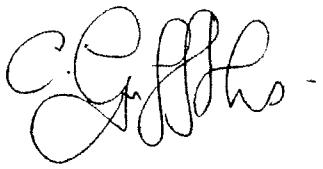
28. For all of the foregoing reasons, the Defence respectfully requests that the Trial Chamber grant the following relief:

(a) Exclude Prosecution evidence which falls outside the temporal scope of the Indictment, OR impose limits on the scope to which such evidence may be taken into consideration;

(b) Exclude Prosecution evidence of crimes committed in locations within Sierra Leone not pleaded in the Indictment, OR impose limits on the scope to which such evidence may be taken into consideration; and

(c) Exclude Prosecution evidence of crimes committed outside of Sierra Leone and impermissibly admitted pursuant to Rule 93 or other Rules.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 24th Day of September 2010,
The Hague, The Netherlands

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SCSL-03-01-PT
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THE SPECIAL COURT FOR SIERRA LEONE

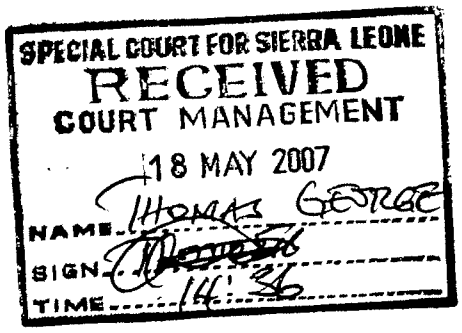
In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 18 May 2007

Case No.: SCSL-2003-01-PT



THE PROSECUTOR

–v–

DAHKPANNAH CHARLES GHANKAY TAYLOR

PUBLIC

CORRIGENDUM TO

RULE 73 *bis*

TAYLOR DEFENCE PRE-TRIAL BRIEF

Office of the Prosecution
Mr. Stephen Rapp
Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Leigh Lawrie

Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 26 April 2007

Case No.: SCSL-2003-01-PT

THE PROSECUTOR

–v–

DAHKPANNAH CHARLES GHANKAY TAYLOR

PUBLIC

CORRECTED VERSION OF:

RULE 73 *bis*

TAYLOR DEFENCE PRE-TRIAL BRIEF

Office of the Prosecution
Mr. Stephen Rapp
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Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

Procedure and Evidence that "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."

7. The Defence is not required to make any admissions at any stage of proceedings in a criminal trial. This is a corollary to the presumption of innocence. Be that as it may, any decision by the Defence not to expressly or implicitly address or rebut, in the present filing, any aspect of the Prosecution's case theory or evidence, as detailed in the Prosecution Pre Trial Brief and / or in the Amended Indictment,[14] should not be considered to be an acceptance of any fact alleged or law propounded by the Prosecution, or a concession in any respect, unless expressly and unambiguously stated to the contrary.

III. Factual Background

8. The Defence has engaged in a dialogue with the Prosecution and the facts agreed by both parties have been filed separately in a joint filing.[15] It stands to reason, therefore, that all facts not currently agreed by the parties, are in dispute and need to be proved by the Prosecution at trial as far as they are material to the indictment, save to the extent that further facts are agreed by the parties in due course.

IV. Territorial and Temporal Limitations of the Amended Indictment

9. The charges against Mr. Taylor are set out in the Amended Indictment. These charges must fall within the territorial and temporal jurisdiction of the Special Court. The Prosecution Pre-Trial Brief and Pre-Conference materials disclose numerous examples where the Prosecution are apparently relying upon alleged facts pre-dating the indictment period and alleged conduct said to have been committed outside the territory of Sierra Leone. The Defence would urge the Trial Chamber to be vigilant in ensuring that there is no expansion of the territorial or temporal jurisdiction of the Court via the back door under the guise of Rule 93 of the Special Court's Rules of Procedure and Evidence.

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[14] *Prosecutor v. Taylor*, SCSL-03-01-I-75, Amended Indictment, 16 March 2006.
[15] Agreed Facts and Law.

10. Rather than precisely focusing on the temporal jurisdiction of the indictment, the Prosecution seek to cobble together alleged conduct geographically and temporally separated in a bid to establish its case. The Defence submit that the manner in which it seems the Prosecution intend to put its case is impermissible and should, in any event, viewed with circumspection. The Prosecution, for example, state that Mr. Taylor's alleged culpable conduct resulting in the crimes allegedly committed by the RUF, Junta, AFRC/RUF and Liberian fighters, detailed in the Amended Indictment and Prosecution Pre-Trial Brief, occurred "[p]rior to and throughout the conflict in Sierra Leone".[16] The only relevant test, of course, is whether any alleged crimes were committed in the period of the indictment.

11. Similarly, the Prosecution Pre-Trial Brief includes a number of allegations concerning the civil war in Liberia. For example, in paragraph 11 of the Prosecution Pre-Trial Brief, it is alleged that "from the beginning of the conflicts in Liberia and Sierra Leone, both the NPFL and the RUF engaged in ongoing widespread crimes against the civilian populations of those countries."

12. The Defence submits that this claim is wholly improper. The Prosecutor of the Special Court of Sierra Leone has no mandate, authority or jurisdiction to allege crimes anywhere other than in Sierra Leone. By making this assertion, he is acting *ultra vires* his authority. The attempt to rely upon evidence outside the territorial and temporal jurisdiction of the Special Court, in relation to another State's affairs, is wholly unwarranted and unacceptable as a matter of law. With respect, it exposes a fundamental misconception of the Prosecution in the theory it seeks to advance.

13. Similarly, in relation to the use of child soldiers, the Prosecution alleges that the "[t]he RUF brought this practice to Sierra Leone from Liberia, where the NPFL engaged in the same criminal conduct".[17] To substantiate this allegation, and to be probative, the Prosecution will have to produce evidence to establish beyond a reasonable doubt that child soldiers were used

[16] Prosecution Pre-Trial Brief. For examples of this and other overbroad language, see paras. 6, 16, 18, 21, 24, 42, 45, 50, 54, 58, 61, 62, 63, and 64.
[17] Prosecution Pre-Trial Brief, para. 18.

in the Liberian war; that, (contrary to well known reality) that the use of "child soldiers" did not pre-date the Liberian conflict, nor was it practiced throughout Africa and many other regions where civil wars and armed insurrections have taken place; and that the use of child soldiers was not independently adopted in Sierra Leone for reasons which had nothing at all to do with the alleged practices in the Liberian civil war in general or Mr. Taylor in particular. Such a convoluted theory is legally dubious and antithetical, in the respectful submission of the Defence, to a fair, concise and focused trial.

14. The Prosecution is allowed to present evidence of a consistent pattern of conduct only if it falls within the scope of Rule 93(A), which provides that:

> "evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the statute may be admissible in the interests of justice".

If the Prosecution intends to present evidence of allegations outside the territorial and temporal jurisdiction of the Special Court and outside the scope of the Amended Indictment, the Trial Chamber is invited to consider the parameters already set by the Special Court's sister tribunals.

15. The scope of Rule 93 has been determined by the ICTR case of *Bagosora et al*, where the Prosecution sought to introduce evidence from a period pre-dating the temporal jurisdiction of the Tribunal. The Trial Chamber held that the Prosecution was only allowed to do so if the alleged events were relevant to and probative of, crimes committed during the time-period of the temporal jurisdiction. Even if relevant and probative the Trial Chamber would still exclude the evidence if unduly prejudicial.[18]

16. The Trial Chamber noted three possible instances when evidence of acts occurring prior to the temporal jurisdiction of the Tribunal (1994) might be relevant and admissible. First, it stated that evidence of acts occurring prior to the mandate year may be relevant to an offence which

[18] *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, paras. 8, 16, 17.

continues into the mandate year. Second, the Court considered that evidence of pre-1994 events providing background or context and *which do not form part of the crimes charged*, could be admissible. Finally, the Trial Chamber considered that evidence of pre-1994 events could be admitted as "similar fact evidence". [19]

17. The Appeals Chamber affirmed the Trial Chamber's ruling in *Bagosora*, holding that under Rule 93, pattern evidence may be relevant to serious violations of international humanitarian law, but even where pattern evidence was relevant and probative, the Appeals Chamber held that the Trial Chamber could still decide to exclude the evidence *in the interests of justice* when its admission could lead to *unfairness* in the trial proceedings, such as *when the probative value of the proposed evidence is outweighed by its prejudicial effect*, pursuant to the Chamber's duty to ensure a fair trial.[20] In that case, the Trial Chamber had determined that the introduction of prior criminal acts of the Accused would be inadmissible for the purpose of demonstrating "a general propensity or disposition" to commit the crimes charged.[21]

18. In light of the Trial Chamber's decision in *Bagosora*, confirmed on appeal, it is submitted that the Prosecution can only introduce evidence of alleged prior criminal acts of Mr. Taylor if they point to the existence of a common plan or design. The Defence reserve the right to object to the admission of any such evidence where its prejudicial effect outweighs its probative value. One of the primary considerations for the Trial Chamber, it is suggested, will be the time lapse between the event(s) cited and the beginning of the indictment and whether the alleged previous act or relationship can be said to be probative on a *continuing* criminal common plan during the indictment period.

19. In relation to all the other allegations of criminal conduct prior to the Amended Indictment period, the Defence contend that these are not relevant to the charges in the Amended

[19] *Ibid.* relying on Judge Shahabuddeen's Opinion as discussed in para. 19.
[20] *Prosecutor v. Bagosora et al*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003. para. 2.
[21] *Prosecutor .v Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 14.

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Indictment and only go to demonstrate "a general propensity or disposition" to commit the crimes charged.[22]

20. The same reasoning applies to allegations of criminal conduct said to have taken place in regions outside the territorial scope of the Amended Indictment and the Special Court's jurisdiction. Allegations of serious criminal conduct in Liberia in particular have no bearing on the alleged criminal conduct in Sierra Leone, not only because the conflicts occurred in different time frames, but also because they involved a different cast of alleged perpetrators. Evidence of the war in Liberia, therefore, similarly only goes to demonstrate "a general propensity or disposition" to commit the crimes charged, and should not be admitted in the present proceedings.

21. A trial on alleged activities in Liberia, by proxy, would be a violation of Mr. Taylor's right to a fair trial, and a disservice not only to the people of Sierra Leone but indeed to the citizens of Liberia who have the right to make their own decisions on issues of post-conflict justice.

22. Should the Prosecution be permitted to adduce evidence of extra-territorial acts predating the Amended Indictment period, and in countries other than Sierra Leone, the result will be a series of "trials within a trial" of subsidiary issues, such as the use of child soldiers in the Liberian civil war and alleged conduct by the NPFL and other groups, allegedly committed in the course of a conflict that lasted for several years. The Defence cannot emphasise strongly enough that it has not investigated these matters and that it does not have the means and facilities to conduct investigations into these allegations that fall outside the scope of the Amended Indictment or which do not relate to Sierra Leone.

23. In accordance with the right of Mr. Taylor to have adequate time and facilities to prepare a defence pursuant to Article 17(4)(b), the Defence would require a substantial allocation of additional resources and a very significant period of time to prepare a defence for a case that will have changed complexion beyond all recognition to that pleaded in the Amended Indictment. The introduction of evidence relating to crimes allegedly committed in the war in

[22] *Ibid*, para. 14.

Liberia will necessarily prolong the length of the trial and may render predictions that the trial phase of these proceedings can be completed within 18 months wholly redundant. The Defence pre-trial preparation, already subject to difficult, if not impossible, time constraints, will have to be completely re-assessed with regard to the need for more manpower and resources, which the Defence does not have available to it at present, to be deployed to Liberia and the alleged conduct in that civil war.

V. Context: The Conflict and Charges in the Indictment

A. Context: The Overthrow of the Regime of Samuel Doe and Mr Taylor's Election

24. The Prosecution attempt to portray Mr. Taylor as a brutal dictator or leader who participated in a common plan or design formulated, according to some Prosecution witnesses in the late 1980's, with its purpose to use "criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone".[23] In understanding his motivations, agenda and conduct, and in assessing the Prosecution's characterisations of Mr. Taylor, it is perhaps relevant to understand the situation which existed in Liberia before the entry of NPFL forces in Liberia in 1989, as well as the background to Mr. Taylor's landslide victory in the 1997 democratic elections. It will be seen that Mr. Taylor's rise to power did not involve ousting a democratic Government or one based on the rule of law. It involved the Liberian people, with the help of Mr. Taylor, removing a tyrannical and oppressive regime and after that, winning a resounding democratic mandate at the polls, internationally verified as being "free and fair".

25. Samuel K Doe and a group of disgruntled soldiers seized power in 1981 coup against then President Tolbert, during which they "stormed the Executive Mansion in Monrovia, captured President Tolbert in his pyjamas and disembowelled him."[24] The group subsequently detained thirteen of Tolbert's cabinet members, placed them on trial, and sentenced them to death. The cabinet members were then taken to the beach, tied to telephone poles, and executed by a

[23] Prosecution Pre-Trial Brief, paras. 6-7.
[24] Bill Berkeley, *The Graves Are Not Yet Full: Race, Tribe and Power in the Heart of Africa*, Basics Books, 2001, pg. 31. [Annex A]

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(4869 — 5385)

PUBLIC

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

Before: Hon. Justice Julia Sebutinde, Presiding
Hon. Justice Richard Lussick
Hon. Justice Teresa Doherty

Acting Registrar: Mr. Herman von Hebel

Date filed: 4 April 2007

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-PT

PUBLIC
RULE 73 *bis*

PRE-TRIAL CONFERENCE MATERIALS

PRE-TRIAL BRIEF

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Ann Sutherland

Defence Counsel for Charles Ghankay Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

I. INTRODUCTION

1. The Prosecution files this pre-trial brief addressing the factual and legal issues in this case in compliance with Rule 73*bis* of the Rules of Procedure and Evidence (Rules) and the Trial Chamber's Scheduling Order dated 2 February 2007.[1] As of 4 April 2007, there are no admissions by the parties, no statements of matters not in dispute, nor any agreed facts or law. Absent such admissions, statements or agreed facts and/or law, all matters of fact and law are contested, and the Prosecution has the burden of proving beyond reasonable doubt all elements of the crimes charged, the underlying acts and the modes of liability. The Prosecution pre-trial brief is written in the context of this requirement.

2. Section II provides a factual overview of the case, including the Accused's individual criminal responsibility, and an indication of the evidence which will be relied upon in proving the case.[2] Given that Section II provides an overview of the case, the Prosecution will not discuss every fact it intends to prove nor cite every source of evidence upon which it intends to rely to prove its case.

3. Section III provides the Prosecution's position on the legal issues relevant to this case.

II. FACTUAL OVERVIEW

4. The Prosecution evidence, including expert witnesses, witnesses of fact and documentary evidence, including audiovisual evidence, will prove the following:

5. The Accused, Charles Ghankay TAYLOR was born on 27 or 28 January 1948 in Arthington in the Republic of Liberia. In the late 1980s, the Accused received military training in Libya. While in Libya, the Accused formed or joined the National Patriotic Front of Liberia (NPFL) and became the leader or head of that organised armed group. He remained the leader of the NPFL throughout its existence. From 2 August 1997 until about 11 August 2003, the Accused was the President of the Republic of Liberia.[3]

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[1] *Prosecutor v. Taylor*, SCSL-03-01-PT-171, Scheduling Order For a Pre-Trial Conference Pursuant to Rule 73*bis*, 2 February 2007.
[2] *Prosecutor v. Sesay et al.*, SCSL-04-5-PT-68, Order to the Prosecution to File a Supplemental Pre-Trial Brief, 30 March 2004.
[3] Wits.TF1-139; 546; 548; 554; 561; Keen; Ellis.

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 15 APRIL 2010
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Artur Appazov
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Ms Logan Hambrick Ms Salla Moilanen

A. Yes.
Q. Did any other leader in the sub-region to your knowledge contact Bockarie about your welfare?
A. Yes, I remember when we were in Buedu - when we were in
13:13:24 Buedu, by then all of them had come back. One day we were taken out of the cells and taken to Mosquito's house, where we met Mr Musa Cisse. He said he had been sent there by Charles Taylor to talk on our behalf so that we would be put either on parole or released. But when he gave the message, Mosquito said the only
13:13:50 thing he can do for us without anybody's instruction is to kill us. He said but for him to say he can release us - he said even if Foday Sankoh himself sent a message to him to have us released, he said he would not do it until he was back. So he refused to release us, even to put us on parole.
13:14:11 Q. Who had sent Musa Cisse?
A. Mr Musa Cisse said he was sent there by Charles Taylor to talk to Foday Sankoh - Mosquito to beg him to have us released --
Q. Did Musa Cisse say why Charles Taylor wanted you released?
A. Well, when we went - because Musa Cisse we knew ourselves
13:14:34 in Ivory Coast when we went there. He said he had been sent by Charles Taylor to talk to Mosquito on our behalf so that - first of all, to save our lives; secondly, so as the peace process can have some kind of a start.
Q. So that's why Charles Taylor had sent Musa Cisse to
13:14:55 Mosquito?
A. Yeah. According to Musa Cisse, that was what he sent him for.
Q. Now, did Mosquito follow - take that advice?
A. I have already said it, no, he did not, because Mosquito

said he would not take anybody's - for our release, he said, if Foday Sankoh himself told him to release us, he said he would not do it until Foday Sankoh was back.

Q. Can you help us as to a time when this envoy, Musa Cisse, was sent by Charles Taylor?

A. That was the time when the peace process was on.

Q. Which peace process?

A. The Lome peace arrangement was on. That was the time. When the Lome Peace Agreement was on.

Q. Now, the Lome Peace Agreement was signed in 1999, yes?

A. Yeah.

Q. Was it prior to the signing that Musa Cisse was sent by Charles Taylor?

A. Of course. It was prior to the signing.

Q. Whilst you were in custody, Mr Fayia, were you ever given a trial or court-martial by the RUF?

A. Yes. There was a day when Mosquito - we did not know that he had met with the War Council and they had come to an agreement to have us tried. They tried us - according to them, they tried us in a court-martial. They marched all of us to the hall where they were waiting us with all the scars - not scars, with all the wounds, because the wounds have just got - we were so messed up, the wounds were very, very fresh. Flies were all over our bodies. They told us to go inside there to be tried, and the judge was one Mr Baindah. One Mr Baindah was the judge. He has gone back to Liberia.

Q. How do you spell his name?

A. Baindah, B-A-I-N-D-A-H.

Q. And was he a Liberian?

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 5 NOVEMBER 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Mr Nicholas Koumjian Mr Alain Werner Ms Ruth Mary Hackler Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah Mr Terry Munyard

Q. Mr Witness, do you know approximately when this was when Bomi Hills was attacked and fell to ULIMO-K?
A. It was in 1992 - I mean '91 when we left and went to Maryland. I stayed in Maryland. I did not go back to Bomi Hills with Oliver and the troops.
10:20:46
JUDGE SEBUTINDE: Mr Koumjian, perhaps I missed something, but the witness did not say anything about ULIMO-K, did he? He said ULIMO.
MR KOUMJIAN: Your Honour, I believe that is absolutely correct. That would not have made sense what I said. The witness said ULIMO.
10:21:04
JUDGE SEBUTINDE: The witness simply said ULIMO.
MR KOUMJIAN: That is my error. Thank you:
Q. Sir, now you've talked about Mr Oliver Varney being executed. How do you know about that?
10:21:21
A. Okay. When I left, that was when I was in Maryland, the news went all around through radio conversations that Oliver had been arrested and I --
PRESIDING JUDGE: Please pause, Mr Witness. Mr Anyah?
MR ANYAH: Yes, I am objecting on the basis of relevance. This is a description of an execution on its face pertaining exclusively to the NPFL and having nothing to do with any nexus to Sierra Leone. The witness is describing how ULIMO-K fighting in Liberia, in the territory of Liberia and Bomi, took over Bomi Hills. Oliver Varney is assigned first to Maryland, reassigned back to Bomi Hills and Bomi Hills falls into the hands of ULIMO-K and it is alleged that an order was given by Mr Taylor to execute Varney.
10:21:46
10:22:11
Now with respect, your Honours, this is not in any way

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 2 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Alain Werner Ms Leigh Lawrie Ms Ruth Hackler
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah
For the Office of the Principal Defender:	Ms Elizabeth Nahamya

necessary to change the leadership of the RUF because he said Foday Sankoh was too old and that he was too stubborn and he was always being arrested, and that he was a lazy leader, so that he should be changed. It was necessary that he be changed.

09:52:31 Augustine Gbao and Issa emphasised that no, that shouldn't happen, but Charles Taylor spoke with them to listen to what the leaders were telling them. So they went on and appointed Issa. First he suggested that he would want to take Mosquito back and Issa said no, and he said, "Ah, but Issa if you would take care

09:52:54 as a commander or as a leader". Then Issa said except if he returned and informed the RUF family, he said because RUF was a family. When he would inform the RUF family, then he will respond whether he would take the position or he would appoint somebody else.

09:53:12 Q. Now, Mr Witness, let's clear up some of the things you have said. You said, "First he suggested that he would want to take Mosquito back". Who suggested that?

A. Charles Taylor suggested that he wanted to send Mosquito back. He suggested that he wanted to send him back to Sierra

09:53:38 Leone as RUF leader.

Q. And then you said, "But, Issa, if you take care as a commander or as a leader." Who was saying that to Issa, "If you take care as a commander or as a leader"?

A. Charles Taylor was saying that to Issa.

09:54:11 Q. Then you said that, "Except if he returned and informed the RUF family, then he will respond whether he would take the position." Who is this who is speaking?

A. Issa was the one speaking to the delegation.

Q. Now what happened after this exchange at this meeting?

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 7 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Shyamala Alagendra Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

Q. What time was it?
A. Around 5 o'clock.
Q. Was that in the morning, or in the evening?
A. Morning.
10:27:12 Q. How is it you were able to know the time?
A. Because I had prayed.
Q. When you entered the house, what happened?
A. My girl - my daughter had opened the window and she said, Mama, come and see the population that is passing by. Look at my
10:27:38 aunt, she has oozing and his jaw and she was naked - on her jaw, sorry, and she was naked.
Q. Did you know who she was referring to?

PRESIDING JUDGE: Mr Anyah?

MR ANYAH: Yes, Madam President, I hesitate to intervene
10:28:02 and interrupt the flow, but I do so with respect. I had made an objection previously about evidence not alleged in the indictment and I made that a continuing objection. This was perhaps two weeks ago.

In this case Karina is in Bombali District, which is
10:28:27 charged in the indictment, but it's only charged in paragraph 30 with respect to looting. So I just reiterate my objection respectfully, knowing that the Court has ruled on the objection, but given the extensive nature of evidence being presented today about this particular locale and concerning acts not alleged in
10:28:50 the indictment I thought it appropriate to renew my objection.

PRESIDING JUDGE: Your reply?

MS HOLLIS: Madam President, with leave if I may respond?

PRESIDING JUDGE: Yes, please do.

MS HOLLIS: Madam President, your Honours, this evidence

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 21 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Doreen Kiggundu
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Ms Shyamala Alagendra Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

Q. Witness, please tell the Court what happened during this attack.

A. We fought back and repelled and they captured one SLA. He confirmed to us that they brought the South Africans, that they were in that area to attack. Later Gullit called Tito, he called Junior Lion saying that Tamba Sewa had told lies to the troop because he knew about the presence of those people, so we should reorganise and go back to the village where Tamba Sewa was and burn that village down. So I left together with Junior Lion, Tito and some other men. We went and set the village on fire and returned. After that Gullit ordered that the soldier should tell us exactly what they knew about the South Africans. This SLA whom we captured had nothing good to tell us, so Gullit gave an order that we should burn him alive, so we tied him and burnt him.

MR ANYAH: Madam President, I'm sorry to interrupt, but I did object to evidence pertaining to atrocities in Koinadugu District last Friday and the Chamber overruled my objection. I simply rise to make that a continuing objection for purposes of perfecting the record, it is not to be disrespectful. My training says that I should object whenever the same issue arises again and I just register a continuing objection to this type of evidence.

PRESIDING JUDGE: Your reply?

MR KOUMJIAN: Your Honour, may I reply for the Prosecution. Your Honour, the Prosecution notes, first of all, in the objection of last week Mr Anyah mentioned Rule 93 requiring that the evidence of other crimes be disclosed pursuant to Rule 66. In fact that has been done. The evidence that this witness is

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 18 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Ms Shyamala Alagendra Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

if we encounter an attack in any town the town should be burnt down as we are going ahead and as we are moving ahead we shall get - we should try and get able bodied civilians to join us.

Q. Did he say anything about civilians who were not able bodied?

13:24:31

PRESIDING JUDGE: Yes, Mr Anyah?

MR ANYAH: Madam President, I object in this sense: We are now talking about civilians and the exposure to harm or injury that may have manifested itself at this time, but in Koinadugu District, in particular Mansofinia, it is not alleged in our indictment of 29 May 2007. If the evidence were limited to the meeting of the minds of these people during a meeting I would not object, but to the extent we now start talking about treatment of civilians in that area I register an objection. It is not in the indictment.

13:25:01

13:25:23

PRESIDING JUDGE: Ms Alagendra?

MS ALAGENDRA: Your Honours, firstly the witness hasn't spoken about any particular area which these orders related to. Secondly, the evidence of crimes which may have taken place in Koinadugu would be relevant under Rule 93. And also, your Honour, it would go towards evidence of a widespread or systematic attack which has been alleged in the indictment. Further than that, your Honour, this Court could possibly hear evidence about this same group moving to an area which is part of the indictment and these orders could relate even to those areas which are in the indictment.

13:25:39

13:26:09

PRESIDING JUDGE: A point of law, is it, Mr Anyah?

MR ANYAH: Well, of course --

PRESIDING JUDGE: I am presuming, Ms Alagendra, you have

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 18 JANUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Julia Sebutinde Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura Mr Vincent Tishekwa
For the Prosecution:	Ms Brenda J Hollis Ms Shyamala Alagendra Ms Leigh Lawrie Mr Mohamed A Bangura
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Andrew Cayley

meeting?
A. I think so.
Q. So would anybody else who had been at that meeting, including President Taylor of Liberia?
12:20:17 A. I would imagine so, yes.
Q. So there would be no basis for him ever suggesting - him being President Taylor - that he had got Johnny Paul Koroma to that meeting?
A. Sorry, you are asking me -
12:20:35 Q. I am asking you about a negative in effect.
A. I am sorry, I am finding this rather difficult to follow.
Q. Let me enlighten you, if I may?
A. Yes.
Q. We had evidence from a previous witness saying that he was
12:20:48 at a meeting with President Taylor and President Taylor, according to that witness's handwritten note, and typed note, got Johnny Paul Koroma to Lome, but Johnny Paul Koroma didn't go to Lome, or take any part in the Lome Accord, did he, from what you know?
12:21:06 A. I was not present in Lome. I have no recollection of Johnny Paul Koroma being present based on reports by people who were there, or the press and so on. I don't know what the whereabouts was of Johnny Paul Koroma in 1999, in any event, but the piece of paper we are consulting is about May 1999 which is
12:21:26 two months before the Lome agreement.
Q. Yes, but it was what led to the Lome agreement.
A. Absolutely.
Q. And Mr Taylor played a significant part in that agreement, didn't he?

A. I would say that the most significant actors behind the Lome Peace Accord of July 1999 were President Taylor and the Reverend Jesse Jackson.

Q. Now, following the Lome Peace Accord there was something of a division within the RUF itself, wasn't there?

12:22:05

A. Yes, the RUF had been in a state of some divisiveness particularly since the arrest of Foday Sankoh in 1997 and, as I think the Truth and Reconciliation Commission stated, or observed, those - even when Foday Sankoh came back to the RUF, which was in 1999, really the divisions remained.

12:22:39

Q. Yes, and following, or as part of the arrangements for the Lome peace agreement the Government of Liberia provided a guesthouse in Monrovia for the RUF leadership and both Foday Sankoh and Sam Bockarie came to Monrovia, stayed in that guesthouse, it was all very public. There was no subterfuge involved in all of this?

12:23:10

A. No, this was all very official, yes.

Q. There then developed a disagreement between Foday Sankoh and Sam Bockarie where Sam Bockarie wanted to delay disarmament. Now, are you aware of that?

12:23:36

A. I am aware of that.

Q. And despite the best efforts of everybody involved, Sam Bockarie would not agree to the disarmament process, or wouldn't agree to the pace at which the disarmament process was supposed to proceed.

12:23:57

A. That is as I have heard it reported, yes.

Q. When it became clear that he wouldn't agree to that, it was agreed by both the President of Sierra Leone, Tejan Kabbah, and President Taylor that Sam Bockarie would be allowed to leave

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 8 JANUARY 2008
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Teresa Doherty Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Mr Simon Meisenberg
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura Mr Vincent Tishekwa
For the Prosecution:	Ms Brenda Hollis Mr Mohamed A Bangura Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Andrew Cayley

Q. Can you tell this Court what happened when you got to Burkina again on this occasion?
A. Yes, sir.
Q. Please go on?
15:00:40 A. At that time we met Mosquito. He said I should stand before him. He had so many bodyguards together with some other commanders and he said to me, "Gentleman, you said you are a pastor and they have told me you are a pastor. The question I asked you last, if you don't give me the answer today I will
15:01:18 kill you and nobody will bury you. The more you are there when you rot the more will be blessed with the glory of God." So I bowed down my head.
Q. Continue, please?
A. I bowed down my head and I took my head up again. I said,
15:02:01 "It is not the case that I don't want to join your rebel group, but the idea is the position given to me is too small for me as a man of God." He asked me, "What position do you want?" And then I bowed down my head again. I told him I want him to make me field marshal. He burst laughing. The whole group around him
15:02:46 burst laughing. They were all laughing in the whole area. Then he moved from the bench where he was seated and came to the ground, himself Mosquito. Later he was up again and he sat back to his bench and he said, "No" and all the commanders answered "Boots shaking" and everybody went into silence.
15:03:31 Q. What happened after that?
A. And then he turned around and told all of his commanders that this man indeed we should free him. "You are saying that I should make you field marshal when I am not yet a five star general - a one star general, sorry. My boss Ghankay Taylor is

not yet a five star general. How can I make you field marshall?" He said to them, "Please, leave that man. He doesn't even know what he is talking about."

Q. After this exchange with Mosquito did anything happen?

15:04:35 A. Yes, sir.

Q. Please tell the Court?

A. From that point they took me and the other civilians and they said we should go to Dawa. It was seven miles away from Buedu which is called Burkina. They said we should go for arms

15:05:10 and ammunition.

Q. D-A-W-A. Mr Witness, before we get onto Dawa I want you to give us a idea of what the atmosphere was at Buedu, Burkina, at this time when you got there. You have said that you went with a group of civilians who came from Superman Ground as well as

15:05:37 commanders. Did you meet any people in Buedu apart from Mosquito whom you went to see?

A. Yes, sir.

Q. Can you describe the people that you met there?

A. Yeah, I met some other civilians who were taken from all

15:06:06 different areas.

Q. Do you know why they were there?

A. Yes.

Q. Why were they there?

A. Because they told all of us that we should go to Dawa for

15:06:25 arms and ammunition. For that reason I knew that that was why they were there.

Q. And the civilians who came from Superman Ground, could you say why they also came to Buedu on this occasion?

A. Yes.

CLN-432

8/10

STATEMENT BY HIS EXCELLENCY DAHKPANNAH DR. CHARLES GHANKAY TAYLOR
PRESIDENT OF THE REPUBLIC OF LIBERIA
AT THE CONCLUSION OF RECONCILIATORY TALKS WITH CPL. FODAY SANKOH,CHAIRMAN, RUF AND LT./COL. JOHNNY PAUL KOROMA, LEADER, AFRC ON IMPLEMENTATION OF THE SIERRA LEONEAN PEACE AGREEMENT
October 2, 1999 Executive Mansion Monrovia, LIBERIA

Distinguished Ladies & Gentlemen:

Today the prospects for peace in the Republic of Sierra Leone are self evident by the presence of Corporal Foday Sankoh of the Revolutionary United Front (RUF) and Lieutenant Colonel Johnny Paul Koroma of the AFRC in Monrovia, as they prepare for their historic return to Sierra Leone.

The Government of Liberia, which along with the leadership of ECOWAS, brokered the peace process, is also serving as the intermediary to facilitate the early return of Corporal Sankoh and Lieutenant-Colonel Koroma to Freetown to help implement the Sierra Leonean peace plan.

We commend ECOWAS leaders for their sacrificial support and the endurance they have shown in restoring peace to Sierra Leone. We particularly laud the efforts of President Olusegun Obasanjo of the Federal Republic of Nigeria, for his dynamism in helping to give the sub-region a new sense of direction for peace and stability. Special note is made of the 39th Independence Anniversary of Nigeria and our best wishes for the peace, progress and prosperity of the people of that great nation.

We applaud the President of Togo and Chairman of ECOWAS, Gnassingbe Eyadema, as well as the ECOWAS Secretariat, for the steady leadership in hosting and directing the negotiations that brought about the Lome Peace agreement for Sierra Leone.

We make particular mention of other leaders in the sub-region with whom we have interacted over the past several days to realize success in these reconciliatory talks. The President of Burkina Faso, Baise Compaore, The President of Sierra Leone, Ahmed Tejan Kabbah, the United Nations Secretary-General, Kofi Annan, the United States Ambassador to Liberia, Bismark Myrick, our special negotiator, former Minister of Foreign Affairs, D. Musuleng Cooper, the officials of the Ministry of Foreign Affairs, all deserve favorable mentioning for their tireless efforts in the process.

Our special thanks goes to the wonderful people of Liberia, the Legislature and all those involved with these talks for their hospitality, brotherliness and understanding. Our people have always been a warm and caring people. They can be proud that once again, Liberia has served as a stage for peace and progress among the comity of nations.

From the onset of the Sierra Leonean civil war, Liberia has believed in constructive engagement for the resolution of the conflict. What we have tried to do in the last few days by hosting these meetings is to provide an atmosphere for stabilizing and maintaining the momentum of the peace process in Sierra Leone by sharing our experience on Conflict Resolution.

LA REVUE

PRESIDENT EYADEMA AND THE «WISE MEN» OF ECOWAS SAVOUR THE FRUITS OF COLLECTIVE ENDEAVOUR IN LOME !

TOGO:

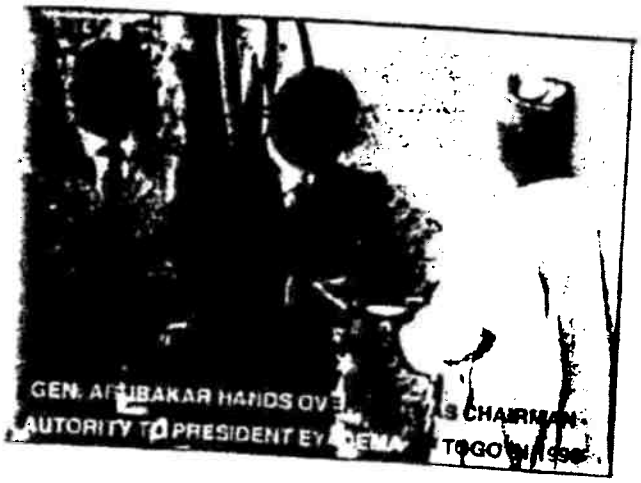
SPECIAL REPORT

CRISES RESOLUTION :

SAGA OF ECOWAS PEACE IN SIERRA LEONE !

IN THIS EDITION

- FOUR HEADS OF STATE KEEP VIGIL OVER SIERRA LEONE
- ARMS MORATORIUM
- A TALE OF TWO SOLOMONS
- EYADEMA'S RISING PROFILE
- THE EURO AND ECOWAS
- COCKTAILS OF PROGRESS



GEN. ABUBAKAR HANDS OV... AUTORITY T... PRESIDENT EY...EMA ...S CHAIRMAN: TOGO IN 1998

EYADEMA PAVES WAY FOR OMAR KONARE OF MALI IN 1999

FINAL COMMUNIQUE ON THE SIERRA LEONE PEACE TALKS IN LOME

Group picture of the peace makers in Lome

1. The Government of the Republic of Sierra Leone, represented by H.E. Alhadji Dr. AHMAD TEJAN KABBAH, President of the Republic of Sierra Leone, on one side, and the United Revolutionary Front, Sierra Leone, represented by Corporal FODAY SAYBANA SANKOH, Leader of RUF, on the other side, on 7 July 1999, have signed a Peace Accord in Lome, Togo, during a solemn ceremony under the auspices of H.E. GNASSINGBE EYADEMA, President of Togo, current Chairman of the Economic Community of West African States (ECOWAS), in presence of their Excellencies :

- BLAISE COMPAORE, President of Burkina Faso, and Chairman of OAU ;
- DAHKPANAH DR. CHARLES GHANKAY TAYLOR, President of the Republic of Liberia ;
- OLUSEGUN OBASANJO, President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria ;
- JAMES VICTOR GBEHO, Minister of Foreign Affairs, representing His Excellency JOHN JERRY RAWLINGS, President of the Republic of Ghana ;
- YOUSSOUFOU BAMBA, Minister of State at the Foreign Ministry in charge of International Co-operation, representing His Excellency HENRI KONAN BEDIE, President of the Republic of Cote d'Ivoire.

2. Also present were :

Mr. ROGER LALOUPO, Representative of the ECOWAS Executive Secretary ;
- Ambassador FRANCIS G. OKELO, Special Representative of the Secretary General of the United Nations ;
- Ms ADWOA COLEMAN, Representative of the Organisation of African Unity ;
- Dr. MOSES K.Z. ANAFU, Representative of the Commonwealth of Nations ;
- Mr. PAUL HARVEY, Special Representative of the United Kingdom;
- His Excellency Mr. AWAD Y. BUHAWIA, Secretary of the People Bureau of the Libyan Arab Socialist and People's Jamahiriya, representing the Jamahiriya ;
- His Excellency Mr. JOSEPH. H. MELROSE, Jr, Ambassador of the United States to Sierra Leone.

3. The Lome Peace Agreement is the outcome of intense multiple consultations and negotiations between the duly mandated Sierra Leonean Plenipotentiaries, assisted by a Mediation Committee comprising member States of the ECOWAS Committee of Seven on Sierra Leone ; the ECOWAS Executive Secretary ; Representatives of UN, OAU, Commonwealth, and observers of Libya Arab Socialist People's Jamahiriya ; US and UK.

4. On the political front, the two parties have agreed on the following :

- Immediate release of Corporal FODAY SAYBANA SANKOH, Leader of the RUF/SL ;
- Liberation of prisoners of war and non combatants ;
- Transformation of RUF/SL into a political party ;
- Enabling Members of the RUF/SL to hold Public Office and their appointment to parastatal posts ;
- Enabling Members of RUF/SL to join Government ;
- Amnesty to be granted to Corporal FODAY SANKOH and to combatants, exiles and other members of RUF/SL for reasons related to the conflict ;
- Establishment of a Commission for the Consolidation of Peace ;
- Establishment of a Commission to review the 1991 Constitution ;
- Establishment of an Independant National Electoral Commission to prepare general elections.

5. With regard to military issues, the two parties agreed on the following :

- The observance and the strengthening of the cease-fire ;
- Adaptation of ECOMOG mandate to new exigencies of peace and national reconciliation ;

Contd. on page 36 ☞

Contd. from page 35

· Security guarantees ;
· Encampment, disarmament, demobilisation and reintegration of combatants ;
· Restructuring and training of the Armed Forces of Sierra Leone and
· Withdrawal of mercenaries.

6. Concerning humanitarian issues, an agreement was reached on the best ways to :

· Enable humanitarian organisations to carry out their activities in favour of the needy populations and war victims ;
· Guarantee the security of refugees and displaced persons ;
· Address specific needs of ex-child combatants ;
· Mobilise appropriate financial and technical resources for purposes of rehabilitation, reconstruction and development in Sierra Leone.

7. With regard to human rights, the two parties have also agreed :
· To protect, guarantee and promote civil and political liberties, and on the one hand, and to reinforce mechanisms of addressing grievances of people in respect of alleged violations of basic human rights, on the other.
· On socio-economic issues, the two parties agreed to share responsibilities in this area, and in this regard, have established a Commission for the Management of Strategic Resources, National Reconstruction and Development, which is placed under the chairmanship of Corporal FODAY SAYBANA SANKOH, with the status of Vice-President of the Republic.

9. The Government of Sierra Leone and the RUF/SL have expressed satisfaction with the will demonstrated by the two parties to reach an agreement in the interest of peace, and with the quality of work accomplished by the Mediation Committee and the climate of serenity, of forthrightness and mutual understanding which characterised the peace talks.

10. They have also expressed satisfaction with the contribution of the members of the civil society and the Inter-religious Council of Sierra Leone.

11. The Government of Sierra Leone and RUF/SL have welcomed the important role played by ECOWAS, in particular, its current Chairman H.E. GNASSINGBE EYADEMA, whose constant involvement and perseverance have been instrumental in bridging the gap between the positions of the two sides and have made possible the opening and the fruitful conclusion of the peace talks.

12. The two parties have agreed to scrupulously adhere to the provisions of the present Agreement in the highest interest of the Sierra Leonean people and nation.

13. In this regard, they have reaffirmed their firm determination to work together to build Sierra Leone with more justice and unity, in peace and security for all.

14. They have, furthermore, expressed their gratitude to humanitarian organisations and the international community for their invaluable assistance to Sierra Leone during this very trying period of its history, and have renewed their appeal to them to continue providing multi-sectoral assistance to the reconstruction and rehabilitation of Sierra Leone.

15. At the conclusion of the ceremony, H.E. Alhadji Dr. AHMAD TEJAN KABBAH, President of the Republic of Sierra Leone and Corporal FODAY SAYBANA SANKOH, Leader of RUF/SL have expressed profound gratitude to President GNASSINGBE EYADEMA for his continued involvement and determination for the cause of peace, stability and security in the sub-region, and have expressed their gratitude for the positive initiatives he has taken to help Sierra Leoneans to resolve their differences.

16. Furthermore, President KABBAH and Corporal SANKOH have also expressed sincere thanks to President GNASSINGBE EYADEMA, to the Government and people of Togo for the warm welcome, the brotherly hospitality and all the attention accorded to them during their stay in Togo.

17. They have also expressed their sincere gratitude to the Excellencies Presidents BLAISE COMPAORE, President of Burkina Faso and Chairman of OAU, DAHKPANAH Dr. CHARLES GHANKAY TAYLOR, President of Liberia, OLUSEGUN OBASANJO, President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria as well as representatives of their Excellencies JOHN JERRY RAWLINGS, President of the Republic of Ghana and HENRI KONAN BEDIE, President of the Republic of Côte d'Ivoire who travelled to Lome.

18. Their Excellency GNASSINGBE EYADEMA, BLAISE COMPAORE, DAHKPANAH Dr. CHARLES GHANKAY TAYLOR and OLUSEGUN OBASANJO have expressed their satisfaction with the happy conclusion of the Lome Peace Talks on Sierra Leone.

19. In this regard, they have expressed satisfaction with the efforts and the sacrifices made by the Economic Community of West African States (ECOWAS) for the restoration of peace and national reconciliation in Sierra Leone..

20. They have appealed to the Government of Sierra Leone, the Revolutionary United Front of Sierra Leone, as well as the people of Sierra Leone as a whole to work together to build a united and prosperous Sierra Leone in newly found peace and understanding.

DONE IN LOME THIS SEVENTH DAY OF THE MONTH OF JULY 1999 IN TWELVE (12) ORIGINAL TEXTS IN ENGLISH AND FRENCH, EACH TEXT BEING EQUALLY AUTHENTIC.

675)

SCSL-04-16-A
(1883-1999)

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SCSL

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date: 22 February 2008

PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU
(Case No. SCSL-2004-16-A)

JUDGMENT

Office of the Prosecutor:
Dr. Christopher Staker
Mr. Karim Agha
Mr. Chile Eboe-Osuji
Ms. Anne Althaus

Defence Counsel for Alex Tamba Brima:
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels

Defence Counsel for Santigie Borbor Kanu:
Ajibola E. Manly-Spain
Silas Chekera

decisions without giving notice to the Parties or without g ving them an opportunity to be heard on the correctness of the previous decision(s).

I. Applicable Principles

(a) Specificity

37. In order to guarantee a fair trial the Prosecution is obliged to plead material facts with a sufficient degree of specificity.[79] The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case.[80]

38. In particular, the required degree of specificity varies according to the form of participation alleged against an accused.[81] Where direct participation is alleged in an indictment, we opine that the Prosecution's obligation to provide particulars in an indictment must be adhered to fully.[82]

39. Where superior responsibility is alleged, the li bility of an accused depends on several material factors such as the relationship of the accused to his subordinates, his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates. Therefore, these are material facts that must be pleaded with a sufficient degree of specificity.[83]

40. In considering the extent to which there is compl ance with the specificity requirement in an indictment, the term specificity should not be understood to have any special meaning. It is to be understood in its ordinary meaning as being specific ir regard to an object or subject matter. An object or subject matter that is particularly named or defined cannot be said to lack specificity.

(b) Exception to Specificity

41. The pleading principles that apply to indictments at international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes when compared with those in domestic jurisdictions. For this reason, there is a narrow exception to the specificity requirement for indictments at international criminal tribunals. In some cases, the widespread nature

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[79] *Kvočka* Form of the Indictment Decision, para. 14.
[80] *Kupreškić* Appeal Judgment, para. 89.
[81] *Krnojelac* Form of the Indictment Decision, para. 18.
[82] *Brđanin* Form of the Indictment Decision, para. 22.
[83] *Krnojelac* Form of the Indictment Decision, para. 18; *Ntagerura* Trial Judgment, para. 35.

and sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity.[84]

2. Challenges to an Indictment on Appeal

42. Challenges to the form of an indictment should be made at a relatively early stage of proceedings and usually at the pre-trial stage pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence ("Rules") which provides that it should be made by a preliminary motion.[85] An accused, therefore, is in the ordinary course of events expected to challenge the form of an indictment prior to the rendering of judgment or at the very least, challenge the admissibility of evidence of material facts not pleaded in an indictment by interposing a specific objection at the time the evidence is introduced.[86]

43. Failure to challenge the form of an indictment at trial is not, however, an absolute bar to raising such a challenge on appeal.[87] An accused may well choose not to interpose an objection when certain evidence is admitted or object to the form of an indictment, not as a means of exploiting a technical flaw, but rather, because the accused is under the reasonable belief that such evidence is being introduced for purposes other than those that relate to the nature and cause of the charges against him.

44. Where an accused fails to make specific challenges to the form of an indictment during the course of the trial or challenge the admissibility of evidence of material facts not pleaded in the indictment, but instead raises it for the first time on appeal, it is for the Appeals Chamber to decide the appropriate response. Where the Appeals Chamber holds that an indictment is defective, the options open to it are to find that the accused waived his right to challenge the form of an indictment, to reverse the conviction, or to find that no miscarriage of justice had resulted notwithstanding the defect.[88] In this regard the Appeals Chamber may also find that any prejudice

[84] *Kvočka* Form of the Indictment Decision, para. 17.
[85] Rule 72(B)(ii) expressly provides that preliminary motions by the accused include "[o]bjections based on defects in the form of the indictment."
[86] *Niyitegeka* Appeal Judgment, para. 199.
[87] *Semanza* Trial Judgment, para. 42.
[88] *Niyitegeka* Appeal Judgment, paras 195-200.

various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya." Commenting on this manner of pleading the Trial Chamber stated:

> "Moreover, the jurisprudence of international criminal tribunals makes it clear that an accused is entitled to know the case against him and is entitled to assume that any list of alleged acts contained in an indictment is exhaustive, regardless of the inclusion of words such as "including", which may imply that other unidentified crimes in other locations are being charged as well."[92]

49. The Trial Chamber found that with respect to crimes alleged in the Indictment, the Prosecution led evidence of offences which occurred in locations not specifically pleaded. As a consequence, it held that with the exception of Counts 9, 12 and 13 the crimes of recruitment of child soldiers, abductions and forced labour and sexual slavery (the three "enslavement crimes"), the Indictment was defective and that it would not make any findings on crimes perpetrated in locations not specifically pleaded. It is to be noted that the exception made by the Trial Chamber was because the Accused had "not specifically objected to lack of specificity with respect to locations [in] relation to enslavement, sexual slavery and child soldier recruitment in Counts 9,[93] 12 and 13," and that in the interest of justice they would treat pleading of those counts as permissible. The Trial Chamber held that evidence of crimes perpetrated in locations not specifically pleaded would only be considered "for proof of the chapeau requirements of Articles 2, 3 and 4 where appropriate, that is the widespread or systematic nature of the crimes and an armed conflict."[94]

2. Submissions of the Parties

(a) Prosecution's Submissions

50. The Prosecution submits that contrary to the Trial Chamber's findings, "locations" were properly pleaded in the Indictment and that in the alternative any defects in the Indictment were cured by providing timely, clear and consistent information to the Accused.[95]

51. It submits that the Indictment is not defective with respect to the pleading of locations and that whilst certain locations may not have been listed exhaustively, they were nonetheless correctly pleaded. The Indictment uses the terms "various" and 'including" to demonstrate clearly that named locations within districts of Sierra Leone were not an exhaustive list of locations where

[92] *Ibid* at para. 37.
[93] *Ibid* at para. 41.
[94] *Ibid* at para. 38.
[95] Prosecution Appeal Brief, para. 197.

demonstrated or if it is necessary to prevent an injustice.[113] We endorse that opinion. Consequently, whether or not an issue relating to the form of an indictment should be reconsidered should be determined on a case-by-case basis having regard to the stage of proceedings, the issues raised by the earlier decision and the effect of reconsideration or reversal on the rights of the Parties.

64. With regard to question (ii) the Parties ought to have been given an opportunity to be heard on the matter as natural justice demands. However, even if they failed to accord the Parties that opportunity, this Chamber has the power to review the situation and come to its own conclusion in the interest of justice. In all the circumstances of the case, we opine that the Trial Chamber's error in not expressly giving notice to the Parties of its intention to reconsider the pre-trial decision, and its failure to re-open the hearings did not invalidate the decision. The Trial Chamber's limited treatment of the evidence of crimes committed in such locations was a proper exercise of its discretion in the interest of justice, taking into account that it is the Prosecution's obligation to plead clearly material facts it intends to prove, so as to afford the Appellants a fair trial.

65. The Prosecution's Second Ground of Appeal therefore fails.

C. Prosecution's Fourth Ground of Appeal and Kanu's Tenth Ground of Appeal: Joint Criminal Enterprise

1. Trial Chamber's Findings

66. Prior to the establishment of Trial Chamber II, Trial Chamber I, ruling on a preliminary motion brought by the Appellant, dealt with several pre-trial issues in this case, including the form of the Indictment and the pleading of joint criminal enterprise ("JCE") as a form of liability. In this regard the Trial Chamber held that:

> "the Indictment in its entirety, is predicated upon the notion of joint criminal enterprise . . [and that] the nature of the alleged joint criminal enterprise, the nature of the Accused's participation in it, the identity of those involved in the same, and the time frame of the alleged joint criminal enterprise are all pleaded with the degree of particularity as the factual parameters of the case admits."[114]

67. On 17 January 2005, the case was transferred to Trial Chamber II. In the AFRC Trial Judgment, Trial Chamber II revisited the question whether joint criminal enterprise was properly

[112] *Ibid* at para. 2.14.
[113] *Ntagerura* Appeal Judgment, para. 55.
[114] *Kamara* Form of the Indictment Decision, para. 52.

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding Judge
Justice Richard Lussick
Justice Teresa Doherty

Registrar: Herman von Hebel

Date: 19 July 2007

Case No.: SCSL-04-16-T

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

SENTENCING JUDGEMENT

Office of the Prosecutor:
Christopher Staker
Karim Agha
Chile Eboe-Osuji
Anne Althaus

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
Agibola E. Manly-Spain
Carry Knoops

extent and gravity of the offences, as well as the difficulty in ascertaining the precise number of victims.[72]

(b) Deliberations

40. The Trial Chamber considers that the crimes for which Brima was convicted were heinous, deliberate, brutal and targeted very large numbers of unarmed civilians and had a catastrophic an irreversible impact on the lives of the victims and their families.

41. Brima was convicted under Article 6(1) and under Article 6(3). Specifically, the Trial Chamber found Brima responsible under Article 6(1) for:

1. committing extermination in Karina, Bombali District;
2. committing the murder of five civilians at State House, Freetown, Western Area;
3. committing the mutilation of one civilian in Freetown, Western Area;
4. ordering the terrorisation of the civilian population in:
    a. Karina, Bombali District;
    b. Rosos, Bombali District; and
    c. Freetown, Western Area;
5. ordering the collective punishment of the civilian population in Freetown, Western Area;
6. ordering and planning the recruitment and use of child soldiers in:
    a. Freetown, Western Area; and
    b. Rosos, Bombali District;
7. ordering the murders of civilians at:
    a. Mateboi, Bombali District;
    b. Gbendembu, Bombali District;
    c. State House, Freetown, Western Area;
    d. Kissy Mental Home, Freetown, Western Area; and
    e. Rogbalan Mosque, Freetown, Western Area;
8. ordering and aiding and abetting the murders of civilians in Fourah Bay, Freetown, Western Area;
9. ordering and planning the enslavement of civilians in Freetown, Western Area;
10. ordering the looting of civilian property; Freetown, Western Area;

[72] Brima Defence Sentencing Brief, para. 12.

11. planning the commission of outrages upon personal dignity in the form of sexual slavery in Bombali District and the Western Area;
12. planning the enslavement of civilians in Bombali District.

42. Brima was further found liable under Article 6(3) for crimes committed by his subordinates throughout Bombali District and Freetown and the Western Area.

43. With regards to the crimes for which Brima is responsible under Article 6(1), the Trial Chamber recalls its factual findings that Brima was the primary perpetrator of the murders of at least 12 civilians in a mosque during the attack on Karina,[73] a fact indicative of the particular gravity of this offence.

44. With regards to the recruitment and use of child soldiers, the Trial Chamber recalls that the young victims were abducted from their families, often in situations of extreme violence, often drugged and forcibly trained to kill and to commit crimes against innocent civilians. These children were robbed of their childhood and many lost the chance of an education.

45. With regards to the crimes for which Brima is responsible under Article 6(3) the Trial Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, detailed in the Trial Chamber's Factual Findings are of a particularly heinous nature. The Trial Chamber recalls in particular that in Karina, Brima's subordinates unlawfully killed children by throwing them into the flames of burning houses.[74] In Rosos, five of Brima's subordinates beat and orally and vaginally gang-raped a civilian[75] and another four raped a civilian so brutally that she was in great pain, could not stand up and testified that "it seem[ed] as though all my guts were coming out".[76] With regards to the sexual crimes in general, the Trial Chamber notes that many of the victims were particularly young and vulnerable, were held in captivity for protracted periods, often coupled with unwanted pregnancy/miscarriages and endured social stigma.

46. The Trial Chamber considers the crime of mutilation was particularly grotesque and malicious. Victims who had their limbs hacked off not only endured extreme pain and suffering, if they survived, but lost their mobility and capacity to earn a living or even to undertake simple daily tasks. They have been rendered dependent on others for the rest of their lives.

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[73] Judgement, para. 1709.
[74] Judgement, para. 888.
[75] Judgement, paras 1031-1032.
[76] Judgement, para. 1035.

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding Judge
Justice Richard Lussick
Justice Teresa Doherty

Registrar: Herman von Hebel, Acting Registrar

Date: 20 June 2007

Case No.: SCSL-04-16-T

PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

JUDGEMENT

Office of the Prosecutor:
Karim Agha
Christopher Staker
Charles Hardaway
Lesley Taylor
Melissa Pack
Vincent Wagona
Shyamala Alagendra

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
Agibola E. Manly-Spain
Carry Knoops

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committing the crime.[1487] 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.[1488]

771. If a principal perpetrator has definitely decided to commit the crime, further encouragement or moral support may still qualify as aiding and abetting.[1489]

(d) Ordering

772. The *actus reus* of 'ordering' requires that a person in a position of authority uses that authority to instruct another to commit an offence.[1490] No formal superior-subordinate relationship between the accused and the perpetrator is necessary; it is sufficient that the accused possessed the authority to order the commission of an offence and that such authority can be reasonably inferred.[1491] The order need not be given in writing or in any particular form,[1492] nor does it have to be given directly to the perpetrator.[1493] The existence of an order may be proven through circumstantial evidence.[1494]

773. The *mens rea* for ordering 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 will be committed in the execution of that order.[1495] The state of mind of an accused may also be inferred from the circumstances, provided that it is the only reasonably inference to be drawn.[1496]

[1487] *Kordić* Appeals Judgement, para. 27.
[1488] *Kordić* Appeals Judgement, paras 29, 32. See also *Orić* Trial Judgement, para. 279.
[1489] *Orić* Trial Judgement, para. 271.
[1490] Rule 98 Decision, para. 295, referring to *Krstić* Trial Judgement, para. 601; *Brđanin* Trial Judgement, para. 270.
[1491] *Strugar* Trial Judgement, para. 331; *Kordić* Appeal Judgement, para. 28; *Brđanin* Trial Judgement, para. 270; see also *Akayesu* Trial Judgement, para. 480.
[1492] *Blaškić* Trial Judgement, para. 281.
[1493] *Brđanin* Trial Judgement, para. 270; *Blaškić* Trial Judgement, para. 282, fn. 508, noting "the High Command Case in which the military tribunal considered that 'to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal'", see USA v. Wilhelm von Leeb et al. in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("High Command Case"), Vol. XI, p. 511.
[1494] *Blaškić* Trial Judgement, para. 281; *Akayesu* Trial Judgement, para. 480; see also *Galić* Trial Judgement, para. 171, providing factors from which the existence of an order may be inferred, including the number of illegal acts, the amount, identity and type of troops involved, the effective command and control exercised over these troops, the widespread occurrence of the illegal acts, the location of the superior at the time and his or her knowledge that criminal acts were committed.
[1495] *Kordić* Appeal Judgement, paras 29, 30; *Blaškić* Appeal Judgement, para. 42.
[1496] *Vasiljević* Appeal Judgement, para. 120; see also *Strugar* Trial Judgement, para. 333.

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relies on the Prosecution evidence to determine whether the Accused Brima is individually criminally responsible for the Karina killings, it must take the following factors into account.

1706. The Indictment does not plead the material facts of this specific incident with regard to the Accused Brima.[2947] The Prosecution failed to include these particulars in the Indictment and rendered the Indictment defective.

1707. From the outset of its case, the Prosecution was aware of material facts regarding the Karina attack including the means with which the Accused Brima committed this attack on Karina and details of the killings at the mosque in Karina. The Prosecution Supplemental Pre-Trial Brief generally provides information that the Accused Brima ordered that AFRC/RUF should make its mark on Karina and that no one should be spared. It also alleges that the Accused Brima participated in the shooting on the attack on Karina.[2948] However, it does not specify the details of the attack on the mosque, that is the means and purpose of the attack or a description of the victims. In addition, the OTP Opening Statement does not specify the Accused Brima participation in the killing of civilians at a mosque in Karina. Instead, the Prosecution indicated that when the people of Karina village were assembled at the mosque at 5:00 o'clock for morning prayers, AFRC/RUF forces led by the three Accused descended on them with guns, machetes and axes. They lined them up and one after the other hacked them to death.[2949]

1708. The Trial Chamber notes that the Prosecution disclosure materials of a Witness Statement of TF1-334 dated 6 November 2003, does not mention the shooting of the Imam by the Accused Brima. However, it specifically states that Witness TF1-334 saw 'Gullit' going to a mosque in Karina and questioned the people as morning prayers were going on. Thereafter, the witness saw 'Gullit' remove his pistol and shoot the civilians dead.[2950] Therefore, the Trial Chamber finds that the above constitutes sufficient notice of the material particulars relating to Brima's participation in the Karina killings and that the defect in the Indictment with regard to this crime was cured by clear, timely and consistent notice to the Defence.

1709. In light of the foregoing considerations and the Trial Chamber's finding that the Accused Brima participated in a mass killing of at least 12 civilians at a mosque in Karina, the Trial

[2947] *See* test applied by the Trial Chamber in Alleged Defects in Form of Indictment, para. 55, *supra*.
[2948] Prosecution Supplemental Pre-Trial Brief, p. 24.
[2949] Prosecution Opening Statement, Transcript 7 March 2005, p. 39.
[2950] Statement of Witness TF1-334, 6 November 2003, CMS p. 6557 [confidential].

Chamber finds that the Prosecution has established beyond reasonable doubt the Accused's responsibility by committing on a large scale the massacre of civilians at a mosque in Karina. The Trial Chamber is further satisfied that the Accused Brima was aware that his participation in the killings on such a massive scale amounted to the crime of extermination.

b. Ordering

i. Order to terrorise and kill the civilian population at Karina

1710. Around June 1998, at Kamagbengbe and in the presence of Kamara and Kanu, the Accused Brima gave orders to the AFRC troops to attack Karina. Brima referred to Karina as a strategic location because it was the home town of President Ahmed Tejan Kabbah. The witness stated that Brima ordered the troops to burn down Karina, capture strong male civilians, and amputate civilians. Brima concluded that he wanted the attack on Karina to shock "the whole country" and the international community. The Trial Chamber has found that there were no ECOMOG or Kamajor troops in Karina at the time and that all the victims were civilians.[2951] Witness TF1-157 testified that after the attack on Karina, he heard rebels say that the town had been attacked because it was the home town of President Kabbah.[2952] Witness TF1-033 testified that he heard 'Gullit' order that civilian women should be stripped naked and raped during the attack on Karina, and the neighbouring town of Bornoya.[2953] The Trial Chamber found this evidence detailed, consistent and credible.

1711. The Trial Chamber is therefore satisified that the Accused Brima ordered his subordinates to perpetrate crimes against the civilian population in Karina and its environs with the specific intent of instilling terror in the civilian population.

ii. Order to terrorise the civilian population around Rosos

1712. Witness TF1-334 testified that during the rainy season in 1998, the AFRC/Junta forces established a base at Rosos and remained there for approximately three months. While at Rosos, the witness heard Brima order the troops to occupy the surrounding villages and ensure that no civilians remained within 15 miles of the village.[2954] Brima ordered that any civilians be executed rather than brought back to the camp, and added that he would take disciplinary action against any soldier who

[2951] TF1-334, Transcript 23 May 2005, pp. 56-60, 61, 64-65; George Johnson, Transcript 15 September 2005, pp. 53-54.
[2952] TF1-157, Transcript 25 September 2005, pp. 29-30, 58-60; Transcript 26 September 2005, pp. 9, 23-24, 30.
[2953] TF1-033, Transcript 11 July 2005, pp. 18-20.

brought a civilian to the camp. Brima named this action "Operation Clear the Area". Witness TF1-334 testified that villages surrounding Rosos were burnt down and looted following this order.[2955] Witness TF1-033 corroborated the evidence of Witness TF1-334 testifying that he heard Brima order his soldiers to kill any civilians in the area of Rosos.[2956] Witness TF1-267 also testified that rebels told her that civilians who did not leave a village near Rosos would be killed.[2957]

1713. The Indictment does not charge unlawful killings at Rosos and therefore will not make any findings on the killings perpetrated following Brima's order. However, the evidence shows that the Accused Brima, in issuing such orders to his subordinates specifically intended to terrorise the civilian population in the areas surrounding Rosos. The Trial Chamber concludes that Brima's generalised instruction created a climate of criminality which endured in the months following the order.

iii. Order for killings at Mateboi and Gbendembu

1714. Witness TFI-334 testified that after the Accused Brima banned civilians from the area surrounding 'Camp Rosos',[2958] an AFRC commander executed six civilians, four men and two women, with an AK-47 rifle in a village near Mateboi.[2959]

1715. Witness TFI-033 testified that in or around August 1998 at 'Colonel Eddie Town,' the Accused Brima ordered two AFRC commanders named Salifu Mansaray and 'Arthur' to attack Gbendembu because tECOMOG and "loyal" Sierra Leonean Army troops were present there.[2960] When the Operations Commander returned from the operation he reported to Brima that the troops had captured arms and ammunition and that 25 civilians had been killed. Brima commended his men for "a job well done."[2961]

1716. The Trial Chamber finds that as overall commander in Bombali District the Accused Brima had sufficient authority over his troops to order the commission of the crimes in the expectation that his orders would be implemented. The Trial Chamber is therefore satisfied that the Accused Brima was aware of the substantial likelihood that crimes would be committed in the execution of the

[2954] TF1-334, Transcript 23 May 2005, p. 104; Transcript 24 May 2005, pp. 2-5.
[2955] TF1-334, Transcript 23 May 2005, pp. 100-106.
[2956] TF1-033, Transcript 11 July 2005, pp. 24-25.
[2957] TF1-267, Transcript 27 July 2005, pp. 8-9, 10-11, 17, 23-26, 29-30
[2958] TF1-334, Transcript 23 May 2005, p. 105.
[2959] TF1-334, Transcript 24 May 2005, pp. 2-5; exhibit P-16 (under seal).
[2960] TF1-033, Transcript 11 July 2005, pp. 32-33; TF1-334, Transcript 23 May 2005, pp. 81, 84.
[2961] TF1-033, Transcript 11 July 2005, p. 34.

order given at 'Colonel Eddie Town.' The Trial Chamber therefore finds that the Accused Brima ordered the murder of civilians in the villages of Mateboi and Gbendembu.

iv. Order at Rosos to recruitment children for military purposes

1717. Witness TF1-334 testified that during a three week training program at Rosos [2962] 77 civilian abductees, including children under the age of 15 years, underwent military training. He was able to provide this estimate because he conducted head counts during muster parades.[2963] Witness George Johnson also confirmed this training at Rosos but estimated that 520 civilians were trained at Rosos. The Trial Chamber observes that Witness TF1-334 referred to the number of civilians trained during one three week period, while George Johnson refers to the number of civilians trained overall at Rosos. Therefore the Trial Chamber does not consider the discrepancy in numbers to be significant. Witness TF1-334 testified that following the completion of the training period, the trainees were addressed by both the Accused Kanu and the Accused Brima. Brima then ordered that the male children be distributed to the various company commanders, while the girls and women were to be turned over to "their husbands" meaning the soldiers and commanders.[2964]

1718. Witness TF1-158, a former child soldier, testified that he was abducted by the AFRC forces and spent one week at Rosos. Upon arrival in Rosos, a commander named 'Staff Alhaji' gave the civilians guns and ordered them to search the town for food.[2965] 'Staff Alhaji' told witness TF1-158 and the other civilians that this order came from the Accused Brima.[2966] During the week at Rosos, the witness was given military training together with approximately 300 other civilians. [2967]

1719. The Trial Chamber has found to be credible and is therefore satisfied that the Accused Brima ordered the abduction of children under the age of 15 years for military purposes.

c. Planning, Instigating and otherwise aiding and abetting

1720. The Prosecution has not adduced any evidence that the Accused Brima planned, instigated or otherwise aided and abetted any of the crimes committed in the Bombali District. The Trial Chamber finds that the Prosecution has not proved any of these modes of individual criminal responsibility against the Accused Brima for the crimes committed in the Bombali District.

[2962] TF1-334, Transcript 24 May 2005, p. 28.
[2963] TF1-334, Transcript 24 May 2005, p. 23; TF1-334, Transcript 23 May 2005, pp. 74-75.
[2964] TF1-334, Transcript 24 May 2005, pp. 29-31.
[2965] TF1-158, Transcript 26 July 2005, pp. 38-39.
[2966] TF1-158, Transcript 26 July 2005, p. 38.
[2967] TF1-158, Transcript 26 July 2005, pp. 39-40.

1742. There is also evidence that the Provost Marshal was in charge of ensuring that "government property," meaning arms, ammunition and medical supplies belonging to the AFRC fighting forces, were not stolen.[2999] The Trial Chamber is of the opinion that this prohibition does not demonstrate the Accused's intention to prevent general looting of civilian property by the troops.

1743. The Trial Chamber accordingly finds that the Accused Brima failed to take necessary and reasonable measures to prevent the crimes committed in Bombali District or punish the perpetrators thereof.

(iii) Conclusion

1744. On the basis of the foregoing, the Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that the Accused Brima as a superior, bears individual criminal responsibility under Article 6(3) for the crimes committed by his subordinates in Bombali District between 1 May 1998 and 30 November 1998 in which he did not directly participate.

7. Freetown and Western Area

1745. The Trial Chamber found in relation to Freetown and the Western Area that AFRC troops committed unlawful killings of civilians[3000] and inflicted sexual[3001] and physical[3002] violence on civilians; that AFRC troops also abducted civilians and used them as forced labour;[3003] that AFRC troops illegally recruited and used children under the age of 15 years for military purposes in the attack on Freetown;[3004] and that AFRC troops engaged in looting,[3005] and committed collective punishments and acts of terror against the civilian population,[3006] as charged in the Indictment.

(a) Responsibility of the Accused Brima under Article 6(1) of the Statute

(i) Submissions

1746. In its Final Trial Brief, the Prosecution asserts that the Accused Brima together with the Accused Kamara and Kanu planned and led the invasion of Freetown, and that the attack on Freetown was designed and organised by Brima. The Prosecution further asks the Trial Chamber to

[2999] George Johnson, Transcript 15 September 2005, p. 49.
[3000] Factual Findings, Unlawful Killings, paras 902-949, *supra*.
[3001] Factual Findings, Sexual Violence, paras 1048-1049, 1056-1057, *supra*.
[3002] Factual Findings, Physical Violence, paras 1229-1242, *supra*.
[3003] Factual Findings, Enslavement, para. 1389, *supra*.
[3004] Factual Findings, Child Soldiers, para. 1278, *supra*.
[3005] Factual Findings, Pillage, para. 1429, *supra*.
[3006] Factual Findings, Acts of Terror and Collective Punishments, paras 1609-1611, *supra*.

the State House on 7 January 1999. This document might have put the Defence on notice of the particulars of the charge against Brima, as it details the manner in which the three men were captured and killed. The Trial Chamber, however, observes that this information was not disclosed to the Defence until at least two months after the opening of the trial. Thus, the notice provided cannot be described as 'timely' nor can it qualify as 'consistent.' However, the Brima Defence did not object to the leading of evidence of this incident. The Trial Chamber therefore finds that the failure to give notice did not materially impair the ability of the Brima Defence to prepare its case.

1755. Accordingly, the Trial Chamber finds the Accused Brima criminally responsible for committing the murder of three civilian Nigerian men at the State House as part of a widespread and systematic attack against the civilian population.

ii. Killing of a soldier's wife at the State House Area

1756. The Trial Chamber has found that the Accused Brima personally killed the wife of one of his soldiers outside State House in Freetown in early January 1999.[3019] Witness TF1-184 stated that he heard the husband of the victim assert that "[t]his Papay [the Accused Brima] had been after my woman for quite sometime."[3020]

1757. Yet again this incident is not pleaded in the Indictment, rendering the Indictment defective. The Trial Chamber must therefore determine whether this defect in the Indictment was cured by clear, timely and consistent notice to the Brima Defence. The Prosecution Supplemental Pre-Trial Brief and the Prosecution's Opening Statements do not refer to this incident. The only document that does refer to the incident is a prior statement of Prosecution Witness TF1-334, dated 7 November 2003, which described the killing in the following terms:

> [...] I returned to State House. Surprisingly Gullit started firing soldiers who, according to him, were not members of the troop, who were not cooperating. Also, some Nigerian soldiers we have captured, Gullit fired them. Also, in my presence, he killed a certain lady we had brought from the jungle.[3021]

1758. As the date of disclosure was not provided to the Trial Chamber, it is unable to determine the timeliness of the notice to the Defence.

1759. Prosecution Witness TF1-334 did not ultimately give evidence of this incident in his oral testimony, but Prosecution Witness TF1-184 did. The Trial Chamber is unable to determine the

[3019] TFI-184, Transcript 27 September 2005, p. 62; TF1-334, Transcript 14 June 2005, pp. 22, 27.
[3020] TF1-184, Transcript 27 September 2005, p. 62.
[3021] Statement of Witness TF1-334 dated 7 November 2003, CMS p. 6585 [confidential].

passage of time between the initial disclosure of the Prosecution material and the testimony of Witness TF1-184, and is therefore unable to determine the timeliness of the notice. However, the Brima Defence did not object. The Trial Chamber therefore finds that the failure to give notice did not materially impair the ability of the Brima Defence to prepare its case.

1760. The Trial Chamber accordingly finds that the Accused Brima is criminally responsible for personally killing a soldier's wife at the State House Area.

iii. Unlawful killings at Kissy Mental Home/Portee area

1761. The Trial Chamber heard unchallenged evidence that shortly after the AFRC forces invaded Freetown in early January 1999, on the way from Kissy Mental Home towards the Portee area, the Accused Brima personally shot dead a nun.[3022] Witness TF1-153 stated that he moved together with the AFRC troops to the Portee area by the Cotton Tree where they met nuns and that after 'Gullit' ordered the nuns to walk faster he later took out his pistol and shot dead "a black nun."[3023]

1762. The Trial Chamber finds that once again, the Indictment does not plead the incident on the killing of a black nun by the Accused Brima around the Portee area, the failure of which renders the Indictment defective. The Trial Chamber observes that the Prosecution Supplemental Pre-Trial Brief and its Opening Statement do not mention the killing of a black nun in the Portee area. However, this defect was cured by the information provided in the pre-trial Statement of witness TF1-153 dated 28 February 2003.

1763. Although the pre-trial statement of witness TF1-153 do not provide specific details on the killing of a black nun by the Accused Brima, the information contained therein put the Defence on adequate notice.[3024] Further information was contained in the pre-trial statement of witness TF1-153 on the conduct of the Accused Brima upon the AFRC troops' retreat from Freetown, and that the witness responded to the question put to him in relation to the killing of the black nun. In addition, the Defence cross examined the witness on this incident.[3025]

1764. Taking these statements together, the Trial Chamber finds that adequate notice was given to the Brima Defence of this incident. Accordingly, the Trial Chamber finds the Accused Brima

[3022] TF1-153, Transcript 23 September 2005, pp. 21-22.
[3023] TF1-153, Transcript 23 September 2005, p. 22.
[3024] TF1-153, Prior Witness Statement, 28 February 2003, CMS pp. 10269-10272 [confidential].
[3025] TF1-153, Transcript 23 September 2005, pp. 50-51.

individually criminally liable for committing the murder of a nun around the Kissy Mental Home/Portee area, as part of a widespread and systematic attack against the civilian population.

iv. Unlawful killings in the Wellington area

1765. Witness TF1-334 testified that in early January 1999, AFRC forces along the Wellington area, including the Accused Brima shot at civilians.[3026] The witness stated that all the three Accused participated in the shooting of civilians and that he saw 'Gullit' shooting with his own gun. The witness did not state whether any persons died as a result of the shooting.

1766. Furthermore, the Indictment does not plead the particulars of the incidents that took place around the Wellington area in which the Accused Brima is alleged to have shot at civilians, and the Prosecution Supplemental Pre-Trial Brief, OTP Opening Statement and Witness Statements provide no information on this specific incident with regard to the Accused Brima. The Trial Chamber will therefore make no finding on this incident.

v. Amputation of a civilian's hand at Old Road area

1767. The Trial Chamber heard unchallenged evidence that 'Gullit' (the Accused Brima) intentionally amputated the hand of a man at Shell Company by Old Road in Freetown in January 1999.[3027] The Indictment does not plead the material facts regarding this specific incident with regard to the Accused Brima and is therefore defective. The Trial Chamber must therefore determine whether this defect was cured by clear, timely and consistent notice to the Brima Defence.

1768. The Prosecution's Pre-Trial Brief and Opening Statement do not refer to this incident. Annex A of the Prosecution Supplemental Pre-Trial Brief states that "Alex Tamba Brima *ordered* amputations of civilians because they had pointed out the rebel positions to ECOMOG" [emphasis added].[3028] This information does not put the Defence on notice of the Prosecution's intent to charge the Accused with the personal commission of an amputation. The Trial Chamber notes however, that the pre-trial statement of witness TF1-184 specifically refers to the commission of the act by the Accused Brima:

[3026] TF1-334, Transcript 14 June 2005, p. 98.
[3027] TF1-184, Transcript 27 September 2005, p. 80.
[3028] Prosecution Supplemental Pre-Trial Brief, Annexure A, p. 100.

> In late January 1999, around the Kissy mental hospital, I saw Kabila telling members of the high command including Gullit that the civilians where showing ECOMOG where we were hiding. I then heard Gullit say 'well those hands that point against us, cut them of'. After this I saw several victims' amputations. The commander in charge of cutting hands was Lt Col Changabulanga. The amputations were done on the Old Road, Shell Company. Changabulanga, Gullit and 55 were there. I saw Gullit cutting hands of one man with [a] cutlass. The boys were doing this too. I saw 6 persons whose hands were cut. [3029]

The Trial Chamber cannot determine whether this information was disclosed to the Defence before the start of trial. Therefore the Trial Chamber considers that the Defence was not give timely and consistent notice of critical material facts.

1769. The Trial Chamber notes however that the Defence cross examined the witness with respect to this incident, [3030] and therefore finds that the failure to provide adequate notice did not materially impair the ability of the Brima Defence to prepare its case. Accordingly, the Trial Chamber Pursuant to Article 6(1) of the Statute, finds the Accused Brima individually criminally liable for committing the amputation of one civilian at Shell Company, Old Road, as part of a wide spread and systematic attack against the civilian population in January 1999.

b. Ordering/Instigating

i. Order to kill civilians in Fourah Bay area

1770. The Trial Chamber has found that the Accused Brima ordered his soldiers to kill civilians in the Fourah Bay area in retaliation for the killing of an AFRC soldier. The Trial Chamber is satisfied that the Accused Brima ordered the commission of these crimes in the awareness that the crimes were likely to be committed.

ii. Orders to terrorise and collectively punish the civilian population

1771. The Trial Chamber heard the following unchallenged evidence of Witness TF1-185 who was with the AFRC troops during the Freetown invasion of January 1999. The witness testified that in the presence of the Accused Kanu, 'Gullit' ordered 'Major Mines' to collect cutlasses and to distribute them to the soldiers so that amputations could be carried out. 'Changabulanga' distributed the cutlasses to the soldiers. Describing the manner in which the amputations were carried out, the witness stated that "Civilians were given either "long sleeves" meaning that the hand from the wrist downwards was removed, or "short sleeves" meaning that the entire arm from the bicep or elbow downwards was removed". The witness further stated that a new battalion under the command of

[3029] Statement of Witness TF1-184 dated 20 May 2005, CMS p. 9824 [confidential].

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'Changabulanga' was created by 'Kande'. The aim of the battalion was to create fear among the civilian population. To do this, they amputated civilian's hands.[3031] The trial Chamber also heard that during the retreat, the Accused Brima ordered the hands of all those who were pointing out the AFRC positions to ECOMOG forces to be amputated. As a result, "Mines" came back with full bag of hands and hour and a half later.[3032] From the pattern of the events, the Trial Chamber has no doubt that the hands were amputated from civilians by AFRC forces.

1772. Witness TFI-334 told court that on an unspecified day during the January 1999 invasion of Freetown, AFRC troops occupied the area of Kissy Mental Home in the eastern part of Freetown.. In the evening hours and in the presence of senior AFRC commanders, including 'Bazzy' (the Accused Kamara) and 'Five-Five' (the Accused Kanu), 'Gullit' (the Accused Brima) ordered his troops to "clear up" the area by killing civilians as punishment for their support of ECOMOG.[3033] The Accused Brima in presence of the Accused Kamara and Accused Kanu, ordered his troops to attack Kissy Mental hospital and to go to the low-cost area and amputate the arms of civilians, kill civilians and burn property "because the civilians were celebrating the arrival of ECOMOG".[3034]

1773. The orders of the Accused Brima to the perpetrators of the amputations, together with the fact that a battalion was created not for military strategy but specifically to instil fear amongst the civilian population in Freetown clearly indicate an intention to terrorise the civilians. The Trial Chamber also heard the following unchallenged evidence of Witness TFI-084 who stated that during the rebel attack on Freetown in January 1999, civilians were mutilated and killed by ARFC forces because the AFRC believed the people of Freetown supported President Tejan Kabbah.[3035] Witness TF1-334 was present when 'Gullit' announced that it was time to attack Freetown and that the Sierra Leone People's Party government was responsible for denying the success of the rebel troops. He ordered that Freetown should be looted and burnt down, that anyone who opposed the troops should be a considered a collaborator and should be killed.[3036] This testimony is corroborated by Witness TF1-033 who also heard 'Gullit' order the burning of houses and the murder of civilians during the attack on Freetown.[3037] This evidence was unchallenged and is credible.

[3030] TF1-184, Transcript 27 September 2005, p. 80.
[3031] TF1-185, Transcript 29 September 2005, pp. 15-16.
[3032] TF1-184, Transcript 27 September 2005, pp. 81-82.
[3033] TF1-334, Transcript 14 June 2005, pp. 83-84.
[3034] Prosecution Final Brief, para. 1663; TF1-334, Transcript 14 June 2005, pp. 84, 87.
[3035] TF1-084, Transcript 6 March 2005, pp. 42-47; TF1-227, Transcript 11 March 2005, pp. 62-63, 101-103.
[3036] TF1-334, Transcript 13 June 2005, pp. 100-104.
[3037] TF1-033, Transcript 11 July 2005, pp. 60-64.

1774. The Trial Chamber also heard that in early January 1999 during the Freetown invasion, at the State House, the Accused told his fighters to force captured civilians to join the AFRC forces in order to compensate for those fighters killed by ECOMOG. Following the order, civilians who refused to join the AFRC forces were shot in the presence of the Accused Brima, and their dead bodies thrown out of the back of State House.[3038] In addition, witness TF1-334 also testified that Brima ordered the abduction of civilians from Freetown during the attack "so as to attract the attention of the international community".[3039] During the attack civilians were indeed abducted. Another witness testified that when the ARFC entered Freetown, they ordered the civilians to sing while they were burning their houses.[3040] The Trial Chamber found the above Prosecution evidence which was unchallenged, credible.

1775. The Trial Chamber also heard evidence that soon after the troops lost State House the Accused Brima was informed by a soldier that one of the troops had been hacked to death by civilians at the Fourah Bay crossroad.[3041] In response, the Accused Brima called 'Major Mines', one of his subordinates, and instructed him to collect cutlasses at the SLRA[3042] compound. 'Major Mines' returned with cutlasses, some of which he kept for himself while the remainder he distributed to 'Changabulanga' who was the "battalion commander for amputations". The Accused Brima then ordered his men to go to Upgun roundabout where he ordered the fighters saying, "these people we should teach them a lesson." He ordered his men to amputate and kill civilians and burn the area down. The Trial Chamber has found that the order to commit these crimes was carried out.[3043] On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed. Witnesses TFI-334 and TFI-104 testified that the amputations and killings of civilians continued during the AFRC retreat from Freetown. When it became clear that Guinean troops had taken over, 'Gullit' saw that the civilian population was celebrating. In the presence of the Accused Kamara and Kanu, 'Gullit' stated that the people of Freetown were ungrateful and ordered the troops to go as far as they could burning and killing people. Attacks on civilians were then carried out by the troops around the area of the Kissy Mental Hospital, Blackhall Road, the Kissy Police Station up to PWD Junction near Shankardass.[3044] Witness TF1-334 testified that he personally saw six civilians

[3038] TF1-024, Transcript 7 March 2005, pp. 46-48, 72-74.
[3039] TF1-334, Transcript 14 June 2005, pp. 62-64.
[3040] TF1-157, Transcript 26 September 2005, pp. 18-19, 23-24, 26, 29-30.
[3041] TF1-184, Transcript 27 September 2005, pp. 71-72.
[3042] "Sierra Leone Roads Authority", clarified upon question from the Bench, Transcript 30 September 2005, p. 5.
[3043] Factual Findings, Unlawful Killings, paras 919-926, *supra*.
[3044] TF1-334, Transcript 14 June 2005, pp. 83-87; TF1-104, Transcript 30 June 2005, pp. 31-33.

whose arms were amputated by 'Changabulanga'. The arms of the civilians were chopped off at the elbow and 'Osman Sesay' told them to "go to Pa Tejan Kabbah to get new hands".[3045]

1776. Prosecution Witness TF1-033 testified that after the AFRC lost the battle in Freetown he remained with the AFRC troops during their retreat for three weeks. During this time the Eastern part of Freetown was occupied by AFRC "fighters" under the command of 'Gullit'. The witness saw and heard Gullit ordering his men to commit atrocities against the civilian population as they were retreating. As a result of the order, girls and women were raped by the fighters.[3046] This evidence was not challenged. The Trial Chamber finds that through the above unchallenged evidence, the Prosecution has proved beyond reasonable doubt that the Accused Brima is individually criminally responsible for ordering his subordinates to commit those crimes, as part of a widespread attack on the civilian population during the January 1999 invasion of and retreat from Freetown.

iii. Orders to kill collaborators

1777. The Trial Chamber also heard evidence that during the January 1999 attack on Freetown, the Police were specifically targeted and punished by the AFRC troops who saw them as "collaborators" of the Kabbah Government. Witness TFI-334 heard Gullit giving orders to the AFRC troops in Freetown, specifying that "Police stations should be targeted and burnt down" and collaborators killed.[3047] Witness TF1-157 who confirmed the fact that the invading AFRC troops searched Freetown for Police officers and killed them and their "their people" (families). The witness also saw the AFRC troops attack the Eastern Police Station.[3048]

iv. Order to loot UN Vehicles and civilian property

1778. The Trial Chamber heard the unchallenged evidence of Witness TFI-334 that on 6 January 1999, the Accused Brima ordered the Operations Commander to loot vehicles at United Nations headquarters and to bring them back to State House and that the Operations Commander complied with the order.[3049] Another witness Gibril Massaquoi, testified that soon after the January 1999 Freetown Invasion, he saw the Accused Kanu and other commanders driving UN vehicles in

[3045] TF1-334, Transcript 14 June 2005, pp. 81-82.
[3046] TF1-033, Transcript 11 July 2005, pp. 65-66.
[3047] TF1-334, Transcript 13 June 2005, pp. 100-102.
[3048] TF1-157, Transcript 25 September 2005, pp. 19-20, 22, 29-30, 58-60; Transcript 26 September 2005, pp. 23-24.
[3049] TF1-334, Transcript 14 June 2005, pp. 5, 21-26.

Freetown.[3050] The Trial Chamber is satisfied on the basis of this evidence that the Accused Brima's that he ordered the commission of this crime in full awareness that the crime was likely to be committed and that the order was carried out. The Trial Chamber heard evidence that in Allen Town, on the eve of the invasion of Freetown in January 1999, the Accused Brima gathered his troops and instructed them to execute "collaborators" - a term witness TF1-334 explained was used to refer to any person who did not support the AFRC troops. Brima also informed his troops that as he did not have the means to pay them they were free to loot from the civilian population. Brima also instructed the troops to burn down all police stations.[3051]

v. Order to kill 14 captive Nigerian ECOMOG soldiers at State House

1779. The Trial Chamber has found that at State House on an unknown date during the Freetown attack, Brima ordered the execution of 14 to 16 captive and unarmed Nigerian ECOMOG soldiers.[3052] Although the Prosecution witnesses TFI-334 and TFI-033 gave varying accounts of why the Nigerians were killed, they were all consistent regarding the fact that the Accused Brima gave the order for the Nigerians to be killed.[3053] The Trial Chamber found that these ECOMOG soldiers, *hors de combat*, were subsequently killed.[3054] On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed.

vi. Order to kill eight nuns at Kissy Mental Home

1780. A number of Prosecution witnesses testified that on an unspecified day in early January 1999, AFRC troops captured two clerics and eight nuns at Kissy Mental Home. After ECOMOG began bombarding the troops there, the two abducted clerics escaped. 'Gullit' ordered his fighters to execute the eight nuns "so as to prevent them escaping and leaking information". Pursuant to this order, Foday Bah Marah a.k.a. 'Bulldoze' executed five nuns. [3055] The witness stated that following the execution of the nuns, the Accused explained to his troops that they were trapped and that it was time "for a complete bulldoze." The entire brigade then began to withdraw towards Wellington

[3050] Gibril Massaquoi, Transcript 7 October 2005, p. 126.
[3051] TF1-334, Transcript 13 June pp. 100-103.
[3052] Factual Findings, Unlawful Killings, paras 911-912, *supra*.
[3053] TF1-033, Transcript 11 July 205, pp 63-65; Gibril Massaquoi, Transcript 7 October 2005, pp. 115-116; TF1-334, Transcript 14 June 2005, pp. 22-28.
[3054] Factual Findings, Unlawful Killings, para. 912, *supra*.
[3055] TF1-334, Transcript 14 June 2005, pp. 95-97; George Johnson, Transcript 16 September 2005, p. 55; TF1-184, Transcript 27 September 2005, pp. 82-84.

killing civilians and burning houses as they went.[3056] Witness George Johnson also testified that the troops had eight abducted nuns at Kissy mental home. However, he stated that when ECOMOG attacked the troops, Foday Bah Marah killed three nuns and the others escaped. The witness did not state whether this was pursuant to any order.[3057] Witness TF1-184 corroborated the evidence that three nuns were killed when the Nigerians attacked the mental home. He does not state who killed the nuns, but he testified that it was 'Gullit' who ordered their execution.[3058] The Trial Chamber is satisfied that the Accused Brima gave the order to kill the nuns and that the killing was carried out. On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed.

vii. Order to massacre civilians in Rogbalan Mosque

1781. The Trial Chamber heard unchallenged evidence that at Kissy Mental Home while the AFRC were retreating from Freetown, the Accused Brima called several senior commanders together and informed them that he had received information that civilians were harbouring ECOMOG troops in a nearby mosque. He told his commanders not to assume that mosques were housing civilians and ordered that all those found in the Mosque be killed. On these instructions, the Accused Kanu set off with the soldiers. Once they reached the Mosque the Accused Kanu ordered the troops to begin firing. The witness observed that the mosque was full of civilians and that many people were killed.[3059] The evidence of this massacre was corroborated by the following evidence.

1782. Witnesses TF1-083 and TF1-021 both testified about a massacre at Rogbalan Mosque in Freetown in January 1999. Towards the end of January 1999,[3060] TF1-083 was told that there was an ongoing fire fight between ECOMOG troops and rebels. He therefore decided to seek refuge in Rogbalan Mosque. When he arrived he found approximately 70 dead bodies inside the mosque.[3061] TF1-021 testified that he was present in Rogbalan Mosque at midday on a Friday in January 1999 when men wearing "mixed clothing" (partly combat uniform and partly civilian clothing) and carrying guns and machetes attacked the mosque. The attackers first robbed the worshippers and then told them that they would all be killed for supporting President Kabbah. The attackers then began shooting. The witness estimated that 71 worshippers were killed in this attack. The witness stressed that the victims were civilian worshippers who had gathered for the traditional 14:00

[3056] TF1-334, Transcript 14 June 2005, pp. 97-98.
[3057] George Johnson, Transcript 16 September 2005, p. 55.
[3058] TF1-184, Transcript 27 September 2005, pp. 82-84.
[3059] TF1-334, Transcript 14 June 2005, pp. 87-89.
[3060] TF1-083, Transcript 8 April 2005, p. 58.

prayers.[3062] The Trial Chamber is satisfied that the Accused Brima gave the order to kill the civilians at Rogbalan Mosque and that the killing was carried out by his subordinates. On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed.

viii. Order to abduct and enslave civilians including child soldiers

1783. The Trial Chamber heard evidence that during the retreat of the AFRC fighters from Freetown, the Accused Brima ordered the abduction of civilians "in order to attract the attention of the international community". Civilians were then abducted by the renegade-SLA troops and used to carry loads. On Brima's orders, the young boys under the age of fifteen years were later trained as Small Boy Units.[3063] The Trial Chamber notes the evidence of Prosecution witness TF1-024 that the Accused Brima ordered the abduction of civilians because he lost so many troops and needed reinforcements from among the civilian population.[3064] On the basis of all the Prosecution evidence narrated above, the Trial Chamber is satisfied that the Accused Brima ordered the commission of these crimes in full awareness that they were likely to be committed. The Trial Chamber finds, pursuant to Article 6(1) of the Statute, that the Prosecution has proved beyond reasonable doubt that the Accused Brima ordered his subordinates to commit crimes against the civilian population in Freetown, in January 1999 as part of a widespread attack on the population.

c. Planning

1784. No evidence was adduced that the Accused Brima planned any crimes under Counts 3 through 6, 10 through 11 and 14 in Freetown and the Western Area. The Trial Chamber finds that the Prosecution has not proved this mode of criminal responsibility against the Accused Brima, in relation to Freetown and the western Area.

d. Otherwise aiding and abetting

1785. As stated above with regards to liability for commission of crimes in Fourah Bay, the Trial Chamber has found that there is evidence that the Accused Brima participated in the attack on Fourah Bay in which civilians were killed and houses burnt. The Trial Chamber found that the

[3061] TF1-083, Transcript 8 April 2005, pp. 69-71.
[3062] TF1-021, Transcript 15 April 2005, pp. 25-32.
[3063] Factual Findings, Child Soldiers, para. 1278, *supra*; TF1-334, Transcript 14 June 2005, pp. 62-64, 118-121; Transcript 15 June 2005, pp. 14-15.
[3064] TF1-024, Transcript 7 March 2005, p. 47.

Accused Brima was present during the commission of the crimes and either himself participated or failed to admonish the troops from committing the crimes.

1786. Given his authority as commander of the troops, the Trial Chamber finds Brima's presence at the scene gave moral support which had a substantial effect on the perpetration of the crime. In addition, given the systematic pattern of crimes committed by the AFRC troops throughout the District, the Trial Chamber is satisfied that the Accused Brima was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators.

(b) Responsibility of the Accused Brima Under Article 6(3) of the Statute

(i) Submissions

1787. The Prosecution submits in its Final Brief that the Accused Brima has superior responsibility for all crimes committed by his subordinates in Freetown between 6 January 1999 until around 28 January 1999.[3065]

1788. The Brima Defence submits that the evidence of mutiny by junior soldiers at Colonel Eddie Town, which led to the arrest and 'long detention' of the three Accused, 'weakens any responsible chain of command and the existence of superior authority'.[3066] The Brima Defence further submits that there was no effective command or control over the fighters that attacked Freetown, citing in support of this argument the Prosecution Military Expert's conclusion that 'the AFRC faction had a strong command capability which failed on 6th January 1999'.[3067]

(ii) Findings

a. Existence of a superior-subordinate relationship

1789. The Trial Chamber has found that the Accused Brima was overall commander of the troops in Freetown.[3068] The Trial Chamber will now consider the evidence pertaining to the Accused Brima's control of the troops from the time he regained command throughout the attack on Freetown until the retreat of the troops to Benguema in February 1999 in order to ascertain whether a superior-subordinate relationship existed.

[3065] Prosecution Final Brief, paras 1637-1640.
[3066] Brima Final Brief, para. 105.
[3067] Brima Final Brief, para. 195; *see also* exhibit P-36, Iron Report, para. E6.1.
[3068] Role of the Accused, Brima, para. 420, *supra*.

decisions, and the command structure was effective enough to be able to conduct a relatively complex manoeuvre".

1805. The foregoing evidence establishes a superior-subordinate relationship existed between the Accused Brima and the AFRC troops in Freetown after the troops lost State House. The Trial Chamber therefore finds that the Accused Brima was in a superior-subordinate relationship with the AFRC troops that committed crimes in Freetown even after the "Headquarters" were dislodged from State House.

b. Actual or Imputed Knowledge

1806. The Prosecution submits that 'based on the fact that in most cases the orders to commit crimes were given to the subordinates directly by the Accused or at least in their presence, the Accused either knew or at the very least had reason to know that the subordinates were about to commit the offences or had done so.'[3107]

1807. The Trial Chamber is satisfied that the Accused Brima ought reasonably to have known of the commission of crimes committed in which he was not directly involved. He directly participated in the commission of a number of crimes.[3108] The crimes were committed on a wide scale in physical proximity to the Accused Brima at State House.

1808. The Trial Chamber therefore finds that there can be no reasonable doubt that the Accused Brima was in possession of information to put him on notice that crimes were being committed by his subordinates, although he may not have been directly involved in such crimes.

c. Failure to prevent or punish

1809. There is no evidence that the Accused Brima took any measures to prevent the troops under his control in Freetown from committing crimes against or punish the perpetrators of such crimes.

(iii) Conclusion

1810. The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that the Accused Brima is liable as a superior under Article 6(3) for crimes committed in Freetown and the Western Area during the relevant Indictment period.

[3107] Prosecution Final Brief, para. 1639.
[3108] *See* Responsibility of the Accused, Brima, paras 1750-1786 *supra*.

Rosos, abducted young women were forced to provide sexual services and to perform domestic tasks.[3124]

1824. The magnitude of commission of the three enslavement crimes by AFRC troops indicates their systemic nature. The Trial Chamber notes that the Brigade included a position in which an individual was appointed specific responsibility for abducted civilians.[3125] Although the Trial Chamber is unable to make a finding on the total number of civilians abducted and forced to undergo military training, the example provided by Colonel Iron that one battalion at 'Colonel Eddie Town' consisted of approximately 150 trained soldiers supplemented by approximately 200 abducted civilians[3126] corroborates the evidence of fact-based witnesses that these crimes were committed on a large scale.[3127]

1825. Indeed, it would appear that once established the *modus operandi* of enslavement became so deeply entrenched that it was difficult to break. Col. Iron's conclusion about the abduction of civilians during the withdrawal from Freetown is instructive.

> There can be little military justification for what happened" during the retreat from Freetown [...] The abductions seem particularly self-defeating: at a time when there was benefit in reducing the size of the force to make it faster moving during the escape, the abductees swelled the size of the column, slowed it down, and made it a bigger target. One reason given for the abductions was to make the fighting strength seem larger than it was; *but I suspect that the truth is more simply that abductions were now common practice for the AFRC.*" [3128] [emphasis added]

1826. Based on the large scale, continuous and organised nature of the enslavement crimes, the Trial Chamber is satisfied that the only reasonable inference is that a substantial degree of planning and preparation were required to commit the crimes.

1827. On the basis of the evidence below, the Trial Chamber is further satisfied that the Accused Brima, alone or with others, designed the commission of the three crimes (enslavement, sexual slavery and recruitment and use of child soldiers) and that although these crimes were largely committed by his subordinates, his contribution was substantial.

1828. The Accused played a substantial role in the system of exploitation and cruelty. The Trial Chamber has found that the Accused Brima was the overall commander of both the AFRC troops that moved from Mansofinia, Koinadugu District to Camp Rosos, Bombali District and of the

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[3124] Factual Findings, Outrages upon Personal Dignity, paras 1138-1139, *supra*.
[3125] Exhibit P-36, Iron Report, para. C3.5; TF1-153, Transcript 23 September 2005, p. 102.
[3126] Exhibit P-36, Iron Report, para. C3.5.
[3127] Factual Findings, Enslavement, para. 1359, *supra*.
[3128] Exhibit P-36, Iron Report, para. D5.4.

1832. As was the pattern with all operations overseen by the Accused Brima, AFRC fighters exhibited a depraved indifference towards human life in abducting and enslaving civilians. Children watched their abductors executing family members.[3142] Throughout the conflict women and young girls were treated as war bounty, abducted from their homes and repeatedly raped.[3143] Child soldiers were terrorised, drugged and forced to commit crimes against other civilians.[3144] Given his authority, the Accused was in a position to shut down this system of exploitation entirely, to deter the excesses committed by his troops, and to alleviate the plight of the victims. On the evidence adduced the Trial Chamber finds that he failed to do so.

1833. The Trial Chamber stresses that the above evidence relates entirely to enslavement crimes committed in Bombali and the Western Area. The Trial Chamber has found that the Accused Brima was not involved in the commission of crimes in Bo, Kenema, Kailahun, Kono, Koinadugu and Port Loko Districts.

1834. The Trial Chamber is satisfied that the Accused planned, ordered, organised and implemented the system to abduct and enslave civilians which was in fact committed by AFRC troops in Bombali and Western Area. It is further satisfied that the Accused had the direct intent to set up and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour.

(a) Responsibility under Article 6(1) for Count 9 (Outrages on Personal Dignity)

1835. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Brima is individually criminally responsible under Article 6(1) of the Statute for planning the commission of the crime of outrages on personal dignity in Bombali District and Freetown and the Western Area.

(b) Responsibility under Article 6(1) for Count 12 (Child Soldiers)

1836. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Brima is individually criminally responsible under Article 6(1) of the Statute for planning the commission of conscription of children under the age of 15 into the armed group or using them to participate actively in hostilities in Bombali District and the Western Area.

[3142] TF1-158, Transcript 26 July 2005, pp. 33-34.
[3143] Factual Findings, Sexual Violence, paras 973-980, 1044-1049, *supra*.
[3144] Factual Findings, Child Soldiers, para. 1254, *supra*.

(c) Responsibility under Article 6(1) for Count 13 (Enslavement)

1837. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Brima is individually criminally responsible under Article 6(1) of the Statute for enslavement in Bombali District and the Western Area.

(d) Responsibility under Article 6(3) for Counts 9, 12 and 13

1838. As the Trial Chamber has already found the Accused Brima criminally responsible for the planning of the enslavement crimes, it is not necessary to examine his responsibility under Article 6(3).

C. The Accused Kamara

1. Allegations in the Indictment

1839. The Indictment alleges:

> At all times relevant to this Indictment, Brima Bazzy Kamara was a senior member of the AFRC/ Junta and RUF forces.
>
> Brima Bazzy Kamara was a member of the group which staged the coup and ousted the government of President Kabbah, Johnny Paul Koroma, Chairman and leader of the AFRC, appointed Brima Bazzy Kamara a Public [sic] Liaison Officer (PLO) within the AFRC. In addition, Brima Bazzy Kamara was a member of the Junta governing body.
>
> Between about mid February 1998 and about 30 April 1998, Brima Bazzy Kamara was a commander of AFRC/RUF forces based in Kono District. In addition, Brima Bazzy Kamara was a commander of AFRC/RUF forces which conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone, including, but not limited to, attacks on civilians in Koinadugu and Bombali Districts between about mid February 1998 and 31 December 1998. Brima Bazzy Kamara was a commander of AFRC/RUF forces which attacked Freetown on 6 January 1999.
>
> [...]
>
> In [his] positions referred to above, [...] Brima Bazzy Kamara [...], individually or in concert with [the Accused Brima and the Accused Kanu], Johnny Paul Koroma aka JPK, Foday Saybana Sankoh, Sam Bockerie aka Mosquito aka Maskita, Issa Hassan Sesay aka Issa Sesay, Morris Kallon aka Belai Karim, Augustine Gbao aka Augustine Bao and/or other superiors in the AFRC, Junta and AFRC/RUF forces, exercised authority, command and control over all subordinate members of the AFRC, Junta and AFRC/RUF forces.
>
> [...]
>
> [...] Brima Bazzy Kamara [...], by [his] acts or omissions, [is] individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, which crimes [he] planned, instigated, ordered, committed or in whose planning, preparation or execution [he] otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which [he] participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which [he] participated.

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before:	Justice George Gelaga King, Presiding Judge Justice Emmanuel Ayoola Justice Renate Winter Justice Raja Fernando Justice Jon M. Kamanda
Registrar:	Herman von Hebel
Date:	28 May 2008

PROSECUTOR **Against** MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-A)

JUDGMENT

Office of the Prosecutor:
Stephen Rapp
Christopher Staker
Karim Agha
Joseph Kamara
Régine Gachoud
Elisabeth Baumgartner
Bridget Osho
Francis Banks-Kamara

Defence Counsel for Moinina Fofana:
Wilfred Davidson Bola-Carrol
Mohamed Pa-Momo Fofana

Defence Counsel for Allieu Kondewa:
Yada Williams
Osman Jalloh

District."[83] Because the Prosecution's concluding arguments include no mention of Bonthe District, the Appeals Chamber finds that the Prosecution has not met its burden of advancing the reasons for the alleged error and the Appeals Chamber will therefore not examine whether the Trial Chamber erred in relation to Bonthe District.[84]

3. Liability for Crimes Committed in Tongo Town

(a) The Findings of the Trial Chamber

43. The Trial Chamber found that the Kamajors launched three attacks on Tongo Town.[85] The first attack was in late November or early December 1997.[86] Between 10-12 December 1997, a passing out parade was held at Base Zero, the headquarters of the CDF High Command ("First Passing Out Parade").[87] Norman, who was the National Coordinator for the CDF, spoke to the Kamajors and commanders,[88] and both Fofana and Kondewa attended this parade.[89] Norman said that "the attack on Tongo will determine who the winner or the looser of the war would be"[90] and that "there is no place to keep captured or war prisoners like the juntas, let alone their collaborators."[91] Norman further said that '"[if] the international community is condemning human rights abuses [...] then I take care of the human left abuses,'"[92] which he clarified to mean that "'[...] any junta you capture, instead of wasting your bullet, chop off his left [hand] as an indelible mark [...] to be a signal to any group that will want to seize power through the barrels [*sic*] of the gun and not the ballot paper [;] [w]e are in Africa, we want to practice democracy.'"[93] The Trial Chamber found that he instructed and encouraged the

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[82] *Ibid* at para. 3.40 (emphasis omitted).
[83] *Ibid* at para. 3.46.
[84] *Ibid* at para. 3.103.
[85] CDF Trial Judgment, para. 376.
[86] *Ibid* at para. 380.
[87] *Ibid* at para. 320. *See also* para. 381.
[88] *Ibid* at paras 722, 735.
[89] *Ibid* at para. 721(x).
[90] *Ibid* at para. 321.
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid.*

Kamajors to kill captured enemy combatants and "collaborators," to inflict physical suffering or injury upon them and to destroy their houses.[94]

44. After Norman instructed the Kamajors to commit unlawful acts, Fofana, as Director of War, addressed the fighters, saying "[n]ow, you've heard the National Coordinator . . . any commander failing to perform accordingly and losing your own ground, just decide to kill yourself there and don't come to report to us."[95]

45. Further, following the speeches of Norman and Fofana, Kondewa spoke to the Kamajors and said "a rebel is a rebel; surrendered, not surrendered, they're all rebels [...t]he time for their surrender had long since been exhausted, so we don't need any surrendered rebel." He then said "I give you my blessings; go my boys, go."[96]

46. Following the First Passing Out Parade, Norman held a commanders' meeting in the same month at which plans to attack Tongo Town were discussed and at which Norman provided further instructions for the Tongo and Black December operations.[97] Those present at this meeting included Fofana, Kondewa, Mohamed Orinco Moosa (the National Deputy Director of War), Albert J. Nallo (Deputy National Director of Operations and Director of Operations, Southern Region), KG Samai, Ngobeh (the district grand Kamajor commander), and some commanders from the Tongo area, such as Musa Junisa, Witness TF2-079, Vandi Songo and some members of the War Council.[98] At the meeting, Norman further reiterated and clarified his orders and expanded upon them to include looting.[99] He repeated that whoever took Tongo would win the war and that it should be taken at all costs. Norman told them not to spare anyone working with or mining for the juntas. Norman also said that all collaborators should forfeit their properties and be killed.[100] Everyone in the meeting

[94] *Ibid* at paras 722, 735.
[95] *Ibid* at paras 321, 722.
[96] *Ibid* at paras 321, 735.
[97] *Ibid* at paras 322, 725.
[98] *Ibid* at para. 322.
[99] *Ibid* at para. 725.
[100] *Ibid* at para. 322.

contributed to the discussion, including Fofana and Kondewa.[101] Norman then ordered Fofana to provide logistics for the operation.[102]

(b) Fofana

(i) The Prosecution's Fourth Ground of Appeal: Instigation

a. Submissions of the Parties

47. The Prosecution submits that the Trial Chamber erred in finding that the elements of instigating were not satisfied on the part of Fofana for the crimes committed during the second and third attacks on Tongo Town, and that the full responsibility of Fofana was therefore not reflected.[103] The Prosecution submits that in finding that Fofana's speech had a substantial effect on the commission of the crimes, the Trial Chamber effectively found that the *actus reus* for instigating was satisfied.[104] Further, the Prosecution submits that in the context of Fofana's seniority at Base Zero as part of what was referred to as the "Holy Trinity," his statement that any commander failing to perform according to Norman's instructions should kill himself and not report to Base Zero,[105] could only be understood as a direct threat to the Kamajors that they would face death or other serious consequences if they failed to carry out Norman's orders.[106]

48. With regard to the *mens rea* required for instigating, the Prosecution submits that Fofana's intent or knowledge that crimes would likely be committed may be inferred from his substantial contribution to the planning, which was done with knowledge of the crimes which Norman had ordered in the execution of their plan.[107] The Prosecution further argues that based on Fofana's speech at the December 1997 Passing Out Parade, which the Trial Chamber

[101] *Ibid* at paras 322, 725.
[102] *Ibid* at paras 322, 726.
[103] Prosecution Appeal Brief, para. 3.49.
[104] *Ibid* at para. 3.52.
[105] *Ibid*, *referring* to CDF Trial Judgment, para. 723.
[106] Prosecution Appeal Brief, para. 3.52. In support of this argument, the Prosecution refers to the Trial Chamber's finding that Nallo, who was a subordinate to Fofana, testified that "if the Kamajors did not follow orders they would cut off your ears or kill you." *Ibid*, *referring* to CDF Trial Judgment, para. 336.
[107] *Ibid* at paras 3.54, 3.74.

51. The Trial Chamber held that the *actus reus* of instigating requires "an act or omission, covering both express and implied conduct of the Accused, which is shown to be a factor substantially contributing to the conduct of another person committing the crime,"[117] and that there must be a "causal relationship between the instigation and the perpetration of the crime . . . although it is not necessary to prove that the crime would not have occurred without the Accused's involvement."[118] The Trial Chamber also held that the *mens rea* of instigating is an intention "to provoke or induce the commission of the crime," or a "reasonable knowledge that a crime would likely be committed as a result of that instigation."[119] Neither of the parties takes issue with the Trial Chamber's definition of instigation.

52. The Trial Chamber found that Fofana's speech at the First Passing Out Parade substantially contributed to the commission of crimes by the Kamajors in Tongo Town and thereby satisfied the *actus reus* of aiding and abetting. The parties have not challenged this finding. Both aiding and abetting and instigating require the *actus reus* to have a substantial effect on the perpetration of the crime.

53. The Trial Chamber concluded that Fofana's actions had a substantial effect on the perpetration of these crimes.[120] The Trial Chamber found that "Fofana's speech at the [first] passing out parade constitutes aiding and abetting only of the *preparation* [*sic*][121] of those criminal acts which were explicitly ordered by Norman, namely, killing of captured enemy combatants and 'collaborators', infliction of physical suffering or injury upon them and destruction of their houses."[122]

54. The Prosecution argues that because the *actus reus* of aiding and abetting is satisfied, the *actus reus* is also satisfied for instigating. However, the Trial Chamber found, relying on ICTY Appeals Chamber jurisprudence, that unlike the *actus reus* of instigating, the *actus reus* of aiding and abetting does not require a causal link between the act of aiding and abetting

[117] CDF Trial Judgment, para. 223.
[118] *Ibid.*
[119] *Ibid.*
[120] *See ibid* at paras 723, 724.
[121] Apparent mistyping for "perpetration." *See also* Fofana Response Brief and Kondewa Response Brief.
[122] *See* CDF Trial Judgment, para. 727 (emphasis added).

and the commission of the crime.[123] The Appeals Chamber holds that the *actus reus* of instigating requires a causal link which aiding and abetting does not and accordingly disagrees with the Prosecution's proposition.

55. Fofana's speech at the First Passing Out Parade at Base Zero was removed both temporally and geographically from the unlawful acts committed by the Kamajors in Tongo Town in January 1998. This alone would not be enough to deny a causal link between the speech and the crimes alleged. However, in this case the Appeals Chamber is of the view that there is insufficient evidence to show how Fofana's words influenced the perpetration of crimes which took place at a significantly different place and time. Fofana's speech may have substantially contributed to the military effort, but not to the crimes as such. Therefore, the Appeals Chamber is satisfied that the Trial Chamber was not in error in finding that Fofana's speech did not have a substantial effect on the perpetration of the crimes or that a causal relationship did not exist and that the *actus reus* for instigating was, consequently, not satisfied.

56. With regard to the *mens rea* required for "instigating," the Prosecution submits that Fofana's intent or knowledge that crimes would likely be committed may be inferred from his substantial contribution to the planning, which was done with knowledge of the crimes which Norman had ordered in the execution of the plan. Fofana's words "[n]ow you've heard the National Coordinator [. . .] any commander failing to perform accordingly and losing your own ground, just decide to kill yourself there and don't come to report to us" are ambiguous and may be interpreted not as approving Norman's unlawful orders, but rather as an appeal to each of the commanders to fight hard and not loose his ground. Further, Fofana's call "to destroy the soldiers finally from where they were [. . .] settled"[124] was directed at the military campaign and does not include any incitement to perpetrate unlawful acts. This leads the Appeals Chamber to conclude that there were other possible interpretations of the evidence than the one suggested by the Prosecution. The Appeals Chamber, therefore, finds that a reasonable trier of fact could have found that Fofana did not have the requisite *mens rea*.

[123] *See ibid* at para. 229, *referring* to *Blaškić* Appeal Judgement, para. 48.
[124] *See ibid* at para. 325.

57. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in failing to convict Fofana for instigating the commission of crimes in Tongo Town. The Prosecution's Fourth Ground of Appeal, therefore, fails in this respect.

(ii) The Prosecution's Fourth Ground of Appeal: Planning

a. Submissions of the Parties

58. The Prosecution does not take issue with the Trial Chamber's pronouncement on the law on planning, and submits that because planning may be undertaken by one or more persons, an accused does not have to have been responsible for all of the planning.[125] The Prosecution notes that the Trial Chamber found that "in the absence of any evidence showing how Fofana contributed to the discussion and decision at th[e] meeting [. . .] there is no evidence to prove beyond reasonable doubt"[126] that Fofana planned the commission of the crimes.[127] The Prosecution submits that the Trial Chamber erroneously suggested that an accused can only be convicted of planning where there is direct evidence of the specific contribution that the accused made to the plan in question.[128] The Prosecution argues that even if the details of an accused's specific contribution to planning is unknown, the accused may still satisfy the *actus reus* for planning if the evidence shows that the accused participated substantially in the planning of the crimes, and that the planning substantially contributed to the criminal conduct.[129]

59. In this case, the Prosecution submits that given Fofana's "seniority as one of the top three figures at Base Zero, and given his express responsibility as Director of War for the planning of operations, no reasonable trier of fact could have concluded that Fofana may have been only a 'passive' participant at all of these meetings."[130] The Prosecution also asserts that no reasonable trier of fact could have failed to infer that Fofana possessed the requisite *mens rea* for instigating and that he made a substantial contribution to planning "in the very clear

[125] Prosecution Appeal Brief, para. 3.56.
[126] CDF Trial Judgment, para. 725.
[127] Prosecution Appeal Brief, paras 3.58-3.59, *referring* to CDF Trial Judgment, para. 725.
[128] *Ibid.*
[129] *Ibid* at para. 3.60.
[130] *Ibid* at para. 3.70.

Chamber observes that one of the purposes of the Passing Out Parade was for Norman to give instructions to the Kamajors for the second and third attacks on Tongo Town,[164] not just instructions concerning unlawful acts. For this reason temporal and geographic remoteness is not of significance to the question of whether Kondewa's speech substantially contributed to the perpetration of the crimes. Thus, in the light of all the circumstances of this case, a reasonable trier of fact could have concluded that the only inference available on the evidence was that through his blessings and speech at the First Passing Out Parade Kondewa substantially contributed to the perpetration of the crimes in Tongo Town.

76. Regarding the requisite *mens rea*, the Appeals Chamber agrees with Kondewa that the Trial Chamber erroneously relied on the fact that he had received the report to Base Zero of the Kamajors' previous crimes in Tongo. On the contrary, the Trial Chamber found that Norman and Fofana received this report, not Kondewa.[165] Thus, the Appeals Chamber finds that the Trial Chamber erred in fact in relying on this report.[166]

77. It is the unchallenged finding of the Trial Chamber, that Norman at the Passing Out Parade ordered the Kamajors to commit criminal acts in Tongo, and that Kondewa who spoke after Norman, knew of the orders of Norman when he said: "a rebel is a rebel; surrendered, not surrendered, they're all rebels . . . [t]he time for their surrender had long since been exhausted, so we don't need any surrendered rebel ... I give you my blessings; go my boys, go."[167] The Trial Chamber further found that "no fighter would go to war without Kondewa's blessings because they believed that Kondewa transferred his mystical powers to them and made them immune to bullets."[168]

78. On these findings the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to conclude that Kondewa by his words of encouragement aided and abetted the commission of criminal acts ordered by Norman in Tongo.

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[164] *Ibid* at para. 721(x).
[165] Kondewa Appeal Brief, para. 141; CDF Trial Judgment, para. 721(ix) ("TF2-079 prepared a situation report on events occurring between 19 September and 13 November 1997 in Zone II Operational Frontline which included Lower Bambara and Dodo Chiefdoms [...]. It [...] narrated crimes which were committed by Kamajors in that area [...]. At Base Zero they gave the report first to Fofana and then to Norman.").
[166] CDF Trial Judgment, para. 737.
[167] *Ibid* at para. 321.
[168] *Ibid* at para. 735.

79. The Appeals Chamber therefore concludes, Justice King dissenting, that the Trial Chamber did not err in finding Kondewa responsible for aiding and abetting the commission of crimes in Tongo Town. The Appeals Chamber accordingly finds, Justice King dissenting, that Kondewa's Fourth Ground of Appeal must fail and upholds his conviction in relation to violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively).

(ii) Prosecution's Fourth Ground of Appeal: Instigation

a. Submissions of the Parties

80. The Prosecution submits that in finding that the elements of instigating were not satisfied, the Trial Chamber erred in fact and in law in its approach to the evaluation of the evidence concerning Kondewa's involvement in the crimes committed in Tongo Town.[169] The Prosecution argues that the *actus reus* of instigating has effectively been satisfied due to the Trial Chamber's finding that the *actus reus* of aiding abetting was satisfied because "Kondewa's words had a substantial effect on the perpetration of those criminal acts."[170]

81. Regarding the requisite *mens rea*, the Prosecution asserts that based on evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kondewa had the necessary *mens rea* for instigating.[171] The Prosecution specifically points to the Trial Chamber's finding that Kondewa expressly encouraged the crimes,[172] and argues that on occasions prior to the First Passing Out Parade, Kondewa threatened others, including members of the War Council, who accused the Kamajors of committing crimes.[173] In addition, while at Base Zero, Kondewa personally killed a civilian and ordered the killing of another civilian.[174] The Prosecution submits that although this evidence is not directly related to

[169] Prosecution Appeal Brief, para. 3.91.
[170] *Ibid* at para. 3.92, *referring* to CDF Trial Judgment, para. 736.
[171] *Ibid* at para. 3.93.
[172] *Ibid.*
[173] *Ibid, referring* to CDF Trial Judgment, paras 306, 308.
[174] *Ibid, referring* to CDF Trial Judgment, paras 921(iii) (v), 934. In footnote 238 it is submitted that "In relation to the incident in which Kondewa was found to have ordered a civilian killed, the Trial Chamber was not satisfied that it

Tongo, it shows that Kondewa supported or advocated the crimes committed by the Kamajors in Tongo.[175]

82. Kondewa responds that he is not liable for instigating because a causal connection has not been shown between his speech at the First Passing Out Parade and the crimes committed in Tongo.[176] He submits that the Prosecution incorrectly stated: that the *actus reus* of instigating and aiding and abetting is the same;[177] that the *actus reus* of these forms of liability is different because proof of a cause-effect relationship is necessary for instigating but not for aiding and abetting;[178] that there is no evidence that the Kamajors who were present at the First Passing Out Parade were the same Kamajors who subsequently committed crimes in Tongo Town;[179] and finally that there is no evidence that any Kamajor was prompted to commit any crime on the basis of his ambiguously phrased words, which he uttered six weeks earlier.[180]

b. Discussion

83. The Trial Chamber's statement of the elements of the *actus reus* and the *mens rea* of instigating has already been noted in paragraph 51.

84. The Trial Chamber found Kondewa's speech at the First Passing Out Parade to have had a substantial effect on the perpetration of crimes in Tongo Town and thereby satisfied the *actus reus* of aiding and abetting. Both aiding and abetting and instigating require the *actus reus* to have a substantial effect on the perpetration of the crime. A finding that an accused's conduct had a "substantial effect" for the purpose of aiding and abetting will therefore normally also satisfy the "substantial effect" requirement for the purpose of instigating.

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occurred within the timeframe pleaded in the Indictment ([CDF Trial Judgment], para. 923). It is submitted that while this mean that Kondewa could not be convicted of this crime, the finding that it occurred and that Kondewa ordered it can be taken into account in determining Kondewa's intent at the time of the attacks on Koribondo, Bo and Kenema."

[175] Prosecution Appeal Brief, para. 3.93.
[176] Kondewa Response Brief, para. 2.2.
[177] *Ibid* at para. 2.4.
[178] *Ibid.*
[179] *Ibid* at para. 2.9.
[180] *Ibid.*

85. In this case, in order to show a causal link between Kondewa's speech and the crimes committed in Tongo Town, the Prosecution must lead evidence to show that the Kamajors who were present at the First Passing Out Parade at which Kondewa's speech was made were the same Kamajors who subsequently committed the crimes in Tongo Town. There was no such evidence before the Trial Chamber. For this reason the Appeals Chamber finds that "instigation" for the crimes charged in Tongo Town was not proved.

86. Consequently, the Prosecution's Fourth Ground of Appeal fails in this respect.

4. Liability for Crimes in Koribondo, Bo District and Kenema District

(a) The Findings of the Trial Chamber

87. The Trial Chamber found that Norman, Fofana and Kondewa also addressed the Kamajors at a Second Passing Out Parade in early January 1998 regarding an "all-out offensive."[181] After thanking the Kamajors for the training they had undergone, and talking about the prior and pending operations, Norman said that he had given instructions for the pending operations which the Kamajors should follow.[182] Norman also said that "whoever knows that he is used to fighting with the cutlass, it is time for him to take up the cutlass [; w]hoever knows that he's used to fighting with a gun, it is time for him to take up the gun [; w]however knows that he's used to fight with a stick, it is time to him to take up his stick."[183]

88. Fofana also gave a speech at this meeting, saying that:

> "[T]the advice that Pa Norman had given to us, that the training that we underwent for a long time, the time has come for us to implement what we've learned. Now that we have received the order that we shall attack the various areas where the juntas are located, they have done a lot for the trainees. They've spent a lot on them. So any commander, if you are given an area to launch an attack and you fail to accomplish that mission, do not return to Base Zero."[184]

[181] CDF Trial Judgment, paras 323-337.
[182] *Ibid* at para. 323.
[183] *Ibid.*
[184] *Ibid* at para. 324.

441. The Appeals Chamber is of the opinion that acts of sexual violence may constitute "other inhumane acts" as alleged in Count 3 of the Indictment[855] as well as "cruel treatment," as alleged in Count 4 of the Indictment.[856]

442. Counts 3 and 4 of the Indictment do not explicitly list the acts of sexual violence that amounts either to an "other inhumane act" under Article 2.i. of the Statute or "cruel treatment" under Article 3.a. of the Statute. The Indictment on its face was defective with respect to allegations relating to sexual violence.

443. However, case law at the *ad hoc* Tribunals recognizes that in limited circumstances, a defect in the indictment may be "cured" if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.[857] While a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused, the defect may be deemed harmless if the Prosecution can demonstrate that the accused's ability to prepare his defence was not materially impaired. Factors to be considered in this respect include, among others, information provided in the Prosecution's pre-trial brief or its opening statement, the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case.[858] The Appeals Chamber adopts these principles.

444. The Appeals Chamber notes that the Prosecution's Pre-Trial Brief, filed on 2 March 2004, clearly notes that in relation to Bonthe District, "[t]he evidence will demonstrate that their daughters and wives [civilians] were systematically raped and held in sexual slavery."[859]

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[855] AFRC Appeal Judgment, para. 186; *Akayesu* Trial Judgement, paras 688, 697; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 1 December 2003, para. 936 [*Kajelijeli* Trial Judgement]; *Niyitigeka* Appeal Judgement, para. 465.

[856] *Akayesu* Trial Judgement, paras 711-712; *Kayishema* Trial Judgement, para. 108; *Prosecutor v. Musema*, ICTR-96-13-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 27 January 2000, para. 156; *Čelebići* Trial Judgement, paras 551-552.

[857] *Kupreškić* Appeal Judgement, para. 114; *Kvočka* Appeal Judgement, para. 43; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 7 July 2005, para. 28; *Ntakirutimana* Appeal Judgement, para. 27; *Gacumbitsi* Appeal Judgement, paras 175-179; *Prosecutor v. Seromba*, ICTR-01-66-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 12 March 2008, para. 100. *See also Blaškić* Appeal Judgement, para. 238-239.

[858] *Simić* Appeal Judgement, para. 24.

[859] Prosecution Pre-Trial Brief, para. 62. The Pre-Trial Brief itself does not set out factual allegations in relation to specific Counts or specific individuals. On 1 April 2004, the Trial Chamber ordered the Prosecution to file a Supplemental Pre-Trial Brief, finding that the Prosecution's Pre-trial Brief of 2 March 2004 does not sufficiently

The Prosecution's Supplemental Pre-Trial Brief, filed on 22 April 2004, alleged that under Counts 3 and 4 of the Indictment, in relation to Bonthe District, both Fofana and Kondewa were being held responsible pursuant to Article 6(1) of the Statute for subjecting women and girls to "sexual assaults, harassment, and non-consensual sex, which resulted in widespread proliferation of sexually transmitted diseases, unwanted pregnancies and severe mental suffering . . . ,"[860] as well as for "committing unlawful physical violence and mental harm or suffering through sexual assaults as well as other acts during the attacks in Bonthe District."[861] Furthermore, the Prosecution's opening statement, delivered on 3 June 2004, referred to the testimony of several witnesses relating to evidence of sexual violence or forced marriage.[862]

445. The Appeals Chamber therefore is satisfied that by the time the Prosecution filed its Admissibility of Evidence Motion, the Accused had timely and consistent notice for nearly one year that acts of sexual violence were being alleged in relation to Bonthe District under Counts 3 and 4 of the Indictment.[863]

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address factual issues, does not provide with reasonable sufficiency notice and an overview of the Prosecution's case against each individual accused, and the nexus between the crimes alleged and the individual criminal responsibility of each accused. *See Prosecutor v. Norman et al.*, SCSL-04-14-PT, Special Court for Sierra Leone, Order to the Prosecution to File a Supplemental Pre-Trial Brief, 1 April 2004.

[860] Prosecution Appeal Brief, para. 8.13; Prosecution Supplemental Pre-Trial Brief, paras 91(b), 220(b).

[861] Prosecution Brief, para. 8.13; Prosecution Supplemental Pre-Trial Brief, para. 92.

[862] The Prosecution stated: "At Tihun, one of the Kamajors wanted to be his wife – wanted her to be his wife, but she refused and, in reward, she was threatened with death. The Kamajor had her perform conjugal duties and that witness was held in sexual slavery for a whole year. The witness was unable to escape because at every point in time there was a Kamajor that stood guard to prevent her from doing so. It was at Talia [Bonthe District] the witness met her mother in captivity and it was also the same place that she met the third Accused, Allieu Kondewa, who took her into his bedroom and raped her many times into the night. That witness will be here to testify to that." Referring to another witness who would testify, the Prosecutor further stated: "She will testify that she was raped by one Kamajor, who then forcefully took her as his wife. She spent three months at Talia with the Kamajors and during her captivity she witnessed a lot of killings of innocent civilians who were brought into town by these Kamajors." The Prosecutor also referred to witnesses who would testify that: "The witnesses also testify that some girls and women were brought to Base Zero and they were forced to have sex and they were raped and they were held in sexual slavery and subject to systematic sexual violence with Kamajor commanders like Kamoh Lahai and King Kondewa himself. The Court will hear testimonies of looting, raping and terrorizing civilians committed by this dreadful death squad." CDF Trial Transcript, 3 June 2004, p. 23. *See also* Dissenting Opinion of Judge Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 26.

[863] The Appeals Chamber notes that there is a distinction between the question of whether the Accused was on notice for the purposes of admitting evidence and whether the Prosecution provided adequate notice upon which a conviction could rest, which can only be made at the end of the trial after taking the totality of the evidence into consideration. *See Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, International Criminal Tribunal for Rwanda, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, Appeals Chamber, 4 October 2004, para. 7.

446. Fofana argues that the Trial Chamber was correct in refusing to admit evidence of sexual violence because the "evidence sought to be adduced would be prejudicial to the interest of the accused persons. Such evidence would cast a cloak of doubt on the image of innocence that the Accused enjoys under law, until the contrary is proved."[864] The Appeals Chamber is of the view that the right to a fair trial enshrined in Article 17 of the Statute cannot be violated by the introduction of evidence relevant to any allegation in the trial proceedings, regardless of the nature or severity of the evidence.[865] The Appeals Chamber concludes that evidence of sexual violence was relevant to charges in the Indictment and that the Trial Chamber was in error in prospectively denying the admittance of such evidence. Further, the accused were put on notice of such evidence, which is not prejudicial in itself.

447. The Appeals Chamber notes that in filing its Urgent Motion for a Ruling on the Admissibility of Evidence on 15 February 2005, the Prosecution sought "clarification as to the extent to which the [Trial Chamber's Indictment Amendment Decision] limit[ed] the adduction of particular relevant and admissible evidence, under existing counts of the Consolidated Indictment."[866] At that stage of the proceedings, the Prosecution had attempted to tender only one witness' testimony concerning sexual violence in evidence.[867] The Trial Chamber denied the Prosecution's request to tender such evidence.[868] The Prosecution did not appeal this denial, but three months later filed its Admissibility of Evidence Motion.

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[864] Fofana Response Brief, para. 149. This argument was argued by Justice Itoe, *see* Separate and Concurring Opinion of Hon. Justice Benjamin Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 65 stating that the admission of evidence of sexual violence constitutes unfair prejudice to the accused because it is considered as being "unfairly compromising of the interests and status of innocence or the good standing of the accused." In so finding, he considered that unfair prejudice occurs where, evidence if adduced, "has the potential of staining the mind of the Judge with an impression that adversely affects his clean conscience towards all parties, and particularly the party who is the victim of that evidence which is tendered, to the extent that it leaves in the mind of the Judge, an indelible scar of bias which could make him ill disposed to the cause of the victim of said evidence [in this case the Accused] as a result of which injustice could be occasioned to the party who after all, may be innocent or have a just cause, and who but for the admission of that contested evidence.

[865] *See* Dissenting Opinion of Judge Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 33. ("[E]vidence of acts of sexual violence are no different than evidence of any other act of violence for the purposes of constituting offences within Counts 3 and 4 of the Indictment and are not inherently prejudicial or inadmissible character evidence by virtue of their nature of characterisation as 'sexual'").

[866] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence, 15 February 2005, para. 1.

[867] CDF Trial Transcript, 2 November 2004.

[868] *Ibid.*

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SCSL – 04 – 14 – A
(049 – 321)

049

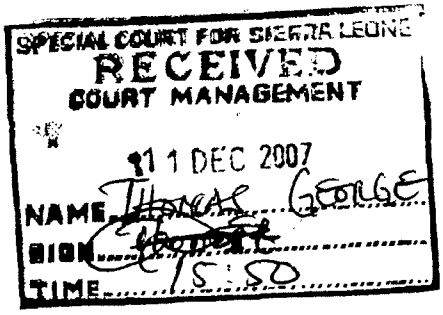
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

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

Registrar: Mr. Herman Von Hebel

Date filed: 11 December 2007



THE PROSECUTOR **Against** **Moinina Fofana**
Allieu Kondewa

Case No. SCSL-04-14-A

PUBLIC
PROSECUTION APPEAL BRIEF

Office of the Prosecutor:
Dr. Christopher Staker
Mr. Chile Eboe-Osuji
Mr. Karim Agha
Mr. Joseph Kamara
Ms. Anne Althaus
Ms. Régine Gachoud

Counsel for Moinina Fofana:
Mr. Wilfred Davidson Bola Carol

Counsel for Allieu Kondewa:
Mr. Yada Williams

Parade.[234] However, the Trial Chamber found that no evidence had been adduced that Kondewa planned, instigated, ordered or committed any of these crimes.[235]

3.91 The Prosecution takes no issue with the Trial Chamber's finding that the elements of aiding and abetting were satisfied. However, as in the case of Fofana, the Prosecution submits, for the reasons given below, that the Trial Chamber erred in fact and/or erred in law in its approach to the evaluation of the evidence in finding that the elements of instigating were not satisfied on the part of Kondewa in relation to these crimes. The Prosecution requests the Appeals Chamber to revise the Trial Chamber's finding of liability for aiding and abetting, by adding a finding that Kondewa is individually responsible for ***instigating*** these crimes.

3.92 In finding Kondewa responsible for aiding and abetting these crimes, the Trial Chamber found effectively that the elements of the *actus reus* of instigating were satisfied in this case.[236]

3.93 The Prosecution further submits that on the basis of the Trial Chamber's findings and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Kondewa had the necessary intent for instigating. At the December 1997 Passing Out Parade, he made a statement that the Trial Chamber expressly found encouraged the commission of crimes during the second and third attacks on Tongo, and, in the Prosecution's submission, amounted to instigating those crimes. His intent that crimes be committed is further evidenced by the fact that Kondewa on previous occasions had threatened others (including members of the War Council) who had made accusations that the Kamajors had committed crimes,[237] that while at Base Zero he personally committed one killing of a civilian and personally ordered the killing of another civilian,[238] and that he

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234 **Trial Chamber's Judgement**, para. 739.

235 *Ibid.*, para. 744.

236 *Ibid.*, para. 736 ("Kondewa's words had a substantial effect on the perpetration of those criminal acts").

237 *Ibid.*, paras. 306, 308.

238 *Ibid.*, paras 921(iii) and (v), 934. In relation to the incident in which Kondewa was found to have ordered a civilian killed, the Trial Chamber was not satisfied that it occurred within the timeframe pleaded in the Indictment (*ibid.*, para. 923). It is submitted that while this mean that Kondewa could not be convicted of this crime, the finding that it occurred and that Kondewa ordered it can be taken into account in determining Kondewa's intent at the time of the attacks on Koribondo, Bo and Kenema.

III

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SCSL-04-14-T
(22021 — 22064)

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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 I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Herman von Hebel

Date: 9th of October 2007

PROSECUTOR Against MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT ON THE SENTENCING OF MOININA FOFANA AND ALLIEU KONDEWA

Office of the Prosecutor:
Stephen Rapp
Christopher Staker
James C Johnson
Joseph Kamara
Kevin Tavener
Mohamed A Bangura
Adwoa Wiafe

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Arrow Bockarie
Michiel Pestman
Steven Powles

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana
Susan Wright

to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead.[88]

50. With respect to the form and degree of Fofana's participation, the Chamber notes that he was found liable for the crimes in Tongo Field as an aider and abettor under Article 6(1) of the Statute. The jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation.[89] The Chamber also notes that while Fofana was found liable for aiding and abetting, he was not present at the scenes of the crimes and that the degree of his participation amounted only to encouragement.[90]

51. With respect to the crimes for which Fofana was convicted under Article 6(3), the Chamber has considered the gravity of Fofana's conduct in failing to prevent the crimes. It finds that the gravity of the offence committed by Fofana given his leadership role as a superior who failed to prevent his subordinates from committing crimes, is greater than that of the actual perpetrators of the crimes.[91] In this case, the fact that Fofana's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to

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[88] Judgement, para 406.

[89] *Vasiljevic* Appeal Judgement, para 182. See also *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgement and Sentence (TC), 28 April 2005, para 593 and *Prosecutor v. Krstic*, IT-98-33-T, Judgement and Sentence (TC), 2 August 2001 [*Krstic* Trial Judgement], para 714. The Prosecution has submitted that "the fact that an accused is found liable as an indirect co-perpetrator does not entitle him to a lower sentence (Prosecution Sentencing Brief, para 40), citing the *Stakic* Appeal Judgement. In *Stakic*, while the ICTY Appeals Chamber did claim that "the fact that an accused is found guilty as an 'indirect co-perpetrator' does not necessarily lead to a lower sentence" (para 380), it discussed this specifically in relation to Stakic's case, where he was a crucial member of a joint criminal enterprise, and had a "uniquely pivotal role in co-ordinating the persecutory campaign carried out by the military, police and civilian government in Prijedor" (para 380). The Chamber stressed the need to consider the form and degree of participation of the Accused in the crime. Stakic's role was thus very different than the type of "indirect co-perpetration" (i.e. aiding and abetting) that Fofana was held liable for.

[90] Fofana Sentencing Brief, para 40, Transcript of 19 September 2007, pp. 67-68.

[91] *Prosecutor v. Blaskic*, IT-95-14-T, Judgement (TC), 3 March 2000 [*Blaskic* Trial Judgement], where the Court held that if a commander "fails in his duty to prevent the crime or punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes" (para 789). In the *Blaskic* Appeal Judgement, the Appeals Chamber reduced Blaskic's sentence on the basis of factual errors made by the Trial Chamber, but did not comment on this aspect of the law.

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SCSL-04-14-T
(21048-21487)

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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 I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Herman von Hebel
Date:	2 August 2007

PROSECUTOR **Against** **MOININA FOFANA**
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT

Office of the Prosecutor:
Stephen Rapp
Christopher Staker
James C Johnson
Joseph Kamara
Kevin Tavener
Mohamed A Bangura
Adwoa Wiafe

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Arrow Bockarie
Michiel Pestman
Steven Powles

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
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Ansu Lansana
Susan Wright

in the Statute be committed or with reasonable knowledge that the crime would likely be committed in the execution of that plan.

4.1.4. Instigating

222. The Prosecution charges the Accused pursuant to Article 6(1) of the Statute with instigating the crimes referred to in the Indictment.[279]

223. The Chamber is of the view that "instigating" a crime means urging, encouraging or "prompting another to commit an offence".[280] The *actus reus* required for instigating a crime is an act or omission, covering both express and implied conduct of the Accused,[281] which is shown to be a factor substantially contributing to the conduct of another person committing the crime.[282] A causal relationship between the instigation and the perpetration of the crime must be demonstrated; although it is not necessary to prove that the crime would not have occurred without the Accused's involvement.[283] To establish the *mens rea* requirement for "instigating" a crime, the Prosecution must prove that the Accused intended to provoke or induce the commission of the crime, or had reasonable knowledge that a crime would likely be committed as a result of that instigation.

4.1.5. Ordering

224. The Chamber notes that the Prosecution charges the Accused pursuant to Article 6(1) of the Statute with ordering the crimes referred to in the Indictment.[284]

225. The Chamber takes the view that the *actus reus* of "ordering" a crime requires that a person who is in a position of authority orders a person in a subordinate position to commit an offence.[285] It is our opinion that no *formal* superior-subordinate relationship between the superior and the

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[279] Indictment, para. 20.
[280] *Kordic and Cerkez* Appeal Judgement, para. 27; *Semanza* Trial Judgement, para. 381; *Krstic* Trial Judgement, para. 601; *Limaj et al.* Trial Judgement, para. 514.
[281] *Brdjanin* Trial Judgement, para. 269; *Blaskic* Trial Judgement, para. 280; *Limaj et al.* Trial Judgement, para. 514; *Oric* Trial Judgement, para. 273.
[282] *Kordic and Cerkez* Appeal Judgement, para. 27; *Gacumbitsi* Appeal Judgement, para. 129; *Limaj et al.* Trial Judgement, para. 514.
[283] *Kordic and Cerkez* Appeal Judgement, para. 27; *Limaj et al.* Trial Judgement, para. 515; *Brdjanin* Trial Judgement, para. 269; *Bagilishema* Trial Judgement, para. 30.
[284] Indictment, para. 20.
[285] *Kordic and Cerkez* Appeal Judgement, para. 28; *Limaj et al.* Trial Judgement, para. 514.

subordinate is required. It is sufficient that there is proof of some position of authority on the part of the Accused that would compel another to commit a crime in compliance with the Accused's order.[286] Such authority can be *de jure* or *de facto* and can be reasonably implied.[287] The Chamber is of the view that a "causal link between the act of ordering and the physical perpetration of a crime [...] also needs to be demonstrated as part of the *actus reus* of ordering" but that this "link need not be such as to show that the offence would not have been perpetrated in the absence of the order."[288]

226. The Chamber finds that to establish the *mens rea* requirement for "ordering" a crime, the Prosecution must prove that the Accused either intended to bring about the commission of the crime or that the Accused had reasonable knowledge that the crime would likely be committed as a consequence of the execution or implementation of that order.

4.1.6. Aiding and Abetting

227. The Chamber notes that the Prosecution charges the Accused pursuant to Article 6(1) of the Statute with aiding and abetting in the planning, preparation or execution of the crimes referred to in the Indictment.[289]

228. It is the view of the Chamber that "aiding and abetting" consists of the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[290] "Aiding and abetting" can include providing assistance, helping, encouraging, advising, or being sympathetic to the commission of a particular act by the principal offender.[291]

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[286] *Gacumbitsi* Appeal Judgement, paras 181-182; *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 361 [*Semanza* Appeal Judgement], referring to *Kordic and Cerkez* Appeal Judgement, para. 28. *See also Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Judgement (AC), 19 September 2005, para. 75 [*Kamuhanda* Appeal Judgement]: "To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." [Footnotes omitted].

[287] *Limaj et al.* Trial Judgement, para. 515 referring to *Brdjanin* Trial Judgement, para. 270.

[288] *Strugar* Trial Judgement, para. 332.

[289] Indictment, para. 20.

[290] *Krstic* Trial Judgement, para. 601; *Limaj et al.* Trial Judgement, para. 516; *Tadic* Appeals Judgement, para. 229.

[291] *Limaj et al.* Trial Judgement, para. 516; *Kvocka et al.* Trial Judgement, para. 254; *Semanza* Trial Judgement, para. 384; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Judgment (TC), 17 June 2004, para. 286 [*Gacumbitsi* Trial Judgement].

bullets by immunisation.[471] However, some initiates, such as members of the War Council, chose only to be immunised and not to fight in the battles.[472]

316. Kondewa was in charge of the initiations at Base Zero; however, it was Norman who decided who should be initiated or who could join the Kamajors.[473] The initiation fee was about 10,000 leones and was paid directly to Kondewa.[474]

317. An example of a Base Zero initiation of fighters was one that involved a group of 400 candidates who were gathered naked in the bush while singing. Children as young as eleven or twelve years of age were in this group, but the majority were adults. Marks were made on initiates' bodies with razor blades and they were told not to bathe for one week. The blade marks symbolised the completion of the initiation. After one week, the initiates were gathered at a graveyard in the middle of the night and allowed to bathe. The initiates were told that if anyone had died for them, that person would return to them in the graveyard and give them something to make them powerful fighters. A substance called "*tevi*", a mixture of burnt human ashes with herbs and leaves in palm oil, was given to all initiates to rub on their bodies before going to the warfront.[475]

2.2.9. Training

318. Training was an important component of the operations at Base Zero. When Norman first landed in Talia, he told the crowd that President Kabbah had sent him there to set up a training base so that they could fight the war and bring peace to the country.[476] Any initiate wanting to become a combatant had to go through military training.[477] MS Dumbuya, who was once the head of the armed wing of the Sierra Leone Police known as the State Security Division ("SSD"), led the

[471] Transcript of 27 January 2006, Samuel Hinga Norman, p. 95.
[472] Transcript of 17 November 2004, TF2-068, pp. 79-80 (CS).
[473] Transcript of 8 June 2005, TF2-011 p. 17 (CS).
[474] Transcript of 2 November 2004, TF2-021, p. 43.
[475] Transcript of 2 November 2004, TF2-021, pp. 37-43; Transcript of 12 October 2006, Abibu Brima, pp. 60-63. For examples of killings as part of Kamajor rituals see the killings of Alpha Dauda Kanu and Mustafa Fallon in Talia and the killing of TF2-088's son in Kpetewoma, described in sections V.2.8.5 and V.2.5.7.2.1; See also Transcript of 19 November 2004, TF2-017, p. 27 (CS).
[476] Transcript of 8 November 2004, TF2-096, pp. 18-19 and 54-55; see also section V.2.2.3.
[477] Transcript of 8 June 2005, TF2-011, p. 44 (CS).

training along with a man named Mbogba.[478] Norman was one of the instructors.[479] There were up to 5,000 trainees at Base Zero at any given time.[480] After the training, a passing out parade would be held at Base Zero, which signified that the Kamajors had passed their training and could present their skills.[481] Thereafter each trainee would be given a certificate, which was signed by Norman, Kondewa and Mbogba.[482]

319. Different levels of training were given for different trainees. For instance, one of the members of the War Council, who was not a combatant, learned "cock and fire" techniques, which took about three to four days, and was given his certificate. A combatant, on the other hand, would be trained for up to two weeks, and learned how to assemble weapons, what to do when ambushed and how to roll like a snake when being followed by a troop. All training was done at the Talia School Field and behind it, where there was an obstacle course with ropes hanging and trenches dug.[483]

2.2.10. Planning Operations: Meetings at Base Zero

2.2.10.1. Passing out Parade in December 1997

320. Between 10 and 12 December 1997, a passing out parade was held at Base Zero. It was witnessed by many civilians and Kamajors at Talia. At this parade instructions for the Tongo and Black December operations were given.[484]

321. Norman said in the open that "the attack on Tongo will determine who the winner or the looser of the war would be" and that "[...] there is no place to keep captured or war prisoners like the juntas, let alone their collaborators".[485] TF2-222 felt uncomfortable with this command because "[g]iving such a command to a group that was 95 percent illiterate who had been wronged,

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[478] Transcript of 18 February 2005, TF2-222, p. 40; Transcript of 10 February 2005, Bobor Tucker, pp. 42-43; Transcript of 16 November 2004, TF2-008, pp. 65-67; Transcript of 26 January 2006, Samuel Hinga Norman, p. 56; Transcript of 17 February 2006, MT Collier, p. 48; Transcript of 8 June 2005, TF2-011, p. 45 (CS).
[479] Transcript of 16 November 2004, TF2-008, pp. 63, 66.
[480] Transcript of 10 February 2005, Bobor Tucker, p. 43
[481] Transcript of 18 February 2005, TF2-222, p .7.
[482] Transcript of 10 February 2005, Bobor Tucker, p. 43; Transcript of 16 November 2004, TF2-008, p. 67; Exhibit 26; Transcript of 19 November 2004, TF2-008, p. 67.
[483] Transcript of 15 February 2005, p. 89 (CS).
[484] Transcript of 17 February 2005, TF2-222, pp. 104-111.
[485] Transcript of 17 February 2005, TF2-222, p. 110; See also Transcript of 7 February 2006, Samuel Hinga Norman, pp. 41-44; Transcript of 15 February 2005, TF2-005, p. 106 (CS).

is like telling them an eye for an eye" and meant telling them not to "[...] spare the vulnerables [*sic*]".[486] Norman also said that "[if] the international community is condemning human rights abuses [...] then I take care of the human left abuses", which was clarified by him to mean that "[...] any junta you capture, instead of wasting your bullet, chop off his left [hand] as an indelible mark [...] to be a signal to any group that will want to seize power through the barrels of the gun and not the ballot paper [;] [w]e are in Africa, we want to practice democracy".[487] He also told the fighters to "spare the houses of those men who burnt down your own houses", which TF2-222 took to be very ironical. He understood the last instruction as telling the fighters indirectly not to spare house of the juntas.[488] Fofana also spoke at this meeting saying "[n]ow, you've heard the National Coordinator [...] any commander failing to perform accordingly and losing your own ground, just decide to kill yourself there and don't come to report to us."[489] Then all the fighters looked at Kondewa, admiring him as a man with mystic power, and he gave the last comment saying "a rebel is a rebel; surrendered, not surrendered, they're all rebels [... t]he time for their surrender had long since been exhausted, so we don't need any surrendered rebel." He then said, "I give you my blessings; go my boys, go."[490]

2.2.10.2. Commanders' Meeting in December 1997 for Tongo

322. Following the passing out parade, a meeting was held by Norman at the *walehun*,[491] which was a small place in the bush which took the role of a big *barri*.[492] Further instructions for the Tongo and Black December operations were then given to the commanders by Norman.[493] The meeting had in attendance, among others, Fofana, Kondewa, Mohamed Orinco Moosa, Albert J Nallo, KG Samai, Ngobeh, some commanders from the Tongo area, such as, Musa Junisa, TF2-

[486] Transcript of 17 February 2005, TF2-222, p. 111.
[487] Transcript of 17 February 2005, TF2-222, pp. 112-114.
[488] Transcript of 17 February 2005, TF2-222, pp. 114-115; TF2-222 also testified that later that day, Alhaji Daramy Rogers held a meeting with TF2-222, Hashim Kallon, George Jambawai and Paramount Chief Charles Caulker to discuss Norman's orders. They were all in agreement that the CDF was now taking the same line of operation as the juntas and doing "unholy acts". Transcript of 17 February 2005, pp. 116-118.
[489] Transcript of 17 February 2005, TF2-222, p. 119.
[490] Transcript of 17 February 2005, TF2-222, pp. 119-120.
[491] Transcript of 26 May 2005, TF2-079, pp. 55-56.
[492] Transcript of 17 February 2005, TF2-222, p. 102.
[493] Transcript of 15 February 2005, TF2-005, pp. 105-107 (CS); Transcript of 26 May 2005, TF2-079, p. 55.

losing their own ground. As found by the Chamber above, those Kamajors who then proceeded to attack Tongo not only received a direction from Norman to commit specific criminal acts, they also had a clear encouragement and support from Fofana, as one of their leaders, to commit such acts.

723. The Chamber is satisfied that Fofana's speech had a substantial effect on the perpetration of those criminal acts. Although this speech was given by Fofana at Base Zero in December 1997, prior to the commission of the criminal acts by Kamajors in Tongo in January 1998, the Chamber finds that the Accused is liable for aiding and abetting even when his conduct occurred before the principal crime had been perpetrated and at a location geographically removed from that of the principal crime.[1544]

724. The Chamber observes that in order to make a finding that Fofana aided and abetted in the commission of the alleged crimes it is irrelevant whether he shared the intent of the perpetrators. Similarly, the Chamber need not examine whether Fofana knew of the precise crime that was intended by the principal perpetrator. However, the Chamber is satisfied that Fofana was aware that one of a number of crimes would probably be committed by the Kamajors and that one of those crimes was in fact committed. The Chamber finds that Fofana knew of Norman's orders that the Kamajors were to kill captured enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to destroy their houses. The Chamber finds that, based on his awareness that the Kamajors who operated in the towns of Tongo Field had previously engaged in criminal conduct, which had been reported to Base Zero,[1545] Fofana knew that it was probable that the Kamajors would commit at least one of these acts in compliance with the instructions issued. With this knowledge and his knowledge of the orders given by Norman, the National Coordinator, Fofana encouraged and supported the Kamajors in their actions, in consequence of which they committed acts of killing and infliction of physical suffering or injury in Tongo, as found by the Chamber above.

[1544] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated and at a location geographically removed from the location of the principal crime: see Section IV.4.1.6 "Aiding and Abetting".

[1545] See fact in para. 721(ix).

733. The Chamber finds that the evidence adduced has not established beyond reasonable doubt that there was a superior-subordinate relationship, either *de jure* or *de facto*, between Fofana and all of the Kamajors, who committed other criminal acts in the towns of Tongo Field prior to, during, and after the second and third attacks on Tongo, which the Chamber found were committed during the time frame charged in the Indictment, so as to conclude that he could or did exercise effective control over those Kamajors.

734. Since an essential element of a superior responsibility is not established, it is not necessary to examine the other remaining elements with respect to other criminal acts which the Chamber found were committed by Kamajors in the towns of Tongo Field during the time frame charged in the Indictment.

3.4.2. Responsibility of Kondewa

3.4.2.1. Responsibility Pursuant to Article 6(1)

735. The Chamber finds that at the passing out parade in December 1997 when the attack on Tongo was discussed Kondewa addressed the fighters as the High Priest after the National Coordinator and the Director of War had made their comments. All the fighters looked at Kondewa, admiring him as a man with mystic powers, and he made the last comment saying that the time for the surrender of rebels had long been exhausted and that they did not need any surrendered rebels. The Chamber finds that in uttering these words Kondewa effectively supported Norman's instructions and encouraged the Kamajors to kill captured enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to destroy their houses. Kondewa then gave his blessings for these criminal acts as the High Priest. The Chamber notes that no fighter would go to war without Kondewa's blessings because they believed that Kondewa transferred his mystical powers to them and made them immune to bullets.

736. As found by the Chamber above, the Kamajors who then proceeded to attack Tongo not only received a direction from Norman to commit specific criminal acts, they also had encouragement and support from Kondewa through his blessing, as one of their leaders with mystical powers, to commit such acts. The Chamber is satisfied that Kondewa's words had a substantial effect on the perpetration of those criminal acts. Although Kondewa's speech was given at Base Zero in December 1997 prior to the commission of the criminal acts by Kamajors in Tongo

in January 1998, the Chamber finds that the Accused is liable for aiding and abetting even when his conduct occurred before the principal crime had been perpetrated and at a location geographically removed from that of the principal crime.

737. The Chamber observes that in order to make a finding that Kondewa aided and abetted in the commission of the alleged crimes it is irrelevant whether he shared the intent of the perpetrators. Similarly, the Chamber need not examine whether Kondewa knew of the precise crime that was intended by the principal perpetrator. However, the Chamber should be satisfied that Kondewa was aware that one of a number of crimes would probably be committed by the Kamajors and that one of those crimes was in fact committed. The Chamber finds that Kondewa knew of Norman's orders that the Kamajors were to kill captured enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to destroy their houses. The Chamber finds that, based on his awareness that the Kamajors who operated in the towns of Tongo Field had previously engaged in criminal conduct, which had been reported to Base Zero,[1547] Kondewa knew that it was probable that the Kamajors would commit at least one of these acts in compliance with the instructions issued. With this knowledge and his knowledge of the orders given by the National Coordinator, Kondewa encouraged and supported the Kamajors in their actions, in consequence of which they committed acts of killing and infliction of physical suffering or injury in the towns of Tongo Field, as was found by the Chamber above.

738. We further find that Kondewa was present and contributed to the discussion at the subsequent commanders' meeting in December 1997 at Base Zero where plans to attack Tongo were discussed. At this meeting Norman further reiterated, clarified and expanded his unlawful orders, which now included looting, to the Kamajor commanders from Tongo. In the absence of any evidence showing how Kondewa contributed to the discussion and decision at this meeting, the Chamber finds that in the circumstances there is no evidence to prove beyond reasonable doubt that Kondewa either planned the commission of this additional crime of looting or that he aided and abetted in the planning, preparation or execution of this additional crime in Tongo.

739. The Chamber finds, however, that the speech by Kondewa at the passing out parade constitutes aiding and abetting in the preparation of those criminal acts which were explicitly

[1547] See para. 721(ix).

reasonable doubt that Kondewa had the requisite knowledge, an essential element of the crime of acts of terrorism.

744. In addition, the Chamber finds that no evidence has been adduced that Kondewa planned, instigated, ordered or committed any of the other criminal acts which the Chamber found were committed in the towns of Tongo Field during the time frame charged in the Indictment. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

3.4.2.2. Responsibility Pursuant to Article 6(3)

745. The Chamber finds that the evidence adduced has not established beyond reasonable doubt that there was a superior-subordinate relationship, either *de jure* or *de facto*, between Kondewa and all of the Kamajors, who committed other criminal acts in the towns of Tongo Field prior to, during, and after the second and third attacks on Tongo, which the Chamber found were committed during the time frame charged in the Indictment, such as to conclude that he could or did exercise effective control over those Kamajors.

746. Since an essential element of a superior responsibility is not established, it is not necessary to examine the other remaining elements with respect to other criminal acts which the Chamber found were committed by Kamajors in the towns of Tongo Field during the time frame charged in the Indictment.

3.4.2.3. Counts - The Towns of Tongo Field

747. The Chamber recognises that other criminal acts have been committed by Kamajors in the towns of Tongo Field during the time frame relevant to the Indictment. In the Chamber's opinion, having regard to all the evidence adduced, these criminal acts were either not charged in the Indictment or fall outside the time frame of the Indictment or there is no indication that the accused were involved in the commission of these crimes through any of the modes of liability

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding Judge
Justice Jon M. Kamanda
Justice George Gelaga King
Justice Emmanuel Ayoola
Justice Shireen Avis Fisher

Acting Registrar: Binta Mansaray

Date: 26 October 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

JUDGMENT

Office of the Prosecutor:
Christopher Staker
Vincent Wagona
Nina Jørgensen
Reginald Fynn
Elisabeth Baumgartner
Régine Gachoud

Defence Counsel Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph
Jared Kneitel

Defence Counsel for Morris Kallon:
Charles Taku
Kennedy Ogeto

Defence Counsel for Augustine Gbao:
John Cammegh
Scott Martin

placed to assess the evidence, including the demeanour of witnesses.[65] The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[66] The Appeals Chamber has adopted the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić et al.*, as follows:

> [T]he task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[67]

The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[68]

33. The same standard of reasonableness and deference to factual findings applies when the Prosecution appeals against an acquittal,[69] however, the Appeals Chamber endorses the view that:

> Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[70]

34. **In regard to procedural errors**: Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be waived or

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[65] *Fofana and Kondewa* Appeal Judgment, para. 33.
[66] *Fofana and Kondewa* Appeal Judgment, para. 33; *Ntakirutimana* Appeal Judgment, para. 12; *Kupreškić et al.* Appeal Judgment, para. 30.
[67] *Fofana and Kondewa* Appeal Judgment, para. 34, *quoting Kupreškić et al.* Appeal Judgment, para. 30.
[68] *See Galić* Appeal Judgment, para. 9, fn. 21; *Stakić* Appeal Judgment, para. 219; *Čelebići* Appeal Judgment, para. 458. Similarly, the standard of proof at trial is the same regardless of the type of evidence, direct or circumstantial.
[69] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.
[70] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.

being specific in regard to an object or subject matter. An object or subject matter that is particularly named or defined cannot be said to lack specificity.[103]

2. Exception to Specificity

52. The pleading principles that apply to indictments at international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes when compared with those in domestic jurisdictions. For this reason, there is a narrow exception to the specificity requirement for indictments at international criminal tribunals. In some cases, the widespread nature and sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity.[104]

B. Challenges to an Indictment on appeal

53. Challenges to the form of an indictment should be made at a relatively early stage of proceedings and usually at the pre-trial stage pursuant to Rule 72(B)(ii) of the Rules which provides that it should be made by a preliminary motion.[105] An accused, therefore, is in the ordinary course of events expected to challenge the form of an indictment prior to the rendering of the judgment or at the very least, challenge the admissibility of evidence of material facts not pleaded in an indictment by interposing a specific objection at the time the evidence is introduced.[106]

54. Failure to challenge the form of an indictment at trial is not, however, an absolute bar to raising such a challenge on appeal.[107] An accused may well choose not to interpose an objection when certain evidence is admitted or object to the form of an indictment, not as a means of exploiting a technical flaw, but rather because the accused is under the reasonable belief that such evidence is being introduced for purposes other than those that relate to the nature and cause of the charges against him.[108]

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[103] *Brima et al.* Appeal Judgment, para. 40.
[104] *Brima et al.* Appeal Judgment, para. 41; *Kvočka* Form of the Indictment Decision, para. 17.
[105] *Brima et al.* Appeal Judgment, para. 42; Rule 72(B)(ii) expressly provides that preliminary motions by the accused include "[o]bjections based on defects in the form of the indictment."
[106] *Brima et al.* Appeal Judgment, para. 42; *Niyitegeka* Appeal Judgment, para. 199.
[107] *Brima et al.* Appeal Judgment, para. 43.
[108] *Brima et al.* Appeal Judgment, para. 43.

Indictment, the Trial Chamber's analysis of cure was belated and prejudiced his defence.[305]

161. Fourth, Kallon argues that the Trial Chamber erred in finding that the defect in the Indictment could be cured.[306] Kallon submits that the Prosecution made no curing disclosures in its pre-trial briefs or opening statement, and that the Trial Chamber improperly relied upon witness statements to cure the defect.[307]

162. In response, the Prosecution argues that the Indictment "clearly alleged attacks against UNAMSIL peacekeepers by the AFRC/RUF, which included 'unlawful killings of UNAMSIL peacekeepers'."[308] The Prosecution submits that the allegation was reiterated in its Pre-Trial Brief, Supplemental Pre-Trial Brief, and "the material facts concerning the killing of UNAMSIL personnel were also made known to [Kallon] through disclosure of witness statements."[309] The Prosecution further states that it cannot respond to Kallon's unspecified allegation that the Indictment does not "plead any of the elements of 6.3 responsibility."[310]

(b) Discussion

163. The Appeals Chamber understands Kallon's first argument to pertain to the pleading of his conduct with respect to his liability for ordering or for incurring superior responsibility for the intentionally directed attacks against UNAMSIL peacekeepers.

164. Ordering involves a person in a position of authority instructing another person to commit an offence; a formal superior-subordinate relationship between the accused and the actual physical perpetrator is not required.[311] The Appeals Chamber finds that the very notion of "instructing" requires a positive action by the person in a position of authority.[312] Since ordering can be established by direct or circumstantial evidence,[313] the order itself

[305] Kallon Appeal, paras 251-252, *citing* Kallon Motion for Acquittal, pp. 50-60; Kallon Motion to exclude Evidence Outside the Scope of the Indictment (without citing any paragraphs); Kallon Final Trial Brief (without citing any paragraphs).
[306] Kallon Appeal, paras 252-253.
[307] Kallon Appeal, paras 253-256.
[308] Prosecution Response, para. 2.57, *quoting* Indictment, para. 83.
[309] Prosecution Response, para. 2.57.
[310] Prosecution Response, para. 2.58, *quoting* Kallon Appeal, para. 250.
[311] *Kordić and Čerkez* Appeal Judgment, para. 28; *Semanza* Appeal Judgment, para. 361.
[312] *See Blaškić* Appeal Judgment, para. 660.
[313] *See e.g., Galić* Appeal Judgment, para. 178.

need not be a material fact pleaded in the indictment since it is a matter for proof from the evidence adduced at trial. In the present case, Kallon's positions of authority were adequately pleaded in paragraphs 24 through 28 of the Indictment, and the charge that he ordered the crime under Count 15 was pleaded in paragraphs 38, 40, 41, 83 and page 21, which provide notice of the charge that (i) by his acts he is individually criminally responsible pursuant to Article 6(1) of the Statute for the crimes he ordered;[314] (ii) he conducted armed attacks in Bombali District targeting humanitarian assistance personnel and peacekeepers assigned to UNAMSIL;[315] (iii) the AFRC/RUF attacks against UNAMSIL peacekeepers and humanitarian assistance workers within Bombali District occurred between 15 April 2000 and about 15 September 2000;[316] (iv) these attacks included unlawful killings of UNAMSIL peacekeepers, abducting them and taking hostages;[317] and (v) and by his acts, Kallon was responsible pursuant to Article 6(1) for Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, punishable under Article 4.b. of the Statute.[318]

165. The Appeals Chamber considers this pleading to have provided sufficient notice of the material facts that Kallon "ordered rebels under his command,"[319] and "used his position of command and authority to direct his subordinates"[320] through "instructions"[321] to attack UNAMSIL peacekeepers in Bombali District on 1 May 2000 and 3 May 2000.[322] These attacks included the "attack on Maroa,"[323] the "abduction of Mendy and Gjellesdad,"[324] "[t]he abduction of Kasoma and ten peacekeepers" and the attack against Kasoma's convoy of approximately 100 peacekeepers[325] to which Kallon objects in his fourth argument in this sub-ground of his appeal.

166. In relation to the material facts of Kallon's superior responsibility for crimes charged under Counts 15 and 17, the Appeals Chamber notes that the Indictment provided notice

[314] Indictment, para. 38.
[315] Indictment, para. 41.
[316] Indictment, para. 83.
[317] Indictment, para. 83.
[318] Indictment, p. 21.
[319] Trial Judgment, para. 2249.
[320] Trial Judgment, para. 2252.
[321] Trial Judgment, para. 2252; *see also* Trial Judgment, paras 2255, 2257 for similar findings.
[322] Trial Judgment, paras 2248, 2253, 2255, 2258.
[323] Kallon Appeal, para. 259.
[324] Kallon Appeal, para. 260.
[325] Kallon Appeal, para. 263.

that Kallon was the Battle Group Commander from "early 2000,"[326] that "while holding [this] position of superior responsibility and exercising effective control over ... subordinates ... [he] is responsible for the criminal acts of his subordinates,"[327] and that by his acts in relation to the attacks against UNAMSIL peacekeepers, Kallon, pursuant to Article 6(3) of the Statute, is individually criminally responsible for the crimes charged under Counts 15 and 17.[328] The Indictment also alleges that Kallon knew or had reason to know that his subordinates were about to commit the criminal acts for which Kallon was alleged to be responsible.[329] The Appeals Chamber considers that these facts are precisely the material facts underpinning Kallon's convictions for superior responsibility. We, therefore, find that Kallon had sufficient notice of these charges and reject his first and second arguments in this sub-ground of his appeal.

167. With regard to Kallon's third and fourth arguments concerning the defective pleading and cure of his liability for personal commission of the attack against Salahuedin, the Appeals Chamber notes that the Trial Chamber found that the pleading of personal commission lacked requisite specificity and therefore was defective.[330] Such defect may be cured by the provision of timely, clear and consistent information detailing the factual basis underpinning the charges against Kallon, which compensates for the failure of the indictment to give proper notice of the charges.[331] Contrary to Kallon's assertion, defective pleading of personal commission may be cured by the Prosecution through witness statements and additional filings.[332] This has also been the practice at other international tribunals. For example, in *Gacumbitsi*, the ICTR Appeals Chamber relied upon one document which indicated the anticipated testimony of a prosecution witness to find that the defective pleading of personal commission of a killing was cured.[333] In *Ntakirutimana*, the ICTR Appeals Chamber relied upon a witness statement taken together with "unambiguous information" contained in the Pre-Trial Brief and its annexes to determine the defective pleading of personal commission was cured.[334] In *Naletilić and Martinović*,

[326] Indictment, para. 27.
[327] Indictment, para. 39.
[328] Indictment, para. 83 and p. 22.
[329] Indictment, para. 39.
[330] Trial Judgment, para. 399.
[331] *Brima et al.* Appeal Judgment, para. 44; *Kupreškić et al.* Appeal Judgment, para. 114.
[332] *See Gacumbitsi* Appeal Judgment, para. 56; *Ntakirutimana* Appeal Judgment, para. 32.
[333] *Gacumbitsi* Appeal Judgment, paras 56, 58.
[334] *Ntakirutimana* Appeal Judgment, para. 48.

the ICTY Appeals Chamber found that the Prosecution had cured the indictment's failure to provide information about a beating through information provided by a chart of witnesses and the reiteration of those details by the Prosecution in its opening statement.[335]

168. In the present case, the Trial Chamber found that the Prosecution had disclosed on 26 May 2003 a witness statement indicating that "the witness would testify [about material particulars] including the direct participation of Kallon in physically assaulting a peacekeeper."[336] The Prosecution also filed a motion on 12 July 2004 indicating that another witness "would testify about the individual criminal responsibility of Kallon during the abduction of the UN peacekeepers."[337] The Appeals Chamber considers that these statements provided sufficient timely notice of Kallon's personal commission of the attack on Salahuedin, such that they cured the defect in the charge against Kallon under Article 6(1) of the Statute with respect to the attacks against UNAMSIL personnel.[338] Kallon's third and fourth arguments in this sub-ground of appeal are, therefore, dismissed.

(c) Conclusion

169. The Appeals Chamber dismisses Kallon Grounds 23, 24 and 28 in regard to the pleading of crimes under Counts 15 and 17 concerning attacks against UNAMSIL peacekeepers.

E. Gbao's Grounds of Appeal relating to the Indictment

1. Application of the "sheer scale" exception to mandatory pleading requirements (Gbao Ground 4)

(a) Submissions of the Parties

170. Gbao argues that the Trial Chamber erred in law in holding that "the fact that the investigations and trials were intended to proceed as expeditiously as possible in an immediate post-conflict environment is particularly relevant" to the degree of specificity

[335] *Naletilić and Martinović* Appeal Judgment, para. 45.
[336] Trial Judgment, para. 2244.
[337] Trial Judgment, para. 2244, fn 3914.
[338] Indictment, para. 83.

832. This distinction between the specificity requirements for the pleading of locations in relation to different modes of liability is consistent with our holding in the *Brima et al.* Appeal Judgment. There, we held that the Trial Chamber's decision to reconsider an earlier form of indictment decision was a proper exercise of its discretion in the interests of justice.[2182] The *Brima et al.* Trial Chamber held that the indictment had not pleaded locations with sufficient specificity and they therefore declined to find the accused liable for crimes committed at unnamed locations. Similar to Kallon's present conviction, the accused in *Brima et al.* were not convicted pursuant to their participation in a JCE, but rather they were convicted of more direct forms of participation, such as, *inter alia*, personal commission and instigation.

833. An accused's proximity to the events at the location for which he is alleged to be criminally responsible is also a factor in determining the pleading specificity required. In the present case, Kallon's liability for instigating the murder of Waiyoh in Wendedu stems directly from his conduct in Wendedu. In May 1998, Waiyoh was being held at an RUF civilian camp in Wendedu. Kallon visited the camp and questioned CO Rocky about Waiyoh, "stating that he considered her a threat."[2183] On a subsequent visit to the camp in Wendedu, Kallon asked CO Rocky if he was "still keeping 'enemies' of the RUF in the camp."[2184] Kallon's bodyguards later visited the camp to enquire about Waiyoh again and Rocky then ordered that she be killed.[2185]

834. In view of the mode of Kallon's liability for the crime and that his culpable conduct occurred at the location, the location of the murder as having occurred at Wendedu was a material fact that must have been pleaded in the Indictment to inform Kallon clearly of the charges against him so that he could prepare a defence.[2186]

835. The Prosecution's failure to plead Wendedu as a location in the Indictment rendered the Indictment defective with respect to the pleading of Kallon's instigation of murder at Wendedu. As Kallon objected at trial to the pleading of a nonexhaustive list of

[2182] *Brima et al.* Appeal Judgment, para. 64.
[2183] Trial Judgment, para. 1174.
[2184] Trial Judgment, para. 1174.
[2185] Trial Judgment, para. 1175.
[2186] *See Kupreškić et al.* Appeal Judgment, para. 88.

1251)

SCSL-04-15-T
(33460-33583)

33460

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Benjamin Mutanga Itoe
Hon. Justice Bankole Thompson

Registrar: Herman von Hebel

Date: 8th of April 2009

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

SENTENCING JUDGEMENT

Office of the Prosecutor:
Stephen Rapp
Joseph Kamara
James C. Johnson
Peter Harrison
Vincent Wagona
Reginald Fynn
Elisabeth Baumgartner
Nina Jørgensen
Régine Gachoud
Amira Hudroge
Bridget Osho
Subhi Barakat

Defence for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph
Jared Kneitel

Defence for Morris Kallon:
Charles Taku
Kennedy Ogero
Momoh Fofanah
Kingsley Belle

Defence for Augustine Gbao:
John Cammegh
Scott Martin
Lea Kulinowski

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iii) the degree of suffering or impact of the crime on the immediate victim, as well as its effect on relatives of the victim;[20] and,

iv) the vulnerability and number of victims.[21]

20. Furthermore, in determining the role of the Accused in the crime, the Chamber may take into account the mode of liability under which the Accused was convicted, as well as the nature and degree of his participation in the commission of the offence. The Chamber may also consider whether the Accused was held liable as an indirect or a secondary perpetrator.[22] In this respect, we have found that aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for a more direct form of participation.[23]

21. The Chamber acknowledges that it is also settled law that in assessing the gravity of the offences for which the Accused was convicted as a superior, it should consider the gravity of the underlying offence and the gravity of the conduct of the Accused in failing to prevent or punish the crimes committed by his subordinates.[24]

22. We also endorse the view that where the Accused has been convicted as a participant in a joint criminal enterprise, the level of contribution as well as the category of joint criminal enterprise under which responsibility attaches are to be considered in assessing the appropriate sentence.[25] As stated in *Brdjanin*, the doctrine of joint criminal enterprise:

> [...] offers no formal distinctions between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great. However, the Appeals Chambers recalls that any such disparity is adequately dealt with at the sentencing stage.[26]

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[19] *Celibici* Appeal Judgement, para. 847; *Blagojevic*, Trial Judgement, para. 833.
[20] *Blaskic* Appeal Judgement, para. 683; *Stakic* Appeal Judgement, para. 380, *Oric* Trial Judgement, para. 729.
[21] *Blaskic* Appeal Judgement, para. 683; *Babic* Sentencing Judgement, para. 47. The Chamber notes that the Prosecution has discussed some of these factors, including the vulnerability and age of victims and the humiliating and degrading nature of the acts, as aggravating factors (Prosecution Sentencing Brief, para. 56). The Chamber is of the view that these are more appropriately considered in relation to its determination of the gravity of the offence.
[22] *Ntagerura*, Sentencing Judgement, para. 813; *Vasiljevic* Appeal Judgement, para. 182.
[23] CDF Sentencing Judgement, para. 50.
[24] *Celibici* Appeals Judgement, para. 732.
[25] *Martic* Appeals Judgement, para. 350.
[26] *Brdjanin* Appeals Judgement, para. 432.

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Benjamin Mutanga Itoe Hon. Justice Bankole Thompson
Registrar:	Herman von Hebel
Date:	2 March 2009

PROSECUTOR	**Against**	ISSA HASSAN SESAY MORRIS KALLON AUGUSTINE GBAO (Case No. SCSL-04-15-T)

Public Document

JUDGEMENT

Office of the Prosecutor:
Pete Harrison
Vincent Wagona
Charles Hardaway
Reginald Fynn
Elisabeth Baumgartner
Régine Gachoud
Amira Hudroge
Bridget Osho

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Charles Taku
Kennedy Ogeto

Court Appointed Counsel for Augustine Gbao:
John Cammegh
Scott Martin

be satisfied by recklessness, but not by proof of negligence or gross negligence.[272] Proof of premeditation is not required.[273]

3.3.5. Violence to Life, Health and Physical or Mental Well-Being of Persons, in Particular Murder (Counts 5 and 17)

141. The Chamber notes that the Indictment charges the Accused under Counts 5 and 17 with "violence to life, health and physical or mental well-being of persons, in particular murder", as a serious violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute. The Chamber has analysed this offence as murder, as the category of 'violence to life and person' does not exist as an independent offence in customary international law.[274]

142. The Chamber takes the view that the elements of the offence of murder as a serious violation of Common Article 3 and Additional Protocol II are the same as for murder as a crime against humanity,[275] except for the general elements outlined above for crimes of this type. The constitutive elements are as follows:

(i) The death of one or more persons;

(ii) The death of the person(s) was caused by an act or omission of the Accused; and

(iii) The Accused intended to either kill or to cause serious bodily harm in the

[272] *Brdjanin* Trial Judgement, para. 386; *Stakic* Trial Judgement, para. 587; *Celebici* Trial Judgement, paras 437-439. This finding was made in the context of murder as a war crime in the *Celebici* and *Stakic* Trial Judgements and then was extended to murder as a crime against humanity in the *Brdjanin* Trial Judgement on the basis that the constitutive elements of both crimes are the same. *See also Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, IT-95-16-T, Judgement (TC), 14 January 2000, para. 561 [*Kupreskic et al.* Trial Judgement].

[273] *Oric* Trial Judgement, para. 348; *Brdjanin* Trial Judgement, para. 386; *Kordic and Cerkez* Trial Judgement, para. 235.

[274] *Vasiljevic* Trial Judgement, para. 195: "Both 'life' and the 'person' are protected in various ways by international humanitarian law. Some infringements upon each of these protected interests are regarded as criminal under customary international law. It is so, for instance, of murder, cruel treatment, and torture. But not every violation of those protected interests has been criminalised, and those that have, as with the three offences just mentioned, have usually been given a definition so that both the individual who commits the act and the court called upon to judge his conduct are able to determine the nature and consequences of his acts [...]" *See also* para. 203: "In the absence of any clear indication in the practice of states as to what the definition of the offence of 'violence to life and person' identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law." [original footnote omitted].

[275] *Brdjanin* Trial Judgement, para. 380; *Vasiljevic* Trial Judgement, para. 205; *Krnojelac* Trial Judgement, para. 323: "[i]t is clear from the jurisprudence of the Tribunal that the elements of the offence of murder are the same under both Article 3 and Article 5 of the Statute. These elements have been expressed slightly differently, but those slight variations in expression have not changed the essential elements of the offence." [original footnote omitted].

269. If an Accused is found guilty of having committed a crime, that Accused cannot also be convicted of having planned the same crime.[475] Involvement in the planning may be considered an aggravating factor.[476]

4.1.4. Instigating

270. The Prosecution charges the Accused pursuant to Article 6(1) of the Statute with instigating the crimes referred to in the Indictment.[477]

271. The Chamber is of the view that "instigating" a crime means urging, encouraging or prompting another person to commit an offence.[478] The *actus reus* required for instigating a crime is an act or omission, covering both express and implied conduct of the Accused,[479] which is shown to be "a factor substantially contributing to the conduct of another person committing the crime."[480] A causal relationship between the instigation and the perpetration of the crime must be demonstrated,[481] although it is not necessary to prove that the crime would not have occurred without the Accused's involvement.[482] To establish the *mens rea* requirement for instigating a crime, the Prosecution must prove that the Accused intended to provoke or induce the commission of the crime or was aware of the substantial likelihood that the crime would be committed as a result of that instigation.

4.1.5. Ordering

272. The Prosecution charges the Accused pursuant to Article 6(1) of the Statute with ordering the crimes referred to in the Indictment.[483]

273. The Chamber considers that "ordering" involves a person in a position of authority using that position to compel another to commit an offence.[484] The *actus reus* of ordering requires that a person who is in a position of authority instructs a person in a subordinate

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[475] *See Brdjanin* Trial Judgement, para. 268; *Kordic and Cerkez* Trial Judgement, para. 386.
[476] *See Brdjanin* Trial Judgement, para. 268; *Stakic* Trial Judgement, para. 443.
[477] Indictment, para. 38.
[478] *Kordic and Cerkez* Appeal Judgement, para. 27.
[479] *Oric* Trial Judgement, para. 273; *Brdjanin* Trial Judgement, para. 269; *Blaskic* Trial Judgement, para. 280.
[480] *Kordic and Cerkez* Appeal Judgement, para. 27. *See also CDF* Appeal Judgement, para. 52.
[481] *CDF* Appeal Judgement, para. 54.
[482] *Kordic and Cerkez* Appeal Judgement, para. 27.
[483] Indictment, para. 38.
[484] *Kordic and Cerkez* Appeal Judgement, para. 28.

position to commit an offence.[485] It is the Chamber's opinion that no *formal* superior-subordinate relationship between the superior and the subordinate is required. It is sufficient that there is proof of some position of authority on the part of the Accused that would compel another to commit a crime in compliance with the Accused's order, command or direction.[486] Such authority can be *de jure* or *de facto* and can be reasonably implied.[487] The Chamber is of the view that a "causal link between the act of ordering and the physical perpetration of a crime [...] also needs to be demonstrated as part of the *actus reus* of ordering" but that this "link need not be such as to show that the offence would not have been perpetrated in the absence of the order."[488]

274. The Chamber finds that to establish the *mens rea* requirement for ordering a crime, the Prosecution must prove that the Accused either intended to bring about the commission of the crime or that the Accused gave an order with the awareness of the substantial likelihood that a crime would likely be committed as a consequence of the execution or implementation of that order, command or direction.[489]

4.1.6. Aiding and Abetting

275. The Chamber notes that the Prosecution charges the Accused pursuant to Article 6(1) of the Statute with aiding and abetting in the planning, preparation or execution of the crimes referred to in the Indictment.[490]

276. The Chamber considers that "aiding and abetting" consists of the act of rendering practical or material assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[491] Aiding and abetting may also consist of an omission,

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[485] *Kordic and Cerkez* Appeal Judgement, para. 28.
[486] *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 361 [*Semanza* Appeal Judgement], referring to *Kordic and Cerkez* Appeal Judgement, para. 28. *See also Gacumbitsi* Appeal Judgement, paras 181-182; *Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Judgement (AC), 19 September 2005, para. 75 [*Kamuhanda* Appeal Judgement]: "To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." [original footnotes omitted].
[487] *Limaj et al.* Trial Judgement, para. 515 referring to *Brdjanin* Trial Judgement, para. 270.
[488] *Prosecutor v. Strugar*, IT-01-42-T, Judgement (TC), 31 January 2005, para. 332 [*Strugar* Trial Judgement].
[489] *Blaskic* Appeal Judgement, para. 42.
[490] Indictment, para. 38.
[491] *See*, amongst others, *Tadic* Appeals Judgement, para. 229; *Limaj et al.* Trial Judgement, para. 516; *Krstic* Trial Judgement, para. 601.

that could amount to aiding and abetting.[498] The Chamber also notes that, in some circumstances, a superior's failure to punish for past crimes might constitute instigation or aiding and abetting for *further* crimes.[499]

280. The Chamber recognises that the *mens rea* of aiding and abetting is the knowledge that the acts performed by the Accused assist the commission of the crime by the principal offender.[500] "Such knowledge may be inferred from all relevant circumstances."[501] The Accused need not share the *mens rea* of the principal offender, but he must be aware of the principal offender's intention.[502] In the case of specific intent offences, the aider and abettor need not possess the principal offender's intent, but must have knowledge that the principal offender possessed the specific intent required.[503] In other words, "it must be shown that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal."[504] The aider and abettor, however, need not know the precise crime that is intended by the principal offender. If he is aware that one of a number of crimes will probably be committed by the principal offender, and one of those crimes is in fact committed, then he has intended to assist or facilitate the commission of that crime, and may be guilty of aiding and abetting.[505]

4.2. Responsibility under Article 6(3) of the Statute

281. In addition or in the alternative, the Prosecution alleges that the Accused are responsible pursuant to Article 6(3) of the Statute for the crimes alleged in Counts 1 through 18 of the Indictment as these crimes were allegedly committed while the Accused were holding

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[498] *Brdjanin* Appeal Judgement, para. 273; *See also Oric* Appeal Judgement, para. 42; *Kayishema and Ruzindana* Appeal Judgement, paras. 201-202.
[499] *See Blaskic* Trial Judgement, para. 337.
[500] *See Vasiljevic* Appeal Judgement, para. 102; *Blaskic* Appeal Judgement, para. 49; *Tadic* Appeal Judgement, para. 229.
[501] *Limaj et al.* Trial Judgement, para. 518 referring to *Celebici* Trial Judgement, para. 328 and to *Tadic* Trial Judgement, para. 676.
[502] *See Aleksovski* Appeal Judgement, para. 162 referring to *Furundzija* Trial Judgement, para. 245. *See also Limaj et al.* Trial Judgement, para. 518; *Brdjanin* Trial Judgement, para. 273; *Kunarac et al.* Trial Judgement, para. 392.
[503] *CDF* Appeal Judgement, para. 367, citing *Ntakirutimana* Appeal Judgement, para. 501 and *Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, Judgement and Sentence (TC), 15 July 2004, para. 457. *See also Prosecutor v. Krstic*, IT-98-33-A, Judgement (AC), 19 April 2004, para. 140 [*Krstic* Appeal Judgement]; *Vasiljevic* Appeal Judgement, para. 142; *Krnojelac* Appeal Judgement, para. 52.
[504] *Aleksovski* Appeal Judgement, para. 162.
[505] *AFRC* Appeal Judgement, para. 243, endorsing *Blaskic* Appeal Judgement, para. 50 and *Prosecutor v. Simic*, IT-95-9-A, Judgement (AC), 28 November 2006, para. 86 [*Simic* Appeal Judgement].

11.2.2.3. Attack on Maroa and three peacekeepers

2249. The Chamber recalls that Kallon ordered rebels under his command to open fire on Maroa's UN Land Rover on 1 May 2000. RUF fighters complied with his order and the four peacekeepers who were in the vehicle were captured and brought to Kallon.[3919] The Chamber is satisfied that Kallon as BGC was in a position of authority over the fighters, that he had effective control over them,[3920] and that they were acting at his direction.

2250. The Chamber finds Kallon liable under Article 6(1) of the Statute for ordering the attack directed against Maroa and three peacekeepers on 1 May 2000, as charged in Count 15.

11.2.2.4. Abduction of Mendy and Gjellesdad

2251. The Chamber recalls that when Mendy and Gjellesdad arrived at the RUF Task Force Office in Makeni, Kallon told Gjellesdad to hand over the keys to their vehicle. Kallon told Gjellesdad that he would be taken captive and when Mendy explained that he would not return to his team site alone, Kallon stated that he would also be taken captive. Kallon told the peacekeepers that his men would escort them to Teko Barracks. The peacekeepers were accompanied by armed RUF fighters to Teko Barracks and on arrival there they were placed in confinement with the other peacekeepers.[3921]

2252. The Chamber finds that the fighters who took the peacekeepers to Teko Barracks were acting on the instructions of Kallon, who used his position of command and authority to direct his subordinates to commit the offence of attacking these two peacekeepers.

2253. The Chamber accordingly finds Kallon liable under Article 6(1) of the Statute for ordering the attack directed against Mendy and Gjellesdad on 1 May 2000, as charged in Count 15.

11.2.2.5. Abduction of Kasoma and ten peacekeepers

2254. We recall that on 3 May 2000, RUF fighters halted Kasoma's convoy at the roadblock and induced Kasoma and ten peacekeepers to move forward into an ambush. After being

[3919] *Supra* paras 1795-1802.
[3920] *Infra* paras 2285-2289.
[3921] *Supra* para. 1804.

forcibly disarmed, Kasoma was taken by RUF fighters including Gbundema to an RUF Commander who forced him to write a note at gunpoint.[3922] The Chamber has found that this Commander was Kallon and that Gbundema was subordinate to him.[3923]

2255. The Chamber is satisfied on the basis of Kallon's command position and the fact that Kasoma was brought to him that the fighters who attacked Kasoma and his ten peacekeepers were acting on Kallon's instructions. The Chamber therefore finds Kallon liable under Article 6(1) of the Statute for ordering the attack directed against Kasoma and ten peacekeepers on 3 May 2000, as charged in Count 15 of the Indictment.

11.2.2.6. Abduction of Kasoma's convoy

2256. The Chamber has found that after being forced to write a note to his second-in-command, Kasoma was escorted into the bush and detained under armed guard by RUF fighters. He next saw Kallon after approximately three hours when he was taken to a vehicle which transported Kasoma and the ten peacekeepers to Makeni. The rest of Kasoma's convoy of peacekeepers, who had remained at the roadblock while he moved forward with only ten men to meet Kallon, were in Makeni and under the control of RUF fighters when Kasoma arrived there.[3924] From this sequence of events, the Chamber finds that while Kasoma was under armed guard in the bush, RUF fighters abducted his convoy and moved them towards Makeni.

2257. The Chamber finds that Kallon's conduct in forcing Kasoma to write the note to his second-in-command, establishes a clear nexus between Kallon's actions and the subsequent abductions. The Chamber further recalls that approximately 1000 RUF fighters were present at the roadblock where the abductions took place and the peacekeepers were subsequently taken to Sesay in Makeni, where Kallon arrived shortly thereafter with Kasoma. In addition, the Chamber has found that Gbundema was giving orders at the roadblock where Kasoma's convoy was ambushed.[3925] The Chamber finds it is inconceivable that such a large military operation would be conducted by Kallon's subordinate Commander without the express

[3922] *Supra* para. 1839.
[3923] *Supra* para. 1856.
[3924] *Supra* para. 1833.
[3925] *Supra* para. 1858.

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authority of Kallon, who was the BGC and the most senior RUF Commander present at the time. Based on the foregoing, the Chamber finds that it is the only reasonable inference that Kallon ordered the abduction of the peacekeepers in Kasoma's convoy.

2258. The Chamber accordingly finds Kallon liable under Article 6(1) of the Statute for ordering the attack directed against Kasoma's convoy of approximately 100 peacekeepers on 3 May 2000, as charged in Count 15 of the Indictment.

11.2.2.7. Attack on ZAMBATT at Lunsar

2259. The Chamber recalls that following the abductions of Kasoma's peacekeepers at nightfall on 3 May 2000, a group of RUF fighters marched to Lunsar and staged a dawn attack on the remainder of Kasoma's contingent using weapons captured from the ZAMBATT peacekeepers. Although there is a nexus between the attacks on 3 May 2000 at Moria and the subsequent attack at Lunsar, the Chamber recalls that Kallon returned to Makeni on the evening of 3 May 2000 and that many of the troops who participated in the Moria attacks escorted the captured peacekeepers to Makeni.[3926] It is not clear whether another Commander or Commanders remained with the balance of the attackers near Moria. Furthermore, the evidence does not establish that Kallon was aware at the time of the abductions on 3 May 2000 or that Kasoma had left a contingent of ZAMBATT peacekeepers stationed at Lunsar. The Chamber thus finds that there is reasonable doubt as to whether Kallon intended or had knowledge that RUF fighters would move to Lunsar to launch a further attack, thus precluding liability under Article 6(1) of the Statute.

2260. We therefore find that the Prosecution has failed to adduce sufficient evidence to establish that Kallon ordered, planned, instigated or aided and abetted the attack directed against ZAMBATT peacekeepers at Lunsar on 4 May 2000. The Chamber will accordingly consider Kallon's liability for this attack pursuant to Article 6(3) of the Statute.

11.2.3. Gbao

11.2.3.1. Attacks on Salahuedin and Jaganathan

[3926] *Supra* paras 1834-1837.

criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Kenema Town in Kenema District; in Tombodu, Wendedu, Penduma, Yardu, Kayima and Sawao in Kono District;

Count 12: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an other serious Violation of International Humanitarian Law, punishable under Article 4(c) of the Statute: **GUILTY**, of planning the use of children under the age of 15 years to actively participate in hostilities pursuant to Article 6(1) of the Statute in relation to events in Kenema, Kailahun, Kono and Bombali Districts;

Count 13: Enslavement, a Crime Against Humanity, punishable under Article 2(c) of the Statute: **GUILTY,** of committing Enslavement by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tongo Field in Kenema District; in Kono District; and in Kailahun District; and pursuant to Article 6(3) in relation to events throughout Kono District;

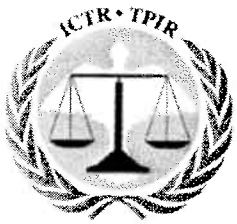
Count 14: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute: **GUILTY**, of Pillage, by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Sembehun in Bo District; and Koidu Town and Tombodu in Kono District;

Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute: **GUILTY**, of committing and ordering attacks on peacekeepers pursuant to Article 6(1) in Bombali District; and pursuant to Article 6(3) of the Statute in relation to events committed in Bombali, Port Loko, Kono and Tonkolili Districts;

Count 16: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute: **NOT GUILTY;**

Count 17: 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

BASIC DOCUMENTS
TEXTES FONDAMENTAUX



Statute **Statut**

International Criminal Tribunal for Rwanda (ICTR)
Tribunal pénal international pour le Rwanda (TPIR)
31 January 2010 – 31 janvier 2010

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.

3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

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I. INTRODUCTION
I.1. The International Tribunal

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"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".
Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.

473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide80. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.

474. Article 6 (1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime, especially those who ordered it, could incur individual criminal responsibility.

475. The International Law Commission, in Article 2 (3) of the Draft Code of Crimes Against the Peace and Security of Mankind, reaffirmed the principle of individual responsibility for the five forms of participation deemed criminal referred to in Article 6 (1) and consistently included the phrase "which in fact occurs", with the exception of aiding and abetting, which is akin to complicity and therefore implies a principal offence.

476. The elements of the offences or, more specifically, the forms of participation in the commission of one of the crimes under Articles 2 to 4 of the Statute, as stipulated in Article 6 (1) of the said Statute, their elements are inherent in the forms of participation *per se* which render the perpetrators thereof individually responsible for such crimes. The moral element is reflected in the desire of the Accused that the crime be in fact committed.

477. In this respect, the International Criminal Tribunal for the former Yugoslavia found in the Tadic case that:

"a person may only be criminally responsible for conduct where it is determined that he knowingly participated in the commission of an offence" and that "his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."81
478. This intent can be inferred from a certain number of facts, as concerns genocide, crimes against humanity and war crimes, for instance, from their massive and/or systematic nature or their atrocity, to be considered *infra* in the judgment, in the Tribunal's findings on the law applicable to each of the three crimes which constitute its *ratione materiae* jurisdiction.

479. Therefore, as can be seen, the forms of participation referred to in Article 6 (1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge. This greatly differs from Article 6 (3) analyzed here below, which does not necessarily require that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention.

480. The first form of liability set forth in Article 6 (1) is **planning** of a crime. Such planning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common law, as stipulated in Article 2 (3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.

481. The second form of liability is **'incitation'** (in the french version of the Statute) to commit a crime, reflected in the English version of Article 6 (1) by the word *instigated.* In English, it seems the words incitement and instigation are synonymous82. Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments83. However, in certain legal systems and, under Civil law, in particular, the two concepts are very different84. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6 (1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2 (3)(c) of the Statute) which, in this instance, translates *incitation* into English as "incitement" and no longer "instigation". Some people are of that opinion85. The Chamber also accepts this interpretation 86.

482. That said, the form of participation through instigation stipulated in Article 6 (1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator87.

483. By **ordering** the commission of one of the crimes referred to in Articles 2 to 4 of the Statute, a person also incurs individual criminal responsibility. Ordering implies a superior- subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda 88, ordering is a form of complicity through instructions given to the direct perpetrator of an offence. Regarding the position of authority, the Chamber considers that sometimes it can be just a question of fact.

484. Article 6 (1) declares criminally responsible a person who "(...) or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (...)". **Aiding** and **abetting**, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ENGLISH
Original: French

APPEALS CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Fausto Pocar
Judge Theodor Meron

Registry: Adama Dieng

Judgement of: 3 July 2002

THE PROSECUTOR
(Appellant)
v.
Ignace BAGILISHEMA
(Respondent)

Case No. ICTR-95-1A-A

JUDGEMENT
(REASONS)

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Sonja Boelaert-Suominen
Mathias Marcussen

Counsel for the Defence:
François Roux
Maroufa Diabira

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27. For a proper interpretation of the "had reason to know" standard, the Prosecution relies on the manner in which this issue was addressed in the *Čelebići* Appeal Judgement[27] and proposes an interpretation of the concept of "inquiry notice" (i.e., a superior's affirmative duty to inquire further when put on notice). The Prosecution dwells at length on the question of applying the above standard to civilian superiors in support of its argument that the said obligation applies to all superiors.[28] Referring to paragraphs 966 to 989 of the Trial Judgement, the Appellant submits that the Trial Chamber only tried to establish, on the basis of direct or circumstantial evidence, that the Respondent had actual knowledge of the facts.[29] According to the Prosecution, the Trial Chamber's findings in paragraphs 988 and 989 of the Judgement reveal that the "had reason to know" standard was not examined.[30] It further submits that insofar as the standard of criminal negligence as applied by the Trial Chamber[31] differs from that used in the *Čelebići* Appeal Judgement, it is necessary to determine whether the legal ingredients required for criminal negligence[32] could amount to the "had reason to know" standard,[33] in accordance with the *Čelebići* jurisprudence.[34]

28. After considering the Appellant's arguments, the Appeals Chamber holds, for the reasons set out below, that the Trial Chamber actually examined the "had reason to know" standard. However, the distinction between the "knowledge" and "had reason to know" standards could have been expressed more clearly by the Trial Chamber. The "had reason to know" standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied that the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates."[35]

29. In paragraph 896 of the Judgement, the Trial Chamber set forth the standard for establishing the Accused's *mens rea* under Article 6(3) of the Statute:

> [...] *the knowledge element of superior responsibility* will be fulfilled if the Accused actually knew of one or more crimes committed or about to be committed in connection with a roadblock, or alternatively was put on notice and failed to inquire further.[36]

The Trial Chamber further considered "'knowledge' [as] an indispensable element of [...] the liability of a superior [...]", by holding that "the mental element of knowledge [must be] demonstrated beyond reasonable doubt."[37] On the basis of this definition, the Trial Chamber found, after examining the direct evidence, that it was not in a position to establish that the Accused *had knowledge* of the murders of Judith and Bigirimana.[38] It therefore proceeded to examine the concept of "knowledge", or the Accused's *mens rea* under Article 6(3) of the Statute, on the basis of the available circumstantial evidence, guided by the indicia set down by the Commission of Experts in its Final Report.[39]

30. The Appeals Chamber recalls that the murders of Judith and Bigirimana are the only criminal acts acknowledged by the Trial Chamber as having been perpetrated by subordinates of the Respondent. With regard to the murder of Bigirimana, the Trial Chamber held in paragraph 974 of the Judgement that it was not convinced that the

Accused *had been notified* of the imminent offence by Bigirimana's wife.[40] It also underscored the fact that "it [was] not possible [...] to look to other known facts in an effort to determine whether the Accused was at his office or at the *bureau communal,* or at any rate close by, when the offence was committed." The Trial Chamber further held that "[a]s the Accused's location is unknown for the date on which Bigirimana was killed, the corresponding indicium of knowledge does not enter into the Chamber's calculations."[41] With respect to the murder of Judith, the Trial Chamber, in considering the Accused's responsibility as superior,[42] took into account its earlier findings, and in particular, the fact that the Respondent denied *having had knowledge* of the murder of Judith.[43] Besides, it appears from paragraphs 986 *et seq.* of the Trial Judgement that the Trial Chamber considered the Prosecution's theory that the Accused "*would have found out about*" the murder of Judith later and "upon being informed of the crime should have initiated an investigation to identify and punish the perpetrators" of the crime. The Trial Chamber also held the view that "the claim that Judith's murder was *public knowledge* in Mabanza *commune* [lacked] *sufficient foundation.*"[44] Following an examination of the indicia relating to the Accused's presence, the geographical location, the time, and *modus operandi*, the Trial Chamber came to the conclusion that there was no evidence to show that the killings of Judith and Bigirimana were not just isolated or exceptional incidents, rather than illustrations of a routine of which the Accused *could not plausibly have remained unaware.*[45] In other words, the Trial Chamber decided that the evidence put forward by the Prosecution did not prove beyond reasonable doubt that the Accused had reason to know that murders had been committed at the Trafipro roadblock.

31. The Appeals Chamber considers that the Prosecution's submissions are based on a partial analysis of the Trial Judgement. The Appeals Chamber concedes that the Trial Chamber did not explicitly refer to the "had reason to know" standard. The Appeals Chamber believes, however, that simply because the Trial Chamber did not explicitly declare that the Accused did not "have reason to know" does not mean that the Chamber did not refer to the standard. An analysis of the Judgement shows that the Trial Chamber indeed sought to know whether the Accused had sufficient information enabling the Chamber to find beyond a reasonable doubt that the Accused "had reason to know."

32. Moreover, with regard to the concept of "criminal negligence" challenged by the Prosecution,[46] the Appeals Chamber observes that the Trial Chamber identified criminal negligence as a "third basis of liability."[47] This form was qualified as a liability by omission, which takes the form of "criminal dereliction of a public duty."[48]

33. The Appeals Chamber wishes to recall and to concur with the *Čelebići* jurisprudence,[49] whereby a superior's responsibility will be an issue only if the superior, whilst some general information was available to him which would put him on notice of possible unlawful acts by his subordinates, did not take the necessary and reasonable measures to prevent the acts or to punish the perpetrators thereof.

34. The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER I

Before: Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Registry: Mr Adama Dieng

Decision of: 7 June 2001

THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA

Case No. ICTR-95-1A-T

JUDGEMENT

The Office of the Prosecutor:

Ms Anywar Adong
Mr Charles Adeogun-Phillips
Mr Wallace Kapaya
Ms Boi-Tia Stevens

Counsel for the accused:

Mr François Roux
Mr Maroufa Diabira
Ms Héleyn Uñac
Mr Wayne Jordash

1.1 Responsibility under Article 6(1) of the Statute

Committing

29. The actual perpetrator may incur responsibility for committing a crime under the Statute by means of an unlawful act or omission.[19]

Planning, instigating, ordering

30. An individual who participates directly in planning to commit a crime under the Statute incurs responsibility for that crime even when it is actually committed by another person. The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.[20] An individual who instigates another person to commit a crime incurs responsibility for that crime. By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime. Proof is required of a causal connection between the instigation and the *actus reus* of the crime. The principle of criminal responsibility applies also to an individual who is in a position of authority, and who uses his or her authority to order, and thus compel a person subject to that authority, to commit a crime.[21]

31. Proof is required that whoever planned, instigated, or ordered the commission of a crime possessed criminal intent, that is, that he or she intended that the crime be committed.

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[19] An individual incurs criminal responsibility for an *omission* by failing to perform an act in violation of his or her duty to perform such an act. As stated by the Nuremberg Tribunal, "international law imposes duties and liabilities upon individuals" (*Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, vol. 22, p. 65*), who therefore may be held personally responsible for failing to perform those duties.

[20] See *Prosecutor v. Zlatko Aleksovski*, Judgement of 25 June 1999 [henceforth *Aleksovski* (TC)] para. 61.

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UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Patrick Robinson** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**14 December 2011**

Théoneste BAGOSORA
Anatole NSENGIYUMVA
v.
THE PROSECUTOR

Case No. ICTR-98-41-A

JUDGEMENT

Counsel for Théoneste Bagosora
Raphaël Constant
Richard Perras

Counsel for Anatole Nsengiyumva
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

Office of the Prosecutor
Hassan Bubacar Jallow
James J. Arguin
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Evelyn Kamau
William Mubiru
Aisha Kagabo
Ndeye Marie Ka

II. STANDARDS OF APPELLATE REVIEW

15. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[37]

16. Regarding errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[38]

17. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[39] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[40]

18. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by the Trial Chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[41]

19. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[42] Arguments which do not have the potential to cause the

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[37] *See, e.g., Munyakazi* Appeal Judgement, para. 5; *Muvunyi* Appeal Judgement of 1 April 2011, para. 7; *Renzaho* Appeal Judgement, para. 7.
[38] *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). *See also, e.g., Munyakazi* Appeal Judgement, para. 6; *Setako* Appeal Judgement, para. 8; *Muvunyi* Appeal Judgement of 1 April 2011, para. 8.
[39] *See, e.g., Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.
[40] *See, e.g., Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.
[41] *Krstić* Appeal Judgement, para. 40 (internal citations omitted). *See also Munyakazi* Appeal Judgement, para. 8; *Setako* Appeal Judgement, para. 10; *Muvunyi* Appeal Judgement of 1 April 2011, para. 10.
[42] *See, e.g., Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement of 1 April 2011, para. 11.

impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[43]

20. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[44] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[45] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[46]

[43] *See, e.g., Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement of 1 April 2011, para. 11.
[44] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See also, e.g., Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.
[45] *See, e.g., Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.
[46] *See, e.g., Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 18 December 2008

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:

Barbara Mulvaney
Christine Graham
Kartik Murukutla
Rashid Rashid
Gregory Townsend
Drew White

Counsel for the Defence:

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

1. CRIMINAL RESPONSIBILITY

2007. The Indictments charge both direct responsibility under Article 6 (1) and superior responsibility under Article 6 (3). The Prosecution in its Closing Brief has focused its legal arguments exclusively on superior responsibility, even though it referred more generally to each form of responsibility under Article 6 (1) in its closing arguments.[2194] As mentioned above, the Accused are mainly charged with superior responsibility. Below, the Chamber will discuss whether they can be convicted on this basis for one of the substantive crimes, enumerated in Articles 2 to 4, and whether they can be held responsible under Article 6 (1), when this form of liability is alleged.

1.1 Legal Principles

1.1.1 Direct Responsibility under Article 6 (1)

2008. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for ordering may be informal or of a purely temporary nature.[2195]

2009. The Appeals Chamber has explained that an aider and abetter carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on its commission.[2196] The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.[2197] The Appeals Chamber has also determined that the *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.[2198] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[2199] In cases of specific intent crimes such as persecution or genocide, the aider and abetter must know of the principal perpetrator's specific intent.[2200]

2010. The Chamber will assess these forms where relevant in its legal findings.

[2194] *Id.* paras. 2002-2038; T. 28 May 2007 p. 5 ("Our case is that they committed these offences, they prepared, they planned, they ordered, they directed, they incited, they encouraged and they approved the killing of innocent civilian Tutsi men, women and children, as well as other civilians who were considered their accomplices.").
[2195] *Semanza* Appeal Judgement, paras. 361, 363.
[2196] *Blagojević and Jokić* Appeal Judgement, para. 127. *See also Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras. 45-46; *Vasiljević* Appeal Judgement, para. 102; *Ntagerura et al.* Appeal Judgement, para. 370.
[2197] *Blagojević and Jokić* Appeal Judgement, para. 127. *See also Blaškić* Appeal Judgement, para. 48; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.
[2198] *Blagojević and Jokić* Appeal Judgement, para. 127. *See also Krstić* Appeal Judgment, paras. 137, 138, 144.
[2199] *Blagojević and Jokić* Appeal Judgement, para. 127. *See also Simić* Appeal Judgement, para. 86; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 46; *Ntagerura et al.* Appeal Judgement, para. 370.
[2200] *Blagojević and Jokić* Appeal Judgement, para. 127. *See also Simić* Appeal Judgement, para. 86; *Krstić* Appeal Judgment, paras. 140, 141.

therefore aided and abetted the killing of Tutsi refugees in Bisesero by making resources available to the local authorities in Kibuye prefecture for this purpose.

2.2.4 Conclusion

Bagosora

2158. The Chamber finds Bagosora guilty of genocide (Count 2) for ordering the crime of genocide committed between 6 and 9 April 1994 at Kigali area roadblocks under Article 6 (1) and for the crimes committed at the Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, Mudende University and Nyundo Parish as a superior under Article 6 (3) of the Statute. Bagosora is also liable as a superior for crimes committed at the Kigali area roadblocks (IV.1.2), which the Chamber will take into account in sentencing.

Kabiligi

2159. The Prosecution did not prove beyond reasonable doubt that Kabiligi was responsible either directly or as a superior for any of the crimes alleged against him in his Indictment. Accordingly, the Chamber acquits Kabiligi of genocide (Count 2).

Ntabakuze

2160. The Chamber finds Ntabakuze guilty of genocide (Count 2) for the crime of genocide committed at Kabeza, Nyanza hill and IAMSEA as a superior under Article 6 (3) of the Statute.

Nsengiyumva

2161. Nsengiyumva is guilty of genocide (Count 2) for ordering the killings in Gisenyi town, Mudende University, Nyundo Parish and aiding and abetting the killings in Bisesero under Article 6 (1) of the Statute. For the reasons set forth above, the Chamber is also satisfied that he could be held responsible as a superior under Article 6 (3) for the crimes committed in Gisenyi town as well as at Mudende University and Nyundo Parish (IV.1.5). This will be taken into account in sentencing.

2.3 Complicity in Genocide

2162. Count 3 of the Indictments charge the Accused with complicity in genocide. The Prosecution has indicated that the count of complicity should be dismissed in the event of a finding on the count of genocide.[2344] Accordingly, the Chamber dismisses this count in respect of Bagosora, Ntabakuze and Nsengiyumva. The Prosecution did not prove beyond reasonable doubt that Kabiligi was responsible either directly or as a superior for any of the crimes alleged against him in his Indictment. Accordingly, the Chamber acquits Kabiligi of complicity in genocide (Count 3).

[2344] Prosecution Closing Brief, para. 2150.

murder of Maharangari.[2355] The assailants and Bagosora were aware that these killings formed part a systematic attack against the civilian population on political grounds (IV.3.2).

(ii) Gisenyi Prefecture

Alphonse Kabiligi, 7 April (III.3.6.5)

2183. Alphonse Kabiligi was brutally murdered on the evening of 7 April. During the course of the attack, soldiers asked to see his identity card and noted that it was bad that he was from Butare prefecture. They also demanded to see his RPF documents before cutting off his arm and taking him outside and shooting him. The Chamber has found that Kabiligi was on a list of suspected accomplices of the RPF maintained by the Rwandan army. It is clear that his murder was premeditated and on political grounds.

2184. In assessing Nsengiyumva's responsibility, the Chamber has viewed the killing of Alphonse Kabiligi in connection with the participation of soldiers and militiamen in the killings at Mudende University (III.3.6.7) and the other targeted killings on 7 April in Gisenyi town (III.3.6.1). Given the nature of these assaults and the involvement of soldiers under Nsengiyumva's command (IV.1.5), the Chamber finds as the only reasonable conclusion that the killing of Alphonse Kabiligi was ordered by Nsengiyumva, the highest military authority in the area. In making this finding, the Chamber has taken into consideration that Nsengiyumva met with military officers on the night of 6 to 7 April in order to discuss the situation in the aftermath of the death of President Habyarimana (III.3.6.1). Furthermore, it has viewed these events in the context of the other parallel crimes being committed in Kigali by elite units and other soldiers in the wake of the death of President Habyarimana, which were also ordered or authorised by the highest military authority (III.3.3; III.3.5.6). In the Chamber's view, Nsengiyumva's orders to these assailants to participate in the crimes substantially assisted in their execution.

2185. Bagosora bears superior responsibility for the murder of Alphonse Kabiligi (IV.1.2). The assailants and the Accused were aware that this killing formed part of a systematic attack against the civilian population on political grounds (IV.3.2).

3.3.4 Conclusion

Bagosora

2186. The Chamber finds Bagosora guilty of murder as a crime against humanity (Count 4) for ordering the murder of Augustin Maharangari and the killings committed between 7 and 9 April 1994 at Kigali area roadblocks under Article 6 (1) of the Statute. He is also responsible as a superior under Article 6 (3) for the murders of Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza and civilians at *Centre Christus*, Kabeza, the Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town on 7 April, including Alphonse Kabiligi, Mudende University and Nyundo Parish. Furthermore, he is responsible for murder as a crime against humanity (Count 5) for the deaths of the 10 Belgian peacekeepers as a superior under Article 6 (3). Bagosora is liable as a superior for crimes

[2355] The murder of Augustin Maharangari is charged against Bagosora under Article 6 (1), while the killing of the other prominent personalities is charged only under Article 6 (3).

committed at the Kigali area roadblocks (IV.1.2), which the Chamber will take into account in sentencing.

Kabiligi

2187. The Prosecution did not prove beyond reasonable doubt that Kabiligi was responsible either directly or as a superior for any of the crimes alleged against him in his Indictment. Accordingly, the Chamber acquits Kabiligi of murder as a crime against humanity (Count 4).

Ntabakuze

2188. The Chamber finds Ntabakuze guilty of murder as a crime against humanity (Count 4) for the crimes committed at Kabeza, Nyanza hill and IAMSEA as a superior under Article 6 (3) of the Statute.

Nsengiyumva

2189. Nsengiyumva is guilty of murder as a crime against humanity (Count 5) for ordering the killings in Gisenyi town, including Alphonse Kabiligi, Mudende University, Nyundo Parish and for aiding and abetting the killings in Bisesero under Article 6 (1) of the Statute. The Chamber is also satisfied that he could be held responsible as a superior under Article 6 (3) for the crimes committed in Gisenyi town as well as at Mudende University and Nyundo Parish (IV.1.5). This will be taken into account in sentencing.

3.4 Extermination

3.4.1 Introduction

2190. Count 6 of the Bagosora and Nsengiyumva Indictments, and Count 5 of the Kabiligi and Ntabakuze Indictment charge the Accused with extermination as a crime against humanity under Article 3 (b) of the Statute.

3.4.2 Law

2191. The crime of extermination is the act of killing on a large scale.[2356] The *actus reus* consists of any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.[2357] Although extermination is the act of killing a large number of people, such a designation does not suggest that a numerical minimum must be reached.[2358] The *mens rea* of extermination requires that the accused intend to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner.[2359]

[2356] *Seromba* Appeal Judgement, para. 189; *Ntakirutimana* Appeal Judgement, para. 516.
[2357] *Seromba* Appeal Judgement, para. 189; *Ndindabahizi* Appeal Judgement, para. 123.
[2358] *Brđanin* Appeal Judgement, para. 470; *Gacumbitsi* Appeal Judgement, para. 86; *Ntakirutimana* Appeal Judgement, para. 522; *Semanza* Appeal Judgement, paras. 268-269; *Simba* Trial Judgement, para. 422.
[2359] *Brđanin* Appeal Judgement, para. 476; *Stakić* Appeal Judgement, paras. 259-260; *Gacumbitsi* Appeal Judgement, para. 86; *Ntakirutimana* Appeal Judgement, para. 522.

3.4.3 Deliberations

2192. Several of the events charged as extermination when viewed separately do not satisfy the threshold of killing on a large-scale, in particular the targeted political assassinations. However, the Chamber has considered the events for which the Accused have been held responsible together since they are essentially part of the same widespread and systematic attacks against the civilian population on political and ethnic grounds. In this respect, the Chamber emphasises the relatively brief time period in which these crimes were committed and that each of them were based on the same set of orders or authorisation from the Accused.

2193. It is clear therefore that the following killings satisfy either in themselves or collectively the requirement of killings on a large-scale: Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza (III.3.3), Alphonse Kabiligi (III.3.6.5) and Augustin Maharangari (III.3.5.6) as well as civilians at roadblocks in the Kigali area between 7 and 9 April (III.5.1), at *Centre Christus* (III.3.5.2), the Kibagabaga Mosque (III.3.5.3), Kabeza (III.3.5.4), the Saint Josephite Centre (III.3.5.5), Karama hill and Kibagabaga Catholic Church (III.3.5.7), Gikondo Parish (III.3.5.8), Nyanza hill (III.4.1.1), IAMSEA (III.4.1.4), Gisenyi town (III.3.6.1), Nyundo Parish (III.3.6.6), Mudende University (III.3.6.7) and Bisesero (III.4.5.1). Each of these killings were conducted on the basis of ethnic and political grounds (IV.3.3.3). As also noted above, the assailants and the Accused were aware that these attacks formed part of widespread and systematic attacks against the civilian population on ethnic and political grounds (IV.3.2).

3.4.4 Conclusion

Bagosora

2194. The Chamber finds Bagosora guilty of extermination as a crime against humanity (Count 6) for the killing of Augustin Maharangari as well as those committed between 7 and 9 April 1994 at Kigali area roadblocks under Article 6 (1) of the Statute. He is responsible as a superior under Article 6 (3) for the killings of Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza and Alphonse Kabiligi as well as for the crimes committed at *Centre Christus*, Kabeza, the Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, Mudende University and Nyundo Parish. Bagosora is also liable as a superior for crimes committed at the Kigali area roadblocks (IV.1.2), which the Chamber will take into account in sentencing.

Kabiligi

2195. The Prosecution did not prove beyond reasonable doubt that Kabiligi was responsible either directly or as a superior for any of the crimes alleged against him in his Indictment. Accordingly, the Chamber acquits Kabiligi of extermination as a crime against humanity (Count 5).

Ntabakuze

2196. The Chamber finds Ntabakuze guilty of extermination as a crime against humanity (Count 5) for the crime of genocide committed at Kabeza, Nyanza hill and IAMSEA as a superior under Article 6 (3) of the Statute.

Nsengiyumva was found responsible under Article 6 (1) for ordering the killings in Gisenyi town, Mudende University, Nyundo Parish and aiding and abetting the killings in Bisesero.

2244. It follows from those findings, that these killings also amount to murder under Article 4 (a) of the Statute. As discussed above, in the circumstances of these attacks, it is clear that the perpetrators were aware that the victims were not taking an active part in the hostilities. Furthermore, each of these crimes against these individuals not taking an active part in the hostilities had a nexus to the non-international armed conflict between the Rwandan government and the RPF.

4.3.4 Conclusion

Bagosora

2245. The Chamber finds Bagosora guilty of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10) for ordering the murder of Augustin Maharangari and the killings committed between 6 and 9 April 1994 at Kigali area roadblocks under Article 6 (1) of the Statute. He is also liable as a superior under Article 6 (3) for the murders and other crimes committed against Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza and civilians at *Centre Christus*, Kabeza, the Kibagabaga Mosque, the Saint Josephite Centre, Karama hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, including Alphonse Kabiligi, Mudende University and Nyundo Parish. Furthermore, Bagosora is responsible as a superior under Article 6 (3) for violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 11) for the deaths of the 10 Belgian peacekeepers. He is also liable as a superior for crimes committed at the Kigali area roadblocks (IV.1.2), which the Chamber will take into account in sentencing.

Kabiligi

2246. The Prosecution did not prove beyond reasonable doubt that Kabiligi was responsible either directly or as a superior for any of the crimes alleged against him in his Indictment. Accordingly, the Chamber acquits Kabiligi of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9).

Ntabakuze

2247. The Chamber finds Ntabakuze guilty of violence to life as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) for the killings at Kabeza, Nyanza hill and IAMSEA as a superior under Article 6 (3) of the Statute.

Nsengiyumva

2248. Nsengiyumva is guilty of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10) for ordering under Article 6 (1) the killings in Gisenyi town on 7 April, including Alphonse Kabiligi, Mudende University, Nyundo Parish and aiding and abetting the killings in Bisesero. He could be held responsible as a superior under Article 6 (3) for the crimes committed in Gisenyi town as well as at Mudende University and Nyundo Parish (IV.1.5). This will be taken into account in sentencing.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **7 July 2006**

SYLVESTRE GACUMBITSI

v.

THE PROSECUTOR

Case No. ICTR-2001-64-A

JUDGEMENT

Counsel for Sylvestre Gacumbitsi:

Mr. Kouengoua
Ms. Anne Ngatio Mbattang

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. Neville Weston
Mr. George Mugwanya
Ms. Inneke Onsea

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> ?Ign some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[134]

Here, the Prosecution contends that the vagueness was cured by the witness statement of Witness TAQ, which provided the date and place of the killing as well as the name of the victim,[135] and by a summary of the anticipated testimony of Witness TAQ that was appended to the Prosecution Pre-Trial Brief.[136] The Appellant argues that the Indictment should have been amended accordingly but was not.[137]

56. In advance of the trial, the Prosecution disclosed to the Appellant the witness statement of Witness TAQ, which set forth, *inter alia*, the date and place of the killing as well as the name of one victim, Mr. Murefu. That statement was also included in summary form in the chart of witnesses, appended to the Prosecution Pre-Trial Brief. The summary of the anticipated testimony of Witness TAQ reads:

> On or around 15 April 1994, KARAMAGE arrived at Nyarabuye church with a large group of Hutu attackers armed with sticks. Not long after, Sylvestre GACUMBITSI arrived with a pick-up truck full of machetes. He was accompanied by a vehicle full of *Interahamwe* armed with firearms and grenades. At first, the refugees rejoiced when they saw GACUMBITSI, but he warned them: "If any Hutu has made the mistake of entering that church, let them come out immediately." GACUMBITSI then instructed the Hutus and the *Interahamwe*: "Get machetes! Start killing and surround the church so that no one escapes." An elderly Tutsi teacher named **MUREFU** rose up and asked GACUMBITSI what the Tutsis had done to deserve that fate. GACUMBITSI grabbed a machete and slashed his neck, killing him instantly. Within moments, grenades were being tossed into the church, and shots were fired.[138]

That statement is included in a chart that shows the charges to which each witness's testimony was expected to correspond. The chart makes clear that Witness TAQ's anticipated testimony related to the charge of genocide, specifically referring to paragraphs 4, 15, 16, 17, 18, 21, 22, and 23 of the Indictment.[139] Paragraph 4 of the Indictment, which was part of the "Concise Statement of Facts for Counts 1 and 2", indicates that the Appellant personally participated in killings.[140]

57. The ICTY Appeals Chamber was recently confronted with similar circumstances in the *Naletilic and Martinovic* case: the material facts concerning a particular incident were not pleaded

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[134] *Kupreškic et al.* Appeal Judgement, para. 114.
[135] Prosecution Response, para. 152.
[136] T. 9 February 2006 p. 28.
[137] T. 9 February 2006 p. 78.
[138] *See* Prosecution Pre-Trial Brief, Appendix 3, p. 11 (emphasis added).
[139] *See* Prosecution Pre-Trial Brief, Appendix 3, p. 10.
[140] "[...] Sylvestre GACUMBITSI killed persons by his own hand, ordered killings by subordinates, and led attacks under circumstances where he knew, or should have known, that civilians were, or would be, killed by persons acting under his authority."

172. Paragraph 25 of the Indictment comes closer to providing the necessary notice, as it clearly refers to concerted action among a plurality of persons in support of "a common scheme, strategy or plan to exterminate the Tutsi" (*"d'un plan, d'une stratégie ou d'un dessein communs visant à exterminer les Tutsis"*). This language is similar to that employed in *Tadic* and seems to encompass the critical elements of a JCE charge. However, in then proceeding to state that the accused participated in the common scheme "by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent", the Indictment could be read to invoke three established modes of liability other than JCE: "committing" through direct, personal perpetration, aiding and abetting, and Article 6(3) superior responsibility. The Appellant could have interpreted the paragraph, taken as a whole, to refer only to those modes of liability and not to JCE, and he cannot therefore be said to have received clear notice of the JCE theory. This is especially so because, at the time of the Indictment, JCE was still an unfamiliar mode of liability in this Tribunal, although it had been employed at the ICTY.

173. As noted, the Prosecution also argues that the material facts set forth in the Indictment were sufficient to provide notice of the JCE theory. Specifically, the Prosecution states that the Indictment identified (i) the nature or essence of the JCE; (ii) the period over which it existed; (iii) the identity of its participants; and (iv) the nature of the accused's participation.[386] But even assuming the Indictment can be construed as containing all the material facts necessary to support a JCE theory, these facts were not clearly identified as being intended to plead such a theory. The mere inclusion in an indictment of scattered facts that might relate to a mode of liability does not suffice to put an accused on notice that the mode of liability is being alleged.

174. For these reasons, the Appeals Chamber finds, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the Trial Chamber did not err in finding the Indictment defective.

3. Whether Defects in the Indictment were Cured

175. The sole post-Indictment submission to which the Prosecution points in support of its contention that any defects in the Indictment were cured is its Pre-Trial Brief. However, that brief did not provide any clear indication to the Appellant that he was being charged as a JCE participant. It nowhere referred to a joint criminal enterprise, a common criminal purpose, or any other synonym. Part II of the Pre-Trial Brief (Factual Allegations) was divided into chapters including

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Indictment, 27 August 2003, paras. 15, 22. *Jokic* Sentencing Judgement, paras. 9, 21. *See also Jokic* Sentencing Appeal Judgement, paras. 14, 16.

[386] *See* Prosecution Appeal Brief, paras. 193, 194.

"Planning", "Preparing", and "Executing" (sub-divided into "Instigating", "Ordering, Leading and Supervising", and "Killing").[387] As to "Executing", the Pre-Trial Brief explained:

> During the month of April 1994, **Sylvestre Gacumbitsi** used his position as the *Bourgmestre* of Rusumo Commune and as an influential member of the MRND political party to execute the campaign of looting, raping and killing of the Tutsi civilians. **Sylvestre Gacumbitsi** ordered his subordinates from the local administration, communal policemen, members of the *Interahamwe* and Hutu civilians to attack and destroy the Tutsi civilian population. He instigated, led and supervised some of these attacks. **Sylvestre Gacumbitsi**, by his own hands, killed Tutsi civilians.[388]

This description does not give any indication that the Prosecution was pursuing a JCE theory. Nor is any such indication to be found in Part III of the Prosecution Pre-Trial Brief (Legal Issues). In fact, when discussing modes of liability in relation to each count, the Pre-Trial Brief does not even refer to "acting in concert with others" or to "a common scheme, strategy or plan" (in contrast to paragraphs 22 and 25 of the Indictment). It simply states that "the accused Sylvester [*sic*] Gacumbitsi, by virtue of the acts attributed to him, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of" genocide,[389] or that "[t]he accused planned, instigated, ordered, committed, or aided and abetted in" the extermination, murder, and rape.[390] Thus, if anything, the Pre-Trial Brief is less clear than the Indictment with respect to joint criminal enterprise, and cannot be found to have cured the Indictment's defects.

176. The Prosecution also mentions certain submissions during the trial, although it concedes that these are "not relevant to the question whether the Respondent was unfairly prejudiced in the conduct of his defence" by defects in the Indictment.[391]

177. The Appeals Chamber has previously stated that "in some instances, information contained in an Opening Statement of the Prosecution may cure a defective indictment."[392] The Appeals Chamber need not decide now whether and under what circumstances such a statement might be sufficient to plead the mode of liability, however, because no assistance is provided to the Prosecution by its Opening Statement in this case. The Prosecution points to the following statement made during its opening address:

> Today, Your Honours, Gacumbitsi stands charged with 5 counts: The count of genocide, or complicity in genocide in the alternative.

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[387] *See* Prosecution Pre-Trial Brief, pp. 11-16.
[388] Prosecution Pre-Trial Brief, para. 2.16.
[389] Prosecution Pre-Trial Brief, para. 3.35c. *See also ibid.*, para. 3.37c, in relation to complicity in genocide ("the accused Sylvester [*sic*] Gacumbitsi, by virtue of the acts attributed to him, knowingly aided and abetted in the planning, preparation or execution [...]").
[390] Prosecution Pre-Trial Brief, paras. 3.39a, 3.41a, 3.43a.
[391] Prosecution Appeal Brief, para. 200.
[392] *See, e.g., Kordic and Cerkez* Appeal Judgement, para. 169.

> He is also charged Your Honours with extermination, murder and rape, as crimes against humanity, all arising from culpable acts we allege he committed in concert with others as part of the common scheme whose singular objective was the total destruction of the Tutsi ethnic group.[393]

Even had it been timely, this statement was not, on its own, sufficient to correct the defect in the Indictment and the Pre-Trial Brief. It was not further developed; the Prosecution did not connect it, for instance, to specific factual allegations that supported the JCE claim. Nor did it specify to which category of JCE it meant to allude. The indictment places an accused on notice of the charges he faces. For a subsequent submission to be understood to clarify vagueness in an indictment, the implications of that submission must be clearer than the Prosecution's statement was here.

178. Only in its Closing Brief did the Prosecution provide further details on its JCE theory, and that submission obviously came too late. Thus, the defect in the Indictment was not cured by the provision of timely, clear, and consistent information, and the Trial Chamber did not err in refusing to consider the JCE theory.

179. Accordingly, this ground of appeal is dismissed in its entirety.

[393] Prosecutor's Opening Statement, T. 28 July 2003 p. 19. *See also* Prosecution Appeal Brief, para. 201.

> *subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.*[397]

182. Thus, after finding that no formal superior-subordinate relationship existed, the Trial Chamber proceeded to consider whether, under the circumstances of the case, the Appellant's statements nevertheless were perceived as orders. This is in accordance with the most recent judgements of the Appeals Chamber. In the *Semanza* Appeal Judgement, the Appeals Chamber explained:

> As recently clarified by the ICTY Appeals Chamber in *Kordić and Cerkez*, the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[398]

The Appeals Chamber notes that this element of "ordering" is distinct from that required for liability under Article 6(3) of the Statute, which does require a superior-subordinate relationship (albeit not a formal one but rather one characterized by effective control).[399] Ordering requires no such relationship -- it requires merely authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.

183. Accordingly, this sub-ground of appeal is dismissed.

2. Alleged Error of Fact

184. The Trial Chamber found that, as *bourgmestre*, the Appellant was the highest authority and most influential person in the commune, with the power to take legal measures binding all residents.[400] His role in the genocide demonstrated his authority: he convened meetings with the *conseillers*; asked them to organize meetings to tell people to kill Tutsis, and verified that these meetings had been held; and directly instructed *conseillers*, other leaders, and the Hutu population to kill and rape Tutsis.[401] The Trial Chamber pointed to several instances in which the Appellant "instructed", "ordered", or "directed" the attackers in general, not just the communal policemen:

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[397] Trial Judgement, paras. 282, 283 (emphasis added, internal citations omitted).
[398] *Semanza* Appeal Judgement, para. 361, referring to *Kordić and Cerkez* Appeal Judgement, para. 28. *See also Kamuhanda* Appeal Judgement, para. 75 ("To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." (internal citations omitted)).
[399] *See supra* section III.B.3.
[400] Trial Judgement, paras. 241-243.
[401] Trial Judgement, paras. 101, 104.

- On 14 April 1994, after giving a speech telling people "to arm themselves with machetes and [...] to hunt down all the Tutsi", the Appellant led assailants to Kigarama, where they engaged in an attack on Tutsis "carried out under [the Appellant's] personal supervision".[402]

- At Nyarubuye Parish on 15 April 1994, the Appellant "*instructed* the communal police and the *Interahamwe* to attack the refugees and prevent them from escaping", which they did.[403]

- On 16 April 1994, the Appellant "directed" an attack at Nyarubuye Parish, during which the assailants "finished off" survivors and looted the parish building.[404]

- On 17 April 1994, the Appellant ordered a group of attackers to kill fifteen Tutsi survivors of previous attacks at Nyarubuye Parish, which they immediately did.[405]

185. These findings made clear that the Appellant had authority over the attackers in question and that his orders had a direct and substantial effect on the commission of these crimes. In view of these facts, no reasonable trier of fact could find that the Appellant's words were not perceived as orders by the attackers in general, not just the communal police, to commit these crimes.

186. In *Semanza*, the Appeals Chamber found that the Trial Chamber had unreasonably failed to conclude that Laurent Semanza was liable for ordering a massacre.[406] This conclusion was based on the facts that Mr. Semanza had "directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees"[407] and that the refugees "were then executed on the directions" of Mr. Semanza.[408] The Appeals Chamber concluded as follows:

> On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.[409]

The Trial Chamber in the *Kamuhanda* case reached a similar conclusion under similar facts, and the Appeals Chamber affirmed it.[410] The present case is materially indistinguishable from these cases.

187. Accordingly, the Trial Chamber erred in fact by not convicting the Appellant for ordering the crimes committed by all attackers, not just the communal policemen, at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama. This sub-ground of appeal is upheld.

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[402] Trial Judgement, para. 98.
[403] Trial Judgement, paras. 152, 154 (emphasis added). *See also ibid.*, paras. 168, 172 (the Appellant "directed attacks" at Nyarubuye), 173 (the Appellant led the attacks at Nyarubuye "by instructing the attackers to kill the refugees").
[404] Trial Judgement, para. 171.
[405] Trial Judgement, para. 163.
[406] *Semanza* Appeal Judgement, paras. 363, 364.
[407] *Semanza* Appeal Judgement, para. 363.
[408] *Semanza* Appeal Judgement, para. 363, quoting *Semanza* Trial Judgement, paras. 178, 196.
[409] *Semanza* Appeal Judgement, para. 363.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER III

ENGLISH
Original: FRENCH

Before Judges: Andresia Vaz, presiding
Jai Ram Reddy
Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 17 June 2004

THE PROSECUTOR

v.

SYLVESTRE GACUMBTSI

Case No. ICTR-2001-64-T

JUDGMENT

Office of the Prosecutor:
Richard Karegyesa
Andra Mobberley
Khaled Ramadan

Counsel for the Defence:
Kouengoua
Anne Ngatio Mbattang

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161. The Chamber notes, however, that Witness TAO, who alone saw the Accused in the morning of 16 April 1994, did not testify that the Accused was armed. Moreover, neither Witness TAO, Witness TAQ nor Witness UHT mentioned any looting in the parish building after the massacre.

17 April 1994

162. As the Defence points out, Witness TAQ testified that he heard the Accused speaking over a megaphone at a location, other than Nyarubuye Parish, on 17 April 1994 at around 9 a.m. Witness TAX also testified that she saw the Accused at the same time. Both Witnesses TAX and TAQ only approximated the time when they saw the Accused.[161] Moreover, Witness TAQ testified that she heard the Accused speaking over a megaphone, and that the Accused was part of a convoy of three vehicles that she saw passing at the time, at the frontier between Kankobwa *secteur* and Nyarubuye *secteur*, in which Nyarubuye Parish is also located. As Witness TAX saw the Accused arriving at the parish in a vehicle, both witnesses could have seen the Accused within a reasonably short interval of time, at around 9 a.m. The Chamber therefore finds that Witness TAQ's evidence does not cast doubt over the reliability and credibility of Witness TAX as to this incident.

163. The Chamber finds that the conditions under which Witness TAX observed the Accused were particularly good. The incident took place in the morning and Witness TAX was at a very short distance, which she estimated to be two metres away from the Accused. On her evidence, the Chamber finds that, on 17 April 1994 at about 9 a.m., the Accused addressed a group of attackers who had gathered 15 Tutsi survivors in front of the Nyarubuye Church, and told them to take their weapons and kill the survivors, aiming at the head and sparing no one. There is no doubt that by these words, the Accused was ordering the murder of each of the 15 Tutsi survivors, given that once these words were uttered, the attackers attacked the survivors with machetes, with two of them mutilating Witness TAX, despite her pleas, leaving her for dead. On this evidence, the Chamber finds that, on 17 April 1994, the Accused led an attack against Tutsi civilians at Nyarubuye Parish by ordering the attackers to kill the refugees, as alleged in paragraph 27 of the Indictment.

The Defence Case: massacres committed by RPF

164. The Defence submits that the pictures in Fergal Keane's report do not date from the attacks on Nyarubuye Parish on 15, 16 and 17 April 1994[162]. Thus, regarding the bodies seen in parts of Fergal Keane's report and blamed on the massacre of 15 April at Nyarubuye Parish, the Defence submits that they are rather proof of the crimes committed by RPF. Such is the purport of the report of the two forensic pathologists, expert witnesses called by the Defence.[163] Similarly, Defence witnesses testified about the crimes committed by RPF. Thus, Defence Witness XW9, a member

[161] T., 31 July 2003, p. 37 (Witness TAX) and T., 29 July 2003, pp. 61 to 62 (Witness TAQ).
[162] Defence Closing Brief, paras. 385 to 394.
[163] Report of Expert Witnesses Vorhauer and Lecomte, p. 13.

274. The Chamber finds that these attacks resulted from the instigation stirred up by the Accused at the Rwanteru trading centre: the Kigarama attack took place under his direct supervision, while Buhanda's house was attacked under the supervision of his representative.

275. In the afternoon of 14 April 1994, the Accused, together with some armed communal policemen, went to the Kanyinya trading centre, where he told a group of about ten people: "Others have already completed their work. Where do you stand?". Soon after he left, a group of attackers set up and led by two demobilized soldiers, Nkaka and Sendama, started attacking Tutsi targets.

276. On 14 April 1994, after addressing the crowd at the Kanyinya commercial centre, the Accused, still accompanied by communal policemen, went to the Gisenyi commercial centre, where he addressed about 40 people, mainly Hutu. The Accused urged them to kill the Tutsi and throw their bodies into the River Akagera. He also asked boatmen to remove their canoes from the river to prevent the Tutsi from using them to cross the river.

277. Furthermore, the Accused met with various political and military officials, notably Colonel Rwagafirita from whom he received boxes of weapons that he had unloaded in various areas of the *commune*.

278. All such facts amount to acts of preparation for the massacres of the Tutsi in Rusumo *commune*. Sylvestre Gacumbitsi's involvement leads the Chamber to find that he planned the murder of Tutsi in Rusumo *commune* in April 1994.

279. "Instigating" involves prompting another person to commit an offence.[258] Instigating need not be direct and public.[259] For it to be a punishable offence, proof[260] is required of a causal connection between the instigation and the *actus reus* of the crime. In this particular case, the Accused, at various locations, publicly instigated the population to kill the Tutsi. For example, the Accused made speeches at the Rwanteru commercial centre where, following his instigation, those who listened to his speeches participated, shortly after, in looting property belonging to the Tutsi and in killing the Tutsi.[261]

280. The Chamber finds that Sylvestre Gacumbitsi incited the killing of Tutsi in Rusumo *commune* in April 1994.

281. "Ordering" refers to a situation where an individual in a position of authority uses such authority to compel another individual to commit an offence.[262] On this issue, the two ad hoc Tribunals have ruled differently. One has held that ordering implies the existence of a superior-subordinate relationship between the individual

[258] *Kajelijeli* Judgment (TC), para. 762; *Bagilishema* Judgment (TC), para. 30; *Akayesu* Judgment (TC), para. 482.
[259] *Semanza* Judgment (TC), para. 381; *Akayesu* Judgment (AC), paras. 478 to 482.
[260] *Bagilishema* Judgment (TC), *ibid.*
[261] See *supra*: Chapter II, Part B.
[262] *Akayesu* Judgment (TC), para. 483; *Kajelijeli* Judgment (TC), para. 763.

who gives the order and the one who executes it.[263] The other has held that ordering does not necessarily imply the existence of such a formal superior-subordinate relationship.[264]

282. The Trial Chamber is of the opinion that the issue must be determined in light of the circumstances of the case. The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be *de jure* or *de facto*. When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis. When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement. Such words and actions are not necessarily culpable, but can, where appropriate, amount to forms of participation in crime, such as "incitement" and "aiding and abetting" provided for in Article 6(1) of the Statute. In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the *de facto* exercise of an administrative function, or even the use of threat or unlawful force. The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6(1) referred to above. Such a situation does not, *ipso facto*, lead to the conclusion that a formal superior-subordinate relationship exists between the person giving the order and the person executing it. As a matter of fact, instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an "order" within the meaning of Article 6(1) of the Statute.

283. The Chamber recalls its factual finding that Sylvestre Gacumbitsi had superior authority only over the communal police.[265] The Prosecution failed to show that he also had superior authority over the *conseillers*, *Interahamwe*, *gendarmes* or any other persons who participated in the attacks. Moreover, the Prosecution failed to demonstrate that, in the absence of a formal superior-subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.

284. Accordingly, the Chamber finds that Sylvestre Gacumbitsi ordered communal policemen who were present at Nyarubuye Parish on 15 April 1994 to kill the Tutsi. On the evidence adduced, the participation of those policemen in the massacre was a direct consequence of the orders given by the Accused. Thus, the Accused incurs liability, pursuant to Article 6(1) of the Statute, for having ordered them to so participate in those crimes.

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[263] *Semanza* Judgment (TC), para. 382; *Ntagerura and others* Judgment (TC), para. 624.
[264] ICTY, *Kordić and Cerkez*, Judgment (TC), para. 388. See also *Kajelijeli* Judgment (TC), para. 763.
[265] See *supra*: Chapter II, Part F.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Khalida Rachid Khan, presiding
Judge Lee Gacuiga Muthoga
Judge Aydin Sefa Akay

Registrar: Adama Dieng

Date: 31 March 2011

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:

Richard Karegyesa
Drew White
Adelaide Whest
Didace Nyirinkwaya
Yasmine Chubin
Leo Nwoye

Counsel for the Defence:

Marie-Pierre Poulain
Kate Gibson

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572. In sum, the Chamber concludes that the Indictment and the Prosecution's post-Indictment submissions have provided timely, clear and consistent notice that it would be relying on all modes of liability, including commission through a joint criminal enterprise, with respect to all of the Counts in the Indictment. Accordingly, the Chamber considers all forms of individual criminal responsibility under Article 6 (1), where relevant, in its legal findings.

1.3 Law

573. "Planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[699] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[700] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[701]

574. "Instigating" implies prompting another person to commit an offence.[702] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[703] The *mens rea* for this mode of responsibility is intent to instigate another person to commit a crime or at a miminum, awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[704]

575. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator need exist. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime pursuant to the accused's order. The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for ordering may be informal or of a purely temporary nature.[705]

576. The Appeals Chamber has held that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law.[706] "Committing" has also been interpreted to contain three forms of joint criminal enterprise: basic, systemic, and extended.[707] The Prosecution has

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alleged joint criminal enterprise. The Chamber, however, does not make any findings with respect to such participants.

[699] *Nahimana et al.* Appeal Judgement para 479, citing *Kordić and Čerkez* Appeal Judgement para. 26.

[700] *Nahimana et al.* Appeal Judgement para. 479, citing *Kordić and Čerkez* Appeal Judgement para. 26.

[701] *Nahimana et al.* Appeal Judgement para. 479, citing *Kordić and Čerkez* Appeal Judgement paras. 29, 31.

[702] *Nahimana et al.* Appeal Judgement para. 480, citing *Ndindabahizi* Appeal Judgement para. 117; *Kordić and Čerkez* Appeal Judgement para. 27.

[703] *Nahimana et al.* Appeal Judgement para. 480, citing *Gacumbitsi* Appeal Judgement para. 129; *Kordić and Čerkez* Appeal Judgement para. 27.

[704] *Nahimana et al.* Appeal Judgement para. 480, citing *Kordić and Čerkez* Appeal Judgement paras. 29, 32.

[705] *Bagosora et al.* Trial Judgement para. 2008, citing *Semanza* Appeal Judgement paras. 361, 363.

[706] *Nahimana et al.* Appeal Judgement para. 478.

[707] *Simba* Trial Judgement para. 386, citing *Kvočka et al.* Appeal Judgement paras. 82-83; *Ntakirutimana* Appeal Judgement paras. 463-465; *Vasiljević* Appeal Judgement paras. 96-99; *Krnojelac* Appeal Judgement para. 30. See also *Nahimana et al.* Appeal Judgement para. 478; *Brđanin* Appeal Judgement para. 364.

the Statute, and that the definition of such harm has not squarely been addressed.[723] Examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.[724] Serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".[725] To support a conviction for genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.[726]

2.3 Deliberations

2.3.1 Meeting, Rwankuba Sector, 7 April 1994

585. In its factual findings, the Chamber determined that, on the morning of 7 April 1994, a group of about 20 *Interahamwe* and *Conseiller* Jean Bizimungu had gathered in the Rwankuba sector office courtyard. Subsequently, Gatete arrived with *Bourgmestre* Jean de Dieu Mwange. Shortly after, a pickup vehicle carrying *Interahamwe* and a communal policeman also arrived. In total, about 40 *Interahamwe* had gathered in the sector office courtyard. Gatete issued instructions to the *Interahamwe* to start killing Tutsis, telling them to "work relentlessly". Before departing, Gatete issued further instructions to "sensitise" other persons to killings. The Chamber has found that the *Interahamwe*, who received instructions from Gatete, participated in the killing of Tutsis and that those present at the gathering marshalled further reinforcements for the attacks which intensified as the day progressed and ultimately also involved soldiers, police and Hutu civilians. The Chamber has determined that, at least, 25 to 30 Tutsis were killed, including 10 members of Witness BBR's family. Tutsi *Responsable* Damascène Macali was also killed during an attack near his home.

586. The Chamber considers that the gathering of *Interahamwe* and *Conseiller* Bizimungu at the sector office, the subsequent arrival of Gatete with *Bourgmestre* Mwange, and the timely arrival of further *Interahamwe*, as well as the subsequent attacks on Tutsis in Rwankuba sector, which intensified as the day progressed and involved a range of assailants, could not have been achieved without considerable organisation. The presence of local authorities such as *Conseiller* Bizimungu and *Bourgmestre* Mwange, as well as a prominent figure such as Gatete, who was respected and well-known in Murambi commune by virtue of his former position as *bourgmestre* there and his post at the time in a national ministry, provided direction and encouragement to the *Interahamwe* prior to the attacks.[727]

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[723] *Seromba* Appeal Judgement para. 46. See also *Kayishema and Ruzindana* Trial Judgement, in which the Trial Chamber stated that, "that 'causing serious mental harm' should be interpreted on a case-by-case basis in light of the relevant jurisprudence." *Id* paras. 110, 113.

[724] *Seromba* Appeal Judgement para. 46 citing *Semanza* Trial Judgement, para. 320, citing *Kayishema and Ruzindana* Trial Judgement, para. 109; *Ntagerura et al.* Trial Judgement, para. 664.

[725] *Seromba* Appeal Judgement para. 46, citing *Kajelijeli* Trial Judgement, para. 815, citing *Kayishema and Ruzindana* Trial Judgement, para. 110; *Semanza* Trial Judgement, para. 321.

[726] *Seromba* Appeal Judgement para. 46, citing *Kajelijeli* Trial Judgement, para. 184; *Krajišnik* Trial Judgement, para. 862; Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May - 26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 91, UN Doc. A/51/10 (1996).

[727] See for example, Witness BBP, T. 20 October 2009 p. 19 (Gatete was a person of authority); Witness LA41, T. 2 March 2010 pp. 5 (in 1994, Gatete was a member of the Ministry of Women and Family Matters), 10 (Gatete had been an active *bourgmestre*); Witness LA43, T. 2 March 2010 p. 59 (Gatete was an active *bourgmestre*); Karemera, T. 4 March 2010 p. 21 (people knew Gatete and talked about him often as he had been

enterprise and shared the common purpose of killing Tutsis in Rwankuba sector. Accordingly, the elements required for a finding that Gatete planned, instigated, ordered, committed through a basic form of joint criminal enterprise, and aided and abetted the killing of Tutsis in Rwankuba sector, are present.

593. Any one of these modes of liability could sustain a conviction for genocide, and, in the Chamber's view, Gatete's participation through a joint criminal enterprise most aptly sums up his criminal conduct. All other modes reflect merely a fraction of his responsibility for the crime. Nevertheless, the Chamber considers that, in order to fully capture the nature of Gatete's criminal culpability and involvement in the crime, it is appropriate to make findings based on all relevant modes of liability. Indeed, such findings are also relevant to the charge of conspiracy to commit genocide (III.4.3.i) as well as to sentencing.[733]

594. Accordingly, the Chamber finds beyond reasonable doubt that Gatete is responsible pursuant to Article 6 (1) of the Statute, for planning, instigating, ordering, committing through a basic form of joint criminal enterprise, and aiding and abetting the killing of Tutsis in Rwankuba sector on about 7 April 1994.

2.3.2 Kiziguro Parish, 11 April 1994

595. The Chamber has found that, in the days following 6 April 1994, hundreds and possibly thousands of primarily Tutsi refugees fled attacks in their localities and sought refuge at the Kiziguro parish. On 8, 9 and 10 April, Gatete visited the parish and spoke to gendarmes, who had been guarding the compound, as well as the priests. On 10 April, Gatete also arrived at the parish with Kiziguro sector *Conseiller* Gaspard Kamali and *Interahamwe* leader Augustin Nkundabazungu and the group took away certain persons from the parish. On 11 April, Gatete returned to the parish with *Conseiller* Kamali, Nkundabazungu, and soldiers. *Interahamwe* were also present at the parish, as well as civilian militia, who included displaced persons from nearby refugee camps. While Gatete was present, Tutsi refugees were separated from the Hutus and Gatete gave express instructions to the *Interahamwe* and civilian militia to kill the Tutsis. Pursuant to Gatete's directions, *Interahamwe* attacked the Tutsi refugees with a range of traditional weapons, while some assailants also used guns. Soldiers facilitated the killings by surrounding the refugees so that they could not escape. Hundreds and possibly thousands of assailants participated in the attack. As a result of the extensive assault, hundreds, and possibly thousands of Tutsi civilians were killed

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[733] The Chamber further recalls that while it considers that Gatete's criminal conduct can also be characterised as "planning" and "commission" through a joint criminal enterprise, some Trial Chambers have found that an accused cannot be convicted of planning and committing the same offence. See, for example, *Brđanin* Trial Judgement para. 268; *Stakić* Trial Judgement para. 443; *Kordić and Čerkez* Trial Judgement para. 386. The Chamber notes that, where the accused is convicted of committing the offence in question, the accused's role in planning the offence is considered as an aggravating factor during sentencing. See *Stakić* Trial Judgement para. 443; *Stakić* Appeal Judgement para. 413 ("The Appellant's role in the planning and ordering of deportation is not an element required to prove the commission of deportation. Yet, it may be taken into account as an aggravating factor because of the contribution that planning and ordering make to the commission of a crime. It furthermore may bear on the moral culpability of the perpetrator."). The Chamber also considers that its finding of "planning" is highly relevant to the crime of conspiracy to commit genocide.

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1406/H

ICTR-00-55B-A
8th May 2012
{1406/H – 1302/H}

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Patrick Robinson
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Carmel Agius

ICTR Appeals Chamber
Date: 8th May 2012
Action:
Copied To: Concerned Judges, Parties, JPU, LOs

Registrar: **Mr. Adama Dieng**

Judgement of: **8 May 2012**

Ildephonse HATEGEKIMANA

v.

THE PROSECUTOR

Case No. ICTR-00-55B-A

JUDGEMENT

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: ROSETTE MUZIGO-MORRISON
SIGNATURE: DATE: 8/May/2012

Counsel for Ildephonse Hategekimana:

Mr. Jean de Dieu Momo

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James J. Arguin
Mr. Alphonse Van
Mr. Alfred Orono Orono
Ms. Thembile Segoete
Ms. Ndeye Marie Ka
Mr. Leo Nwoye

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Hategekimana gave the order and there was no circumstantial evidence of Rugomboka's murder.[138] In his view, it was therefore impossible to establish that there was an order to kill Rugomboka and that the people who killed him did so on Hategekimana's order.[139] Hategekimana contends that, in reaching its findings, the Trial Chamber gave undue weight to his position of authority and to his actions following the killing.[140] Furthermore, Hategekimana argues that the Trial Chamber erred in convicting him because it made no findings concerning a "statement or act by [him] revealing hatred for Rugomboka's political opinion and the will to commit a murder for political reasons."[141]

66. The Prosecution responds that the Trial Chamber reasonably concluded on the basis of the circumstantial evidence, in particular related to his actions during the course of the abduction, that Hategekimana, as the commander of the Ngoma Military Camp, ordered the killing of Rugomboka.[142]

67. The Appeals Chamber recalls that a person in a position of authority may incur responsibility for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[143] Ordering, like any other form of responsibility, can be inferred from circumstantial evidence, so long as it is the only reasonable inference.[144]

68. As described above,[145] the Trial Chamber explained why the evidence compelled the conclusion that Hategekimana issued the order to kill Rugomboka.[146] In addition, even though there is no direct evidence that soldiers committed Rugomboka's killing,[147] the Trial Chamber inferred this based on circumstantial evidence,[148] which was within its discretion.[149] Based on the Trial Chamber's findings, Hategekimana clearly played a prominent role in Rugomboka's abduction and in monitoring and controlling the events in the aftermath of the killing. In addition, soldiers detained Rugomboka at the Ngoma Military Camp prior to his death and later disposed of his mutilated corpse in the forest. Beyond challenging the reliability of the underlying evidence

[138] Appeal Brief, paras. 183, 186.
[139] Appeal Brief, para. 186.
[140] Appeal Brief, para. 185.
[141] Appeal Brief, para. 187.
[142] Response Brief, paras. 106-110.
[143] *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, para. 75. *See also Nahimana et al.* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 182; *Semanza* Appeal Judgement, para. 361; *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28.
[144] *Renzaho* Appeal Judgement, para. 318. *See also Dragomir Milošević* Appeal Judgement, para. 265; *Galić* Appeal Judgement, para. 178.
[145] *See supra* para. 64.
[146] Trial Judgement, para. 304.
[147] Trial Judgement, paras. 286, 292.
[148] Trial Judgement, para. 296.
[149] *See, e.g., Muhimana* Appeal Judgement, paras. 49, 50 (finding no error in the Trial Chamber's conclusion based on circumstantial evidence that two women were raped).

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER II

Before: Judge Arlette Ramaroson, Presiding
Judge Taghrid Hikmet
Judge Joseph Masanche

Registrar: Adama Dieng

Date: 6 December 2010

THE PROSECUTOR

v.

Ildephonse HATEGEKIMANA

Case No. ICTR-00-55B-T

JUDGEMENT AND SENTENCE

The Prosecution:
William T. Egbe
Peter Tafah
Adama Niane
Disengi Mugeyo
Amina Ibrahim

The Defence:
Jean de Dieu Momo
Ata Quam Dovi Avouyi

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is sufficient simply to show that the incitement substantially contributed to the conduct of another person committing the crime. The *mens rea* is the intent to instigate another person to commit a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions instigated.[1235]

645. "Ordering" requires that a person in a position of authority instructs another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator of the crime is required. It is sufficient that there is a proof of some position of authority on the part of the accused that would compel another person to commit a crime in following the accused's order.[1236] The authority creating the type of relationship envisaged under Article 6(1) of the Statute for ordering may be informal or temporary in nature.[1237] A superior is someone with *de jure* or *de facto* power or authority over his subordinates and the power or authority need not be conferred through a formal appointment.[1238]

646. "Committing," covers primarily the physical perpetration of a crime, with criminal intent, or a culpable omission of an act that is mandated by a rule of criminal law.[1239] It is established in the jurisprudence of the Tribunal that "committing" is not limited to direct and physical perpetration and that other acts can constitute direct participation in the *actus reus* of the crime.[1240] "Committing" has also been interpreted to mean participation in any of the three forms of joint criminal enterprise, namely, the basic, the systemic and the extended forms.[1241] The Chamber discusses below Hategekimana's alleged participation in a joint criminal enterprise.

647. The Prosecution has pleaded that it intends to rely on the basic form of joint criminal enterprise in a clear and unambiguous manner in the Indictment. In addition to stating the mode, extent and nature of Hategekimana's participation, the Indictment refers to joint criminal enterprise under all four counts in connection with responsibility under Article 6(1). The Prosecution has set forth the purpose of the enterprise and has identified the co-perpetrators alleged to have materially committed the crimes forming part of the common criminal purpose.[1242] Several of the alleged co-perpetrators are named in various paragraphs throughout the Indictment in connection with the commission of the crimes.[1243]

648. The Defence raises general issues with respect to the pleading of the requisite elements of joint criminal enterprise. The Chamber has already addressed these and other preliminary issues in Chapter II of this Judgement.[1244]

[1235] *Setako* Trial Judgement para. 447, *Nahimana* Appeal Judgement para. 480.
[1236] *Gacumbitsi* Appeal Judgement para. 182; *Semanza* Appeal Judgement para. 361.
[1237] *Setako* Trial Judgement para. 449; *Bagosora* Appeal Judgement para. 2008, citing *Semanza* Appeal Judgement para. 361 and 363.
[1238] *Kajelijeli* Appeal Judgement para. 85, citing *Bagilishema* Appeal Judgement para. 50, citing *Čelebići* Appeal Judgement para. 192.
[1239] *Nahimana et al.* Appeal Judgement para. 480; *Seromba* Appeal Judgement para. 161; *Gacumbitsi* Appeal Judgement para. 60.
[1240] *Seromba* Appeal Judgement para. 161, citing *Gacumbitsi* Appeal Judgement para. 60.
[1241] *Simba* Trial Judgement para. 386, citing *Kvočka et al.* Appeal Judgement paras. 82-83; *Ntakirutimana* Appeal Judgement paras. 463-465, *Vasiljević* Appeal Judgement paras. 96-99, *Krnojelac* Appeal Judgement para. 30.
[1242] Indictment paras. 6, 34, 42.
[1243] See *e.g.* paragraph 16 refers to Gatwaza, Pacifique, Rutanihubwoba and *Conseiller* Jacques Habimana.
[1244] See Chapter II, Notice Section.

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER II

Original: English

Before Judges: William H. Sekule, Presiding
Winston C. Matanzima Maqutu
Arlette Ramaroson
Registrar: Adama Dieng

Judgment of: 1 December 2003

THE PROSECUTOR
v.
Juvénal KAJELIJELI

Case No. ICTR-98-44A-T

JUDGMENT AND SENTENCE

Counsel for the Prosecution:
Ifeoma Ojemeni

Counsel for the Defence:
Lennox S. Hinds
Nkeyi M. Bompaka

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Nkuli *Commune*; and that Witness GDD committed these murders, in furtherance of the Accused's order to "fine comb" the Nkuli *Commune* for Tutsis.

834. The Chamber found that on or around 14 April 1994 at the Ruhengeri Court of Appeal, about three hundred Tutsi were killed by *Interahamwe*. The Chamber found that the Accused played a vital role as an organizer and facilitator of the *Interahamwe* and other attackers. He did this by procuring weapons, rounding up the *Interahamwe* for purposes of the attack, and facilitating their transport to the Ruhengeri Court of Appeal by supplying them with petrol.

835. Accordingly, the Chamber finds that genocidal killings of members of the Tutsi group occurred in Mukingo, Nkuli and Kigombe *Communes* (at the Ruhengeri Court of Appeal) in April 1994, and that the Accused participated in those killings.

- **Individual Criminal Responsibility of the Accused (Article 6.1 of the Statute)**

836. On the basis of its factual findings and its legal findings above the Chamber finds that the Accused participated in the killings in Mukingo and Nkuli *communes* by instigating the attacks against members of the Tutsi group, ordering the *Interahamwe* to kill members of the Tutsi group and instigating others to kill members of the Tutsi group.

837. The Chamber finds that the Accused participated to the killings of members of the Tutsi group in the Ruhengeri Court of Appeal in Kigombe *commune* by aiding and abetting the commission of the crime.

838. The Chamber finds that at the time of his participation in these killings, the Accused harboured the intent to destroy the Tutsi ethnic group in whole or in part.

- **Criminal Responsibility of the Accused as a superior (Article 6.3 of the Statute)**

839. On the basis of all the evidence reviewed to in Part III and on the basis of its previous findings the Chamber finds that the Accused knew or had reason to know that the *Interahamwe* were about to commit acts of genocide in Mukingo and Nkuli *Communes* and at the Ruhengeri Court of Appeal in Kigombe *Commune* between 7 and 14 April 1994.

840. The Chamber infers from the evidence and its previous findings as well as from the circumstances of the case that the Accused failed to take the necessary and reasonable measures to prevent the acts of genocide committed by his subordinates.

841. There is, however, insufficient evidence for the Chamber to find that the Accused failed to take the necessary and reasonable measures to punish the acts of genocide committed by his subordinates.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Judgement of: **20 October 2010**

CALLIXTE KALIMANZIRA

v.

THE PROSECUTOR

Case No. ICTR-05-88-A

JUDGEMENT

Counsel for Callixte Kalimanzira:

Mr. Arthur Vercken
Ms. Anta Guissé

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alphonse Van
Ms. Charity Kagwe-Ndungu
Mr. François-Xavier Nsanzuwera
Ms. Florida Kabasinga
Ms. Jane Mukangira

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acted, no reasonable trier of fact could have held otherwise [than] that his acts and conduct more appropriately amounted to participation through *ordering* and *committing* [...]."[564]

210. The Appeals Chamber considers, in turn, whether the Trial Chamber erred in not finding that Kalimanzira either ordered or committed the crime of genocide in relation to the events at Kabuye hill.

(a) Ordering

211. The Prosecution contends that the Trial Chamber erred in failing to find that "the acts and utterances of [Kalimanzira], the resulting killings[,] and the overall context of the events" demonstrated that he ordered genocide at Kabuye hill.[565] In this respect, the Prosecution submits that, based on the Trial Chamber's findings, Kalimanzira had authority over the attackers and was perceived by the attackers as an authority.[566] It also underscores that, based on the evidence presented at trial, Kalimanzira was the highest authority present at the Kabuye hill massacre.[567]

212. In addition, the Prosecution points to an event recounted by Prosecution Witness BWO, namely, the killing of a group of refugees by civilians allegedly acting on Kalimanzira's instructions.[568] The Prosecution states that, according to Witness BWO, Kalimanzira promised a leader of a group of Tutsi refugees protection, but then told a group of assailants that they should kill the refugees.[569] The Prosecution submits that this "order was immediately obeyed."[570] In sum, the Prosecution submits that "[b]y telling the attackers to kill the Tutsi refugees immediately and by bringing as reinforcements persons under his authority, directed to participate in the attacks, [Kalimanzira] therefore gave direct orders and completed the *actus reus* of ordering genocide [...]."[571]

213. The Appeals Chamber recalls that ordering requires that a person in a position of authority instruct another person to commit an offence.[572] It is clear that the Trial Chamber found that Kalimanzira was in a position of authority.[573] The Trial Chamber, however, made no findings that

[563] Prosecution Appeal Brief, paras. 28-32, 47-52, 68-76.
[564] Prosecution Appeal Brief, para. 29 (emphasis in original) (internal citations omitted).
[565] Prosecution Appeal Brief, para. 47 (internal citations omitted). *See also* Prosecution Appeal Brief, paras. 48-52.
[566] Prosecution Appeal Brief, paras. 48-51.
[567] Prosecution Appeal Brief, para. 50.
[568] Prosecution Appeal Brief, para. 49.
[569] Prosecution Appeal Brief, para. 49.
[570] Prosecution Appeal Brief, para. 49.
[571] Prosecution Appeal Brief, para. 51.
[572] *Semanza* Appeal Judgement, paras. 361, 363.
[573] Trial Judgement, paras. 97-99.

he instructed anyone at Kabuye hill to commit a crime. Instead, it follows from the Trial Judgment that Kalimanzira's role during his time at Kabuye hill involved "providing armed reinforcements."[574] While it is possible that an order to attack could have been inferred from the surrounding circumstances, the Appeals Chamber is not satisfied that the Prosecution has demonstrated that this is the only reasonable inference from the evidence.

214. The Prosecution's argument relies heavily on Witness BWO's account of Kalimanzira telling a group of assailants at Kabuye hill to kill a group of Tutsi refugees. The Trial Chamber found the witness credible and accepted his evidence about this incident even though it was "substantially uncorroborated."[575] In reviewing Witness BWO's evidence, however, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber not to convict Kalimanzira for ordering based on Witness BWO's testimony.

215. More specifically, it follows from Witness BWO's evidence that the group of assailants arrived at the hill after Kalimanzira.[576] Although the leader of a group of Tutsi refugees recognized Kalimanzira,[577] it is not clear from the evidence that the civilian assailants did so as well, or that they knew that he was an authority. More significantly, it is not entirely clear from the witness's testimony whether the civilian assailants attacked the group of refugees immediately after Kalimanzira spoke to them,[578] or attacked the refugees only upon the arrival of soldiers some time after his departure.[579] Given these ambiguities, the Trial Chamber acted within its discretion in

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[574] Trial Judgement, para. 393.
[575] Trial Judgement, para. 383.
[576] T. 5 May 2008 pp. 30, 31; T. 19 May 2008 p. 8.
[577] Trial Judgement, para. 317.
[578] *See* T. 5 May 2008 p. 30 ("When he was talking to the people who arrived and who were behind him – I can try to repeat what he said. After Boniface spoke to him, Callixte turned to the newcomers and said, 'You should kill them immediately because the others have already finished.' And that was when we fled and we joined the other refugees. But, Kalimanzira had already uttered those words, and some of the refugees were killed on the spot."); T. 19 May 2008 p. 9 ("Q. And this group of persons, who included the two individuals whose names you mentioned, that group was only composed of civilians, or were there also soldiers in the group? A. They were civilians and *Interahamwe*. When they started attacking us, I personally escaped. I left the scene. But let me point out that there were many of them. There were *Interahamwe*, civilians, and later on soldiers also arrived at the scene. And the attack lasted the entire day. So let me point out that there were also soldiers. Q. At the time you fled, Mr. Witness, there was only that group of civilians. Do you agree with me? A. Yes, there was that group of people who had come almost at the same time as Kalimanzira, and it was at about 11. Between 1 p.m. and 2 p.m. soldiers came to the scene and started firing at the refugees and killing them."). However, the Appeals Chamber observes that, if Witness BWO fled when the civilian assailants attacked shortly after Kalimanzira left, it is not clear how he would have been in a position to observe the arrival of the soldiers two hours later.
[579] *See* T. 5 May 2008 pp. 31, 32 ("Q. What happened following Kalimanzira speaking to these civilians from Dahwe? A. Soldiers and *Interahamwe* arrived. [...] Q. After Kalimanzira got into his vehicle and left, what did you and the other refugees do? A. We stayed where we were; there was nothing else we could do. And it was during that time that the *Interahamwe* and the soldiers arrived. [...] Q. How did the soldiers and the *Interahamwe* get to where they were to attack you? A. They arrived and they started shooting immediately. When we heard the gunshots, we were hopeless and we ran helter-skelter. The other attackers started attacking us with machetes and bladed weapons. Q. Do you know how the soldiers and *Interahamwe* reached where you were, by foot or in a vehicle? A. The vehicle dropped the soldiers at Gisagara, and they joined the *Interahamwe* and came to the place where we were on foot. Q. You told us that

UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges:	Dennis C. M. Byron, Presiding Gberdao Gustave Kam Vagn Joensen
Registrar:	Adama Dieng
Date:	22 June 2009

THE PROSECUTOR

v.

Callixte KALIMANZIRA

Case No. ICTR-05-88-T

JUDGEMENT

Office of the Prosecutor
Christine Graham
Veronic Wright
Ousman Jammeh

Defence Counsel
Arthur Vercken
Anta Guissé

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14. The Defence suggests that any consideration of *de facto* authority should be ruled out because the defect has not been cured in any subsequent filings.[8] However, the Chamber notes that in its own Pre-Trial Brief, filed six and a half months before it raised the present issue, the Defence introduced the Prosecution's position on Kalimanzira's alleged control in Butare *préfecture* as including both *de jure* and *de facto* authority.[9] The Defence was clearly aware long ago that Kalimanzira's alleged *de facto* authority over the people of Butare was an issue in this trial and formed part of the Prosecution's case. The omission of "de fait" from the French version of the Indictment has not caused the Defence any prejudice or created any confusion. In fact, Kalimanzira's defence is premised on his high-standing and good reputation throughout Butare society. Kalimanzira's *de facto* authority is therefore not in serious contention (see also III.1.1.4); the question is whether he abused it to genocidal ends. The Defence's attempt to persuade the Chamber to dismiss a consideration of Kalimanzira's alleged *de facto* authority is therefore unfounded.

2.2. Failure to Plead Superior Responsibility

15. The Defence points out that Kalimanzira is only accused of individual criminal responsibility under Article 6 (1) of the Statute, and argues that because superior responsibility under Article 6 (3) has not been pleaded, Kalimanzira's alleged criminal responsibility may not be evaluated in light of any hierarchical powers he may have held. This contention stands to be rejected for the following reasons.

16. The language used in paragraph 2(vii) of the Indictment, *i.e.* that by virtue of the government positions Kalimanzira held, he exercised "*de jure* and *de facto* authority" over various Butare officials and civilians, "in that he could order these persons to commit or refrain from committing unlawful acts and discipline or punish them for their unlawful acts or omission," is similar to that used when pleading an accused's responsibility as a superior. However, crimes committed by virtue of an accused's abuse of his or her *de jure* or *de facto* powers are not limited to liability under Article 6 (3). Evidence of *de jure* or *de facto* authority can also assist in factually proving criminal liability under the modes of participation contained within Article 6 (1). In fact, at times it is more appropriate to convict under Article 6 (1) than 6 (3), even if an accused has *de jure* authority.[10]

17. The first portion of the underlined extract above refers to Kalimanzira's alleged ability to order others to commit crimes. Ordering is a mode of participation under Article 6 (1). With respect to ordering, a person in a position of authority[11] may incur responsibility for ordering another person to commit an offence,[12] if the person who received the order actually proceeds to commit the offence subsequently.[13]

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[8] See Defence Closing Brief, fn 998.

[9] See Defence Closing Brief, para. 10.

[10] For instance, when, for the same count and the same set of facts, the accused's responsibility is pleaded pursuant to both Articles 6 (1) and 6 (3) and the accused could be found liable under both provisions, the Trial Chamber should rather enter a conviction on the basis of Article 6 (1) alone and consider the superior position of the accused as an aggravating circumstance. See *Nahimana et al.* Appeal Judgement, para. 487; *Kajelijeli* Appeal Judgement, para. 81; see also *Galić* Appeal Judgement, para. 186; *Jokić* Appeal Judgement, paras. 23-28; *Kordić and Čerkez* Appeal Judgement, paras. 34-35; *Blaškić* Appeal Judgement, para. 91.

[11] It is not necessary to demonstrate the existence of an official relationship of subordination between the accused and the perpetrator of the crime: *Galić* Appeal Judgement, para. 176; *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.

[12] *Galić* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras. 28-29.

[13] *Nahimana et al.* Appeal Judgement, para. 481.

UNITED NATIONS
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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Judgement of: 19 September 2005

JEAN DE DIEU KAMUHANDA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-54A-A

JUDGEMENT

Counsel for the Appellant:

Ms. Aïcha Condé

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Amanda Reichman
Mr. Neville Weston
Ms. Inneke Onsea

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65. First, the Appeals Chamber observes that the Trial Chamber in the cited paragraph found that the Appellant enjoyed a "certain influence in the Gikomero community".[129] This fact alone is not sufficient to establish the Appellant's responsibility for "instigating" the crimes. Second, this reasoning would be inconsistent with the fact that the Trial Chamber did not exclude the possibility that the attackers did not come from Gikomero, but from Rubungo.[130] Therefore, the Appeals Chamber finds the fact that the Appellant enjoyed a certain influence in the Gikomero community to be immaterial to the alleged relation between the meeting in the Appellant's cousin's home and the attack on the Gikomero Parish Compound.

66. In summary, the Appeals Chamber finds that the Trial Chamber's conclusion that the Appellant instigated assailants to kill members of the Tutsi ethnic group is not supported by the evidence.

2. Aiding and Abetting

67. The Trial Chamber concluded that the Appellant aided and abetted the commission of the crimes through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound. The Appellant challenges the Trial Chamber's finding that he distributed weapons prior to the attack, and argues that there was no evidence that he directed the attackers.[131]

68. The Appeals Chamber agrees, Judge Schomburg dissenting, with the Appellant that the evidence does not support any connection between the distribution of weapons and the subsequent attack on the Gikomero Parish Compound. It was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack, nor that the weapons he distributed were used at all. The Appeals Chamber recalls again that the Trial Chamber did not rule out the possibility that the attackers did not come from Gikomero, but from another location.[132]

69. In paragraph 648 of the Trial Judgement, the Trial Chamber found that the Appellant aided and abetted the commission of the crimes "by leading the attackers *to* the Gikomero Parish Compound".[133] This could be understood in the sense that the Trial Chamber held the Appellant responsible for aiding and abetting the attackers by guiding them to the Gikomero Parish

[129] Trial Judgement, para. 73.
[130] Trial Judgement, para. 67.
[131] Appeal Brief, para. 185.
[132] Trial Judgement, para. 67.

commune. This, the Appellant contends, shows that he could not have had any authority over the attackers.[147]

74. The Prosecution responds that there was sufficient evidence supporting the Trial Chamber's finding that the Appellant gave the order to "work", and that, in the absence of any clear evidence of authority, the existence of such authority may be inferred from the fact that an order is obeyed.[148] The Prosecution adds that the Appellant held a prominent and influential position in the Gikomero community and was a well-known civil servant, and that his mere presence at the Parish would have been an encouragement to the attackers.[149]

75. The Appeals Chamber notes that superior responsibility under Article 6(3) of the Statute is a distinct mode of responsibility from individual responsibility for ordering a crime under Article 6(1) of the Statute. Superior responsibility under Article 6(3) of the Statute requires that the accused exercise "effective control" over his subordinates to the extent that he can prevent them from committing crimes or punish them after they committed the crimes.[150] To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime,[151] and that his order have a direct and substantial effect on the commission of the illegal act.[152] In the *Semanza* Appeal Judgement, the Appeals Chamber made clear that no formal superior-subordinate relationship is required.[153]

76. There is no requirement that an order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence.[154] As will be shown below, the factual finding that the Appellant gave the order to start the massacre, and that this order was obeyed, was not unreasonable.[155] The Appeals Chamber finds that a reasonable trier of fact could conclude from the fact that the order to start the massacre was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had

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[147] Appeal Brief, paras. 204-210.
[148] Respondent's Brief, paras. 259, 260.
[149] Respondent's Brief, para. 261.
[150] *Bagilishema* Appeal Judgement, para. 50.
[151] *Semanza* Appeal Judgement, para. 361. *See also Kordi} and Cerkez* Appeal Judgement, para. 28 (for the identical provision in Article 7(1) of the ICTY Statute).
[152] *Kayishema and Ruzindana* Appeal Judgement, para. 186.
[153] *Semanza* Appeal Judgement, para. 361.
[154] *Kordi} and Cerkez* Trial Judgement, para. 388.
[155] *See* Chapter XI.K.4.c.

authority over the attackers, regardless of their origin. This sub-ground of appeal is therefore without merit and the Appeals Chamber dismisses it.

4. The Appellant's Convictions for Ordering and Aiding and Abetting

77. The factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes. Both modes of participation form distinct categories of responsibility. In this case, however, both modes of responsibility are based on essentially the same set of facts: the Appellant "led" the attackers in the attack and he ordered the attackers to start the killings. On the facts of this case, with the Appeals Chamber disregarding the finding that the Appellant distributed weapons for the purposes of determining whether the Appellant aided and abetted the commission of the crimes, the Appeals Chamber does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting. In this case the mode of responsibility of ordering fully encapsulates the Appellant's criminal conduct at the Gikomero Parish Compound.[156]

B. Genocide

78. The Appellant submits that his intent to destroy the Tutsi ethnic group in whole or in part has not been proven.[157] He argues that the Trial Chamber based its finding on circumstantial evidence which was unreliable.[158] He challenges, in particular, the Trial Chamber's holding that the origin of the attackers was immaterial to his criminal responsibility.[159] The Appellant maintains that the attackers did not come from Gikomero, but from the neighbouring commune of Rubungo, whereas, the Appellant argues, the Trial Chamber found that he had influence only in the Gikomero Commune.[160]

79. Under the heading "Intent to Destroy in Whole or in Part the Tutsi Ethnic Group", the Trial Chamber referred to a number of its earlier findings:

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[156] *Cf. Semanza* Appeal Judgement, paras. 353, 364, Disposition (where the Trial Chamber's convictions for aiding and abetting extermination and complicity in genocide were reversed on appeal and the Appeals Chamber entered convictions for ordering extermination and genocide (ordering) with respect to the same events).
[157] Appeal Brief, para. 194.
[158] Appeal Brief, paras. 196-201.
[159] Appeal Brief, para. 204.
[160] Appeal Brief, paras. 205-210.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before:
Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 22 January 2004

The PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-95-54A-T

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Additional Protocol II.
588. Article 6(1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit that crime, but also by individuals who participate in and contribute to the commission of a crime in other ways, ranging from its initial planning to its execution, as specified in the five categories of acts in this Article: planning, instigating, ordering, committing, or aiding and abetting.
589. Pursuant to Article 6(1), an individual's participation in the planning or preparation of an offence within the Tribunal's jurisdiction will give rise to criminal responsibility only if the criminal act is actually committed. Accordingly, crimes which are attempted but not consummated are not punishable, except for the crime of genocide, pursuant to Article 2(3)(b),(c) and (d) of the Statute.
590. Jurisprudence has established that for an accused to incur criminal responsibility, pursuant to Article 6(1), it must be shown that his or her participation has substantially contributed to, or has had a substantial effect on, the completion of a crime under the Statute.
591. The elements of the crimes of genocide, Crimes against Humanity, and violations of Article 3 common to the Geneva Conventions and Additional Protocol II, articulated in Articles 2 to 4 of the Statute, are inherent in the five forms of criminal participation enumerated in Article 6(1), for which an individual may incur criminal responsibility. These five forms of participation are discussed below.
o Forms of Participation
(i) Planning
592. "Planning", implies that one or more persons contemplate a design for the commission of a crime at both the preparatory and execution phases. The existence of a plan may be demonstrated through circumstantial evidence. In Bagilishema, it was held that the level of participation in planning to commit a crime must be substantial, such as the actual formulation of a plan or the endorsement of a plan proposed by another individual.
(ii) Instigating
593. "Instigating", involves prompting another person to commit an offence, and needs not be direct or public. Both positive acts and omissions may constitute instigation. Instigation is punishable on proof of a causal connection between the instigation and the commission of the crime.
(iii) Ordering
594. "Ordering", implies a situation in which an individual with a position of authority uses such authority to impel another, who is subject to that authority, to commit an offence. No formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order. The position of authority of the person who gave an order may be inferred from the fact that the order was obeyed.
(iv) Committing
595. To "commit" a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law. In this sense, there may be one or more perpetrators in relation to the same crime where the conduct of each perpetrator satisfies the requisite elements of the substantive offence.
(v) Aiding and Abetting in the Planning, Preparation, or Execution of an Offence

UNITED NATIONS

International Criminal Tribunal for Rwanda

Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Taghrid Hikmet, Presiding
Judge Seon Ki Park
Judge Joseph Masanche

Registrar: Adama Dieng

Date: 1 November 2010

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Holo Makwaia
Althea Alexis Windsor
Cheikh Tidiane Mara
Lansana Dumbuya

Defence Counsel:
David Jacobs
Claver Sindayigaya
Marc Nerenberg
Iain Edwards

of another person committing the crime.[1706] The *mens rea* for this mode of responsibility is intent to instigate another person to commit a crime or at a miminum, awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[1707]

620. A person in a position of authority may incur criminal liability for "ordering" under Article 6(1) where he or she instructs another person to commit an offence.[1708] A superior-subordinate relationship between the accused and the perpetrator is not required.[1709] It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[1710] This authority may be informal or of a purely temporary nature.[1711]

621. An aider or abettor carries out "acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime."[1712] The act(s) of the aider or abettor need not serve as a condition precedent for the underlying crime and may occur before, during or after the principal crime is committed.[1713] The requisite mental element for aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[1714] In cases of specific intent crimes, such as persecution or genocide, the aider or abettor must know of the principal perpetrator's specific intent.[1715]

622. The Appeals Chamber has held that commission covers, primarily, direct and physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a

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[1706] *Nahimana et al.*, Judgement (AC), para. 480, citing *Gacumbitsi*, Judgement (AC), para. 129; *Kordić and Čerkez*, Judgement (AC), para. 27.
[1707] *Nahimana et al.*, Judgement (AC), para. 480, citing *Kordić and Čerkez*, Judgement (AC), paras. 29, 32.
[1708] *Semanza*, Judgement (AC), para. 361, citing *Kordić and Čerkez*, Judgement (AC), para. 28. See also *Nahimana et al.*, Judgement (AC), para. 481. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order and that crime is subsequently effectively committed by the person who received the order. *Nahimana et al.*, Judgement (AC), para. 481, citing *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement (AC), 30 November 2006, paras. 152, 157; *Kordić and Čerkez*, Judgement (AC), para. 30; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 42.
[1709] *Semanza*, Judgement (AC), para. 361.
[1710] *Semanza*, Judgement (AC), para. 361.
[1711] *Semanza*, Judgement (AC), para. 363.
[1712] *Muvunyi*, Judgement (AC), para. 79; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Judgement (AC), 9 May 2007, para. 127, citing *Simić*, Judgement (AC), para. 85. See also *Ntagurera et al.*, Judgement (AC), para. 370; *Blaškić*, Judgement (AC), paras. 45-46; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement (AC), 25 February 2004, para. 102 . In some cases, an accused may be convicted of aiding or abetting where it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. *Muvunyi*, Judgement (AC), para. 80, citing *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgement (AC), 3 April 2007, paras. 273, 277.
[1713] *Blagojević & Jokić*, Judgement (AC), para. 127, citing *Blaškić*, Judgement (AC), para. 48. See also *Ntagurera et al.*, Judgement (AC), para. 372.
[1714] *Muvunyi*, Judgement (AC), para. 79; *Ntagurera et al.*, Judgement (AC), para. 370; *Simić*, Judgement (AC), para. 86; *Vasiljević*, Judgement (AC), para. 102. See also *Blaškić*, Case Judgement (AC), paras. 46, 49. The aider or abettor need not (although he or she may) share the principal's criminal intent. See, e.g., *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgement (TC), 11 September 2006, para. 16, citing *Blaškić*, Judgement (AC), para. 49; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003, para. 51; *Vasiljević*, Judgement (AC), para. 102; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, para. 388 ("The accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*.").
[1715] *Blagojević & Jokić*, Judgement (AC), para. 127; *Simić*, Judgement (AC), para. 86; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment (AC), 19 April 2004, paras. 140, 141.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Karin Hökborg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 5 August 2005

THE PROSECUTOR
v.
Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-R72

DECISION ON DEFECTS IN THE FORM OF THE INDICTMENT

Rule 72(A)(ii) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Dior Fall
Gregory Lombardi
Iain Morley
Tamara Cummings-John
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson

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evidence by which such facts are to be proven.[7] Specifically, the Indictment needs not achieve the impossible standard of reciting all aspects of the evidence against the accused as it will unfold at trial.[8]

10. Defendants contend that the Indictment is so deficient that it should be dismissed for the following reasons:

i) it alleges all modes of individual liability found in Article 6(1) of the Statute;

ii) that there are still many allegations in the Indictment which are unclear and unspecified regarding dates, identities of individuals, locations of alleged events, and particular acts which allege that the Accused executed an offence;

iii) that the Indictment does not properly plead the command responsibility of the Accused since it does not specify the means by which he exercised effective control over their alleged subordinates;

iv) that the Indictment is inconsistent with the representations made by the Prosecution to obtain severance of André Rwamakuba by its references to the Interim Government;

v) that the charge of complicity in genocide in the alternative cannot rely on the same factual allegations as the charge of genocide; and

vi) that the charge of rape as a crime against humanity is vague.

Mode of Liability

11. Defendants Nzirorera and Ngirumpatse complain that Paragraph 4 of the Amended Indictment has left them without sufficient notice of the case against them by charging all possible forms of liability set out in Article 6(1).

12. The material facts to be plead in an Indictment may vary depending on the particular form of participation under Article 6(1) of the Statute.[9] When alleging that the Accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed with the greatest precision. However, where it is alleged that the Accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[10]

13. The jurisprudence is mixed as to the appropriateness of the Prosecution to allege every form of participation allowed in Article 6(1) of the Statute. However, this practice can be deemed vague without further particularizing the alleged acts of the accused that give rise to each form of participation charged.[11] It is in the interests of a fair and

expeditious trial that the Prosecution pleads only the type of responsibility that it intends to rely upon on the basis of specific factual allegations.[12] A precise link between the types of responsibility plead pursuant to Article 6(1) and a respective set of facts must exist in order to give the Accused sufficient notice of the charges against him.[13] The Indictment should leave no doubt as to which form of liability is invoked by the specific facts alleged.[14]

14. In this case, the Chamber reads Paragraph 4 to be a general paragraph introducing the forms of liability and, as explained by the Prosecution, serves primarily to specify that the term "committing" includes participation in a joint criminal enterprise. The Prosecution has made specific factual allegations in the remainder of the Indictment, from which the forms of liability that have been alleged throughout could be inferred if the allegations are successfully proved at trial. The Chamber has not yet heard evidence to consider whether the forms of liability alleged have been proved for each respective factual scenario.

15. The Chamber therefore finds that the general allegation in Paragraph 4, along with the precise facts and forms of liability alleged with those facts, satisfy the Indictment requirements. As a result, no defect is found with regard to Paragraph 4.

Lack of specificity in the Indictment

16. The materiality of a particular fact and the degree of specificity depends on the Prosecution Case.[15] It is possible that an Indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession.[16] The Prosecution, however, is expected to know its case before it goes to trial.

17. The materiality of other facts and the specificity with which the Prosecutor must plead these facts depend on the form of participation alleged in the Indictment and the proximity of the accused to the underlying crime.[17] As noted above, a distinction has been drawn in the *ad hoc* Tribunal's jurisprudence between the level of specificity required when pleading an act where it is alleged that the accused had 1) individual responsibility by personally carrying out the acts underlying the crimes charged; 2) individual responsibility where the accused did not personally carry out the acts underlying the crimes charged; and 3) superior responsibility for the acts underlying the crimes charged.[18]

Identity of Members of the Joint Criminal Enterprise

18. In Paragraph 6 and Count 1, Defendant Nzirorera requests the names of all known members of the joint criminal enterprise, instead of the addition of the phrases "among others," or "with others." Prosecution responds that the members have been sufficiently identified by category and in addition, individuals from those categories have been named. Prosecution states that they do not know any more names of the individuals involved.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

APPEALS CHAMBER

Before Judges: Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 1 June 2001

THE PROSECUTOR

v.

CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-A

JUDGEMENT
(REASONS)

Counsel for Clément Kayishema:

André Ferran
Philippe Moriceau

Counsel for Obed Ruzindana:

Pascal Besnier
William van der Griend

Office of the Prosecutor:

Carla del Ponte
Salomon Loh
Wen-qi Zhu
Sonja Boelaert-Souminen
Morris Anyah

HAGUE(A)01-21 (E)

such is wholly irrelevant and the Trial Chamber has explained this reasonably.[269] The Prosecution also refers to paragraph 570 and 571 of the Trial Judgement and submits that the Trial Chamber found, beyond a reasonable doubt, that Ruzindana caused the death of Tutsis at numerous places in the Bisesero area and was also found responsible for all types of complicity under Article 6(1) of the Statute.[270]

183. The Prosecution has not responded to Ground Four.[271]

184. In his reply, during the hearing on appeal, Ruzindana does not develop or respond to the Prosecution's submissions but reiterates his main submission on Ground Two.[272]

(b) Discussion

(i) Error in finding Ruzindana individually responsible for committing killings within the meaning of Article 6 (1) by reason of the Prosecution's failure to establish a resulting death

185. Article 6(1) of the Statute provides that a person who "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime." This provision reflects the criminal law principle that criminal liability is not incurred solely by 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. Article 6 (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.[273]

186. The Appeals Chamber notes that the Trial Chamber did, earlier in the Judgement, discuss the general principles relating to criminal responsibility under Article 6 (1) of the Statute. The relevant paragraph of the Trial Judgement reads:

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[269] *Ibid.*, p. 179.
[270] *Ibid.*, pp. 179-180.
[271] It is interesting to note that the Prosecution has not seen fit to respond despite the fact that this ground was validly filed.
[272] T(A), 30 October 2000, pp. 236-238.
[273] See *Tadić* Appeal Judgement, para. 190 in relation to an identical provision in Article 7(1) of ICTY Statute; see also *Kordić* Trial Judgement, para. 373.

> The Trial Chamber is of the opinion that, as was submitted by the Prosecution, there is a further two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6 (1). This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime.[274]

The Appeals Chamber finds that this statement corresponds to the elements of individual criminal responsibility as set out, as follows, by the jurisprudence[275] of this Tribunal and that of ICTY:

1. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have a direct and substantial effect on the commission of the illegal act; and

2. The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act.

Ruzindana does not challenge the Trial Chamber's definition in relation to the elements that need to be satisfied in order to establish individual responsibility under Article 6 (1) of the Statute. However, he raises the specific issue of a material element required to establish responsibility for committing killings, namely "resulting death".

187. On the aspect of the legal element of "committing" referred to in Article 6 (1) of the Statute, the Appeals Chamber in the *Tadić* Appeal Judgement had occasion to consider an identical provision in Article 7 (1) of ICTY Statute and stated that:

> This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.[276]

The Appeals Chamber accepts this statement as accurate. Thus, any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts

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[274] Trial Judgement, para. 198, This test was drawn from the *Tadić* Trial Judgement applying identical provisions in Article 7 (1) of ICTY Statute.
[275] *Tadić* Trial Judgement, paras. 674 and 689; *Čelebići* Trial Judgement, para. 326; *Akayesu* Trial Judgement, para. 477.
[276] *Tadic* Appeal Judgement, para. 188, cited in *Kordić* Trial Judgement, para. 376.

UNITED NATIONS

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

Case No. ICTR-96-13-A

Date: 16 November 2001

ENGLISH

Original: FRENCH

APPEALS CHAMBER

Before Judges: Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 16 November 2001

ALFRED MUSEMA
(Appellant)
v.

THE PROSECUTOR
(Respondent)

JUDGEMENT

Counsel for the Appellant:
Steven Kay, QC
Michail Wladimiroff
Sylvia de Bertodano

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Mathias Marcussen
Sonja Boelaert-Suominen

Translation certified by LCSS, ICTR
MUSEMA(A)01-006/Rev.1 (E)

before or after conviction; and the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served. This list is not exhaustive; it was held by the Appeals Chamber of ICTY that it is inappropriate for it "to attempt to list exhaustively the factors that [...] should be taken into account by a Trial Chamber in determining sentence".[639]

381. In *Tadić*, the Appeals Chamber of ICTY also considered the relative position of a convicted person in a command structure to be a relevant factor in determining sentence. In that case, the Appeals Chamber considered that, while Tadic's criminal conduct was "incontestably heinous", his level in the command structure in comparison to his superiors was low",[640] and consequently, the sentence passed by the Trial Chamber was excessive.[641] In subsequent ICTY Appeals Chamber decisions, the need to establish a gradation of sentencing has been endorsed.[642] In the *Čelebići* appeal, the Appeals Chamber held that:

> [e]stablishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime ... the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.[643]

382. It went on to state that "while the Appeals Chamber has determined that it is important to establish a gradation in sentencing, this does not detract from the finding that it is as essential that a sentence take into account all the circumstances of an individual case".[644] It follows that the jurisprudence of ICTY acknowledges the existence of a general principle that sentences should be graduated, that is, that the most senior levels of the command structure should attract the severest sentences, with less severe sentences for those lower down the structure. This principle is, however, always subject to the proviso that the gravity of the offence is the primary consideration for a Trial Chamber in imposing sentence.[645]

383. As to whether this principle should be applicable to the Trial Chambers of this Tribunal, as a general principle, this Appeals Chamber agrees with the jurisprudence of ICTY that the most senior members of a command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out the orders. But this principle is always subject to the crucial proviso that the gravity of the offence is the primary consideration of a Trial Chamber in imposing sentence; if the offence is serious enough, a

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[639] *Čelebići* Appeal Judgement, para. 718; *Furundzija* Appeal Judgement, para. 238.

[640] *Ibid.*, para. 56.

[641] The sentences imposed by the Trial Chamber, which ranged from 6 to 25 years, were revised, and a sentence of 20 years' imprisonment was passed in respect of each count, to be served concurrently.

[642] See *Čelebići* Appeal Judgement, para. 849, and *Aleksovski* Appeal Judgement, para. 184.

[643] *Čelebići* Appeal Judgement, para. 847.

[644] *Čelebići* Appeal Judgement, para. 849.

[645] *Čelebići* Appeal Judgement, para. 731; *Aleksovski* Appeal Judgement, para. 182; *Krstić* Trial Judgement, para. 698; *Todorović* Trial Judgement, para. 31; *Kupreskić* Trial Judgement, para. 852; and *Čelebići* Trial Judgement, 1225.

Trial Chamber should not be precluded from imposing a severe penalty upon the accused, just because he is not at a high level of command.

384. In paragraphs 999 to 1004 of the Trial Judgement, the Trial Chamber sets out the circumstances of the case. It found that Musema was the Director of the Gisovu Tea Factory, one of the most successful tea factories in Rwanda, and that he exercised legal and financial control over his employees. He personally led certain attacks, and was perceived by individuals as a figure of authority and as someone who wielded considerable power in the region, and had powers enabling him to remove, or threaten to remove, an individual from his or her position at the tea factory. These findings show that, while no reference was made to the role played by Musema in the context of the larger political picture in Rwanda, the Trial Chamber *did* consider Musema's role in the Kibuye *préfecture*, and found him to be an influential figure of considerable importance. It follows that Musema was not a low-level figure in the overall Rwandan conflict. Taking into account all the circumstances of the case, including the fact that Musema was an influential figure of considerable importance in the Kibuye *préfecture*, it can be said that the offences were of utmost gravity. The Appellant has therefore failed to demonstrate that the Trial Chamber ventured outside its discretionary framework in imposing the maximum sentence of life imprisonment. Accordingly, the Appeals Chamber finds no error on the part of the Trial Chamber, and rejects this argument.

2. The Trial Chamber erred by failing to pass a sentence commensurate with other sentences passed by ICTR for the crime of genocide

(a) Arguments of the parties

385. The Appellant notes that a conviction for the crime of genocide does not necessarily have to attract a sentence of life imprisonment.[646] He submits that the sentence of life imprisonment imposed upon Musema was "out of proportion with the crimes of which he was convicted", in comparison with the sentence of 15 years' imprisonment imposed upon the Accused Omar Serushago in the case of *The Prosecutor v. Serushago*.[647] While acknowledging that Serushago benefited from pleading guilty and cooperating with the Prosecution, the Appellant argues that the appropriate credit gained by the plea and cooperation should not be such that Serushago received a 15-year sentence, whereas Musema received a life sentence.[648] In comparing the two cases, he notes that Serushago's criminal conduct spanned a three month period, whereas Musema was convicted of crimes occurring on six occasions. Further, Serushago was a leader of a group of *Interahamwe* militia, while Musema had control only over the actions of the Tea Factory workers.[649]

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[646] Appellant's Brief, para. 515. At the time that the Appellant filed his brief, two persons convicted of the crime of genocide at ICTR, Ruzindana and Serushago, had received sentences of imprisonment of 25 and 15 years respectively.
[647] Appellant's Brief, para. 522.
[648] *Ibid.*, para. 521.
[649] *Ibid.*, para. 519.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: ENGLISH

Trial Chamber I

Before Judges:
Judge Lennart Aspegren, President
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Mr. Agwu U. Okali

Judgement of: 27 January 2000

THE PROSECUTOR
v.
ALFRED MUSEMA

Case No. ICTR-96-13-A

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Ms Carla Del Ponte
Ms Jane Anywar Adong
Mr Charles Adeogun-Philips
Ms Holo Makwaia

Counsel for the Defence:
Mr Steven Kay, QC
Prof Michaïl Wladimiroff

880. The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.

881. In relation to other members of the population of Kibuye *Préfecture*, including *thé villageois* plantation workers, while the Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region, it is not satisfied beyond reasonable doubt on the basis of the evidence presented to it that Musema did, in fact, exercise *de jure* power and *de facto* control over these individuals.

882. The Chamber finds, therefore, that it has been established beyond reasonable doubt that there existed at the time of the events alleged in the Indictment a *de jure* superior-subordinate relationship between Musema and the employees of the Gisovu Tea Factory.

883. In Section 6 of the Judgement in its legal findings, the Chamber will evaluate whether Musema's individual criminal responsibility is engaged under Article 6 of the Statute with respect to paragraphs 4.6 to 4.11 of the Indictment.

6. LEGAL FINDINGS

6.1 Count 1 - Genocide & Count 2 - Complicity in Genocide

884. *In Count 1*, relating to all the facts alleged in the Indictment, the Prosecutor charges Musema with criminal responsibility, under Article 6 (1) and (3) of the Statute, for the crime of *genocide*, a crime punishable under Article 2 (3) (a) of the Statute.

885. As an alternative, the Prosecutor also charges Musema with *Count 2,* in which Musema is held criminally responsible, under Article 6 (1) and (3) of the Statute, for having committed the crime of *complicity in genocide*, a crime punishable under Article 2 (3) (e) of the Statute. Count 2 also relates to all the acts alleged in the Indictment.

886. The Chamber recalls, as it indicated *supra* in its findings on the applicable law, that it holds that an accused is guilty of the crime of genocide if he committed one of the acts enumerated under Article 2 (2) of the Statute against a national, ethnical, racial or religious group, specifically targeted as such, with the intent to destroy, in whole or in part, said group.

887. Furthermore, the Chamber holds that an accused is liable for complicity in genocide if he knowingly and voluntarily aided or abetted or instigated a person or persons to commit genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, specifically targeted as such.

888. As Count 2 stands in the alternative to Count 1, the Chamber will now present its findings with respect to both counts by examining, firstly, on the basis of the factual findings set forth above in Chapter 5, which of the acts alleged in the Indictment to have been committed by Musema it considers to have been established beyond a reasonable doubt and for which he incurs responsibility.

The Chamber will then determine whether those acts are constituent elements of the crime of genocide and, if not, whether they constitute elements of the crime of complicity in genocide.

With respect, firstly, to the facts alleged in the Indictment, the Chamber is satisfied beyond any reasonable doubt, on the basis of the factual findings, of the following:

889. *Firstly*, regarding the allegations presented under paragraph 4.8 of the Indictment, according to which Musema, in concert with others, ordered and abetted in the rape of Annunciata, a Tutsi, and thereafter ordered that she and her son be killed, the Chamber holds that even if it is proven that Musema ordered that Annunciata be raped, such order, by and of itself, does not suffice for him to incur individual criminal responsibility, given that no evidence has been adduced to show that the order was executed to produce such result, namely the rape of Annunciata. Nor has it been proven that Musema ordered that she and her son be killed.

890. *Secondly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that on 26 April 1994, Musema led and participated in an attack on Gitwa Hill. Musema arrived at the site of the attack in a Daihatsu vehicle belonging to the Gisovu Tea Factory. He carried a firearm and was accompanied by employees of the Gisovu Tea Factory wearing blue uniforms. Musema and other persons, some of whom wore banana leaves and *Imihurura* belts, attacked Tutsi refugees. It has also been established beyond a reasonable doubt that Musema shot into the crowd of refugees. The attackers killed resolutely, and few refugees survived the large-scale attack.

891. The Chamber finds that Musema incurs individual criminal responsibility for the above-mentioned acts, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, having aided and abetted in the murder of members of the Tutsi ethnic group, and for the causing of serious bodily and mental harm to members of the said group.

892. With respect to the Prosecutor's contention that Musema could additionally be held criminally responsible, under Article 6 (3) of the Statute, the Chamber finds that for an accused to be

held criminally responsible under these statutory provisions, the Prosecutor must establish: (1) that one of the acts referred to under Articles 2 to 4 of the Statute was, indeed, committed by a subordinate of the Accused; (2) that the accused knew or had reason to know that the subordinate was about to commit such act or had done so; and (3) that the accused failed to take the necessary and reasonable measures to prevent the commission of said act by the subordinate or to punish him for the criminal conduct.

893. The Chamber notes that, in the instant case, it has been established that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

894. The Chamber finds that it has also been established that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power.[189] Considering that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

895. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 26 April 1994 on Gitwa Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

896. *Thirdly*, the Chamber is satisfied beyond a reasonable doubt that between 27 April and 3 May 1994, Musema participated in the attack on Rwirambo Hill. Musema arrived in a red Pajero, followed by four Daihatsu pick-ups from the Gisovu Tea Factory which were carrying persons that Witness R described as *Interahamwe*. The witness recognized those persons from their blue

[189] See section 5.2 of the Judgement.

uniforms which had the name "*Usine à thé Gisovu*" printed on the back. Musema was armed with a rifle. While trying to flee, Witness R's arm was injured from a bullet which came from Musema's direction.

897. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having committed and, by his presence and participation, having aided and abetted in the causing of, serious bodily and mental harm to members of the Tutsi group.

898. With respect to the Prosecutor's argument that Musema could also be held responsible under Article 6 (3) of the Statute, the Chamber finds, firstly, that among the attackers at Rwirambo were persons identified as employees of the Gisovu Tea Factory. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

899. The Chamber finds that it has also been established, as held *supra*, that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power. Noting that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in their commission, by his presence and by his personal participation.

900. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack on Rwirambo Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the basis of Article 6 (3) of the Statute.

901. *Fourthly*, on the basis of numerous corroborating testimonies, the Chamber is satisfied that it has been established beyond any reasonable doubt that on 13 May 1994 a large-scale attack was launched at Muyira Hill against 40,000 Tutsi refugees. The attack began in the morning. Some of the attackers arrived on Muyira Hill on foot while others came in vehicles, including Daihatsus belonging to the Gisovu Tea Factory. Employees of the Gisovu Tea Factory dressed in their uniforms, gendarmes, soldiers, civilians and members of the *Interahamwe* were among the attackers. The attackers were armed with firearms, grenades, rocket launchers and traditional weapons. They chanted anti-Tutsi slogans.

902. The Chamber is satisfied beyond a reasonable doubt that Musema was among the leaders of the attack. He arrived at the location in his red Pajero. He was armed with a rifle which he used during the attack. Thousands of unarmed Tutsi men, women and children were killed during the attack, while others were forced to flee for their lives.

903. The Chamber finds that, for the acts mentioned *supra*, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, aided and abetted in the murder of members of the Tutsi group and the causing of serious bodily and mental harm to members of said group.

904. The Chamber notes, on the basis of the factual findings set forth *supra*, that it has been established beyond a reasonable doubt, that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.

905. The Chamber also finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Noting that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The

Chamber notes that the Accused, nevertheless, failed to take necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

906. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 13 May 1994, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

907. *Fifthly*, the Chamber finds that it has been established beyond a reasonable doubt that on 13 May 1994, during the above-mentioned attack on Muyira Hill, Musema, having been told by a policeman called Ruhindara that a young Tutsi woman, a teacher by the name Nyiramusugi, was still alive, asked Ruhindara to catch her and to bring her to him. With the help of four young men, Ruhindara dragged the woman on the ground and brought her to Musema who had his rifle in his hand. The four young men, who were restraining Nyiramusugi, dropped her on the ground and pinned her down. Two of them held her arms, while the other two clamped her legs. The latter two opened the legs of the young woman and Musema tore her garments and undergarments, before undressing himself. In a loud voice, Musema said: "The pride of the Tutsi is going to end today". Musema raped Nyiramusugi. During the rape, as Nyiramusugi struggled, Musema immobilized her by taking her arm which he forcibly held to her neck. Standing nearby, the four men who initially held Nyiramusugi to the ground watched the scene. After Musema's departure, they came back to the woman and also raped her in turns. Thereafter, they left Nyiramusugi for dead.

908. The Chamber finds that Musema incurs individual criminal responsibility under Article 6 (1) of the Statute, for having raped, in concert with others, a young Tutsi woman and for thus having caused serious bodily and mental harm to a member of the Tutsi group. The Chamber also finds that Musema incurs individual criminal responsibility under Article 6(1) of the Statute, for having abetted others to rape the girl, by the said act of rape and the example he thus set.

909. With respect to the Prosecutor's argument that Musema could also be liable under Article 6(3) of the Statute, the Chamber notes that the Prosecutor has not established, nor even alleged, that among the assailants who attacked Nyiramusugi there were employees of the Gisovu Tea Factory or other persons who were Musema's subordinates. Therefore, the Chamber holds that Musema does not incur individual criminal responsibility under Article 6(3) of the Statute for Nyiramusugi's rape.

910. *Sixthly*, the Chamber is satisfied beyond a reasonable doubt that another large-scale attack took place on Muyira Hill on 14 May 1994 against Tutsi civilians. The attackers, who numbered about 15 000, were armed with traditional weapons, firearms and grenades. They chanted slogans. Musema, who was armed with a rifle, was one of the leaders of that attack.

911. Furthermore, the Chamber is satisfied beyond a reasonable doubt that Musema participated in an attack which took place in mid-May 1994 on Muyira Hill against Tutsi civilians and that Musema led the attackers, who included the *Interahamwe* and employees of the Gisovu Tea Factory. Musema's red Pajero and vehicles belonging to the Gisovu Tea Factory were seen at the site of the attack. Musema launched the attack by shooting his rifle, and he personally shot at the refugees, although it has not been established beyond a reasonable doubt that he killed anyone.

912. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having ordered, committed and, by his presence and participation, aided and abetted in the causing of serious bodily and mental harm to members of the Tutsi group.

913. The Chamber notes that, on the basis of the factual findings set forth *supra,* it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers. The Chamber holds that the participation of said employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.

914. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* power. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

915. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.

916. *Seventhly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that Musema participated in an attack on Mumataba Hill in mid-May 1994. Among the attackers, who numbered between 120 and 150, were employees of the Gisovu Tea Factory armed with traditional weapons, and communal policemen. In the presence of Musema, vehicles of the tea factory transported the attackers to the sites. The attack, which was carried out against some 2000 to 3000 Tutsis who had sought refuge in the house of one Sakufe and in the vicinity of the said house, was sparked off by blowing whistles. The Chamber is satisfied beyond any reasonable doubt that Musema was present, that he stayed with the others near his vehicle during the attack, and that he left the site with the attackers.

917. The Chamber finds that, for these acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6(1) of the Statute, for having, by his presence and the fact that he witnessed the attack, aided and abetted in the murder of members of the Tutsi group and in the causing of serious bodily and mental harm to members of the said group.

918. The Chamber notes that it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers and that they were transported to the attack sites

by vehicles of the factory, in the presence of Musema. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.

919. The Chamber finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Considering that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said act by his subordinates, but rather abetted his subordinates in the commission of those acts, by his presence and by his personal participation.

920. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the Mumataba attack, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6(3) of the Statute.

921. *Eighthly*, the Chamber is convinced beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave. Musema was aboard his Pajero in a convoy, travelling towards the cave, which included tea factory Daihatsus aboard of which were tea factory workers. It has been proved beyond reasonable doubt that Musema was armed with a rifle, and that he was present at the attack during which assailants closed off the entrance to the cave with wood and leaves, and set fire thereto. The Chamber finds that it has been proven beyond reasonable doubt that over 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire.

922. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having committed and, by his presence, aided and abetted in the commission of serious bodily and mental harm to members of the Tutsi group.

923. The Chamber notes that, on the basis of the factual findings set forth *supra,* it has been established beyond reasonable doubt that Gisovu Tea Factory workers were among the attackers. The Chamber holds that the participation of these employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.

924. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* control. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

925. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.

926. It emerges from the foregoing findings that the Chamber is satisfied beyond any reasonable doubt that Musema is criminally responsible, under Article 6 (1) of the Statute, for having ordered, committed and, by his presence and his participation aided and abetted in the killing of members of the Tutsi group, to whom he caused serious bodily and mental harm. Moreover, the Chamber is satisfied beyond any reasonable doubt that Musema incurs further criminal responsibility under Article 6(3) of the Statute for the acts committed by the employees of the Gisovu Tea Factory.

Regarding ,secondly, whether the above-mentioned acts were committed against the Tutsi group as such, and whether Musema possessed genocidal intent at the time those acts were committed:

927. As held in the findings regarding the applicable law on the determination of genocidal intent, the Chamber is of the view that it is necessary to infer such intent by deduction from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by Musema.

928. The Chamber notes, firstly, that based on numerous submissions of evidence proffered at the trial, and, in particular, on acts referred to in paragraphs 4.4, 4.5, and 4.11 of the Indictment [190], it has been proven that, at the time of the facts alleged in the Indictment, numerous atrocities were committed against the Tutsis in Rwanda. Musema acknowledged that roadblocks manned by individuals, some of whom were armed with machetes and an assortment of weapons, were erected at the time all along the road from Kigali to Gitarama. Musema testified that he personally saw several bodies along the road and also witnessed incidents of looting. Musema conceded that those people had been killed at the roadblocks because they were accused of being *Inyenzi,* a term which at the time was equivalent to Tutsi.

929. In particular, Musema acknowledged that from April to June 1994, thousands of men, women and children, predominantly Tutsis, sought refuge in the Bisesero area. Musema admitted that those people were targets of regular attacks from approximately 9 April to 30 June 1994. The assailants used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis. In the Bisesero area, the attacks resulted in thousands of deaths and injuries among these men, women and children.

930. Musema also conceded that around 13 May 1994 a large-scale attack was launched against Tutsi civilians who had taken refuge on Muyira Hill in Gisovu *Commune* and that those Tutsis then became victims of acts of genocide. Musema admitted, in general, that during the months of April, May and June 1994, in the *communes* of Gisovu and Gishyita, in Kibuye *Préfecture*, acts of genocide were committed against the Tutsi ethnic group.

[190] See Section 4.1.of the Judgement..

931. Consequently, the Chamber notes that the above acts, with which Musema and his subordinates are charged, were committed as part of a widespread and systematic perpetration of other criminal acts against members of the Tutsi group. Furthermore, the Chamber notes that Musema acknowledged that genocide directed against the Tutsis took place at the time of the events alleged in the Indictment and at the very sites where the acts with which he is charged were committed.

932. Next, and foremost, the Chamber notes that, on the basis of corroborating testimonies presented, the participation by Musema in the attacks against members of the Tutsi group has been proved beyond a reasonable doubt. The anti-Tutsi slogans chanted during the attacks, including the slogan "Let's exterminate them", directed at the Tutsis, clearly demonstrated that the objective of the attackers, including Musema, was to destroy the Tutsis. The Chamber is satisfied that Musema, who held *de facto* authority, by virtue *inter alia* of his position as Director of the Gisovu Tea Factory and as an educated man with political influence, ordered the commission of crimes against members of the Tutsi group and abetted in said crimes by participating personally in them. These attacks were pointedly aimed at causing harm to and destroying the Tutsis. The victims, namely men, women and children, were deliberately and systematically targeted on the basis of their membership in the Tutsi ethnic group. Certain degrading acts were purposely intended to humiliate them for being Tutsis.

933. Accordingly, the Chamber notes that on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: "The pride of the Tutsis will end today". In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that

Nyiramusugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that "what they did to her is worse than death".

934. Therefore, the Chamber is satisfied beyond a reasonable doubt that at the time of commission of the above-mentioned acts, which the Chamber considers to have been established, Musema had the intent to destroy the Tutsi ethnic group as such.

935. On that basis, the Chamber recalls that, with regard to the issue of whether the Tutsis were, indeed, a protected group within the meaning of the Genocide Convention, at the time of the events alleged in the Indictment, the Defence did admit that acts of genocide were committed against the Tutsi ethnic group. Consequently, after having considered all the evidence submitted, and the political, social and cultural context prevailing in Rwanda, the Chamber holds that, at the time of the alleged events, the Tutsi group did constitute and still constitutes a protected group within the meaning of the Genocide Convention and , thereby, under Article 2 of the Statute.

936. In conclusion, from all the foregoing, the Chamber is satisfied beyond a reasonable doubt that: *firstly,* Musema incurs individual criminal responsibility for the above-mentioned acts, which are constituent elements of the crime of genocide; *secondly*, that said acts were committed by Musema with the specific intent to destroy the Tutsi group, as such; and *thirdly*, that the Tutsi group is one of the groups legally protected from the crime of genocide. Musema incurs individual criminal responsibility under Article 6(1) and (3) of the Statute for the crime of genocide, a crime punishable under Article 2(3)(a) of the Statute.

6.2 Count 3 - Conspiracy to commit genocide

937. Under Count 3, which relates to all acts alleged in the Indictment, the Prosecutor charges Musema with the crime of conspiracy to commit genocide, a crime punishable under Article 2 (3) (b) of the Statute.

938. The Chamber notes that the acts thus alleged by the Prosecutor under Count 3 are the same as the acts alleged under Count 1(genocide) and Count 2 (complicity in genocide).

939. Regarding the law applicable to the crime of conspiracy to commit genocide, the Chamber held *supra* that:

> "... conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide".[191]

940. The Chamber notes that the Prosecutor has neither clearly alleged, nor, above all, adduced evidence that Musema, indeed, conspired with other persons to commit genocide and that he and such persons reached an agreement to act to that end.

941. Therefore, the Chamber holds that Musema does not incur criminal responsibility for the crime of conspiracy to commit genocide, under Count 3, all the more so as, on the basis of the same acts, the Prosecutor presented evidence of Musema's participation in the commission of genocide, the substantive offence in relation to conspiracy.

[191] See Section 3.2.3 of this Judgement.

6.3 Legal Findings - Count 5: Crime against Humanity (extermination)

942. *Count 5* of the Indictment charges Musema with *crime against humanity (extermination)*, pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

943. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were either a racial or ethnic group; that there were widespread or systematic attacks throughout Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds, ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (extermination).

944. The Chamber notes that Article 6(1) of the Statute, provides that 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." It is also noted that Article 6(3) of the Statute provides that "acts [...] 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 failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".

945. The Chamber has found, beyond a reasonable doubt that Musema:

- was armed with a rifle and that he ordered, aided and abetted and participated in the commission of attacks on Tutsi civilians who had sought refuge on Muyira hill on 13 and 14 May 1994, and in mid-May 1994. The Accused was one of the leaders of the attacks and

some of the attackers were employees of the Gisovu Tea Factory who had traveled to Muyira hill in motor vehicles belonging to the Gisovu Tea Factory;[192]

- participated in an attack on Tutsi civilians, who had sought refuge on Mumataba hill in mid-May 1994. Some of the attackers were tea factory employees who were transported to Mumataba hill in motor vehicles belonging to Gisovu Tea Factory. The Accused was present through out the attack and left with the attackers;[193]

- participated in an attack on Tutsi civilians who had sought refuge in the Nyakavumu cave;[194]

- participated in an attack on Tutsi civilians who had sought refuge on Gitwa hill on 26 April 1994[195]; and;

- participated in an attack on Tutsi civilians between 27 April and 3 May 1994 in Rwirambo.

946. The Chamber finds that in 1994, the Accused had knowledge of a widespread or systematic attack that was directed against the civilian population in Rwanda. This finding is supported by the presence of Musema at attacks in different locations in Kibuye *Préfecture*, as found above, by the testimony of the Accused, and by Defence exhibits. The Chamber recalls, in particular, the following testimony of the Accused:

> "[...] compte tenu d'abord d'une part les massacres qui se faisaient à l'intérieur [...] il y avait ce génocide qui venait de se commettre, qui était encore en train de se commettre [...]"[196];

[192] *See Supra* Section 5.2.
[193] *See Supra* Section 5.2.
[194] *See Supra* Section 5.2.
[195] *See Supra* Section 5.2.
[196] *See Testimony of the Accused, transcript of 24 May 1999.* English translation: "considering the killings that were taking place inside the country there was this genocide which had been committed, and which was being committed".

"[...] des gens ont été massacrés à Kibuye, dans d'autres préfectures [...]"[197];

"[...] Ce bébé qui est mort, cette vieille femme, ce petit enfant qui est mort, qui a été massacré, par des bourreaux impitoyables, pour moi ce sont des martyrs."[198]

947. The Chamber further recalls statements made by Musema in letters written to Nicole Pletscher, which were tendered as Defence exhibits, specifically:

"Depuis le 06/04 le pays a vécu un bain de sang incroyable: troubles ethniques - massacres - vols - tout ce qu'on puisse ou plutôt qu'on ne peut pas s'imaginer sur le plan de l'horreur humaine ... Ruhengeri est plus ou moins touché. Mais Byumba est occupé à 100% ... Mais on indique que les morts dépassent des centaine de milliers de gens [...] Des milliers et des milliers de déplacés de guerre, quelle horreur qui s'ajoute à des milliers de cadavres!"[199]

"Au niveaux des droits humanitaires des massacres se sont arrêtés dans la Zône gouvernmentale mais se perpetrent toujours dans la Zône FPR. L'aide humanitaire est attendue mais n'arrive pas."[200]

[197] *See Testimony of the Accused, transcript of 24 May 1999.* English translation: "people were massacred in Kibuye and other Prefectures ...".

[198] *See Testimony of the Accused, transcript of 24 May 1999.* English translation: "Babies, elderly women, children who died, who were massacred by butchers. They were butchered."

[199] *See* Defence exhibit D36. English translation: " Since 06/04, the country has been living through an incredible blood bath: ethnic unrests - massacres - thefts - all that can or rather all that cannot be imagined at the level of human horror ... Runegeri is more or less affected. But Byumba is 100% affected ... It is estimated that about hundred of thousands of people [*sic*] have been killed ... Thousands and thousands of displaced people, how dreadful in addition to the thousands of corpses!"

[200] *See* Defence exhibit D76. "At the level of human rights, the massacres have been halted in the Government zone but still to continue in the FPR zone. Humanitarian assistance is expected but has not arrived". [Unofficial translation]

948. The Chamber finds that, Musema's criminal conduct was consistent with the pattern of the then ongoing widespread or systematic attack on the civilian population and his conduct formed a part of this attack.

949. The Chamber finds, that Musema's conduct: in ordering and participating in the attacks on Tutsi civilians who had sought refuge on Muyira hill and on Mumataba hill; in aiding and abetting in the aforementioned attacks by providing motor vehicles belonging to Gisovu Tea Factory, for the transport of attackers to Muyira hill and Mumataba hill; and in his participation in attacks on Tutsi civilians who had sought refuge in Nyakavumu cave, Gitwa hill and Rwirambo, renders the Accused individually criminally responsible, pursuant to Article 6(1) of the Statute.

950. The Chamber has already found that there existed at the time of the events alleged in the indictment a *de jure* superior-subordinate relationship between Musema and the employees at the Gisovu Tea Factory.[201] The Chamber also found that the Accused had the authority to take reasonable measures to prevent the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of the attacks[202]. The Chamber finds that the Accused, despite his knowledge of the participation of Gisovu Tea Factory employees in these attacks and their use of Tea Factory property in the commission of these attacks, failed to take any reasonable measures to prevent or punish such participation or such use of Tea Factory property.

951. The Chamber therefore finds beyond a reasonable doubt that Musema is individually criminally responsible for crime against humanity (extermination), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, as charged in Count 5 of the Indictment.

[201] *See Supra* Section 5.4.
[202] *See Supra* Section 5.4.

6.4 Count 4: Crime against Humanity (murder)

952. *Count 4* of the Indictment charges Musema with *crime against humanity (murder)*, pursuant to Articles 3(a), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

953. The Chamber notes that the Accused is also charged, under count 5 of the Indictment, for crime against humanity (extermination), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment, which acts include the attacks on civilians at various locations in Bisesero. The allegations in the aforementioned paragraphs of the Indictment also form the basis for Count 4, crimes against humanity (murder).

954. The Chamber concurs with the reasoning in *Akayesu* that:

> "[...] it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide."[203]

[203] *See Akayesu* Judgement, para. 468.

955. The Chamber also concurs with the reasoning in the *Rutaganda* Judgement which states that:

> "murder and extermination, as crimes against humanity, share the same constituent elements of the offence, that it is committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Both murder and extermination are constituted by unlawful, intentional killing. *However,* murder is the killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals....."[204] *(Emphasis added)*

956. The Chamber notes that in the *Akayesu* Judgement, a series of acts of murder, as alleged in individual paragraphs of the Indictment were held collectively to constitute an act of extermination. In the *Rutaganda* Judgement a single act of an attack on the "ETO", although charged *inter alia* both as murder and as extermination, was held to constitute extermination, and not murder, because it was found to be a killing of a collective group of individuals.

957. In this case, the killings at Gitwa hill, Muyira hill, Rwirambo hill, Mumataba hill and at the Nyakavumu cave are killings of collective groups of individuals, hence constituting extermination and not murder. Therefore, the Accused cannot be held culpable for crime against humanity (murder), in respect of these killings. The Chamber recalls its findings in Section 6.3 above.

958. The Chamber therefore finds that Musema is not individually criminally responsible, for crime against humanity (murder), pursuant to Article 3(a), 6(1) and 6(3) of the Statute, and as charged in Count 4 of the Indictment.

[204] *See Rutaganda* Judgement, para.422.

6.5 Count 6: Crime against Humanity (other inhumane acts)

959. *Count 6* of the Indictment charges Musema with *crime against humanity (other inhumane acts)*, pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

960. The Chamber has already defined "Other inhumane Acts", as envisaged in Article 3 of the Statute.[205]

961. The Chamber finds that the Prosecutor has failed to prove beyond a reasonable doubt that Musema is individually criminally responsible for any act, falling within the ambit of crime against humanity (other inhumane acts), pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, as charged in Count 6 of the Indictment.

[205] *See Supra* Section 3.3.

6.6 Count 7: Crime Against Humanity (rape)

962. *Count 7* of the Indictment charges Musema with *crime against humanity (rape)*, pursuant to Articles 3(g), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

963. In light of its factual findings with regard to the allegations in paragraph 4.10 of the Indictment[206], the Chamber considers the criminal responsibility of the Accused, pursuant to Articles 6(1) and 6(3) of the Statute.

964. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were a racial or ethnic group; that there were widespread or systematic attacks through out Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds of ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (rape).

965. The Chamber has adopted the definition of rape set forth in the *Akayesu* Judgement, as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"[207] and the definition of sexual violence set forth in the *Akayesu* Judgement as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[208]

966. The Chamber has made the factual finding that on 13 May 1994 the Accused raped a Tutsi woman called Nyiramusugi. The Chamber recalls its finding in Section 6.3 *supra*, that the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack.

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[206] *See Supra* Section 5.3.
[207] *See Supra*, Section 3.3.
[208] *See Supra*, Section 3.3.

967. The Chamber therefore finds, that Musema is individually criminally responsible for crime against humanity (rape), pursuant to Articles 3(g) and (6)(1) of the Statute.

968. However, the Chamber finds, that the Prosecutor has failed to prove beyond a reasonable doubt any act of rape that had been committed by Musema's subordinates and that Musema knew or had reason to know of this act and he failed to take reasonable measures to prevent the said act or to punish the perpetrators thereof, following the commission of such act. The Prosecutor has therefore not proved beyond a reasonable the individual criminal responsibility of Musema, pursuant to Articles 3(g) and 6(3) of the Statute, as charged in Count 7 of the Indictment.

6.7 Counts 8 and 9 -Violation of Common Article 3 and Additional Protocol II

969. *Counts 8* and *9* of the Indictment charge Musema with *serious violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto*, as incorporated in Article 4 of the Statute of the Tribunal.

970. The Chamber notes that the Defence admitted that, at the time of the events alleged in the Indictment, there existed an internal armed conflict meeting the temporal and territorial requirements of both Common Article 3 and Additional Protocol II. Further, evidence presented during the trial, in particular the testimony of Musema, demonstrated the full extent of the conflict between the dissident armed forces, the FPR, and the Government forces, the FAR, in Rwanda throughout the period the offences were said to have been perpetrated.

971. On the basis of the above, the Chamber finds that it has been established beyond reasonable doubt that at the time of the events alleged in the Indictment there existed a non-international armed conflict meeting the requirements of Common Article 3 and Additional Protocol II.

972. The Chamber is also satisfied beyond reasonable doubt that the victims of the offences alleged, comprised of unarmed civilians, men, women and children, are protected persons under Common Article 3 and Additional Protocol II. Moreover, the Chamber notes that the Defence admitted that the victims of the alleged crimes were individuals protected under Common Article 3 and Additional Protocol II.

973. The Chamber recalls, as developed in Section 3.4 of the Judgement on the Applicable Law, that offences must be closely related to the hostilities or committed in conjunction with the armed conflict to constitute serious violations of Common Article 3 and Additional Protocol II. In other words, there must be a nexus between the offences and the armed conflict.

974. The burden rests on the Prosecutor to establish, on the basis of the evidence adduced during trial, that there exists a nexus, on the one hand, between the acts for which Musema is individually

criminally responsible, including those for which he is individually criminally responsible as a superior, and, on the other, the armed conflict. In the opinion of the Chamber, the Prosecutor has failed to establish that there was such a nexus.

975. Consequently, the Chamber finds Musema not guilty of serious violations of Common Article 3 and Additional Protocol II as charged in Counts 8 and 9 of the Indictment.

8.6 The Chamber

1000. The Chamber has examined all the submissions presented by the parties in determination of the sentence, and finds as follows.

Aggravating circumstances

1001. Amongst the aggravating circumstances, the Chamber finds, first of all, that the offences of which Musema is found guilty are extremely serious, as the Chamber already pointed out when it described genocide as the 'crime of crimes'.

1002. As to Musema's role in the execution of the crimes, the Chamber notes that he led attackers who killed a large number of Tutsi refugees in the Bisesero region on 26 and between 27 April and 3 May 1994, in mid-May 1994, including on 13 and 14 May, and at the end of May 1994. Musema was armed with a rifle and used the weapon during the attacks. He took no steps to prevent tea factory employees or vehicles from taking part in the attacks.

1003. The Chamber recalls that it found that individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region. The Chamber is of the opinion that, by virtue of this capacity, Musema was in a position to take reasonable measures to help in the prevention of crimes.

1004. The Chamber however finds that Musema did nothing to prevent the commission of the crimes and that he took no steps to punish the perpetrators over whom he had control. As the Chamber found in Section 5, Musema had powers enabling him to remove, or threaten to remove, an individual from his or her position at the Gisovu Tea Factory if he or she were identified as a perpetrator of crimes punishable under the Statute.

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **29 August 2008**

THARCISSE MUVUNYI

v.

THE PROSECUTOR

Case No. ICTR-2000-55A-A

JUDGEMENT

Counsel for Tharcisse Muvunyi:

Mr. William E. Taylor III
Ms. Abbe Jolles
Mr. Dorian Cotlar

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote Odora
Mr. Neville Weston
Ms. Linda Bianchi
Ms. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

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II. STANDARDS OF APPELLATE REVIEW

8. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[18]

9. As regards errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[19]

10. As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[20]

The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding. However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[21]

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[18] *See Seromba* Appeal Judgement, para. 9; *Nahimana et al.* Appeal Judgement, para. 11; *Simba* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 6, fn. 14 (recalling jurisprudence under Article 25 of the ICTY Statute and under Article 24 of the Statute).

[19] *See Gacumbitsi* Appeal Judgement, para. 7, quoting *Ntakirutimana* Appeal Judgement, para. 11 (internal citations omitted). *See also Muhimana* Appeal Judgement, para. 7; *Kajelijeli* Appeal Judgement, para. 5; *Stakić* Appeal Judgement, para. 8; *Vasiljević* Appeal Judgement, para. 6.

[20] *Gacumbitsi* Appeal Judgement, para. 8, quoting *Krstić* Appeal Judgement, para. 40 (citations omitted). *See also Muhimana* Appeal Judgement, para. 8; *Kajelijeli* Appeal Judgement, para. 5.

[21] *Seromba* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras. 13, 14.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 12 September 2006

PROSECUTOR
v.
Tharcisse MUVUNYI

Case No. ICTR-2000-55A-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor

Mr Charles Adeogun-Phillips
Ms Adesola Adeboyejo
Ms Renifa Madenga
Ms Memory Maposa
Mr Dennis Mabura

Defence Counsel

Mr William E. Taylor
Ms Cynthia Cline

Instigating

464. To ground individual responsibility for instigation pursuant to Article 6(1), the Accused must have encouraged, urged, or otherwise prompted another person to commit an offence under the Statute. Such instigation may arise from a positive act or a culpable omission. The instigation of the Accused must have a substantial nexus to the actual commission of the crime. Instigation differs from incitement in that it does not have to be direct or public. Therefore, private, implicit or subdued forms of instigation could ground liability under Article 6(1) if the Prosecution can prove the relevant causal nexus between the act of instigation and the commission of the crime.[660]

465. The *mens rea* required to establish a charge of instigating a statutory crime is proof that the Accused directly or indirectly intended that the crime in question be committed and that he intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts.[661]

466. The instigation of the accused must have a substantial effect on the actual commission of the crime and represents a general form of participation relevant to every crime in the Statute. However, direct and public incitement is only relevant in the context of genocide and it is criminalised as such. The Prosecution must therefore prove that a person accused of direct and public incitement to commit genocide shared the special intent of the principal perpetrator.

Ordering

467. Ordering under Article 6(1) requires that a person in a position of authority uses that position to issue a binding instruction to or otherwise compel another to commit a crime punishable under the Statute.[662] In *Semanza*, the Appeals Chamber held that "no formal superior-subordinate relationship between the Accused and the perpetrator is required" to establish the *actus reus* of "ordering" under Article 6(1).[663] However, proof of such a relationship may be evidentially relevant to show that the person alleged to have issued the order, was in a position of authority.

468. The responsibility for ordering the commission of a crime could also be proved by circumstantial evidence, but as required by the jurisprudence, the Chamber will thoroughly evaluate such evidence and treat it with caution.

Aiding and Abetting

469. Aiding and abetting reflect forms of accomplice liability. The aider and abettor is usually charged with responsibility for providing assistance that furthers the principal perpetrator's commission of a crime. It is therefore required that the conduct of the aider and abettor must have a substantial effect on the commission of the crime by the principal

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[660] *Akayesu*, Judgement (TC), para. 482; *Bagilishema*, Judgement (TC), para. 30; *Kamuhanda*, Judgement (TC), para. 593; *Semanza*, Judgement (TC), para. 381, *Kajelijeli*, Judgement (TC), para. 381.

[661] *Bagilishema*, Judgement (TC), para. 31. See also *Blaskic*, Judgement (TC), para 278; *Kordić and Cerkez*, Judgement (TC), para. 386, 387; *Naletilić and Martinović*, Judgement, (TC), para. 60.

[662] *Bagilishema*, Judgement (TC), para. 30.

[663] *Semanza*, Judgement (AC), para. 361, citing *Kordić and Čerkez*, para. 28.

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Adama Dieng

Judgement of: 28 November 2007

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(*Appellants*)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

JUDGEMENT

Counsel for Ferdinand Nahimana
Jean-Marie Biju-Duval
Diana Ellis

Counsel for Jean-Bosco Barayagwiza
Donald Herbert
Tanoo Mylvaganam

Counsel for Hassan Ngeze
Bharat B. Chadha
Dev Nath Kapoor

The Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart
Neville Weston
George Mugwanya
Abdoulaye Seye
Linda Bianchi
Alfred Orono Orono

478. The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.[1153] However, it does not appear that the Prosecutor charged the Appellants at trial with responsibility for their participation in a joint criminal enterprise,[1154] and the Appeals Chamber does not deem it appropriate to discuss this mode of participation here.[1155]

479. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[1156] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1157] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[1158]

480. The *actus reus* of "instigating" implies prompting another person to commit an offence.[1159] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[1160] The *mens rea* for this mode of responsibility is the intent to instigate another person to commit a crime or at a miminum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[1161]

481. With respect to ordering, a person in a position of authority[1162] may incur responsibility for ordering another person to commit an offence,[1163] if the person who received the order actually proceeds to commit the offence subsequently. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that

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[1153] *Tadić* Appeal Judgement, para. 188.
[1154] Even if such a charge could possibly be inferred from certain paragraphs of the Indictments, for example: *Nahimana* Indictment, para. 6.27; *Barayagwiza* Indictment, para. 7.13; *Ngeze* Indictment, para. 7.15.
[1155] For a more detailed discussion of this form of participation, see *Brđanin* Appeal Judgement, paras. 389-432; *Stakić* Appeal Judgement, paras. 64-65; *Kvočka et al.* Appeal Judgement, paras. 79-119; *Ntakirutimana* Appeal Judgement, paras. 461-468; *Vasiljević* Appeal Judgement, paras. 94-102; *Krnojelac* Appeal Judgement, paras. 28-33, 65 *et seq.*; *Tadić* Appeal Judgement, paras. 185-229.
[1156] *Kordić and Čerkez* Appeal Judgement, para. 26.
[1157] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément determinant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".
[1158] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 31.
[1159] *Ndindabahizi* Appeal Judgement, para. 117; *Kordić and Čerkez* Appeal Judgement, para. 27.
[1160] *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27. Once again, although the French version of the *Kordić and Čerkez* Judgement reads "*un élément déterminant*", the English version – which is authoritative – reads "factor substantially contributing to".
[1161] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 32.
[1162] It is not necessary to demonstrate the existence of an official relationship of subordination between the accused and the perpetrator of the crime: *Galić* Appeal Judgement, para. 176; *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[1163] *Galić* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras. 28-29.

order, and if that crime is effectively committed subsequently by the person who received the order.[1164]

482. The *actus reus* of aiding and abetting[1165] is constituted by acts or omissions[1166] aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime.[1167] Contrary to the three modes of responsibility discussed above (which require that the conduct of the accused precede the perpetration of the crime itself), the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[1168] The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[1169] It is not necessary for the accused to know the precise crime which was intended and which in the event was committed,[1170] but he must be aware of its essential elements.[1171]

483. The Appeals Chamber concludes by recalling that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.[1172]

B. Responsibility under Article 6(3) of the Statute

484. The Appeals Chamber recalls that, for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been

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[1164] *Galić* Appeal Judgement, paras. 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[1165] The French version of some Appeal and Trial Judgements of this Tribunal and of the ICTY mention the term "*complicité*" ("complicity") rather than "*aide et encouragement*" ("aiding and abetting"). The Appeals Chamber prefers "*aide et encouragement*" because these terms are the ones used in Article 6(1) of the Statute. Furthermore, the Statute uses the word "*complicité*" in a very specific context (see Article 2(3)(e) of the Statute); it should thus be reserved for that context.

[1166] *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.

[1167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370 and footnote 740; *Blaškić* Appeal Judgement, paras. 45 and 48; *Vasiljević* Appeal Judgement, para. 102.

[1168] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. See also *Čelebići* Appeal Judgement, para. 352, citing with approval the conclusion of the Trial Chamber in that case that it is not necessary that the assistance in question be given at the time of the commission of the crime.

[1169] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, paras. 45 and 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.

[1170] *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50.

[1171] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50; *Aleksovski* Appeal Judgement, para. 162.

[1172] *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77.

518. Further, the Trial Chamber considered that, even though "the evidence does not establish a specific link between the publication and subsequent events, [...] a link was clearly perceived by many witnesses such as Witness AHI, Witness ABE and Nsanzuwera, suggesting that *Kangura* greatly contributed to the climate leading to these events, if not causing them directly".[1247] The Trial Chamber then adds that "[a]t times *Kangura* called explicitly on its readers to take action. More generally, its message of prejudice and fear paved the way for massacres of the Tutsi population".[1248] The Appeals Chamber emphasizes, however, that the specific examples given by Witness Nsanzuwera and Witness ABE of attacks on individuals following the publication of *Kangura* articles date back to 1990 and 1991 and do not fall within the temporal jurisdiction of the Tribunal. Moreover, none of the testimonies makes explicit reference to the impact of *Kangura* issues published after 1 January 1994.

519. While there is probably a link between the Appellant's acts, because of his role in *Kangura*, and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained,[1249] the Appeals Chamber considers that there was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the *Kangura* publications in the first months of 1994 susbstantially contributed to the commission of acts of genocide between April and July 1994. Therefore, the Appeals Chamber is of the opinion that the Trial Chamber erred in finding Appellant Ngeze guilty of the crime of genocide under Article 6(1) of the Statute for having "instigated" the killing of Tutsi civilians as founder, owner and editor of *Kangura*.[1250]

(iii) Link between CDR activities and the acts of genocide

520. Appellant Barayagwiza contends that no causal link was established between the activities of the CDR and the acts of genocide.[1251]

521. The Trial Chamber explained in paragraph 951 of the Judgement that:

> [t]he Hutu Power movement, spearheaded by CDR, created a political framework for the killing of Tutsi and Hutu political opponents. The CDR and its youth wing, the *Impuzamugambi*, convened meetings and demonstrations, established roadblocks, distributed weapons, and systematically organized and carried out the killing of Tutsi civilians. The genocidal cry of "*tubatsembatsembe*" or "let's exterminate them", referring to the Tutsi population, was chanted consistently at CDR meetings and demonstrations. As well as orchestrating particular acts of killing, the CDR promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.

[1247] Judgement, para. 242.
[1248] *Ibid.*, para. 243.
[1249] See *Kangura* publications mentioned in paragraphs 136-243 of the Judgement. See also the Trial Chamber's findings in paragraphs 245, 246, 950 and 1036 of the Judgement, which make specific reference to "The Appeal to the Conscience of the Hutu" and "The Ten Commandments", and to *Kangura* No. 26.
[1250] Judgement, para. 977A.
[1251] Barayagwiza Appellant's Brief, paras. 194-195.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron
Gberdao Gustave Kam
Robert Fremr

Registrar: Adama Dieng

Date: 12 November 2008

THE PROSECUTOR

v.

Siméon NCHAMIHIGO

Case No. ICTR-01-63-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Alphonse Van
Lloyd Strickland
Madeleine Schwartz
Adama Niane

Defence Counsel:
Denis Turcotte
Benoît Henry

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6.1.3. The Killing of Emilien Nsengumuremyi, Aloys Gasali, Isidore Kagenza, and Jean-Marie Vianney Tabaro

351. The Chamber found that Nchamihigo read out Nsengumuremyi, Gasali, Tabaro, and Kagenza's names at the roadblock near the Bank of Kigali and instructed the *Interahamwe* there to find them and kill them. The Prosecution offered no evidence to show that Gasali, Tabaro, and Kagenza were hurt or killed. Nsengumuremyi was eventually found and killed by Lieutenant Kajisho.

352. The crimes of genocide, murder and extermination require proof of a causal link between the order which Nchamihigo gave the *Interahamwe*, and Nsengumuremyi's murder. The crime is not committed when the order is given unless the specific consequences set out in the Statute occur. In the present case, the consequence did occur but the evidence has not established that Nsengumuremyi's death resulted from the order Nchamihigo gave. LAG gave unequivocal evidence that neither he nor his group were involved in Nsengumuremyi's killing; both Prosecution and Defence witnesses point to Lieutenant Kajisho as the killer. No evidence was adduced from which the Chamber could find that Nchamihigo gave orders to or instigated Lieutenant Kajisho to kill Nsengumuremyi, or that the grenades Nchamihigo distributed aided and abetted Lieutenant Kajisho to kill Nsengumuremyi. The finding of fact that the killing was executed in that manner does not allow the imposition of criminal responsibility on Nchamihigo for that killing.

6.1.4. The Killing of Joséphine Mukashema, Hélène and Marie

353. The Chamber found that Nchamihigo, having learnt that the three Tutsi girls were being given refuge in BRD's house, removed them and took them to Gatandara roadblock so that they may be killed, declaring them to be *Inkotanyi.*

354. By his actions, Nchamihigo aided and abetted their killing. The Chamber is satisfied that he did this because they were Tutsi and in furtherance of his intention to destroy the Tutsi ethnic group in whole or in part, and that he did this as part of a widespread or systematic attack on the Tutsi civilian population. As such, the Chamber finds Nchamihigo guilty beyond reasonable doubt of Genocide and Murder as a Crime against Humanity for aiding and abetting the killing of Joséphine Mukashema, Hélène and Marie.

6.1.5. The Killing of Uzier Ukwizagenza and Innocent

355. The Chamber found that the Prosecution failed to show beyond reasonable doubt that Nchamihigo ordered or instigated the killing of these students. No convictions may therefore be brought against him for their deaths.

6.1.6. The Killing of Father Joseph Boneza

356. The Chamber found that on 19 May 1994, Nchamihigo chased Father Boneza, a Tutsi priest, to Kucyapa roadblock. Nchamihigo desired the death of Father Boneza and made plans to effect it. Those present at the roadblock showed reluctance to attack the priest. The impasse was resolved when Nchamihigo asked for an "intelligent Hutu" to kill the priest. Mutabazi seized Father Boneza, and Nyagatere struck the priest on the head with a tree trunk, killing him.

357. Nchamihigo's words were calculated. As a Deputy Prosecutor, he was a man of influence. At that very roadblock he had previously exercised the power of life and death by

giving orders to either kill or spare those who attempted to pass through. The Chamber finds that Nchamihigo intended his words to induce one of the persons present to kill Father Boneza, and his expectations were realised when Mutabazi and Félicien Nyagatere did so. The conduct and words of Nchamihigo satisfy the legal definition of instigating the killing. The Chamber concludes, beyond reasonable doubt, that Nchamihigo intended to destroy the Tutsi ethnic group in whole or in part and that Father Boneza was killed, at Nchamihigo's instigation, because he was a Tutsi. The killing also occurred as part of a widespread and systematic attack on the Tutsi civilian population. The Chamber therefore finds Nchamihigo guilty of Genocide and Murder as a Crime against Humanity for the killing of Father Boneza.

6.1.7. The Killing of Thirteen FAR Soliders

358. The Chamber found the Prosecution evidence with respect to this allegation to be unreliable, and therefore dismisses the charge of Extermination as a Crime against Humanity for this event contained at paragraph 65 of the Indictment.

6.2. Kamarampaka Events

6.2.1. Killings at the Gendarmerie on 16 April 1994

359. The Chamber found beyond reasonable doubt that Nchamihigo and other members of the PSC contrived a strategy to kill influential Tutsi at PSC meetings on 11 and 14 April 1994. On 15 April 1994, Nchamihigo and other PSC members transferred most of the refugees at Cyangugu Cathedral to Kamarampaka Stadium. Then on 16 April 1994, Prefect Bagambiki instructed the Commander Munyarugerero to read out names from a list prepared by the PSC of people to be removed from Kamarampaka Stadium.

360. The instructions were carried out and approximately 12 people, including Baziruwiha, were removed from the stadium. Once outside, they joined four others who stayed behind at the cathedral the previous day. All 16 refugees except for Marianne Baziruwiha were Tutsi, were transferred to the Gendarmerie, and were killed there by *Interahamwe* and other civilian attackers who had been brought in by Nchamihigo to assist in the killings. The killings took place in the presence of Nchamihigo, Lieutenant Imanishimwe, and Prefect Bagambiki. Nchamihigo ordered the killers to take the corpses to Mutongo sector and bury them in pit latrines at Gapfumu's house, one of the victims. The Chamber is satisfied that Nchamihigo instigated the killings, and finds him guilty beyond reasonable doubt of Genocide, as pleaded at paragraphs 20(d), 21 and 38 to 42 of the Indictment.

361. The Chamber found no evidence on the allegation of mutilation and therefore dismisses the charge of Other Inhumane Acts as a Crime against Humanity contained at paragraph 70 of the Indictment in its entirety.

6.2.2. Further Killings on 18 April 1994

362. The Prosecution evidence in relation to a second visit to remove more refugees is unclear. Even if it could be considered reliable, no causal link has been established between the alleged removal of refugees and the alleged subsequent killings. No conviction could be entered on this allegation because no direct evidence was adduced as to the manner in which the people named in the relevant paragraphs of the Indictment were killed. The Chamber therefore dismisses the charge of Genocide contained at paragraph 43 of the Indictment in its entirety.

question was committed sometime in April, but after the 14th according to BRF, and most likely around the 28th, 29th, or 30th of the month, as per SCL and SFF's testimonies.

369. The Chamber is mindful that a two-week time period may reduce the impact of the instigation. However, the Chamber considers that the particularity of the call for intervention at Shangi parish and the immediate decision to dispatch Munyakazi's Interahamwe leaves no room for reasonable doubt. The Chamber concludes that Nchamihigo's call for intervention on 14 April 1994 and subsequent encouragement and hospitality substantially contributed to the killings at Shangi parish perpetrated by Munyakazi's *Interahamwe*. In this way, Nchamihigo instigated Munyakazi's *Interahamwe* to kill the Tutsi refugees at Shangi parish. He did so with the intent to destroy in whole or in part the Tutsi group. As such, the Chamber finds Nchamihigo guilty of Genocide, as pleaded at paragraph 20(a) of the Indictment.

6.3.3. Hanika Parish

370. The Chamber found that after the PSC meeting on Cyangugu hill in the morning of 11 April 1994, Nchamihigo went that afternoon to attend another meeting near Hanika parish where he expressed a need to drive out the Tutsi who had sought refuge at the parish. An immediate but failed attack ensued on Hanika parish that same day. The Chamber further found that Nchamihigo's actions on 11 April, his threat to civilians on 12 April upon his return to Hanika parish that they would be slaughtered if they did not hurry up and finish the job, and his distribution of four grenades to the soldiers present at the attack, substantially contributed to the massacre of approximately 1,500 Tutsi refugees of all ages and both genders at Hanika parish on 12 April 1994.

371. The Chamber therefore finds Nchamihigo guilty of Genocide beyond reasonable doubt by having instigated soldiers and civilians to kill the refugees at Hanika parish on or about 12 April 1994 with the intent to destroy in whole or in part the Tutsi group, as pleaded at paragraph 33 of the Indictment.

6.3.4. Nyamasheke Parish

372. The Chamber found that while a massacre did occur against Tutsi civilians who sought refuge at Nyamasheke parish, the Prosecution's evidence was insufficient to prove that Nchamihigo led, ordered, or instigated the massacre. Moreover the allegations against Nchamihigo in respect of this event were made under paragraphs 28 and 57 of the Indictment, which are incapable of sustaining convictions on their own. The Chamber therefore dismisses the charges against Nchamihigo in respect of the massacres at Nyamasheke parish.

6.3.5. Mibilizi Parish and Hospital

373. The Chamber found that on 18 April 1994, Nchamihigo came to the town centre of Mutongo sector. Upon their arrival, Nchamihigo reproached Conseiller Barati for not having mobilized the people of Mutongo to "flush out" the Tutsi who had sought refuge at Mibilizi parish and hospital. Thereafter, Conseiller Barati and Nchamihigo distributed arms and a group went to launch the attack at Mibilizi. At Mibilizi, Nchamihigo gave instructions on how to conduct the attack, and after it was over, ordered the attackers to loot the premises and load the booty onto a vehicle with which he subsequently drove away with. The casualties were Tutsi of both genders and all ages.

374. After considering the totality of the evidence adduced, the Chamber concludes that Nchamihigo's actions and words substantially contributed to the massacres perpetrated against the Tutsi refugees at Mibilizi parish and hospital on 18 April 1994. Nchamihigo intended to destroy the Tutsi group in whole or in part, and instigated the massacre as part of a widespread and systematic attack on the Tutsi civilian population. The Chamber therefore finds Nchamihigo guilty of Genocide and Extermination as a Crime against Humanity, as pleaded at paragraphs 35 and 63 of the Indictment.

6.3.6. Nyakanyinya School

375. The Chamber found that on 12 April 1994, after he took the nuns across the border, either on his way to or from Hanika parish, Nchamihigo stopped in Mutongo sector (Mururu commune) where he briefly spoke at a small meeting convened for members of the public and told them Tutsi refugees were attacking Hutus at Nyakanyinya school. Immediately after the meeting, an attack was launched on the school and Nchamihigo, accompanied by Sergeant Major Ruberanziza, provided a carton of grenades that were used to kill the refugees. In so doing, Nchamihigo instigated the massacre of Tutsi refugees at Nyakanyinya school on 12 April 1994, both with the intent to destroy in part the Tutsi group, and as part of a widespread and systematic attack on the Tutsi population.

376. As such, the Chamber finds Nchamihigo guilty beyond reasonable doubt of Genocide by instigation as pleaded at paragraph 32 of the Indictment, and of Extermination as a Crime against Humanity, as pleaded at paragraph 60.

6.3.7. Gihundwe Sector

377. The Chamber found that on 14 or 15 April 1994, Nchamihigo instigated civilians, *Interahamwe* and *Impuzamugambi* to launch attacks against Tutsis who had been hiding in their own or others' homes in the four cellules of Gihundwe sector. His contribution to the gathering of civilians and organization thereof into four groups was substantial in bringing about the subsequent massacre of Tutsi on that day. The Chamber also found that on 24 April 1994, Nchamihigo made inquiries into the status of the extermination of the Tutsi in Gihundwe sector, and that the nature of his inquiries instigated others present at the meeting to find more Tutsi in hiding to kill within the three-day time frame advocated by Habimana.

378. Thus, the Chamber finds Nchamihigo guilty of Genocide for instigating the 14-15 and 24 April 1994 massacres in Gihundwe sector with the intent to destroy part in whole or in part the Tutsi group, as pleaded at paragraphs 20(b) and 24 of the Indictment, and guilty of Extermination as a Crime against Humanity for instigating the 14-15 April massacres in Gihundwe sector as part of a widespread and systematic attack against the Tutsi civilian population, as pleaded at paragraph 61.

6.3.8. Bisesero

379. The Chamber found that the evidence of Nchamihigo's entertaining Munyakazi's *Interahamwe* with food and drink is not in itself sufficient to support a finding beyond reasonable doubt that Nchamihigo ordered or instigated *Interahamwe* to kill Tutsi who had taken refuge in Bisesero. It could, however, support a finding of aiding and abetting. However, given the fact that the entertainment and hospitality were alleged to have taken place in April 1994, and not in June 1994 as per the Indictment, the Chamber disregarded this evidence as irrelevant.

UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER II

Before Judges: Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

Registrar: Adama Dieng

Date: 17 May 2011

THE PROSECUTOR
v.
Augustin NDINDILIYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No: ICTR-00-56-T

JUDGEMENT AND SENTENCE

For the Prosecutor:
Alphonse Van
Moussa Séfon
Abubacarr Tambadou
Lloyd Stickland
Faria Rekkas

For the Defence:
For **Augustin Ndindiliyimana**:
Christopher Black & Vincent Lurquin
For **Augustin Bizimungu**:
Gilles St. Laurent & Benoît Henry
For **François-Xavier Nzuwonemeye**:
Charles Taku & Beth Lyons
For **Innocent Sagahutu**:
Fabian Segatwa & Saidou Doumbia

CHAPTER V: LEGAL FINDINGS

1909. The Prosecution has charged Bizimungu, Ndindiliyimana, Sagahutu and Nzuwonemeye with conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity (murder, extermination and rape) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (murder and rape, humiliating and degrading treatment). The Indictment includes both charges of direct responsibility under Article 6(1) and charges of superior responsibility under Article 6(3) of the Statute.

1.11 Legal Principles

1.11.1 *Direct Responsibility Under Article 6(1)*

1910. Article 6(1) of the Statute provides that a person who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of a crime referred to in Articles 2 to 4 shall be individually responsible. In the present case, the Chamber considers that only ordering, committing, and aiding and abetting are relevant to the crimes under review. The Chamber will now consider each of these forms of participation before determining which form of participation best reflects the conduct of the Accused in question.

1911. "Ordering" requires that a person in a position of authority instruct another to commit an offence. Unlike superior responsibility under Article 6(3), "ordering" does not require a superior-subordinate relationship between the accused and the perpetrator of the crime. The accused will incur responsibility if the Prosecution proves that he holds a position of authority, which may be informal or of a purely temporary nature, and that he used that authority to compel another to commit a crime.[3606]

1912. "Committing" covers the direct and physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, and participation in a joint criminal enterprise.[3607]

1913. "Instigating" implies an *actus reus* of prompting another person to commit an offence. The Prosecution must prove that the acts of the accused contributed substantially to the commission of the crime, but they need not be a condition precedent for its commission. The *mens rea* is the intent to instigate another person to commit a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[3608]

[3606] Media Appeal Judgement, para. 481; *Ntagerura et al.* Appeal Judgement, para. 365; *Semanza* Appeal Judgement, paras. 361, 363 ; *Bagosora et al.* Trial Judgement, para. 2008.

[3607] Media Appeal Judgement, para. 478; *Gacumbitsi* Appeal Judgement, para. 60. *But see Seromba* Appeal Judgement, para. 161, holding that in the context of genocide, "committing" goes beyond direct and physical perpetration of the crime, and includes those situations in which the actions of the accused "were as much an integral part of the genocide as were the killings [they] enabled." In that case, Seromba was found to have committed genocide because he approved and embraced as his own the decision to commit the crime. *See also Gacumbitsi* Appeal Judgement, para. 60, holding that in the context of genocide, "direct and physical perpetration" need not mean physical killing.

[3608] Media Appeal Judgement, paras. 480, 660; *Ndindabahizi* Appeal Judgement, para. 117.

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ICTR-96-14-A
09 July 2004
(2655/h-2556/h)

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding Judge**
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Adama Dieng**

Judgement of: **9 July 2004**

ICTR Appeals Chamber
Date: 09 July 2004
Action:
Copied To: All Judges, Parties, Judicial Archives, LOs, LSS

ELIÉZER NIYITEGEKA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-96-14-A

JUDGEMENT

Counsel for the Appellant:

Ms. Sylvia Geraghty
Mr. Feargal Kavanagh SC

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Melanie Werrett
Mr. James Stewart
Mr. Kenneth C. Fleming
Ms. Linda Bianchi
Mr. Alex Obote Odora

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Rosette Muzigo-Morrison
SIGNATURE: ..... DATE: 09 July 2004

information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[385]

194. *Kupreškić* also addressed the possibility that the Prosecution might be unable to plead a material fact with specificity because it was not in the Prosecution's possession prior to trial. As a general matter, "the Prosecution is expected to know its case before it goes to trial" and cannot expect to "mould[] the case against the accused in the course of the trial depending on how the evidence unfolds."[386] If the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial. The Trial Chamber must consider whether proceeding to trial in such circumstances is fair to the accused. *Kupreškić* indicated that there are "instances in criminal trials where the evidence turns out differently than expected," and such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[387]

195. Failure to set forth the specific material facts of a crime constitutes a "material defect" in the indictment.[388] Such a defect does not mean, however, that trial on that indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreškić* stated that a defective indictment "*may*, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic.[389] *Kupreškić* left open the possibility that the Appeals Chamber could deem a defective indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[390]

196. A Trial Chamber faced with a situation in which "the evidence turns out differently than expected" may not simply find that the error has been cured, but rather should take one or more of the steps envisioned by *Kupreškić*, including excluding the evidence or ordering the Prosecution to move to amend the indictment.[391] In considering a motion to amend the indictment, a Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response. On appeal, however, amendment of the indictment is no

[385] *Kupreškić et al.* Appeal Judgement, para. 90.
[386] *Kupreškić et al.* Appeal Judgement, para. 92.
[387] *Ibid.*
[388] *Kupreškić et al.* Appeal Judgement, para. 114.
[389] *Ibid.* (emphasis added).
[390] *Ibid.*
[391] *Kupreškić et al.* Appeal Judgement, para. 92.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Lee Gacuiga Muthoga, presiding
Judge Seon Ki Park
Judge Robert Fremr

Registrar: Adama Dieng

Date: 19 June 2012

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

Case No. ICTR-2000-55C-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Drew White
Kirsten Gray
Yasmine Chubin

Counsel for the Defence:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi
Sébastian Chartrand
Léopold Nsengiyumva

1463. Moreover, the Chamber observes that the Prosecution continued to give timely, clear and consistent notice of its intent to pursue joint criminal enterprise liability with respect to the proven criminal conduct through its Pre-Trial Brief.[3776] Similarly, the Prosecution reiterated its position in its opening statements.[3777] Based on the foregoing, the Chamber finds that the Prosecution has provided timely, clear and consistent notice with respect to its reliance on the basic and extended forms of joint criminal enterprise.

2.1.2 Ordering

(i) Elements

1464. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for ordering may be informal or of a purely temporary nature.[3778]

(ii) Notice

1465. Ordering is clearly pleaded in the Indictment's chapeau paragraph alleging Article 6 (1) liability. This mode is repeated in several of the paragraphs alleging particular crimes and Nizeyimana's course of conduct in relation to them.[3779] Much of the proven criminal conducted is also identified as examples of Nizeyimana's responsibility for "ordering" crimes in the Prosecution Pre-Trial Brief.[3780] This position was affirmed in the Prosecution's opening statement.[3781] Indeed, the Defence has not made any objections as it relates to the

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[3776] Indeed, the Prosecution Pre-Trial Brief refers to these killings in the context of the "Joint Criminal Enterprise in Butare". *See* Pre-Trial Brief, p. 17 *and* paras. 54-55. The Defence argues that the Pre-Trial Brief cannot be used to cure any defect in the Indictment as it was filed prior to the operative Indictment. See Defence Motion for Exclusion of Evidence, 29 April 2011, paras. 26-27. The Chamber recalls that the operative Indictment was filed pursuant to a Chamber order requesting the Prosecution to make several specific changes to a few discrete paragraphs of the Indictment. *See* Decision on Defence Preliminary Motion on Defects in the Indictment (TC), 16 December 2010, pp. 21-22. Other than these specific requested modifications, the operative Indictment as a whole remained largely identical in language to the previous version. Notwithstanding, the subsequent changes, references in the previously filed Pre-Trial Brief and its Annex of witness summaries remain clearly linked to the paragraphs of the operative Indictment. The Defence's challenges also do not relate to the modified text. In this context, the Chamber considers that the fact that the Pre-Trial Brief was filed shortly before the operative Indictment does not prevent it from being used to cure certain defects, if any. *Cf. Renzaho* Appeal Judgement, para. 122. Indeed, in *Nchamihigo*, the Appeals Chamber looked at a Pre-Trial Brief as well as an opening statement that were submitted prior to the operative Indictment to determine if a defect relating to the accused's role in the attack on Shangi parish had been cured. *See Nchamihigo* Appeal Judgement, paras. 13, 337-344, Annex B, p. 156.

[3777] *See* T. 17 January 2011, p. 16 (Prosecution Opening Statement) (referring to Pre-Trial Brief paragraph 55 as providing a more expanded treatment of its theory of joint criminal enterprise).

[3778] *Semanza* Appeal Judgement, paras. 361, 363.

[3779] *See, e.g.*, Indictment, paras. 13 ("ordered" and "orders"), 23 ("ordered" and "orders"), 24 ("ordered" and "orders"), 29 ("ordered" and "orders").

[3780] Pre-Trial Brief, para. 30. *Cf.* Pre-Trial Brief, paras. 75, 78-79 (describing Nizeyimana as having "ordered" the killings of Rwekaza and Uwambaye).

[3781] *See* T. 17 January 2011, p. 14 (Prosecution Opening Statement) (referring to Pre-Trial Brief, paras. 28-30 as it related to "ordering" liability).

(b) Article 6 (3)

1516. The record demonstrates that Nizeyimana could also bear superior responsibility for the killings of Rosalie Gicanda and those removed from her home. The Chamber has found that Nizeyimana authorised the killings. The record reflects that Second Lieutenant Jean Pierre Bizimana also reported the killing to Nizeyimana afterward. In addition, the record demonstrates that Nizeyimana and Second Lieutenant Jean Pierre Bizimana were relatively close.

1517. Noting this evidence, as well as Nizeyimana's position within the ESO hierarchy and the considerable authority he possessed, the Chamber has no doubt that Nizeyimana was in a position to prevent this crime and to take reasonable measures to punish it.[3862] Given his prior authorisation, as well as the ensuing report of the crime's completion, the Chamber has no doubt that Nizeyimana authorised the killing of Rosalie Gicanda, which led to her death and others taken from her residence.

1518. In so finding, the Chamber considers that Muvunyi may have possessed these same powers of effective control. However, absent credible evidence of Muvunyi's involvement in this event, the Chamber does not consider that this parallel authority reasonably eliminates Nizeyimana's effective control over the perpetrators of this crime. The Chamber shall consider how these conclusions impact sentencing as Nizeyimana may not be convicted pursuant to Articles 6 (1) and 6 (3) of the Statute.[3863]

(iv) Remy Rwekaza, Witness ZAV and Beata Uwambaye

(a) Article 6 (1)

1519. In its factual findings, the Chamber concluded that Nizeyimana ordered ESO soldiers to kill Remy Rwekaza and Witness ZAV, both Tutsis, at the Gikongoro / Cyangugu and Kigali roads junction roadblock, on or about 21 April 1994. The soldiers shot and killed Rwekaza. Witness ZAV was shot, but survived, and the Chamber has concluded that he suffered serious bodily harm.[3864] Likewise, the Chamber has found that Nizeyimana ordered ESO soldiers to kill Beata Uwambaye, a Tutsi, at the same barrier around 5 May. The soldiers carried out Nizeyimana's instructions and killed Uwambaye.[3865] In all instances, the victims were in civilian clothing and unarmed.

1520. Through his presence and orders at the roadblock, Nizeyimana substantially and significantly contributed to the killings of Remy Rwekaza and Beata Uwambaye, as well as the shooting of Witness ZAV. His position of authority among the relatively young ESO soldiers and his instructions to execute these Tutsis played a decisive role in these crimes. Indeed, as it relates to the incident of 21 April 1994, Nizeyimana's contribution of stopping Rwekaza and Witness ZAV after they were allowed through the roadblock, returning them to the barrier and then ordering their execution was a necessary condition to the ensuing murder and assault committed by the ESO soldiers.

[3862] The Chamber has previously determined that Second Lieutenant Jean Pierre Bizimana was not punished for this crime. II.6.2.
[3863] *See, e.g., Setako* Appeal Judgement. para. 266; *Renzaho* Appeal Judgement, para. 564.
[3864] II.7.1.
[3865] II.7.2.

1521. While these attacks only resulted in the deaths of two Tutsis and the serious bodily harm of a third, the Chamber has no doubt that the perpetrators acted with the intent to destroy at least a substantial part of the Tutsi group. These attacks were emblematic of the systematic nature in which Tutsi civilians were identified and killed on an ongoing basis at this roadblock and others manned by ESO soldiers in Butare town.[3866] Notably, a prominent Tutsi lecturer, Pierre Claver Karenzi, was killed in the vicinity of a nearby roadblock manned by ESO soldiers on the same day that Rwekaza was killed and Witness ZAV was shot.[3867]

1522. Indeed, these attacks followed President Sindikubwabo's 19 April 1994 speech, which marked a significant increase in violence and the targeting of Tutsi civilians within Butare town. Around 20 April, ESO soldiers killed Rosalie Gicanda, the former Tutsi Queen of Rwanda, and others taken from her home.[3868] Around 21 April, ESO soldiers participated in the separation and killing of Tutsis at the Butare University.[3869] Around 29 April, ESO soldiers participated in the separation and removal of Tutsis at the *Groupe Scolaire*, which led to their subsequent slaughter.[3870] There is additional evidence that, starting in the last third of April, soldiers used lists to identify and kill Tutsis at the Butare University Hospital.[3871]

1523. In this context, the fact that only two Tutsis were killed and one injured on these occasions reflects the rudimentary and inefficient means employed by ESO soldiers to commit these crimes.[3872] It raises no doubt that the soldiers possessed genocidal intent at the moment of their commission.[3873] Based on Nizeyimana's conduct during the killing of Rwekaza and attack of Witness ZAV, as well as his actions during Uwambaye's murder, the record demonstrates that he shared this genocidal intent. This conclusion is further supported by the Chamber's findings relating to Nizeyimana's participation in other proven criminal conduct.

1524. The Chamber concludes that Nizeyimana is responsible, pursuant to Article 6 (1) of the Statute, for ordering the killing of Remy Rwekaza and Beata Uwambaye and causing serious bodily and mental harm to Witness ZAV. The facts equally support the conclusion that Nizeyimana participated in a basic joint criminal enterprise to kill Tutsis at this roadblock. However, the Chamber considers that "ordering", which is also a direct form a responsibility, most appropriately captures Nizeyimana's criminal participation in these specific events.[3874]

[3866] II.7.3.
[3867] II.6.5.
[3868] II.6.2.
[3869] II.5.1.
[3870] II.10.
[3871] *See* II.8.1.
[3872] *Cf. Krstić* Appeal Judgement, para. 32 ("In determining that genocide occurred ... the cardinal question is whether the intent to commit genocide existed. ... the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.").
[3873] *See Hategekimana* Appeal Judgement, para. 133-135 (affirming the Trial Chamber's conclusion that the killers of three Tutsi women possessed genocidal intent when viewed in context of the specific killings and other violence targeting Tutsis).
[3874] The legal characterisation of Nizeyimana's actions as ordering instead of committing pursuant to a joint criminal enterprise does not impact sentencing considerations.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Case No. ICTR-99-46-A

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Adama Dieng

Date: 7 July 2006

THE PROSECUTOR
(Appellant and Respondent)

v.

ANDRÉ NTAGERURA
(Respondent)
EMMANUEL BAGAMBIKI
(Respondent)
SAMUEL IMANISHIMWE
(Appellant and Respondent)

JUDGEMENT

Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart

Counsel for André Ntagetura
Benoït Henry
Hamuli Rety

Counsel for Emmanuel Bagambiki
Vincent Lurquin

Counsel for Samuel Imanishimwe
Marie Louise Mbida
Jean-Pierre Fofé

Translation certified by LSS, ICTR

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I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal," respectively) is seized of appeals by Samuel Imanishimwe ("Imanishimwe") and by the Prosecution, against the Judgement rendered by Trial Chamber III in the case of *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe* on 25 February 2004 (the "Trial Judgement").

A. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe

2. André Ntagerura ("Ntagerura") was born on 2 January 1950 in Cyangugu prefecture, Rwanda. From March 1981 through July 1994 Ntagerura served as a minister in the Rwandan Government, his last appointment being Minister of Transport and Communications in the Interim Government.[1]

3. Emmanuel Bagambiki ("Bagambiki") was born on 8 March 1948 in Cyangugu prefecture, Rwanda. From 4 July 1992 to 17 July 1994, Bagambiki served as the prefect of Cyangugu.[2]

4. Samuel Imanishimwe ("Imanishimwe") was born on 25 October 1961 in Gisenyi prefecture, Rwanda. Imanishimwe, a lieutenant in the Rwandan Armed Forces, served as the acting commander of the Cyangugu military camp, which is also referred to as the Karambo military camp, from October 1993 until he left Rwanda in July 1994.[3]

B. The Trial Judgement

5. The trial was based on two separate indictments. The first indictment, filed on 9 August 1996 and amended on 29 January 1998, charged Ntagerura with genocide, conspiracy to commit genocide, extermination as a crime against humanity, serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and two counts of complicity in genocide, both as an individual pursuant to Article 6(1) and as a superior under Article 6(3) of the Statute of the Tribunal (the "Statute"). Another indictment, filed on 9 October 1997 and amended on 10 August 1999, charged Bagambiki and Imanishimwe with genocide, complicity in genocide, conspiracy to commit genocide, murder, extermination and imprisonment as crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Imanishimwe was, in addition, charged with torture as a crime against humanity.

6. The trial of Ntagerura, Bagambiki and Imanishimwe was based on the following facts:

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[1] Trial Judgement, para. 5.
[2] *Ibid.*, para. 12.
[3] *Ibid.*, para. 13.

- On the evening of 6 April 1994, after receiving notification of President Habyarimana's death, Imanishiwme addressed the soldiers of the Karambo military camp and immediately placed his camp on alert.[4]

- On 7 April, refugees began to arrive at the parishes of Shangi and Mibilizi.[5]

- On 8 April, predominantly Tutsi refugees fleeing the violence in their neighbourhoods began gathering at Cyangugu Cathedral and eventually numbered 5,000. The prefectural authorities provided at least two to four gendarmes to protect the refugees at the cathedral.[6] On the same day, Bagambiki sent gendarmes to guard Shangi Parish at the request of parish authorities.[7] Still on the same day, Hutu assailants began attacking Tutsi homes in Gisuma commune and, after several days of clashes, a number of refugees gathered at the Gashirabwoba football field.[8]

- Between 9 and 11 April 1994, four gendarmes were posted at Mibilizi Parish.[9]

- On 10 April, daily attacks began at Shangi Parish. The sub-prefect went to the the parish to examine the situation.[10]

- On 11 April, a group of *Interahamwe* came to the cathedral shooting into the air, creating disorder and panic among the refugees. Bagambiki came to the cathedral after this attack to speak briefly to the refugees.[11] On the same day, soldiers arrested seven refugees in the vicinity of the cathedral and took them to the Karambo military camp, where they were maltreated in Imanishimwe's presence.[12] Some other refugees who had been arrested were returned to the cathedral after Witness LY asked Bagambiki to intervene.[13] Still on the same day, the gendarmes posted at the cathedral deterred two attacks on the refugees gathered there.[14]

- By 11 April 1994, about 500 refugees had gathered at the Gashirabwoba football field. On the morning of this day, they repulsed an attack. During the afternoon, Bagambiki and Imanishimwe arrived at the football field and took away Côme Simugomwa, the local head of the PL party. After the genocide, Côme Simugomwa's body was found by a river in Karengera commune. In the evening, soldiers arrived at the football field.[15]

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[4] *Ibid.*, para. 389.
[5] *Ibid.*, para. 478 (Shangi) and 529 (Mibilizi).
[6] *Ibid.*, para. 309.
[7] *Ibid.*, para. 478.
[8] *Ibid.*, para. 435.
[9] *Ibid.*, para. 529.
[10] *Ibid.* paras. 480-481.
[11] *Ibid.*, para. 309.
[12] *Ibid.*, para. 310.
[13] *Ibid.*, para. 311.
[14] *Ibid.*, para. 313.
[15] *Ibid.* para. 435.

- On 11 and 12 April, local *Interahamwe* attacked Mibilizi Parish, but the refugees warded off the attacks.[16]

- On 11 April, a delegation including a sub-prefect visited Nyamasheke Parish, where a number of Tutsi had sought refuge.[17] On the same day, soldiers killed a number of civilians detained at the Karambo military camp.[18]

- On 12 April, Sub-Prefect Munyangabe delivered medicine to Shangi Parish.[19] On the same day, the refugee population at the Gashirabwoba football field had swelled to nearly 3,000. That morning, thousands of assailants began attacking the refugees at the football field. Bagambiki and Nsabimana, the director of the Shagasha tea factory, came to the football field and Bagambiki promised to send soldiers to protect the refugees. An hour later, armed factory guards and soldiers arrived at the football field and started firing and throwing grenades at the refugees. *Interahamwe* then killed the survivors and looted their personal possessions.[20]

- On the same day, *Interahamwe* attacked Nyamasheke Parish. No one was killed during that attack. The next day, the assailants returned and engaged in a similar attack. During the attack, a gendarme fired and killed three *Interahamwe*, ending the attack. After Bagambiki had been informed about the attack, he went to Nyamasheke Parish to intervene.[21]

- On 13 April 1994, the prefecture made available gendarmes and a vehicle to take a shipment of food to Shangi Parish. Either on the same day or on the next day, there was a massive assault on the parish, which by one estimate resulted in the death of 800 refugees.[22]

- Either on the same day or the next day, Bagambiki prevented an attack against the refugees at Cyangugu Cathedral when he personally stopped an armed crowd of assailants heading to the cathedral. On 14 April, the church authorities convened a meeting with Bagambiki and Imanishimwe because the church authorities felt that they could no longer ensure the refugees' safety. Bagambiki determined that the refugees should be transferred to Kamarampaka Stadium.[23] On the same day, a number of refugees tried to seek refuge at Kamarampaka Stadium, but were stopped by soldiers. Some of the soldiers then fetched Bagambiki, who briefly addressed the refugees. After he left the refugees, *Interahamwe* emerged from the bush and killed some of them.[24]

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[16] *Ibid.*, para. 530.
[17] *Ibid.*, paras. 577, 579.
[18] *Ibid.*, para. 408.
[19] *Ibid.*, para. 479.
[20] *Ibid.*, para.437.
[21] *Ibid.*, paras. 580-581.
[22] *Ibid.*, paras. 479-480.
[23] *Ibid.*, paras. 313-314.
[24] *Ibid.*, para. 594.

- On 14 April, Bagambiki and others went to Mibilizi Parish to discuss the situation with delegations of local *Interahamwe* and refugees.[25]

- On 15 April 1994, refugees from Cyangugu cathedral were transferred to the Kamarampaka Stadium. Bagambiki and the bishop accompanied the procession of refugees that was protected by gendarmes.[26] The refugees joined between 50 and 100 refugees who had been at the stadium since 9 April 1994. A number of other refugees from various locations throughout the prefecture arrived later.[27] The refugees at the stadium were guarded by gendarmes.[28]

- On the same day, there was another clash between the refugees and the local attackers at Mibilizi Parish.[29] Also at Nyamasheke Parish, assailants launched a massive assault against the parish, killing most of the refugees there.[30]

- On 16 April, Bagambiki and Imanishimwe received a list of names of people with suspected ties to RPF from assailants who were threatening to attack Kamarampaka Stadium.[31] Bagambiki and Imanishimwe then searched for and took away 17 refugees from the Cyangugu Cathedral and Kamarampaka Stadium. Bagambiki addressed the refugees at the stadium, stating that the authorities were going to remove and question the 17 refugees in order to ensure the safety of the other refugees. Out of the 17 refugees, 16 were killed that evening or during the following night.[32]

- On the same day, Nyamasheke Parish was attacked again. Most of the refugees who had survived the attack of 15 April were killed. After the attack, Bagambiki suspended *Bourgmestre* Kamana because of his involvement in the attack.[33]

- On 18 April, Miblizi Parish suffered several attacks. Sub-Prefect Munyangabe was sent there and tried to negotiate with the assailants. He did not succeed in preventing a massive assault in which the assailants killed many refugees.[34] On 20 April, the assailants returned to the parish, removed between 60 and 100 refugees and killed them.[35]

- On 26 April, Bagambiki was informed about an imminent massive attack against the refugees at Shangi Parish. At Bagambiki's insistence, Munyangabe went to the parish to try to prevent the attack. Munyangabe negotiated with the attackers and agreed that he would remove about 40 refugees from the parish

[25] *Ibid.*, para. 530.
[26] *Ibid.*, para. 316.
[27] *Ibid.*, paras. 316-317, 335.
[28] *Ibid.*, para. 329.
[29] *Ibid.*, para. 530.
[30] *Ibid.*, para. 584.
[31] *Ibid.*, para. 614.
[32] *Ibid.*, paras. 318, 320.
[33] *Ibid.*, paras. 585-586.
[34] *Ibid.*, para. 534.
[35] *Ibid.*, para. 536.

if the assailants agreed not to attack the remaining refugees there. The selected refugees were taken to the Kamarampaka Stadium. On the way, they were attacked and mistreated, and one of them was killed. The others finally arrived at the stadium.[36]

- Around 27 April, a number of refugees were selected and removed from the Kamarampaka Stadium. One of them was killed, while the fate of the others was unknown.[37]

- On 28 or 29 April, a massive attack was launched on Shangi Parish, killing most of the refugees there.[38]

- On 30 April, gendarmes tried in vain to prevent an attack on Mibilizi Parish. Between 60 and 80 refugees were killed.[39]

- In May, the prefectural authorities transferred the refugees from Kamarampaka Stadium to a new camp at Nyarushishi, where the conditions were better. The camp was guarded by gendarmes, who pushed back at least one attempted attack between 11 May 1994 and the arrival of the French *Opération Turquoise* forces on 23 June 1994.[40] The surviving refugees from Shangi and Mibilizi Parishes were also transferred to this camp.[41]

- On 6 June 1994 in Kamembe city, soldiers arrested approximately 300 people in the presence of Bagambiki and Imanishimwe. Some of the arrested persons were killed on Imanshimwe's orders. Subsequently, a number of detainees were held at the Karambo military camp, where they were questioned and mistreated in Imanishimwe's presence.[42]

7. The Trial Chamber acquitted Ntagerura and Bagambiki on all the counts in the Indictment.[43] Pursuant to Article 98 *bis* of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), the Trial Chamber had already acquitted Imanishimwe of conspiracy to commit genocide during the trial.[44] In the Trial Judgement, Imanishimwe was by majority found guilty of genocide (Count 7), extermination as a crime against humanity (Count 10) and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 13) under Article 6(3) of the Statute.[45] The Trial Chamber unanimously found him not guilty of complicity in genocide, but guilty of murder (Count 9), imprisonment (Count 11), and torture (Count 12) as crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 13) under Article 6(1) of the Statute. Having convicted Imanishimwe on Counts 7 and 10, the Chamber

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[36] *Ibid.*, para. 481.
[37] *Ibid.*, para. 325.
[38] *Ibid.*, para. 482.
[39] *Ibid.*, para. 538.
[40] *Ibid.*, paras. 609-611.
[41] *Ibid.*, para. 482 (Shangi) and para. 539 (Mibilizi).
[42] *Ibid.*, paras. 394-395.
[43] *Ibid.*, para. 829.
[44] *Ibid.*, para. 807; T.6 March 2002 p. 54.
[45] *Ibid.*, para. 806.

materially impaired.[97] Where, however, an accused had already raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to demonstrate on appeal that the accused's ability to prepare a defence was not materially impaired.[98] All of this is subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[99]

32. The Appeals Chamber emphasizes that the possibility to cure defects in the indictment is not unlimited. A clear distinction has to be drawn between vagueness in the indictment and an indictment omitting certain charges altogether. While it is possible to remedy the vagueness of an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis underminning the charges, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.

C. Alleged Refusal of the Trial Chamber to Consider Joint Criminal Enterprise (Prosecution's 3rd Ground of Appeal)

33. At paragraph 34 of the Trial Judgement, the Trial Chamber held:

> If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify upon which form of joint criminal enterprise the Prosecutor will rely. In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise. For these reasons, the Chamber will not consider the Prosecutor's arguments, which were advanced for the first time during the presentation of closing arguments, to hold the accused criminally responsible based on this theory [footnotes omitted].

34. The Prosecution submits that the Trial Chamber erred in law in refusing to allow the Prosecution to rely on joint criminal enterprise as a basis for establishing the individual criminal responsibility of the Accused.[100] More specifically, the Prosecution alleges in its Notice of Appeal and Appeal Brief that the Trial Chamber erred in law in finding that the Prosecution had failed to plead joint criminal enterprise in the Indictments.[101] Relying on the jurisprudence of the Tribunal and the ICTY,[102] the Prosecution argues that it was not obliged to expressly plead joint criminal enterprise in the Indictments.[103] However, during the Appeal hearings, the Prosecution clarified that it had abandoned this argument in view of the recent

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[97] *Niyitigeka* Appeal Judgement, para. 200; *Kvo~ka et al.* Appeal Judgement, para. 35.
[98] *Idem.*
[99] *Niyitigeka* Appeal Judgement, para. 200.
[100] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, paras. 40, 41 and 51. While admitting that it did not explicitly plead joint criminal enterprise in the Indictments, the Prosecution argued that it provided adequate notice of its intention to rely on the theory of joint criminal enterprise, and that such information was conveyed to each of the Accused in the charges and facts alleged in the Indictments, in the evidence as set forth in the Prosecution's Pre-Trial Brief, in the Prosecution's Opening Statements, in the arguments presented in the Prosecution's Closing Brief, in the evidence presented at trial and also in the Trial Chamber's Decision to join the Indictments.
[101] Prosectorat Notice of Appeal, para. 15; Prosecution Appeal Brief, para. 40.
[102] Prosecution Appeal Brief, paras. 45, 46 and 48.
[103] Prosecution Appeal Brief, paras. 61, 64-65.

criminal enterprise as a mode of liability. Similarly, the Decision on Joinder did not serve to put the Accused on notice that that mode of liability was being alleged.

39. Furthermore, it is apparent from the Prosecution's oral arguments on the joinder motion that the said arguments were made in relation to the "same transaction" test, and not to clarify the modes of liability argued in the Indictments. In any event, the broad reference to "one genocide in Rwanda", coupled with the failure to specify the nature of the Accused's participation in such "criminal enterprise", did not provide the Accused with clear and consistent information which might have compensated for the ambiguity in the Indictments relating to joint criminal enterprise.

40. In the second place, the Prosecution submits that its Pre-Trial Brief put the Accused on notice that it would rely on joint criminal enterprise.[111] The Appeals Chamber agrees with the Prosecutor[112] that the Prosecution Pre-Trial Brief contained factual allegations that the Accused participated in the recruiting, arming and training of the *Interahamwe* and that they planned the genocide in Cyangugu prefecture.[113] The Accused were also alleged to have participated in meetings, to have been present together during massacres and to have played a part in relation to massacres.[114] However, it is the Appeals Chamber's opinion that the Prosecution Pre-Trial Brief, particularly in the parts relating to the individual criminal responsibility of the Accused,[115] makes no specific mention of a joint criminal enterprise, a common criminal plan or any other synonym of that mode of criminal liability. It was therefore not obvious that the aforementioned factual allegations were meant to underpin a charge of joint criminal enterprise.

41. The Prosecution further argues that "throughout the trial, [it] consistently pursued its theory of joint criminal enterprise against all three of the [Accused]".[116] In support of this, the Prosecution refers to its Opening Statement, which states that the Accused "acted in concert for the realisation of a single and the same criminal enterprise",[117] and to its Final Trial Brief which mentions the common purpose doctrine – in other words, the joint criminal enterprise doctrine –in relation to Article 6(1) of the Statute.[118] It further submits that, given that the Accused called 82 witnesses to controvert the Prosecution case, it is inappropriate for them to claim that the preparation of their defence was impaired.[119]

42. The Appeals Chamber notes that, contrary to the Trial Chamber's view,[120] the Prosecution did not mention joint criminal enterprise for the first time in its closing

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[111] Prosecution Appeal Brief, paras. 77, 79 and 80, citing the Prosectorat Pre-Trial Brief, paras. 2.16, 2.45, 2.47, 2.60, 2.64, 2.87, 2.88, 2.98, 2.99, 2.105-2.108, 2.110-2.112, 2.114 and 2.116.
[112] Prosecution Appeal Brief, paras. 76-77, citing Prosecution Pre-Trial Brief, para. 2.4. The Prosecution alleged in support that the Respondents were present together at occasions involving weapons distribution and training: *ibid.*, para. 77, citing Prosecution Pre-Trial Brief, paras. 2.8, 2.12-2.13.
[113] Prosecution Pre-Trial Brief, paras. 2.8, 2.12, 2.13 and 2.16.
[114] *Ibid.*, para. 78, citing Prosecution Pre-Trial Brief, paras. 2.17-2.28, 2.33, 2.34, 2.36-2.38, 2.45, 2.64, 2.102, 2.105-2.110, 2.112 and 2.114.
[115] Prosecution Pre-Trial Brief, paras. 3.1-3.37.
[116] *Ibid.*, para. 82.
[117] *Ibid.*, para. 83, citing T.18 September 2000, pp. 41-42.
[118] Prosecution Appeal Brief, para. 83, citing Prosecution Final Trial Brief, para. 57.
[119] *Ibid.*, para. 68.
[120] Trial Judgement, para. 34. See also Prosecution Appeal Brief, para. 40.

arguments. The Prosecution alluded to this mode of liability in its Opening Statement in the following terms:

> Whether they acted severally or jointly depending on the circumstances, André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe acted in concert for the realisation of a single and the same criminal enterprise; namely, the elimination of the Tutsi ethnic group from the population map of Rwanda and particularly from the Préfecture of Cyangugu, and all of this in flagrant and deliberate violation of all the duties imposed on them by the laws of Rwanda. It thus appears that to achieve this goal, each of the Accused persons made his active, effective and crucial contribution, the contribution in terms of their intelligence, experience, professional skills, their authority or influence, each and every one of them in their specific roles, and all of them together in exemplary coordination and complementarity (sic). By the same token, the Prosecutor will be presenting to you each of the Accused and their respective roles in the execution of the massacres in Cyangugu.[121]

43. Then, in its Final Trial Brief the Prosecution clarified its intention to rely upon the theory of joint criminal enterprise under the section on individual criminal responsibility pursuant to Article 6(1).[122]

44. The Appeals Chamber however recalls that if the material facts of an accused's alleged criminal activity are not disclosed to the Defence until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial.[123] In the present case, the Prosecution waited until the first day of trial, when it gave its Opening Statement, to allude to its intention of relying upon joint criminal enterprise. It then waited until it delivered its Final Trial Brief to develop its arguments on this mode of liability as it directly related to the Accused's individual criminal responsibility. In neither its Opening Statement nor its Final Trial Brief did the Prosecution specify which form of joint criminal enterprise it had relied upon. The Prosecution's argument that the Accused called 82 witnesses during trial[124] is not indicative of the Accused's ability to prepare their defence against the specific allegation of participation in a joint criminal enterprise. As a result, the Appeals Chamber finds that the Accused were not provided with timely, clear and consistent notice that their individual criminal responsibility would be invoked under the theory of joint criminal enterprise.

45. The Trial Chamber thus correctly declined to consider the criminal responsibility of the Accused under the theory of joint criminal enterprise. As a result, it is unnecessary for the Appeals Chamber to deal with the Prosecution's submission that the Accused "acted pursuant to a joint criminal enterprise and therefore should have been held individually criminally responsible under Article 6(1) of the Statute".[125]

46. The Prosecution's third ground of appeal is therefore dismissed.

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[121] T.18 September 2000, pp. 41-42.
[122] Prosecution Final Trial Brief, paras. 52-57.
[123] *Niyitegeka* Appeal Judgement, para. 194. In the *Kvočka* case, which was cited by the Prosecution during the appeals hearing (AT., 6 February 2006, p. 37), the accused had been informed well before the opening of the trial; *Kvočka* Appeal Judgement, paras. 44-45.
[124] Prosecution Appeal Brief, para. 68.
[125] *Ibid.*, paras. 84-95.

document".[150] The Prosecution generally contends that each Indictment supported the other in relation to the charges of conspiracy to commit genocide, but restricts its detailed arguments to the Trial Chamber's findings on the Ntagerura Indictment.[151]

58. Imanishimwe responds that the fact that the trials of the Accused were joined did not also cause the charges against them to be joined.[152] Bagambiki for his part responds that the Trial Chamber did not recognise in its Decision on Joinder that the charges in any one of the Indictments could be brought against any one of the Accused, nor did it modify any of the references to the factual allegations underpinning the charges in the Indictments.[153] He argues that it would run contrary to the right of the accused to be informed of the charges brought against him for a Trial Chamber to consider factual allegations in an indictment other than his own.[154] Ntagerura responds that the Trial Chamber and the accused should not have to turn to a second indictment to understand the allegations made in the first indictment.[155]

59. The Prosecution replies that its object is not to "confuse the charges against accused A with those against accused B", but to point to the error committed by the Trial Chamber in disregarding the particulars relating to the charges against Accused A when they appear in the indictment against Accused B.[156]

60. The Appeals Chamber notes that in the Indictments, the Prosecution informed the Accused of the factual allegations which underpinned the charges by listing the relevant paragraphs in the Indictments which corresponded to each Count. However, the Prosecution did not, in this way, cross-reference between the Indictments. Therefore, the factual allegations made in each of the Indictments remained inherently linked to the charges in the respective Indictments. The mere fact that the Accused were joined "for the purposes of a joint trial"[157] (as opposed to having their charges joined) did not serve to notify the Accused that the factual allegations underpinning the charges in one Indictment would also underpin the charges in the other Indictment. Therefore, although Ntagerura was mentioned in the Bagambiki/Imanishimwe Indictment, the Appeals Chamber cannot conclude that he was put

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[150] *Ibid.*, para. 173, citing Decision on Joinder para. 30, where the Trial Chamber cited the Separate and Concurring Opinion of Judge Tieya and Judge Nieto-Navia in the *Kanyabashi* case: "permission for joint charging under [Rule 48] does not necessarily require the bringing of a new, substitute indictment in lieu of the existing ones because by adding names to one of the existing indictments which concern the same facts or transactions, the case may become a joint trial of several accused on different charges found in one single indictment, subject to, of course, any request for amendment": *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdictions of Trial Chamber I, 3 June 1999, Separate and Concurring Opinion of Judge Wang Tieya and Judge Nieto-Navia, para. 6.

[151] It argues in this regard that the following paragraphs should have been read together: (i) paragraph 13 of the Ntagerura Indictment with paragraph 3.16 of the Bagambiki/Imanishimwe Indictment; (ii) paragraph 16 of the Ntagerura Indictment with paragraph 3.29 of the Bagambiki/Imanishimwe Indictment; and (iii) paragraphs 17, 18 and 19 of the Ntagerura Indictment with paragraphs 3.16 and 3.23 of the Bagambiki/Imanishimwe Indictment: Prosecution Appeal Brief, paras. 176-178.

[152] Imanishimwe Response Brief, paras. 70, 74-75.

[153] Bagambiki Response Brief, paras. 159, 161.

[154] *Ibid.* Response Brief, para. 160.

[155] Ntagerura Response Brief, para. 115.

[156] Prosecution Brief in Reply, paras. 24, 31.

[157] Decision on Joinder, para. 60 (emphasis added). The Trial Chamber's reference to the Separate and Concurring Opinion of Judge Tieya and Judge Nieto-Navia in the *Kanyabashi* case, referred to by the Prosecution, was made in support of the Trial Chamber's conclusion that "accused persons can be jointly tried, even if they were not jointly charged": Decision on Joinder, para. 30.

on notice that the allegations in that Indictment would underpin the charges in the Indictment against him.

61. The Prosecution further argues that reading the Indictments separately with regard to the factual allegations "negates the rationale for creating the joinder in the first place".[158] This argument cannot prosper. It is not self-evident that distinct indictments should be read together as a whole, in case of a joinder. In joint trials, each accused shall be accorded the same rights as if he were being tried separately.[159] The Prosecution thus remains under an obligation to plead, in each indictment brought, the material facts underpinning the charges against each accused.[160] The Prosecution's argument that the Indictment "became, in law, a single indictment" is dismissed. It was up to the Prosecutor to submit a new, joint and single Indictment against the three Accused.

62. For these reasons, the Appeals Chamber finds that the Prosecution's argument that the Indictments should have been read together as a whole is without merit. Insofar as the Appeals Chamber concludes that the Trial Chamber did not err by refusing to read the Indictments together, it is not necessary to examine the effect that a combined reading of the two Indictments might have had.

63. Turning to the Prosecution's other grounds of appeal, the Appeals Chamber concedes that tt would be logical to now consider whether the Trial Chamber erred in determining that the Indictments were defective. To avoid a double analysis of each contested paragraph – to see whether it was defective and, if it was defective, whether the defect was cured – the Appeals Chamber will first examine whether the Trial Chamber erred in not considering whether the defects identified in the Indictments were cured.[161] Only after this analysis will the Appeals Chamber proceed to examine each Indictment paragraph by paragraph.

3. Curing of defects in the Indictments

(a) Did the Trial Chamber err in not considering whether the defects had been cured?

64. The Trial Chamber concluded that "the operative paragraphs underpinning the charges against Ntagerura, Bagambiki and Imanishimwe, as well as the charges themselves, [were] unacceptably vague". Moreover, the Chamber finds no justifiable reason for the Prosecutor to have pleaded the allegations or charges in such a generic manner.[162] The Trial Chamber took note of the ICTY Appeal Judgement in *Kupre{ki} et al.* and the possibility that, in a limited number of cases, a defective indictment may be cured of its defects.[163] The Trial Chamber went on to note that:

> the supporting materials to the Ntagerura and to the Bagambiki/Imanishimwe Indictments, other pre-trial disclosure, and the Pre-Trial Brief provide additional

[158] Prosecution Brief in Reply, para. 24.
[159] Rule 82(A) of the Rules.
[160] *Cf. Ntakirutimana* Appeal Judgement, para. 470; *Kupre{ki} et al.* Appeal Judgement, para. 88.
[161] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111.
[162] Trial Judgement, para. 64. The Trial Chamber noted that paragraphs 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3, 16, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.12-3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment were defective in one way or the other.
[163] Trial Judgement, para. 65.

> information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case. However, pre-trial submissions and disclosure are not adequate substitutes for a properly pleaded indictment, which is the only accusatory instrument mentioned in the Statute and the Rules. The indictment must plead all material facts. The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused's alleged crimes, in particular, because some of this material is not made available until the eve of trial.[164]

65. The Appeals Chamber recalls that it is well established in the jurisprudence of both this Tribunal and the ICTY that, in a limited number of cases, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[165] In the present case, it is apparent from the Trial Judgement that the Trial Chamber did not consider whether the defects in the Indictments were cured. The Appeals Chamber recalls that, if an indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must determine whether the accused has nevertheless been accorded a fair trial.[166] In view of the Trial Chamber's statement that some of Prosecution's post-indictment submissions "provide[d] additional information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case",[167] the Appeals Chamber considers that the Trial Chamber, in fulfilling its obligation to consider whether or not the trial was fair, should have evaluated whether the defects were cured. The Trial Chamber erred in failing to do so. As a result, where applicable, the Appeals Chamber will consider the Prosecution's argument that the defects in the Indictments were cured.

(b) The "Strong Evidence Passage" in the *Kupre{ki} et al.* Appeal Judgement

66. After having concluded that the Indictments were defective and declining to consider whether the defects were cured, the Trial Chamber held that:

> in *Kupre{ki}* the Appeals Chamber intimated that it "might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused." The Chamber will thus consider the Prosecutor's evidence against Ntagerura, Bagambiki, and Imanishimwe to see if such strong evidence exists.[168]

67. The Appeals Chamber considers that the statement made by the ICTY Appeals Chamber in *Kupre{ki} et al.* that "it might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused" does not permit a Trial Chamber to consider material facts of which the accused was not adequately put on notice. The "strong evidence passage" arose in relation to whether, having upheld the appellants' objections that the indictment was too vague, the appropriate remedy on appeal was to remand the matter for

[164] Ibid., para. 66 (footnotes omitted).
[165] See *supra*, para. 28.
[166] *Kvo~ka et al.*, Appeal Judgement, para. 33.
[167] Trial Judgement, para. 66.
[168] *Ibid.*, para. 68.

retrial.[169] This question does not arise at trial. The Appeals Chamber emphasises that if the indictment is found to be defective at trial, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. No conviction may be pronounced where the accused's right to a fair trial has been violated because of a failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.[170]

4. Reading the paragraphs of the Indictments in isolation from one another and conclusions of the Trial Chamber on the defects affecting certain paragraphs of the Indictments

68. The Appeals Chamber notes that the Prosecution's argument that the Trial Chamber erred in reading the paragraphs of each Indictment in isolation from one another mainly relates to the Trial Chamber's finding that several paragraphs of the Indictments failed to describe the criminal conduct of the Accused that was being alleged.[171] With respect to the Trial Chamber's finding that the dates, venues and circumstances of the alleged events were insufficiently pleaded in the Indictments, the Prosecution argues that its post-indictment submissions cured any defects in the Indictments.[172] In order to simplify the analysis, the Appeal Chamber will examine these two arguments together.

69. The Appeals Chamber notes that despite having found defects in some paragraphs of the Indictments, the Trial Chamber continued to make factual findings on the basis of such paragraphs.[173] Accordingly, the Trial Chamber's conclusions on the validity of the Indictments did not have any impact on its final judgement as regards a certain number of allegations. Rather than having been rejected for reasons relating to the form of the Indictments, these allegations were rejected because the Trial Chamber considered them to be unfounded. Although the Prosecution submits that it is not satisfied with the findings the Trial Chamber made in relation to these paragraphs, it does not develop this point. Given that the arguments raised by the Prosecution under its fourth ground of appeal relating to those paragraphs on which the Trial Chamber made factual findings cannot succeed, the Appeals Chamber will limit its discussion to the consideration of Prosecution arguments relating to the paragraphs on which the Trial Chamber did not make any factual findings. These are paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment and paragraphs 3.12 through 3.15 of the Bagambiki/Imanishimwe Indictment. The Appeals Chamber will also examine paragraph 3.28 of the Bagambiki/Imanishimwe Indictment which was only partly discussed.

(a) Ntagerura Indictment

70. The Appeals Chamber recalls that the Trial Chamber made factual findings in relation to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment, and will, accordingly, examine only the alleged errors with regard to paragraphs 11, 12.1, 13 and 16.

(i) Paragraph 11

[169] *Kupreškić et al.* Appeal Judgement, para. 125.
[170] *Kvočka et al.*, Appeal Judgement, para. 33. See also para. 30.
[171] Prosecution Appeal Brief, paras. 179-181.
[172] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111; Prosecution Notice of Appeal, para. 22; Prosecution Appeal Brief, para. 126.
[173] To wit, paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.16 to 3.31 of the Bagambiki/Imanishimwe Indictment. See Trial Judgement, para. 69.

71. Paragraph 11 of the Ntagerura Indictment reads:

> From 1 January to 31 July 1994 and particularly in February, March and April 1994, **ANDRE NTAGERURA** allowed and/or authorized the use of government vehicles, specifically buses for the transport of militiamen, armed *Interahamwe* militiamen and civilians, including Tutsis, as well as for the transport of weapons and ammunition to and throughout Cyangugu *préfecture*, particularly through Karengera, Bugarama, Nyakabuye and other *communes* as well as in Butare, Ruhengeri and Kibuye *préfectures* and elsewhere.

72. The Trial Chamber found that this paragraph failed to allege any instance when Ntagerura allowed or authorised the use of government vehicles or any circumstance in which they were used. It further held that, because the paragraph did not set out the intended purpose of the transports or Ntagerura's knowledge of such a purpose, it failed to allege the elements of a criminal act. The Prosecution particularly sought to use this paragraph in support of Ntagerura's Article 6(3) superior responsibility as alleged in Count 6.[174] The Trial Chamber found in that respect that paragraph 11, like the Ntagerura Indictment as a whole, failed to identify Ntagerura's subordinates who actually approved the use of the buses and the other material facts necessary to make out an allegation of superior responsibility.[175]

73. The Prosecution submits that the summary of Witness MF's statement included details of Ntagerura's authorisation, on several occasions, for the use of government vehicles for purposes such as the transport of arms, ammunition and *Interahamwe*, as well as details of the vehicles used, such as the ONATRACOM buses, and the persons to whom the authorisation was given.[176]

74. The summary of Witness MF's statement specified one incident when Ntagerura allegedly ordered the use of a government vehicle, namely vehicle A-7058, which he ordered to be given to the sub-prefect of Busengo in March 1994. However, the summary provides no information regarding the criminal purpose for which this vehicle would subsequently be used or Ntagerura's knowledge of such purpose. Accordingly, this summary did not put Ntagerura on notice of the material facts of his alleged responsibility under Article 6(3) of the Statute.[177]

(ii) Paragraphs 12.1, 13 and 16

75. The Prosecution submits that the Trial Chamber erred in its findings on paragraphs 12.1, 13, 14.1, 14.3 and 16 of the Ntagerura Indictment.[178] Although the Trial Chamber made factual findings on paragraphs 14.1 and 14.3, the Appeals Chamber will

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[174] Ntagerura Indictment, Count 6.
[175] Trial Judgement, para. 42.
[176] Prosecution Appeal Brief, para. 133, citing Appendix 4 to Prosecution Pre-Trial Brief, Appendix 4: Summary of Prosecution witness statements, filed on 3 July 2000 ("Appendix 4"), p. 5, No. 17 (Witness MF).
[177] Appendix 4, p. 5, No. 17 (Witness MF): Witness will state that he knew Ntagerura and alleges that Ntagerura used to avail government vehicles to *Interahamwe*, for example, vehicle A-7058 which Ntagerura ordered the witness to give the Sous-Prefect of Busengo in March 1994; that Ntagerura did this on several occasions; the witness also saw Onatracom buses transporting arms, ammunition and *Interahamwe*; that the witness reported these incidents to his chief and Ntagerura but never received any reaction on these reports.
[178] Prosecution Appeal Brief, para. 184.

79. The Appeals Chamber notes that paragraphs 12.1, 13, 14.1, 14.3 and 16 allege a certain connection between Ntagerura, Munyakazi and the *Interahamwe* and indicated that the latter perpetrated criminal acts. However, such a general allegation did not suffice to put Ntagerura on notice of the material facts of his criminal conduct. The Appeals Chamber notes that it is not obvious that those members of the *Interahamwe* who in paragraph 14.3 were alleged to have carried out acts of killing were the same members who in paragraph 12.1 were alleged to have been trained. In fact, it is not even indicated that the training was undertaken in furtherance of such acts. Moreover, there is no indication in paragraph 14.3 of who allegedly gave and/or executed "[the orders to kill all the Tutsis and political opponents]". Further, the allegations that Ntagerura "was often seen in the company of, and publicly expressed his support for Munyakazi and the *Interahamwe*", as alleged in paragraph 14.1; that he "monitor[ed] the activities" of the *Interahamwe* as pleaded in paragraph 14.3; or that he issued MRND orders as stated in paragraph 16, did not sufficiently describe his role, if any, in the distribution of weapons alleged in paragraph 13.

80. Similarly, it was not clear whether the MRND orders that Ntagerura allegedly issued concerned the activities described in paragraphs 12.1, 13, 14.1 or 14.3. In addition, the Appeals Chamber notes that Ntagerura is not mentioned in paragraph 13 at all. An objective reader cannot understand in what respect the storing and distribution of arms in the prefecture of Cyangugu was related to Ntagerura. For the same reasons, Ntagerura's alleged participation in the events alleged in paragraphs 14.1 and 14.3 was not clarified by paragraphs 12.1, 13 or 16. Therefore, the Trial Chamber did not err in finding that paragraphs 12.1, 13, 14.1, 14.3 and 16 failed to sufficiently plead Ntagerura's criminal conduct.

81. The Appeals Chamber notes that the summaries of the statements of Witnesses LAB, MF, LAI, LAP and LAR, which the Prosecution refers to in support of its argument that the defects in paragraphs 12.1, 13, 14.1, 14.3 and 16 were cured,[183] do not cure the vagueness with which Ntagerura's criminal conduct was pleaded in those paragraphs.

82. The summary of Witness LAB's statement alleges that Ntagerura addressed a crowd in the Nyamuhunga Sector in April 1994, but makes no link between his statements on that occasion and any underlying crime with which he is charged.[184] Although the summary of Witness LAB's statement alleges that on 18 May 1994 Ntagerura delivered arms to the Shagasha factory, it did not indicate whether those weapons were used in any crime or in the training that took place at the factory. Moreover, that training was alleged to have taken place between January and April 1994, that is, before 18 May 1994.[185] The allegation in the summary of Witness LAP's statement that Ntagerura arrived on 28 January 1994 in Bigogwe with boots and uniforms which were distributed to the *Interahamwe* also fails to mention any crime in which those supplies were used.[186] The same holds true for the allegation in the summary of Witness LAR's statement that on 28 January 1994 Ntagerura announced to a crowd assembled in Bugarama that he had delivered boots and uniforms.[187] The summary of Witness MF's statement alleges that Ntagerura ordered that government vehicle A-7058 be

[183] *Ibid.*, para. 136, footnote 181.
[184] Appendix 4, p. 11, No. 32 (Witness LAB).
[185] Appendix 4, p. 11, No. 32 (Witness LAB). Furthermore, the Appeals Chamber has already found that the summary of Witness LAB did not indicate whether Ntagerura participated in the training at the Shagasha factory.
[186] Appendix 4, p. 7, No. 22 (Witness LAP).
[187] Appendix 4, p. 9, No. 26 (Witness LAR).

Imanishimwe's participation in the meetings, or regarding any agreement to commit genocide reached by them.

(ii) Paragraph 3.15

97. For a proper analysis, the Appeals Chamber deems it necessary to place paragraph 3.15 in its context, and then examine it in the light of paragraphs 3.16, 3.17 and 3.18. Paragraphs 3.15, 3.16, 3.17 and 3.18 read as follows:

> 3.15 Also, during this same period, André NTAGERURA, Yussuf MUNYANKAZI, and **Emmanuel BAGAMBIKI** publicly expressed anti-Tutsi sentiments.
>
> 3.16 Before and during the events referred to in this indictment, Minister André NTAGERURA, *Préfet* **Emmanuel BAGAMBIKI**, Yussuf MUNYANKAZI, Christophe NYANDWI, all of whom were influential figures in the MRND in Cyangugu, participated, directly or indirectly, in the training and instructing of, and distributing of weapons to, the MRND militiamen, the *Interahamwe*, who later committed massacres of the civilian Tutsi population.
>
> 3.17 During the events referred to in this indictment, **Lieutenant Samuel IMANISHIMWE**, in his capacity as Commander of the Cyangugu Barracks, participated, with *Préfet* **Emmanuel BAGAMBIKI** and other persons, in preparing lists of people to eliminate, mostly Tutsis and some Hutus in the opposition.
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> 3.18 These lists were given to the soldiers and militiamen with orders to arrest and kill the persons whose names were listed. The soldiers and the *Interahamwe* then carried out the orders.

98. The Trial Chamber found that none of these paragraphs pleaded the dates or venues of the alleged activities with sufficient particularity.[213] It further held that paragraph 3.15 failed to specify the nature and approximate content of the alleged statements or their connection to the commission of an underlying crime,[214] and that paragraph 3.16 did not plead Bagambiki's role in the training and weapons distribution nor did it indicate any massacre in which those persons who were trained might have participated.[215] Finally, the Trial Chamber found that paragraphs 3.17 and 3.18 failed to identify any individuals named on the lists as well as Bagambiki's or Imanishimwe's role or knowledge in the issuing or execution of the orders that were alleged to have been given.[216]

99. In the first place, the Prosecution argues that the Trial Chamber's assessment of paragraphs 3.15 to 3.18 and its finding on the lack of particularity are unreasonable due to the underlying charge of conspiracy to commit genocide. In addition, it argues that any defects in paragraphs 3.15 to 3.18 were cured.[217]

100. The Appeals Chamber has found that paragraphs 3.12 and 3.13 failed to plead the material fact that Bagambiki, Imanishimwe and others agreed to commit genocide, and that

[213] Trial Judgement, paras. 52-54.
[214] *Ibid.*, para. 52.
[215] *Ibid.*, para. 53.
[216] *Ibid.*, para. 54.
[217] Prosecution Appeal Brief, paras. 152-155.

paragraph 3.14 was too vague, because it did not indicate the nature of Bagambiki's and Imanishimwe's participation in the meetings. For the purposes of the crime of conspiracy, it is therefore inconsequential that paragraphs 3.15, 3.16, 3.17 and 3.18 provide information on the background and continuing nature of the acts that culminated in the commission of genocide. The Trial Chamber correctly found that the allegations supporting the charge of conspiracy to commit genocide (Count 19) "could not constitute the material elements of the crime of conspiracy".[218]

101. The Prosecution further submits that the summaries of the statements of Witnesses LAI, LAP, LAG, LAR and LAN provided details of Bagambiki's and Imanishimwe's expressions of anti-Tutsi sentiments alleged in paragraph 3.15.[219]

102. The Appeals Chamber notes that the summary of Witness LAI's statement alleged that "Bagambiki also incited the population to kill [T]utsi", but without specifying date, place or how this statement was connected to an underlying crime.[220] The summary of Witness LAP's statement indicated that Bagambiki attended a meeting at Kamarampaka Stadium in 1993 where the population was "incited against the Tutsi", but does not mention whether Bagambiki expressed any sentiments to that effect.[221] The same holds true for the meeting alleged in the summary of Witness LAG's statement.[222] The summary of Witness LAR's statement contained no information that Bagambiki publicly expressed anti-Tutsi sentiments.[223] The summary of Witness LAN's statement alleged that Ntagerura, Bagambiki and others "presided over" a meeting at Bushenge centre on 7 February 1993, during which "the *Interahamwe* sang songs inciting ethnic cleansing which were applauded by Ntagerura, Bagambiki and others".[224] However, no mention was made of any agreement made at this meeting to commit genocide, the material fact found to be lacking in paragraph 3.15.

(iii) Paragraph 3.28

103. Paragraph 3.28 reads:

> 3.28 During the events referred to in this Indictment, *Préfet* **Emmanuel BAGAMBIKI** had the duty of ensuring the protection and safety of the civilian population within his *préfecture*. On several occasions in April 1994, *Préfet* **BAGAMBIKI** failed or refused to assist those whose lives were in danger who asked for his help, particularly in Gatare *commune*, where those Tutsis were massacred.

104. The Trial Chamber found that paragraph 3.28 did not indicate any occasion by date and specific location or any instance where Bagambiki failed or refused to assist those whose lives were in danger.[225]

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[218] Trial Judgement, para. 70.
[219] Prosecution Appeal Brief, para. 152.
[220] Appendix 4, p. 6, No. 21 (Witness LAI).
[221] Appendix 4, p. 7, No. 22 (Witness LAP).
[222] Appendix 4, p. 8, No. 25 (Witness LAG).
[223] See Appendix 4, p. 9, No. 26 (Witness LAR).
[224] Appendix 4, p. 8, No. 24 (Witness LAN).
[225] Trial Judgement, para. 61.

105. The Prosecution submits that the summary of Witness LQ's statement stated that Bagambiki, despite repeated warnings given to him of the impending attack on the refugees at Hanika Parish in April 1994 and his repeated promises to intervene, did nothing, and about 2 000 refugees were killed in the attack. It also argues that the summary of Witness MP's statement indicated that Bagambiki failed to stop the assault by the *Interahamwe* on thousands of refugees at Mbilizi Parish between 12 and 30 April 1994.[226]

106. Although the Trial Chamber made a number of factual findings with respect to the attacks at Gatare Parish alleged in paragraph 3.28,[227] it, however, declined to mention in its Judgement the attack at Hanika Parish testified to by Witness LQ.

107. The summary of Witness LQ's statement states in relevant part that:

> at 0900AM on 11th April, 1994 [I]nterahamwe attackers surrounded the [Hanika] parish; that the witness telephoned Bagambiki seeking his intervention to stave off the attack and that Bagambiki promised to send the burgomaster of Gatare with gendarmes; that the attacks first started with machetes, then with grenades; that around noon the witness called BAGAMBIKI again, who told him to be patient; that meanwhile the assault continued; that the burgomaster arrived at around 4:30PM with only one gendarme and two communal policemen; [...] that about 2000 refugees were killed on that day.[228]

108. The summary does not indicate that Bagambiki, whose assistance was sought by Witness LQ, refused to stave off the attack. Rather, it states that Bagambiki told Witness LQ "to be patient" and that the protection promised by Bagambiki, however sparse, did arrive in the afternoon. Therefore, the Appeals Chamber finds that the summary of Witness LQ's statement did not clearly allege that Bagambiki failed or refused to assist the people under attack at the Hanika Parish on 11 April 1994 and that, as such, it remains unclear whether this summary does in fact support the allegations made in paragraph 3.28 at all.

(iv) The Counts in the Bagambiki/Imanishimwe Indictment

109. The Trial Chamber found that the formulation of the counts in the Bagambiki/Imanishimwe Indictment were "problematic" because they did not clearly identify whether Bagambiki and Imanishimwe were being charged as principals or as accomplices nor did they specify what particular form of complicity was charged.[229] The Prosecution contends that its arguments relating to how the defects in the Bagambiki/Imanishimwe Indictment were cured show the "nature of Bagambiki's and Imanishimwe's involvement in the crimes with which they were charged as well as their relationship to any other perpetrators".[230]

110. The Prosecution does not show how the remark made by the Trial Chamber to the effect that the formulation of the counts in the Bagambiki/Imanishimwe Indictment was "problematic" impacted on the Trial Judgement. In the preceding section, the Appeals Chamber has already found that the Prosecution's challenges to the Trial Chamber's

[226] Prosecution Appeal Brief, para. 165.
[227] Trial Judgement, paras. 528-540.
[228] Appendix 4, p. 3, No. 10 (Witness LQ).
[229] Trial Judgement, para. 63.
[230] Prosecution Appeal Brief, para. 167.

conclusions, in so far as they are said to impact on the Judgement, are unfounded. The Appeals Chamber therefore declines to further consider the Prosecution's argument on this point.

(v) Conclusion on the Bagambiki/Imanishimwe Indictment

111. The Appeals Chamber finds that the Prosecution has failed to show that the Trial Chamber erred in finding that paragraphs 3.12, 3.13, 3.14, 3.15 and 3.28 of the Bagambiki/Imanishimwe Indictment were defective. Similarly, it failed to show that the defects identified therein had been remedied. Consequently, the Prosecution's arguments as to the Bagambiki/Imanishimwe Indictment are also dismissed.

5. Conclusion

112. The Appeals Chamber finds that the Prosecution's arguments concerning the paragraphs of the Indictments on which the Trial Chamber made no factual findings (or its findings on a portion of paragraph 3.28 of the Bagambiki/Imanishimwe Indictment) are unfounded. The Prosecution, indeed, failed to demonstrate that the paragraphs were not defective or that they had been cured of their defects.

113. The Appeals Chamber had earlier found that the Trial Chamber erred in reconsidering its pre-trial decisions on the form of the Indictments after the close of the trial, without giving the parties the opportunity to be heard.[231] The Appeals Chamber also finds that the Trial Chamber erred in failing to consider whether the defects in the Indictments were cured.[232] In view of its findings on the other grounds of appeal, the Appeals Chamber, however, considers that these two errors do not invalidate the Trial Chamber's decisions. Accordingly, the Prosecution's 4th ground of appeal is dismissed in its entirety.

114. The Appeals Chamber wishes to express its concern regarding the Prosecution's approach in the present case. The Appeals Chamber recalls that the indictment is the primary accusatory instrument and must plead the Prosecution case with sufficient detail. Although the Appeals Chamber allows that defects in an indictment may be "remedied" under certain circumstances, it emphasizes that this should be limited to exceptional cases.[233] In the present case, the Appeals Chamber is disturbed by the extent to which the Prosecution seeks to rely on this exception. Even if the Prosecution had succeeded in arguing that the defects in the Indictments were remedied in each individual instance, the Appeals Chamber would still have to consider whether the overall effect of the numerous defects would not have rendered the trial unfair in itself.

[231] See *supra*, paras. 55-56.
[232] See *supra*, para. 65.
[233] *Kupreškić et al.* Appeal Judgement, para. 114; see also *Ntakirutimana* Appeal Judgement, para. 125; *Kvočka et al.* Appeal Judgement, para. 33.

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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

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TRIAL CHAMBER III

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Before Judges: Lloyd G. Williams, QC, Presiding
Yakov Ostrovsky
Pavel Dolenc

Registrar: Adama Dieng

Judgement of: 25 February 2004

2004 FEB 25 P 4:35

THE PROSECUTOR
v.
ANDRÉ NTAGERURA
EMMANUEL BAGAMBIKI
SAMUEL IMANISHIMWE
Case No. ICTR-99-46-T

JUDGEMENT AND SENTENCE

Counsel for the Prosecution:
Richard Karegyesa
Holo Makwaia
Andra Mobberley

Counsel for André Ntagerura:
Benoît Henry
Hamuli Rety

Counsel for Emmanuel Bagambiki:
Vincent Lurquin
Seydou Doumbia

Counsel for Samuel Imanishimwe:
Marie Louise Mbida
Jean-Pierre Fofé

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Gustave K. Hometowu
SIGNATURE: DATE: 25-02-2004

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1. Applicable Principles

29. In accordance with Article 20(4)(a) of the Statute, an accused has a fundamental right "to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her."[32] This provision is based on Article 14(3)(a) of the International Covenant on Civil and Political Rights and is substantially similar to the guarantee in Article 6(3)(a) of the European Convention on Human Rights. While neither this Tribunal nor the International Criminal Tribunal for the Former Yugoslavia has previously defined or made a distinction between the nature and the cause of the charges, the Chamber understands that the *nature of the charge* refers to the precise legal qualification of the offence, and the *cause of the charge* refers to the facts underlying it.[33] Although Article 20(4)(a) of the Statute does not require that the nature and the cause of the charge be communicated to the accused in any particular format, it is clear from the Statute and the Rules that this information should be included in the indictment, which is the only accusatory instrument provided for therein.[34]

30. Accordingly, the Prosecutor has an obligation to plead all material facts underpinning the charges against an accused in the indictment with sufficient detail so that the accused can prepare his defence.[35] In assessing an indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.[36] Moreover, when assessing an indictment at the post-trial phase, the Chamber is primarily concerned with defects in the indictment that prejudice the rights of the accused.[37]

31. The mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set forth in the indictment.[38] The materiality of

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[32] *See also* Article 19(2); *Semanza*, Judgement (TC), para. 42; *Kupreskic*, Judgement (AC), para. 114.

[33] KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 95 (1998); MANFRED NOVAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 255 (1993).

[34] Articles 17(4), 19(2), 20(4); Rule 47. *See also Semanza*, Judgement (TC), para. 42; *Kupreskic*, Judgement (AC), para. 88; *Hadzihasanovic et al*, Case No. IT-01-47-PT, Decision on the Form of the Indictment (TC), 7 December 2001, para. 8.

[35] *Semanza*, Judgement (TC), para. 44; *Krnojelac*, Judgement (AC), paras. 130, 131; *Kupreskic*, Judgement (AC), paras. 88, 92.

[36] *Rutaganda*, Judgement (AC), para. 304.

[37] *See Semanza*, Judgement (TC), para. 43; *Rutaganda*, Judgement (AC), para. 303 ("Before holding that an event charged is immaterial or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him."); *Kupreskic*, Judgement (AC), paras. 115-125 (undertaking prejudice analysis for vagueness allegation raised in post-trial stage).

[38] The Chamber recognises that the Prosecutor may allege more than one form of participation for each crime, but emphasises that it is vague for the Prosecutor to simply refer broadly to Article 6(1) without further particularising the alleged acts of the accused that give rise to each form of participation charged. *Semanza*, Judgement (TC), para. 59. *See also Krnojelac*, Judgement (AC), para. 138 ("Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial."); *Celebici*, Judgement (AC) para. 350.

other facts and the specificity with which the Prosecutor must plead these facts depend on the form of participation alleged in the indictment and the proximity of the accused to the underlying crime.[39]

32. In cases where the Prosecutor alleges that an accused personally "committed" criminal acts within the meaning of Article 6(1), an indictment generally must plead with particularity the identity of the victims, the time and place of the events, and the means by which the acts were committed.[40] The Chamber, however, does not expect the Prosecutor to perform an impossible task and recognises that the nature or scale of the crimes, the fallibility of witnesses' recollections, or witness protection concerns may prevent the Prosecution from fulfilling its legal obligations to provide prompt and detailed notice to the accused.[41] If a precise date cannot be specified, a reasonable range of dates should be provided.[42] If victims cannot be individually identified, then the indictment should refer to their category or position as a group.[43] Where the Prosecution cannot provide greater detail, then the indictment must clearly indicate that it provides the best information available to the Prosecutor.[44]

33. Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.[45] Where superior responsibility

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[39] *Kupreskic*, Judgement (AC), para. 89; *Prosecutor v. Galic*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal (AC), 30 November 2002, para 15.

[40] *Semanza*, Judgement (TC), para. 45; *Kupreskic*, Judgement (AC), para. 89.

[41] *Semanza*, Judgement (TC), paras. 55, 57-58; *Kupreskic*, Judgement (AC), para. 89. Of course, witness protection cannot be used as a pre-text to frustrate the proper preparation of a defence. *See Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 11("The protection of witnesses should not . . . serve to frustrate or hinder an effective defence."); *Prosecutor v. Krnojelac*, Case No. 97-25-PT, Decision on the DEfence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, para. 40 ("It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair. The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.")

[42] *See, e.g., Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 22.

[43] *See, e.g., Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 22; *Prosecutor v. Krnojelac*, Case No.97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, para. 40 paras. 55, 58 ("The prosecution must provide some identification of who died (at least by reference to their category or position as a group), and it is directed to amend the indictment accordingly").

[44] *See, e.g., Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 22; *Prosecutor v. Krnojelac*, ICTY Case No. 97-25-PT. Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 paras. 33-34, 43.

[45] *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 20.

is alleged, the relationship of the accused to his subordinates is most material, as are his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.[46]

34. If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify upon which form of joint criminal enterprise the Prosecutor will rely.[47] In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise.[48] For these reasons, the Chamber will not consider the Prosecutor's arguments, which were advanced for the first time during the presentation of closing arguments, to hold the accused criminally responsible based on this theory.

35. The specificity required to plead the identity of the victims, the time and place of the events, and the means by which the acts were committed is not as high where criminal responsibility is predicated on accomplice liability or superior responsibility.[49] The Chamber emphasises, however, that the accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged subordinates or accomplices.[50] Thus, pleading accomplice or superior responsibility does not obviate the Prosecution's obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible, particularly where the accused was allegedly in close proximity to the events.[51]

36. Although no rule specifies the content of the "count", it is evident from the context of Rule 47 that this term refers to the legal characterisation or qualification of the crime alleged in the concise statement of facts of the crime.[52] This legal

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[46] *Prosecutor v. Mejakic*, ICTY Case No. IT-02-65-PT, Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment (TC), 14 November 2003, p. 3; *Prosecutor v. Deronjic*, Case No. IT-02-61-PT, Decision on Form of the Indictment (TC), 25 October 2002, para. 7.

[47] *Krnojelac*, Judgement (AC), para. 138; *Prosecutor v. Mejakic*, ICTY Case No. IT-02-65-PT, Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment, 14 November 2003, p. 3. *See also Tadic*, Judgement (AC), paras. 185-226 (discussing the forms of joint criminal enterprise).

[48] *See, e.g., Prosecutor v. Stansic*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions (TC), 14 November 2003, p. 5; Prosecutor *v. Mejakic*, Case No. IT-02-65-PT, Decision on Dusko Knezevic's Preliminary Motion on the Form of the Indictment (TC), 4 April 2003.

[49] *Semanza*, Judgement (TC), para. 45; *Prosecutor v. Galic*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal (AC), 30 November 2002, para 15 ("As the proximity of the accsed person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.").

[50] *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC), 28 June 2002.

[51] *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC), 28 June 2002. *See also Brdjanin and Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment (TC), 20 February 2001, paras. 19-20.

[52] This is particularly evident in Rule 47(I) (". . . indictment based on *the acts underlying* the count . . .") (emphasis added).

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor MERON, Presiding** **Judge Florence MUMBA** **Judge Mehmet GÜNEY** **Judge Wolfgang SCHOMBURG** **Judge Inés Mónica WEINBERG DE ROCA**
Registrar:	**Mr. Adama Dieng**
Date:	**13 December 2004**

THE PROSECUTOR

v.

ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA

Cases Nos. ICTR-96-10-A and ICTR-96-17-A

JUDGEMENT

Counsel for the Prosecution

Mr. James Stewart
Ms. Linda Bianchi
Ms. Michelle Jarvis
Mr. Mathias Marcussen

Counsel for the Defence

Mr. David Jacobs
Mr. David Paciocco
Mr. Ramsey Clark

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a high degree of specificity in such matters."[35] Even in cases where a high degree of specificity is "impractical," however, "since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[36]

26. *Kupreškić* also envisioned the possibility in which the Prosecution was unable to plead with specificity because the material facts were not in the Prosecution's possession. As a general matter, "the Prosecution is expected to know its case before it goes to trial" and cannot expect to "mould the case against the accused in the course of the trial depending on how the evidence unfolds."[37] If the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation for trial until then. A trial chamber must be mindful of whether proceeding to trial in such circumstances is fair to the accused. *Kupreškić* indicated that while there are "instances in criminal trials where the evidence turns out differently than expected," such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[38]

27. If an indictment is insufficiently specific, *Kupreškić* stated that such a defect "may, in certain circumstances cause the Appeals Chamber to reverse a conviction."[39] However, *Kupreškić* left open the possibility that a defective indictment could be cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[40] The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeal Judgement put it, whether the trial was "rendered unfair" by the defect.[41] *Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial.[42] In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution's case are

[35] *Id.*
[36] *Id.*, para. 90.
[37] *Id.*, para. 92.
[38] *Id.*
[39] *Id.*, para. 114.
[40] *Id.*
[41] *Id.*, para. 122.
[42] *Id.*, paras. 117-120.

relevant.[43] As has been previously noted, "mere service of witness statements by the FPğrosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[44]

28. In *Kupreškić*, the omitted facts were not clearly stated in the pre-trial brief or in the Prosecution's opening statement;[45] the underlying witness statement was not disclosed until "one to one-and-a-half weeks prior to trial and less than a month prior to Fthe witness'sğ testimony in court";[46] and the omitted fact was indicative of a "radical transformation" of the Prosecution's case from one alleging "wide-ranging criminal conduct ... during a seven-month period" to a targeted prosecution for persecution because of participation "in two individual attacks."[47] Moreover, the Appeals Chamber concluded that "whether the Trial Chamber would take into account Fthe unpleaded factsğ as a possible basis for liability in respect of the persecution count was, until the very end of trial, not settled,"[48] and that this uncertainty "materially affected" the ability of the accused to prepare their defence.[49] These factors eliminated the possibility that the failure to plead material facts in the indictment had not prejudiced the accused in *Kupreškić*; rather, their "right to prepare their defence was seriously infringed" and their trial "rendered unfair."[50]

29. The allegations against Elizaphan and Gérard Ntakirutimana must be assessed in light of these standards. The Trial Chamber acknowledged that "some paragraphs of the Mugonero and Bisesero Indictments are rather generally formulated."[51] The question, then, is whether these general formulations meet the *Kupreškić* test for sufficient pleading of the material facts on which the Trial Chamber based the convictions and, if they do not, whether the Prosecution cured the defects through post-indictment communications.

(i) Did the Mugonero Indictment Fail to Plead Material Facts?

30. The principal allegations in the Mugonero Indictment are as follows:

> 4.7 On or about the morning of 16 April 1994, a convoy, consisting of several vehicles followed by a large number of individuals armed with weapons went to the Mugonero Complex. Individuals in the convoy included, among others, Elizaphan Ntakirutimana, Gerard Ntakirutimana

[43] *Id.*, paras. 119-121.
[44] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.
[45] *Kupreškić et al.* Appeal Judgement, paras. 117-118.
[46] *Id.*, para. 120.
[47] *Id.*, para. 121.
[48] *Id.*, para. 110.
[49] *Id.*, para. 119.
[50] *Id.*, para. 122.
[51] Trial Judgement, para. 43.

> & Charles Sikubwabo, members of the National Gendarmerie, communal police, militia and civilians.
>
> 4.8 The individuals in the convoy, including Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, participated in an attack on the men, women and children in the Mugonero Complex, which continued throughout the day.
>
> 4.9 The attack resulted in hundreds of deaths and a large number of wounded among the men, women and children who had sought refuge at the Complex.
>
> 4.10 During the months that followed the attack on the Complex, Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, searched for an Fsicg attacked Tutsi survivors and others, killing and causing serious bodily or mental harm to them.[52]

31. Under this Indictment, the Prosecution alleged and the Trial Chamber found that Gérard Ntakirutimana "procured ammunition and gendarmes for the attack on the Complex" and "killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994."[53] These findings supported the Trial Chamber's conclusion that Gérard Ntakirutimana had the requisite intent for genocide and, in the case of the killing of Ukobizaba, the conclusion that Gérard Ntakirutimana was "individually criminally responsible" for his death and therefore was guilty of genocide.[54] The killing of Ukobizaba also grounded the conclusion that Gérard Ntakirutimana was guilty of murder as a crime against humanity.[55] Gérard Ntakirutimana was therefore found guilty of genocide at Mugonero because of acts committed by him personally, namely the killing of Ukobizaba and the procurement of ammunition and gendarmes. Similarly, Elizaphan Ntakirutimana was pronounced guilty of genocide because the Trial Chamber found that he "conveyed armed attackers to the Mugonero Complex in his vehicle on the morning of 16 April 1994."[56]

32. Under *Kupreškić*, criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed."[57] The Appeals Chamber must therefore consider whether the material facts underlying the Mugonero convictions were sufficiently pled in the Indictment and, if not, whether that failure was cured by other means.

a. The Allegation That Gérard Ntakirutimana Murdered Charles Ukobizaba

[52] Mugonero Indictment, paras. 4.7-4.10 (emphasis omitted).
[53] Trial Judgement, para. 791.
[54] *Id.*, paras. 793-795.
[55] *Id.*, paras. 806-810.
[56] *Id.*, paras. 788, 790.
[57] *Kupreškić et al.* Appeal Judgement, para. 89.

36. The Pre-Trial Brief, filed 16 July 2001, states: "Dr. Gerard Ntakirutimana personally killed several Tutsi individuals including the hospital accountant, Charles Ukobizaba and one Kajongi."[64] Annex B to the Pre-Trial Brief, which was filed 15 August 2001, summarized the planned testimony of Prosecution witnesses. Annex B gave notice of Witness GG's testimony that "Fdğuring the attack he saw *Dr. Gérard Ntakirutimana* kill Ukobizaba, the hospital accountant, and take the keys of his office,"[65] and of Witness HH's testimony that "Fiğn the course of the attack the witness saw *Dr. Gérard Ntakirutimana* kill the hospital accountant Ukobizaba Charles after confiscating the key to his office."[66]

37. In contrast to the witness statements alone, the Pre-Trial Brief made it unequivocal that the Prosecution intended to prove that Gérard Ntakirutimana personally killed Ukobizaba. Annex B further indicated that the Prosecution planned to rely on the testimony of Witnesses GG and HH in this regard. Thus, the Prosecution had clearly and consistently informed the Defence by 16 July 2001 that it planned to assert that Gérard Ntakirutimana killed Ukobizaba at Mugonero on 16 April 1994. The Prosecution further informed the Defence on 15 August 2001 of the witnesses on whose testimony this charge was based.

38. In order to satisfy *Kupreškić*, however, the disclosure made in the Pre-Trial Brief and Annex B must also be found to be timely, such that the Defence suffered no prejudice from the failure of the Indictment to allege specifically that Gérard Ntakirutimana killed Ukobizaba. The Pre-Trial Brief was filed two months before the opening of trial, and Annex B was filed one month before trial, both pursuant to an oral order of the Trial Chamber on 2 April 2001 that was later reaffirmed in a written decision.[67] The proximity of these filings to trial, however, is not the only consideration. The Mugonero Indictment stated that Gérard Ntakirutimana was responsible for "the killings and causing of serious bodily or mental harm to members of the Tutsi population"[68] and "the murder of civilians."[69] In this context, allegations that Gérard Ntakirutimana personally killed a Tutsi individual, particularly allegations supported by two witnesses, would necessarily be of significant importance.

39. Unlike in *Kupreškić*, where the unpleaded facts represented a "drastic change in the Prosecution case" and were coupled with "ambiguity as to the pertinence" of the underlying

[64] Pre-Trial Brief, para. 15.
[65] Annex B to Pre-Trial Brief, p. 5.
[66] *Id.*, p. 6.
[67] *See* Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure Etc., 16 July 2001, para. 11 (citing T. 2 April 2001, pp. 29-34).
[68] Mugonero Indictment, Count 1A.
[69] *Id.*, Count 3.

evidence, which was only disclosed in the weeks before trial,[70] here the fact of Ukobizaba's killing fit directly into the Prosecution's case as pleaded in the Mugonero Indictment, was clearly supported by two previously-disclosed witness statements, and was made unambiguously known to the Appellants two months before trial.

40. Gérard Ntakirutimana argues that the two witness statements cannot, on their own, remedy the Indictment alone because they were "inconsistent."[71] First of all, Gérard Ntakirutimana does not identify any inconsistencies between the two statements, but only purported inconsistencies between the trial testimony of Witnesses GG and HH,[72] which, though relevant to their credibility at trial, are irrelevant to the question of whether their statements aided in curing an error in the Indictment. More importantly, however, the *Kupreškić* test is not directed to the clarity and consistency of the Prosecution's *evidence* as disclosed to the accused, but rather to the clarity and consistency of the Prosecution's announcement of the *material facts* it intends to prove. Here, the Appellants were informed by the Pre-Trial Brief and Annex B that the Prosecution would argue that Gérard Ntakirutimana killed Ukobizaba and rely on the evidence of Witnesses GG and HH as support. Whether Witnesses GG and HH gave consistent testimony in their statements would affect the Prosecution's ability to prove the charge, but it has no bearing on Gérard Ntakirutimana's notice of that charge against him or his ability to prepare a defence against it.

41. Of course, if the only arguable notice to the Defence regarding the Prosecution's intent to prove a particular material fact is its inclusion in conflicting or ambiguous disclosure, the chamber will be unlikely to find that the accused had "timely, clear, and consistent information detailing the factual basis underpinning the charges against him or her."[73] In this regard, the mere fact of disclosure of witness statements on 10 April 2000 was insufficient to cure the indictment error, because of the contradiction between the statements of Witnesses GG and AA with regard to the method of Ukobizaba's murder. The Pre-Trial Brief and Annex B made plain that the Prosecution planned to rely on Witnesses GG's and HH's testimony, not AA's – a decision that is hardly surprising given the obvious importance of an allegation of direct commission of murder to the Prosecution's case. Thus, while Gérard Ntakirutimana is correct that the witness statements alone were not sufficient to overcome the defect in the Indictment, the explicit mention of Ukobizaba's murder in the Pre-Trial Brief and Annex B's identification of Witnesses GG and HH as the witnesses on which the Prosecution would rely, when combined with the previously-disclosed

[70] *Kupreškić et al.* Appeal Judgement, para. 121.
[71] Appeal Brief (G. Ntakirutimana), para. 10.b.
[72] *See* Reply (G. Ntakirutimana), para. 6 (citing Appeal Brief (G. Ntakirutimana), para. 91).
[73] *Kupreškić et al.* Appeal Judgement, para. 114.

Ntakirutimana was part of a "convoy, consisting of several vehicles followed by a large number of individuals armed with weapons" that went to the Mugonero Complex "Foğn or about the morning of 16 April 1994."[83] The statement in the Pre-Trial Brief that Gérard Ntakirutimana visited the Kibuye camp "Fbğetween 10 and 16 April 1994" is precise enough to enable the preparation of a defence to the charge of procurement, particularly when viewed in combination with Annex B and the statement of Witness OO. Annex B makes clear that the allegation of procurement rests on the testimony of Witness OO, whose statement in turn makes clear that Gérard Ntakirutimana physically obtained arms and personnel at the Kibuye camp on the morning of the day of the attack on the hospital and the church. Based on these three documents, the Appellants were clearly informed that the Prosecution intended to prove that Gérard Ntakirutimana visited the camp between 10 and 16 April and that he obtained arms and gendarmes there on the morning of 16 April.

48. Gérard Ntakirutimana submits that the allegation of procurement was "buried among 83 statements disclosed."[84] This argument would have great force if the allegation were insignificant in the context of the case pleaded in the Indictment and if it were never mentioned except in isolated references in a witness statement. In this situation, however, the assertion in Witness OO's statement that Gérard Ntakirutimana procured weapons and attackers on the morning of the attack on the Mugonero Complex is obviously one of direct relevance to the pleaded allegation that Gérard Ntakirutimana "participated in an attack on the men, women and children in the Mugonero Complex."[85] While the importance of the allegation might not have been enough to cure an Indictment defect on its own given that it was contained in a single witness statement, it must be viewed together with the unambiguous information in the Pre-Trial Brief and Annex B that the Prosecution intended to rely on Witness OO's evidence as proof that Gérard Ntakirutimana was "supplied with arms, ammunition and gendarmes" for the purpose of an attack on Mugonero.[86] As with the killing of Ukobizaba, this information sufficed to cure the vagueness in the Indictment. Gérard Ntakirutimana failed to identify any particular prejudice to his ability to defend against the charge of procurement at trial by the fact that the Prosecution failed to communicate it specifically until the Pre-Trial Brief was filed on 15 July 2001. These circumstances compel the conclusion that the Prosecution sufficiently cured the defect in the Indictment by subsequent clear, consistent, and timely information regarding the nature of its case.

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[82] Trial Judgement, para. 186.
[83] Mugonero Indictment, paras. 4.7-4.8.
[84] Appeal Brief (G. Ntakirutimana), para. 10.a.
[85] Mugonero Indictment, para. 4.8.
[86] Annex B to Pre-Trial Brief, p. 10.

basis for several months."[213] The Prosecution at no point indicated that it planned to treat any two witnesses as corroborating each other on a specific fact. Gérard Ntakirutimana does not point to any such indication by the Prosecution, nor does he show that he was misled into believing that the witnesses who testified to attacks at Mubuga or at Muyira were testifying to anything other than separate attacks. The Prosecution also points out that counsel for the Defence appear to have proceeded on the assumption that each witness testified to an independent occurrence, in that they challenged the credibility of each witness individually. The Appeals Chamber notes that Gérard Ntakirutimana does not indicate how the defence could have been altered had he been informed that the Mubuga and Muyira witnesses were testifying to separate attacks, as the Trial Chamber found. In these circumstances, the Appeals Chamber considers that the Prosecution has shown that any uncertainty regarding whether it was charging single or several attacks at Mubuga and Muyira did not result in any unfairness against the Accused.

p. Concluding Remark

125. It is evident from the foregoing analysis that the Indictments in this case failed to allege a number of the material facts for which the Appellants were tried and convicted. The Appeals Chamber, having accepted many of the Appellant's complaints of a lack of notice resulting in prejudice, stresses to the Prosecution that the practice of failing to allege known material facts in an indictment is unacceptable and that it is only in exceptional cases that such a failure can be remedied, for instance, "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[214] The Appeals Chamber emphasises that, when material facts are unknown at the time of the initial indictment, the Prosecution should make efforts to ascertain these important details through further investigation and seek to amend the indictment at the earliest opportunity.

2. The Burden of Proof

126. Gérard Ntakirutimana contends that the Trial Chamber made various errors in assessing the evidence that amounted to errors of law in the application of the burden of proof.

(a) Assessing the Detention of Witness OO

127. Gérard Ntakirutimana contends that the Trial Chamber erred in refusing to draw an adverse inference against a Prosecution witness, Witness OO, who was being detained in Rwanda at the

[213] Bisesero Indictment, para. 4.13.

UNITED NATIONS
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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

Or. : Eng.

TRIAL CHAMBER I

Before Judges:	Erik Møse, Presiding Navanethem Pillay Andrésia Vaz
Registrar:	Adama Dieng
Judgement of:	21 February 2003

THE PROSECUTOR

V.

ELIZAPHAN and GÉRARD NTAKIRUTIMANA

Cases No. ICTR-96-10 & ICTR-96-17-T

JUDGEMENT AND SENTENCE

Counsel for the Defence:

Ramsey Clark
David Jacobs

Counsel for the Prosecution:

Charles Adeogun-Phillips
Wallace Kapaya
Boi-Tia Stevens

CHAPTER II

FACTUAL FINDINGS

1. Introduction

39. This Chapter contains an assessment of the evidence adduced by the Prosecution in support of its case. The Chamber will consider the specific events alleged in the Mugonero and Bisesero Indictments in approximate chronological order (see II.3 and 4, respectively). In connection with its discussion of the Prosecution evidence the Chamber will take into account the submissions of the Defence concerning the credibility of witnesses who testified against the two Accused. It will also discuss the Accused's alibi in relation to the events in the Indictments.

40. Before doing so, the Chamber will consider whether the Indictments provide the Accused with sufficient information on the nature of the charges against them, as required by the Statute and the Rules of the Tribunal (II.2). This issue was not included in the closing briefs submitted by the parties. The Chamber therefore invited the parties to address the issue during their closing arguments.[44]

41. The remaining components of the Defence case are considered in section II.5 and the following sections. After a brief section on the alibi submissions (II.5) comes the Chamber's assessment of the contention that the allegations against the Accused are totally inconsistent with their previous life and character (II.6). Furthermore, the Defence argues that there was a political campaign against the Accused (II.7).

2. Specificity of the Indictments

2.1 Introduction

42. According to Article 17 (4) of the Statute, an indictment shall contain "a concise statement of the facts and the crime or crimes with which the accused are charged". Similarly, Rule 47 (C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". It follows from case law that the Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 20 (2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the *ad hoc* Tribunals, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the

[44] T. 21 August 2002 p. 98 and T. 22 August 2002 p. 122.

Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence. Reference is made to the ICTY Appeals Chamber's Judgement in *The Prosecutor v. Kupreskic et al.* (henceforth *Kupreskic*), which was delivered on 23 October 2001, more than a month after the commencement of the trial in the present case.[45]

43. In *Kupreskic*, the Appeals Chamber found that the convictions of two of the Accused were based on material facts not specifically pleaded in the Indictment. Furthermore, it concluded that the defects in the Indictment had not been cured, because timely, clear and consistent information had not been provided to the Accused. The trial was therefore considered unfair in relation to these Accused, and their convictions were overturned. In the present case, some paragraphs of the Mugonero and Bisesero Indictments are rather generally formulated. These paragraphs give rise to the question whether the Indictments were pleaded with sufficient particularity.

2.2 Prosecution

44. Counsel for the Prosecution sought to distinguish the facts dealt with in *Kupreskic* from the facts in the present case. He submitted that the main paragraphs of the Bisesero Indictment allege, firstly, that the two Accused went to Bisesero in April, May and June; secondly, that they went there in convoys of attackers; and thirdly, that they participated in attacks in the Bisesero area. According to the Prosecution, the first two allegations are contained in the Indictment and the supporting material.[46] The Accused had the opportunity to challenge the Indictments at the pre-trial stage, as well as after the close of the Prosecution's case (by way of a motion for acquittal under Rule 98*bis*), but failed to do so. Certain specific allegations, such as the killings at Murambi Church alleged by Witness YY, or the killing of Ignace Rugwizangoga at Murambi Hill alleged by Witness GG,[47] came to the Prosecution's attention just prior to the testimony of the witnesses concerned. In the Prosecution's view, the allegation should not have come as a surprise to the Defence because it follows from paragraph 4.14 of the Bisesero Indictment that the Accused allegedly participated in the killing of refugees.[48]

2.3. Defence

45. Counsel for Elizaphan Ntakirutimana argued that paragraph 91 of *Kupreskic* (which states that where it is practicable for the Prosecution to plead with specificity the identity of the victims, etc., it must do so) impacts on both Indictments, but especially on the Bisesero Indictment. No victims of the killings were identified by name and there was no particularization of the time and place of their commission. Consequently, the Indictment did not provide sufficient information.[49]

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[45] *Kupreskic* (AC).
[46] T. 22. August 2002 pp. 134-135.
[47] This is not entirely correct. The killing of a certain "Ignace" appears in Annex B to the Pre-trial Brief.
[48] T. 22 August 2002 pp. 135-137.
[49] Id. p. 50.

from *Kupreskic* that if the Prosecution was, when it drew up the Indictment, in a position to provide details, it should have done so.[58]

55. The Chamber recalls that, according to *Kupreskic*, the degree of specificity required in indictments depends on the nature of the alleged criminal conduct charged to the accused. There may be instances where "the sheer scale of the alleged crimes" makes it "impracticable" to require a high degree of specificity in such matters as the identity of the victims, the time and place of the events, and the means by which the acts were committed. According to the Appeals Chamber, one example is where the accused participated as a member of a military force "in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings".[59]

56. The statement of facts in the Bisesero Indictment contains six paragraphs (4.11-4.16) concerning attacks in the Bisesero area. According to paragraphs 4.13 and 4.15, the Accused participated in convoys and searched for, attacked, and killed Tutsi persons. However, there is no specification of time, date, location, victims, or other material details concerning any single attack.

57. Previous judgements of the Tribunal have established that there were regular attacks in the Bisesero region from April 1994 through June 1994. The victims were men, women and children who were predominantly Tutsi and who had sought refuge in the Bisesero region. Thousands of Tutsi were killed, injured and maimed.[60] Similar findings follow from the evidence in the present case. In a situation with frequent attacks in the same area it may be difficult for the Prosecution to provide precise evidence, several years after the events, about specific attacks on particular dates against named victims in precise locations. Survivors, who during three months were under great distress and subject to numerous attacks, may have difficulties in recalling the time and place of the alleged crimes as well as the identity of the victims. In such situations the sheer scale of the alleged crimes may well make it impracticable to require a high degree of specificity.

58. As stated above, it follows from *Kupreskic* that if the Prosecution is in a position to provide details, it should do so. In the present case, witness statements containing specific allegations were available to the Prosecution well before the trial. Already on 18 March 1997, the Prosecution disclosed 30 witness statements to Gérard Ntakirutimana. On 10 April 2000, following the co-Accused's surrender, it disclosed 34 witness statements to Elizaphan Ntakirutimana. On 29 August 2000, it disclosed to each Accused 67 statements from 41 witnesses. By 20 February 2001, the Prosecution had disclosed at least 83 statements from 51 witnesses.[61] Understandably, the Accused were not in a position to know precisely which statements were being relied upon by the Prosecution. However the central point is that the Prosecution had in its possession a

[58] *Kupreskic* (AC) paras. 89, 90 and 95.
[59] Id. para. 90 (quoted above).
[60] See *Kayishema and Ruzindana* (TC) paras. 405 *et seq.*, and *Musema* (TC) para. 363 with further references.
[61] Annex A to Prosecution's Response to Defence Motions for Dismissal or for Disclosure and Investigations by the Prosecution, 20 March 2001.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Adama Dieng

Date: 24 June 2011

THE PROSECUTOR
v.
Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI
Élie NDAYAMBAJE

Case No. ICTR-98-42-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor
Hassan Bubacar Jallow
Holo Makwaia
Adelaide Whest
Althea Alexis Windsor
Madeleine Schwarz
Cheikh Tidiane Mara
Astou Mbow
Lansana Dumbuya

For the Defence
For **Pauline Nyiramasuhuko**
Nicole Bergevin & Guy Poupart
For **Arsène Shalom Ntahobali**
Normand Marquis & Mylène Dimitri
For **Sylvain Nsabimana**
Josette Kadji & Pierre Tientcheu Weledji
For **Alphonse Nteziryayo**
Titinga Frederick Pacere &
Gershom Otachi Bw'Omanwa
For **Joseph Kanyabashi**
Michel Marchand & Alexandra Marcil
For **Élie Ndayambaje**
Pierre Boulé & Claver Sindayigaya

CHAPTER IV: LEGAL FINDINGS

4.1 Criminal Responsibility

4.1.1 Article 6 (1) of the Statute

5590. Article 6 (1) of the Statute provides for individual criminal responsibility for anyone who planned, instigated, ordered, committed, or aided and abetted a crime falling within the Tribunal's jurisdiction.

5591. "Planning" requires that one or more persons design the criminal conduct constituting a statutory crime that is later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The *mens rea* entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[14534]

5592. "Instigating" implies prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime. The *mens rea* is the intent to instigate another person to commit a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[14535]

5593. A person in a position of authority may incur responsibility for "ordering" another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order. There is no requirement of a formal superior-subordinate relationship between the orderer and the perpetrator; it is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime following the accused's order.[14536]

5594. "Committing" covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission.[14537] Physical perpetration can include physical killing, as well as other acts that constitute direct participation in the *actus reus* of the crime. "The question is

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[14534] *Dragomir Milošević*, Judgement (AC), para. 268; *Nahimana et al.*, Judgement (AC), para. 479.
[14535] *Karera*, Judgement (AC), para. 317; *Nahimana et al.*, Judgement (AC), para. 480.
[14536] *Renzaho*, Judgement (AC), paras. 315, 480; *Kalimanzira*, Judgement (AC), para. 213; *Boškoski & Tarčulovski*, Judgement (AC), para. 164; *Nahimana et al.*, Judgement (AC), para. 481; *Semanza*, Judgement (AC), paras. 360-361, 363.
[14537] *Nahimana et al.*, Judgement (AC), para. 478 (which also states commission includes participation in a joint criminal enterprise). As the Prosecution has not charged the Accused with any such alleged participation, the Chamber will not discuss joint criminal enterprise here.

to the BPO. The Tutsi refugees who left the BPO by bus on day one were attacked by *Interahamwe* at Nyange and all but a handful of those refugees were killed (3.6.40.4).

5933. Having regard to the organised nature of the attack and the *Interahamwe's* words, namely that they were tired of killing, the Chamber finds that the assailants intentionally killed members of the Tutsi ethnic group at Nyange. Further, in view of the large number of Tutsi victims at Nyange, the ongoing attacks against Tutsis at the BPO, in addition to the extensive evidence of the targeting of members of this group in Butare *préfecture* since the swearing-in ceremony of *Préfet* Nsabimana on 19 April 1994, the Chamber is satisfied that the assailants possessed the requisite intent to destroy, in whole or in substantial part, the Tutsi group.

Nsabimana

5934. The Chamber found Nsabimana ordered the transfer of the refugees from the BPO to Nyange (3.6.40.4.7). Notwithstanding the foregoing findings, the Chamber lacks sufficient reliable evidence to determine that Nsabimana gave orders to, or otherwise directed *Interahamwe* at Nyange or anyone else, that the refugees on board the buses should be killed.

5935. As such, the Chamber does not find Nsabimana responsible pursuant to Article 6 (1) for ordering, instigating, aiding and abetting, or otherwise participating in the killing of Tutsi refugees at Nyange. As the Prosecution did not prove beyond a reasonable doubt the existence of a superior-subordinate relationship between Nsabimana and *Interahamwe*, the Chamber acquits Nsabimana of responsibility under Article 6 (3) on the basis of the current allegation for the acts committed by *Interahamwe* at Nyange. Accordingly, the Chamber finds Nsabimana not guilty of genocide on the basis of this allegation.

Kanyabashi

5936. As noted, Kanyabashi provided Nsabimana with two *commune* policemen to help with the transfer but was not present during the boarding of the buses. The *commune* policemen beat the refugees, forced them to board the buses, and escorted the refugees to Nyange where they were killed (3.6.40.4.8). However, the Prosecution has failed to adduce sufficient evidence for the Chamber to conclude beyond a reasonable doubt that Kanyabashi knew the purpose of the transfer, or that he was aware the refugees on board the buses would be killed at Nyange.

5937. As such, the Chamber does not find Kanyabashi responsible pursuant to Article 6 (1) for aiding and abetting, or otherwise participating in the killing of Tutsi refugees at Nyange. The Chamber will not make any finding as to Kanyabashi's superior responsibility for the crimes of policemen, or other assailants, at Nyange pursuant to Article 6 (3) of the Statute since such charge was neither adequately pled in the Kanyabashi Indictment, nor subsequently cured (3.6.40.2). Accordingly, the Chamber acquits Kanyabashi of genocide on the basis of this allegation.

4.2.2.3.17 Distribution of Condoms, Early June 1994

5938. The Chamber has found beyond a reasonable doubt that Nyiramasuhuko came to Cyarwa-Sumo *secteur*, Ngoma *commune*, in the beginning of June 1994 and distributed

Statute. Accordingly, the Chamber finds that the Prosecution has not proven beyond a reasonable doubt that this incident qualifies as persecution as a crime against humanity, or that Ntahobali or Nteziryayo are responsible for it.

4.3.6.4 Conclusion

Nyiramasuhuko

6120. The Chamber finds Nyiramasuhuko guilty of ordering persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

Ntahobali

6121. The Chamber finds Ntahobali guilty of committing, ordering, and aiding and abetting persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

Nsabimana

6122. For failing to discharge his duty, the Chamber finds Nsabimana guilty of aiding and abetting persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

Nteziryayo

6123. Because the Prosecution has not proven that Nteziryayo is criminally responsible for persecution as a crime against humanity, the Chamber acquits him of this charge.

Kanyabashi

6124. The Chamber finds Kanyabashi guilty of persecution as a crime against humanity, pursuant to Article 6 (3) of the Statute for superior responsibility.

Ndayambaje

6125. The Chamber finds Ndayambaje guilty of instigating and aiding and abetting persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

4.3.7 Other Inhumane Acts

4.3.7.1 Introduction

6126. The Accused are charged with other inhumane acts as a crime against humanity under Article 3 (i) of the Statute. This charge comprises Count 9 of the Nyiramasuhuko and Ntahobali Indictment, and Count 8 of the Nsabimana and Nteziryayo, Kanyabashi, and Ndayambaje Indictments.

4.3.7.2 Law

6127. The crime of other inhumane acts was deliberately designed as a residual category for sufficiently serious acts which are not otherwise enumerated in Article 3 of the Statute. For an act or an omission to be "inhumane" under this Article, the victim must have suffered serious

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TRIAL CHAMBER III

Before: Judge Solomy Balungi Bossa, Presiding
Judge Bakhtiyar Tuzmukhamedov
Judge Mparany Rajohnson

Registrar: Adama Dieng

Date: 31 May 2012

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor
Hassan Bubacar Jallow
Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja
Alison McFarlane

Defence Counsel
Vincent Courcelle-Labrousse
Philippe Larochelle

CHAPTER IV: LEGAL FINDINGS

1690. Having completed its consideration and analysis of the factual allegations brought by the Prosecution against Nzabonimana, the Chamber will proceed to assess Nzabonimana's legal culpability.

1691. The Indictment alleges that Nzabonimana is criminally responsible, pursuant to Article 6(1) of the Statute, for the crimes of Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Commit Genocide, Extermination as a Crime Against Humanity and Murder as a Crime Against Humanity.

4.1 Article 6(1) of the Statute

1692. Article 6(1) of the Statute provides for individual criminal responsibility for anyone who planned, instigated, ordered, committed, or aided and abetted a crime falling within the Tribunal's jurisdiction.

1693. "Planning" requires that one or more persons design the criminal conduct constituting a statutory crime that is later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The *mens rea* entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[2146]

1694. "Instigating" implies prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime. The *mens rea* is the intent to instigate another person to commit a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[2147]

1695. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. A person in a position of authority may incur responsibility for ordering if the order has a direct and substantial effect on the commission of the illegal act. No formal superior-subordinate relationship between the accused and the perpetrator is required. The authority envisaged by ordering under Article 6(1) of the Statute may be informal or of a purely temporary nature. It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime. Whether such authority exists is a question of fact.[2148]

1696. "Committing" consists of the physical perpetration of a crime with criminal intent or a culpable omission.[2149] Physical perpetration may include physical killing or other acts which may constitute direct participation in the *actus reus* of the crime.[2150] The question is whether an

[2146] *Dragomir Milošević*, Judgement (AC), para. 268; *Nahimana et al.*, Judgement (AC), para. 479.
[2147] *Karera*, Judgement (AC), para. 317; *Nahimana et al.*, Judgement (AC), para. 480.
[2148] *Setako*, Judgement (AC), para. 240.
[2149] *Munyakazi*, Judgement (AC), para. 135; *Nahimana et al.*, Judgement (AC), para. 478.
[2150] *Munyakazi*, Judgement (AC), para. 135.

ICTR-97-31-A
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NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Judgement of: **1 April 2011**

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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SIGNATURE:
DATE: 01/04/11

Tharcisse RENZAHO

v.

THE PROSECUTOR

Case No. ICTR-97-31-A

JUDGEMENT

Counsel for the Appellant

Mr. François Cantier
Mr. Barnabé Nekuie

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. James Arguin
Mr. Alphonse Van
Mr. Abdoulaye Seye

ICTR Appeals Chamber
Date: 01 April 2011
Action:
Copied To: Concerned Judges, Parties, Judicial Archives

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315. The Appeals Chamber recalls that a person in a position of authority may incur responsibility for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[687] Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order.[688] A person who orders an act with such awareness has the requisite *mens rea* for establishing liability under Article 6(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[689] No formal superior-subordinate relationship between the accused and the perpetrator is required.[690]

316. The Appeals Chamber recalls that the Trial Chamber found that at the 10 April Meeting, Renzaho ordered local officials to establish roadblocks in Kigali.[691] It further found that, at the 16 April Meeting, Renzaho facilitated the acquisition of weapons by local officials for distribution to the civilian population.[692] Based on Renzaho's orders to establish roadblocks, his sanctioning the conduct at them, and his continued material support for the killings through the distribution of weapons, the Trial Chamber found Renzaho guilty of aiding and abetting genocide.[693]

317. The Trial Chamber noted that there was no explicit evidence that Renzaho ordered the killing of Tutsis at roadblocks.[694] Nonetheless, it found, based on circumstantial evidence, that Renzaho "must have equally" ordered the killings at roadblocks.[695] On this basis, the Trial Chamber found that, in addition to aiding and abetting, Renzaho was "also liable under Article 6(1) of the Statute for ordering the killings"[696] and convicted him accordingly.

318. Renzaho does not specify whether he contends that, by law, no conviction could be entered against him for ordering the killing of Tutsis unless based on direct evidence or whether he challenges the Trial Chamber's findings themselves. To the extent that Renzaho challenges the Trial Chamber's reliance on circumstantial evidence for a conviction, the Appeals Chamber recalls

[687] *Kamuhanda* Appeal Judgement, paras. 75, 76.
[688] *Nahimana et al.* Appeal Judgement, para. 481, and citations therein.
[689] *Blaškić* Appeal Judgement, para. 42.
[690] *Nahimana et al.* Appeal Judgement, fn. 1162; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[691] Trial Judgement, para. 763.
[692] Trial Judgement, para. 764.
[693] Trial Judgement, para. 766.
[694] Trial Judgement, para. 764.
[695] Trial Judgement, para. 764.
[696] Trial Judgement, para. 766.

that ordering, as a mode of responsibility, can be inferred from circumstantial evidence, so long as it is the only reasonable inference.[697] The Trial Chamber was fully aware of this standard.[698]

319. The Appeals Chamber considers, however, that in finding that Renzaho gave a distinct order to kill Tutsis at roadblocks, the Trial Chamber failed to explain how this was the only reasonable inference that could be drawn from the evidence. The Trial Chamber enumerated the factors that it took into account: Renzaho's "authority, his actions in support of roadblocks, their role in the 'defence' of the city, their widespread and continuous operation, as well as his order to distribute weapons".[699] However, no explanation is provided to show how the combination of these factors necessarily leads to the conclusion that Renzaho ordered killings. Even if all of these factors consistently show that Renzaho's actions were aimed at the killing of Tutsis at roadblocks or that he was aware of the risk that Tutsis would be killed at roadblocks, there is an insufficient basis to make the factual finding that Renzaho "ordered" such killings. Judge Güney and Judge Pocar dissent on this point.

320. The Appeals Chamber further notes that the conclusion that Renzaho gave an order to kill at roadblocks is, standing alone, an insufficient basis to find that Renzaho is criminally responsible under Article 6(1) of the Statute for ordering any such killings. In the present case, the Trial Chamber made no findings concerning when or where Renzaho gave the order,[700] to whom or to what category of perpetrators he gave the order,[701] and whether Renzaho was in a position of authority *vis-à-vis* the recipient.[702] The Appeals Chamber recalls that a Trial Chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[703] Taken together, the paucity of findings in relation to the conclusion that Renzaho ordered killings at roadblocks convinces the Appeals Chamber, Judge Pocar dissenting, that the Trial Chamber erred in failing to provide a reasoned opinion.

321. Accordingly, the Appeals Chamber, Judge Güney and Judge Pocar dissenting, quashes Renzaho's conviction for genocide for ordering killings at roadblocks.

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[697] *See D. Milošević* Appeal Judgement, para. 265 ("the *actus reus* and the *mens rea* of ordering can be established through inferences from circumstantial evidence, provided that those inferences are the only reasonable ones"). *See also Kamuhanda* Appeal Judgement, para. 76; *Galić* Appeal Judgement, para. 178.
[698] *See* Trial Judgement, para. 764, fn. 855, *referring to Galić* Appeal Judgement, paras. 177, 178, 389.
[699] Trial Judgement, para. 764.
[700] *Cf. D. Milošević* Appeal Judgement, para. 267.
[701] *Cf. Boškoski and Tarčulovski* Appeal Judgement, para. 75.
[702] *See Kamuhanda* Appeal Judgement, para. 75.
[703] *Kajelijeli* Appeal Judgement, para. 60; *Kordić and Čerkez* Appeal Judgement, para. 383.

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Original: FRENCH

Before: Judge Theodor Meron, presiding
Judge Fausto Pocar
Judge Claude Jorda
Judge Mohamed Shahabuddeen
Judge Mehmet Güney

Registrar: Adama Dieng

Judgement of: 26 May 2003

GEORGES ANDERSON NDERUBUMWE RUTAGANDA

v.

THE PROSECUTOR

Case No. ICTR-96-3-A

JUDGEMENT

Office of the Prosecutor:

Norman Farrell
Mathias Marcussen
Norul Rashid
Helen Brady

Counsel for the Appellant:

David Jacobs
David Paciocco

HAG(A)03-0004 (E)

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> Chamber does not consider these variances to be material or to have prejudiced the Accused. The Accused had ample opportunity to cross-examine the witnesses. In reviewing the allegation set forth in this paragraph of the Indictment, the Chamber finds that the date is not of the essence. The essence of the allegation is that the Accused distributed weapons in this general time period.[480] (Emphasis added)

301. An Indictment is aimed at providing the accused with "a description of the charges against him with sufficient particularity to enable him to mount his defence."[481] Accordingly, the indictment must be sufficiently specific, meaning that it must reasonably inform the accused of the material charges, and their criminal characterisation. The materiality of an alleged fact depends, above all, on the nature of the alleged criminal conduct charged to the accused.[482] Before the ICTY, these principles derive from Articles 17(4), 20(2), 20(4)(a) and (b) of the Statute, and Rule 47(C) of the Rules.

302. Although, *a priori*, the Prosecution is required to prove the facts alleged in the Indictment, the Appeals Chamber holds the view that the Indictment cannot have the degree of specificity of the evidence underpinning it. The Appeals Chamber therefore considers that, in general, minor differences between the indictment and the evidence presented at trial are not such as to prevent the Trial Chamber from considering the indictment in the light of the evidence presented at trial. Moreover, the Appeals Chamber notes that in *Kunarac,* the ICTY Appeals Chamber held that "minor discrepancies between the dates in the Trial Judgement and those in the Indictment [...] go to prove [...] that the events charged in the Indictment did not occur."[483]

303. Such doctrines must, however, be assessed in the light of paragraphs 20(2), (4)(a) and (b) of the Statute, and take into account the specific circumstances of each case. Indeed, the Appeals Chamber is of the opinion that the right of the accused to be informed of the nature of the charge against him and the right to have adequate time for the preparation of his defence imply that an accused must be able to identify the criminal acts and conduct alleged in the indictment in all circumstances. Before holding that an event charged is immaterial[484] or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him. Depending on the specific circumstances of each case, the question to be to determined is whether an accused was reasonably able to identify the crime and criminal conduct alleged in each of the paragraphs of the Indictment.[485]

304. In the present case, the Appeals Chamber finds that paragraph 10 of the Indictment is a sufficiently concise description of the criminal conduct with which the accused was charged, pursuant to Article 17(4) of the Statute and Rule 47(C) of the Rules. Though paragraph 10 of the Indictment alleged that the Appellant had distributed weapons "on or about 6 April 1994", the Appeals Chamber notes that this paragraph cannot be read in isolation from the rest of the document. Indeed, this paragraph must be read in the context of the other paragraphs of the Indictment relating to genocide and extermination as crime against humanity. Moreover, the Appeals Chamber notes that the description of the events charged in paragraph 10 of the Indictment does not show that the Prosecution necessarily envisaged only a single act of weapons distribution. On the contrary, the Prosecution evidence presented at trial shows that the

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[480] Trial Judgement, para. 201 (Footnotes omitted).
[481] *Kupreskic* Appeal Judgement, para. 95; see also para. 88, and the *Furundzija* Appeal Judgement, para. 61.
[482] *Kupreskic* Appeal Judgement, para. 89.
[483] *Kunarac* Appeal Judgement, para. 217.
[484] Non-material facts are, by nature, superfluous; in other words, it is not, in principle, necessary to prove them in order to establish the culpability of an accused for a given crime.
[485] Moreover, it goes without saying that where an accused considers that the evidence at trial falls outside the scope of the indictment, he may raise an objection as to lack of fair notice and/or seek appropriate remedy from the Trial Chamber, either by way of an adjournment of the proceedings or by excluding the challenged evidence. (*Furundzija* Appeal Judgement, para. 61).

UNITED
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Tribunal Pénal International pour le Rwanda

International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr Adama Dieng**

Judgement of: **20 May 2005**

LAURENT SEMANZA

v.

THE PROSECUTOR

Case No. ICTR-97-20-A

JUDGEMENT

The Office of the Prosecutor:

Mr James Stewart
Ms Amanda Reichman
Mr Neville Weston

Counsel for the Appellant

Mr Charles Achaleke Taku

Mabare mosque, and that in addition to his personal participation in the killings, he "led the attack on the refugees at Musha church"[761] and "directed the attacks on the refugees" at Mwulire hill and at Mabare mosque.[762] The Indictment adds that the Appellant had "*de facto* and/or *de jure* authority and control over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces (FAR), communal police and other government agents."[763] The contents of the Indictment thus put the Appellant on notice that the case against the Appellant included criminal responsibility for ordering massacres.

359. The Appeals Chamber now turns to the Prosecution's argument that the Trial Chamber committed a legal error by making the Appellant's liability for ordering dependent upon proof of a superior-subordinate relationship.

360. In its Judgement, the Trial Chamber considered the correct definition for ordering under Article 6(1) of the Statute to be as follows:

> "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime. Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it.[764]

361. Thus, in its definition, the Trial Chamber did not require proof of a formal superior-subordinate relationship for the Appellant to be found responsible for ordering. All that it required was the implied existence of a superior-subordinate relationship. The Trial Chamber's approach in this case is consistent with recent jurisprudence of the Appeals Chamber. As recently clarified by the ICTY Appeals Chamber in *Kordi} and Cerkez*, the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required.[765] It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[766] The Trial Chamber thus committed no legal error in its enunciation of the elements of ordering.

362. Bearing in mind that the Trial Chamber correctly defined the elements of ordering, the Appeals Chamber does not consider that the Trial Chamber thereafter required the Prosecution to furnish proof of a formal superior-subordinate relationship for the Appellant to be convicted of

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[761] *Ibid.*, para. 3.11.
[762] *Ibid.*, paras 3.12 and 3.13.
[763] *Ibid.*, para. 3.16.
[764] Trial Judgement, para. 382.
[765] *Kordi} and Cerkez* Appeal Judgement, para. 28.

ordering. That being said, in the view of the Appeals Chamber, the evidence before the Trial Chamber in relation to Musha church does not support the Trial Chamber's finding that the Appellant did not possess any form of authority over the attackers.

363. It should be recalled that authority creating the kind of superior-subordinate relationship envisaged under Article 6(1) of the Statute for ordering may be informal or of a purely temporary nature. Whether such authority exists is a question of fact. In the present case, the evidence is that the Appellant directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees at Musha church. According to the Trial Chamber, the refugees "were then executed on the directions" of the Appellant.[767] On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.

364. Consequently, the Appeals Chamber rejects the Prosecution submission that the Trial Chamber committed a legal error by making the legal qualification of ordering under Article 6(1) of the Statute dependent upon proof of a formal superior-subordinate relationship. The Trial Chamber presented the correct definition for ordering under Article 6(1) of the Statute. However, the Appeals Chamber finds that the Trial Chamber erred in its application of this correct legal standard to the facts. It is clear from the evidence that the Appellant had the necessary authority to render him liable for ordering the attacks and killings at Musha church. The Appeals Chamber, Judge Pocar dissenting, therefore enters a conviction for ordering genocide and for ordering extermination in relation to the massacre at Musha church.

B. War Crimes (Ground 4)

365. The Prosecution's fourth ground of appeal concerns the Trial Chamber's acquittal of the Appellant for serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II under Article 4(a) of the Statute (Counts 7 and 13 of the Indictment). Although the Trial Chamber found that a number of the acts of the Appellant constituted serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute), the Trial Chamber declined to enter convictions for these acts due to the application of the law on cumulative convictions. The Prosecution argues that the Trial Chamber's failure to do so is against

[766] *Ibid.*
[767] Trial Judgement, paras 178, 196.

382. It adds that, by trying to determine the Appellant's sentence through a comparative analysis of the range of sentences imposed by the Tribunal, the Trial Chamber gave insufficient weight to the Appellant's conduct and placed too much importance on labeling as a principal or indirect perpetrator. According to the Prosecution, to attempt to ensure that each sentence is comparative or relative to those received by other convicted persons may result in an inappropriate sentence.

383. The Prosecution argues that it is clear from the Tribunal's jurisprudence that in cases of genocide, where the mitigating circumstances are outweighed by the aggravating circumstances, the sentence generally imposed is life imprisonment. Finally, the Prosecution notes that there is nothing in the Tribunal's jurisprudence to suggest a lesser sentence is to be imposed on those who are convicted of complicity in genocide alone, rather than genocide itself.[797]

384. The Appeals Chamber notes that many of the arguments of the Prosecution relate to the appropriate sentence to be imposed upon an accused convicted for genocide, presumably as a principal perpetrator, rather than an accomplice or aider and abettor. As explained above, the Appeals Chamber has concluded that the Trial Chamber erred in its application of the correct legal standard to the facts of this case, and that the Appellant had the necessary authority to render him liable for ordering the attacks and killings at Musha church.[798] The pertinent question is whether this error affects the sentence.

385. In the main, the Trial Chamber's approach to determining the appropriate sentence was conscientious. Its approach was premised on the need to individualise the sentence in light of the particular circumstances of the case. It indicated that it should "go beyond the abstract gravity of the crime to take into account the particular circumstances of the case, as well as the form of and degree of the participation of the accused."[799] The Trial Chamber rejected the Prosecution's request that a life sentence be imposed.[800]

386. The Trial Chamber noted that the crimes of the Appellant were of the most serious gravity, and that the Appellant, through his participation in the crimes, contributed to the harming and killing of many civilian Tutsi.[801] In the view of the Appeals Chamber, by listing the various offences for which he was found guilty, although the Trial Chamber did not make express reference to his genocidal intent and substantial assistance, the Trial Chamber implicitly took these into account when it considered sentencing.

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[797] Prosecution Appeal Brief, paras 6.14-6.41.
[798] *See supra* para. 364.
[799] Trial Judgement, para. 556.

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15-5-2003
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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

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TRIAL CHAMBER III

Original: English

Before Judges: Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

Registrar: Adama Dieng

Judgement of: 15 May 2003

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ICTR

THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

JUDGEMENT AND SENTENCE

Counsel for the Prosecution:

Chile Eboe-Osuji

Counsel for the Defence:

Charles Acheleke Taku
Sadikou Ayo Alao

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David Scheffer as well as other evidence, the Appeals Chamber's holding is not based solely on this peripheral discussion. The Chamber therefore holds that the attempt of the Defence to reargue this settled issue based solely on the peripheral matter of the validity of Judge Mballe's attestation is without merit.

B. The Nullity of the Indictment Due to Vagueness and Cumulative Charges

41. The Defence raised a number of challenges to the Indictment asserting that it was vague and thus prejudiced the Accused's ability to organize his defence.[24]

42. As the primary accusatory instrument, an indictment must contain a concise statement of the facts detailing the crime or crimes with which an accused is charged.[25] The accused also has a right to be "promptly" informed "in detail" of the nature of the charges against him.[26] The Chamber emphasises that allegations of vagueness should normally be dealt with in the pre-trial stage.[27] The Defence has not offered any explanation for its delay in raising many of its specific challenges to the Indictment until its Closing Brief. Nonetheless, the Chamber finds that its duty to ensure the integrity of the proceedings and safeguard the rights of the Accused warrants full consideration of the arguments of the Defence.[28]

43. The Chamber emphasises that at this post-trial phase it is concerned only with defects in the Indictment that actually prejudiced the rights of the Accused.[29] The Chamber notes that the Defence failed to articulate any particular instance of prejudice.

44. The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence.[30] The indictment must state the material facts underpinning the charges, but

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[23] *Semanza,* Decision, AC, 31 May 2000, para. 100.
[24] Defence Closing Brief pp. 16-19.
[25] Article 17(4); Rule 47(C).
[26] Articles 19(2), 20(4)(a).
[27] *Kupreskic,* Judgement, AC, para. 79. *See also* Rule 72(F).
[28] *Kupreskic,* Judgement, AC, para. 79. *See also Kayishema and Ruzindana,* Judgement, AC, paras. 95, 97; *Ntakirutimana,* Judgement, TC, para. 52.
[29] *Kupreskic,* Judgement, AC, paras. 115-125 (undertaking prejudice analysis for vagueness allegations raised in the post-trial phase).
[30] *Kupreskic,* Judgement, AC, para. 88.

need not elaborate on the evidence by which such material facts are to be proved.[31] The Chamber assesses the materiality of a particular fact in the context of the alleged criminal conduct with which the accused is charged.[32]

45. In cases where the Prosecutor alleges that an accused personally committed the criminal acts, an indictment generally must plead with particularity the identity of the victims, the time and place of the events, and the means by which the acts were committed.[33] The specificity required to plead these kinds of facts is not necessarily as high where criminal responsibility is predicated on accomplice liability or superior responsibility.[34] The Chamber is also mindful that even when personal participation is alleged, situations may exist where the nature or scale of the alleged crimes makes it impracticable to require a high degree of specificity in the identity of victims or the dates of commission.[35]

1. Failure to Specify Precise Dates of Criminal Acts

46. The Defence argued that the Indictment failed to specify the dates of the alleged acts by using language such as: (i) "on or about" a particular date in paragraphs 3.10, 3.13, and 3.18; (ii) "between" two specific dates in paragraphs 3.7, 3.11, 3.12, 3.15, 3.16, and 3.17; (iii) "as of the beginning of 1994" in paragraph 3.8; and (iv) "as early as 1991" in paragraph 3.9.[36]

47. The Prosecutor's use of "on or about" a particular date in paragraphs 3.10, 3.11, 3.12, 3.13, 3.18, and 3.19 did not prejudice the Accused in this case because the underlying events actually occurred on the particular dates set out in each of these paragraphs.

48. In paragraphs 3.11 and 3.12, the Chamber finds that "between" appropriately refers to two relatively narrow five to thirteen day ranges when the Accused allegedly

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[31] *Kupreskic,* Judgement, AC, para. 88.
[32] *Kupreskic,* Judgement, AC, para. 89.
[33] *Kupreskic,* Judgement, AC, para. 89.
[34] *See Brdjanin and Talic,* Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment, TC, 20 February 2001, paras. 18-20.
[35] *Kupreskic,* Judgement, AC, para. 89.
[36] Defence Closing Brief p. 16. Though the Defence complained about the use of "on or about" only in paragraphs 3.10, 3.13, and 3.18, the Chamber notes that this phrase is also in paragraph 3.11, 3.12, and 3.19.

are punishable only for the crime of genocide pursuant to Article 2(3)(b), (c), and (d).[627]

379. To satisfy Article 6(1), an individual's participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime.[628]

a. Forms of Participation

(i) Planning

380. "Planning" envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime.[629] The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.[630]

(ii) Instigating

381. "Instigating" refers to urging, encouraging, or prompting another person to commit a crime.[631] Instigation need not be direct and public.[632] Proof is required of a causal connection between the instigation and the commission of the crime.[633]

(iii) Ordering

382. "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime.[634] Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-

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[627] *Musema*, Judgement, TC, para. 115; *Rutaganda*, Judgement, TC, para. 34; *Akayesu*, Judgement, TC, para. 473.
[628] *Kayishema and Ruzindana*, Judgement, AC, paras. 186, 198; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 30, 33; *Musema*, Judgement, TC, para. 126; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, paras. 199, 207; *Akayesu*, Judgement, TC, para. 477.
[629] BLACK'S LAW DICTIONARY p. 1150 (6th ed. 1990) (defining "plan"); *Rutaganda*, Judgement, TC, para. 37.
[630] *Bagilishema*, Judgement, TC, para. 30.
[631] *Bagilishema*, Judgement, TC, para. 30; *Akayesu*, Judgement, TC, para. 482.
[632] *Akayesu*, Judgement, AC, paras. 478-482.
[633] *Bagilishema*, Judgement, TC, para. 30.
[634] *Bagilishema*, Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.

subordinate relationship between the individual who gives the order and the one who executes it.[635]

(iv)Committing

383. "Committing" refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute.[636]

(v) Aiding and Abetting in the Planning, Preparation, or Execution

384. The terms "aiding" and "abetting" refer to distinct legal concepts.[637] The term "aiding" means assisting or helping another to commit a crime, and the term "abetting" means encouraging, advising, or instigating the commission of a crime.[638] However, the terms "aiding" and "abetting" are frequently employed together as a single broad legal concept,[639] as is the case in this Tribunal.

385. In the Tribunal's jurisprudence, "aiding and abetting" refers to all acts of assistance that lend encouragement or support to the commission of a crime.[640] This encouragement or support may consist of physical acts, verbal statements, or, in some cases, mere presence as an "approving spectator".[641] Except in the case of the "approving spectator," the assistance may be provided before or during the

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[635] *Bagilishema,* Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.
[636] *Kayishema and Ruzindana*, Judgement, AC, para. 187; *Tadic*, Judgement, AC, para. 188.
[637] *See Akayesu*, Judgement, TC, para. 484. *See generally* MEWETT & MANNING ON CRIMINAL LAW p. 272 (3rd ed. 1994); BLACK'S LAW DICTIONARY p. 69 (7th ed. 1999) (defining "aid and abet"), *quoting* Wharton's Criminal Law § 29 (15th ed. 1993). *See, e.g.,* The Criminal Code, R.S.C. 1985, ch. C-46, § 21(b),(c) (Canada) (treating aiding and abetting separately).
[638] *See Ntakirutimana*, Judgement, TC, para. 787; *Akayesu*, Judgement, TC, para. 484; SMITH & HOGAN, CRIMINAL LAW p. 144 (10th ed. 2002) (quoting Oxford English Dictionary); MEWETT & MANNING ON CRIMINAL LAW p. 272 (3rd ed. 1994); BLACK'S LAW DICTIONARY p. 69 (7th ed. 1999) (defining "aid and abet"), *quoting* Wharton's Criminal Law § 29 (15th ed. 1993).
[639] MEWETT & MANNING ON CRIMINAL LAW p. 272 (3rd ed. 1994) (noting that aiding and abetting are "almost universally used conjunctively").
[640] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 33, 36; *Musema*, Judgement, TC, paras. 125-126; *Kayishema and Ruzindana*, Judgement, TC, paras. 200-202; *cf. Akayesu*, Judgement, TC, para. 484.
[641] *Kayishema and Ruzindana*, Judgement, AC, paras. 201-202; *Kayishema and Ruzindana*, Judgement, TC, para. 198; *Aleksovski*, Judgement, TC, para. 63.

commission of the crime, and an accused need not necessarily be present at the time of the criminal act.[642]

386. Criminal responsibility as an "approving spectator" does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.[643] The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement.[644] Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances.[645]

b. *Mens Rea*

387. An individual who "commits" a crime as a principal perpetrator must possess the requisite *mens rea* for the underlying crime.[646]

388. In cases involving a form of accomplice liability, the *mens rea* requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime.[647] The accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*.[648]

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[642] *Bagilishema*, Judgement, TC, para. 33; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, para. 200; *Akayesu*, Judgement, TC, para. 484. Physical presence during the commission of the crime was traditionally the distinguishing factor between aiding and abetting, which required presence, and other forms of complicity such as counselling and procuring. *See generally* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW p. 429 (3rd ed. 1999).
[643] *Bagilishema*, Judgement, TC, para. 36; *Aleksovski*, Judgement, TC paras. 64-65.
[644] *Aleksovski*, Judgement, TC, para. 65.
[645] *Kvocka*, Judgement, TC, para. 257; *Aleksovski*, Judgement, TC, paras. 64-65. *See, e.g., Akayesu*, Judgement, TC, para. 693 (authority and prior words of encouragement); *Tadic*, Judgement, TC, para. 690 (presence and previous active role in similar acts by the *same* group).
[646] *Kayishema and Ruzindana*, Judgement, AC, para. 187.
[647] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Bagilishema*, Judgement, TC, para. 32; *Kayishema and Ruzindana*, Judgement, TC, para. 201.
[648] *Kayishema and Ruzindana*, Judgement, TC, para. 205. *See also Aleksovski*, Judgement, AC, para. 162; *Vasiljevic*, Judgement, TC, para. 71; *Krnojelac*, Judgement, TC, paras. 75, 90; *Kvocka*, Judgement, TC, paras. 255, 262; *Kunarac*, Judgement, TC, para. 392; *Furundzija*, Judgement, TC, para. 249. *But see Ntakirutimana*, Judgement, TC, para. 787 (stating that aiding and abetting under Article 6(1) required proof that an accused possessed the *mens rea* of the underlying crime, for

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ICTR-2001-66-T
25-9-2007
(4596 – 4471)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER

Case No. ICTR-2001-66-I

ENGLISH
Original: FRENCH

Before: Andrésia Vaz, presiding
Karin Hökborg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 13 December 2006

THE PROSECUTOR

v.

ATHANASE SEROMBA

JUDGEMENT

Office of the Prosecutor:
Silvana Arbia
Jonathan Moses
Gregory Townsend
Althea Alexis-Windsor
Tolulope Olowoye

Counsel for the Defence:
Patrice Monthé
Barnabé Nekuie
Sarah Ngo Bihegué

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304. Participation by "instigating" implies urging or encouraging another person to commit a crime.[621] Proof of this mode of participation requires the Prosecution to establish that the instigation was a factor element substantially contributing to the conduct of another person committing the crime. It is, however, not mandatory to prove that the crime would not have been committed without the intervention of the accused.[622]

305. Participation by "ordering" presupposes that a person in a position of authority orders another person to commit an offence. This mode of participation implies the existence of a superior-subordinate relationship between the person who gives the order and the one who executes it.[623] A formal superior-subordinate relationship is, however, not required.[624] A superior-subordinate relationship is established by showing a formal or informal hierarchical relationship involving an accused's effective control over the direct perpetrators.[625]

306. The requisite *mens rea* for the four modes of responsibility referred to above is the direct intent of the perpetrator in relation to his own planning, instigating, or ordering.[626]

307. Participation by "aiding and abetting" refers to any act of assistance or support in the commission of the crime.[627] Such mode of participation may take the form of tangible assistance, or verbal statements. It may also consist in the mere presence of the accused at the scene of the crime, conceptualized in the theory of the "approving spectator".[628] Aiding and abetting must have a substantial effect on the commission of the crime, but does not necessarily constitute an indispensable element, i.e. a *conditio sine qua non*, of the crime.[629] Except in the case of the "approving spectator", assistance may be provided prior to or during the commission of the crime, and it is not necessary for the person providing assistance to be present during the commission of the crime.[630]

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[621] *Bagilishema*, Judgement (TC), 7 June 2001, para. 30; *Krstić*, Case No. IT-98-33, Judgement (TC), 2 August 2001, para. 601.

[622] *Bagilishema*, Judgement (TC), 7 June 2001, para. 30: "By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime. Proof is required of a causal connection between the instigation and the *actus reus* of the crime." *Akayesu*, Judgement (TC), 2 September 1998, paras. 478-482.

[623] *Bagilishema*, Judgement (TC), 7 June 2001, para. 30; *Akayesu*, Judgement (TC), 2 September 1998, para. 483; *Rutaganda*, Judgement (TC), 6 December 1999, para. 39.

[624] *Kordić* Judgement (AC), 17 December 2004, para. 28.

[625] *Semanza* Judgement, para. 415.

[626] *Kordić* Judgement (AC), 17 December 2004, paras. 26-29.

[627] *Bagilishema* Judgement (TC), 7 June 2001, para. 33; *Akayesu* Judgement (TC), 2 September 1998, para. 484; *Kayishema* Judgement (AC), 1 June 2001, para. 186; *Kayishema* Judgement (TC), 21 May 1999, paras. 200-202.

[628] *Kayishema* Judgement (AC), 1 June 2001, paras. 201-202; *Kayishema*, Judgement (TC), 21 May 1999, para. 198;

[629] *Bagilishema*, Judgement (TC), 7 June 2001, para. 33; *Furundžija*, Case No. IT-95-17/1-T, Judgement (TC), 10 December 1998, paras. 209-226.

[630] *Bagilishema*, Judgement (TC), 7 June 2001, para. 33; *Rutaganda*, Judgement (TC), 6 December 1999, para. 43; *Kayishema*, Judgement (TC), 21 May 1999, para. 200; *Akayesu*, Judgement (TC), 2 September 1998, para. 484.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**28 September 2011**

Ephrem SETAKO

v.

THE PROSECUTOR

Case No. ICTR-04-81-A

JUDGEMENT

Counsel for the Appellant	**Office of the Prosecutor**
Prof. Lennox Hinds	Mr. Hassan Bubacar Jallow Mr. James J. Arguin Ms. Deborah Wilkinson Mr. Ousman Jammeh Ms. Thembile Segoete Ms. Christina Fomenky Ms. Betty Mbabazi

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239. The Prosecution responds that whether an accused has the authority required for a finding of responsibility for "ordering" under Article 6(1) of the Statute is a question of fact.[534] It argues that Setako's assertion that the Prosecution was required to prove that "the individuals receiving the order would be compelled to follow it" is inconsistent with the established jurisprudence.[535] According to the Prosecution, Setako's authority to give orders at Mukamira camp on 25 April 1994 and 11 May 1994 was established based on his high rank in the Rwandan army, his appearance at the camp with other high-ranking military and civilian leaders, and the fact that individuals who followed his orders knew of his high-ranking position.[536] The Prosecution contends that, contrary to Setako's assertion, the question whether the people at Mukamira camp were formally required to follow his orders is irrelevant.[537] More relevant were the indicia of authority publicly demonstrated by Setako and perceived by "his interlocutors."[538]

240. The Appeals Chamber recalls that ordering requires that a person in a position of authority instruct another person to commit an offence.[539] A person in a position of authority may incur responsibility for ordering if the order has a direct and substantial effect on the commission of the illegal act.[540] No formal superior-subordinate relationship between the accused and the perpetrator is required.[541] The authority envisaged by ordering under Article 6(1) of the Statute may be informal or of a purely temporary nature.[542] It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.[543] Whether such authority exists is a question of fact.[544]

241. The Trial Chamber correctly recalled these principles at the outset of its legal analysis on Setako's responsibility.[545] Setako does not challenge the Trial Chamber's statement of law, but

[534] Prosecution Response, para. 38.
[535] Prosecution Response, para. 38. *See also* AT. 29 March 2011 pp. 23-25.
[536] Prosecution Response, para. 39.
[537] Prosecution Response, para. 40.
[538] Prosecution Response, para. 40; AT. 29 March 2011 p. 23.
[539] *See, e.g., Kalimanzira* Appeal Judgement, para. 213; *Semanza* Appeal Judgement, paras. 361, 363.
[540] *See Renzaho* Appeal Judgement, para. 315; *Nahimana et al.* Appeal Judgement, paras. 481, 492; *Gacumbitsi* Appeal Judgement, para. 185; *Kamuhanda* Appeal Judgement, para. 75; *Kayishema and Ruzindana* Appeal Judgement, para. 185.
[541] *Nahimana et al.* Appeal Judgement, fn. 1162; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28; *Boškoski and Tarčulovski* Appeal Judgement, para. 164.
[542] *Semanza* Appeal Judgement, para. 363.
[543] *Semanza* Appeal Judgement, para. 361; *Boškoski and Tarčulovski* Appeal Judgement, para. 164.
[544] *Semanza* Appeal Judgement, para. 363.
[545] Trial Judgement, para. 449.

contends that it erred by failing to require the "proof of some position of authority on Fhisğ part" that compelled the perpetrators to commit the 25 April and 11 May Killings.[546]

242. In concluding that Setako was criminally responsible under Count 1 (genocide)[547] for ordering the 25 April and 11 May Killings, the Trial Chamber stated that it was convinced that Setako instructed soldiers and militiamen at Mukamira camp to kill Tutsis there.[548] It explained that, "Fağs a lieutenant colonel, who hailed from the area, in particular one invited to address such a large gathering at the camp, there is no doubt that FSetakoğ was a person in a position of authority."[549] The Trial Chamber also found that the "proximity of the killing to FSetako'sğ actions at the camp on F25 April and 11 May 1994ğ shows that his instructions substantially contributed to the killings."[550] In concluding that Setako was criminally responsible under Count 4 (extermination as a crime against humanity) and Count 5 (violence to life, health, and physical or mental well-being of persons (murder) as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II) for ordering the 25 April Killings, the Trial Chamber referred to its conclusions, as well as the underlying reasons, already provided under Count 1 (genocide).[551] The Appeals Chamber finds no error in the Trial Chamber's reasoning in support of its conclusion that Setako possessed the requisite authority for ordering.

243. In addition, the Appeals Chamber finds that the following specific circumstances, which are apparent from credible evidence on the record, lead to the only reasonable conclusion that Setako had the required authority when he instructed soldiers and militiamen to kill Tutsis on 25 April 1994. He was given the floor in front of a large gathering of soldiers and militiamen while in the company of military[552] and civilian authorities.[553] According to Witness SLA, Bizabarimana, the Mukamira camp commander, presented Setako to the group and Setako introduced himself.[554] In this context, the only reasonable conclusion was that the audience, who were soldiers and civil defence force trainees, knew that Setako was a high-ranking officer. That they felt compelled to

[546] Setako Appeal Brief, para. 58. *See also* Setako Appeal Brief, para. 59; Setako Brief in Reply, para. 17; AT. 29 March 2011 p. 38.
[547] Trial Judgement, para. 473.
[548] Trial Judgement, para. 473.
[549] Trial Judgement, para. 473.
[550] Trial Judgement, para. 473.
[551] *See* Trial Judgement, paras. 481, 482, 490, 491.
[552] The Appeals Chamber recalls that Witnesses SLA and SAT testified that Bizimungu and Bizabarimana, the commander of Mukamira camp were present. *See* Trial Judgement, paras. 323, 328, 341. In addition, Witness SAT testified that Bivugabagabo, Hasengineza, and Mburuburengero were among those in attendance. *See* Trial Judgement, paras. 328, 341.
[553] The Appeals Chamber recalls that Witnesses SLA and SAT testified that Kajelijeli and Gatsimbanyi were present. *See* Trial Judgement, paras. 323, 328, 341.
[554] *See* Trial Judgement, para. 323.

follow his orders is evidenced by the fact that Setako used clear and imperious language and was given silent approval by the military and civilian authorities present.[555]

244. Similarly, it was reasonable for the Trial Chamber to find that Setako had the required authority when he ordered soldiers and civil defence force trainees to kill Tutsis whom he had brought to Mukamira camp on 11 May 1994. Setako had previously given similar instructions, on 25 April 1994, and his orders had been obeyed. According to Witness SLA, on 11 May 1994, Setako spoke to Bivugabagabo and Mburuburengero in the presence of soldiers and civil defence force members.[556] He reminded the crowd of his previous instructions that no Tutsis should be in the camp or the region and criticised the passivity of the civil defence force.[557] According to Witness SAT, Setako instructed Hasengineza to kill the Tutsis.[558] The victims were killed the same night, near the armoury of the camp.[559] On these facts, the only reasonable conclusion was that the soldiers and civil defence force trainees to whom Setako gave instructions regarded him as speaking with authority and felt compelled to obey him.

245. For the foregoing reasons, the Appeals Chamber dismisses Setako's argument.

[555] *Cf. Semanza* Appeal Judgement, paras. 362-364 (where the Appeals Chamber found that Semanza had the necessary authority to render him liable for ordering the attacks and killings at Musha church, based on the evidence that he directed attackers to kill Tutsi refugees who had been separated from the Hutu refugees at Musha church and the Trial Chamber's findings that the refugees were then executed on the directions of Semanza).
[556] *See* Trial Judgement, para. 326.
[557] *See* Trial Judgement, para. 326.
[558] *See* Trial Judgement, para. 330.
[559] *See* Trial Judgement, paras. 326, 330.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 25 February 2010

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-T

JUDGEMENT AND SENTENCE

The Prosecution
Ifeoma Ojemeni Okali
Simba Mawere
Christiana Fomenky

The Defence
Lennox Hinds
Cainnech Lussiaà-Berdou

intentionally killed one or more members of the group.[573] In view of the Chamber's factual findings, it is unnecessary to discuss causing serious bodily or mental harm.

2.2 Application

469. Prosecution Witnesses SLA and SAT were recruited into the civil defence forces in mid-April 1994 and trained at Mukamira camp in Ruhengeri prefecture. As part of this training, they were taught that Tutsis and others who supported the RPF were the enemy. On the morning of 25 April, Setako addressed a large gathering of these recruits and other soldiers at the camp. He was accompanied by other authorities and local prominent personalities.

470. According to Witness SLA, Setako stated that Tutsis and their accomplices needed to be hunted down and called for the killing of Tutsi soldiers and their accomplices at the camp. Witness SAT testified that Setako expressed surprise that Tutsis had taken refuge at the camp since they were being killed elsewhere. These formulations are not identical, which, in the Chamber's view, results from the passage of time. Their fundamental features, however, are consistent. More importantly, the significance of Setako's words in both versions are clear: Tutsis at Mukamira camp should be killed. That night, 30 to 40 Tutsis living at the camp were shot.

471. Setako returned to the camp on the afternoon of 11 May with nine or 10 Tutsis in his vehicle. As a small crowd gathered, he spoke with some of the officers and told one of them to take the Tutsis and kill them. The individuals were killed near the armoury.

472. Considering the nature of these events, the Chamber finds that the assailants intentionally killed these two groups of Tutsis. The selection of the victims was not by chance. Setako called for the killing of Tutsis at the camp on 25 April, and among the large number of persons there only members of this group were killed. In addition, the victims of the killings on 11 May were identified as Tutsis before the instruction to kill them was given. The Chamber has also heard extensive evidence of the targeting of Tutsis in Ruhengeri prefecture (II.3.1-.5). In this context, the only reasonable conclusion is that the assailants who perpetrated the killings possessed the intent to destroy, in whole or in substantial part, the Tutsi group.

473. Turning to Setako's responsibility for these crimes, the Chamber is convinced that he instructed soldiers and militiamen at the camp on 25 April and 11 May to kill Tutsis there. As a lieutenant colonel, who hailed from the area, in particular one invited to address such a large gathering at the camp, there is no doubt that he was a person in a position of authority. Thus, the Chamber finds that he ordered these crimes. The proximity of the killing to his actions at the camp on both dates shows that his instructions substantially contributed to the killings. Moreover, the content of his interventions demonstrates that he intended the killings and possessed genocidal intent.

2.3 Conclusion

474. Accordingly, the Chamber finds Setako guilty of genocide (Count 1) for ordering under Article 6 (1) the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994 and the

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[573] *Bagosora et al.* Trial Judgement para. 2117, citing *Simba* Trial Judgement para. 414, referring to *Kayishema and Ruzindana* Appeal Judgement para. 151.

UNITED
NATIONS

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

Date: September 2009

Original: English & French

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)
(AS AMENDED 17 MAY 2002 BY RESOLUTION 1411)
(AS AMENDED 14 AUGUST 2002 BY RESOLUTION 1431)
(AS AMENDED 19 MAY 2003 BY RESOLUTION 1481)
(AS AMENDED 20 APRIL 2005 BY RESOLUTION 1597)
(AS AMENDED 28 FEBRUARY 2006 BY RESOLUTION 1660)
(AS AMENDED 29 SEPTEMBER 2008 BY RESOLUTION 1837)
(AS AMENDED 7 JULY 2009 BY RESOLUTION 1877)

ICTY RELATED RESOLUTIONS:
Resolution 1503 of 28 August 2003
Resolution 1504 of 4 September 2003
Resolution 1534 of 26 March 2004
Resolution 1581 of 18 January 2005
Resolution 1613 of 26 July 2005
Resolution 1629 of 30 September 2005
Resolution 1668 of 10 April 2006
Resolution 1775 of 14 September 2007
Resolution 1786 of 28 November 2007
Resolution 1800 of 20 February 2008

(Not an official document. This compilation is based on original United Nations resolutions.)

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7
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 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 17
The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18
Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19
Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Article 22
Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23
Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

UNITED
NATIONS

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

Case No.: IT-95-14-A

Date: 29 July 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

41. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's above articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

42. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[76]

2. Aiding and Abetting

43. The Appellant submits that liability for aiding and abetting requires, at a minimum, actual knowledge.[77] He submits that not only must the aider and abettor know that his acts provide support to another person's offence, but he must also know the specifics of that offence. Recklessness or negligence on his part is not sufficient, he asserts, contrary to the Trial Chamber's alleged finding on that point.[78] Furthermore, the Appellant submits that the *actus reus* of aiding and abetting includes a causation requirement which the Trial Chamber failed to acknowledge and to apply.[79] In other words, the contribution must "have a direct and important impact on the commission of the crime."[80] Instead, the Appellant maintains, the Trial Chamber erroneously applied a strict liability standard to find the Appellant guilty as an aider and abettor and reiterates that the Trial Chamber's conclusion that "he could be found guilty if he accepted the possibility that some unspecified crime was a 'possible or foreseeable consequence' of military action effectively eliminates the 'actual knowledge' *mens rea* of aiding and abetting, and is thus erroneous as a matter

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[76] The French translation of this legal standard reads as follows:
Quiconque ordonne un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre possède la *mens rea* requise pour établir la responsabilité aux termes de l'article 7 alinéa 1 pour avoir ordonné. Le fait d'ordonner avec une telle conscience doit être considéré comme l'acceptation dudit crime.

[77] Appellant's Brief, p. 131.

[78] Appellant's Brief, pp. 131-133.

[79] Appellant's Brief, pp. 133-135.

[80] Appellant's Brief, p. 134.

> attacks on property. In other words, the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.[334]

164. The Appeals Chamber reiterates that the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions as a crime against humanity requires evidence of a "specific intent to discriminate on political, racial, or religious grounds."[335] The requisite discriminatory intent may not be "inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity."[336] However, the Appeals Chamber considers that the "discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent."[337]

165. Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions. The Appeals Chamber further dismisses the Appellant's allegation that a discriminatory purpose alone is insufficient to establish the *mens rea* for the crime of persecutions. The Trial Chamber was correct when it held at paragraph 235 of the Trial Judgement that the *mens rea* for persecutions "is the specific intent to cause injury to a human being because he belongs to a particular community or group." The Appeals Chamber stresses that there is no requirement in law that the actor possess a "persecutory intent" over and above a discriminatory intent.

166. The Appeals Chamber has also examined the Appellant's argument that the Trial Chamber erred in applying a recklessness standard in relation to the *mens rea* requirement for persecutions. In paragraph 235 of the Trial Judgement, reproduced above, there is no reference to recklessness. Paragraph 254 of the Trial Judgement outlines a standard of indirect malicious intent, or recklessness, for the knowing participation in the attack, as a *chapeau* requirement of crimes against humanity, and not for the crime of persecution. However, the Appeals Chamber is cognizant of the fact that in making its factual findings relating to the ordering of crimes under Article 7(1) of the Statute, the Trial Chamber frequently employed language such as "took the risk" or "deliberately ran the risk."[338] As stated above, the correct legal standard in relation thereto is that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under

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[334] Trial Judgement, para. 235 (footnotes omitted).
[335] *Krnojelac* Appeal Judgement, para. 184; *Vasiljević* Appeal Judgement, para. 113.
[336] *Krnojelac* Appeal Judgement, para. 184.
[337] *Krnojelac* Appeal Judgement, para. 184.
[338] *See*, for example, Trial Judgement, paras. 474, 562, 592, 653, and 738.

Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. Thus, an individual who orders an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the order's execution, may be liable under Article 7(1) for the crime of persecutions. Whether the facts in this case support a finding that the Appellant is responsible for ordering persecutions as a crime against humanity will be considered in the factual chapters of this Judgement.

dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.[430]

210. There is a distinction between those material facts upon which the Prosecution relies which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded and is provided by way of pre-trial discovery.[431] The Appeals Chamber reiterates that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged.[432] The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution.[433] The precise details to be pleaded as material facts are the acts of the accused, not the acts of those persons for whose acts he is alleged to be responsible.[434]

211. A distinction has been drawn in the International Tribunal's jurisprudence between the level of specificity required when pleading: (i) individual responsibility under Article 7(1) in a case where it is not alleged that the accused personally carried out the acts underlying the crimes

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[430] *Kupreškić* Appeal Judgement, para. 88. Where the Appeals Chamber referred to the following authority: *Furundžija* Appeal Judgement, para. 147; *Prosecutor v. Krnojelac,* Case No.: IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999 ("*Krnojelac* Decision 24 February 1999"), paras. 7, 12; *Prosecutor v. Krnojelac,* Case No.: IT-97-25-PT, Decision on Preliminary Motion on the Form of Amended Indictment, 11 Feb. 2000 ("*Krnojelac* Decision 11 February 2000"), paras. 17, 18; *Prosecutor v. Brđanin and Talić,* Case No.: IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001 ("*Brđanin and Talić* 20 February 2001 Decision"), para. 18. This view was subsequently adopted by the Appeals Chamber in the *Krnojelac* Appeal Judgement, para. 131.

[431] *Krnojelac* 24 February 1999 Decision, para. 12; *see also Prosecutor v. Došen and Kolundžija*, Case No.: IT-95-8-PT, Decision on Preliminary Motions, 10 Feb. 2000 ("*Kolundžija* 10 February 2000 Decision"), para. 21; *Krnojelac* Decision 11 February 2000, para. 17; *Prosecutor v. Naletilić and Martinović*, Case No.: IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 Feb. 2000, paras. 17, 18; *Furundžija* Appeal Judgement, para. 153; *Prosecutor v. Krajišnik,* Case No.: IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug. 2000 ("*Krajišnik* Decision"), para. 8; *Prosecutor v. Krajišnik,* Case No. IT-00-39-AR72, Decision on Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment, 13 Sept. 2000, p. 3.

[432] *Kupreškić* Appeal Judgement, para. 89; *Krnojelac* Appeal Judgement, para. 132.

[433] *Krnojelac* 11 February 2000 Decision, para. 18; *Prosecutor v. Brđanin and Talić,* Case No.: IT-99-36-PT, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 Feb. 2001 ("*Brđanin and Talić* 23 February 2001 Decision"), para. 13; *Brđanin and Talić* 20 February 2001 Decision, para. 18; *Prosecutor v. Hadžihasanović et al,* Case No.: IT-01-47-PT, Decision on Form of the Indictment, 7 Dec. 2001 ("*Hadžihasanović* 7 December 2001 Decision"), para. 19; *Prosecutor v. Mrkšić et al,* Case No.: IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("*Mrkšić* Decision"), para. 8. *See also Kolundžija* 10 February 2000 Decision, para. 15. In that case, the Prosecution had provided additional information regarding the time and place of the alleged offences, and the identity of the victims and co-perpetrators, in a confidential attachment. The Trial Chamber also ordered the Prosecution to file an amended version of the confidential attachment as part of the amended indictment. *See Prosecutor v. Mrkšić et al,* Case No.: IT-95-13/1-PT, Decision on Form of Consolidated Amended Indictment and on Prosecution Application to Amend, 23 Jan. 2004, para. 52.

[434] *Brđanin and Talić* 23 February 2001 Decision, para. 10; *Mrkšić* Decision, para. 8.

charged; (ii) individual responsibility under Article 7(1) in a case where it *is* alleged that the accused personally carried out the acts in question;[435] and (iii) superior responsibility under Article 7(3).

212. Depending on the circumstances of a case based on individual criminal responsibility under Article 7(1) of the Statute, the Prosecution may be required to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, to indicate the particular form of participation.[436] This may be required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused,[437] and to enable the accused to effectively and efficiently prepare his defence.[438] The material facts to be pleaded in an indictment may vary depending on the particular form of participation under Article 7(1).[439]

213. When alleging that the accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision."[440] However, where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[441]

214. In the *Došen and Kolundžija* case, the Trial Chamber required the Prosecution to amend the indictment to specify which crimes the two accused were charged with having committed "directly" pursuant to Article 7(1), including "where possible, specifying the *form* of participation, such as "planning" *or* "instigating" *or* "ordering" etc"; which crimes they were charged with having committed pursuant to Article 7(3); and which crimes were based on both types of responsibility, specifying the *form* of participation with respect to Article 7(1) responsibility.[442] This approach was adopted by the Appeals Chamber in *Krnojelac*, wherein it was held that the *Krnojelac* Trial Chamber was correct to refuse to consider one particular form of participation (that of the extended

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[435] This type of responsibility was described by the Trial Chamber in *Krnojelac* as "personal" responsibility and referred to as "direct" responsibility by the Appeals Chamber in *Krnojelac*. See *Krnojelac* 11 February 2000 Decision, para. 18 (C) and *Krnojelac* Appeal Judgement, para. 138.
[436] *Čelebići* Appeal Judgement, para. 350.
[437] *Aleksovski* Appeal Judgement, para. 171, n. 319 (referring to *Krnojelac* 11 February 2000 Decision, paras. 59-60).
[438] *Prosecutor v. Deronjić*, Case No.: IT-02-61-PT, Decision on Form of the Indictment, 25 Oct. 2002 (*Deronjić* Decision), para. 6; *Mrkšić* Decision, para. 9.
[439] *Ibid.*
[440] *Prosecutor v. Tadić*, Case No.: IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, paras. 11-13; *Krnojelac* 11 February 2000 Decision, para. 18; *Kupreškić* Appeal Judgement, para. 89. The Trial Chamber in the *Deronjić* case ordered the Prosecution to plead the identity of the murder victims with respect to each incident charged under Article 7(1) and Article 7(3) of the Statute. *Deronjić* Decision, para. 37.
[441] *Krnojelac* 24 February 1999 Decision, para. 13; *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 20.

by the Trial Chamber in *Čelebići*.[449] The Trial Chamber in *Krnojelac* stated that the identification of subordinates who allegedly committed the criminal acts by their "category" or "as a group" was sufficient, if the Prosecution was unable to identify those directly participating in the alleged crimes by name.[450]

218. In accordance with the jurisprudence of the International Tribunal, the Appeals Chamber considers that in a case where superior criminal responsibility pursuant to Article 7(3) of the Statute is alleged, the material facts which must be pleaded in the indictment are:

(a) (i) that the accused is the superior[451] of (ii) subordinates sufficiently identified,[452] (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct [453]– and (iv) for whose acts he is alleged to be responsible;[454]

(b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates,[455] and (ii) the related conduct of those others for whom he is alleged to be responsible.[456] The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision,[457] because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue;[458] and

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[449] *Prosecutor v. Delalić et al*, Case No.: IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, 2 Oct. 1996, para. 19.
[450] *Krnojelac* 24 February 1999 Decision, para. 46.
[451] *Deronjić* Decision, para. 15 (ordering the Prosecution to clearly plead the position forming the basis of the superior responsibility charges).
[452] *Deronjić* Decision, para. 19.
[453] *Čelebići* Appeal Judgement, para. 256.
[454] *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Krajišnik*, Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, paras 11, 17; *Mrkšić* Decision, para. 10.
[455] *Krnojelac* 11 February 2000 Decision, para. 18; *Krajišnik* Decision, para. 9; *Brđanin and Talić*, 20 February 2001 Decision, para. 19; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[456] *Krnojelac* 24 February 1999 Decision, para. 38; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[457] *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[458] *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Prosecutor v. Kvočka et al*, Case No.: IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr. 1999, para. 17; *Krajišnik* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.

(c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[459]

219. With respect to the *mens rea*, there are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.[460] Each of the material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication.[461] This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the legal pre-requisite.[462]

220. Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.[463] The Appeals Chamber in *Kupreškić* examined a situation in which the necessary information to ground the alleged responsibility of an accused was not yet in the Prosecution's possession and stated that, in such circumstances, "doubt must arise as to whether it is fair to the accused for the trial to proceed."[464] The Appeals Chamber emphasised that the Prosecution is expected to inform the accused of the nature and cause of the case before it goes to trial. It is unacceptable for it to omit the material facts in an indictment with the aim of moulding its case against the accused during the course of the trial depending on how the evidence unfolds.[465] Where the evidence at trial turns out differently than expected, an amendment of the indictment may be required, an adjournment may be granted, or certain evidence may be excluded as being outside the scope of the indictment.[466]

221. If a trial verdict is found to have relied upon material facts not pleaded in an indictment, it is still necessary to consider whether the trial was thereby rendered unfair.[467] If the trial was rendered

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[459] *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Krnojelac* 11 February 2000 Decision, para.18; *Krajišnik* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Deronjić* Decision, para. 7; *Mrkšić* Decision, para. 10.
[460] *Brđanin and Talić* 26 June 2001 Decision, para. 33; *Mrkšić* Decision, para. 11.
[461] *Brđanin and Talić* 20 February 2001 Decision, para. 48; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 12; *Hadžihasanović* 7 December 2001 Decision, para. 10; *Deronjić* Decision, para. 9; *Mrkšić* Decision, para. 12.
[462] *Brđjanin and Talić* 20 February 2001 Decision, para. 48; *Hadžihasanović* 7 December 2001 Decision, para. 10; *Mrkšić* Decision, para. 12.
[463] *Kupreškić* Appeal Judgement, para. 114.
[464] *Kupreškić* Appeal Judgement, para. 92 (footnote omitted).
[465] *Ibid.*, at para. 92 (footnote omitted).
[466] *Ibid.*
[467] *Ibid.*, para. 87.

239. The Appeals Chamber recognizes, as it did in the *Kupreškić* Appeal Judgement, that in certain circumstances, an indictment which fails to plead with sufficient detail an essential aspect of the Prosecution case, may result in the reversal of a conviction. Yet, it considers that the *Kupreškić* case is distinguishable from the present appeal.

240. In *Kupreškić*, Zoran and Mirjan Kupreškić were charged generally with crimes occurring in and around a particular village. At trial, the case against them was eventually narrowed to the point where it focused solely on an attack on two houses and the killing of six people, and it was for this attack that they were convicted. The Appeals Chamber described this process as a "radical transformation" of the charges against the accused, which occurred between the issuing of the indictment and the issuing of the judgement.[498] The Appeals Chamber found that the defects in the indictment were only compounded by the "extremely general" nature of the Prosecution's Pre-trial Brief, and its failure to disclose the statement of the key witness relied on to convict the two accused until only "one to one-and-a-half weeks prior to trial and less than a month prior to [the witness's] testimony in court."[499] For all these reasons, the Appeals Chamber found that the ability of the accused to prepare their defence had been "seriously infringed" and the fairness of their trial directly affected by the defective nature of the original indictment.[500]

241. The Appeals Chamber in the present case is faced with a distinct situation. In the case at hand, no verdict was delivered at trial on the basis of material facts which were *not* pleaded in the Indictment. Therefore, a finding that the trial was unfair would be necessarily dependent upon a showing that the Appellant's ability to prepare his defence was materially impaired by the defects in the Second Amended Indictment.

242. The Appeals Chamber is not persuaded by the Appellant's arguments that he was prejudiced by the Prosecution's alleged failure to "commit" to either theory of responsibility during the trial with respect to the crimes charged. It is apparent from the Prosecution's opening statement that the case against the Appellant relied on both theories of responsibility.[501] Immediately after the conclusion of the Prosecution's opening statement, Counsel for the Appellant did not raise any claims regarding the Prosecution's alleged failure to choose one theory of responsibility or the other, and did not make any preliminary statement.[502] The Prosecution remained obliged to indicate

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[498] *Ibid.*, para. 121.
[499] *Ibid*, paras. 117, 120.
[500] *Ibid*, para. 122 (emphasis added).
[501] *See* T 9-19, 26, 31-35, 40, 43, 50 (24 June 1997).
[502] T 53 (24 June 1997). The Appeals Chamber notes that, with respect to the allegations pertaining to Ahmići, during its opening argument, the Prosecution addressed the issue of the Appellant's superior responsibility for the commission of crimes by his subordinates, and his individual criminal responsibility by reference to the Appellant's orders to attack villages mentioned in the indictment. *See* T 43, 50 (24 June 1997).

the particular type of responsibility alleged in order to enable the Appellant to defend himself. However, the Prosecution was not obliged to "commit" to one theory of responsibility, or choose between different heads of responsibility in the presentation of its case. The Appeals Chamber's review of the trial record suggests that the Prosecution did clearly present the necessary information to put the Appellant on notice of the nature of its case against him during the trial, by express reference to the precise time when the crimes charged in the Second Amended Indictment were committed, and the circumstances surrounding the commission of such crimes.[503]

243. During the Appellant's trial, there was no system in place by which the parties had to introduce the evidence presented through each witness by providing a summary. Indeed, no legal provision required the Prosecution to provide detailed summaries to the Defence making specific reference to Article 7(1) or Article 7(3) of the Statute in order to introduce a witness's testimony.[504] When the Appellant's trial took place, no legal provision imposed upon the Prosecution the obligation to file a document identifying in relation to *each* count, a summary of the evidence which it intended to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused.[505] The Appellant was expected to craft his cross-examination on the basis of the information elicited from the testimony of the witnesses called by the Prosecution during the presentation of its case. Whether the Appellant was prejudiced at trial in the conduct of his defence is not dependent on whether summaries, which made express reference to the form of responsibility attributable to him, were provided by the Prosecution, but on the relevance of the evidence to the question of his responsibility. For the foregoing reasons, the Appeals Chamber is not persuaded that the manner in which the Prosecution provided the said summaries to the Appellant compromised his ability to cross-examine Prosecution witnesses.

244. With respect to the Appellant's argument that the Trial Chamber misled the Appellant and that as a result he was unable to prepare his defence, the Appeals Chamber observes that the Trial Chamber never expressly indicated that it intended to restrict the scope of the Second Amended Indictment to responsibility pursuant to Article 7(3) either by way of an oral ruling or a written decision. After having identified the comments made by the presiding Judge of the Trial Chamber, and considered their impact, the Appeals Chamber is not persuaded by the Appellant's argument that these would have reasonably given the Appellant the impression that he claims they did, and

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[503] *See Krnojelac* 24 February 1999 Decision, para. 40.

[504] As noted by the Prosecution, it was not until after 20 November 1997, that it started providing summaries at the request of the Trial Chamber. *See* the following statement made by the Presiding Judge: "We are going to have a witness brought in, and we will try out a different system. What I mean is that before the witness comes in, whether it be for the Prosecution and then if it goes well this will apply to the Defence as well, which means that before the witness comes in, the Prosecutor might tell us very quickly what he expects from the witness." T 4063 (20 Nov. 1997).

[505] Rule 65*ter* was adopted during the twenty-fourth plenary session held from 11-13 July 2001 (26 July 2001) (IT/32/Rev.21).

UNITED
NATIONS

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

Case No. IT-95-14-T

Date: 3 March 2000

Original: English
French

IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Almiro Rodrigues
Judge Mohamed Shahabuddeen

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 3 March 2000

THE PROSECUTOR

v.

TIHOMIR BLA[KI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

275. Finally, in the view of the Defence, the *mens rea* satisfying Article 7(1) is intent to commit an act facilitating offences. The deliberate act cannot be presumed even if the evidence were to satisfy the criminal omission element of Article 7(3) of the Statute[502].

c) Discussion and Findings

276. The Appeals Chamber in the *Tadi}* case and the Trial Chambers in other cases brought before both this Tribunal and the ICTR, notably the *Tadi}*, *Akayesu*, *^elebi}i* and *Furund`ija* cases[503], defined those legal elements which under customary international law refer to the various forms of individual criminal responsibility included in Article 7(1) of the Statute. This Trial Chamber will consider their findings in order to ascertain their applicability to the present case.

277. Following the approach taken by the Prosecution, the Trial Chamber will determine the *actus reus* and *mens rea* required for holding an accused individually criminally responsible for having "planned", "instigated", "ordered" or "aided and abetted" the offences alleged in the indictment.

i) Planning, instigating and ordering

278. The Trial Chamber holds that proof is required that whoever planned, instigated or ordered the commission of a crime possessed the criminal intent, that is, that he directly or indirectly intended that the crime in question be committed. However, in general, a person other than the person who planned, instigated or ordered is the one who perpetrated the *actus reus* of the offence. In so doing he must have acted in furtherance of a plan or order. In the case of instigating, as appears in the definition below, proof is required of a causal connection between the instigation and the fulfilment of the *actus reus* of the crime. In defining each of the forms of participation, the Trial Chamber concurs with the relevant findings of the Trial Chamber in the *Akayesu* case.

279. Accordingly, planning implies that "one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases"[504]. The Trial Chamber is of the view that circumstantial evidence may provide sufficient proof of the existence of a plan.

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[502] *Ibid.*, p. 38.
[503] *Tadi}* Judgement; *Akayesu* Judgement; *^elebi}i* Judgement; *Furund`ija* Judgement.
[504] *Akayesu* Judgement, para. 480.

280. Instigating entails "prompting another to commit an offence"[505]. The wording is sufficiently broad to allow for the inference that both acts and omissions may constitute instigating and that this notion covers both express and implied conduct. The ordinary meaning of instigating, namely, "bring about"[506] the commission of an act by someone, corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.

281. The *Akayesu* Trial Chamber was of the opinion that ordering

> implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence[507].
>
> There is no requirement that the order be in writing or in any particular form; it can be express or implied. That an order was issued may be proved by circumstantial evidence.

It is not necessary that an order be given in writing or in any particular form. It can be explicit or implicit. The fact that an order was given can be proved through circumstantial evidence.

282. The Trial Chamber agrees that an order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence[508]. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order. Therefore, it is irrelevant whether the illegality of the order was apparent on its face.

ii) Aiding and abetting

283. As a starting point, the Trial Chamber concurs with the opinion of the Trial Chamber in the *Furund`ija* case which states that

> the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence[509].

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[505] *Ibid*, para. 482.
[506] The Concise Oxford Dictionary, 10th edition (1999), p. 734.
[507] *Akayesu* Judgement, para. 483.
[508] As to criminal responsibility of commanders for passing on criminal orders, the Trial Chamber notes the *High Command* case in which the military tribunal considered that "to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal" (*U.S.A. v. Wilhelm von Leeb et al.*, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, (hereinafter the "*Trials of War Criminals*") Vol. XI, p. 511)
[509] *Furund`ija* Judgement, para. 249.

IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Haopei Li
Judge Fouad Riad

Registrar:
Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of:
4 April 1997

THE PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION ON THE DEFENCE MOTION TO DISMISS THE INDICTMENT BASED UPON DEFECTS IN THE FORM THEREOF (VAGUENESS/LACK OF ADEQUATE NOTICE OF CHARGES)

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Russell Hayman
Mr. Gregory Kehoe
Mr. William Fenrick

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 16 December 1996, the Defence submitted to Trial Chamber I a preliminary motion "to dismiss the indictment based on defects in the form of the indictment (vagueness/lack of adequate notice of charges)" (hereinafter "the Motion"). The Prosecutor, in opposition to the Defence, responded to the Motion on 20 January 1997 (hereinafter "the Response"). The Defence replied to the Response in a brief filed on 3 February 1997 (hereinafter "the Reply"). The Trial Chamber heard the parties at a hearing on 12 and 13 March 1997.

The Trial Chamber would first analyse the claims and arguments of the parties and then the disputed points of fact and law.

I) Analysis of the claims and arguments of the parties

2. The Defence motion concerns the amended indictment, confirmed on 22 November 1996, of which the accused was officially notified by the Trial Chamber on 4 December 1996 during a public hearing. It replaces the initial indictment which was confirmed on 10 November 1995.

The Defence considers that the crimes ascribed to the accused in the amended indictment are vague and

accused at a specific date and place should have been indicated instead of merely having stated that it was a "unique and factual description of both the criminal offence and the participation of the accused in that offence".[9]

Trial Chamber II made a distinction between two cases:

- for a whole series of counts, the Trial Chamber considered that since the indictment identified the accused, stated paragraph by paragraph the facts of each incident , and specified clearly the particular provisions of international humanitarian law that had been violated, the provisions of Sub-rule 47(B) of the Rules had been complied with[10].

- then, referring to Article 21(4)(a) of the Statute, the Trial Chamber made arrangements for the manner in which, under its supervision, the additional material would be made available to the accused in accordance with Sub-rules 66(A) and 67(A) of the Rules[11].

- however, the preliminary motion was deemed to be justified for another set of counts concerning *inter alia* the alleged conduct of the accused. The Trial Chamber considered that "paragraph 4 clearly enough does not, in its very generalised form, provide the accused with any specific, albeit concise, statement of the facts of the case and of the crimes with which he is charged. It says nothing specific about the accused's conduct, about what was the nature and extent of his participation in the several courses of conduct which are alleged...".[12] And the Trial Chamber concluded that "if the Prosecution is to persist in relation to the matters alleged in that paragraph, the indictment should be further amended so as to provide the necessary degree of specificity."[13]

(ii) in the case *The Prosecutor v. Dorje Djukic (IT-96-20-T)*[14]

19. As regards the information appearing in the indictment which the Defence claimed was imprecise, although it is true that the Trial Chamber took note of the summary nature of the indictment[15], it also considered that "at this stage of the proceedings, the indictment meets the relevant provisions of the Statute and the Rules conditional on its being understood that each of the parties will have to prove its allegations during the trial on the merits ."[16]

However, the Trial Chamber considered that it had to point out the excessively vague or ambiguous character of the indictment (which it did for paragraph 7). Nonetheless , although it invited the Prosecutor to make "such modifications as he deems necessary if he intends maintaining the counts"[17], the Trial Chamber also noted the fact that "the Prosecutor indicated that further evidence will be submitted as part of the process of disclosure".[18]

By this decision, the Trial Chamber intended already to emphasise the distinction pointed out above between the minimum demands required for the presentation of the indictment to the accused and all the guarantees which the accused must enjoy after the indictment in respect of the subsequent production of additional or supplementary evidence permitting him to prepare his defence in due time. In this case, Trial Chamber I also referred to the *Tadic* case-law.

(iii) in the case *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo (IT-96-21-T).*

20. In light of the arguments of the parties in the case *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo (IT-96-21-T),* Trial Chamber II (as well as the Appeals Chamber) identified certain principles regarding the function and content of an indictment by considering that:

1) the principal function of the indictment is to notify the accused in a summary manner[19] as to the nature of the crimes of which he is charged and to present the factual basis for the accusations[20].

2) the indictment must contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it)[21] in order to avoid prejudicial surprise[22].

Furthermore, the Appeals Chamber specified that the use of alternative characterisations of the facts, which is accepted in military manuals and international humanitarian law, does not render the indictment fatally vague, although, whenever possible, the Prosecutor should clearly indicate the precise line of conduct and mental element alleged[23].

3) a preliminary motion on the form of the indictment is not the appropriate framework for contesting the facts[24].

4) the question of knowing whether the allegations appearing in the indictment are vague will, in the final analysis, be settled at trial[25].

d) in conclusion of this entire analysis, the Trial Chamber considers that:

21. - an indictment, by its very nature and given the very initial phase in which it is reviewed, is inevitably concise and succinct. Such is the meaning, such is the spirit of the texts governing the proceedings of the International Tribunal, themselves inspired by international standards and their interpretation.

- with respect to this single aspect of the general presentation of the indictment , the Defence confuses the minimum right granted to it by virtue of a presentation , however succinct, of facts and charges made against it, with the right to be promptly provided with far more detailed information so that it may prepare its defence.

- with respect only to the principles underlying the form and the presentation of the amended indictment against General Blaskic, as confirmed on 22 November 1996 , it is obvious that the review of the said indictment generally satisfies the provisions of the Statute and the Rules on the presentation of indictments.

-nevertheless, in line with the case-law established by the Tribunal, the Trial Chamber will review each of the motions filed by the accused in support of the preliminary motion; this review being limited, however, to considering the extent to which an accused was in a position to prepare his defence in due time given the more or less detailed information provided to him by the Prosecutor in the indictment, and in the indictment alone.

B. Review of the indictment

1. Review of the indictment from the perspective of vagueness/ with regard to the location and time of the alleged events, and to the identity of the victims and the participants

a) With regard to the location of alleged events (point C of the Motion)

22. With regard to location (point C.), the Defence considers that the use of expressions such as

- "including, *but not limited to*"(paragraphs 6.1 to 7: (Count 1), (paragraph 9 (Counts 4 to 9)), (paragraph 10 (Counts 10 to 13) and paragraphs 12 and 15 (Counts 14 to 19)).

- "attacks in, *among others*, the following towns and villages"

casts doubt as to the exact locations where the alleged acts were supposedly committed .

The Trial Chamber agrees with the Defence that expressions such as "including, but not limited to" or "among others" are vague and subject to interpretation and that they do not belong in the indictment when it is issued against the accused.

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UNITED
NATIONS

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

Case No. IT-04-82-A

Date: 19 May 2010

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Judgement of: **19 May 2010**

PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Paul Rogers
Mr. François Boudreault
Ms. Nadia Shihata
Ms. Elena Martin Salgado
Ms. Laurel Baig

Counsel for Ljube Boškoski:

Ms. Edina Rešidović
Mr. Guénaël Mettraux

Counsel for Johan Tarčulovski:

Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz
Mr. Antonio Apostolski
Mr. Jordan Apostolski

15. The same standard of reasonableness and the same deference to factual findings applies when the Prosecution appeals against an acquittal.[47] Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[48] Considering that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal from a defence appeal against conviction.[49] An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt.[50] The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[51]

16. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[52] Arguments which do not have the potential to cause the impugned decision to be reversed or revised need not be considered on the merits and may be immediately dismissed by the Appeals Chamber.[53]

17. The Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties.[54] In a primarily adversarial system, like that of the Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties.[55] It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner.[56] In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the

[47] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[48] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[49] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[50] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[51] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[52] *Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[53] *Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[54] *Milošević* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 13.
[55] *Simić* Appeal Judgement, para. 13.
[56] *Milošević* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 43 (fns ommitted).

was indeed satisfied that the elements of instigation, including this *actus reus* element,[426] were established.[427] Tarčulovski's arguments in this respect are therefore dismissed.

D. Ordering

1. *Actus reus* of ordering – proof of an order and a causal link

158. Tarčulovski avers that the Trial Chamber erred in law and fact in concluding that he ordered any crime, since there was no evidence or finding in the Trial Judgement that he ordered or instructed any other person to commit a crime, nor was a link established between an act of ordering and the physical perpetration of a crime.[428] Tarčulovski claims that the Trial Chamber merely found that he personally led a police operation in Ljuboten on 12 August 2001, which is insufficient to incur criminal responsibility.[429]

159. The Prosecution responds that the Trial Chamber need not identify "positive evidence of a specific order to a specific perpetrator" to convict Tarčulovski.[430] The Prosecution argues that an order need not be explicit and that its existence may be proven through circumstantial evidence.[431] The Prosecution submits that the circumstances surrounding the operation and the crimes, and Tarčulovski's role as the person in charge lead to the only reasonable conclusion that he ordered the crimes committed.[432] Furthermore, the Prosecution contends that it is unnecessary to prove that the crimes would not have been perpetrated without his involvement, and that the Trial Chamber reasonably found that his acts substantially contributed to the commission of the crimes.[433]

160. The Appeals Chamber recalls that the *actus reus* of ordering requires that a person in a position of authority instruct another person to commit an offence.[434] There is no requirement that the order be given in any particular form, and the existence of the order may be proven through

[426] Trial Judgement, para. 399.
[427] Trial Judgement, para. 577.
[428] Tarčulovski Appeal Brief, paras 122-126 (citing Trial Judgement, paras 541 and 564; Witness M037; T. 868) and 176; Tarčulovski Amended Notice of Appeal, paras 40, 77 (citing Trial Judgement, paras 306-312) and 85 (citing Trial Judgement, paras 57 and 321-328); Tarčulovski Reply Brief, paras 45, 53 and 55; AT. 36 and 59-61.
[429] Tarčulovski Appeal Brief, paras 123 and 125-126 (citing Trial Judgement, paras 541 and 564); Tarčulovski Amended Notice of Appeal, para. 40; AT. 60-61.
[430] Prosecution Response Brief, para. 90.
[431] Prosecution Response Brief, paras 90-91 (citing Trial Judgement, para. 400).
[432] Prosecution Response Brief, paras 89, 92 (citing Trial Judgement, paras 537-560 and 574) and 141. *See* also Prosecution Response Brief, Section V.
[433] Prosecution Response Brief, para. 93 (citing Trial Judgement, para. 577 and fn. 2052).
[434] *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28; *Nahimana et al.* Appeal Judgement, para. 481; *Semanza* Appeal Judgement, para. 361. *See* also Trial Judgement, para. 400.

circumstantial evidence.[435] Furthermore, it is sufficient to demonstrate that the order substantially contributed to the physical perpetrator's criminal conduct.[436]

161. The Trial Chamber found that Tarčulovski "led and directed the operation at all stages on 10, 11 and 12 August," and that "[t]he actions of the police in the village [of Ljuboten] were at his direction."[437] These actions included the murders of Rami Jusufi, Sulejman Bajrami, Muharem Ramadani, wanton destruction of a number of houses owned by Albanian villagers and cruel treatment of thirteen individuals.[438] The Trial Chamber also concluded that the predominant objective of the operation was to indiscriminately attack Albanian villagers and their property.[439] The Appeals Chamber is satisfied that these findings on Tarčulovski's directions are a sufficient basis for the Trial Chamber's conclusion that he instructed and ordered the members of his police group to commit the crimes at issue.[440] Tarčulovski's arguments are therefore dismissed.

2. Tarčulovski's authority and control over physical perpetrators

162. Tarčulovski submits that there was no evidence showing that he had *de jure* or *de facto* authority to order killings, burnings or beatings or that any perpetrator believed that he had such authority.[441] In addition, he submits that there was no evidence showing that the persons committing the crimes were under his control.[442] In particular, concerning the cruel treatment at Braca's house, Tarčulovski contends that the Trial Chamber found that Ljube Boškoski was present

[435] Trial Judgement, para. 400 (citing, in particular, *Kamuhanda* Appeal Judgement, para. 76; *Galić* Appeal Judgement, paras 170-171; *Limaj et al.* Trial Judgement, para. 515; *Blaškić* Trial Judgement, para. 281).
[436] *Nahimana et al.* Appeal Judgement, para. 492; *Strugar* Trial Judgement, para. 332. *See* also *Aleksovski* Trial Judgement, para. 61; *Tadić* Trial Judgement, paras 673-674.
[437] Trial Judgement, para. 574.
[438] Trial Judgement, paras 312, 320, 325, 328, 346, 380, 383-387, 391 and 566-570.
[439] Trial Judgement, para. 572.
[440] *See supra* paras 130, 135, 138, 141, 146-147, 150 and 153-154. *See* Trial Judgement, paras 400 and 577.
[441] Tarčulovski Appeal Brief, para. 124 (citing Trial Judgement, para. 574); Tarčulovski Amended Notice of Appeal, paras 70 (citing Trial Judgement, paras 36-44, 306-312 and 553) (regarding his authority over perpetrators of the killing of Rami Jusufi), 77 (citing Trial Judgement, paras 306-312) and 85 (citing Trial Judgement, paras 57 and 321-328); Tarčulovski Reply Brief, paras 55 and 78.
[442] Tarčulovski Appeal Brief, para. 177 (citing Trial Judgement, para. 575) and 179; Tarčulovski Amended Notice of Appeal, para. 93 (citing Trial Judgement, paras 381-391); Tarčulovski Reply Brief, para. 78. Although the Tarčulovski Appeal Brief addresses this issue of "control" specifically in relation to cruel treatment, the Tarčulovski Amended Notice of Appeal, which was filed subsequently, indicates that Tarčulovski intends to make this assertion in relation to other crimes such as murder and wanton destruction (Tarčulovski Amended Notice of Appeal, para. 61 (citing Trial Judgement, para. 574)). Tarčulovski appears to be of the view that Tarčulovski's presence at the crime scenes needed to be proven in order for the Trial Chamber to conclude that he had control over the police who perpetrated the crimes (Tarčulovski Amended Notice of Appeal, paras 78 (citing Trial Judgement, paras 306-312), 80 (citing Trial Judgement, paras 36-44, 54-58, 313-320 and 553) and 84 (citing Trial Judgement, paras 306-312)). The Appeals Chamber recalls its finding that the accused's presence at crime scenes is not a requirement for establishing planning, instigating and ordering, *see supra* para. 125. It follows that the accused's presence at crime scenes is not necessary to prove the accused's control or authority over physical perpetrators, although it may be considered as a factor to support proof of such control or authority. Tarčulovski also appears to argue that specific identities of physical perpetrators needs to be proven in order for the Trial Chamber to find that he had control over them (Tarčulovski Reply Brief, para. 53). The Appeals Chamber recalls its consideration on physical perpetrators' identities, and finds that the Trial Chamber

at the house, and that there is no evidence that the men who were abusing the villagers there were under Tarčulovski's control.[443]

163. The Prosecution responds that the Trial Chamber properly found that Tarčulovski had *de facto* authority over the physical perpetrators and exercised effective leadership and control over the police in the village.[444]

164. The Appeals Chamber recalls that the *actus reus* of ordering requires no formal superior-subordinate relationship between the orderer and a physical perpetrator.[445] It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.[446] The Trial Chamber found that Tarčulovski was in charge of the operation in Ljuboten, which he led and directed from its preparatory phase until its execution.[447] In light of the totality of the evidence,[448] it was reasonable for the Trial Chamber to conclude that he was in a position of authority to compel the police members to commit a crime.[449] Furthermore, the presence of Ljube Boškoski at Andreja Braca's house does not in and of itself render the finding on Tarčulovski's authority unreasonable. Tarčulovski has failed to show why his authority and that of Boškoski, if any, could not coincide. Therefore, Tarčulovski's arguments are dismissed.

3. Superior order given to Tarčulovski

165. Finally, Tarčulovski argues that the Trial Chamber could neither determine who ordered the operation nor the substance of this order. Consequently, it erred in finding that it was Tarčulovski who had the *mens rea* to order that specific crimes be committed.[450] Tarčulovski also contends that although the Trial Chamber considered his claim that the operation was ordered by the President,

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sufficiently identified physical perpetrators for the purposes of proving Tarčulovski's authority over them (*see supra* para. 75).

[443] Tarčulovski Appeal Brief, para. 179 (citing Trial Judgement, para. 72); Tarčulovski Amended Notice of Appeal, para. 93 (citing Trial Judgement, paras 381-391). Tarčulovski also asserts that this constitutes a violation of his right to be presumed innocent (Tarčulovski Amended Notice of Appeal, para. 93 (citing Trial Judgement, paras 381-391)). *See* also Tarčulovski Appeal Brief, para. 196.

[444] Prosecution Response Brief, paras 94 (citing Trial Judgement, para. 574) and 144 (citing Trial Judgement, paras 73-74, 428, 558, 570 and 574). The Prosecution argues that "[p]olice superiors generally do not have legal authority to order their subordinates to commit crimes, but the point is that Tarčulovski in fact controlled all actions of the police during the operation." The Prosecution requests summary dismissal on the grounds that his argument is contrary to common sense and that Tarčulovski merely asserts that the Trial Chamber failed to interpret evidence in a particular manner (*ibid.*, para. 94). The Prosecution further asserts that Tarčulovski's allegation concerning the presence of Boškoski at Braca's house is irrelevant to establishing liability for planning, ordering and instigating (*ibid.*, para. 145).

[445] *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361.

[446] *Semanza* Appeal Judgement, para. 361.

[447] Trial Judgement, paras 555, 560 and 574.

[448] *See supra* paras 130, 135 and 153-154.

[449] *See* Trial Judgement, para. 574.

[450] Tarčulovski Appeal Brief, paras 125 and 128 (both citing Trial Judgement, para. 541); Tarčulovski Amended Notice of Appeal, para. 43 (citing Trial Judgement, para. 541), also stating that the Trial Chamber found Tarčulovski

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-82-T
		Date:	10 July 2008
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: **Mr Hans Holthuis**

Judgement of: **10 July 2008**

PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Dan Saxon
Ms Antoinette Issa
Ms Joanne Motoike
Mr Gerard Dobbyn
Ms Meritxell Regue
Ms Nisha Valabhji
Mr Matthias Neuner

Counsel for the Accused:

Ms Edina Rešidović and Mr Guénaël Mettraux for Ljube Boškoski

Mr Antonio Apostolski and Ms Jasmina Živković for Johan Tarčulovski

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conduct.[1586] There must be proof of a nexus between the instigation and the perpetration of the crime, which is satisfied where the particular conduct substantially contributes to the commission of the crime. It need not be proven that the crime would not have occurred without the instigation.[1587] As regards the *mens rea*, it must be shown that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed as a result of that instigation.[1588]

(d) Ordering

400. The *actus reus* of "ordering" requires that a person in a position of authority instructs another person to commit an offence.[1589] Closely related to "instigating", this form of liability additionally requires that the accused possess the authority, either *de jure* or *de facto*, to order the commission of an offence.[1590] That authority may reasonably be implied from the circumstances.[1591] Further, there is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.[1592] With regard to the *mens rea,* the accused must have intended to bring about the commission of the crime, or have been aware of the substantial likelihood that a crime would be committed as a consequence of the execution or implementation of the order.[1593]

(e) Aiding and abetting

401. "Aiding and abetting" is a form of accomplice liability[1594] which has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[1595]

402. With respect to the *actus reus*, a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct was a condition precedent to the commission of the crime need not be established.[1596] However, it needs to be shown that the

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1586 *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.
1587 *Kordić* Appeals Judgement, para 27.
1588 *Kordić* Appeals Judgement, para 32.
1589 *Kordić* Appeals Judgement, para 28, citing *Kordić* Trial Judgement, para 388; *Semanza* Appeals Judgement, para 361.
1590 *Brđanin* Trial Judgement, para 270; *Mrkšić* Trial Judgement, para 550.
1591 *Brđanin* Trial Judgement, para 270; *Limaj* Trial Judgement, para 515.
1592 *Kamuhanda* Appeals Judgement, para 76, citing *Kordić* Trial Judgement, para 388; *see* also *Blaškić* Trial Judgement, para 281; *Limaj* Trial Judgement, para 515; with respect to proving an order by circumstantial evidence, *see* also *Galić* Appeals Judgment, paras 170 -171.
1593 *Blaškić* Appeals Judgement, para 42; *Kordić* Appeals Judgement, para 30; *Brđanin* Trial Judgement, para 270.
1594 *Tadić* Appeals Judgement, para 229.
1595 *Krstić* Trial Judgement, para 601; *Aleksovski* Appeals Judgement, para 162, citing *Furundžija* Trial Judgement, para 249; *Blagojević and Jokić* Appeals Judgement, para 127; *Mrkšić* Trial Judgement, para 551.
1596 *Blaškić* Appeals Judgement, para 48, *Limaj* Trial Judgement, para 517.

not established that the police responsible for this cruel treatment then intended his death, nor did they act realising that his death was a probable consequence of their actions. It was different police, not under the authority or direction of Johan Tarčulovski, who further mistreated Atulla Qaili later at Mirkovci police station and whose conduct constitutes his murder, as set out earlier in this Judgement. It has not been established that Johan Tarčulovski is criminally responsible for their actions in murdering Atulla Qaili.

576. The circumstances that have been discussed and, in particular, the presence of Johan Tarčulovski as the leader of the police when the acts of murder, cruel treatment and wanton destruction were committed during the operation demonstrates, in the Chamber's finding, that acts of murder, cruel treatment and wanton destruction were intended by Johan Tarčulovski at the times relevant respectively to ordering, planning and instigating, or, alternatively, that the commission of crimes of this nature were foreseen, at these times, to be a substantial likelihood of the execution of the operation.

577. The elements necessary to constitute ordering, planning and instigating, for the purposes of Article 7(1) of the Statute have been set out earlier in this Judgement.[2052] Having regard to the matters discussed above, the Chamber finds that it has been established that the Accused Johan Tarčulovski is criminally responsible for ordering, planning and instigating some of the offences charged against him in the Indictment. These offences are:

- the murder of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani;

- the wanton destruction of the houses or other property of Alim Duraki, Agim Jusufi, Qenan Jusufi, Sabit Jusufi, Xhevxhet Jusufovski, Abdullah Luftiu, Harun Rexhepi (Redžepi), Ismet Rexhepi (Rexhepovski), Nazim Murtezani, Qani Jashari, Afet Jashari and Ramush Jashari;

- the cruel treatment at Adem Ametovski's house of M012, Hamdi Ahmedovski, Adem Ametovski, Aziz Bajrami, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, Muharem Ramadani, Osman Ramadani, and Sulejman Bajrami and at Braca's house of M012, Hamdi Ahmedovski, Adem Ametovski, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, and Osman Ramadani.

The Accused will be convicted of these offences pursuant to Article 7(1) of the Statute.

[2052] In addition to those elements which were discussed in this section, the Chamber is also satisfied that the actions taken by Johan Tarčulovski at both the preparatory and execution phases of the operation to enter the village of Ljuboten contributed substantially to the commission of the crimes with which he is charged and which have been proved.

UNITED
NATIONS

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

Case No. IT-99-36-T

Date: 1 September 2004

Original: English

IN THE TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr. Hans Holthuis**

Judgement of: **1 September 2004**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Anna Richterova
Ms. Ann Sutherland
Mr. Julian Nicholls

Counsel for the Accused:

Mr. John Ackerman
Mr. David Cunningham

relinquish their property to the SerBiH without compensation or in a minority of cases exchange their property for property located outside the ARK.[681]

255. The ARK Crisis Staff decisions on resettlement ensured the permanent removal of non-Serbs from the territory of the ARK. Although the ARK decisions called for voluntary compliance and reciprocity, the resettlement of non-Serbs was in part a result of the intolerable conditions imposed on them by the Bosnian Serb authorities, including the shelling, looting and destruction of non-Serb towns and houses, the dismissals from posts and the other crimes carried out against non-Serbs in pursuit of the Strategic Plan.[682]

2. Conclusions

256. The dismissals of non-Serb professionals, the disarmament of non-Serbs and the resettlement of the non-Serb population were operational measures taken in furtherance of the Strategic Plan. The Trial Chamber is fully satisfied that the ARK Crisis Staff was responsible for directing and co-ordinating the execution of these measures within the territory of the ARK. The execution of these measures ensured Bosnian Serb control throughout the ARK and facilitated the implementation of the Strategic Plan in the area. Accordingly, the Trial Chamber is satisfied beyond reasonable doubt that the decisions of the ARK Crisis Staff in the three above mentioned areas substantially contributed to the commission of crimes against non-Serbs in the Bosnian Krajina during the period relevant to the Indictment.

[681] Ex. P1855, "Decision" from the Petrovac Municipal Assembly", dated 28 October 1992; ex. P1843, "Statement" from the Petrovac Municipal Assembly"; ex. P1006, "Record", relating to the Departure of Population from Ključ Municipality, 31 July 1992; ex. P1007, "Decision" on criteria required in order to move out of Ključ Municipality, adopted by the Ključ Municipal Assembly at its session held on 30 July 1992; ex. P696, "Decision on the Criteria for the Possibility of Departure from the Municipality", dated 2 July 1992.
[682] *See* IX.A.2., "Exterminatin and Wilful Killing"; IX.B.2., "Torture"; IX.D.2., "Destructions".

Articles 2 to 5 of the Statute, proof is required that the crime in question has actually been committed by the principal offender(s).[705]

(a) Planning

268. Planning implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[706] Moreover, it needs to be established that the accused, directly or indirectly, intended the crime in question to be committed.[707] 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.[708] Involvement in the planning may however be considered an aggravating factor.[709]

(b) Instigating

269. Instigating means prompting another to commit an offence.[710] Both acts and omissions may constitute instigating, which covers express as well as implied conduct.[711] The *nexus* between instigation and perpetration requires proof.[712] It is not necessary to demonstrate that the crime would not have been perpetrated without the accused's involvement;[713] it is sufficient to prove that

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[705] For 'planning', *see Akayesu* Trial Judgement, para. 473; *Blaškić* Trial Judgement, para. 278; *Kordić* Trial Judgement, para. 386. For 'instigating', *see Akayesu* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Krstić* Trial Judgement, para. 601; *Kordić* Trial Judgement, para. 387. For 'ordering', implicitly, *see Stakić* Trial Judgement, para. 445. For 'aiding and abetting', implicitly, *see Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 164; *Čelebići* Appeal Judgement, para. 352; *Furundžija* Trial Judgement, paras 235, 249; *Vasiljević* Trial Judgement, para. 70; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 161.

[706] *Akayesu* Trial Judgement, para. 480, reiterated in *Krstić* Trial Judgement, para. 601; in *Blaškić* Trial Judgement, para. 279; in *Kordić* Trial Judgement, para. 386; and in *Naletilić* Trial Judgement, para. 59.

[707] *Blaškić* Trial Judgement, para. 278; *Kordić* Trial Judgement, para. 386.

[708] *Kordić* Trial Judgement, para. 386.

[709] *Stakić* Trial Judgement, para. 443.

[710] *Akayesu* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Krstić* Trial Judgement, para. 601, *Kordić* Trial Judgement, para. 387.

[711] *Blaškić* Trial Judgement, para. 280.

[712] *Blaškić* Trial Judgement, para. 280.

[713] *Kordić* Trial Judgement, para. 387; *Galić* Trial Judgement, para. 168.

[714] *Kordić* Trial Judgement, para. 387; *Kvočka* Trial Judegment, para. 252.

[715] *Kvočka* Trial Judgement, para. 252.

[716] *Krstić* Trial Judgement, para. 601; *Galić* Trial Judgement, para. 168.

[717] *Akayesu* Trial Judgement, para. 483; *Blaškić* Trial Judgement, paras 281-282; *Kordić* Trial Judgement, para. 388.

[718] *Blaškić* Trial Judgement, para. 281.

[719] *Blaškić* Trial Judgement, para. 282.

the instigation was a factor clearly contributing to the conduct of other persons committing the crime in question.[714] It has further to be demonstrated that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.[715]

(c) Ordering

270. Responsibility for ordering requires proof that a person in a position of authority uses that authority to instruct another to commit an offence.[716] It is not necessary to demonstrate the existence of a formal superior-subordinate relationship between the accused and the perpetrator; it is sufficient that the accused possessed the authority to order the commission of an offence and that that authority can be reasonably implied.[717] The order does not need to be given in any particular form,[718] nor does it have to be given by the person in a position of authority directly to the person committing the offence.[719] The person ordering must have the required *mens rea* for the crime with which he or she is charged[720] and he or she must also have been aware of the substantial likelihood that the crime committed would be the consequence of the execution or implementation of the order.[721]

(d) Aiding and abetting

271. An accused will incur individual criminal responsibility for aiding and abetting a crime under Article 7(1) where it is demonstrated that the accused carried out an act that consisted of practical assistance, encouragement or moral support to the principal offender of the crime.[722] The acts of the principal offender that the accused is alleged to have aided and abetted must be established.[723] The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.[724] The assistance may consist of an act or omission, and it may occur before, during, or after the act of the principal offender.[725] An individual's position of superior authority does not suffice to conclude from his mere presence at the scene of the crime that he encouraged or supported the crime. However, the presence of a superior can be perceived as an important *indicium* of encouragement or

[720] *Blaškić* Trial Judgement, para. 282.
[721] *Blaškić* Appeal Judgement, paras 41-42.
[722] *Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, paras 163-164; *Čelebići* Appeal Judgement, para. 352; *Furundžija* Trial Judgement, para. 235, para. 249; *Vasiljević* Trial Judgement, paras 70-71; *Vasiljević* Appeal Judgement, para. 102; *Naletilić*Trial Judgement, para. 63; *Simić* Trial Judgement, para. 161.
[723] *Aleksovski* Appeal Judgement, para. 165. The Appeals Chamber held that the principal offender may not even be aware of the accomplice's contribution: *Tadić* Appeal Judgement, para. 229.
[724] *Vasiljević* Appeal Judgement, para. 102; *Furundžija* Trial Judgement paras 223, 224, 249; *Aleksovski* Trial Judgement, para. 61; *Kunarac* Trial Judgement, para. 391; *Kordić* Trial Judgement, para. 399, *Vasiljević* Trial Judgement, para. 70.

VIII. THE ACCUSED'S ROLE AND HIS RESPONSIBILITY IN GENERAL

A. Positions held by the Accused

286. The Trial Chamber is satisfied beyond reasonable doubt that during the period covered in the Indictment and already before then, the Accused was a leading political figure in the ARK and held key positions. He played a significant political role on all three levels of the Bosnian Serb leadership: municipal, regional and republic.

287. The Accused joined the SDS before the first multi-party elections in Bosnia and Herzegovina, held in November 1990.[771]

288. At the municipal level, the Accused was appointed President of the Executive Board for Čelinac on 19 December 1990.[772] On 13 May 1992, the Čelinac Municipal Assembly appointed the Accused member of the Čelinac Crisis Staff.[773] Following the take-over of Banja Luka by the SOS in early April 1992, the Banja Luka Crisis Staff was formed and the Accused became a member thereof, representing the ARK Assembly.[774] Within the Banja Luka Crisis Staff, the Accused was appointed head of the Commission for Standardisation of Personnel.[775]

289. At the regional level, upon the formation of the ZOBK on 26 April 1991, the Accused was appointed First Vice-President of the ZOBK Assembly.[776] In July 1991, he also became a member of a "Personnel Commission" within the ZOBK.[777] On 16 September 1991, the ZOBK transformed itself into the ARK and, by virtue of his previous position within the ZOBK, the Accused became First Vice-President of the ARK Assembly.[778] On 29 October 1991, the Accused represented

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[771] Ex. P758, "Official Gazette of the SerBiH", no. 42, 19 December 1990, p. 1249; Muhamed Filipović, T. 9307.
[772] Ex. DB151, "Decision regarding the election of president of the Executive board of the Municipal Assembly Čelinac, signed by the President of the Čelinac Municipal Assembly", dated 19 December 1990; *see* also Boro Mandić, T. 21251. The Accused was subsequently dismissed from this post on 12 June 1992: ex. DB153, "Decision regarding the dismissal of the president of the Executive board of the Municipal Assembly Čelinac", dated 12 June 1992.
[773] Ex. P1993, "Decision of the Čelinac Municipal Assembly on the appointments to the Crisis Staff of Čelinac", dated 13 May 1992; ex. P1999, "Extract from the minutes of the 15th session of the Čelinac Municipal Assembly", held on 31 May 1992, p. 21.
[774] Ex. P137, "*Glas* newspaper article", dated 4 April 1992, p. 6.
[775] Ex. P154, "*Glas* newspaper article", dated 21 April 1992. The Commission for Standardisation of Personnel was established by the Banja Luka Crisis Staff for the purpose of meeting one of the main demands of the SOS and achieving one of the main tasks of the Banja Luka Crisis Staff, namely the removal of non-Serbs from positions of responsibility in public institutions and companies. *See* also BT-7, T. 2829, 2871 (closed session).
[776] Ex. P67, "Decision on the Election of the First Vice-President of the Assembly of the Community of Bosnian Krajina Municipalities", 26 April 1991.
[777] Ex. P77, "Decision taken at a joint session of the SDS Regional Board for the municipalities covered by the Banja Luka CSB and the ZOBK", dated 1 August 1991; Patrick Treanor, T. 18720-18721.
[778] Ex. P81, "Decision on the Proclamation of the ARK as an Inseparable Part of the Federal State of Federative Yugoslavia and an Integral Part of the Federal Unit of BiH", 16 September 1991; Patrick Treanor, T. 18730; ex. P12, "Extract from the minutes of the 7th session of the Assembly of the ZOBK", held on 16 September 1991.

himself to the ARK municipal authorities as "Co-ordinator for Implementing Decisions".[779] On 5 May 1992, the ARK Crisis Staff was formally created and the Accused was appointed as its President.[780] On 13 May 1992, the Accused was appointed by the ARK Crisis Staff to the ARK Executive Council as Secretary of the Secretariat for Traffic and Communications, Construction and Spatial Planning and the Fund for Highways and Regional Roads.[781] On 9 July 1992, the ARK Crisis Staff renamed itself the ARK War Presidency, while retaining the same scope of authority. The Accused then became President of the ARK War Presidency.[782]

290. As far as the Accused's positions at the republican level are concerned, in the first multi-party elections he was elected to the SRBH Assembly as an SDS deputy from Čelinac Municipality.[783] Upon the withdrawal of the SDS from the multi-party SRBH Assembly on 24 October 1991 and the establishment of the SerBiH on 9 January 1992, the Accused became a member of the SerBiH Assembly.[784] On 15 September 1992, after the ARK was abolished as a territorial unit of the SerBiH, the Accused was appointed by the SerBiH Assembly to the Government of the SerBiH as Acting Deputy Prime Minister for Production.[785] On the same day he was also appointed Minister for Construction, Traffic and Utilities in the Government of the SerBiH.[786]

B. *De jure* and *de facto* power of the Accused

291. The Trial Chamber is satisfied that between mid 1991 and the end of 1992, the Accused possessed *de jure* and *de facto* power that made him one of the most significant political figures in the ARK. The sources of the Accused's power are twofold. In the first place, the Accused possessed power by virtue of the political positions that he occupied at the municipal, regional and republican levels. In the second place, he was entrusted with political power directly by the Bosnian Serb leadership, including Radovan Karadžić. The Accused already enjoyed a great measure of power before the creation of the ARK Crisis Staff. His power was consolidated with his appointment as

[779] Ex. P22/ex. P89, "Telex referring to orders of the SDS Sarajevo". *See* also para. 181 *supra*. Although there is no document in evidence establishing the formal appointment of the Accused to the position of "Co-ordinator for Implementing Decisions", the Trial Chamber is satisfied that the Accused exercised this function.
[780] Ex. P168, "Decision of the ARK Executive Council on the establishment of the ARK Crisis Staff, dated 5 May 1992". *See* also ex. P176, "Telephone numbers of members of the ARK War Staff", 6 May 1992.
[781] Ex. P277, "ARK Official Gazette", decision of 13 May 1992, item 8.
[782] Ex. P2351, "Expert Report of Patrick Treanor", pp. 29, 33-34; ex. P278, "*Glas* newspaper article", dated 10 July 1992, in which the Accused gave an explanation for the change of name.
[783] Ex. P758, "Official Gazette of the SerBiH", no. 42, 19 December 1990, p. 1249; Patrick Treanor, T. 18702-18703.
[784] Ex. P2469, "Transcript of the 5th session of the SerBiH Assembly".
[785] Ex. P323, "Decision of the SerBiH Assembly", signed by Momčilo Krajišnik, dated 15 September 1992; Ahmet Krzić, T. 1812; Patrick Treanor, T. 18842-18843; Pedrag Radić, T. 22125-22127.
[786] BT-103, T. 19944 (closed session); Mevludin Sejmenović, T. 12144-12145.

original decisions is irrelevant. The important thing was that for these decisions to carry authority they had to appear to bear the signature of the President of the ARK Crisis Staff.[803] There is no indication that, at the time, the Accused ever contested the signature on the ARK Crisis Staff decisions to be his own.

298. The Accused's public speeches on behalf of the ARK Crisis Staff, examined below,[804] as well as the fact that other members of the ARK Crisis Staff did not bother to attend all its meetings,[805] are additional proof that he was the driving force behind the major decisions issued by the ARK Crisis Staff.[806]

299. In addition, the Trial Chamber is of the view that the fact that in the eyes of the public, it was the Accused who personified the power of the ARK Crisis Staff is a further important indication that he was indeed the driving force behind the decisions of the ARK Crisis Staff.[807]

300. On 14 June 1992, a number of ARK municipalities issued a joint statement, expressing their dissatisfaction with the efficiency of the operation conducted by the ARK Crisis Staff and openly criticising the Accused, demanding his replacement as President of the ARK Crisis Staff.[808] As noted earlier, the Trial Chamber is of the view that the municipalities in question were motivated by the fact that the ARK Crisis Staff did not pay sufficient attention to the problems in all constituent ARK municipalities. Despite their concerns, these municipalities did not question the authority of the ARK Crisis Staff. On the contrary, they expressly stated that the decisions of the ARK Crisis Staff had to be implemented.[809] Moreover, the Trial Chamber is satisfied that, despite the municipalities' personal criticism of the Accused, they did not actually question his authority. In fact, they continued to implement the ARK Crisis Staff's decisions despite the fact that the Accused was never replaced.[810]

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[803] Boro Blagojević, T. 21900.
[804] *See*, C.5, *infra*, "The Accused's propaganda campaign".
[805] Milorad Sajić, T. 23625-23630; Boro Blagojević, T. 21736-21738; Zoran Jokić, T. 23964-23967.
[806] *See*, C.5, *infra*, "The Accused's propaganda campaign".
[807] BT-94, T. 24725.
[808] Ex. P247, "Inter-municipal agreement", Sansko-Unska Area, dated 14 June 1992. The Municipalities stipulating this agreement were Bosanska Krupa (referred to as Srpska Krupa), Bosanski Petrovac, Bosanski Novi, Bosanska Dubica, Prijedor and Sanski Most. The agreement includes the following statement: "We think that the work of the [ARK] Crisis Staff has been unsatisfactory and it has been serving the local interests of Banja Luka. We are of the opinion that the Crisis Staff should be composed of the municipal assemblies and the representatives of the Serbian Democratic Party from all the constituent municipalities of the ARK. (...) Accordingly, personnel changes should be made in the Crisis Staff of the ARK".
[809] Ex. P247, "Inter-municipal agreement", Sansko-Unska Area, dated 14 June 1992. Referring to the 8th session of the ARK Crisis Staff, the document states: "We request that concrete and clear replies be given to each of the conclusions reached at this session and that individuals in charge of these conclusions be held personally accountable for their implementation".
[810] *See* VI.C.1, "The authority of the ARK Crisis Staff with respect to municipal authorities".

314. During the spring of 1992, the Accused began to advocate vociferously the dismissal of non-Serbs as part of the Strategic Plan to permanently forcibly displace most of the Bosnian Muslim and Bosnian Croat population from the ARK. He did so as Vice–President of the ARK Assembly and, after the take-over of Banja Luka by the SOS in April 1992, as a member of the Banja Luka Crisis Staff and as the head of the Commission for Standardisation of Personnel of the Crisis Staff of Banja Luka. The task of this commission was to systematically implement the policy of dismissing non-Serb personnel from managerial positions in public enterprises and institutions in Banja Luka. At the same time, the Accused started publicly calling upon the non-Serb population to leave the Bosnian Krajina.[835]

3. The Accused's participation in the implementation of the Strategic Plan as President of the ARK Crisis Staff

315. During the period of operation of the ARK Crisis Staff, the Accused as its President continued to substantially contribute to the implementation of the Strategic Plan in the ARK.

316. The Trial Chamber has previously established that the ARK Crisis Staff exercised *de facto* authority over the municipal authorities and over the police, both at the level of the CSB and of the SJBs. The municipal authorities and the police accepted the authority of the ARK Crisis Staff and implemented its decisions in three key areas: a) dismissals of non-Serb professionals; b) disarmament of paramilitary units and individuals who illegally possess weapons, selectively enforced against non-Serbs; and c) resettlement of the non-Serb population.[836]

317. The Trial Chamber has also established that the ARK Crisis Staff, sharing a joint approach with respect to the implementation of the Strategic Plan with the Command of the 1st KK of the VRS, closely co-operated with the 1st KK.[837] Decisions and discussions of the ARK Crisis Staff impacted on military activity such as the mobilisation of military conscripts, deadlines concerning the surrender of weapons, the forceful confiscation of weapons, the removal of non-Serbs from the

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over the phone on the issue of military mobilisation in Bosnian Krajina for the war in Croatia. With respect to military mobilisation, the Accused was recorded stating: "I am in charge of that" and "the part that we're doing is going well".

[834] The Trial Chamber has evidence that in August 1991 a delegation, including the Accused, Stojan Župljanin and military officers, visited the training camp in Gornji Podgradci in Bosanska Gradiška Municipality, where Serb paramilitary units were trained. Whereas before the visit of this delegation, the trainees did not have enough equipment and food, from that day onwards they were given sufficient food, weapons, ammunition, and uniforms, T. 21061-21064 (closed session).

[835] *See*, C.5, *infra*, "The Accused's propaganda campaign".

[836] *See*, VI.C.1, "The authority of the ARK Crisis Staff with respect to municipal authorities"; VI.C.2, "The authority of the ARK Crisis Staff with respect to the police"; VI.D, "The role of the ARK Crisis Staff in the implementation of the Strategic Plan".

[837] From establishment of the ARK Crisis Staff until the establishment of the VRS, the ARK Crisis Staff closely co-operated with the 5th Krajina Corps of the JNA.

army and the formation of a civilian government in Donji Vakuf Municipality, which was run by a military administration.[838]

318. Moreover, the ARK Crisis Staff had substantial influence over the SOS, one of the paramilitary groups operating in the ARK and responsible for creating an atmosphere of fear and terror amongst the non-Serb inhabitants of the Bosnian Krajina by committing crimes against Bosnian Muslims and Bosnian Croats including murder, rape, plunder and the destruction of property, including religious buildings.[839] The ARK Crisis Staff used the SOS as an operative tool that contributed to the implementation of the Strategic Plan.[840]

319. The Trial Chamber has also found that the Accused was not only formally representing the ARK Crisis Staff as its President, but was in fact at the very heart of the ARK Crisis Staff and was its key figure, being the driving force behind the major decisions issued by the ARK Crisis Staff.[841] The Trial Chamber is satisfied that the Accused was appointed as President of the ARK Crisis Staff precisely to fulfil this role and because he was considered as the most suitable for it in the circumstances. In the view of the Trial Chamber, the decisions of the ARK Crisis Staff can, therefore, be attributed to the Accused. The Trial Chamber is convinced that those decisions and the Accused are inseparable and the submission of the Defence that the Accused should not be held accountable for them is unfounded.

320. The Trial Chamber has already found that the ARK Crisis Staff issued decisions that substantially contributed to the implementation of the Strategic Plan and ultimately to the commission of crimes.[842] The Trial Chamber is satisfied that the Accused in his capacity as President of the ARK Crisis Staff personally made a substantial contribution to the implementation of the Strategic Plan in the ARK. The decisions of the ARK Crisis Staff reflected the ideas and strategies which the Accused had been advocating since 1991. By virtue of these decisions, and the *de facto* authority and influence exercised by the ARK Crisis Staff, the Accused was able to give effect to his ideas.[843]

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[838] *See*, VI.C.3, "The authority of the ARK Crisis Staff with respect to the army".
[839] *See*, IV.C, "The implementation of the Strategic Plan in the Bosnian Krajina". *See* also Osman Selak, T. 12956-12959; ex. P2326, entry of 8 October 1992 (under seal). *See* also BT-104, T. 18492; Adil Draganović, T. 4899, 4901; Besim Islamčević, T. 7423, 7510, 7541-7542; Zijahudin Smailagić, T. 1951. The Trial Chamber has already found that the head of the SOS and another member, Nenad Stevandić and Slobodan Dubočanin respectively, were members of the ARK Crisis Staff, *see*, para. 193 *supra*.
[840] *See*, VI.C.4, "The authority of the ARK Crisis Staff with respect to Serbian paramilitary units".
[841] *See*, B.2, *supra*, "The power of the Accused as President of the ARK Crisis Staff".
[842] *See* VI.D, "The role of the ARK Crisis Staff in the implementation of the Strategic Plan".
[843] As to the Accused's political ideas, *see* also, C.5, *infra*, "The Accused's propaganda campaign".

356. For the foregoing reasons, the Trial Chamber, considering all the circumstances, dismisses JCE as a possible mode of liability to describe the Accused's individual criminal responsibility.

2. Planning

357. As contended by the Prosecution, the Accused in the present case did not physically perpetrate any of the crimes established.[891] Responsibility for 'planning' a crime could thus, according to the above definition, only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance. 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.

358. Although the Accused espoused the Strategic Plan, it has not been established that he personally devised it.[892] The Accused participated in its implementation mainly by virtue of his authority as President of the ARK Crisis Staff and through his public utterances. Although these acts may have set the wider framework in which crimes were committed, the Trial Chamber finds the evidence before it insufficient to conclude that the Accused was involved in the immediate preparation of the *concrete crimes*. This requirement of specificity distinguishes 'planning' from other modes of liability. In view of the remaining heads of criminal responsibility, some of which more appropriately characterise the acts and the conduct of the Accused, the Trial Chamber dismisses 'planning' as a mode of liability to describe the individual criminal responsibility of the Accused.

3. Instigating

359. Many of the decisions of the ARK Crisis Staff for which the Accused bears responsibility requested that certain acts amounting to crimes be carried out. Most of the decisions did not take immediate effect and required implementation by, *e.g.*, municipal organs. In this context, it is immaterial whether the physical perpetrators were subordinate to the instigator, or whether a number of other persons would necessarily have to be involved before the crime was actually committed, as long as it can be shown that there was a causal link between an act of instigation and

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these deaths were predictable." *See* also, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, paras 44-45.

[890] ICTY cases have applied JCE to enterprises of a smaller scale, limited to a specific military operation and only to members of the armed forces (*Krstić* Trial Judgement, para. 610); a restricted geographical area (*Simić* Trial Judgement, paras 984-985); a small group of armed men acting jointly to commit a certain crime (*Tadić* Appeal Judgement, paras 232 *et seq.*; *Vasiljević* Trial Judgement, para. 208); or, for the second category of JCE, to one detention camp (*Krnojelac* Trial Judgement, para. 84).

[891] Indictment, para. 33.

the commission of a particular crime. Causality needs to be established between all acts of instigation and the acts committed by the physical perpetrators, even where the former are the public utterances of the Accused.

360. The Trial Chamber has found that decisions of the ARK Crisis Staff regarding the disarmament, dismissal and resettlement of non-Serbs were systematically implemented by the municipal Crisis Staffs, the local police, and the military. Moreover, it has been abundantly proved that the Accused made several inflammatory and discriminatory statements, *inter alia*, advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay on the territory of the ARK. In light of the various positions of authority held by the Accused throughout the relevant time, these statements could only be understood by the physical perpetrators as a direct invitation and a prompting to commit crimes. Against this background, the Trial Chamber is satisfied that the Accused instigated the commission of some crimes charged in the Indictment.

361. The relation of this mode of liability to individual crimes will be analysed below in the sections dealing with the responsibility of the Accused for the specific crimes.

4. Ordering

362. The Trial Chamber has already found that the ARK Crisis Staff became the highest organ of civilian authority in the ARK, to which the municipal authorities were *de facto* subordinated. Municipal authorities maintained a clear line of communication with the ARK Crisis Staff commensurate with such a relationship: ARK Crisis Staff meetings were attended on a weekly basis by the Presidents of the member municipalities or their representatives.

363. The ARK Crisis Staff repeatedly stated that its decisions were binding on all municipalities. In addition, the municipal authorities accepted the authority of the ARK Crisis Staff to issue decisions that were directly binding on them.

364. That a number of municipalities had started implementing certain aspects of the Strategic Plan even before the ARK Crisis Staff issued instructions does not detract from the fact that, following its establishment, the ARK Crisis Staff had the authority to issue binding decisions and in fact did so, and that the municipal authorities acted pursuant to these decisions. Furthermore, the Trial Chamber is satisfied that these decisions were binding on municipal authorities even if there was no *formally* established mechanism for imposing sanctions on the municipalities in case of failure to implement ARK Crisis Staff decisions, and even if in some occasions municipal

[892] *See*, C.1, *supra*, "The Accused's espousal of the Strategic Plan".

authorities disregarded these decisions and acted independently, because the municipal authorities did not challenge the authority of the ARK Crisis Staff to issue these decisions or their binding nature.

365. The Trial Chamber has also found that the ARK Crisis Staff, as the highest civilian authority of the ARK, exercised *de facto* authority over the police in the ARK, and that through its decisions it in fact issued orders which the CSB passed down to the SJBs with the instruction to implement them.

366. As shown, ARK Crisis Staff decisions were systematically implemented by the municipal authorities and by the police in three key areas: a) the disarmament of "paramilitary groups" and confiscation of weapons; b) the dismissals of non-loyal/non-Serb professionals; and c) the resettlement of the non-Serb population. The Trial Chamber has also found that the decisions of the ARK Crisis Staff can be attributed to the Accused. Whether the ARK Crisis Staff decisions in these key areas amounted to orders to commit crimes charged in the Indictment is analysed for each crime under the heading of the responsibility of the Accused.

5. Aiding and abetting

367. The Trial Chamber is satisfied that the ARK Crisis Staff practically assisted the commission of crimes by the army, the police and paramilitary organisations by, *inter alia*, demanding the disarmament of non-Serbs through announcements and decisions setting deadlines concerning the surrender of weapons and providing for the eventual forceful confiscation of weapons. These announcements and decisions not only facilitated the Bosnian Serb armed take-over of individual municipalities but on many occasions were used as the pretext for such take-overs. The Trial Chamber has also found that the decisions of the ARK Crisis Staff can be attributed to the Accused.

368. In addition, some of the inflammatory and discriminatory statements made by the Accused, in light of the positions of authority that he held, amount to encouragement and moral support to the physical perpetrators of crimes. Moreover, the Accused made threatening public statements which had the effect of terrifying non-Serbs into wanting to leave the territory of the ARK, thus paving the way for their deportation and/or forcible transfer by others. The establishment by the ARK Crisis Staff of an Agency for the Movement of People and Exchange of Properties in Banja Luka further assisted in this regard.

369. The Trial Chamber is thus satisfied that the Accused carried out acts that consisted of practical assistance, encouragement or moral support to the principal offenders of the crimes, and that he did so in his capacity as member of the SerBiH Assembly and the ARK Assembly before the

further satisfied that these killings fulfil the element of massiveness for the crime of extermination. It is also proven that the direct perpetrators had an intention to kill or to inflict serious injury, in the reasonable knowledge that their acts or omissions were likely to cause the death of the victim.

3. The Responsibility of the Accused

466. The Trial Chamber has already dismissed JCE, planning and superior criminal responsibility under Article 7(3) of the Statute as possible modes of liability to describe the individual criminal responsibility of the Accused.[1230]

467. There is no evidence to establish that the Accused ordered or instigated the commission of the crimes of extermination and/or wilful killing charged under Counts 4 and 5 of the Indictment.

468. The Trial Chamber is not satisfied that the public utterances of the Accused, in particular his statements with respect to mixed marriages and those suggesting a campaign of retaliatory ethnicity-based murder[1231] prompted the physical perpetrators to commit any of the acts charged under Counts 4 and 5 of the Indictment, because the *nexus* between the public utterances of the Accused and the commission of the killings in question by the physical perpetrators has not been established. Moreover, neither the public utterances of the Accused nor the decisions of the ARK Crisis Staff are specific enough to constitute instructions by the Accused to the physical perpetrators to commit any of the killings charged.

(a) Wilful killing (Count 5)

469. The Trial Chamber recalls its previous finding that the decisions of the ARK Crisis Staff can be attributed to the Accused.[1232] It also found that between 9 May 1992 and 18 May 1992, the ARK Crisis Staff issued a number of decisions demanding the disarmament of "paramilitary formations" and of "individuals who illegally possess weapons", specifying that "[a]ll formations that are not in the Army of the Serbian Republic of Bosnia and Herzegovina or the Banja Luka Security Services Centre and are in the Autonomous Region of Krajina, are considered paramilitary formations and must be disarmed." Moreover, the Trial Chamber has found that, although these decisions on disarmament were not expressly restricted to non-Serbs, the disarmament operations were selectively enforced against them by the municipal civilian authorities, the CSB and the SJBs, and by the army.[1233]

[1230] *See* VIII.D., "The Accused's criminal responsibility in general".
[1231] *See* paras 328-329 *supra*.
[1232] *See* para. 319 *supra*.
[1233] *See* VI.D., "The role of the ARK Crisis Staff in the implementation of the Common Plan".

3. Responsibility of the Accused

571. The Trial Chamber has already dismissed JCE, planning and superior criminal responsibility under Article 7(3) of the Statute as possible modes of liability to describe the individual criminal responsibility of the Accused.[1474]

572. The Trial Chamber recalls its previous findings that the decisions of the ARK Crisis Staff can be attributed to the Accused,[1475] and that the ARK Crisis Staff's decisions of 28 and 29 May 1992, advocating the resettlement of the non-Serb population, were implemented by the municipal authorities and the police.[1476]

573. The Trial Chamber is not satisfied that the Accused ordered the crimes of deportation and forcible transfer. The wording of the ARK Crisis Staff's decisions of 28 and 29 May incites to action, but on its face does not order.[1477] The public utterances of the Accused are not specific enough to constitute orders to commit deportation and forcible transfer.

574. The Trial Chamber is however satisfied that the ARK Crisis Staff's decisions of 28 and 29 May 1992 prompted the municipal authorities and the police, who implemented them, to commit the crimes of deportation and forcible transfer after those dates. Although the two decisions are, not disingenuously, framed in terms of voluntary compliance, to the municipal authorities and the police they could have only meant a direct incitement to deport and forcibly transfer non-Serbs from the territory of the ARK. This is the only reasonable conclusion that may be drawn when the terms of the decisions are considered in the light of the Accused's unambiguous public statements, made repeatedly from early April 1992 onwards, calling upon the non-Serb population to leave the Bosnian Krajina and stating that only a small percentage of non-Serbs would be allowed to stay.[1478]

575. Furthermore, the Accused's espousal of the Strategic Plan, of which the crimes of deportation and forcible transfer formed an integral part, and the implementation of which he coordinated in his position as President of the ARK Crisis Staff, and his awareness that it could only be implemented through force and fear, demonstrate that he intended to induce the commission of the crimes of deportation and forcible transfer.[1479]

[1474] *See* VIII., "The Accused's Role and his Responsibility in General", *supra*.
[1475] *Ibid.*
[1476] Ex. P211, "ARK Crisis Staff Conclusions", 28 May 1992, signed by the President, Radoslav Brđanin; Ex. P227, "Official Gazette of the ARK, ARK Crisis Staff Conclusions", 29 May 1992, with a signature block of the President of the Crisis Staff Radoslav Brđanin. *See* VI.D. *supra*.
[1477] *Ibid.* Ex. P277, "ARK Crisis Staff Conclusions", 20 May 1992: "There are no reasons whatsoever for people of any nationality to move out of the ARK".
[1478] *See* VIII.C.5., "The Accused's propaganda campaign", *supra*.
[1479] *See* VIII.C.1., "The Accused's espousal of the Strategic Plan", *supra*.

3. The Responsibility of the Accused

1051. The Trial Chamber has already dismissed JCE, 'planning' and superior criminal responsibility under Article 7(3) of the Statute as possible modes of liability to describe the individual criminal responsibility of the Accused.[2635]

(a) Wilful killing, torture, destruction of property, religious buildings, deportation and forcible transfer as persecution

1052. The Trial Chamber has previously established the responsibility of the Accused for aiding and abetting certain crimes of wilful killing,[2636] torture,[2637] destruction of property and religious buildings[2638] as well as deportation and forcible transfer.[2639] The Accused has also been found responsible for instigating certain incidents of deportation and forcible transfer.[2640] For the purposes of persecution, the Trial Chamber has also found that these acts were committed with the requisite intent by the physical perpetrators.[2641] To hold the Accused responsible for these crimes under persecution, it needs to be demonstrated that the Accused also acted with discriminatory intent.

1053. The essence of the utterances made by the Accused are, in the Trial Chamber's view, instructive of his attitude towards Bosnian Muslims and Bosnian Croats. The Trial Chamber recalls that the Accused repeatedly used derogatory and abusive language when referring to Bosnian Muslims and Bosnian Croats in public.[2642] Moreover, he openly labelled these people 'second rate'[2643] or 'vermin'[2644] and stated that in a new Serbian state, the few Bosnian Muslims and Bosnian Croats allowed to stay would be used to perform menial work.[2645] The Trial Chamber is thus satisfied that not only the physical perpetrators, but also the Accused possessed the intent to discriminate against the Bosnian Muslim and Bosnian Croat victims.

1054. The Trial Chamber finds that the Accused aided and abetted persecution with respect to wilful killing, torture, destruction of properties, religious and cultural buildings as well as deportation and forcible transfer. The Accused also instigated persecution with respect to deportation and forcible transfer.

[2635] *See* VIII.D., "The Accused's criminal responsibility in general".
[2636] Count 5, *see* para. 476 *supra*.
[2637] Counts 6 and 7, *see* paras 535-538 *supra*.
[2638] Counts 11-12, *see* paras 669, 677-678 *supra*.
[2639] Counts 8 and 9, *see* paras 576-583 *supra*.
[2640] *Ibid.*
[2641] *See* "The facts and findings" earlier in this chapter.
[2642] See VIII.C.5., "The Accused's Propaganda Campaign".
[2643] BT-9, T. 3204 (closed session).
[2644] BT-7, T. 2834 (closed session).
[2645] BT-11, T. 3990 (closed session).

(b) Appropriations, physical violence, rapes, sexual assaults, constant humiliation and degradation as persecution

1055. Earlier in this chapter, the Trial Chamber has found that Bosnian Muslims and Bosnian Croats were exposed to physical violence, rapes, sexual assaults, as well as to constant humiliation and degradation by Bosnian Serb soldiers and policemen.[2646] In addition, the Trial Chamber has found that there was extensive appropriation of non-Serb property by Bosnian Serb forces.[2647] The Trial Chamber is satisfied that the Accused aided and abetted the commission of these crimes by the physical perpetrators.

1056. The Trial Chamber is satisfied that the ARK Crisis Staff decisions on disarmament issued between 9 May 1992 and 18 May 1992,[2648] which can be personally attributed to Accused,[2649] had the effect of creating an imbalance of arms and weapons favouring the Bosnian Serbs in the Bosnian Krajina. The Trial Chamber finds that the decisions on disarmament were selectively enforced on non-Serbs,[2650] while at the same time, the Bosnian Serb population was arming itself on a massive scale.[2651] Furthermore, at the municipal level, where the ARK Crisis Staff decisions with respect to disarmament were implemented, deadlines to hand over weapons were on occasion used as a pretext to attack non-Serb villages.[2652]

1057. The Trial Chamber is thus satisfied that the ARK Crisis Staff decisions on disarmament had a substantial effect on the commission of said crimes by Bosnian Serb soldiers and policemen during and immediately after the armed attacks on non-Serb towns, villages and neighbourhoods. The Trial Chamber is also satisfied that the Accused was aware that the Bosnian Serb forces were to attack non-Serb towns, villages and neighbourhoods and that through the ARK Crisis Staff decisions on disarmament, he rendered practical assistance and a substantial contribution to the Bosnian Serb forces carrying out these attacks, during which some of the crimes in question were committed.

1058. In addition, the Trial Chamber is satisfied that the Accused aided and abetted the crimes of physical violence, rapes, sexual assaults, and constant humiliation and degradation in camps and detention facilities throughout the ARK by Bosnian Serb soldiers and policemen. It has been established beyond reasonable doubt that the Accused had knowledge of the existence of these

[2646] *See* paras 999-1020 *supra*.
[2647] *See*, XI.D.2, "Destructions. Facts and Findings".
[2648] *See* paras 242-247 *supra*.
[2649] *See* para. 319 *supra*.
[2650] *See* VI.D., "The role of the ARK Crisis Staff in the implementation of the Strategic Plan".
[2651] *See* IV., "General Overview".
[2652] *See* IV., "General Overview" and IX.D., "Destructions".

IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Decision of:
26 June 2001

PROSECUTOR

v

RADOSLAV BRDANIN & MOMIR TALIC

DECISION ON FORM OF FURTHER AMENDED INDICTMENT AND PROSECUTION APPLICATION TO AMEND

The Office of the Prosecutor:

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

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application and its background

1. The accused Momir Talic ("Talic") has filed a Preliminary Motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"),[1] in which he alleges that the form of the further amended indictment now filed by the prosecution is defective.[2]

2. The further amended indictment pleads the same twelve counts against Talic as were pleaded in the amended indictment.[3] These are:

(a) genocide,[4] and complicity in genocide ;[5]

(b) persecutions,[6] extermination,[7] deportation[8] and forcible transfer (amounting to inhumane acts),[9] as crimes against humanity;

(c) torture, as both a crime against humanity,[10] and a grave breach of the Geneva Conventions;[11]

the killing incidents, in the identity of the facilities where the killings and maltreatment are alleged to have occurred and in the inhumane acts committed. He asserts that he is entitled to know whether these lists are intended to be exhaustive or, if they are not so intended, the details which are not presently listed.[182] The prosecution responds that the lists are *not* intended to be exhaustive . It says that it will be leading evidence of each of the incidents listed and each of the facilities listed. In addition, evidence may be given in relation to other incidents and other facilities. It argues that it is permitted to do so where , as here, it does not assert that either of the accused was directly involved in those incidents.[183]

61. The right of the prosecution to lead evidence in relation to facts not pleaded in the indictment is not as unlimited as its response to this complaint may suggest . Article 21.4(a) entitles the accused "to be informed promptly and in detail [...] of the nature and cause of the charge against him". For example, it would not be possible, simply because the accused was not alleged to be directly involved, to lead evidence of a completely new offence which has not been charged in the indictment without first amending the indictment to include the charge. Where, however, the offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the prosecution is not required to lay a separate charge in respect of each murder. The old pleading rule was that a count which contained more than one offence was bad for duplicity , because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count. Such a rule is completely impracticable in this Tribunal, given the massive scale of the offences which it has to deal with.[184] But the rule against duplicity was nevertheless also one of elementary fairness, and the consideration of fairness involved was that the accused must know the nature of the case he has to meet.

62. Where, therefore, the prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence.[185] Until such notice is given, an accused is entitled to proceed upon the basis that the details pleaded *are* the only case which he has to meet in relation to the offence or offences charged. Notice that such evidence will be led in relation to a particular offence charged is *not* sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66(A). This necessarily follows from the obligation now imposed upon the prosecution to identify in its Pre-Trial Brief, in relation to *each* count, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused.[186] If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its Pre-Trial Brief, specific notice must be given to the accused of that particular intention.

63. Accordingly, at this stage and until given sufficient notice that evidence will be led of additional incidents or facilities in relation to a particular offence charged, both accused are entitled to proceed upon the basis that the lists of killings and facilities *are* exhaustive in nature.

64. Talic also complains that insufficient details are supplied as to the means by which the crimes other than the killings pleaded in the indictment were perpetrated .[187] Specifically, he complains that the prosecution has failed to provide any details as to the acts which constitute the torture, sexual assaults and other inhumane acts to which reference is made in the indictment in relation to these two counts.[188] The prosecution has responded that, in a case such as the present case, these are matters of evidence and not material facts, because the criminal responsibility of Talic is "based upon his high position within the leadership and a widespread and extensive pattern of criminal conduct, rather than on his proximity to any particular crime".[189]

65. Reference has already been made in general terms to the way in which the genocide charges have been pleaded.[190] Such generality is not displaced by reference to the exact wording of the indictment. After asserting the participation of both accused in "a campaign designed to destroy Bosnian Muslims and

IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Decision of:
20 February 2001

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON OBJECTIONS BY MOMIR TALIC TO THE FORM OF THE AMENDED INDICTMENT

The Office of the Prosecutor:

Ms Joanna Korner
Mr Nicholas Koumjian
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. The accused Momir Talic ("Talic") has filed a preliminary motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"),[1] in which he alleges that the form of the amended indictment is defective.[2] By that Motion, Talic seeks a number of rulings:[3]

(1) The facts grounding the charges against him give "no indication of places, time frame, identity of the perpetrators and victims or offences put forward".[4]

(2) The amended indictment fails to identify whether he is alleged to have committed the acts charged himself, or had them committed or whether he knew of those acts or should have known of them.[5]

(3) The prosecution has impermissibly charged him with cumulative charges based upon the same facts, and it must elect upon which of the charges he is to be prosecuted .[6]

(4) The allegation of grave breaches against the Geneva Conventions of 1949 (counts 5, 7

Tribunal's Statute and Rules as interpreted by the jurisprudence of the Tribunal , which is said to require the indictment in every case, whatever the nature of the responsibility alleged, to contain information as to the identity of the victims , the place and date of the offence and the methods used to perpetrate it.[60] Talic says that the indictment fails to identify the "actual perpetrators" of the alleged crimes, or any connection between them and himself, or the nature of his responsibility for their acts.[61]

15. Talic also argues that, following the statement by the prosecution that it does not intend to call as witnesses a number of persons whose statements formed part of the supporting material accompanying the indictment when confirmation was sought , the amended indictment now has no validity; the suggestion is made that a number of these statements provided the only material before the confirming judge in relation to various of the alleged events pleaded.[62] As stated earlier, the prosecution filed no response to this argument, but it may nevertheless be dismissed. The Trial Chamber has already pointed out that, once the indictment has been confirmed, the issue as to whether there is evidence to support any charge pleaded in the indictment is to be determined by the Trial Chamber at the conclusion of the trial or (if the issue is raised) at the close of the prosecution case.[63] The absence of material which was before the confirming judge has no relevance to the *form* of the indictment .

16. In relation to the other issues raised by Talic, the prosecution denies that it is obliged in an indictment to give the details to which Talic has referred, and it says that such details should be the subject of a request for further and better particulars.[64] It dismissed the decisions of this Trial Chamber to the contrary effect as being out of line with the decisions of the other Trial Chambers.[65] These two assertions are dealt with separately.[66]

17. This Trial Chamber does not accept that its decisions are inconsistent with those of other Trial Chambers. It is not proposed to restate in this decision what has already been said in previous decisions (and not just those of this Trial Chamber) concerning the need for particularity in pleading, except where necessary to deal with a particular issue raised in the present case.

18. The starting point in the present case is the need for the accused to be informed of the "nature and cause of the charge against him".[67] A distinction is drawn in the Tribunal's jurisprudence between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which need not be pleaded).[68] Whether a particular fact is a material one which must be pleaded depends in turn upon the nature of the case which the prosecution seeks to make, and of which the accused must be informed. The materiality of such details as the identity of the victim, the place and date of the events for which an accused is alleged to be responsible , and the description of the events themselves, necessarily depends upon the alleged proximity of that accused to those events.[69]

19. In a case based upon superior responsibility, what is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.[70] However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give , the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) is often unknown – and because the acts themselves often cannot be greatly in issue.[71]

20. In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible – where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility – again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of

those acts.[72] But more precision is required in relation to the material facts relating to those acts of other persons than is required for an allegation of superior responsibility . In those circumstances, what the accused needs to know as to the case he has to meet is not only what is alleged to have been his own conduct but also in somewhat more detail than for superior responsibility what are alleged to have been the acts for which he is to be held responsible,[73] subject of course to the prosecution's ability to provide such particulars.[74] But the precision required in relation to those acts is not as great as where the accused is alleged to have personally done the acts in question.[75]

21. Another form of "accomplice liability" within the meaning of Article 7.1 is that of acting in concert as part of a common purpose or design, or as part of a common criminal enterprise, referred to above.[76] Where such liability is charged, the indictment must inform the accused of the nature or purpose of the joint criminal enterprise (or its "essence"), the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group – and the nature of the participation *by the accused* in that enterprise.[77]

22. In a case based upon individual responsibility where the accused is alleged to have *personally* done the acts pleaded in the indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed.[78] Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible .[79] Where the precise date cannot be specified, a *reasonable* range of dates may be sufficient.[80] Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient.[81] Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.[82]

6 Relief in the event that the form of the indictment is defective

23. It is *not* the function of a Trial Chamber to check for itself whether the form of an indictment complies with the pleading principles which have been laid down. The Trial Chamber is, of course, entitled *proprio motu* to raise issues as to the form of an indictment but, unless it does so, it waits until a *specific* complaint is made by the accused before ruling upon the compliance of the indictment with those pleading principles.[83] This is fundamental to the primarily adversarial system adopted for the Tribunal by its Statute.

24. The only sufficiently *specific* complaints made by Talic in relation to the form of the amended indictment in the present case are two in number:

> (1) that he has been improperly charged cumulatively with a number of charges based upon the same facts, and
>
> (2) that the charges alleging grave breaches of the Geneva Conventions are irrelevant in the absence of any allegation in the indictment that the acts upon which the charges are based took place in the course of an international armed conflict.

Both of these complaints are dealt with in the succeeding sections of this decision .

25. The remaining complaints are very general in nature – no real attempt has been made to identify the specific allegations to which they relate. This approach by Talic was perhaps understandable in view of the almost complete lack of detail in the amended indictment, but it does not assist the Trial Chamber to make *specific* orders against the prosecution in relation to the defects in its indictment. However, this difficulty largely disappeared when the Senior Trial Attorney for the prosecution very fairly and properly

conceded that the defects in the indictment were a result of a misapprehension on her part as to of the pleading principles which had been laid down in the Tribunal, and her belief that it would be sufficient for the prosecution to provide schedules to the defence disclosing these details at a later stage.[84]

26. Now that this misapprehension has been dispelled, it is sufficient, in the opinion of the Trial Chamber, simply to order the prosecution to file a further amended indictment which *does* comply with the pleading principles which have been laid down by the Tribunal and discussed in the *Krnojelac* cases. Despite the impression conveyed by some sections of the Office of the Prosecutor that it is the prosecution policy to avoid disclosing what the real nature of its case is until as late a stage as possible, the Trial Chamber is confident – from the assurances given by the Senior Trial Attorney for the prosecution during the status conferences to which reference has been made – that it *will* now comply with those pleading principles. Bearing in mind that – subject to contingencies beyond its control – the Trial Chamber hopes to be able to commence the trial in this case in May or June this year, there is a need for the form of the indictment to be finalised as soon as possible without further litigation. If the defence is dissatisfied with the prosecution's compliance with those pleading principles, the Trial Chamber will entertain a new motion objecting to the form of the further amended indictment – *provided* that the motion identifies the specific allegations to which it takes objection.[85]

27. It is, however, necessary to dispose of the suggestion earlier made by the prosecution , that the detail missing from this indictment should be the subject of a request for further and better particulars. The right of an accused to seek further and better particulars of an allegation in the indictment does *not* overcome a deficiency in the form of the indictment. The indictment *must* state all of the *material* facts upon which the prosecution relies to establish the charges laid. If the evidentiary material provided by the prosecution during the pre-trial discovery process does not sufficiently identify the *evidence* upon which the prosecution relies to establish those material facts,[86] then – and only then – is it appropriate for an application to be made to the Trial Chamber for an order that the prosecution supply particulars (and even then only if a request to the prosecution for such particulars has not been satisfactorily answered).[87] The response by the prosecution that the complaints made by Talic in relation to the form of the indictment should have been the subject of an application for further and better particulars is rejected.

28. There is one final statement to be made in relation to the form of the further amended indictment which the prosecution is being ordered to file. This Trial Chamber has stated that, in order to avoid ambiguity, it is *preferable* that an indictment indicate precisely *and expressly* the particular nature of the responsibility alleged in relation to each individual count.[88] The extent to which the prosecution adopts this Trial Chamber's *preferred* manner of pleading in this regard will provide a good indication of the degree to which the prosecution is prepared now to co-operate with the Trial Chamber in this case.

7 Cumulative charging

29. Talic says that the indictment does not respect the principles of international law that:[89]

(i) only a single legal characterisation may be applied to the same facts,

(ii) where the same facts may constitute two offences, only the charge which contains the more specific elements may be charged (a principle which he says is derived from the *Blockburger* case),[90] and

(iii) genocide, as a composite offence, incorporates the ingredients of persecution , extermination, wilful killing, torture, deportation and forcible transfer, and therefore cannot be charged with any of those separate offences in relation to the same facts.[91]

30. Yet, Talic says,[92] he has been charged cumulatively in relation to the same facts in each case with:

(a) both genocide and/or complicity in genocide (counts 1 and 2);

48. It is a fundamental rule of pleading that the indictment must identify each of the essential factual ingredients of the offence charged.[119] That requirement includes any legal pre-requisites to the application of the offence in the circumstances of the particular case. Such a rule is not a mere technicality ; compliance with it is essential to enable the accused to know the nature of the case against him, as Article 21.4(a) of the Tribunal's Statute requires. Each of those essential factual ingredients must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication .[120] This fundamental rule of pleading , however, is *not* complied with if the pleading merely assumes the existence of the pre-requisite.

49. The amended indictment does not, as it must when an Article 2 offence is charged , plead either that the armed conflict within which the offence is alleged to have been committed was an international one or sufficient facts from which such a finding could be made. The facts pleaded in pars 24, 25 and 27 are not sufficient for that purpose. The character of the armed conflict is not identified by necessary implication – it is merely assumed. Nor does the amended indictment give any indication of the basis upon which the prosecution will be asserting that the armed conflict was international in character. The basis upon which such an assertion is made is clearly also a material fact which must be pleaded to enable the accused to know the nature of the case against them.

50. If, for example, the prosecution is relying upon the evidence from which the Appeals Chamber in the *Tadic* Conviction Appeal Judgment concluded that the armed conflict in that case was international, it would have to plead as a material fact that the armed forces of the Bosnian Serbs were acting in the armed conflict in the present case under the overall control of and on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro).[121] If the evidentiary material provided by the prosecution during the pre-trial discovery process has not sufficiently identified the evidence upon which the prosecution relies to establish that material fact, and if a request to the prosecution for such particulars has not been satisfactorily answered, it would be appropriate for an application to be made to the Trial Chamber for an order that the prosecution supply particulars of that allegation.

51. The objection to the indictment taken by Talic is therefore made out. It is not to the point that the indictment in *Tadic* was similarly deficient. No point was raised by the accused in that case as to the absence of such an allegation ,[122] so the form of the *Tadic* indictment provides no authority in support of the form of the indictment in this case.

52. There has been no consistent practice within the Tribunal as to the precise nature of the relief granted when upholding a complaint by an accused in relation to the form of the indictment.[123] In the circumstances of some urgency to which reference was made earlier in this decision, the Trial Chamber believes that no good purpose would be served by striking out the allegation of grave breaches of the Geneva Conventions as irrelevant; the more appropriate course is simply to order the prosecution to plead, as material facts, the allegation that the armed conflict was international in character and the basis upon which such an assertion is made. If the prosecution fails to do so within the period allowed, the Trial Chamber will entertain an application from the defence to strike out the allegation of grave breaches of the Geneva Conventions .

9 Time to amend

53. As earlier stated,[124] the prosecution has been aware since at least 17 November last that it would be ordered to amend the indictment further so that it complied with the principles discussed in the Trial Chamber's earlier decisions in *Krnojelac*. It has also been aware since at least 2 February that it would be given a very short period after this decision is given in which to file such an amended pleading. A period of "something like two weeks" was suggested.[125] On both occasions the prosecution was urged to commence that exercise without waiting for the decision.

54. The Trial Chamber is particularly concerned that any further delay in the production of an adequate indictment could well result in an impermissible delay in the commencement of the trial. Because of the

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-96-21-T
	Date:	16 November 1998
	Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Adolphus G. Karibi-Whyte, Presiding**
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **16 November 1998**

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Rešidović, Mr. Eugene O'Sullivan, for Zejnil Delalić
Ms. Nihada Buturović, Mr. Howard Morrison, for Zdravko Mucić
Mr. Salih Karabdić, Mr. Thomas Moran, for Hazim Delić
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landžo

through his act(s) either aided and abetted in the commission of the unlawful act, or that he participated in a common enterprise or transaction which resulted in the death of the victim.[335]

324. The Defence, similarly relying on the *Tadić Judgment,* adopts the view that, for an accused to be criminally liable for the direct acts of another pursuant to Article 7(1), four criteria must be met. It is thus submitted that the accused must: (i) have intended to participate in an act; (ii) in violation of international humanitarian law; (iii) knowing that the act was unlawful; and (iv) that this participation directly and substantially aided the commission of the illegal act. It is noted that a direct contribution to the commission of the offence does not require the accused's presence at the scene of the crime or his direct physical assistance in its commission and, conversely, that physical presence at the scene of the crime in itself is insufficient to prove that an accused is an aider and abetter.[336]

3. Discussion and Findings

325. As noted above, the applicable standard for the imposition of individual criminal responsibility under Article 7(1) has previously been considered by Trial Chamber II in the *Tadić Judgment*. In reaching its findings, the Trial Chamber there carried out a detailed investigation of the parameters of individual responsibility under customary international law, considering at some length the existing body of precedents arising out of the war crimes trials conducted after the Second World War. The Trial Chamber, having considered the relevant material, adopts as sound the reasoning thus expressed, and concludes that the standard there adopted is applicable to the present case.

326. It is, accordingly, the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have "a direct and substantial effect on the

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[335] Ibid.
[336] Delalić Closing Brief, RP D8592-D8594; Delić Closing Brief, RP D8254; Mucić Closing Brief, RP D8138-D8140. The Trial Chamber notes that the accused Esad Landžo has not presented any arguments on this matter.

commission of the illegal act". [337] The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime".[338]

327. More specifically, the Trial Chamber accepts as a correct statement of the law the determination that aiding and abetting includes all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by the requisite *mens rea*. Subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed both in time and place from the actual commission of the offence. Furthermore, such assistance may consist not only of physical acts, but may also manifest itself in the form of psychological support given to the commission of an illegal act through words or again by physical presence at the scene of the perpetration of the offence.[339]

328. As regards the mental element of such participation, it is the Trial Chamber's view that it is necessary that the act of participation be undertaken with knowledge that it will contribute to the criminal act of the principal. The Trial Chamber agrees that the existence of this *mens rea* need not have been explicitly expressed, but that it may be inferred from all relevant circumstances.[340] Nor is it required that the Trial Chamber find that there was a pre-existing plan to engage in the criminal conduct in question.[341] However, where such a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible under Article 7(1) for the resulting criminal conduct. Depending upon the facts of any given situation, the culpable individual may, under such circumstances, be held criminally responsible either as a direct perpetrator of, or as an aider and abetter to, the crime in question.

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[337] *Tadić Judgment*, para. 689. *See also* paras. 681-688, and the authorities cited therein.
[338] *Ibid.*, para. 674. *See also* paras. 675-680 and the authorities cited therein.
[339] *Ibid.*, paras. 678-687, 689-691 and the authorities cited therein.
[340] *Ibid.*, para. 676.
[341] *Ibid.*, para. 677.

UNITED
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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-05-87/1-T
		Date:	23 February 2011
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christoph Flügge
Judge Melville Baird

Registrar: **John Hocking**

Judgement of: **23 February 2011**

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC JUDGEMENT
WITH CONFIDENTIAL ANNEX

VOLUME I of II

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Ms Priya Gopalan
Ms Paige Petersen
Ms Silvia D'Ascoli
Mr Eliott Behar

Counsel for the Accused:

Mr Dragoljub Đordević
Mr Veljko Đurđić

were a natural and foreseeable consequence of a common criminal purpose (third category of JCE).[6392]

(b) Planning

1869. The *actus reus* of "planning" requires that one or more persons plan or design, at both the preparatory and execution phases, the criminal conduct constituting one or more crimes, provided for in the Statute, which are later perpetrated.[6393] Such planning need only be a feature which contributes substantially to the criminal conduct.[6394] As regards the *mens rea*, the accused must have acted with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed, in the execution of that plan.[6395]

(c) Instigating

1870. The term "instigating" has been defined to mean "prompting another to commit an offence."[6396] Both acts and omissions may constitute instigating, which covers express and implied conduct.[6397] Additionally, liability for instigating does not require that the Accused have "effective control" over the perpetrator or perpetrators.[6398] There must be proof of a nexus between the instigation and the perpetration of the crime, which is satisfied where the particular conduct substantially contributes to the commission of the crime.[6399] It need not be proven that the crime would not have occurred without the instigation.[6400] As regards the *mens rea*, it must be shown that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed as a result of that instigation.[6401]

(d) Ordering

1871. The *actus reus* of "ordering" requires that a person in a position of authority instructs another person to commit an offence.[6402] Closely related to "instigating", this form of liability

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[6392] *Brđanin* Appeal Judgement, paras 410, 411 and 418; *Martić* Appeal Judgement, para 171.
[6393] *Boškoski* Trial Judgement, para 398; *Brđanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443; *Kordić* Appeal Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
[6394] *Kordić* Appeal Judgement, paras 26-31; *Nahimana* Appeal Judgement, para 479; *Limaj* Trial Judgement, para 513.
[6395] *Kordić* Appeal Judgement, para 31; *Blaškić* Appeal Judgement, para 42.
[6396] *Boškoski* Trial Judgement, para 399; *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeal Judgement, para 27; *Kordić* Trial Judgement, para 387; *Limaj* Trial Judgement, para 514.
[6397] *Milutinović* Trial Judgement Volume I, para 83; *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.
[6398] *Milutinović* Trial Judgement Volume I, para 83; *Semanza* Appeal Judgement, para 257.
[6399] *Boškoski* Trial Judgement, para 399.
[6400] *Kordić* Appeal Judgement, para 27.
[6401] *Kordić* Appeal Judgement, para 32.
[6402] *Kordić* Appeal Judgement, para 28, citing *Kordić* Trial Judgement, para 388; *Semanza* Appeal Judgement, para 361.

additionally requires that the accused possess the authority, either *de jure* or *de facto*, to order the commission of an offence.[6403] That authority may reasonably be implied from the circumstances.[6404] Further, there is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.[6405] However, ordering requires a positive act; it cannot be committed by omission.[6406] The accused need not give the order directly to the physical perpetrator,[6407] and an intermediary lower down than the accused on the chain of command who passes the order on to the physical perpetrator may also be held responsible as an orderer for the perpetrated crime or underlying offence, as long as he has the required state of mind.[6408]

1872. With regard to the *mens rea*, the accused must have intended to bring about the commission of the crime, or have been aware of the substantial likelihood that a crime would be committed as a consequence of the execution or implementation of the order.[6409]

(e) Aiding and abetting

1873. "Aiding and abetting" is a form of accomplice liability[6410] which has been defined as acts or omissions which assist, encourage or lend moral support to the perpetrator of a specific crime and which have a substantial effect on the perpetration of that crime.[6411]

1874. With respect to the *actus reus*, a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct was a condition precedent to the commission of the crime, need not be established.[6412] However, it needs to be shown that the assistance provided by the accused had a substantial effect on the commission of the crime,[6413] which requires a fact-based inquiry.[6414] Such assistance may occur before, during or after the

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[6403] *Boškoski* Trial Judgement, para 400; *Brđanin* Trial Judgement, para 270; *Mrkšić* Trial Judgement, para 550.
[6404] *Brđanin* Trial Judgement, para 270; *Limaj* Trial Judgement, para 515.
[6405] *Kamuhanda* Appeal Judgement, para 76, citing *Kordić* Trial Judgement, para 388; *Blaškić* Trial Judgement, para 281; *Limaj* Trial Judgement, para 515; with respect to proving an order by circumstantial evidence, *see* also *Galić* Appeal Judgment, paras 170-171.
[6406] *Galić* Appeal Judgement, para 176; *Milutinović* Trial Judgement Volume I, para 87.
[6407] *Milutinović* Trial Judgement Volume I, para 87; *Kordić* Trial Judgement, para 388; *Blaškić* Trial Judgement, para 282.
[6408] *Milutinović* Trial Judgement Volume I, para 87; *Kupreški* Trial Judgement, paras 827, 862.
[6409] *Blaškić* Appeal Judgement, para 42; *Kordić* Appeal Judgement, para 30; *Brđanin* Trial Judgement, para 270; *Boškoski* Trial Judgement, para 400.
[6410] *Tadić* Appeal Judgement, para 229; *Boškoski* Trial Judgement, para 401.
[6411] *Mrkšić* Appeal Judgement, para 81; *Nahimana* Appeal Judgement, para 482; *Blagojević* Appeal Judgement, para 127; *Blaškić* Appeal Judgement, para 45 citing *Vasiljević* Appeal Judgement, para 102; *Aleksovski* Appeal Judgement, para 162, citing *Furundžija* Trial Judgement, para 249.
[6412] *Mrkšić* Appeal Judgement, para 81; *Blaškić* Appeal Judgement, para 48; *Limaj* Trial Judgement, para 517.
[6413] *Blaškić* Appeal Judgement, para 48, *Boškoski* Trial Judgement, para 402; *Furundžija* Trial Judgement, para 249; *Kunarac* Trial Judgement, para 391; *Limaj* Trial Judgement, para 517.
[6414] *Blagojević* Appeal Judgement, para 134.

persons killed in Kosovo and their secret reburial on the territory of MUP facilities in Serbia. Despite his responsibilities for police investigation, not only did the Accused fail to take any measures to investigate the killings, but he took active steps to prevent any investigation into the circumstances of these killings by instructing MUP personnel not to involve the judicial authorities. The Accused played an active role in engaging volunteers and paramilitary units in Kosovo and personally authorised the deployment to Kosovo of a paramilitary unit, notorious for crimes committed during the war in Bosnia and Herzegovina. Upon their deployment to Kosovo, members of this unit murdered 14 women and children in Podujevo/Podujevë. The unit was withdrawn from Kosovo, but no effective investigation followed and within a short time it was redeployed to Kosovo, again with the authorisation of the Accused. The Chamber is satisfied that by acts such as these the Accused had a substantial effect on the perpetration by MUP forces of the crimes of murder, deportation and persecutions in Kosovo in 1999 and that the Accused was aware that his acts were assisting the commission of these crimes.

2164. The Chamber is satisfied beyond reasonable doubt and finds that Vlastimir Đorđević is guilty of aiding and abetting the crimes of deportation, forcible transfer, murder, and persecutions established in this Judgement.

(b) Planning, ordering and instigating

2165. The Prosecution submits that the evidence it relies on in support of Vlastimir Đorđević's responsibility for aiding and abetting the crimes also establishes his criminal responsibility for planning and ordering the crimes.[7329] It submits that the same evidence and the evidence relevant to Vlastimir Đorđević's failure to discipline MUP officials who committed crimes, establish the criminal responsibility of the Accused on the basis of instigating.[7330]

2166. The Defence submits that there is no evidence that Vlastimir Đorđević planned, ordered or instigated the crimes.[7331] It is submitted that he had no knowledge or reason to acquire knowledge about the activities of the MUP Staff or about a plan or policy to expel ethnic Albanians from Kosovo.[7332]

2167. In order to find the Accused guilty of planning the crimes, the Chamber must be satisfied that he planned or designed, at both the preparatory and execution phases, the criminal conduct

[7328] Defence Final Brief, para 637.
[7329] Prosecution Final Brief, para 1300.
[7330] Prosecution Final Brief, para 1300.
[7331] Defence Final Brief, para 637.
[7332] Defence Final Brief, paras 637-638.

constituting one or more of the established crimes.[7333] The Chamber has been able to be satisfied that Vlastimir Đorđević participated in a common plan, the purpose of which was to modify the ethnic balance of Kosovo. While the means by which the common plan was to be implemented involved the commission of the crimes established in this Judgement, the purpose of this common plan was not, in and of itself, a crime. The evidence does not establish that the Accused directly planned any of the crimes that have been committed in furtherance of the common plan. The Chamber, therefore, is not satisfied that Vlastimir Đorđević is guilty of planning any of the crimes established in this Judgement.

2168. No direct evidence has been tendered to prove the allegation that the Accused directly ordered or instigated the crimes charged in the Indictment. With respect to the Prosecution's submission that the Accused's alleged failure to discipline MUP officials who have committed crimes supports a conviction for instigation, the Chamber notes that to establish responsibility for instigating, a nexus between the act of instigation and the perpetration of crime must be established.[7334] No such nexus has been established in the present case. The Chamber is not satisfied, therefore, that Vlastimir Đorđević is guilty of ordering or instigating any of the crimes established in this Judgement.

4. Vlastimir Đorđević's responsibility under Article 7(3) of the Statute

2169. The Prosecution submits that Đorđević, while holding a position of superior authority, is individually criminally responsible for the acts or omissions of his subordinates, pursuant to Article 7(3) of the Statute for the crimes alleged in Counts 1 to 5 of the Indictment.[7335] It alleges that as Chief of the RJB and Assistant Minister of the MUP, Đorđević exercised *de jure* and *de facto* authority over all RJB units in Kosovo.[7336] It submits that he was aware of the crimes committed by such forces and failed to take necessary and reasonable measures to prevent and punish crimes committed by them.[7337]

2170. The Defence does not specifically address the above allegations in relation to liability under Article 7(3) of the Statute. However, the Chamber recalls the Defence contention that the Accused did not have effective control over the use of MUP forces in Kosovo.[7338] According to the Defence, since the creation of the MUP Staff for the Suppression of Terrorism by decision of the Minister on

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[7333] *See supra*, para 1869.
[7334] *See supra*, para 1870.
[7335] Indictment, para 22.
[7336] Prosecution Final Brief, para 1302.
[7337] Prosecution Final Brief, paras 1312-1352.
[7338] Closing Arguments, T 14492-14493; Defence Final Brief, paras 379, 382.

Article 7(3) for the crimes established in this Judgement. However, by virtue of its adverse finding under Article 7(1) it is not open to the Chamber to also convict the Accused under Article 7(3).

C. Conclusion

2193. The Chamber is satisfied and finds the Accused Vlastimir Đorđević guilty pursuant to Article 7(1) of the Statute for having participated in a joint criminal enterprise with the purpose of modifying the ethnic balance in Kosovo. The Chamber is satisfied and finds that the crimes established in this Judgement were the means by which the purpose of this joint criminal enterprise was to be achieved.

2194. The Chamber is further satisfied and finds the Accused guilty of having aided and abetted the crimes that have been established, pursuant to Article 7(1). The modes of responsibility under Article 7(1) of the Statute are not mutually exclusive, and it is possible to convict on more than one mode in relation to a crime if this better reflects the totality of the accused's conduct.[7385] In this case, the Accused's leading role in the MUP efforts to conceal the killings of Kosovo Albanian civilians and other persons taking no active part in the hostilities by organising for the clandestine transportation of the bodies of persons killed by Serbian forces in Kosovo to secret mass grave sites on MUP property in Serbia, together with his active steps to prevent any investigation into the circumstances of these killings, and his failure to ensure that all offences by MUP forces were reported and investigated, taking into account his position as Chief of the RJB, substantially assisted the commission of these crimes. These facts are sufficiently compelling to also maintain the conviction for aiding and abetting, as well as the conviction for participating as a member of the JCE, in order to fully encapsulate the Accused's criminal conduct.

2195. In addition, the Chamber is satisfied and finds that it has been established that the Accused is criminally responsible pursuant to Article 7(3) of the Statute for his failure in respect of the members of the MUP under his authority, to prevent the crimes and to punish the perpetrators. However, pursuant to the jurisprudence of this Tribunal,[7386] the Chamber will enter a conviction on the basis of Article 7(1) only. The Accused's position of command of many of the actual perpetrators will be considered as an aggravating factor in sentencing as required by the jurisprudence of the Tribunal.

[7385] *Nahimana* Appeal Judgement, para 483; *Ndindabahizi* Appeal Judgement, paras 122-123; *Kamuhanda* Appeal Judgement, para 77.
[7386] *See supra*, para 1891.

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

Case No. IT-98-29/1-A

Date: 12 November 2009

Original: English

IN THE APPEAL CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr John Hocking**

Judgement of: **12 November 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

on the basis of the case record, establish beyond reasonable doubt that Milošević ordered sniping and shelling of the civilian population in Sarajevo during the Indictment period.

(a) Ordering and planning the campaign

265. The Trial Chamber has adopted a very general approach in that it did not analyse whether Milošević ordered every sniping or shelling incident, but rather concluded that those incidents could only take place if ordered by him in the framework of the campaign directed against the civilian population of Sarajevo. In principle, this approach is not erroneous as such, given that both the *actus reus* and the *mens rea* of ordering can be established through inferences from circumstantial evidence, provided that those inferences are the only reasonable ones. The Appeals Chamber underlines, however, that when applying such an approach to the facts of the case, great caution is required.

266. First, the Appeals Chamber emphasizes that, as the Trial Chamber correctly held in its discussion of the widespread or systematic attack, "[a] campaign is a military strategy; it is not an ingredient of any of the charges in the Indictment, be that terror, murder or inhumane acts".[780] The Appeals Chamber notes, however, that in other parts of the Trial Judgement, the Trial Chamber appears to hold Milošević responsible for planning and ordering a campaign of crimes.[781] The Appeals Chamber understands these references as illustrating that the crimes at stake formed a pattern comprised by the SRK military campaign in Sarajevo. Therefore, the "campaign" in the present Appeal Judgement shall be understood as a descriptive term illustrating that the attacks against the civilian population in Sarajevo, in the form of sniping and shelling, were carried out as a pattern forming part of the military strategy in place.

267. Second, the Appeals Chamber notes that the Trial Chamber did not rely on any evidence that would identify a specific order issued by Milošević with respect to the campaign of shelling and sniping in Sarajevo as such. Rather, it relied on the nature of the campaign carried out in the context of a tight command to conclude that it could only "have been carried out on [Milošević's] instructions and orders".[782] The Appeals Chamber recalls that the *actus reus* of ordering cannot be established in the absence of a prior positive act because the very notion of "instructing", pivotal to the understanding of the question of "ordering", requires "a positive action by the person in a

[780] Trial Judgement, para. 927.
[781] Trial Judgement, paras 910-913, 927-928, 932, 938, 953, 966, 975, 978.
[782] Trial Judgement, para. 966.

position of authority".[783] The Appeals Chamber accepts that an order does not necessarily need to be explicit in relation to the consequences it will have.[784] However, the Appeals Chamber is not satisfied that the Trial Chamber established beyond reasonable doubt that Milošević instructed his troops to perform a campaign of sniping and shelling of the civilian population in Sarajevo as such.

268. Although Milošević does not explicitly challenge his responsibility for planning the crimes under this ground of appeal, the Appeals Chamber takes note of his relevant submissions under other grounds[785] and decides to address the issue within the present Section of the Judgement. In this regard, the Appeals Chamber recalls that the *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[786] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[787] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[788]

269. The Appeals Chamber reiterates that the campaign of sniping and shelling civilians in Sarajevo was already in place when Milošević took the SRK command over from Galić.[789] Although this cannot be determinative in the present case, the Appeals Chamber finds it instructive to note that Galić was held responsible for ordering the indicted crimes, but not for planning them. Conversely, Milošević, although found not having "devise[d] a strategy for Sarajevo on his own"[790]

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[783] *Galić* Appeal Judgement, para. 176. See also, *Nahimana et al.* Appeal Judgement, para. 481, referring to *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras 28-30.

[784] *Cf. Nahimana et al.* Appeal Judgement, para. 481: "Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order." See also, *Galić* Appeal Judgement, paras 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[785] See *e.g.*, Defence Appeal Brief, paras 41, 42-99 and p. 94.

[786] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, para. 26.

[787] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément déterminant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".

[788] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, paras 29, 31.

[789] *Galić* Trial Judgement, paras 746-747. The findings remained undisturbed on appeal.

[790] Trial Judgement, para. 960.

UNITED
NATIONS

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

Case No. IT-98-29/1-T
Date: 12 December 2007
Original: English

IN THE TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: **Mr. Hans Holthuis**

Judgement of: **12 December 2007**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty
Mr. Manoj Sachdeva
Ms. Maxine Marcus
Mr. Salvatore Cannata

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

Prosecution must show that, in the given circumstances, a reasonable person could not have believed that the individual he or she attacked was a combatant.[3165]

953. The Trial Chamber recalls its finding that the crime of terror shares the same elements with the crime of unlawful attacks against civilians, except for the additional requirement that to constitute terror it must be established that the acts were committed with the primary purpose of spreading terror among the civilian population. It follows, therefore, that the acts which the Trial Chamber found to have constituted terror must *a fortiori* also constitute unlawful attacks against civilians and civilian population, and the Trial Chamber so finds.

B. Individual Criminal Liability of the Accused

954. All the counts charge the Accused with responsibility under Article 7(1) and 7(3) of the Statute. Article 7(1) of the Statute 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 5 of the present Statute, shall be individually responsible for the crime."

The Accused is charged with planning, ordering, or in the alternative, aiding and abetting the crimes.

955. In order to establish individual criminal responsibility for planning, ordering or aiding and abetting of a crime, proof is required that the crime in question has actually been committed by the principal perpetrator(s) ("the underlying crime").[3166] If the underlying crime has been established, the Trial Chamber will assess the individual criminal responsibility of the Accused for that crime.

956. Planning is established when it is proven that one or more persons contemplated the commission of one or more crimes provided for in the Statute, which were later perpetrated.[3167] If a person is convicted of having committed a crime, his involvement in the planning of the crime can only be considered as an aggravating factor.[3168]

957. Ordering requires that a person in a position of authority, whether *de jure* or *de facto*, instructs another person to commit a crime.[3169] This authority may be proved expressly or may be reasonably implied from the evidence.[3170]

[3165] *Galić* Trial Judgement, para. 55.
[3166] *See Brđanin* Trial Judgement, para. 267, with further references.
[3167] *Kordić and Čerkez* Appeal Judgement, para. 26.
[3168] *Kordić and Čerkez* Trial Judgement, para. 386; *Stakić* Trial Judgement, para. 443.
[3169] *Kordić and Čerkez* Appeal Judgement, para. 28; *Gacumbitsi* Appeal Judgement, para. 182; *Brđanin* Trial Judgement, para. 270.

carried out consistently throughout the Indictment period by the SRK forces of which the Accused was the commander. On the other hand, some evidence has been presented that on a number of occasions during his visits to the troops, the Accused instructed his men on the confrontation line to abide by the Geneva Conventions and not to shoot at civilians. On one particular occasion, on 1 October 1995, he issued an order not to shoot at civilians. In addition, there is also evidence that there were instructions to adhere to the COHA.[3177] The issue is the impact of the latter three pieces of evidence on a finding by the Trial Chamber that the Accused ordered and planned the crimes charged; in particular, does that evidence contradict a finding of having ordered and planned? In approaching this question, the Trial Chamber must have regard to the burden that is placed on the Prosecution to establish the charges beyond reasonable doubt.

966. The Trial Chamber considers that it must examine the evidence of the two sets of circumstances as a whole and ask itself whether, at the end of the day, it is satisfied beyond reasonable doubt that the Accused planned and ordered the campaign. In doing so, the Trial Chamber must determine what weight is to be attached to the various items of evidence. It disregards the evidence that, in October 1995, the Accused issued an order prohibiting sniping, because that order was issued virtually at the end of the conflict. It is observed that the last incident charged in the Indictment occurred on 28 August 1995 and the Dayton Accords were signed a month later. The Trial Chamber does not disregard the evidence that the Accused, on certain occasions, instructed his soldiers to abide by the Geneva Conventions and not to shoot civilians or that there were instructions to adhere to the COHA. However, an examination of the evidence in its totality obliges the Trial Chamber to look at the vast body of evidence as to the campaign of shelling and sniping. When the Trial Chamber does that, it sees a design, a consistency and a pattern that is only explicable on the basis of a system characterised by a tight command and control. The evidence shows that the Accused was in command and control of his troops, who carried out this campaign of sniping and shelling. The Trial Chamber need only mention the order to shell Hrasnica with a modified air bomb and his acknowledgement of success of the SRK troops in shelling the TV Building.[3178] The Trial Chamber is convinced that, notwithstanding the evidence of the above-mentioned instructions and orders, the campaign was such that not only must it have had the consent of the Accused, but it must also have been carried out on his instructions and orders.

967. As far as the crime of terror is concerned, the Trial Chamber recalls that the Prosecution must prove that the Accused had a specific intent to spread terror among a civilian population.[3179]

[3177] *See supra*, paras 837 - 840.
[3178] *See supra*, Sections II.E.6(b)(iii) and (xi)
[3179] *See supra*, Section III.A.2(b) The Crime of Terror.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-29-A
		Date:	30 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Mr. Mark Ierace
Ms. Michelle Jarvis
Ms. Shelagh Mc Call
Ms. Anna Kotzeva

Counsel for Stanislav Galić:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

149. The Appeals Chamber has previously held that murder can be committed through an act or an omission.[447] Further, as previously held by the Appeals Chamber regarding Article 7(1) of the Statute[448] and as demonstrated by Article 7(3) of the Statute, the Appeals Chamber reiterates that the commission of a positive act is not an absolute requirement of criminal responsibility.

150. With respect to Galić's second argument, the Appeals Chamber notes that the Statute expressly contemplates attaching criminal responsibility to an accused for the acts of another, and the International Tribunal has done so on numerous occasions. Even if the physical perpetration of the act of murder was committed by another person, Article 7 of the Statute attaches criminal liability for all the crimes articulated in Articles 2 to 5 of the Statute, including murder, to those who did not actually perpetrate the physical act, but either "planned, instigated, ordered [...] or otherwise aided and abetted in the planning, preparation or execution",[449] or, in the case of superiors, "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[450] Galić's argument is therefore rejected.

151. Regarding the *mens rea* requirement of murder, Galić contends that an action cannot be murder if death is a consequence of the infliction of serious injury and the consequence is due to the perpetrator's negligence.[451] In response, the Prosecution contends that specific intent to kill is not part of the *mens rea* for murder[452] and that the Trial Chamber did not apply a negligence standard.[453] In that respect, it argues that the Trial Chamber required a finding of "an intention [...] to kill, or to inflict serious injury, in reckless disregard of human life".[454] It further claims that Stanislav Galić has confused negligence and recklessness, and that recklessness is an appropriate *mens rea* for ordering murder, as held in the *Blaškić* Appeal Judgement.[455]

152. The Appeals Chamber notes that Galić was not convicted for committing murder, but for ordering murder under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that murder would be committed in the execution of his orders.[456]

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[447] *Kvočka et al.* Appeal Judgement, para. 261. Although this holding was made for murder under Article 3 of the Statute, the Appeals Chamber sees no reason why it would be any different for murder under Article 5 of the Statute.
[448] *Blaškić* Appeal Judgement, para. 663.
[449] Article 7(1) of the Statute.
[450] Article 7(3) of the Statute.
[451] Defence Appeal Brief, para. 92.
[452] Prosecution Response Brief, para. 8.16.
[453] Prosecution Response Brief, para. 8.17.
[454] Prosecution Response Brief, para. 8.17.
[455] Prosecution Response Brief, para. 8.18.
[456] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.

Consequently, there is no reason for the Appeals Chamber to consider on their merits Galić's arguments pertaining to the *mens rea* required for committing murder.[457]

153. For the foregoing reasons, this part of Galić's ground of appeal is dismissed.

C. Inhumane acts

154. Galić submits that the Trial Chamber erred in its definition of "other inhumane acts" pursuant to Article 5(i) of the Statute.[458] His arguments concern both the *actus reus* and the *mens rea* required for the crime of inhumane acts.

155. As regards the *actus reus*, Galić contends that an omission cannot constitute an inhumane act.[459] The Prosecution responds that the jurisprudence of the International Tribunal establishes that inhumane acts can consist of omissions.[460] In that regard, the Appeals Chamber adopts *mutatis mutandis* its above discussion on an accused's criminal responsibility for an act of omission regarding the crime of murder.[461] This part of Galić's ground of appeal is therefore dismissed.

156. As regards the *mens rea* of the crime of inhumane acts, Galić argues that the Prosecution must prove that the perpetrator had the "will to directly produce the consequence".[462] He contends that "[c]onsent to the consequence excludes the intention" and that merely accepting the consequence does not make a person responsible for crimes.[463] The Prosecution responds that Galić is positing a standard of specific intent as the minimum *mens* rea required for the crime of other inhumane acts, without proposing any authority for this view. The Prosecution argues that the jurisprudence of the International Tribunal has required lesser mental states in order to prove other inhumane acts.[464]

157. The Appeals Chamber notes that Galić was not convicted for committing inhumane acts, but for ordering inhumane acts under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that inhumane acts would be committed in the execution of his

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[457] When an error has no chance of changing the outcome of a decision, it may be rejected on that ground. *See Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16; *Krnojelac* Appeal Judgement, para. 10.
[458] Defence Appeal Brief, para. 93.
[459] Defence Appeal Brief, para. 94.
[460] Prosecution Response Brief, para. 8.19.
[461] *See also* the definition of inhumane acts given at paragraph 234 of the *Vasiljević* Trial Judgement, confirmed at paragraph 165 of the *Vasiljević* Appeal Judgement. *See supra* para. 149.
[462] Defence Appeal Brief, para. 95.
[463] Defence Appeal Brief, para. 96.
[464] Prosecution Response Brief, paras 8.21-8.22.

orders.[465] Consequently, there is no reason for the Appeals Chamber to consider Galić's arguments pertaining to the *mens rea* required for committing inhumane acts.

158. The Appeal Chamber further notes that the Trial Chamber did not expressly determine which acts constituted other inhumane acts (the *actus reus*). Although the Trial Chamber did not do so, the Appeals Chamber finds that it did point, in its analysis of the scheduled incidents, to numerous acts that qualify as such. For the scheduled sniping incidents, the Trial Chamber pointed to the serious injuries inflicted and held that those injuries were the result of deliberate sniping by members of the SRK forces for whose acts Galić bore criminal responsibility.[466] The same applies to the scheduled shelling incidents, for which the Trial Chamber made specific findings related to serious injuries and found that the shells were deliberately fired at areas where civilians would be seriously injured as a result.[467]

159. The Appeals Chamber accordingly dismisses Galić's eighth ground of appeal.

[465] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.
[466] *See, e.g.*, Trial Judgement, paras 258, 271, 276, 289, 317, 321, 360, 367, 518, 537, 551, 555.
[467] *See, e.g.*, Trial Judgement, paras 397, 496.

action" is required for responsibility under Article 7(1) of the Statute.[495] He also challenges the holding of the Trial Chamber that "a superior may be found responsible under Article 7(1) [of the Statute] where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met".[496]

174. In response, the Prosecution argues that omissions are an accepted form of liability under the Statute.[497] It also argues that the actual findings of the Trial Chamber indicate active conduct and active ordering.[498] The Prosecution considers that the reference of the Trial Chamber to Galić's failure to act was relevant to his *mens rea,* and could have supported the *actus reus* for ordering.[499] It claims, "The Chamber did not rely on [Galić]'s failure to take certain steps but on all his conduct to find that he ordered the campaign of sniping and shelling. The Chamber's findings on his inaction support its findings regarding [his] *mens rea.*"[500] The Prosecution further argues that ample Tribunal jurisprudence supports the Trial Chamber's proposition that any conduct, whether active or passive, which contributes to or facilitates the commission of a crime, may result in liability under Article 7(1) of the Statute.[501]

175. The Appeals Chamber affirms that the omission of an act where there is a legal duty to act,[502] can lead to individual criminal responsibility under Article 7(1) of the Statute.[503] Galić's argument in this regard is therefore dismissed. Nevertheless, the Appeals Chamber clarifies several points with regard to the mode of responsibility of ordering pursuant to Article 7(1) of the Statute.

176. The Appeals Chamber recalls that the *actus reus* of ordering has been defined as a person in a position of authority instructing another person to commit an offence; a formal superior-subordinate relationship between the accused and the actual physical perpetrator not being required.[504] The Appeals Chamber finds that the very notion of "instructing" requires a positive action by the person in a position of authority.[505] The failure to act of a person in a position of

[495] Defence Appeal Brief, para. 109.
[496] Defence Appeal Brief, para. 110, citing paragraph 169 of the Trial Judgement. The Trial Chamber continued: "[A] superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions [...] where the effect of such conduct is to commission crimes by subordinates." Trial Judgement, para. 169.
[497] Prosecution Response Brief, paras 8.11, 10.1.
[498] Prosecution Response Brief, paras 10.2-10.3.
[499] Prosecution Response Brief, para. 10.4.
[500] Prosecution Response Brief, para. 10.5.
[501] Prosecution Response Brief, paras 10.7-10.8.
[502] *See Ntagerura et al.* Appeal Judgement, paras 334-335.
[503] *Blaškić* Appeal Judgement, para. 663. *See also Tadić* Appeal Judgement, para. 188: "This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."
[504] *Kordić and Čerkez* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361.
[505] *See Blaškić* Appeal Judgement, para. 660.

authority, who is in a superior-subordinate relationship with the physical perpetrator, may give rise to another mode of responsibility under Article 7(1) of the Statute or superior responsibility under Article 7(3) of the Statute.[506] However, the Appeals Chamber cannot conceive of a situation in which an order would be given by an omission, in the absence of a prior positive act.[507] The Appeals Chamber concludes that the omission of an act cannot equate to the mode of liability of ordering under Article 7(1) of the Statute.[508]

177. In the present case, the Appeals Chamber notes that Galić conflates two separate issues: (1) whether an omission can constitute an act of ordering; and (2) whether an act of ordering can be *proven* by taking into account omissions. The Trial Chamber here employed the latter approach, which does not constitute a legal error. It did not find Galić guilty for having ordered the crimes by his failure to act or culpable omissions. That is, it did not infer from the evidence the fact that he omitted an act and that this omission constituted an order. Rather, where the Trial Chamber mentions failures to act, it took those failures into account as circumstantial evidence to prove the mode of liability of ordering. The Trial Chamber inferred from the evidence adduced at trial, which included, *inter alia*, acts and omissions of the accused, that Galić had given the order to commit the crimes.[509]

178. The Appeals Chamber thus concludes that the mode of liability of ordering can be proven, like any other mode of liability, by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused. The Trial Chamber must be convinced beyond reasonable doubt from the evidence adduced at trial that the accused ordered the crime.[510] Whether or not the Trial Chamber could have inferred from the evidence adduced at trial that Galić had ordered the crimes is a question of fact and will be addressed as part of his eighteenth ground of appeal.

179. For the foregoing reasons, Galić's argument is dismissed.

B. Challenges relating to Article 7(3) responsibility

180. While he does not contest the conditions that must be met before a person can be held responsible pursuant to Article 7(3) of the Statute,[511] Galić raises three challenges to the Trial

[506] When, for example, a person is under a duty to give an order but fails to do so, individual criminal responsibility may incur pursuant to Article 7(1) or Article 7(3) of the Statute.
[507] The Appeals Chamber, however, notes that this has to be distinguished from the fact that a superior may be criminally liable if he orders an omission. The Appeals Chamber has held that a "person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order" has the requisite *mens rea* for ordering. *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.
[508] It would thus be erroneous to speak of "ordering by omission".
[509] Trial Judgement, para. 749: "General Galić is guilty of having ordered the crimes proved at trial."
[510] *Stakić* Appeal Judgement, para. 219.
[511] Defence Appeal Brief, para. 113, referring to paragraph 173 of the Trial Judgement.

UNITED
NATIONS

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

Case No. IT-98-29-T

Date: 5 December 2003

Original: English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie**
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: **Mr. Hans Holthuis**

Judgement Of: **5 December 2003**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT AND OPINION

The Office of the Prosecutor:

Mr. Mark Ierace
Mr. Chester Stamp
Mr. Daryl Mundis
Ms. Prashanthi Mahindaratne
Mr. Manoj Sachdeva

Counsel for the Accused:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

166. Article 7 of the Statute provides for imposition of individual and superior responsibility on persons on the following basis:

> 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 5 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 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

1. Individual Responsibility under Article 7 (1) of the Statute

167. The Indictment, in describing the Accused's responsibility, makes reference to each head of responsibility in Article 7(1).[275] In the Prosecution's Final Trial Brief reference is made to "ordering" as the basis of responsibility. It is within the Trial Chamber's discretion to convict, if at all, the Accused under the appropriate head of responsibility within the limits set by the Indictment and insofar as the evidence permits.[276]

168. The Trial Chamber considers, briefly, the case-law of the International Tribunals which elaborates the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute.[277] Considering them in the order in which they appear in the Statute, "planning" has been defined to mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases,[278] and the crime was actually committed within the framework of that design[279] by others.[280] "Instigating" means prompting another to commit an offence, which is actually committed.[281] It is sufficient to demonstrate that the instigation was "a clear contributing factor to the conduct of other person(s)".[282] It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement.[283] "Ordering" means a person in a position of authority using that authority to instruct another to commit an offence. The order does not need to

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[275] Id., para. 10.
[276] *Furundžija* Trial Judgement, para. 189, *Kupreškić* Trial Judgement, para. 746; *Kunarac* Trial Judgement, para. 388, *Krstić* Trial Judgement, para. 602.
[277] *Cf.* Article 6(1) of the Statute of the ICTR. See also the Prosecution Pre-trial Brief (paras 69 *et seq.*) and the Defence's submissions on Article 7 in its Pre-trial Brief (paras 6.1-6.35).
[278] *Akayesu* Trial Judgement, para. 480. See also *Blaškić* Trial Judgement, para. 279; *Kordić* Trial Judgement, para. 386 quoting the *Akayesu* Trial Judgement.
[279] *Akayesu* Trial Judgement, para. 473.
[280] If the person planning a crime also commits it, he or her is only punished for the commission of the crime and not for its planning, *Kordić* Judgement, para. 386 (quoting the *Blaškić* Trial Judgement, para. 278).
[281] *Akayesu Trial* Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Kordić* Trial Judgement, para. 387.
[282] *Kvočka* Trial Judgement, para. 252, citing *Kordić* Trial Judgement, para. 387.
[283] *Kvočka* Trial Judgement, para. 252, citing *Kordić* Trial Judgement, para. 387.

be given in any particular form.[284] "Committing" means that an "accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute".[285] Thus, it "covers first and foremost the physical perpetration of a crime by the offender himself."[286] "Aiding and abetting" means rendering a substantial contribution to the commission of a crime.[287] These forms of participation in a crime may be performed through positive acts or through culpable omission.[288] It has been held in relation to "instigating" that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates.[289] The Defence contests the applicability of that case-law and considers that "in all the cases [under Article 7(1)] a person must undertake an action that would contribute to the commission of a crime".[290]

169. In the Majority's opinion, a superior may be found responsible under Article 7(1) where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) (see further below) the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the superior's disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior's liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior's conduct. In such cases the subordinate will most likely be aware of the superior's support or encouragement, although that is not strictly necessary. In the Majority's view, the key point in all of this is that a superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions or apparent omissions or understated participation or any mixture of overt and non-overt actions, where the effect of such conduct is to commission crimes by subordinates.

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[284] *Krstić* Trial Judgement, para. 601, citing *Akayesu* Trial Judgement, para. 483; *Blaškić* Trial Judgement, para. 281; *Kordić* Trial Judgement, para. 388.
[285] *Kvočka* Trial Judgement, paras 250-1.
[286] *Tadić* Appeal Judgement, para. 188.
[287] *Aleksovski* Appeal Judgement, paras 162-4.
[288] *Tadić* Appeal Judgement, para. 188.
[289] *Blaškić* Trial Judgement, para. 337.
[290] Defence Pre-trial Brief, paras 6.3-6.4.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-06-90-A
		Date:	16 November 2012
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Patrick Robinson
Judge Mehmet Güney
Judge Fausto Pocar

Registrar: **Mr. John Hocking**

Judgement of: **16 November 2012**

PROSECUTOR

v.

ANTE GOTOVINA
MLADEN MARKAČ

JUDGEMENT

The Office of the Prosecutor
Ms. Helen Brady
Mr. Douglas Stringer
Ms. Laurel Baig
Mr. Francois Boudreault
Ms. Ingrid Elliott
Mr. Todd Schneider
Ms. Saeeda Verrall
Mr. Matthew Cross

Counsel for Ante Gotovina
Mr. Gregory Kehoe
Mr. Luka Mišetić
Mr. Payam Akhavan
Mr. Guénaël Mettraux

Counsel for Mladen Markač
Mr. Goran Mikuličić
Mr. Tomislav Kuzmanović
Mr. John Jones
Mr. Kai Ambos

> In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. [...] Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[39]

14. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[40] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[41]

15. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[42] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[43] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it may dismiss arguments which are evidently unfounded without providing detailed reasoning.[44]

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[39] *Haradinaj et al.* Appeal Judgement, para. 12 (internal citations omitted). *See also Boškoski and Tarčulovski* Appeal Judgement, paras 13-14; *Bagosora and Nsengiyumva* Appeal Judgement, para. 18.
[40] *Boškoski and Tarčulovski* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 19.
[41] *Boškoski and Tarčulovski* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 19.
[42] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, paras 1(c)(iii)-(iv), 4(b)(i)-(ii). *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17; *Mrkšić and Šljivančanin* Appeal Judgement, para. 17; *Bagosora and Nsengiyumva* Appeal Judgement, para. 20.
[43] *Boškoski and Tarčulovski* Appeal Judgement, para. 17; *D. Milošević* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 20.
[44] *Boškoski and Tarčulovski* Appeal Judgement, para. 17; *D. Milošević* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 20.

artillery attacks.[460] More broadly, the Trial Chamber repeatedly recalled the existence of unlawful attacks in framing its discussion of Markač's liability.[461]

153. In these circumstances, any attempt by the Appeals Chamber to derive inferences required for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its erroneous reliance on unlawful artillery attacks, assessing the persuasiveness of this evidence, and then determining whether Markač's guilt was proved beyond reasonable doubt in relation to the elements of a different mode of liability. Such a broad-based approach to factual findings on appeal risks transforming the appeals process into a second trial.

154. The Appeals Chamber observes that in the context of this case, drawing the inferences needed to enter convictions based on alternate modes of liability would also substantially undermine Markač's fair trial rights, as he would not be afforded the opportunity to challenge evidence relied on by the Appeals Chamber to enter additional convictions. The Appeals Chamber notes that Markač was provided the opportunity to discuss whether the Trial Chamber's findings implicate alternate forms of liability.[462] However the scope of this additional briefing did not extend to challenging evidence presented to the Trial Chamber.[463] Even if the Appeals Chamber had exceptionally authorised Markač to challenge evidence not related to his convictions, the very large scale of potentially relevant evidence on the record would render any submissions by Markač voluminous and speculative. In addition, Markač would almost certainly have been left uncertain about the scope of the case against him on appeal.[464]

155. The Appeals Chamber notes that the foregoing analysis does not *per se* preclude replacing convictions based on JCE with convictions based on alternate modes of liability. Indeed, the Appeals Chamber has on certain occasions revised trial judgements in this way. However the Appeals Chamber notes that in each of these appeals, the trial chamber's errors had a comparatively limited impact.[465] Thus in the *Simić* Appeal Judgement, the Appeals Chamber entered a conviction on the basis of aiding and abetting after finding that the indictment failed to plead participation in a JCE as a mode of liability.[466] In both the *Vasiljević* Appeal Judgement and the *Krstić* Appeal

[460] Trial Judgement, paras 2370, 2583. Judge Agius and Judge Pocar dissent on the Appeals Chamber's assessment of the Trial Judgement.
[461] *See* Trial Judgement, paras 2580-2587.
[462] *See* Order for Additional Briefing, pp. 1-2.
[463] *See* Order for Additional Briefing, pp. 1-2.
[464] The foregoing discussion also applies to other modes of liability that the Prosecution claims are incurred on the same factual basis. *See* Additional Prosecution Brief (Markač), para. 4 n. 11. Judge Agius and Judge Pocar dissent on this entire paragraph.
[465] *See Simić* Appeal Judgement, paras 74-191, 301; *Krstić* Appeal Judgement, paras 134-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, p. 60.
[466] *See Simić* Appeal Judgement, paras 74-191, 301.

UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-06-90-T
		Date:	15 April 2011
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: **Mr John Hocking**

Judgement of: **15 April 2011**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

JUDGEMENT
VOLUME II OF II

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi
Ms Prashanti Mahindaratne
Ms Katrina Gustafson
Mr Edward Russo
Mr Saklaine Hedaraly
Mr Ryan Carrier

Counsel for Ante Gotovina

Mr Luka Mišetić
Mr Gregory Kehoe
Mr Payam Akhavan

Counsel for Ivan Čermak

Mr Steven Kay, QC
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

of the substantial likelihood that the crime would be committed as a consequence of his or her conduct.[969]

1959. *Ordering*. Liability may be incurred by ordering the principal perpetrator to commit a crime or to engage in conduct that results in the commission of a crime.[970] The person giving the order must, at the time it is given, be in a position of formal or informal authority over the person who commits the crime.[971] The person giving the order must intend that the crime be committed or be aware of the substantial likelihood that the crime would be committed in the execution of the order.[972]

1960. *Aiding and abetting*. Liability may be incurred by assisting, encouraging or lending moral support to the commission of a crime.[973] Aiding and abetting by omission requires that the accused had the means to fulfil his or her duty to act.[974] Aiding and abetting may occur before, during, or after the commission of the principal crime.[975] The aider and abettor must have knowledge that his or her acts or omissions assist in the commission of the crime of the principal perpetrator.[976] The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind.[977] This includes the specific

[969] *Kordić and Čerkez* Appeal Judgement, paras 29, 32; *Nahimana et al.* Appeal Judgement, para. 480; *Nchamihigo* Appeal Judgement, para. 61.
[970] *Kordić and Čerkez* Appeal Judgement, para. 28; *Galić* Appeal Judgement, para. 176; *Nahimana et al.* Appeal Judgement, para. 481.
[971] *Kordić and Čerkez* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361; *Galić* Appeal Judgement, para. 176; *Nahimana et al.* Appeal Judgement, para. 481; *Milošević* Appeal Judgement, para. 290; *Boškoski and Tarčulovksi* Appeal Judgement, paras 160, 164; *Kalimanzira* Appeal Judgement, para. 213.
[972] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, paras 29-30; *Nahimana et al.* Appeal Judgement, para. 481.
[973] *Tadić* Appeal Judgement, para. 229; *Čelebići* Appeal Judgement, para. 352; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45-46, 48; *Kvočka et al.* Appeal Judgement, para. 89; *Simić et al.* Appeal Judgement, para. 85; *Blagojević and Jokić* Appeal Judgement, para. 127; *Nahimana et al.* Appeal Judgement, para. 482; *Orić* Appeal Judgement, para. 43; *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 81, 146, 159; *Kalimanzira* Appeal Judgement, paras 74, 86.
[974] *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 82, 154.
[975] *Blaškić* Appeal Judgement, para. 48; *Simić et al.* Appeal Judgement, para. 85; *Blagojević and Jokić* Appeal Judgement, paras 127, 134; *Nahimana et al.* Appeal Judgement, para. 482; *Mrkšić and Šljivančanin* Appeal Judgement, paras 81, 200.
[976] *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45-46; *Simić et al.* Appeal Judgement, para. 86; *Brđanin* Appeal Judgement, paras 484, 488; *Blagojević and Jokić* Appeal Judgement, para. 127; *Nahimana et al.* Appeal Judgement, para. 482; *Orić* Appeal Judgement, para. 43; *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 146, 159; *Haradinaj et al.* Appeal Judgement, paras 57-58; *Kalimanzira* Appeal Judgement, para. 86.
[977] *Aleksovski* Appeal Judgement, para. 162; *Simić et al.* Appeal Judgement, para. 86; *Brđanin* Appeal Judgement, paras 484, 487-488; *Nahimana et al.* Appeal Judgement, para. 482; *Orić* Appeal Judgement, para. 43; *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 146, 159; *Haradinaj et al.* Appeal Judgement, paras 57-58.

commission of violent crimes in the former RSK area,[2588] was common knowledge to those present in Croatia at the time and that Gotovina was aware of this context at the outset of Operation Storm.

2374. The Trial Chamber also recalls Gotovina's presence at a meeting on 2 August 1995, in which the Minister of Defence Šušak gave instructions regarding the risk of uncontrolled conduct, including torching and looting.[2589] This put Gotovina on further notice of the possibility of the commission of crimes during and following Operation Storm. Gotovina's failure to adequately address the commission of crimes also shows his reckless attitude towards crimes falling outside of the common purpose. In relation to unlawful detentions, the Trial Chamber considers that this crime often constitutes a first step in the process of a deportation. Since Gotovina was familiar with the objective of the JCE, attended the 2 August 1995 meeting, and was aware of feelings of revenge amongst his troops, the Trial Chamber finds that he had the awareness that crimes such as destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions (on their own or as underlying acts of persecution) were possible consequences of the execution of the JCE. Gotovina nevertheless contributed to the JCE, reconciling himself with the possibility that these crimes could be committed. Thus, Gotovina knowingly took the risk that these crimes would be committed. The Trial Chamber further finds that the crimes of destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions (on their own or as underlying acts of persecution) were a natural and foreseeable consequence of the JCE's implementation.

2375. On the basis of all of the above findings and considerations, the Trial Chamber finds that Gotovina is liable pursuant to the mode of liability of JCE. Consequently, it is not necessary for the Trial Chamber to make findings on the other modes of liability alleged in the Indictment.

[2588] See chapter 5.1.2.
[2589] See the evidence of D409 reviewed in Chapter 6.2.2.

Case No: IT-01-47-PT

IN TRIAL CHAMBER II

Before:
Judge Wolfgang Schomburg, Presiding

Judge Florence Ndepele Mwachande Mumba

Judge Carmel Agius

Registrar:
Mr Hans Holthuis

Decision of:
7 December 2001

PROSECUTOR

v

ENVER HADZIHASANOVIC

MEHMED ALAGIC

AMIR KUBURA

DECISION ON FORM OF INDICTMENT

The Office of the Prosecutor:

Ms Jocelyne Bodson

Mr Ekkehard Withopf

Counsel for the Accused:

Ms Edina Residovic for Enver Hadzihasanovic
Mr Vasvija Vidovic and Mr John Jones for Mehmed Alagic

Mr Fahrudin Ibrisimovic and Mr Rodney Dixon for Amir Kubura

1. Background

1. The Trial Chamber is seized of a joint Defence Motion on the form of the indictment in the present case,[1] and the subsequent related filings.[2] A part of the Motion may be considered as a challenge to the Tribunal's jurisdiction. Since issues on the form of the indictment are substantially different from jurisdictional issues , the Trial Chamber considers them in separate decisions.[3] The objections on the form of the indictment are the subject of this decision.

2. The three accused, Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura, are charged with a number of crimes alleged to have been committed between 1 January 1993 and 31 January 1994 against Bosnian Croats and Bosnian Serbs in various municipalities in central Bosnia and

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(c) Count 13, taking of civilians as hostages, a violation of Article 2(h) of the Statute.

Enver Hadzihasanovic and Amir Kubura are further together charged with:

(a) Count 14, cruel treatment, a violation of Article 3 of the Statute, based on common Article 3(1)(a).

(b) Count 15, inhuman treatment, a violation of Article 2(b) of the Statute.

Finally, Enver Hadzihasanovic and Mehmed Alagic are together charged under count 19 with destruction or wilful damage done to institutions dedicated to religion, a violation of Article 3(d) of the Statute.

4. Two preliminary matters are to be addressed before turning to the specific objections on the form of the indictment.

2. Reply and Supplementary Response

5. The Trial Chamber's "Order on Filing of Motions" makes no mention of the right of a party to file a reply or to supplement a previous filing.[8] Counsel for the accused Alagic faxed an application for leave to reply to the Chamber , and leave was granted orally.[9] The Prosecution has applied for leave to file a supplement to its Response in the light of the recent *Kupreskic* Appeal Judgment,[10] where issues relating to the form of indictment were addressed.[11] Leave is granted to the Prosecution to file the Supplementary Response. However , the Chamber has in the meantime issued a "Further Order on Filings of Motions", *inter alia* providing that a party must seek and be granted leave to file a reply or a supplement to a previous filing *prior* to the filing of such reply or supplement.[12] To ensure that both the other party and the Chamber are sufficiently put on notice as to what is sought, such filings must in future be made by way of formal motion.

3. Length of joint motions

6. The parties have previously been instructed to familiarise themselves with the " Practice Direction on the Length of Briefs and Motions" ("Practice Direction").[13] In the interests of expediting the proceedings the Trial Chamber, in the exceptional circumstances of the present case, grants leave to file the Motion and Reply in their present form.

4. The general pleading principles

7. The general pleading principles identified in *previous cases* and which may be applicable to the present are as follows.

8. Article 21(4)(a) of the Statute provides, as one of the minimum rights of an accused , that he/she shall be entitled to be informed in detail of the nature and cause of the charge against him/her, and this provision also applies to the form of indictments .[14] This entitlement translates into an obligation on the Prosecution to plead the material facts underpinning the charges in the indictment.[15] The pleadings in an indictment will therefore be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence.[16] The Prosecution is, however, not required to plead the evidence by which such material facts are to be proven.[17]

9. The basis of these pleading principles are to be found in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").[18] The former, in relevant part,

reads that "SiCn the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees , in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him S...C."[19] The latter essentially provides the same as the ICCPR.[20]

10. All legal prerequisites to the application of the offences charged constitute material facts, and must be pleaded in the indictment. The materiality of other facts (facts not directly going to legal prerequisites), which also have to be pleaded in the indictment, cannot be determined in the abstract. A decisive factor in determining their materiality is the nature of the alleged criminal conduct charged to the accused ,[21] which includes the proximity of the accused to the relevant events.[22] Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication.[23] This fundamental rule of pleading, however, is not complied with if the pleading merely assumes the existence of the pre-requisite.[24]

11. In a case based upon superior responsibility, the following are material facts that have to be pleaded in the indictment:

(a) The relationship between the accused and the others whose acts he is alleged to be responsible for.[25] In particular , the superior-subordinate relationship between the accused and those others, is a material fact that must be pleaded.

(b) The accused knew or had reason to know that the crimes were about to be or had been committed by those others,[26] and the related conduct of those others for whom he is alleged to be responsible .[27] The facts relevant to the acts of those will usually be stated with less precision,[28] the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue.[29]

(c) The accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.[30]

12. Generally, an *indictment*, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.[31] In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief.[32] In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed.[33] The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[34] Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment.[35]

5. Objections relating to the pleading of command responsibility

13. The Defence has raised six objections relating to the pleading of command responsibility of the three accused.[36]

Case No.: IT-01-48-PT

IN THE TRIAL CHAMBER

Before:
Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar:
Mr. Hans Holthuis

Order of:
17 December 2004

PROSECUTOR

v.

SEFER HALILOVIC

DECISION ON PROSECUTOR'S MOTION SEEKING LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:

Mr. Philip Weiner
Ms. Sureta Chana

Counsel for the Accused:

Mr. Peter Morrissey
Mr. Guénaël Mettraux

I. The Current Motions

1. This Trial Chamber is seised of a "Prosecutor's Motion Seeking Leave to Amend the Indictment" ("Motion to Amend"), filed on 29 September 2004. The Defence filed its "Response to Prosecution Motion to Amend the Indictment" ("Response") with a Confidential Annex on 18 October 2004. This filing exceeded the page limit established by the Practice Direction on the Length of Briefs and Motions ("Practice Direction ").[1] The Prosecution filed a "Reply to Defence Response to Prosecution Motion to Amend Indictment" on 22 October 2004 ("Prosecution Reply"). Before attempting to rebut the Defence's arguments, the Prosecution Reply first seeks leave under Rule 126 *bis* to reply to the Response. The Trial Chamber believes that its decision is aided by consideration of all the arguments raised by the parties. The Prosecution is therefore granted leave to reply to the Response, and the Chamber accepts the filing of the over-sized Response by the Defence.

II. The Indictment and Related Procedural Background

2. On 30 July 2001, the Prosecutor filed an indictment, with supporting material, against Sefer Halilovic ("the Accused"). On 10 September 2001, the Prosecutor filed a modified and supplemented indictment ("Current Indictment").[2] On 12 September 2001, the reviewing Judge confirmed the Current Indictment

50(C), and 62.

26. The Prosecution's citation of authority for its arguments is confined to three related references in the Motion to Amend to a decision of this Chamber in *Prosecutor v. Mejakic et al*, which are used to support the proposition that "where new charges or amendments are based on facts all or most of which were included in the original indictment, it is generally accepted that there will be no prejudice to the Accused."[45] The Trial Chamber notes that the Prosecution appears to concede that a failure to prevent crimes is a "charge", and instead focuses its efforts on arguing that the charge of failure to prevent crimes in Uzdol is not "new" because it is already contained in the indictment, and thus that the automatic procedural consequences of adding a "new charge" do not apply to this case.[46] The Chamber has already rejected the assertion that the Current Indictment alleges a failure to prevent crimes in Uzdol,[47] and considers that neither the Prosecution's apparent concession nor its reliance on *Mejakic* can aid the Chamber's consideration of whether the proposed amendment is a "new charge" for the purposes of Rule 50. Although the consolidated indictment in *Mejakic* did bring new charges against most of the Accused in that case, those new charges were included as new and separate counts in the consolidated indictment, and added three different crimes as recognised by different Articles of the Statute.[48] The *Mejakic* decision did not discuss, and therefore cannot answer, the question the Trial Chamber now faces: is a new allegation that neither adds a count to the indictment nor relies on a different Article of the Statute, but instead alleges an alternative omission within a mode of liability, nevertheless a "new charge" for the purposes of Rule 50?

27. There is little guidance in this Tribunal's jurisprudence on the test as to whether a new allegation in a proposed amended indictment constitutes a new charge for the purposes of Rules 50(B) and 50(C). In *Prosecutor v. Niyitegeka*, an ICTR Trial Chamber viewed "new charges in an amended indictment as an application to *[inter alia]* allege an additional legal theory of liability with no new acts ", but the example given immediately after that definition distinguished between direct responsibility pursuant to the equivalent of Article 7(1) and superior responsibility under the parallel provision to Article 7(3).[49] Similarly, most of the other decisions of this Tribunal that discuss new charges or the bases of liability pleaded in an indictment either focus exclusively on the differences between direct and superior responsibility, the addition of new counts based on the same facts, or the addition of new charges or counts based on the inclusion of new alleged facts.[50]

28. The concept of a "new charge" has been held to include (a) an amendment alleging a different crime under the Statute,[51] (b) the addition of an underlying offence without changing the crime that is alleged under the Statute,[52] and (c) the addition of treaty provisions also recognising the same conduct as a violation of international law, with no additional factual allegations, no reliance on an additional Article of the Statute, and no other alteration of the affected count.[53]

29. Since in this case the Prosecution has formally charged the Accused with only one crime under the Statute (murder in violation of Common Article 3 of the Geneva Conventions); has alleged only one kind of individual liability (superior responsibility as recognised in Article 7(3) of the Statute); and does not seek to add allegations of any new underlying offences, the proposed amendment does not fall into any of the categories, listed above, of new allegations that have been viewed as constituting new charges.

30. Yet nothing in Rule 50, or in the decisions of this and other Trial Chambers, requires that the concept of a "new charge" be restricted to the categories listed above. All that is clear from the text of the Rule is that the accused will have to make a further appearance pursuant to Rule 50(B) for the purpose of entering a plea.[54] That must be because the accused now faces an indictment that contains a new basis for conviction. As the European Court of Human Rights has noted, albeit in a different context, the term "charge" is very wide in scope, and the fundamental nature of the right to a fair trial should prompt courts to prefer a "substantive, rather than formal, conception" of the term.[55] When considering whether a proposed amendment results in the inclusion of a "new charge", it is therefore appropriate to focus on the

imposition of criminal liability on a basis that was not previously reflected in the indictment. In the opinion of the Trial Chamber the key question is, therefore, whether the amendment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment.

31. On this approach, since the bases for the imposition of criminal liability under Article 7(3) are two alternative omissions, the addition of an allegation of a new omission would logically be seen as including a new charge in the indictment. It is well-established in the Tribunal's jurisprudence that the disjunctive "or" in the last phrase of Article 7(3)—"the superior failed to take the necessary and reasonable measures to prevent such acts *or* to punish the perpetrators thereof"—reflects the fact that the duty to prevent crimes and the duty to punish the perpetrators are distinct and separate responsibilities under international law. For example, in an interlocutory appeal in *Prosecutor v. Hadzihasanovic, Alagic, and Kubura* , the Appeals Chamber noted that the duty to prevent and the duty to punish are separable.[56] In a decision on the form of the indictment in the same case, Trial Chamber II held that there was "no ambiguity in the use of the disjunctive formulation [of the bases of superior responsibility]—the Prosecution is entitled to plead both versions and the Defence is sufficiently and clearly put on notice that it has to prepare its case to answer both versions."[57] In a decision rejecting a joint defence motion to dismiss portions of an indictment for lack of jurisdiction, the Trial Chamber seised of *Prosecutor v. Kordic and Cerkez* concluded that failure to prevent crimes and failure to punish crimes are independent bases for criminal liability.[58] Recently, the Appeals Chamber in *Prosecutor v. Blaskic* rejected the Appellant's argument that failure to punish is merely another form of failure to prevent, noted that these failures "involve different crimes committed at different times", and concluded that each is a separate head of responsibility.[59]

32. The failure to punish and the failure to prevent are not only legally distinct, but are factually distinct in terms of the type of knowledge that is involved in each basis of superior responsibility. Failure to prevent presumes prior knowledge ("knew or had reason to know") that crimes were being, or were about to be, committed, while failure to punish presumes subsequent knowledge ("knew or had reason to know") that crimes had already been committed.[60]

33. The disjunctive nature of the bases of superior responsibility, combined with the distinguishing factor of the type of knowledge involved for each basis, means that an accused can be convicted on the basis of one omission even if the other is not proved. For example, if the Prosecution proves that the Accused knew that his subordinates had committed crimes in Uzdol, then if all the other elements of the crime are established, the Accused may be convicted based on his failure to punish those crimes, even if he had no prior knowledge and therefore lacked the ability to prevent their commission. If, however, the Prosecution proves that the Accused knew that his subordinates were going to commit crimes in Uzdol, then if all the other elements of the crime are established, the Accused may be convicted based on his failure to prevent those crimes, even if he were no longer their superior after the crimes and therefore lacked the ability to punish their commission.[61]

34. The Trial Chamber considers that, where the new allegation could be the sole action or omission of the Accused that justifies his conviction, that amendment is a "new charge" for the purposes of Rule 50. There are three distinct bases in the Current Indictment for a possible finding of guilt: (1) failure to prevent crimes in Grabovica ; (2) failure to punish crimes in Grabovica; and (3) failure to punish crimes in Uzdol. If the Prosecution were allowed to add this new allegation, there would be a fourth, failure to prevent crimes in Uzdol. If the Prosecution fails to ascribe any of the first three omissions to the Accused, yet proves the fourth, the Accused may still be found guilty of the crime of murder under Articles 3 and 7(3) of the Statute. As a result of the proposed amendment, therefore, the indictment would include a "new charge" for the purposes of Rule 50 because the Accused would be exposed to conviction based on conduct that is a basis for criminal liability not presently reflected in the Current Indictment, and which is sufficient on its own to support a conviction of murder under Article 3 of the Statute.[62]

35. This understanding of "new charge", which is not limited by the particular technicalities of pleading before the Tribunal, is consistent with the concern for fairness to the Accused that animates the

UNITED
NATIONS

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

Case No. IT-95-14/2-A

Date: 17 December 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Hans Holthuis**

Judgement of: **17 December 2004**

PROSECUTOR

v.

DARIO KORDIĆ
AND
MARIO ČERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Helen Brady
Ms. Marie-Ursula Kind and Ms. Michelle Jarvis

Counsel for Dario Kordić:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr. and Mr. Stephen M. Sayers

Counsel for Mario Čerkez:

Mr. Božidar Kovačić and Mr. Goran Mikuličić

III. APPLICABLE LAW

A. Planning, instigating and ordering pursuant to Article 7(1) of the Statute

25. The Appeals Chamber notes that the Trial Chamber convicted Kordić for planning, instigating, and ordering crimes pursuant to Article 7(1) of the Statute.[18] The Trial Chamber's legal definitions of these modes of responsibility have not been appealed by any of the Parties. However, the Appeals Chamber deems it necessary to set out and clarify the applicable law in relation to these modes of responsibility insofar as it is necessary for its own decision.

26. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[19] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.

27. The *actus reus* of "instigating" means to prompt another person to commit an offence.[20] While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[21]

28. The *actus reus* of "ordering" means that a person in a position of authority instructs another person to commit an offence.[22] A formal superior-subordinate relationship between the accused and the perpetrator is not required.[23]

29. The *mens rea* for these modes of responsibility is established if the perpetrator acted with direct intent in relation to his own planning, instigating, or ordering.

30. In addition, the Appeals Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute. The Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[24]

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[18] Trial Judgement, paras 829, 834.
[19] See Trial Judgement, para. 386.
[20] See Trial Judgement, para. 387.
[21] *Cf.* Trial Judgement, para. 387.
[22] Trial Judgement, para. 388.
[23] Trial Judgement, para. 388.
[24] *Blaškić* Appeal Judgement, para. 42.

31. The Appeals Chamber similarly holds that in relation to "planning", a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.

32. With respect to "instigating", a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to instigating. Instigating with such awareness has to be regarded as accepting that crime.

B. The responsibility under Article 7(1) and Article 7(3) of the Statute

33. In the *Aleksovski* Appeal Judgement, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences"[25] in relation to those offences of which he was convicted for his direct participation.[26] While the finding of superior responsibility in that case resulted in an aggravation of sentence, there was no entry of conviction under both heads of responsibility in relation to the count in question. In the *Čelebići* Appeal Judgement, the Appeals Chamber stated:

> Where criminal responsibility for an offence is alleged *under one count* pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[27]

34. The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute.[28] Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber

[25] *Blaškić* Appeal Judgement, para. 90, referring to *Aleksovski* Appeal Judgement, para. 183.
[26] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745.
[27] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745 (emphasis added).
[28] *Blaškić* Appeal Judgement, para. 91, referring to the *Blaškić* Trial Judgement, para. 337.

is no requirement in law that the actor possess a "persecutory intent" over and above a discriminatory intent.[135]

112. In addition, the Appeals Chamber considers that a person who orders, plans or instigates an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, plan or instigation, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering, planning or instigating. Ordering, planning or instigating with such awareness has to be regarded as accepting that crime. Thus, an individual who orders, plans or instigates an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the execution of the order, plan or instigation, may be liable under Article 7(1) of the Statute for the crime of persecutions.[136]

3. Murder pursuant to Article 5(a) of the Statute

113. The elements of murder as a crime against humanity are undisputed.[137]

4. Imprisonment pursuant to Article 5(e) of the Statute

114. The Appeals Chamber notes the finding of the Trial Chamber that imprisonment of civilians is unlawful where

- civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.* that they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;
- the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified; and
- the imprisonment occurs as part of a widespread or systematic attack directed against a civilian population.[138]

115. The Appeals Chamber finds that not all of these elements necessarily have to be met in order to establish liability for unlawful confinement pursuant to Article 5(e) of the Statute: the existence of an international armed conflict, an element of Articles 42 and 43 of Geneva Convention IV, is not required for imprisonment as a crime against humanity.

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[135] *Blaškić* Appeal Judgement, para. 165.
[136] *Blaškić* Appeal Judgement, para. 166.
[137] *Cf.* Trial Judgement, para. 236.
[138] Trial Judgement, para. 303.

159. The words "forcible transfer" are also mentioned in paragraph 33 of the Indictment, without, however, providing any further detail.

160. Based on the wording of the above-mentioned paragraphs of the Indictment, Kordić and Čerkez were not sufficiently informed that they had to – and how they could – defend themselves against possible allegations of forcible transfer and/or expulsion of Bosnian Muslim civilians.

(iv) Is forcible transfer/expulsion a part of inhuman and/or cruel treatment of detainees?

161. It could be argued that the references to forcible transfer and/or expulsion in paragraphs 45 and 51 of the Indictment also relate to the counts on inhuman and/or cruel treatment of detainees (Counts 23, 24, 31, 32), respectively. However, a careful reading of paragraphs 46 and 52 in connection with paragraphs 49 and 54 of the Indictment clarifies that it is trench-digging that is charged as inhuman and/or cruel treatment of detainees, and that neither forcible transfer nor expulsion were pleaded under these counts.

162. Finally, it must be noted that Counts 10 and 12 (Kordić), and 17 and 19 (Čerkez) on inhumane acts and inhuman treatment do not contain any reference to a forcible transfer and/or expulsion of Bosnian Muslims. Instead, in paragraphs 42 and 43 of the Indictment, these Counts refer exclusively to "Injuries". Thus, the forcible transfer and/or expulsion of Bosnian Muslim civilians were not pleaded.

163. For the reasons set out above, the Indictment is impermissibly vague as regards forcible transfer/expulsion in relation to Counts 1 and 2, and this is not cured in Counts 3 through 44.

164. In applying the standard as set out by the Appeals Chamber in *Kupreškić et al.*, this vagueness of the Indictment does not constitute a "minor defect nor a technical imperfection"; instead, it amounts to a "fundamental defect" that "materially impaired" the ability of the Accused to defend himself against the charges.

(v) Has the vagueness of the Indictment been cured by the Pre-trial Brief or the opening statement?

165. An examination of the Prosecution Pre-trial Brief reveals that the information contained therein did not sufficiently inform the Accused of the nature and scope of a charge of forcible transfer and/or expulsion of Bosnian Muslim civilians as an underlying offence of persecutions. The Prosecution submitted that

> the evidence demonstrates that unlawful acts, namely, the killings, torture, beatings, attacks, destruction, imprisonment, hostage-taking, and inhuman treatment did occur. [...] These acts constituted the crime against humanity of persecution.[215]

Neither forcible transfer nor expulsion of Bosnian Muslim civilians are mentioned. In other parts of the Pre-trial Brief, the information on the forced removal of Bosnian Muslims is rather vague and unspecific. The Prosecution submitted, for example, that

> [t]he details of the attacks reveal that the aim was to decimate the Muslim population and force Muslims to leave the areas that the Bosnian Croat leadership sought to control.[216]

166. No further reference was made as to where the Muslim population was forced to go, or from which areas they were forced to leave. Therefore, although the above-mentioned submission by the Prosecution can be seen as a hint to forcible transfer/removal and/or expulsion, it was not sufficiently clear to put the Accused on notice about the nature of a specific charge of forcible transfer/removal and/or expulsion.

167. In this context, the Appeals Chamber recalls its finding in *Kupreškić et al.* that a defective indictment can in some instances be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[217]

168. The Appeals Chamber finds, however, that the information contained in the Pre-trial Brief does not satisfy this test and that the Prosecution accordingly failed to cure the vagueness of the Indictment in relation to the forcible transfer and/or expulsion of Bosnian Muslim civilians in these locations. Although the Pre-trial Brief mentions more specifically the times and locations of the attacks in Novi Travnik, Busovača, Ahmići, Zenica, and Stupni Do, the Appeals Chamber is not satisfied that the Prosecution identified the "particular acts" or "the particular course of conduct"[218] with sufficient clarity to cure the vagueness of the Indictment in relation to these locations. The Accused were not put on notice about the nature of the allegations against them with respect to the forcible transfer and/or expulsion of Bosnian Muslim civilians. It does not specify in what way these Bosnian Muslims were allegedly expelled and to what destinations they were allegedly expelled. Furthermore, Annex 3 to the Prosecution Pre-trial Brief, a document linking witnesses to counts and locations, does not provide any further information on the forcible transfer and/or expulsion of Bosnian Muslim civilians.

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[215] Prosecution Pre-trial Brief, para. 41.
[216] Prosecution Pre-trial Brief, para. 87. For further instances see paras 69, 82, 96, 101, 107.
[217] *Kupreškić et al.* Appeal Judgement, para. 114.
[218] *Blaškić* Appeal Judgement, para. 213 (with further references).

169. The Appeals Chamber notes that, in some instances, information contained in an Opening Statement of the Prosecution may cure a defective indictment. However, an examination of the Prosecution Opening Statement[219] reveals that it did not further clarify the forcible transfer and/or expulsion of Bosnian Muslim civilians. The Prosecution only once referred "to the developing pattern of behaviour leading to [...] the expulsion of one community from the territory aspired to by the other". This reference was made in relation to an attack which was "not the subject of a count in the indictment", and no specific information was given on the victims or the places to which they were expelled.[220]

170. Finally, the Appeals Chamber notes after reviewing the trial record that the Accused were not put on notice by the Trial Chamber with regard to this issue by way of an instructive, judicial suggestion.

(b) Conclusion

171. For the reasons set out above, the Appeals Chamber finds that the Indictment is defective in relation to the allegations concerning the forcible transfer/removal and/or expulsion of Bosnian Muslim civilians, and that these defects were not been cured in the Prosecution Pre-trial Brief, the Prosecution Opening Statement, or elsewhere.

172. The Appeals Chamber therefore finds that the Trial Chamber was not seized of the charge of forcible transfer and/or expulsion in relation to both Kordić and Čerkez. Therefore, the convictions of Kordić and Čerkez could not entail the forcible transfer and/or expulsion of Bosnian Muslim civilians.

C. Equality of arms

1. Submissions of the parties

173. Kordić submits that much of the material necessary to his defence was inaccessible to him, thereby denying him equality of arms in violation of Article 21 of the Statute.[221]

174. The Prosecution avers that an appellant who raises the equality of arms as a ground of appeal must show that "the unequal treatment amounts to an error of *law on the part of the Trial Chamber*"[222], and that merely complaining about the manner in which the Prosecution conducted its

[219] T. 8-120.
[220] T. 50-51.
[221] Kordić Appeal Brief, Vol. I, pp 35–37. See Accused Dario Kordić's Renewed Motion, in Light of Subsequent Developments, for Full Access to the Non-Public materials in the Lašva Valley Cases, 15 May 2000.
[222] Prosecution Response, para. 2.4 (emphasis in original).

UNITED
NATIONS

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

Case No. IT-95-14/2-T

Date: 26 February 2001

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: **Mr. Hans Holthuis**

Date: **26 February 2001**

PROSECUTOR

v.

DARIO KORDI]
&
MARIO ^ERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Geoffrey Nice, Q.C.
Mr. Patrick Lopez-Terres
Mr. Kenneth R. Scott
Ms. Susan Somers
Mr. Fabricio Guariglia

Counsel for the Accused:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr., Mr. Stephen M. Sayers, Mr. Robert Stein and Mr. Christopher G. Browning, Jr., for Dario Kordi}

Mr. Božidar Kova~i} and Mr. Goran Mikuli~i}, for Mario ^erkez

found to have committed a crime will not be found responsible for planning the same crime. Moreover, an accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed.[530]

387. The *Bla{ki}* Trial Chamber held that instigating "entails 'prompting another to commit an offence'."[531] Both positive acts and omissions may constitute instigation,[532] but it must be proved that the accused directly intended to provoke the commission of the crime. Although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e., that the contribution of the accused in fact had an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement.

388. The Trial Chamber is of the view that no formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order.[533] The Trial Chamber agrees with the *Bla{ki}* finding that there is no requirement that an order be given in writing or in any particular form, and that the existence of an order may be proven through circumstantial evidence.[534] In relation to ordering, the *Bla{ki}* Trial Chamber further held that the order "does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order."[535]

4. Aiding and Abetting and Participation in a Common Purpose or Design[536]

(a) Arguments of the parties

(i) Aiding and abetting

389. In the Prosecution's opinion, these two concepts are distinct in that aiding means giving assistance to someone while abetting implies facilitating the commission of an offence. Either one suffices to render an accused criminally responsible under Article 7(1).[537] The Prosecution

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[529] *Bla{ki}* Trial Judgement, para. 279.
[530] *Bla{ki}* Trial Judgement, para. 278.
[531] *Bla{ki}* Trial Judgement, para. 280, endorsing *Akayesu* Trial Judgement, para. 482.
[532] *Bla{ki}* Trial Judgement, para. 280.
[533] The Trial Chamber disagrees with the *Bla{ki}* and *Akayesu* Trial Chambers in this respect. *See Bla{ki}* Trial Judgement, para. 281, citing *Akayesu* Trial Judgement, para. 483.
[534] *Bla{ki}* Trial Judgement, para. 281.
[535] *Bla{ki}* Trial Judgement, para. 282.
[536] Aiding and abetting and participation in a common purpose are addressed in the same section in light of the *Tadi}* Appeal Judgement which, in setting out the elements of the latter, compared it to aiding and abetting.
[537] Prosecution Final Brief, Annex 4, p. 18.

UNITED
NATIONS

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

Case No. IT-00-39-A

Date: 17 March 2009

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: **Mr. John Hocking**

Judgement of: **17 March 2009**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter M. Kremer QC
Ms. Shelagh McCall
Ms. Barbara Goy
Ms. Katharina Margetts
Mr. Steffen Wirth
Ms. Anna Kotzeva
Mr. Matteo Costi
Ms. Julia Thibord

Momčilo Krajišnik *pro se*

Counsel for Momčilo Krajišnik on JCE:
Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz

***Amicus Curiae*:**
Mr. Colin Nicholls QC

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5. Arguments contrary to common sense

22. The Appeals Chamber will, as a general rule, summarily dismiss arguments and allegations that are contrary to common sense.[66]

6. Challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the Appellant

23. When an appellant raises arguments against factual findings by the Trial Chamber without elaborating on how the alleged error of fact had any impact on the findings of the Trial Chamber, so as to amount to a miscarriage of justice, the Appeals Chamber will, as a general rule, summarily dismiss the alleged error or argument.[67]

7. Mere repetition of arguments that were unsuccessful at trial

24. The Appeals Chamber will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial without any demonstration that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber.[68]

8. Allegations based on material not on record

25. The Appeals Chamber will summarily dismiss arguments and allegations based on material that is not part of the trial record and that has not been admitted on appeal pursuant to Rule 115 of the Rules.[69]

9. Mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error

26. Submissions will be dismissed without detailed reasoning where an appellant makes factual claims or presents arguments that the Trial Chamber should have reached a particular conclusion without advancing any evidence in support. Indeed, an appellant is expected to provide the Appeals Chamber with an exact reference to the parts of the trial record invoked in support of its arguments.[70] As a general rule, in instances where this is not done, the Appeals Chamber will

[66] *Brđanin* Appeal Judgement, para. 30; *Galić* Appeal Judgement, paras 308 and 310.
[67] *Brđanin* Appeal Judgement, para. 31.
[68] *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16; *Halilović* Appeal Judgement para. 12; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, paras 10 and 303; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[69] *Galić* Appeal Judgement, paras 311-313.
[70] *Martić* Appeal Judgement, para. 20; *Strugar* Appeal Judgement, para. 22. *See* Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002 ("Practice Direction on Formal Requirements for Appeals from Judgement"), paras 1(c)(iii), 1(c)(iv), 4(b)(ii). *See* also *Halilović* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 15; *Gacumbitsi* Appeal Judgement, para. 10.

and which were carried out by people with whom he had no contact and over whom he had no control.[1733]

661. The Prosecution responds that the Tribunal's jurisprudence has characterised JCE liability as part of "committing" in Article 7(1) of the Statute. It posits that this does not render the other modes of liability under Article 7(1) of the Statute nugatory because the elements of JCE distinguish it from them.[1734] The Prosecution also argues that Krajišnik's individual contributions to the JCE need not amount to physical commission, or be direct or material.[1735] Finally, it contends that JCE is "committing" regardless of whether the principal perpetrators are part of the JCE. It avers that a group with a common purpose amounting to or involving the commission of crimes under the Statute poses a greater danger than individual perpetrators and merits a serious form of liability in the form of "commission".[1736]

(ii) Analysis

662. The Appeals Chamber has consistently held that participation in a JCE is a form of "commission" under Article 7(1) of the Statute.[1737] Although the facts of a given case might establish the accused's liability under both JCE and other forms of liability under Article 7(1), the legal elements of JCE distinguish it from these other forms. In the first place, none of the other forms require a plurality of persons sharing a common criminal purpose. Moreover, whereas JCE requires that the accused intended to participate and contribute to such a purpose,[1738] an accused may be found responsible for planning, instigating or ordering a crime if he intended that the crime be committed or acted with the awareness of the substantial likelihood that a crime would be committed.[1739] In terms of *actus reus*, planning and instigating consists of acts "substantially contributing" to the perpetration of a certain specific crime[1740] and ordering means "instructing" a person commit an offence.[1741] By contrast, JCE requires that the accused contributes to the common purpose in a way that lends a significant contribution to the crimes.[1742] The differences between

[1733] Dershowitz Brief, para. 27.
[1734] Prosecution's Response to Dershowitz, paras 6-7.
[1735] Prosecution's Response to Dershowitz, para. 8, referencing *Tadić* Appeal Judgement, para. 277; *Brđanin* Trial Judgement, para. 263; *Rwamakuba* Appeal Decision, para. 25; *Brđanin* Appeal Judgement, para. 425.
[1736] Prosecution's Response to Dershowitz, para 9.
[1737] *E.g. Kvočka et al.* Appeal Judgement, paras 79-80; *Tadić* Appeal Judgement, paras 188; *Ojdanić* Decision on Joint Criminal Enterprise, para. 20.
[1738] *Kvočka et al.* Appeal Judgement, paras 82-83. In the case of JCE Catergory 3, it must also have been foreseeable to the accused that a crime other than the one agreed upon in the common objective might be perpetrated by a member of the JCE, or by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose, and the accused willingly took that risk by joining or continuing to participate in the enterprise.
[1739] *Nahimana et al.* Appeal Judgement, paras 479-481; *Kordić and Čerkez* Appeal Judgement, paras 30-32.
[1740] *Kordić and Čerkez* Appeal Judgement, paras 26-27.
[1741] *Kordić and Čerkez* Appeal Judgement, para. 28.
[1742] *Brđanin* Appeal Judgement, para. 430; *Kvočka et al.* Appeal Judgement, paras 96-97.

JCE and aiding and abetting are well-established and need not be repeated here.[1743] JCE counsel's argument that JCE renders the other forms of liability under the Article 7(1) nugatory is thus without merit.

663. The Appeals Chamber notes that the question of whether Krajišnik was removed from the actual commission of the crimes is legally irrelevant to his conviction under JCE.[1744] His remoteness *vis-à-vis* the crimes is also not directly relevant to whether his acts can be characterised as "commission" under JCE. As explained in *Kvočka et al.*, participation in a JCE as a form of "commission"

> is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question. [1745]

664. JCE counsel argue that it is improper to locate JCE within "commission" where the principal perpetrators of the crime are not JCE members. In the *Brđanin* Appeal Judgement, the Appeals Chamber left open the question of whether equating JCE with "commission" is appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.[1746] In the present case, Krajišnik was indeed convicted at least in part on the basis of crimes committed by non-JCE members but imputed to JCE members.[1747]

665. In any case, whether Krajišnik should be held responsible for having "committed" the crimes in question or pursuant to another mode of responsibility, it remains that the Trial Chamber did not err in convicting him under Article 7(1) of the Statute for these crimes. As such, JCE counsel fail to demonstrate how the alleged error invalidates the decision.

666. To the extent JCE counsel's unreferenced argument regarding "how the [Trial Chamber] incorporated certain crimes into JCE liability" refers to the Trial Chamber's findings concerning the expansion of the JCE over time, the Appeals Chamber notes that this issue has been dealt with

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[1743] *Kvočka et al.* Appeal Judgement, paras 89-90; *Vasiljević* Appeal Judgement, para. 102.
[1744] *See Tadić* Appeal Judgement, para. 227(iii).
[1745] *Kvočka et al.* Appeal Judgement, para. 80, citing *Tadić* Appeal Judgement, para. 191.
[1746] *Brđanin* Appeal Judgement, fn. 891.
[1747] *See supra* III.C.11.

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
11 February 2000

PROSECUTOR

v

Milorad KRNOJELAC

DECISION ON PRELIMINARY MOTION ON FORM OF AMENDED INDICTMENT

The Office of the Prosecutor:

Mr Dirk Ryneveld
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

the original indictment was not the subject of investigation in the earlier preliminary motion. In its previous decision, the Trial Chamber said:[16]

The prosecution is therefore required to amend the indictment so as to identify, *in relation to each count or group of counts*, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged.

The issue in the present Motion is whether the amended indictment has complied with that order.

17. The prosecution says that it has sufficiently identified the accused's course of conduct which gave rise to his individual responsibility for the persecutions alleged in Count 1.[17] Reliance is placed upon what the Trial Chamber said in its previous decision:[18]

What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.

That statement was made against the background of more general statements as to the obligation of the prosecution to give particulars in the indictment:[19]

The extent of the prosecution's obligation to give particulars in an indictment is to ensure that the accused has "a concise statement of the facts" upon which reliance is placed to establish the offences charged, but only to the extent that such statement enables the accused to be informed of the "nature and cause of the charge against him" and in "adequate time S...C for the preparation of his defence". An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.

The previous decision then went on to refer to the clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which need not be pleaded).[20]

18. That distinction is an important one. Whether a particular fact is material depends in turn upon the nature of the case which the prosecution seeks to make. The materiality of such things as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the

alleged proximity of the accused to those events. There are, in general, three different situations to be considered:

(A) In a case based upon superior responsibility, what is most material is:

(i) the relationship between the accused and the others who did the acts for which he is alleged to be responsible; and

(ii) the conduct of the accused by which he may be found (a) to have known or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.[21]

However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) are often unknown – and because the acts themselves often cannot be greatly in issue.[22]

(B) In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible – where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility – again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts.[23] (This may more conveniently be described in general terms as an "aiding and abetting" responsibility.) But more precision is required in relation to the material facts relating to those acts of other persons than is required for an allegation of superior responsibility. As the Trial Chamber said in its previous decision, in those circumstances what the accused needs to know as to the case he has to meet is not only what is alleged to have been his own conduct but also what are alleged to have been the acts for which he is to be held responsible,[24] subject of course to the prosecution's ability to provide such particulars.[25] But the precision required in relation to those acts is not as great as where the accused is alleged to have personally done the acts in question.[26]

(C) In a case where it *is* alleged that the accused personally did the acts in question (which may more conveniently be described in general terms as "personal" responsibility), the material facts must be stated with the greatest precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the place and the

approximate date of those acts and the means by which the offence was committed.[27]

19. Against that background, it should be clear that what was said in the Trial Chamber's previous decision concerning the course of conduct on the part of the accused appears to have been misinterpreted by the prosecution. For convenience, the statement in that previous decision is repeated:[28]

What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.

The reference to the "particular course of conduct" of the accused is relevant to the first and (to some extent) the second of the three general situations identified in par 18 above. But, where precision is required in relation to the acts of the accused himself, as in the third general situation identified above, the prosecution does *not* fulfil its obligation to state the material facts in the indictment by merely identifying some course of conduct on his part.

20. The remainder of this decision does not concern the allegation of superior responsibility; it is concerned only with personal responsibility and with aiding and abetting responsibility.

21. As the prosecution has alleged in par 4.9 of the indictment that, *inter alia*, the accused personally committed the offence of persecution pleaded in par 5.2, and as it has not identified with sufficient precision the material facts upon which it relies to establish that he did so, it has not complied with the Trial Chamber's previous decision that this be done.[29] The information to be pleaded must, so far as it is possible to do so, identify the victim or victims, the place and the approximate date of the alleged offence and the means by which it was committed.[30] Alternatively, the prosecution must either withdraw from the charge of individual responsibility the allegation that the accused personally committed these offences or make it clear in the indictment (as it has in relation to other allegations) that the individual responsibility of the accused for the matters alleged in par 5.2 is for the acts of others and not for his own acts otherwise than of an aiding and abetting nature only.[31]

22. Even if par 5.2 is considered without the allegation that the accused personally committed the offences, so that he remains charged with an aiding and abetting responsibility, greater precision is required than has been given. The prosecution does not have to identify precise conversations or actions taken by the accused, but the accused is entitled to know the manner in which he is to be held responsible – for example, whether it is alleged that

he ordered the persecution, torture, beatings, countless killings, forced labour and inhumane conditions, or whether he merely assisted in some other *identified* way. The accused is entitled to a specific, albeit concise, statement in the indictment of the nature and extent of his participation in the several courses of conduct alleged.[32]

23. The prosecution has submitted that such a degree of specificity "would render redundant the disclosure materials provided to the Defence".[33] This was an argument put before, and rejected in the Trial Chamber's previous decision.[34] At the present time, it must be said, the prosecution appears to have attempted to make its allegations as broad and as comprehensive as possible without giving any real idea of what the case actually is. It is not entitled to do so.

24. This complaint is upheld.

(d) Paragraph 5.4

25. Paragraphs 5.4-6 are the sole foundation for that part of Counts 5 to 7 ("Torture and Beatings") which appears under the heading "Beatings Upon Arrival in the Prison Yard".[35] Paragraph 5.4 is in the following terms:

Upon their arrival in the prison-camp between April and December 1992, detainees of the KP Dom were beaten in the prison yard by the prison guards or by soldiers in the presence of regular prison personnel, as described in paragraphs 5.5 and 5.6. MILORAD KRNOJELAC participated in these beating by granting soldiers access to the detainees and instructing his guards not to intervene. He also encouraged and approved assaults by the guards.

Again, the accused seeks –

(a) to know whether his alleged liability is based on individual or command responsibility, and

(b) particulars of the specific acts on his part by which he is alleged to bear any individual responsibility,

in relation to the beatings alleged in this paragraph.[36]

26. Again the indictment already discloses that the accused is alleged to bear both individual and superior responsibility. However, although par 4.9 still alleges by way of universal application that the accused's individual responsibility includes his personal commission of the offences pleaded, the terms of par 5.4 should be interpreted as alleging by implication that the

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding

Judge Antonio Cassese

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of: 24 February 1999

PROSECUTOR

v

MILORAD KRNOJELAC

DECISION ON THE DEFENCE PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Franck Terrier
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

I Introduction

1. Milorad Krnojelac ("the accused") is charged on eighteen counts arising out of events at the Foca Kazneno-Popravni Dom ("KP Dom" or "KPD FOCA") – said to be one of the largest prisons in the former Yugoslavia – of which he is alleged to have been the commander and in a position of superior authority. The charges against him allege:

> 1.1 grave breaches of the Geneva Conventions of 1949, consisting of torture (Count 3), wilfully causing serious injury to body or health (Count 6), wilful killing (Count 9), unlawful confinement of civilians (Count 12), wilfully causing great suffering (Count 14) and inhuman treatment (Count 17);[1]
>
> 1.2 violations of the laws and customs of war, consisting of torture (Count 4), cruel treatment (Counts 7 and 15), murder (Count 10) and slavery (Count 18);[2] and
>
> 1.3 crimes against humanity, consisting of persecution on political, racial and/or

detainees arrived and that he appeared during beatings. Even so, para 3.1 is directed only to showing that the accused had responsibility as a superior, not that he personally participated in any beatings. It may be that – differently expressed, and in a distinct, separate and more detailed allegation – these facts would go at least some way to support a finding that the accused had aided and abetted in the beatings and that he was therefore individually responsible for those beatings,[14] but para 3.1 does not provide particulars of the individual responsibility of the accused.

12. The accused therefore complains, with some justification, that he has not been informed of the facts upon which the prosecution relies to establish his individual responsibility.[15] The extent of the prosecution's obligation to give particulars in an indictment is to ensure that the accused has "a concise statement of the facts" upon which reliance is placed to establish the offences charged,[16] but only to the extent that such statement enables the accused to be informed of the "nature and cause of the charge against him"[17] and in "adequate time [...] for the preparation of his defence".[18] An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.[19] However, these obligations in relation to what must be pleaded in the indictment are not to be seen as a substitute for the prosecution's obligation to give pre-trial discovery (which is provided by Rule 66 of the Rules) or the names of witnesses (which is provided by Rule 67 of the Rules).[20] There is thus a clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery).

13. But, even recognising that distinction, the indictment as presently drafted gives the accused no idea at all of the nature and cause of the charges against him so far as they are based upon his individual responsibility – either by way of personal participation or as aiding and abetting those who did so participate. It is not sufficient that an accused is made aware of the case to be established upon only one of the alternative bases pleaded.[21] What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.[22]

14. The prosecution has already given pre-trial discovery of all the supporting material which accompanied the indictment when confirmation was sought.[23] It has not yet provided the accused with translated witness statements.[24] It submits that the supporting material "should" supply all necessary details as to the nature of the case to be made against the accused sufficient to enable him to prepare his defence, so that there is no need to amend the indictment.[25] Reliance is placed upon the decision of the ICTR in *Prosecutor v Nyiramashuko*[26] as supporting that proposition. What the ICTR said was:

> "Whilst it is essential to read the indictment together with the supporting material, the indictment *on its own* must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance."[27]

15. It is true that, in a limited class of case, less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred, it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation. It has not been shown to be the case here. Indeed, the lack of particularity in the indictment strongly suggests that the prosecution does not have statements which fall within that limited class of case. It is not clear from the judgment of the ICTR in

Prosecutor v Nyiramashuko whether that case fell within such a limited class, but this Trial Chamber does not accept any interpretation of the ICTR decision which suggests that the supporting material given during the discovery process can be used by the prosecution to fill any gaps in the material facts pleaded in the indictment, except in the limited class of case to which reference has already been made.

16. Where the discovered material does not cure the imprecision in the indictment, the dangers of an imprecise indictment remain – such as in relation to subsequent pleas of *autrefois acquit* and *autrefois convict*.[28] The prosecution has not established that the discovered material does cure these imprecisions.

17. The prosecution is therefore required to amend the indictment so as to identify, *in relation to each count or group of counts*, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged. The complaints by the accused in relation to the particulars of his responsibility as a superior will be dealt with separately.

V Particularity in pleading – responsibility as a superior

18. In relation to the allegation that the accused was in a position of superior authority,[29] the accused requires the prosecution to identify with precision the "grounds" for the allegations made that, "at the critical time", he was "the head of the KPD FOCA and in a superior position to everybody in the detention camp" and "the person responsible for the functioning of the KPD FOCA as a detention camp".[30] The indictment identifies the relevant time as being from April 1992 until at least August 1993. The statements quoted by the accused are to some extent inaccurately transcribed, and in one aspect significantly so. They are also taken out of context. Paragraph 3.1 in its entirety is in the following terms:

> SUPERIOR AUTHORITY
>
> 3.1 From April 1992 until at least August 1993, MILORAD KRNOJELAC was the commander of the KP Dom and was in a position of superior authority to everyone in the camp. As commander of the KP Dom, MILORAD KRNOJELAC was the person responsible for running the Foca KP Dom as a detention camp. MILORAD KRNOJELAC exercised powers and duties consistent with his superior position. He ordered and supervised the prison staff on a daily basis. He communicated with military and political authorities from outside the prison. MILORAD KRNOJELAC was present when detainees arrived, appeared during beatings, and had personal contact with some detainees.

19. The accused's argument fails once the actual wording of the paragraph itself is considered. To describe the accused as the "commander" of a camp – the word "commander" is significantly omitted in the statements quoted by the accused – is sufficient "ground" for asserting that he was superior to everyone else and that he was responsible for the functioning of the camp. Even if it were not, the allegations made in the remainder of the paragraph provide sufficient "ground" for asserting that the accused was in a position of superior authority as part of the basis for making him criminally responsible in accordance with Art 7(3). The manner in which these material facts are to be proved is a matter of evidence and thus for pre-trial discovery, not pleading.

20. The accused's second argument is that particular precision is required in relation to these assertions because, he says, at the relevant time the Foca KP Dom in fact consisted of two institutions – one which was under the control of the army and used for detaining war prisoners, and the other a civil correction centre. It is said that the accused will prove that he was the "head" of the second such institution, but that he had "no competence" in relation to the first. This argument also fails. An objection to the form of an

by others was extensively discussed recently in *Prosecutor v Furundzija*,[44] and the concept itself cannot be said to be unclear. The Trial Chamber has already determined in this present decision that the accused is entitled to particulars of the material facts (but not the evidence) upon which the prosecution relies to establish the individual responsibility of the accused for each offence or group of offences charged.[45] Such particulars must necessarily demonstrate the basis upon which it is alleged that the accused aided and abetted those who personally participated in each of the offences charged.

35. This complaint is rejected.

36. The accused complains[46] that the indictment fails in many instances to identify even the approximate time when the various offences are alleged to have occurred.[47] The prosecution submits that, because the charges concern events which took place over a specified period in the conduct of a detention center, it is not obliged to provide information as to the identity of the victim, the specific area where and the approximate date when the events are alleged to have taken place or (where the accused is charged with responsibility as a superior or as aiding and abetting rather than as having personally participated in those events) the identity of the persons who did personally participate in those events.

37. On the face of it, the stand taken by the prosecution is directly contrary to its obligations as to pleading an indictment as imposed by the Statute and the Rules, to which reference has already been made,[48] as interpreted by the Trial Chamber in *Prosecutor v Blaskic*.[49] The prosecution nevertheless relies upon the decision of the Trial Chamber in *Prosecutor v Aleksovski*[50] as justifying its stand.

38. According to that decision, the indictment charged Aleksovski in relation to certain events which occurred in the Kaonik prison while he was responsible for it. The indictment identified a period of five months during which it was alleged that he was so responsible. It is apparent from the decision that the indictment did not identify either the place or the approximate date of the events which are alleged to have occurred. The Trial Chamber stated:[51]

> The time period – the first five months of 1993 – is sufficiently circumscribed and permits the accused to organise his defence with full knowledge of what he was doing. It follows that, because it specifies the overall period during which the crimes were allegedly committed, the indictment does not violate the rules governing the presentation of the charges.

Insofar as that decision supports the submission of the prosecution, that it is not obliged to provide the information referred to in the paragraph before last, there are two observations to be made about it. The first is that it is no answer to a request for particulars that the accused knows the facts for himself; the issue in relation to particulars is not whether the accused knows the true facts but, rather, whether he knows what facts are to be alleged against him.[52] It cannot be assumed that the two are the same. The second observation is that what the accused needs to know is not only what is to be alleged to have been his own conduct giving rise to his responsibility as a superior but also what is to be alleged to have been the conduct of those persons for which he is alleged to be responsible as such a superior. Only in that way can the accused know the "nature and cause of the charge against him".[53] With great respect to the Trial Chamber in *Aleksovski*, this Trial Chamber is unable to agree with the decision insofar as it supports the prosecution's submission.

39. In any event, the accused in the present case is also charged upon the alternative basis of his own individual participation in these events. Particulars must be supplied which enable the accused to know the nature of the case which he must meet upon that basis.

40. It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it

is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair.[54] The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.

41. In some jurisdictions, a procedure has been adopted of permitting an oral examination and cross-examination of a witness prior to the trial by counsel in the case (who are less restricted in their scope for questioning than police officers or other investigators), in an endeavour to elicit from the witness sufficient information to cure the prejudice which would otherwise exist.[55] But it is necessary first to determine whether the prosecution is able to give better particulars.

42. The complaint by the accused is at this stage upheld, and the prosecution is required to identify in the indictment the approximate time when each offence is alleged to have taken place. Obviously, there will be cases where the identification cannot be of a specific date, but a reasonable range should be specified. The period of April 1992 to August 1993 would *not* be a reasonable period.

43. The accused has also suggested that greater precision than usual will be required in specifying these times in relation to the offences based upon Art 2 of the Statute because the period from April 1992 to August 1993 straddles the period of May 1992 when – so it was found by the Trial Chamber in *Prosecutor v Tadic* – the conflict ceased to be an international one in the relevant area.[56] However, that finding was one of fact only, made upon the evidence presented in that trial and in proceedings between different parties. It cannot amount to a *res judicata* binding the Trial Chamber in this trial.[57] In the Celebici case, for example, it was held that the conflict in that area continued to be international in character for the rest of 1992.[58] It is clear that it is for the Trial Chamber in each individual trial to determine this issue for itself upon the evidence given in that trial. That is not an issue of fact which can be resolved at this stage.

44. When identifying the facts by which Counts 2 to 7 are to be proved,[59] the indictment, under the general heading "Beatings in the Prison Yard", has alleged as facts:

> 5.4 On their arrival in the prison and/or during their confinement, many detainees of the KP Dom were beaten on numerous occasions by the prison guards or by soldiers in the presence of regular prison personnel.
>
> 5.5 On several occasions between April and December 1992, soldiers approached and beat detainees in the prison yard, among them FWS-137, while guards watched without interfering.

The accused asserts that it is unclear whether the case against him is to be that it was the guards or the soldiers who were the perpetrators, and that, if the former, the reference to regular prison personnel is unclear.[60]

45. It is reasonably clear that the prosecution here is relying upon a number of beatings at different times – some by the prison guards, and some by soldiers in the presence of regular prison personnel. The significance of the presence of the regular prison personnel and their inaction at the time is that the beatings by the soldiers were being at least condoned, and perhaps also encouraged, by the regular prison personnel. This in turn suggests that the infliction of such beatings, either by the prison guards or by the soldiers, was a course of conduct approved by the accused as the person in command of the prison.

46. But, if these two paragraphs were intended to stand alone, the prosecution has failed to give the

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

Case No: IT-98-33-A
Date: 19 April 2004
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement: **19 April 2004**

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

Counsel for the Prosecution:

Mr. Norman Farrell
Mr. Mathias Marcussen
Ms. Magda Karagiannakis
Mr. Xavier Tracol
Mr. Dan Moylan

Counsel for the Defendant:

Mr. Nenad Petrušić
Mr. Norman Sepenuk

civilians under Article 3, violations of the laws or customs of war, and for extermination and persecution under Article 5, all of which arise from the executions of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995. As the preceding factual examination has established, there was no evidence that Krstić ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances the criminal responsibility of Radislav Krstić is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator.

F. Radislav Krstić's Criminal Responsibility for the Opportunistic Crimes Committed at Potočari

145. The Defence also contests the findings of the Trial Chamber in relation to Krstić's criminal responsibility for the crimes committed on 12 and 13 July 1995 at Potočari. The Trial Chamber found that Radislav Krstić was a participant in a joint criminal enterprise to forcibly remove the Bosnian Muslim civilians from Potočari, and so incurred criminal responsibility for the murders, beatings and abuses committed there as natural and foreseeable consequences of that joint criminal enterprise. The Defence argues that these crimes were not natural and foreseeable consequences of the ethnic cleansing campaign, and that the Trial Chamber's finding that Krstić was aware of them is contrary to the presumption of innocence.

146. According to the Defence, the evidence established that he was at Potočari on 12 July 1995 for at most two hours. There was no evidence to support the conclusion of the Trial Chamber that he had "first-hand knowledge that the refugees were being mistreated by VRS or other armed forces," or that he witnessed the inhumane conditions of the White House and the killing of civilians there. The Defence argues that, to the contrary, the evidence establishes that there were orders from the military authorities to treat the civilians humanely.[251] The Defence refers to an order of 9 July 1995 issued by Mr. Karadžić as Supreme Commander of the Serb forces, which expressly provided that the civilian population was to be treated in accordance with the Geneva Conventions,[252] the evidence of Drazen Erdemović that soldiers entering the town of Srebrenica were explicitly told not to fire at civilians,[253] the intercept of 12 July 1995 in which Radislav Krstić stated that nothing must happen to the civilians transported from

[251] Defence Appeal Brief, paras. 143 - 156.
[252] *Ibid.*, para. 154; Exh. D432.
[253] *Ibid.*, para. 154; Trial Testimony of Drazen Erdemović, T, p. 3083 (14 April 2000).

attempts being made on the part of Radislav Krstić to ensure that these orders were respected.[261] There was also no evidence of Drina Corps units under his command taking any steps to ensure that the orders of their Commander were respected, or to report any contravention of these orders to him.

149. In these circumstances, the Defence's argument that the crimes committed against the civilian population of Potočari were not natural and foreseeable consequences of the joint criminal enterprise to forcibly transfer the Bosnian civilians is not convincing. The Trial Chamber reasonably found that the creation of a humanitarian crisis in Potočari fell within the scope of the intended joint criminal enterprise to forcibly transfer the civilian population. The Trial Chamber expressly found that, "given the circumstances at the time the plan was formed, Radislav Krstić must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and sheer lack of sufficient numbers of UN soldiers to provide protection."[262] The Appeals Chamber agrees with this finding. Further, given Krstić's role in causing the humanitarian crisis in Potočari, the issuance of orders directing that civilians not be harmed is not sufficient to establish that the crimes which occurred were not a natural and foreseeable consequence of the plan to forcibly transfer the civilians.

150. The Defence further argues that he cannot be held responsible for crimes that he was unaware were actually occurring. In making this argument, the Defence misunderstands the third category of joint criminal enterprise liability. For an accused to incur criminal responsibility for acts that are natural and foreseeable consequences of a joint criminal enterprise, it is not necessary to establish that he was aware in fact that those other acts would have occurred. It is sufficient to show that he was aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise, and that the accused participated in that enterprise aware of the probability that other crimes may result. As such, it was unnecessary for the Trial Chamber to conclude that Radislav Krstić was actually aware that those other criminal acts were being committed; it was sufficient that their occurrence was foreseeable to him and that those other crimes did in fact occur.

151. The Defence further asserts that Radislav Krstić should not be found guilty with respect to the crimes committed at Potočari on 12 and 13 July 1995 because General Živanović was

[261] *Ibid.*, para. 358.
[262] *Ibid.*, para. 616.

Commander of the Drina Corps until 13 July 1995.[263] This argument is inapposite. The responsibility of Radislav Krstić for the crimes committed at Potočari arose from his individual participation in a joint criminal enterprise to forcibly transfer civilians. The opportunistic crimes were natural and foreseeable consequences of that joint criminal enterprise. His conviction for these crimes does not depend upon the rank Krstić held in the Drina Corps staff at the time of their commission. Radislav Krstić's appeal against his convictions for the opportunistic crimes that occurred at Potočari as a natural and foreseeable consequence of his participation in the joint criminal enterprise to forcibly transfer is dismissed.

[263] Defence Appeal Brief, para. 208.

263. The Appeals Chamber is therefore unable to find a discernible error in the reasoning of the Trial Chamber in this regard. The Defence's appeal on this ground is dismissed.

6. The Defence's argument as to inadequate weight accorded to mitigating circumstances

264. The Defence submits that the Trial Chamber failed to give adequate weight to the alleged mitigating circumstances.[427]

265. The Trial Chamber considered the circumstances identified by the defence, but concluded that they did not constitute mitigating circumstances.[428] The Trial Chamber has discretion in deciding whether a particular circumstance should be regarded as a mitigating one. The Defence has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion in this regard, and the ground of appeal is dismissed.

C. The Appeals Chamber's Considerations

266. The Appeals Chamber decides that the sentence must be adjusted due to the fact that it has found Radislav Krstić responsible as an aider and abettor to genocide and to murders as a violation of the laws or customs of war committed between 13 and 19 July 1995, instead of as a co-perpetrator, as found by the Trial Chamber. In accordance with its power to do so without remitting the matter to the Trial Chamber,[429] the Appeals Chamber proceeds with the adjustment of Krstić's sentence in light of its findings, and in accordance with the requirements of the Statute and the Rules.

267. As correctly stated by the Trial Chamber,[430] the general sentencing principles applicable in this case include the following: (i) the gravity of the crime(s) alleged;[431] (ii) the general practice of

[426] *Banović* Sentencing Judgement, para. 89.
[427] Defence Response to Prosecution Appeal Brief, paras. 66 - 72 and 99. *See* Trial Judgement at paras. 713 – 717 and 723. The alleged mitigating circumstances were: good personal character; no previous record; poor health; and cooperation with the Prosecution.
[428] Trial Judgement, para. 713.
[429] *Vasiljević* Appeal Judgement, para. 181.
[430] Paras. 697 *et seq.*
[431] Article 24(2), recognized as "normally the starting point for consideration of an appropriate sentence" in the *Aleksovski* Appeal Judgement, para. 182: "the most important consideration, which may be regarded as the litmus test for the appropriate sentence." *See also Čelebići* Trial Judgement, para. 1225 ("By far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence.").

274. The Appeals Chamber notes that the Prosecution requested the imposition of a minimum sentence of 30 years' imprisonment.[444] As the Appeals Chamber explained in the *Tadić* Judgement in Sentencing Appeals, the decision whether to impose a minimum sentence is within the sentencing Chamber's discretion.[445] The imposition of a minimum sentence is ordered only rarely. In the absence of compelling reasons from the Prosecution as to why it should do so, the Appeals Chamber does not believe that a minimum sentence is appropriate in this case.

275. The Appeals Chamber finds that Radislav Krstić is responsible for very serious violations of international humanitarian law. The crime of genocide, in particular, is universally viewed as an especially grievous and reprehensible violation. In the light of the circumstances of this case, as well as the nature of the grave crimes Radislav Krstić has aided and abetted or committed, the Appeals Chamber, taking into account the principle of proportionality, considers that the sentence imposed by the Trial Chamber should be reduced to 35 years.

[444] Prosecution Appeal Brief, 5.3.
[445] *Tadić* Judgement in Sentencing Appeals, paras. 28, 32.

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

Case No. IT-98-33-T

Date: 02 August 2001

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

RADISLAV KRSTIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Peter McCloskey
Mr. Andrew Cayley
Ms. Magda Karagiannakis

Counsel for the Accused:

Mr. Nenad Petrušic
Mr. Tomislav Višnji}

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602. Since the Prosecution has not charged any specific head of criminal responsibility under Article 7(1) of the Statute,[1347] it is within the discretion of the Trial Chamber to convict the Accused under the appropriate head within the limits of the Indictment and fair notice of the charges and insofar as the evidence permits.[1348] As to joint criminal enterprise liability, in its Final Trial Brief the Defence contends that it is not open to the Trial Chamber to apply this doctrine because it has not been pleaded in the Indictment. The Trial Chamber rejects this submission. The Prosecutor's Pre-trial Brief discussed this form of liability, specifically in the context of ethnic cleansing;[1349] the Defence acknowledged this pleading in its Pre-trial Brief and did not object to the concept itself but only to some details of the legal submissions on the matter.[1350] Moreover, the Trial Chamber finds that the "nature and cause of the charge against the accused" pleaded in the indictment contains sufficient references to his responsibility for the alleged crimes committed in concert with others.[1351]

603. The Prosecution "also, or alternatively" alleges that General Krsti} incurs "command responsibility" for the crimes charged in the Indictment pursuant to Article 7(3) of the Statute.[1352] Pursuant to this provision:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

604. According to the case law,[1353] the following three conditions must be met before a person can be held responsible for the acts of another person under Article 7(3) of the Statute:

[1346] *Tadic* Appeal Judgement, paras. 185-229. The Appeals Chamber in the *Tadic* Appeal Judgement interchangeably used several other terms, such as "common purpose" liability (*Tadic* Appeal Judgement, para. 220), to denote the same form of participation. For reasons discussed below, the Trial Chamber proposes to apply the label "joint criminal enterprise" throughout this Judgement. Trial Chamber II recently discussed joint criminal enterprise liability in detail in *Prosecutor* v. *Radoslav Brdanin and Momir Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-PT, 26 June 2001 (the "*Talic* Decision").

[1347] The Trial Chamber notes in this regard that the Appeals Chamber held that: "Although greater specificity in drafting indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the 'nature and cause of the charge against him'". *Celebici* Appeal Judgement, para. 351.

[1348] *Furundžija* Judgement, para. 189; *Kupreškic* Judgement, para. 746; *Kunarac* et al. Judgement, para. 388.

[1349] Prosecutor's Pre-trial Brief, paras. 21-27. The Prosecution refers to joint criminal enterprise liability as "co-perpetration"; the Appeals Chamber has in fact employed this term in this sense (*Tadic* Appeal Judgement, paras. 196, 228; *Furundžija* Appeal Judgement, para. 118). The Prosecution further considers "co-perpetration" to be a form of "committing".

[1350] Defence's Pre-trial Brief, paras. 18-19. See also para. 21 of the Prosecutor's Pre-trial Brief annexed to the Prosecutor's Submission of Agreed Matters of Law Presented During the Pre-trial Conference of 7 March 2000, dated 8 March 2000. On the Defence's objection to the joint criminal enterprise doctrine, see para. ?? *supra*.

[1351] See Indictment, e.g., paras. 6-11.

[1352] Para. 19 of the Indictment.

[1353] See, e.g., *Blaškic* Judgement, para. 294; *Kunarac* et al. Judgement, para. 395.

614. In order to determine whether General Krsti} had the requisite *mens rea* for responsibility to arise under the joint criminal enterprise doctrine, the Trial Chamber must determine which crimes fell within and which fell outside the agreed object of the joint criminal enterprise to ethnically cleanse the Srebrenica enclave.

615. The object of the joint criminal enterprise implemented at Potocari on 12 and 13 July was firstly the forcible transfer of the Muslim civilians out of Srebrenica. That General Krsti} had the intent for this crime is indisputably evidenced by his extensive participation in it. Furthermore, the humanitarian crisis that prevailed at Potocari was so closely connected to, and so instrumental in, the forcible evacuation of the civilians that it cannot but also have fallen within the object of the criminal enterprise. When General Krsti} marched triumphantly into Srebrenica alongside General Mladi} on 11 July, he saw the town completely empty and soon found out, at least by the evening, that a huge number of the inhabitants had fled to Potocari and were crowded together in the UN compound and surrounding buildings. Although, by his own claim, he was the organiser of the military operation on Srebrenica, he had taken no action to provide food or water, nor to guarantee the security of the civilians inhabitants of the town. The Trial Chamber finds that General Krsti} subscribed to the creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians. This is the only plausible inference that can be drawn from his active participation in the holding and transfer operation at Potocari and from his total declination to attempt any effort to alleviate that crisis despite his on the scene presence.

616. The Trial Chamber is not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed, General Krsti} must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the transportation of the women, children and elderly outside the enclave; General Krsti} was himself on the scene and exposed to firsthand knowledge that the refugees were being mistreated by VRS or other armed forces.

617. In sum, the Trial Chamber finds General Krsti} guilty as a member of a joint criminal enterprise whose objective was to forcibly transfer the Bosnian Muslim women, children and elderly from Potocari on 12 and 13 July and to create a humanitarian crisis in support of this

endeavour by causing the Srebrenica residents to flee to Potocari where a total lack of food, shelter and necessary services would accelerate their fear and panic and ultimately their willingness to leave the territory. General Krsti} thus incurs liability also for the incidental murders, rapes, beatings and abuses committed in the execution of this criminal enterprise at Potocari.

618. Finally, General Krsti} knew that these crimes were related to a widespread or systematic attack directed against the Bosnian Muslim civilian population of Srebrenica; his participation in them is undeniable evidence of his intent to discriminate against the Bosnian Muslims. General Krsti} is therefore liable of inhumane acts[1367] and persecution[1368] as crimes against humanity.

(b) General Krsti}'s criminal responsibility for the killing of the military-aged Muslim men from Srebrenica

619. The Trial Chamber has made findings that, as of 13 July, the plan to ethnically cleanse the area of Srebrenica escalated to a far more insidious level that included killing all of the military-aged Bosnian Muslim men of Srebrenica. A transfer of the men after screening for war criminals - the purported reason for their separation from the women, children and elderly at Potocari - to Bosnian Muslim held territory or to prisons to await a prisoner exchange was at some point considered an inadequate mode for assuring the ethnic cleansing of Srebrenica. Killing the men, in addition to forcibly transferring the women, children and elderly, became the object of the newly elevated joint criminal enterprise of General Mladi} and VRS Main Staff personnel. The Trial Chamber concluded that this campaign to kill all the military aged men was conducted to guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica and therefore constituted genocide.

620. The issue that remains to determine is whether General Krsti} was a member of the escalated joint criminal enterprise to kill the military-aged men and whether he thus incurred responsibility for genocide, including the causing of serious bodily and mental harm to the few men surviving the massacres. In this respect, the Trial Chamber will discuss the relationship between Article 7(1) and Article 4(3), and between "genocide" in Article 4(3)(a)[1369] and the alternative allegation of "complicity in genocide" in Article 4(3)(e).[1370] The Trial Chamber further will determine whether General Krsti} also incurs responsibility for the other crimes constituted by the killings, that is, persecutions,[1371] extermination[1372] and murder[1373] as crimes against humanity, and

[1367] Forcible transfer - count 8.
[1368] Murder, and cruel and inhumane treatment (including terrorisation, destruction of personal property and forcible transfer) - count 6.
[1369] Count 1 of the Indictment.
[1370] Count 2 of the Indictment.
[1371] Count 6 of the Indictment.

Žepa and as Drina Corps Chief of Staff and Commander-to-be[1401] he had to make provision for Drina Corps resources to be applied in the clean-up activities following the fall of Srebrenica. On 14 July, while some of his Drina Corps troops were participating in the @epa operation, other troops under his effective control were engaged in capturing and assisting in the execution of Muslim men from Srebrenica.

632. On 15 July, General Krsti}'s participation in the killing plan reached an aggressive apex. According to an interchange intercepted early that day, Colonel Beara - a Main Staff officer whom General Krsti} himself identifies as personally engaged in supervising the killings - requests General Živanovi} to arrange for more men to be sent to him. General Živanovi} states he can not "arrange for that anymore" and refers Colonel Beara to General Krsti}.[1402] Colonel Beara subsequently urgently requests General Krsti}'s assistance in the "distribution of 3,500 parcels", a code term repeatedly used in military communications to signify captured Bosnian Muslim men that are slated to be killed. General Krsti} suggests that Colonel Beara solicit help from several units, including the Bratunac and Milici Brigades in the Drina Corps, and the MUP. Colonel Beara replies that these units were not available, saying: "I don't know what to do. I mean it, Krle". The intercept strongly implies that when the MUP troops declined to carry out the killings, General Krsti} agreed to fill the breach, stating: "I'll see what I can do".[1403] General Krsti} arranged for Bratunac Brigade members to assist in the killings at the Branjevo Farm and the Pilica Dom the next day.[1404]

633. The Trial Chamber concludes beyond reasonable doubt that General Krsti} participated in a joint criminal enterprise to kill the Bosnian Muslim military-aged men from Srebrenica from the evening of 13 July onward. General Krsti} may not have devised the killing plan, or participated in the initial decision to escalate the objective of the criminal enterprise from forcible transfer to destruction of Srebrenica's Bosnian Muslim military-aged male community, but there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men. This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets.

634. Finally, the Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of

[1401] Witness JJ was told by General @ivanovi} that General Mladi} had informed him between 15 and 20 June 1995 that General Krsti} was going to replace him as Corps Commander. General @ivanovi} also told the witness that General Krsti} was anxious to be in command. T. 9683, 9708.
[1402] *Supra*, para. 323.
[1403] *Supra*, para. 380.

of one Drina Corps officer. He unsuccessfully tried to have this person replaced and, as a result, was himself subsequently targeted by the Security Services for special surveillance. General Krsti} testified that, at the time, he feared for his safety and that of his family.[1425] He stated under cross-examination that:[1426]

> I must acknowledge here before you and this Trial Chamber that not in my wildest dreams was I able to undertake any measures. We weren't allowed to talk about anything like that let alone take steps against a commanding officer, regardless of my knowledge that he or somebody else had perhaps committed a war crime. [...] It was my intention to report war crimes but that was not a possibility. I was not able to do so. [...] First of all, for security reasons, the security and safety of my family.

651. However, Mr. Butler, the Prosecutor's military expert, testified that VRS Corps Commanders did switch jobs throughout the war and that he had found no evidence that officers in general were operating in a climate of fear.[1427] Moreover, in the case of General Krsti}, the fact is that he was publicly extolled by both General Mladi} and President Karad`ic for his leadership role in the conquest of the Srebrenica enclave, months after the massacres occurred. General Krsti} also appeared on public platforms as an enthusiastic supporter of General Mladi} in the following year and indeed signed a plea to President Karad`i} to keep General Mladi} on as Commander of the Main Staff of the VRS.[1428] These facts tend to demonstrate General Krsti}'s solidarity with, rather than his fear of, the highest military and civilian echelons of the Republika Serpska.

652. Although the elements of Article 7(3) have thus been fulfilled, the Trial Chamber will not enter a conviction to that effect because in its view General Krsti}'s responsibility for the participation of his troops in the killings is sufficiently expressed in a finding of guilt under Article 7(1).

(c) Conclusions on General Krsti}'s criminal responsibility

653. The Trial Chamber's findings on the issue of cumulative convictions are discussed below. At this point, the Trial Chamber concludes that General Krsti} incurs criminal responsibility for his participation in two different sets of crimes that occurred following the attack of the VRS on Srebrenica in July 1995.

[1424] *supra*, para. 477.
[1425] Krsti}, T. 6350-6351, 6358, 7422.
[1426] Krsti}, T. 6347.
[1427] Butler, T. 5474-5. General Dannatt testified likewise, stating that: "I don't believe I have come across an incident in the Balkans whereby a general who refused to follow orders has been shot. [...] I think there are cases of people being removed or dismissed from their position, which is quite common in military matters." Dannatt, T. 5685.
[1428] *Supra*, paras. 334, 417.

his knowledge of what was going on; he is guilty, but his guilt is palpably less than others who devised and supervised the executions all through that week and who remain at large. When pressured, he assisted the effort in deploying some men for the task, but on his own he would not likely have initiated such a plan. Afterwards, as word of the executions filtered in, he kept silent and even expressed sentiments lionising the Bosnian Serb campaign in Srebrenica. After the signing of the Dayton Accords, he co-operated with the implementers of the accord and continued with his professional career although he insisted that his fruitless effort to unseat one of his officers, whom he believed to have directly participated in the killings, meant he would not be trusted or treated as a devoted loyalist by the Bosnian Serb authorities thereafter. His story is one of a respected professional soldier who could not balk his superiors' insane desire to forever rid the Srebrenica area of Muslim civilians, and who, finally, participated in the unlawful realisation of this hideous design.

725. The Prosecutor submits that General Krsti} should be sentenced to consecutive life sentences for each count of the Indictment under which General Krsti} is found guilty. However, in view of the fact that General Krsti} is guilty of crimes characterised in several different ways but which form part of a single campaign or strategies of crimes committed in a geographically limited territory over a limited period of time, the Trial Chamber holds it preferable to impose a single sentence, bearing in mind that the nearly three years spent in the custody of the Tribunal is to be deducted from the time to be served.[1519]

726. In light of the above considerations, the Trial Chamber sentences General Krsti} to Fourty six years of imprisonment.

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the injuries he sustained from the landmine, part of his leg was amputated and he remained in rehabilitation and on leave until mid May 1995.

[1519] Rule 101 (D).

V. DISPOSITION

727. Based upon the facts and the legal findings as determined by the Trial Chamber and for the foregoing reasons, the Trial Chamber:

FINDS Radislav Krsti} **GUILTY of:**

- Genocide;
- Persecution for murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians;
- Murder as a violation of the Laws and Customs of War;

SENTENCES Radislav KRSTI] to Fourty six years of imprisonment and **STATES** that the full amount of time spent in the custody of the Tribunal will be deducted from the time to be served.

Done on second of August 2001 in English and French, the English text being authoritative.

At The Hague, The Netherlands

Judge Fouad Riad	**Judge Almiro Rodrigues**	**Judge Patricia Wald**
	Presiding	

UNITED
NATIONS

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

Case No.: IT-95-16-A

Date: 23 October 2001

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patricia Wald, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. Hans Holthuis**

Judgement of: **23 October 2001**

PROSECUTOR

v

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
VLADIMIR ŠANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. Anthony Carmona
Mr. Fabricio Guariglia
Ms. Sonja Boelaert-Suominen
Ms. Norul Rashid

Counsel for the Defendants:

Mr. Ranko Radovi}, Mr. Tomislav Pasari} for Zoran Kupre{ki}
Ms. Jadranka Slokovi}-Glumac, Ms. Desanka Vranjican for Mirjan Kupre{ki}
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupre{ki}
Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovi}
Mr. Petar Pavkovi} for Vladimir [anti}

at the scene of the crime and thus [could not] draw any inferences as to [their] possible participation in these events."[146]

87. In order to address the complaint raised by Zoran and Mirjan Kupre{ki}, the Appeals Chamber has to determine (i) whether the Trial Chamber returned convictions on the basis of material facts not pleaded in the Amended Indictment; and (ii) if the Appeals Chamber finds that the Trial Chamber did rely on such facts, whether the trial of Zoran and Mirjan Kupre{ki} was thereby rendered unfair. The first aspect of this determination begins with a discussion of the statutory framework relating to indictments and how this body of law has been interpreted in the jurisprudence of the Tribunal.

1. Were the convictions based on material facts not pleaded in the Amended Indictment?

88. An indictment shall, pursuant to Article 18(4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged". Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.[147] Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

89. The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the

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[145] Trial Judgement, paras 426 and 779.
[146] Trial Judgement, paras 786 and 793. The Trial Chamber also rejected the evidence of Witness C who testified with regard to Zoran and Mirjan Kupre{ki}'s presence as HVO members in the Ahmi}i village on 16 April 1993, *see* Trial Judgement, para. 774.
[147] *Furund`ija* Appeal Judgement, para. 147. *See also Krnojelac* Decision of 24 February 1999, paras 7 and 12; *Krnojelac* Decision of 11 February 2000, paras 17 and 18; and *Br|anin* Decision of 20 February 2001, para.18.

accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.[148] Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[149]

90. Such would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment.[150] Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.[151]

91. Despite the broad-ranging allegations in the Amended Indictment, the case against Zoran and Mirjan Kupre{ki} was not one that fell within the category where it would have been impracticable for the Prosecution to plead, with specificity, the identity of the victims and the dates for the commission of the crimes. On the contrary, the nature of the Prosecution case at trial was confined mainly to showing that Zoran and Mirjan Kupre{ki} were present as HVO members in Ahmi}i on 16 April 1993 and personally participated in the attack on two different houses resulting, *inter alia*, in the killing of six people. Clearly, in such circumstances, an argument that the sheer scale of the alleged crimes prevented the Prosecution from setting out the details of the alleged criminal conduct is not persuasive.

92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed.[152] In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material

[148] *See generally Krnojelac* Decision of 11 February 2000, para. 18; *Br|anin* Decision of 20 February 2001, para. 22.
[149] *Kvo~ka* Decision of 12 April 1999, para 17; *Brdanin* Decision of 26 June 2001, para. 61.
[150] *See Prosecutor* v *Erdemovi}*, Case No.: IT-96-22, Indictment, 22 May 1996, para. 12 (identifying the victims as "hundreds of Bosnian Muslim male civilians").
[151] *Kvo~ka* Decision of 12 April 1999, para. 23.

aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[153] There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.

93. The Appeals Chamber observes that the case against Zoran and Mirjan Kupre{ki}, however, does not fall within this category either. Instead, the thrust of the persecution allegation against them somehow changed between the filing of the Amended Indictment and the presentation of the Prosecution case, so that the latter was no longer reflected in the former. The allegations in the Amended Indictment were broad and imprecise and there was, for example, a substantial part of the allegations under count 1, as noted above, upon which the Prosecution presented no evidence at all. In effect, the main case against Zoran and Mirjan Kupre{ki} was dramatically transformed from alleging integral involvement in the preparation, planning, organisation and implementation of the attack on Ahmi}i on 16 April 1993, as presented in the Amended Indictment, to alleging mere presence in Ahmi}i on that day and direct participation in the attack on two individual houses, as presented at trial. The Trial Chamber rejected all evidence relating to one of these houses and the other was not mentioned in the Amended Indictment.

94. In view of the factual basis of the conviction of Zoran and Mirjan Kupre{ki}, the relevant facts of the Prosecution case pleaded in the Amended Indictment are: i) the deliberate and systematic killing of Bosnian Muslim civilians; ii) the comprehensive destruction of Bosnian Muslim homes and property; and iii) the organised expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.[154] The Prosecution contends that the Amended Indictment thereby pleads the material facts underlying the persecution charge on which Zoran and Mirjan Kupre{ki} were found guilty with sufficient detail. The Appeal Chamber disagrees.

95. In the circumstances of the present case, the Prosecution could, and should, have been more specific in setting out the allegations in the Amended Indictment. In particular, the Appeals Chamber notes the absence of any detailed information about the nature of Zoran and Mirjan Kupre{ki}'s role in the three alleged categories of criminal conduct. The Amended Indictment in no way particularises what form this alleged participation took. By framing the charges against

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[152] *Krnojelac* Decision of 24 February 1999, para. 40.
[153] *Krnojelac* Decision of 11 February 2000, para. 23.
[154] Organised detention listed in paragraph 21 of the Amended Indictment is excluded because the Prosecution did not present any evidence of such criminal conduct and, accordingly, the Trial Chamber did not address any such allegations in the Trial Judgement.

112. Compared to Drago Josipovi}, the Trial Chamber was not as explicit in its legal findings relating to Zoran and Mirjan Kupre{ki}. Nevertheless, it is a reasonable assumption that the Trial Chamber applied the same logic in relation to Zoran and Mirjan Kupre{ki} in returning convictions on the persecution count based upon a factual basis not pleaded in the Amended Indictment. The Appeals Chamber understands the Trial Chamber's reasoning to be as follows. By alleging participation during a seven-month period in (i) the deliberate and systematic killing of Bosnian Muslim civilians; (ii) the comprehensive destruction of Bosnian Muslim homes and property; and (iii) the organised detention and expulsion of Bosnian Muslims, the Amended Indictment pleaded the underlying criminal conduct of the accused with sufficient detail. On that basis, the Trial Chamber was satisfied that Zoran and Mirjan Kupre{ki} had sufficient information to prepare their defence. Consequently, any allegation of specific criminal conduct not pleaded in the Amended Indictment, such as the attack on Suhret Ahmi}'s house, could be taken into account as relevant evidence for the charge of persecution (count 1). This was so regardless of the fact that the specific criminal act constituting the primary basis for holding Zoran and Mirjan Kupre{ki} criminally liable for persecution was not pleaded in the Amended Indictment.

113. The Appeals Chamber is unable to agree with this reasoning. As found above, the attack on Suhret Ahmi}'s house and its consequences constituted a material fact in the Prosecution case and, as such, should have been pleaded in the Amended Indictment. Absent such pleading, the allegation pertaining to this event should not have been taken into account as a basis for finding Zoran and Mirjan Kupre{ki} criminally liable for the crime of persecution. Hence, the Trial Chamber erred in entering convictions on the persecution count because these convictions depended upon material facts that were not properly pleaded in the Amended Indictment.

114. The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. For the reasons that follow, the Appeals Chamber finds that this case is not one of them.

2. Did the defects in the Amended Indictment render the trial unfair?

115. The second inquiry that the Appeals Chamber must make is whether the trial against Zoran and Mirjan Kupre{ki} was rendered unfair by virtue of the defects in the Amended Indictment. The Prosecution submits that, in the event that the Amended Indictment did not plead the material facts with the requisite detail, Zoran and Mirjan Kupre{ki} must be considered to have been put on notice by the Prosecution Pre-Trial Brief, or through the knowledge acquired during the trial.[173] The Prosecution specifically claims that the Pre-Trial Brief, which was filed in mid-July 1998, adequately informed Zoran and Mirjan Kupre{ki} of the charges against them.[174] The Appeals Chamber disagrees with the Prosecution's contention.

116. The Appeals Chamber observes that, in its Pre-Trial Brief, the Prosecution simply stated that at the outset of the attack in the early morning of 16 April 1993, Zoran and Mirjan Kupre{ki}

> were accompanying HVO troops unfamiliar with Ahmi}i, pointing out Muslim houses suitable for destruction. Both Mirjan and Zoran joined in the attack on several of these homes, participating in at least a half a dozen murders in the area, including the killing of an eight year old child and a three month old baby boy crying in his crib.[175]

The Pre-Trial Brief further stated that the Prosecution anticipated

> presenting recently acquired evidence of individual acts of violence perpetrated by the accused. This conduct has not been specifically charged as individual crimes, because the evidence upon which it is based was not available until after the Amended Indictment was confirmed. Since such evidence is, in any event, admissible as relevant to Count 1 Persecution charge, no further request to amend the [Amended] Indictment by adding new Counts has been made in an effort to avoid delay to the trial schedule.[176]

117. In the Appeals Chamber's view, the information given in the Prosecution Pre-Trial Brief is extremely general in nature and it is difficult to see how it could have assisted Zoran and Mirjan Kupre{ki} in the preparation of their defence. In the short section pertaining directly to Zoran and Mirjan Kupre{ki} it is stated that they "joined in the attack" on several houses, "participating in at least a half a dozen murders".[177] There is no mention of which particular houses they attacked or whose murders they participated in. Similarly, the paragraph referring to "recently acquired evidence of individual acts of violence" does not establish whether those acts were additional to the attacks on the two houses and "the half a dozen murders".[178] In light of the evidence actually presented at trial, it appears that they were not.

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[173] Appeal Transcript, 862-863.
[174] Appeal Transcript, 838-839, 862.
[175] Prosecution Pre-Trial Brief, para. 23.
[176] Prosecution Pre-Trial Brief, para. 27.
[177] Prosecution Pre-Trial Brief, para. 23.
[178] Prosecution Pre-Trial Brief, para. 27.

118. During the opening statements, on the first day of the trial, the Prosecution stated that Zoran and Mirjan Kupre{ki} committed "specific crimes" during the attack on Ahmi}i on 16 April 1993. Although referring specifically to the attack on Witness KL's house in this connection, the Prosecution made no reference whatsoever to the attack on Suhret Ahmi}'s house or to Zoran and Mirjan Kupre{ki}'s involvement in that event (Witness H's evidence).[179]

119. In light of the above, the Appeals Chamber is not persuaded by the Prosecution's submission on this point that the "mechanics of the process of the indictment, notice in the Prosecution Pre-Trial Brief, and disclosure of the evidence" put Zoran and Mirjan Kupre{ki} on sufficient notice of the factual charge underpinning the persecution count, i.e., the attack, including the resulting murders, on Suhret Ahmi}'s house.[180] The Appeals Chamber accepts that, from what occurred during the trial on 3 September 1998, it appears that, by that time, Zoran and Mirjan Kupre{ki} had been informed that the allegation pertaining to the attack on Suhret Ahmi} house was relevant to the persecution count. Nonetheless, the information provided on that day did not adequately convey the relevance of Witness H's evidence for the persecution count. No certain conclusion could be drawn as to how that evidence was going to be relied upon by the Trial Chamber for the purpose of deciding the issue of Zoran and Mirjan Kupre{ki}'s criminal liability for persecution. What transpired on the next to last day of the trial only confirms the uncertainty surrounding this matter. In these circumstances, the conclusion that this uncertainty materially affected Zoran and Mirjan Kupre{ki}'s ability to prepare their defence is unavoidable.

120. Moreover, the Appeals Chamber is disturbed by how close to the beginning of the trial the Prosecution disclosed Witness H's statement to Zoran and Mirjan Kupre{ki}. Pursuant to an order of the Trial Chamber, Witness H's statement was disclosed to them only approximately one to one-and-a-half weeks prior to trial and less than a month prior to Witness H's testimony in court.[181] The Trial Chamber's reason for accepting the delay in the disclosure of Witness H's statement was that the delay only concerned one witness and that, therefore, no prejudice was caused to the Defendants.[182] In hindsight, it is obvious that, in this case, the issue of prejudice was not dependent on the number of witness statements of which disclosure was delayed, but the materiality of the witness' evidence to the question of Zoran and Mirjan Kupre{ki}'s criminal responsibility. Considering the significance of Witness H's evidence, the timing of the disclosure of that evidence was essential for the preparation of Zoran and Mirjan Kupre{ki}'s defence. The Prosecution's

[179] Trial Transcript, 96-127.
[180] Appeal Transcript, 863.
[181] The Trial Chamber's Order for the Protection of Victims and Witnesses, 9 July 1998; *see also* Prosecution Response, para. 11.20.
[182] Order for the Protection of Victims and Witnesses, 9 July 1998, 2.

motion requesting the delay reveals that it had some merit.[183] However, it cannot be excluded that Zoran and Mirjan Kupre{ki}'s ability to prepare their defence, in particular the cross-examination of Witness H, was prejudiced by the fact that disclosure took place so close to the commencement of the trial and to Witness H testifying in court.

121. The Appeals Chamber also bears in mind the radical "transformation" of the prosecution case against Zoran and Mirjan Kupre{ki}. Based on the Amended Indictment, they had to mount a defence against an allegation of wide-ranging criminal conduct against Bosnian Muslim civilians in the Ahmi}i-[anti}i region during a seven-month period, such as systematic and deliberate killing, comprehensive destruction of houses, and organised detention and expulsion. However, when it came to trial, this was not the case that the Prosecution tried to prove. Instead, it pursued a trial strategy which sought to demonstrate that Zoran and Mirjan Kupre{ki} were guilty of persecution, principally, because of their participation in two individual attacks (Suhret Ahmi}'s house and Witness KL's house).[184] Considering this drastic change in the Prosecution case, in conjunction with the ambiguity as to the pertinence of Witness H's evidence for the persecution count and the late disclosure of Witness H's evidence, the Appeals Chamber is unable to accept that Zoran and Mirjan Kupre{ki} were informed with sufficient detail of the charges against them, so as to cure the defects the Appeals Chamber has identified in the Amended Indictment.

122. The Appeals Chamber emphasises that the vagueness of the Amended Indictment in the present case constitutes neither a minor defect nor a technical imperfection. It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet. If such a fundamental defect can indeed be held to be harmless in any circumstances, it would only be through demonstrating that Zoran and Mirjan Kupre{ki}'s ability to prepare their defence was not materially impaired. In the absence of such a showing here, the conclusion must be that such a fundamental defect in the Amended Indictment did indeed cause injustice, since the Defendants' right to prepare their defence was seriously infringed. The trial against Zoran and Mirjan Kupre{ki} was, thereby, rendered unfair.

123. Finally, the Appeals Chamber observes that no waiver argument has been raised by the Prosecution in this case since Zoran and Mirjan Kupre{ki} objected to the form of the Amended Indictment, *inter alia*, on the same ground as they are now raising before the Appeals Chamber. On 15 May 1998, the Trial Chamber rejected their objection. As to the specific question of whether the

[183] Prosecutor's Request for Additional Time to Disclose the Statement of One Witness, 7 July 1998 (*Ex Parte and Under Seal*).
[184] The latter allegation was not upheld because of insufficient evidence.

material facts were pleaded with sufficient details, the Trial Chamber did not provide any reasons for its finding. It simply held that the Amended Indictment met the requirements of Rule 47(C).[185]

3. Conclusion

124. For the foregoing reasons, the Appeals Chamber holds that the Amended Indictment failed to plead the material facts of the Prosecution case against Zoran and Mirjan Kupre{ki} with the requisite detail. By returning convictions on count 1 (persecution) on the basis of such material facts, the Trial Chamber erred in law. The Appeals Chamber is unable to conclude that Zoran and Mirjan Kupre{ki} were, through the disclosed evidence, the information conveyed in the Prosecution Pre-Trial Brief, and knowledge acquired during trial, sufficiently informed of the charges pertaining to the attack on Suhret Ahmi}'s house, his resulting murder as well as that of Meho Hrustanovi}, the destruction of Suhret Ahmi}'s house, and the expulsion of the surviving members of the Suhret Ahmi} family. The right of Zoran and Mirjan Kupre{kic to prepare their defence was thereby infringed and the trial against them rendered unfair. Accordingly, this ground of appeal by Zoran and Mirjan Kupreški} is allowed.

125. Having upheld the objections of Zoran and Mirjan Kupreškic based on the vagueness of the Amended Indictment, the question arises as to whether the appropriate remedy is to remand the matter for retrial. The Appeals Chamber might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused. However, additionally, Zoran and Mirjan Kupreškic have raised a number of objections regarding the factual findings made by the Trial Chamber. If accepted, these complaints would fatally undermine the evidentiary basis for the convictions of these two Defendants, rendering the question of a retrial moot. Accordingly, the Appeals Chamber now proceeds to consider the objections raised by the Kupreškic brothers as to the Trial Chamber's factual findings.

C. Participation of Zoran and Mirjan Kupreškic in the attack on the house of Suhret Ahmic on 16 April 1993

126. As outlined above, the Trial Chamber accepted the evidence of Witness H and, in the case of Zoran Kupreškic, Witness JJ, and found that both of these Defendants participated in the attack on the house of Suhret Ahmic on 16 April 1993.[186] Zoran and Mirjan Kupreškic maintain that they

[185] Decision on Defence Challenges to Form of the Indictment, 15 May 1998, 2.
[186] The Trial Chamber's finding that the two Defendant's provided local knowledge and the use of their houses as bases for the attacking forces is considered *infra* paras 233-241.

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

Case No. IT-98-30/1-A

Date: 28 February 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

MIROSLAV KVOČKA
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Anthony Carmona
Ms. Helen Brady
Ms. Norul Rashid
Mr. David Re
Ms. Kelly Howick

Counsel for the Accused:

Mr. Krstan Simić for Miroslav Kvočka
Mr. Toma Fila for Mlađo Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Goran Rodić for Dragoljub Prcać

for which no corresponding material facts are pleaded, the Indictment is vague and is therefore defective.

42. The Appeals Chamber also considers that the Indictment is defective because it fails to make any specific mention of joint criminal enterprise, although the Prosecution's case relied on this mode of responsibility. As explained above, joint criminal enterprise responsibility must be specifically pleaded. Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 7(1) of the Statute. Such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility. Moreover, in the Indictment the Prosecution has failed to plead the category of joint criminal enterprise or the material facts of the joint criminal enterprise, such as the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.[110]

43. The Appeals Chamber notes, however, that a careful review of the trial record reveals that the Prosecution gave timely, clear, and consistent information to the Appellants, which detailed the factual basis of the charges against them and thereby compensated for the Indictment's failure to give proper notice of the Prosecution's intent to rely on joint criminal enterprise responsibility.

44. The Appeals Chamber also notes that the Prosecution's Pre-Trial Brief of 9 April 1999 reproduces Article 7(1) of the Statute and mentions the common purpose doctrine in broad terms but does not specify that the Prosecution intends to rely on this mode of responsibility.[111]

45. In the Prosecution's Submission of Updated Version of Pre-Trial Brief, filed 14 February 2000, the Prosecution addresses common purpose responsibility in some detail. The brief specifically pleads the requisite elements of joint criminal enterprise, setting out the alleged common purpose, the plurality of participants, and the nature of the participation of each Accused in the common enterprise.[112] According to the Prosecution, the common purpose of the Accused was to "rid the Prijedor area of Muslims and Croats as part of an effort to create a unified Serbian State."[113] This brief also delineates the three categories of collective criminality, citing

[110] *See, e.g., Prosecutor v. Stanišić*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v. Meakić et al.*, Case No. IT-02-65-PT, Decision on Duško Knežević's Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 6; *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave To Amend the Consolidated Indictment, 4 March 2002, para. 13.
[111] Prosecutor's Pre-Trial Brief, 9 April 1999, paras 209-210.
[112] Prosecution Pre-trial Brief, paras 208-240.
[113] Prosecution Pre-trial Brief, para. 236.

corresponding case law, and indicates into which category each of the Accused falls.[114] The Prosecution only names Kvočka as being responsible under the first category of joint criminal enterprise, but alleges that Kvočka, Radić and Kos were part of a systemic joint criminal enterprise.[115] According to the Prosecution, Kvočka, Radić, and Kos were also responsible under the extended form of joint criminal enterprise for the foreseeable consequences of the acts of others who were, such as Žigić, permitted to enter the camp.[116] It is unclear from this brief whether Žigić is alleged to have joined the common purpose of the joint criminal enterprise. The Prosecution states clearly that the other three accused are alleged to be responsible for the acts of Žigić and "others like him" because they permitted them to enter the camp.[117] However, the Prosecutor also states that "[e]ach of the accused actively participated in this common design, and in doing so, each bears responsibility for crimes against humanity and violations of the laws of war", suggesting, without clearly stating, that Žigić also shared the common purpose.[118]

46. The Appeals Chamber further considers that the Prosecution's concentration on joint criminal enterprise is emphasized again in the opening statement of 28 February 2000. Prosecution Counsel referred to paragraph 191 of the *Tadić* Appeal Judgement and argued that the common design that united the accused was the creation of a Serbian state within the former Yugoslavia, and that they worked to achieve this goal by participating in the persecution of Muslims and Croats.[119] Prosecution Counsel submitted that although Kvočka did not physically commit any crimes, his presence and his failure to restrain the guards encouraged the abuse of detainees. Therefore, in the Prosecution Counsel's view, Kvočka voluntarily participated in the "common criminal design" and was responsible under the "first category of liability under this theory of common purpose".[120] With regard to the acts committed by outsiders, who, like Žigić, entered the Omarska camp to maltreat detainees, Counsel alleged that the accused did nothing to prevent such incursions. Thus, Counsel argued, the accused became responsible for the foreseeable consequences of these incursions under "the third category of common purpose liability."[121]

47. After the Prosecution's opening statement, the Trial Chamber heard the testimonies of Kvočka[122] and Radić.[123] Before any prosecution witnesses were called, Prcać was arrested and the

[114] Prosecution Pre-trial Brief, paras 208-240.
[115] Prosecution Pre-trial Brief, paras 220-229.
[116] Prosecution Pre-trial Brief, paras 230-234.
[117] Prosecution Pre-trial Brief, para. 234.
[118] Prosecution Pre-trial Brief, para. 236.
[119] T. 646-647.
[120] T. 649.
[121] T. 657.
[122] T. 676-1010.
[123] T. 1020-1070.

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

Case No. IT-03-66-T

Date: 30 November 2005

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr Hans Holthuis**

Judgement of: **30 November 2005**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

JUDGEMENT

The Office of the Prosecutor:

Mr Alex Whiting
Mr Julian Nicholls
Mr Colin Black
Mr Milbert Shin

Counsel for the Accused:

Mr Michael Mansfield Q.C. and Mr Karim A.A. Khan for Fatmir Limaj
Mr Gregor D. Guy-Smith and Mr Richard Harvey for Haradin Bala
Mr Michael Topolski Q.C. and Mr Steven Powles for Isak Musliu

(e) Ordering

515. The *actus reus* of "ordering" requires that a person in a position of authority instructs another person to commit an offence.[1691] It is not necessary to demonstrate the existence of a formal superior-subordinate command structure or relationship between the orderer and the perpetrator; it is sufficient that the orderer possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.[1692] There is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.[1693] With regard to the *mens rea*, the accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.[1694]

(f) Aiding and abetting

516. "Aiding and abetting" has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[1695] Strictly, "aiding" and "abetting" are not synonymous.[1696] "Aiding" involves the provision of assistance; "abetting" need involve no more than encouraging, or being sympathetic to, the commission of a particular act.[1697] These forms of liability have, however, been consistently considered together in the jurisprudence of the Tribunal.

517. The *actus reus* of aiding and abetting is that the support, encouragement or assistance of the aider and abettor has a substantial effect upon the perpetration of the crime.[1698] There is no requirement of a causal relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct was a condition precedent to the commission of the crime.[1699] An omission may, in the particular circumstances of a case, constitute the *actus reus* of aiding and abetting.[1700] Further, the assistance may occur before, during or after the principal crime

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1691 *Kordić* Appeals Judgement, para 28, citing *Kordić* Trial Judgement, para 388.
1692 *Brđanin* Trial Judgement, para 270.
1693 *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005, para 76, citing *Kordić* Trial Judgement, para 388; *Blaškić* Trial Judgement, para 281.
1694 *Blaškić* Appeals Judgement, para 42; *Kordić* Appeals Judgement, para 30; *Brđanin* Trial Judgement, para 270.
1695 *Krstić* Trial Judgement, para 601; *Aleksovski* Appeals Judgement, para 162, citing *Furundžija* Trial Judgement, para 249.
1696 *Kvočka* Trial Judgement, para 254, citing *Akayesu* Trial Judgement, para 484.
1697 *Kvočka* Trial Judgement, para 254, citing *Akayesu* Trial Judgement, para 484.
1698 *Blaškić* Appeals Judgement, para 48; *Furundžija* Trial Judgement, para 249; *Kunarać* Trial Judgement, para 391.
1699 *Blaškić* Appeals Judgement, para 48.
1700 *Blaškić* Appeals Judgement, para 47. *See* also *Krnojelac* Trial Judgement, para 88; *Kunarac* Trial Judgement, para 391.

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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-11-A
		Date:	8 October 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr Hans Holthuis**

Judgement of: **8 October 2008**

PROSECUTOR

v.

MILAN MARTIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms Michelle Jarvis
Mr Paul Rogers
Ms Laurel Baig
Ms Kristina Carey
Ms Nicole Lewis
Ms Najwa Nabti

Counsel for Milan Martić:

Mr Predrag Milovančević
Mr Nikola Perović

convinced beyond a reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.[20]

11. When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[21] The Appeals Chamber bears in mind that, in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber."[22] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[23] Furthermore, the Appeals Chamber recalls, as a general principle, the approach adopted in *Kupreškić et al.*, wherein it was stated that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[24]

Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[25]

12. The same standard of reasonableness and the same deference to factual findings applies when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[26] Under Article 25(1)(b) of the Statute, the Prosecution, like the accused, must demonstrate "an error of fact that occasioned a miscarriage of justice." Considering that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against

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[20] *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8; see also *Ntagerura et al.* Appeal Judgement, para. 136.
[21] *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10.
[22] *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12; *Bagilishema* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18.
[23] *Strugar* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, para. 13. Similarly, the type of evidence, direct or circumstantial, is irrelevant to the standard of proof at trial, where the accused may only be found guilty of a crime if the Prosecution has proved each element of that crime and the relevant mode of liability beyond a reasonable doubt. See *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.
[24] *Kupreškić et al.* Appeal Judgement, para. 30.
[25] *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Simić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Vasiljević* Appeal Judgement, para. 8.
[26] *Strugar* Appeal Judgement, para. 14; *Hadžihasanović and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13.

acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[27]

13. Furthermore, the Appeals Chamber reiterates that it does not review the entire trial record *de novo*; in principle, it takes into account only evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any.[28]

B. Standard for summary dismissal

14. The Appeals Chamber recalls that it has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing.[29] Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively.[30] A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber.[31] Additionally, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[32]

15. When applying these basic principles, the Appeals Chamber has identified a number of categories of deficient submissions on appeal which are liable to be summarily dismissed.[33] The Appeals Chamber in the present case has identified the following five categories as most pertinent to the arguments of the parties.

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[27] *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Hadžihasanović and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11.
[28] *Strugar* Appeal Judgement, para. 15; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8; *Bagilishema* Appeal Judgement, para. 11.
[29] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 12; *Brđanin* Appeal Judgement, para. 16; *Gacumbitsi* Appeal Judgement, para. 10; *Kamuhanda* Appeal Judgement, para. 10.
[30] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 43.
[31] *Strugar* Appeal Judgement, para. 16; *Halilović* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Gacumbitsi* Appeal Judgement, para. 9.
[32] *Brđanin* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11.
[33] *Strugar* Appeal Judgement, paras 18-24; *Brđanin* Appeal Judgement, paras 17-31.

B. Alleged error of law in relation to ordering pursuant to Article 7(1) of the Statute (Milan Martić's Sixth Ground of Appeal)

1. Submissions of the Parties

218. Martić submits that the Trial Chamber erred in the way it set out the mental element of ordering a crime pursuant to Article 7(1) of the Statute. In particular, he claims that the Trial Chamber erroneously stated that indirect intent is sufficient for ordering. He refers to the *Blaškić* Appeal Judgement and argues that the Trial Chamber was supposed to follow the standard set out therein, *i.e.*, that knowledge of any risk, however low, does not suffice for the imposition of criminal responsibility. Martić submits that the Trial Chamber failed to specify the degree of risk that must be proven by the Prosecution.[541] He requests that the Appeals Chamber, in the event it affirms the Trial Chamber's finding that he ordered the shelling, rule on whether he did so with "awareness of a higher likelihood of risk and a volitional element."[542]

219. The Prosecution responds that Martić incorrectly relies on the *Blaškić* Appeal Judgement, which, according to the Prosecution, endorsed an indirect intent standard for the mode of liability of "ordering" under Article 7(1) of the Statute.[543] The Prosecution further avers that the Trial Chamber convicted Martić on the basis of his direct intent to attack civilians;[544] moreover, the Trial Chamber's conclusions regarding Martić's awareness of the deaths and injuries resulting from the shelling were reasonable.[545]

2. Discussion

220. Martić challenges the Trial Chamber's articulation of the *mens rea* elements of ordering a crime pursuant to Article 7(1) of the Statute.[546] In this respect, the Trial Chamber held the following:

> The mens rea [of ordering] is either direct intent in relation to the perpetrator's own ordering or indirect intent, that is, a person who orders with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite mens rea for this mode of liability under Article 7(1) of the Statute.[547]

221. From the outset, the Appeals Chamber recalls its discussion in the *Blaškić* Appeal Judgement of the requisite subjective element for "ordering" a crime under the Statute. The Appeals

[541] Defence Appeal Brief, paras 214-215; see also Defence Reply Brief, para. 95.
[542] Defence Reply Brief, para. 96.
[543] Prosecution Response Brief, para. 183.
[544] Prosecution Response Brief, para. 184.
[545] Prosecution Response Brief, para. 185.
[546] Defence Notice of Appeal, para. 54, referring exclusively to Trial Judgement, para. 441.
[547] Trial Judgement, para. 441.

Chamber in that case had to address the question of "whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute, and if so, how it should be defined."[548] After an extensive analysis,[549] the Appeals Chamber concluded as follows:

> The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting the crime.[550]

222. The Appeals Chamber explained that there is indeed a lower form of intent than direct intent. It specified, however, that the "knowledge of any kind of risk, however low, does not suffice"[551] to impose criminal responsibility under the Statute. It considered that "an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard."[552] Hence, it reached its conclusion that the person giving the order must act with the awareness of the *substantial* likelihood that a crime will be committed in the execution of the order. This reasoning was confirmed in the *Kordić and Čerkez* and *Galić* Appeal Judgements.[553]

223. In this case, the Trial Chamber merely repeated the standard set out in the *Blaškić* Appeal Judgement, *i.e.* it required that the person giving the order acted with awareness of the substantial likelihood that a crime would be committed in the execution of that order, thus accepting the crime. The Appeals Chamber can find no error in this. Insofar as Martić in his Reply Brief alleges that the *application* of that standard was erroneous, the Appeals Chamber notes that in his Notice of Appeal and his Appeal Brief, under this ground of appeal Martić challenged only the Trial Chamber's articulation of the standard.[554] His further submissions[555] will therefore only be considered to the extent that they are relevant under Martić's eighth ground of appeal.[556]

3. Conclusion

224. For the foregoing reasons, the Appeals Chamber dismisses Martić's sixth ground of appeal in its entirety.

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[548] *Blaškić* Appeal Judgement, para. 32.
[549] *Blaškić* Appeal Judgement, paras 33-41.
[550] *Blaškić* Appeal Judgement, para. 42. See also *Blaškić* Appeal Judgement, fn. 76, providing a French translation of that standard: "*Quiconque ordonne un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre possède la* mens rea *requise pour établir la responsabilité aux termes de l'article 7 alinéa 1 pour avoir ordonné. Le fait d'ordonner avec une telle conscience doit être considéré comme l'acceptation dudit crime*".
[551] *Blaškić* Appeal Judgement, para. 41.
[552] *Blaškić* Appeal Judgement, para. 41; *Nahimana et al.* Appeal Judgement, para. 481.
[553] *Kordić and Čerkez* Appeal Judgement, paras 29-30; *Galić* Appeal Judgement, para. 152. See for the application of the same standard to the modes of liability of planning and instigating under Article 7(1) of the Statute: *Kordić and Čerkez* Appeal Judgement, paras 31-32.
[554] Defence Notice of Appeal, paras 54-56; Defence Appeal Brief, paras 214-215.
[555] Defence Reply Brief, paras 95-96.
[556] See *infra*, paras 237 ff.

UNITED
NATIONS

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

Case No. IT-95-11-T

Date: 12 June 2007

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Judgement of: **12 June 2007**

PROSECUTOR

v.

MILAN MARTIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for Milan Martić:

Mr. Predrag Milovančević
Mr. Nikola Perović

B. Findings on the individual criminal responsibility of Milan Martić

434. Milan Martić is charged with individual criminal responsibility pursuant to Article 7(1) in its entirety in relation to each Count. Article 7(1) of the Statute 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 5 of the present Statute, shall be individually responsible for the crime.

With regard to Counts 3 to 14, and Count 1 insofar as it relates to these counts, the Trial Chamber finds that the individual criminal responsibility of Milan Martić is one of JCE pursuant to Article 7(1) of the Statute. With regard to Counts 15 to 19, and Count 1 insofar as it relates to these counts, the Trial Chamber finds that the individual criminal responsibility of Milan Martić is one of ordering pursuant to Article 7(1) of the Statute. Other modes of liability pursuant to Article 7(1) and 7(3) of the Statute will not be considered.

1. JCE pursuant to Article 7(1) of the Statute

435. JCE is established as a form of liability within the meaning of "commission" under Article 7(1) of the Statute.[1171] The Appeals Chamber found that "whoever contributes to the commission of crimes by [a] group of persons or some members of [a] group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions".[1172] Three categories of JCE have been identified in customary international law.[1173] The Prosecution charges Milan Martić pursuant to the "first" and "third" categories of JCE.[1174] As stated by the Appeals Chamber, regardless of the categories of JCE, a conviction requires a finding that the accused participated in a JCE. There are three requirements for such a finding: a plurality of persons, the existence of a

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[1171] *Tadić* Appeal Judgement, para. 190. *See also Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras 20, 31; *Stakić* Appeal Judgement, para. 62 and the jurisprudence cited therein.
[1172] *Tadić* Appeal Judgement, para. 190.
[1173] *Tadić* Appeal Judgement, para. 220.
[1174] Indictment, para. 5. The first form of JCE is described by the Appeals Chamber as follows: "all-co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result," *Tadić* Appeal Judgement, para. 196; the third is characterized as follows: "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, one or more of the victims is shot and killed," *Tadić* Appeal Judgement, para. 204.

performed any part of the *actus reus* of the perpetrated crime.[1184] It is also not required that his participation be necessary or substantial to the crimes for which the accused is found responsible.[1185] Nevertheless, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[1186]

2. Ordering pursuant to Article 7(1) of the Statute

441. Ordering requires that a person in a position of authority instructs another person to commit a crime.[1187] It is required that the crime in question was actually committed by the principal perpetrators.[1188] It is sufficient that the person ordering the crime possesses authority, whether *de jure* or *de facto*.[1189] This authority may be proved expressly or may be reasonably implied from the evidence.[1190] The mens rea is either direct intent in relation to the perpetrator's own ordering or indirect intent, that is, a person, who orders with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite mens rea for this mode of liability under Article 7(1) of the Statute.[1191]

3. Findings on Counts 1 to 14

(a) Common purpose

442. The Prosecution alleges that the common purpose of the JCE was "the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of the Republic of Croatia ["Croatia"] and large parts of the Republic of Bosnia and Herzegovina ["BiH"], in order to make them part of a new Serb-dominated state."[1192] The evidence establishes the existence, as of early 1991, of a political objective to unite Serb areas in Croatia and in BiH with Serbia in order to establish an unified territory.[1193] Moreover, the evidence establishes that the SAO Krajina, and subsequently the RSK, government and authorities fully embraced and advocated this objective, and strove to accomplish it in cooperation with the Serb leaderships in Serbia and in the RS in BiH.[1194] The Trial Chamber considers that such an objective, that is to unite with other ethnically similar areas, in and of itself does not amount to a common purpose within the

[1184] *Kvočka et al.* Appeal Judgement, para. 99; *Stakić* Appeal Judgement, para. 64.
[1185] *Brđanin* Appeal Judgement, para. 430; *Kvočka et al.* Appeal Judgement, para. 98.
[1186] *Brđanin* Appeal Judgement, para. 430.
[1187] *Kordić and Čerkez* Appeal Judgement, para. 28; *Gacumbitsi* Appeal Judgement, para. 182.
[1188] *Brđanin* Trial Judgement, para. 267 (with further references).
[1189] *Brđanin* Trial Judgement, para. 270. *See also Kordić and Čerkez* Appeal Judgement, para. 28, in which it is held that a formal superior-subordinate relationship is not required.
[1190] *Brđanin* Trial Judgement, para. 270; *Limaj et al.* Trial Judgement, para. 515.
[1191] *See Kordić and Čerkez* Appeal Judgement, paras 29-30; *Blaškić* Appeal Judgement, para. 42.
[1192] Indictment, para. 4.
[1193] *See supra* Section III I.
[1194] *Ibid.*

UNITED
NATIONS

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

Case No. IT-05-87-T

Date: 26 February 2009

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Acting Registrar: **Mr. John Hocking**

Judgement of: **26 FEBRUARY 2009**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

JUDGEMENT

Volume 1 of 4

The Office of the Prosecutor:
Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused:
Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

II. APPLICABLE LAW

A. LEGAL STANDARDS FOR INDIVIDUAL CRIMINAL RESPONSIBILITY

1. Introduction

75. Each of the six Accused is charged with responsibility for the crimes alleged in the Indictment pursuant to Article 7(1) and 7(3) of the Statute. The text of Article 7 is quoted in full below:

> **Article 7**
> **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 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

76. Because the Prosecution alleges all possible forms of responsibility in respect of each charge, the Chamber has the discretion, and indeed the obligation, to choose under which form or forms of responsibility to assess the evidence in respect of each Accused.[73] A Chamber is not obliged to make exhaustive factual findings on each and every charged form of responsibility, and may opt to examine only those that describe the conduct of the accused most accurately.[74] Nevertheless, the Chamber is bound in the exercise of its discretion by certain guiding principles on concurrent convictions and forms of responsibility.[75]

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[73] *Krstić* Trial Judgement, para. 602; *Furundžija* Trial Judgement, para. 189; *Semanza* Trial Judgement, para. 397.

[74] *See Krstić* Trial Judgement, para. 602; *Kunarac et al.* Trial Judgement, paras. 388–389.

[75] The Chamber will follow the practice of the Appeals Chamber in using the term "concurrent convictions" to describe simultaneous convictions pursuant to different forms of responsibility enshrined in Articles 7(1) and 7(3), reserving the term "cumulative convictions" to describe simultaneous convictions for more than one substantive crime in respect of the same conduct. *See Jokić* Judgement on Sentencing Appeal, para. 24; *Kordić* Appeal Judgement, paras. 35, 1030; *Blaškić* Appeal Judgement, paras. 89–93; *Kajelijeli* Appeal Judgement, para. 81; *but see Gacumbtsi* Trial Judgement, para. 266 (using the term "cumulative convictions" when referring to simultaneous convictions pursuant to different

4. Ordering

85. The Prosecution establishes the physical and mental elements of ordering by proving that the accused intentionally instructed another to carry out an act or engage in an omission,[94] with the intent that a crime or underlying offence be committed in the execution of those instructions, or with the awareness of the substantial likelihood that a crime or underlying offence would be committed in the execution of those instructions.[95]

86. While the Prosecution need not prove that there existed a formal superior-subordinate relationship between the accused and the physical perpetrator or intermediary perpetrator,[96] it must provide "proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order."[97] Such authority may be informal and of a temporary nature,[98] and as a consequence the order issued by the accused need not be legally binding upon the physical perpetrator or intermediary perpetrator.

87. The order need not take any particular form; it need not be in writing.[99] However, ordering requires a positive act; it cannot be committed by omission.[100] Because the Appeals Chamber has held that the accused need merely "instruct another person to commit an offence",[101] it is clear that liability for ordering may ensue where the accused issues, passes down, or otherwise transmits the order, and that he need not use his position of authority to "convince" the physical perpetrator or intermediary perpetrator to commit the crime or underlying offence.[102] Furthermore, the accused need not give the order directly to the physical perpetrator,[103] and an intermediary lower down than the accused on the chain of command who passes the order on to the physical perpetrator may also be held responsible as an orderer for the perpetrated crime or underlying offence, as long as he has the requisite state of mind.[104]

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[94] The accused need only instruct another to carry out an act or engage in an omission—and not necessarily a crime or underlying offence *per se*—if he has the intent that a crime or underlying offence be committed in the execution of the order, or if he is aware of the substantial likelihood that a crime or underlying offence will be committed. *Semanza* Appeal Judgement, paras. 359–364.

[95] *Kordić* Appeal Judgement, paras. 28, 30; *Martić* Appeal Judgement, paras. 221–222.

[96] *Kordić* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361.

[97] *Semanza* Appeal Judgement, para. 361; *see also Kordić* Appeal Judgement, para. 28.

[98] *Semanza* Appeal Judgement, paras. 363, 364 (finding that the accused—a civilian mayor with no formal position in the Rwandan military hierarchy—had the necessary authority over Interahamwe fighters to render him liable for ordering them to kill Tutsis at Musha church, and that the Trial Chamber had erred in not convicting him under this form of responsibility).

[99] *Strugar* Trial Judgement, para. 331; *Blaškić* Trial Judgement, para. 281.

[100] *Galić* Appeal Judgement, para. 176.

[101] *Kordić* Appeal Judgement, para. 28.

[102] *See Krstić* Trial Judgement, para. 601; *Blaškić* Trial Judgement, para. 281.

[103] *Kordić* Trial Judgement, para. 388; *Blaškić* Trial Judgement, para. 282.

[104] *Kupreškić et al.* Trial Judgement, paras. 827, 862.

611. The Priština Corps was composed of a variety of units in 1999.[1554]

(A) Units subordinate to the Priština Corps

612. The following units were subordinated to the Priština Corps in 1999, according to its peacetime establishment: the 549th Motorised Brigade (commanded by Colonel Božidar Delić); the 52nd Artillery-rocket Brigade for Anti-aircraft Defence (commanded by Colonel Miloš Đošan); the 243rd Mechanised Brigade (commanded by Colonel Krsman Jelić); the 15th Armoured Brigade (commanded by Colonel Ćirković)[1555]; the 125th Motorised Brigade (commanded by Colonel Dragan Živanović)[1556]; the 58th Light Infantry Brigade (commanded by Dragutin Milentijević until 16 April 1999 when he was replaced by Ljubomir Savić)[1557]; and the 52nd Mixed Artillery Brigade (commanded by Colonel Stefanović who was later replaced by Colonel Milinović).[1558]

613. Two other units were also subordinated to the Priština Corps in peacetime: the 354th Infantry Brigade[1559] and the 192nd Engineering Regiment.[1560]

614. In addition, there were eight smaller units—the size of battalions or smaller— attached to the Priština Corps: the 53rd Border Battalion; the 55th Border Battalion; the 57th Border Battalion;

[1554] P950 (Vladimir Lazarević interview with the Prosecution), pp. 33–35; 5D1370 (PrK organigram: command and coordination in wartime); 4D240 (Structure, Deployment, and Manning level of 3rd Army Military-Territorial Component, 14 January 1999), p. 2.

[1555] P950 (Vladimir Lazarević interview with the Prosecution), pp. 33–34. Vladimir Marinković, a member of the 15th Armoured Brigade during the time relevant to the Indictment, testified that the general area of responsibility of the 15th Armoured Brigade was in the north of Kosovo and covered the municipalities of Priština/Prishtina, Vučitrn/Vushtrria, Kosovo Polje/Pushë Kosovo, parts of Lipljan/Lypjan, and parts of Glogovac/Gllogoc. Vladimir Marinković, T. 20252 (13 December 2007); T. 20302 (14 December 2007).

[1556] Dragan Živanović, T. 20439 (17 January 2008). Miloš Mandić testified that the Mechanised Battalion of the 252nd Armoured Brigade was present in Kosovo from 16 March 1999, including seven tanks, and that it was re-subordinated to the command of the 125th Motorised Brigade in Kosovska Mitrovica/Mitrovica. Miloš Mandić, T. 20909–20911 (23 January 2008). Ljubomir Savić added that the 2nd Light Infantry Battalion was resubordinated to the 125th Motorised Brigade, "which was located in the defence region in Rugovska canyon". Ljubomir Savić, 5D1392 (witness statement dated 27 December 2007), para. 10. Saša Antić testified that around 12 or 13 April 1999, a company was formed from the 52nd Military Police Battalion and sent to the area of the Košare and Morina border posts, where it became resubordinated to the 125th Motorised Brigade. Antić was sent to the area on 21 April 1999, to become the commander of the company which had been resubordinated days before. Saša Antić, 5D1443 (witness statement dated 5 January 2008), paras. 15, 17, 19.

[1557] Savić testified that the 58th Light Infantry Brigade was "deployed in the wider region of Kosovska Mitrovica" and was a "tactical unit intended to execute combat actions in mountainous and manoeuvrable terrain". Ljubomir Savić, 5D1392 (witness statement dated 27 December 2007), para. 7.

[1558] 3D1116 (Radovan Radinović's Expert Report), p. 25; P950 (Vladimir Lazarević interview with the Prosecution), pp. 33–34, 57–60; *See also* Dragan Živanović, T. 20534 (18 January 2008); P1929 (3rd Army report, 31 March 1999), pp. 3–4.

[1559] P950 (Vladimir Lazarević interview with the Prosecution), pp. 35–36; Mihajlo Gergar testified that the 354th Infantry Brigade was mainly formed by reservists; Mihajlo Gergar, T. 21510 (31 January 2008). He further added that the brigade was involved in the action in Palatna at the end of May 1999 and that he was in charge of planning and leading both the 211th Armoured Brigade and the 354th Infantry Brigade on that action; Mihajlo Gergar, T. 21492–21496 (31 January 2008); 6D709 (Order from the PrK, 22 May 1999), p. 3; *see also* 5D1070 (211th Armoured Brigade Combat Report to PrK, 25 May 1999) on the Palatna action.

the 52nd Military Police Battalion (commanded by Stevo Kopanja); the 52nd Communications Battalion; the 52nd Reconnaissance and sabotage Company; the 52nd Atomic-Biological-Chemical Defence Battalion; and the 52nd Centre for Electronic Intelligence and Jamming.[1561]

(1) The 549th Motorised Brigade

615. Božidar Delić testified at length about various actions involving the brigade in 1998 and 1999.[1562] The brigade's area of responsibility consisted of Prizren, Suva Reka/Suhareka, Orahovac/Rahovec, and Dragaš/Dragash municipalities, in the south of Kosovo.[1563] In 1980s Zlatomir Pešić was commander of the artillery battalion of the 549th Motorised Brigade.[1564] Witnesses K82, K54, Pavle Gavrilović, and Vlatko Vuković were also members of the 549th Motorised Brigade at various times.[1565] Franjo Glončak transferred, at his request, from the 175th Battalion in April 1999.[1566]

616. The testimony of these witnesses and several VJ documents in evidence indicate that the 549th Motorised Brigade was active across a relatively large area of the frontier of Kosovo from May 1998 onwards, providing "in depth" security along the border.[1567] Locations of operations included Junik,[1568] Orahovac/Rahovec,[1569] Gramočelj Village,[1570] Donje Retimlje/Retia e Ulët,[1571] Studenčane/Studenqan,[1572] Suva Reka/Suhareka,[1573] Ješkovo/Jeshkova, and Kabaš/Kabash.[1574]

[1560] P950 (Vladimir Lazarević interview with the Prosecution), p. 35. *See also* P1929 (3rd Army report, 31 March 1999) pp. 3–4.

[1561] The 52nd Military Police Battalion was an independent unit directly subordinated and under the command of the PrK. 5D1370 (PrK organigram: command and coordination in wartime); 3D1116 (Radovan Radinović's Expert Report), pp. 25–26; Momir Stojanović, T. 20082 (12 December 2007); Saša Antić, 5D1443 (witness statement dated 5 January 2008), paras. 5, 7. *See also* P950 (Vladimir Lazarević interview with the Prosecution), p. 37.

[1562] Božidar Delić, T. 19269 (28 November 2007); *see also* K82, P2863 (witness statement), para. 2; K90, P2640 (witness statement dated 8 December 2002), para. 28.

[1563] K82, P2863 (witness statement), para. 2; *see also* K54, P2883 (witness statement dated 26 April 2002), p. 2.

[1564] Zlatomir Pešić, T. 7312 (24 November 2006).

[1565] K82, P2863 (witness statement), para. 1; Pavle Gavrilović, 5D1445 (witness statement dated 9 January 2008), paras. 3–4; Vlatko Vuković, 5D1442 (witness statement dated 5 January 2008), para. 2, *see* K54, P2883 (witness statement dated 26 April 2002), p. 2.

[1566] K90, P2391 (witness statement dated 8 December 2002), para. 28 (under seal); Franjo Glončak, 5D1395 (witness statement dated 26 December 2007), para. 5.

[1567] P1401 (Report from PrK to 3rd Army, 13 May 1998), p. 2.

[1568] 4D101 (PrK Plan for the engagement of units in Kosovo, 23 July 1998).

[1569] P1425 (Letter from 549th Motorised Brigade to PrK relating to MUP troop performance, 8 August 1998).

[1570] P1427 (PrK Decision, 10 August 1998).

[1571] P2015 (Joint Command Order, 23 March 1999).

[1572] P1613 (Order signed by Pavković, 27 August 1998).

[1573] Vladimir Lazarević, T. 17940 (8 November 2007).

[1574] Vladimir Lazarević, T. 18374 (15 November 2007).

Mechanised Brigade's area of responsibility was Suva Reka/Suhareka municipality, in conjunction with the 549th Motorised Brigade.[1586]

(3) The 52nd Artillery Rocket Brigade

619. Novica Stamenković testified that the 52nd Artillery Rocket Brigade was referred to in the alternative as the 52nd Anti-aircraft Defence Artillery Brigade.[1587] Colonel Miloš Đošan was the Commander of the brigade when the crimes charged in the Indictment were allegedly committed, and the Chief of Staff was Lieutenant Colonel Stanković.[1588]

620. Sergej Perović, the chief of the security organ of the 52nd Artillery Rocket Brigade,[1589] testified that it was stationed in the Đakovica/Gjakova garrison.[1590] This was confirmed by Nike Peraj who was assigned there on 21 December 1998.[1591]

(B) Wartime forces attached to the Priština Corps

621. After the proclamation of a state of imminent threat of war and the subsequent declaration of a state of war by the FRY Government,[1592] the Priština Corps activated some of its wartime units, such as the 52nd Medical Battalion and the 52nd Artillery Battery.[1593] In addition, it was reinforced during the NATO campaign by resubordinated units and formations from other strategic groups and operative formations of the VJ, as discussed below.

622. Resubordinated units were in principle ranked one level below the unit they were resubordinated to, and were under an obligation to obey orders issued by the commanding officer to whom they were resubordinated. Thus, "the original parent unit had no right to interfere in commanding over" the resubordinated unit during the execution of combat tasks. Nevertheless,

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[1586] P1969 (Joint Command Order, 28 March 1999), pp. 6–8; *see also* P2000 (Order of the 549th Motorised Brigade, 29 March 1999), pp. 2–4.

[1587] Novica Stamenković, T. 20121–20122 (12 December 2007).

[1588] Nike Peraj, P2248 (witness statement dated 18 April 2000), para. 6, P2253 (witness statement dated 8–9 August 2006), para. 6; P950 (Vladimir Lazarević interview with the Prosecution), pp. 33–34; Milan Kotur, T. 20687 (21 January 2008).

[1589] Sergej Perović, 5D1396 (witness statement dated 8 January 2008), paras. 4–5.

[1590] Sergej Perović, 5D1396 (witness statement dated 8 January 2008), para. 4.

[1591] Nike Peraj, T. 1585 (14 August 2006), P2248 (witness statement dated 18 April 2000), para. 5, P2253 (witness statement dated 8–9 August 2006), para. 4.

[1592] P992 (Decision to proclaim a state of imminent threat of war, 23 March 1999); P991 (Decision to declare a state of war, 24 March 1999).

[1593] 5D1370 (PrK organigram: command and coordination in wartime).

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The Office of the Prosecutor:
Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused:
Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
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only reasonable inference is that he knew of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians.

626. Ojdanić provided practical assistance, encouragement, and moral support to the VJ forces engaging in the forcible displacement of Kosovo Albanians in co-ordinated action with the MUP. He contributed by issuing orders for VJ participation in joint operations with the MUP in Kosovo during the NATO air campaign, by mobilising the forces of the VJ to participate in these operations, and by furnishing them with VJ military equipment.[1507] In addition to issuing orders allowing the VJ to be in the locations where the crimes were committed, he also refrained from taking effective measures at his disposal, such as specifically enquiring into the forcible displacements, despite his awareness of these incidents. Furthermore, Ojdanić contributed to the commission of crimes in Kosovo by the VJ through his role in arming the non-Albanian population and ordering its engagement in 1999.[1508] These contributions had a substantial effect on the commission of the crimes, because they provided assistance in terms of soldiers on the ground to carry out the acts, the VJ weaponry to assist these acts, and encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes.

627. Furthermore, Ojdanić had extensive powers to instigate disciplinary proceedings against any other member of the VJ and was obliged to ensure that VJ members who committed offences and infractions against VJ military discipline were held responsible as soon as possible during a state of war.[1509] After he issued an order at the start of April 1999 that criminal activities be reported to the Supreme Command Staff, Pavković failed to do so.[1510] This under-reporting occurred throughout 1998 and 1999, and Ojdanić was expressly warned by Dimitrijević of such misreporting by Pavković on a number of occasions.[1511] Ojdanić did take certain measures in response to Pavković's actions, including sending members of his Security Administration to find out more information and initiating the 17 May 1999 meeting with Milošević. However, these actions were insufficient to remedy the problem, as discussed above. In light of his knowledge of widespread criminal activity amongst VJ members from the 16 and 17 May meetings, the Arbour letter, the

[1507] 3D690 (VJ General Staff Directive for the engagement of the VJ, *Grom* 3 Directive, 16 January 1999); Vladimir Lazarević, T. 17894–17895 (8 November 2007); P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999), p. 1; P1925 (Order of the VJ General Staff, 23 March 1999).
[1508] P931 (Minutes of the Collegium of the General Staff of the VJ for 2 February 1999), p. 23; P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999), p. 1.
[1509] P984 (FRY Law on the VJ), articles 159, 180, 181; 4D532 (VJ Rules on Service, 1 January 1996), articles 291, 313, 314.
[1510] 4D276 (3rd Army Report to General Staff, 3 April 1999).

publication of the first indictment, and various prior reports of criminal offences by VJ members, Ojdanić's request for a response from Pavković was insufficient.[1512] Subsequently, when information was again presented to the Supreme Command Staff that crimes were still being committed by VJ personnel in Kosovo in June 1999, Ojdanić stuck to his approach of calling for reports and issuing orders to enhance the operation of the military courts.[1513] Again, he did not take disciplinary measures against the 3rd Army Commander, despite the fact that crimes were still not being included in written reports up to the Supreme Command Staff from the 3rd Army.[1514] Ojdanić's failure to take effective measures against Pavković provided practical assistance, encouragement, and moral support to members of the VJ who perpetrated crimes in Kosovo, by sustaining the culture of impunity surrounding the forcible displacement of the Kosovo Albanian population, and by allowing the Commander of the 3rd Army to continue to order operations in Kosovo during which the forcible displacement took place.

628. The Chamber finds that it has been established that all of Ojdanić's actions described above were voluntary. The Chamber finds that, through his acts and omissions, Ojdanić provided practical assistance, encouragement, and moral support to members of the VJ, who were involved in the commission of forcible transfer and deportation in the specific crime sites where it has been found that the VJ participated, that his conduct had a substantial effect on the commission of these crimes, that he was aware of the intentional commission of these crimes by the VJ in co-ordinated action with the MUP, and that he knew that his conduct assisted in the commission of these crimes.

629. While the forcible displacements were part of the VJ and MUP organised campaign, the Chamber is not satisfied beyond reasonable doubt that killings, sexual assaults, or the destruction of religious and cultural property were intended aims of this campaign. Accordingly, although he was aware of VJ members killing Kosovo Albanians in some instances, it has not been proved that Ojdanić was aware that VJ and MUP forces were going into the specific crime sites referred to above in order to commit killings, sexual assaults, or the destruction of religious and cultural property. Consequently, in Ojdanić's case, the mental element of aiding and abetting has not been established in relation to counts 3, 4, and 5.

[1511] P928 (Minutes of the Collegium of the General Staff of the VJ, 30 December 1998), p. 14; P933 (Minutes of the Collegium of the General Staff of the VJ, 4 March 1999), p. 15; P938 (Minutes of the Collegium of the General Staff of the VJ, 18 March 1999), p. 21.

[1512] 3D790 (Pavković Letter responding to accusations of Louise Arbour, 17 May 1999); Milovan Vlajković, T. 16046–16047 (20 September 2007).

[1513] 3D633 (Briefing to the Chief of Staff of the Supreme Command, 2 June 1999), p. 2; 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999), p. 1.

[1514] Radovan Radinović, T. 17323–17325 (19 October 2007).

630. The Trial Chamber therefore finds that it has been established that Dragoljub Ojdanić is responsible for aiding and abetting, under Article 7(1) of the Statute, the crimes in the following locations:

- Peć/Peja
  - Peć/Peja town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Đakovica/Gjakova
  - Đakovica/Gjakova town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Korenica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dobroš/Dobrosh—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ramoc—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Meja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Other villages in the Reka/Caragoj valley—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Prizren
  - Pirane/Pirana—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Orahovac/Rahovec
  - Celina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Srbica/Skenderaj
  - Turićevac/Turiçec—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Izbica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Tušilje/Tushila—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ćirez/Qirez—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Priština/Prishtina
  - Priština/Prishtina town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Gnjilane/Gjilan
  - Žegra/Zhegra—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Vladovo/Lladova—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Prilepnica/Përlepnica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Uroševac/Ferizaj
  - Sojevo/Sojeva—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Mirosavlje/Mirosala—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Staro Selo—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Kačanik/Kaçanik
  - Kotlina/Kotllina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Kačanik/Kaçanik—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dubrava/Lisnaja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity.

631. In respect of the crimes proved to have been committed for which Ojdanić has not been held responsible as an aider and abettor, the Chamber finds that he also did not plan, instigate, or order them.

c. Superior Responsibility

632. Looking to Ojdanić's responsibility under Article 7(3) of the Statute for counts 1 and 2, the Chamber notes that there are specific crimes of forcible displacement for which he has not been found responsible as an aider and abettor. These specific crimes were those of forcible displacement carried out by the MUP, without the participation of the VJ. As found above, it has not been established that Ojdanić had effective control of the forces of the MUP acting in Kosovo. Consequently, he is not responsible under Article 7(3) for the remaining crimes in counts 1 and 2 that have been proved, those being:

- Dečani/Deçan
  - Beleg—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Prizren
  - Dušanovo/Dushanova, part of the town of Prizren—deportation, crime against humanity; forcible transfer, other inhumane act, crime against humanity;

- Suva Reka/Suhareka
  - Suva Reka/Suhareka town—deportation, crime against humanity; forcible transfer, other inhumane act, crime against humanity;

- Kosovska Mitrovica/Mitrovica

to appreciate during these meetings the influence exerted by the Joint Command over the MUP and VJ in respect of the implementation of the various stages of the Plan for Combating Terrorism. In 1999, he did not participate in the meetings held in Belgrade on 4, 16, or 17 May between *inter alia* Milošević, Milutinović, Pavković, Ojdanić, and Lukić.[2316] Consequently, the Chamber considers that he was distanced from the policy-makers in Belgrade and that this militates against him being a member of the joint criminal enterprise. Lazarević also took a number of steps in relation to the criminal offences of members of the VJ and MUP in Kosovo, including in some cases issuing written orders to prevent the civilian population from being displaced and requiring that misconduct towards civilians be severely punished. These orders suggest that, although he knew that the VJ was involved in the widespread movement of the Kosovo Albanian population, he took some steps to ameliorate the circumstances in which this occurred.

919. In light of this evidence, the Chamber finds that the Prosecution has not proved beyond reasonable doubt that Lazarević shared the intent of the joint criminal enterprise members to maintain control over Kosovo through the forcible displacement of Kosovo Albanians. Because of this finding, the Chamber does not address whether he made a significant contribution to the joint criminal enterprise.

920. Recalling that a Chamber need only address those forms of responsibility under Article 7(1) that describe the conduct of the accused most accurately, the Chamber makes the general observation on the physical elements of the other forms of responsibility under Article 7(1) that planning primarily applies to those who design crimes, that instigating primarily applies to those who prompt others to commit crimes, and that ordering primarily applies to those who instruct others to commit crimes; whereas aiding and abetting applies to those who provide practical assistance, encouragement, or moral support to the perpetration of a crime.[2317] On this basis, the Chamber does not consider that planning, instigating, or ordering most accurately describe the conduct of Lazarević and dismisses these modes of liability to describe his individual criminal responsibility. Accordingly, the Chamber now addresses his responsibility for aiding and abetting the commission of the crimes proved to have occurred.

b. Aiding and abetting

921. In order for Lazarević to be held responsible for aiding and abetting any of the crimes that have been proved, it must be shown that he provided practical assistance, encouragement, or moral

[2316] Vladimir Lazarević, T. 18134 (12 November 2007), T. 18657 (20 November 2007). The Chamber notes that Lukić did not attend the 16 and 17 May meetings but did attend the 4 May meeting.
[2317] For the complete descriptions of the elements of these forms of responsibility, see Section II.

support to the perpetrator of a crime or underlying offence and also that such practical assistance, encouragement, or moral support had a substantial effect upon the commission of a crime or underlying offence.[2318] Furthermore, it must be shown that he intentionally provided this assistance and that he was aware of the essential elements of that crime or underlying offence, including the mental state of the physical perpetrator or intermediary perpetrator.[2319] The lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime occurs.[2320] An accused may aid and abet through an omission, where (a) there is a legal duty to act, (b) the accused has the ability to act, (c) he fails to act either intending the criminal consequences or with awareness and consent that the consequences will ensue, and (d) the failure to act results in the commission of the crime.

922. The Chamber has found that, from March to June 1999, VJ and MUP forces carried out a campaign of widespread and systematic forcible displacements in numerous villages across 13 municipalities in Kosovo, which involved the commission of crimes against hundreds of thousands of Kosovo Albanians.

923. Lazarević was aware of this campaign of forcible displacements that was conducted by the VJ and MUP throughout Kosovo during the NATO air campaign. During 1998 and the period leading up to the campaign, Lazarević was provided with information indicating that VJ and MUP personnel were responsible for serious criminal acts committed against ethnic Albanians within Kosovo. The evidence above, including the notes of the Joint Command meetings, some Priština Corps Command orders, the evidence pertaining to Lazarević's presence in the border area between Albania and Kosovo at the time when joint operations were being conducted there, and the evidence of his knowledge of the crimes committed in the village of Gornje Obrinje/Abria e Epërme in Glogovac/Gllogoc municipality in October 1998, as well as in the village of Slapuzne on 8 January 1999, indicates that Lazarević was aware of the fact that crimes were committed against civilians and civilian property during operations conducted by the VJ and the MUP in 1998 and early 1999. He was aware of the humanitarian catastrophe in Kosovo, as described in UN Security Council Resolution 1199, which stated that this was in part caused by the VJ and MUP using excessive force,[2321] and he was aware that the VJ were involved in burning the houses of Kosovo Albanians; indeed, he was present at a meeting of the VJ leadership when Samardžić stated that

[2318] *Blaškić* Appeal Judgement, paras. 45, 46; *Vasiljević* Appeal Judgement, para. 102.
[2319] *Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162; *Simić et al.* Appeal Judgement, para. 86.
[2320] *Blaškić* Appeal Judgement, para. 48.
[2321] P1468 (Notes of the Joint Command), pp. 124–125.

fighting terrorism by torching was "a disgrace".[2322] Consequently, Lazarević was aware that similar excessive uses of force and forcible displacements were likely to occur if he ordered the VJ to operate in Kosovo in 1999.

924. From late March 1999 and throughout the campaign of forcible displacements, Lazarević, as the Commander of the Priština Corps, was present in Kosovo where the campaign was being conducted by his subordinates acting together with the MUP, and was reported as stating of himself that he was on the "front-line" of the action.[2323] From 24 March 1999, continuing for some weeks, the VJ and MUP, operating together, forcibly displaced large numbers of Kosovo Albanian civilians from Priština/Prishtina in an organised manner, which required significant planning and co-ordination. Lazarević was present in Priština/Prishtina throughout most of this time and was aware of these displacements and the atmosphere of terror in the town created by the VJ and MUP. Lazarević indicated that he was aware of the previous forcible displacement of Kosovo Albanians by members of the Priština Corps when he called upon his subordinates to prevent the mistreatment of the civilian population, through practices such as banning civilians from returning to inhabited places.[2324] Furthermore, Lazarević was informed about the massive scale of the displacement of the civilian population in reports sent by his subordinate units. For example, he knew that from 24 March to 2 April over 300,000 Kosovo Albanians left for Albania.[2325] The combination of Lazarević's general knowledge of the widespread displacement of Kosovo Albanians in the course of VJ operations and his specific knowledge of the locations of those operations, including at most of the locations named in the Indictment, lead the Chamber to conclude that the only reasonable inference is that he knew of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians.

925. Lazarević provided practical assistance, encouragement, and moral support to the VJ forces engaging in the forcible displacement of Kosovo Albanians in co-ordinated action with the MUP. Throughout the campaign of forcible displacements, Lazarević was the Commander of the Priština Corps, with *de jure* and *de facto* authority over all its members and the power to plan the VJ activities and operations in Kosovo.[2326] Lazarević significantly participated in the planning and

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[2322] 4D97 (Minutes from the briefing of the commanders of the PrK and 3rd Army, 7 August 1998), p. 3.

[2323] P1523 (Transcript of a talk show held on 18 July 1999, published on 21 July 1999), p. 2.

[2324] 5D374 (Order of the PrK, 23 April 1999), p. 1.

[2325] 5D885 (Document of the 549th Motorised Brigade Command, 3 April 1999), p. 1.

[2326] The Chamber notes that the military territorial detachments in Kosovo were resubordinated to Lazarević by 8 April at the latest. In respect of the crimes listed below, for which Lazarević is being convicted, the Chamber is satisfied that members of the Priština Corps or VJ units subordinated to the Priština Corps at the time were involved in their commission. In relation to Staro Selo in Uroševac/Ferizaj, the Chamber notes that VJ volunteers were involved. The Chamber recalls the evidence discussed in Section VI.A.2.c.iv, where it is noted that volunteers were sent to training

execution of the joint operations conducted by the VJ, acting solely or in co-ordination with the MUP, on the ground in Kosovo from March to June 1999. His *Grom* 3 and 4 orders, and the Joint Command orders—which the Priština Corps drafted—sent the VJ into actions in Kosovo and provided the authorisation within the VJ chain of command for the VJ to operate in the crime sites where many of the forcible displacements of Kosovo Albanians were conducted. Lazarević's presence in the field, inspecting VJ units that were involved in the commission of crimes against Kosovo Albanians, was expressly noted to improve the morale of soldiers.[2327] Lazarević knew that the military courts were not effectively prosecuting VJ members for expelling Kosovo Albanians from their homes. Despite his knowledge of the campaign of forcible displacements occurring in Kosovo, he reported on 15 May 1999 that only one officer from the Priština Corps was charged with murder.[2328] Furthermore, only one commander of a Priština Corps unit was criminally prosecuted in relation to the events in Kosovo and that was for failing to take measures, resulting in the death of the VJ member. Lazarević knew that his failure to take adequate measures to secure the proper investigation of serious crimes committed by the VJ enabled the forces to continue their campaign of terror, violence, and displacement.

926. These acts and omissions provided a substantial contribution to the commission of the crimes that the Chamber has found to have been committed by VJ members, as specified below, as they provided assistance in terms of soldiers on the ground to carry out the acts, the organisation and equipping of VJ units, and the provision of weaponry, including tanks, to assist these acts. Furthermore, Lazarević's acts and omissions provided encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes by VJ members. As the Commander of the Priština Corps, Lazarević knew that his conduct would assist the implementation of the campaign to forcibly displace Kosovo Albanians.

927. The Chamber finds that it has been established beyond reasonable doubt that all of Lazarević's actions described above were voluntary. Consequently, the Chamber finds that, through his acts and omissions, Lazarević provided practical assistance, encouragement, and moral support to members of the VJ, who were involved in the commission of forcible transfer and deportation in the specific crime sites outlined above, which had a substantial effect on the

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centres in Serbia and then assigned to Priština Corps units in Kosovo. On this basis, the Chamber is satisfied that these volunteers in Staro Selo were under the jurisdiction of the Priština Corps at the relevant time.

[2327] P1903 (PrK Combat Report to 3rd Army, 5 April 1999), p. 3; P2617 (PrK Combat Report to 3rd Army, 4 April 1999), p. 2.

[2328] P1182 (Information sent by PrK to the 52nd Artillery Rocket Brigade, 15 May 1999), p. 4; Radomir Gojović, T. 16694–16695 (2 October 2007), T. 16756 (3 October 2007); P1011 (Ivan Marković, ed., *The Application of Rules of the International Law of Armed Conflicts* (2001)), p. 166.

commission of these crimes, that he was aware of the intentional commission of these crimes by the VJ in co-ordinated action with the MUP, and that he knew that his conduct assisted in the commission of these crimes.

928. While the forcible displacements were part of the VJ and MUP organised campaign, the Chamber is not satisfied beyond reasonable doubt that killings, sexual assaults, or the destruction of religious and cultural property were intended aims of this campaign. Accordingly, although he was aware of VJ members killing Kosovo Albanians in some instances, it has not been proved that Lazarević was aware that VJ and MUP forces were going into the specific crime sites referred to above in order to commit killings, sexual assaults, or the destruction of religious and cultural property. Consequently, in Lazarević's case, the mental element of aiding and abetting has not been established in relation to counts 3, 4, and 5.

929. The Chamber notes here that, in making its findings in relation to the responsibility of Lazarević, it has had regard to all the relevant evidence in relation to Lazarević, including that which supports his plea of not guilty and his own evidence denying any responsibility for events that are the subject of the Indictment. However, the Chamber finds that these denials are overwhelmed in some cases by the evidence identified above that it has accepted and that paints a clear picture of the practical assistance, encouragement, and moral support that Lazarević gave to the perpetrators of some of the underlying offences.

930. The Trial Chamber therefore finds that it has been established beyond reasonable doubt that Vladimir Lazarević is responsible for aiding and abetting, under Article 7(1) of the Statute, the crimes in the following locations:

- Peć/Peja
  - Peć/Peja town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Dečani/Deçan
  - Beleg—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Đakovica/Gjakova
  - Đakovica/Gjakova town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Korenica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dobroš/Dobrosh—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ramoc—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Meja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
- Other villages in the Reka/Caragoj valley—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Prizren
  - Pirane/Pirana—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Orahovac/Rahovec
  - Celina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Srbica/Skenderaj
  - Turićevac/Turiçec—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Izbica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Tušilje/Tushila—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ćirez/Qirez—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Priština/Prishtina
  - Priština/Prishtina town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Gnjilane/Gjilan
  - Žegra/Zhegra—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Vladovo/Lladova—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Prilepnica/Përlepnica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Kačanik/Kaçanik
  - Kotlina/Kotllina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Kačanik/Kaçanik—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dubrava/Lisnaja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity.

931. In respect of the crimes proved to have been committed for which Lazarević has not been held responsible as an aider and abettor, the Chamber finds that he also did not plan, instigate, or order them.

c. Superior responsibility

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-13/1-A
		Date:	5 May 2009
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Acting Registrar: **Mr. John Hocking**

Judgement of: **5 May 2009**

PROSECUTOR
V.
MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN

PUBLIC

JUDGEMENT

The Office of the Prosecutor:
Ms. Helen Brady
Mr. Paul Rogers
Mr. Marwan Dalal
Ms. Kristina Carey
Ms. Najwa Nabti
Ms. Kyle Wood
Ms. Nicole Lewis

Counsel for Veselin Šljivančanin:
Mr. Novak Lukić and Mr. Stéphane Bourgon

Counsel for Mile Mrkšić:
Mr. Miroslav Vasić and Mr. Vladimir Domazet

Chamber".[35] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in the *Kupreškić et al.* case, according to which:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[36]

15. The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[37] However, since the Prosecution bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction.[38] An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[39]

16. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[40] Arguments of a party which do not have the

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[35] *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19; *Krnojelac* Appeal Judgement, para. 11; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64. *See* also *Seromba* Appeal Judgement, para. 11; *Nahimana et al.* Appeal Judgement, para. 14; *Muhimana* Appeal Judgement, para. 8; *Kamuhanda* Appeal Judgement, para. 7; *Kajelijeli* Appeal Judgement, para. 5; *Ntakirutimana* Appeal Judgement, para. 12; *Musema* Appeal Judgement, para. 18.

[36] *Kupreškić et al.* Appeal Judgement, para. 30.

[37] *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 13; *Blagovević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14. *See* also *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 13.

[38] *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Krnojelac* Appeal Judgement, para. 14.

[39] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14.

[40] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11; *Blaškić* Appeal Judgement, para. 13. *See* also *Seromba* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 6, citing *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.

potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[41]

17. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[42] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[43]

18. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[44]

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[41] *Orić* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11. *See* also *Seromba* Appeal Judgement, para. 12; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Ntagerura et al.* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 6, citing *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.

[42] *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; Practice Direction on Appeals Requirements, para. 4(b). *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

[43] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 43, 48. *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura et al.* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.

[44] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 12; *Brđanin* Appeal Judgement, para. 16; *Stakić* Appeal Judgement, paras 11, 13; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 47-48. *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 17; *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, paras 9-10; *Ntagerura et al.* Appeal Judgement, paras 13-14; *Kajelijeli* Appeal Judgement, paras 6, 8; *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-13/1-T
		Date:	27 September 2007
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: **Mr Hans Holthuis**

Judgement of: **27 September 2007**

PROSECUTOR

v.

MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Marks Moore
Mr Philip Weiner
Mr Bill Smith
Mr Vincent Lunny
Ms Meritxell Regue
Mr Alexis Demirdjian

Counsel for the Accused:

Mr Miroslav Vasić and Mr Vladimir Domazet for Mile Mrkšić
Mr Borivoje Borović and Ms Mira Tapušković for Miroslav Radić
Mr Novak Lukić and Mr Momčilo Bulatović for Veselin Šljivančanin

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for in the Statute, which are later perpetrated.[1908] Such planning need only be a feature which contributes substantially to the criminal conduct.[1909] As regards the *mens rea*, the accused must have acted with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan.[1910]

(c) Instigating

549. The term "instigating" has been defined to mean "prompting another to commit an offence."[1911] Both acts and omissions may constitute instigating, which covers express and implied conduct.[1912] There must be proof of a nexus between the instigation and the perpetration of the crime, which is satisfied where the particular conduct substantially contributed to the commission of the crime. It need not be proven that the crime would not have occurred without the instigation.[1913] As regards the *mens rea*, it must be shown that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed as a result of that instigation.[1914]

(d) Ordering

550. The *actus reus* of "ordering" requires that a person in a position of authority instructs another person to commit an offence.[1915] Closely related to "instigating", this form of liability additionally requires that the accused possess the authority, either *de jure* or *de facto*, to order the commission of an offence.[1916] That authority may reasonably be implied from the circumstances.[1917] Further, there is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.[1918] With regard to the *mens rea,* the accused must have intended to bring about the commission of the crime, or have been aware of the substantial likelihood that a crime would be committed as a consequence of the execution or implementation of the order.[1919]

[1908] *Brđanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443; *Kordić* Appeals Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
[1909] *Kordić* Appeals Judgement, para 26; *Limaj* Trial Judgement, para 513.
[1910] *Kordić* Appeals Judgement, para 31.
[1911] *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeals Judgement, para 27; *Kordić* Trial Judgement, para 387; *Limaj* Trial Judgement, para 514.
[1912] *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.
[1913] *Kordić* Appeals Judgement, para 27.
[1914] *Kordić* Appeals Judgement, para 32.
[1915] *Kordić* Appeals Judgement, para 28, citing *Kordić* Trial Judgement, para 388; *Semanza* Appeals Judgement, para 361.
[1916] *Brđanin* Trial Judgement, para 270.
[1917] *Brđanin* Trial Judgement, para 270; *Limaj* Trial Judgement, para 515.
[1918] *Kordić* Trial Judgement, para 388; *see* also *Blaškić* Trial Judgement, para 281: *Limaj* Trial Judgement, para 515; with respect to proving an order by circumstantial evidence, *see* also *Galić* Appeals Judgment, paras 170 -171.
[1919] *Blaškić* Appeals Judgement, para 42; *Kordić* Appeals Judgement, para 30; *Brđanin* Trial Judgement, para 270.

UNITED
NATIONS

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

Case No. IT-98-34-A

Date: 3 May 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 May 2006**

PROSECUTOR

v.

MLADEN NALETILIĆ, *a.k.a.* "TUTA"
VINKO MARTINOVIĆ, *a.k.a.* "ŠTELA"

JUDGEMENT

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter M. Kremer
Ms. Marie-Ursula Kind
Mr. Xavier Tracol
Mr. Steffen Wirth

Counsel for Naletilić and Martinović:

Mr. Matthew Hennessy and Mr. Christopher Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

43. In the part of its Opening Statement related to the charges on torture and willfully causing great suffering (Counts 9 to 12) of the Indictment, the Prosecution made no specific reference to these incidents.[127]

44. For these reasons, the Appeals Chamber finds that Martinović was not provided with sufficiently clear and consistent information that would have put him on notice of the incident of beatings in July or August 1993 for which he was found responsible.

45. For its findings on the incident involving the "Professor", the Trial Chamber relied on the testimonies of Witnesses II and OO.[128] In the summary of Witness II in the Prosecution Chart of Witnesses and List of Facts, the incident involving the "Professor" is not mentioned, nor is any reference made to Counts 9 to 12 or paragraph 49 of the Indictment.[129] The summary of Witness OO, however, explicitly refers to paragraph 49 of the Indictment, which alleges that Martinović beat prisoners in his area of command. The summary specifies the victim's identity as "the Professor" and states that the victim was beaten by Martinović until he collapsed after which Martinović put him in a garbage can.[130] These details were specifically reiterated by the Prosecution in its Opening Statement.[131] Although no exact date is provided, the Appeals Chamber considers that the rather detailed information otherwise provided was sufficient to put Martinović on notice of what specific incident was being alleged. Thus, the defect in the Indictment was cured with respect to this incident by the provision of timely, clear and consistent information.

46. With respect to the incident involving a prisoner called Tsotsa, the Trial Chamber relied on the evidence of Witness Y.[132] The summary of Witness Y in the Prosecution Chart of Witnesses does not mention beatings administered by Martinović.[133]

47. The victim, Tsotsa, is not mentioned elsewhere in the Prosecution Chart of Witnesses. No reference to this incident was made in the Prosecution Opening Statement.[134] Martinović was thus not put on notice of the incident of beatings involving a prisoner called Tsotsa.

48. For the foregoing reasons, the Appeals Chamber sets aside the findings that Martinović was responsible for the incident in July or August 1993 as well as for the incident involving a prisoner

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[127] T. 1849-1853.
[128] Trial Judgement, para. 386, fn. 1010.
[129] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 45.
[130] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 22-23.
[131] T. 1851.
[132] Trial Judgement, para. 388.
[133] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 41.
[134] T. 1804-1860. Examples of alleged beatings administered by Martinović are given by the Prosecution at T. 1851-1853.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No. Date: Original:	IT-03-68-T 30 June 2006 English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Hans Henrik Brydensholt
Judge Albin Eser

Registrar: **Mr. Hans Holthuis**

Judgement of: **30 June 2006**

PROSECUTOR

v.

NASER ORIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Jan Wubben
Ms. Patricia Viseur Sellers
Mr. Gramsci Di Fazio
Ms. JoAnne Richardson
Mr. José Doria

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. John Jones

the commission of the principal crime(s) must either be instigated or otherwise aided or abetted, and (iii) with regard to the participant's state of mind, the acts of participation must be performed with the awareness that they will assist the principal perpetrator in the commission of the crime.[733] Noting that the meaning and contents of these elements in the case law of the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR") are partly described in different terms, the Trial Chamber will state its position as far as it may become relevant to rule on the crimes charged in the Indictment.

1. Instigation

(a) *Actus Reus*

270. With regard to the participant's conduct,[734] instigating is commonly described as 'prompting' another to commit the offence.[735]

271. On the one hand, this has to be more than merely facilitating the commission of the principal offence, as it may suffice for aiding and abetting.[736] It requires some kind of influencing the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the crime. This does not necessarily presuppose that the original idea or plan to commit the crime was

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Trial Judgement"), para. 267; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement"), para. 38; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement"), paras 116, 120; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement"), para. 378; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement, 22 January 2003 ("*Kamuhanda* Trial Judgement"), para. 589; *Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-T, Judgement, 15 July 2004 ("*Ndindabahizi* Trial Judgement"), para. 456. The same requirement of a completed principal crime applies with regard to aiding and abetting: *see Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 165; *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić* Trial Judgement"), para. 161; *Brđanin* Trial Judgement, para. 271.

[733] When taking steps (i) and (ii) together as constituting the stage of *actus reus* and step (iii) as the stage of *mens rea*, one can also speak of a "two-stage test": *Kayishema* Trial Judgement, para. 198; *Kayishema* Appeal Judgement, para. 186.

[734] *See* step (ii), para. 269 *supra*.

[735] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 27, upholding *Kordić* Trial Judgement, para. 387; *Blaškić* Trial Judgement, para. 280; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement"), para. 601; *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-T, Trial Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"), paras 243, 252; *Prosecutor v. Mladen Naletilić (aka "Tuta") and Vinko Martinović (aka "Štela")*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 60; *Brđanin* Trial Judgement, para. 269; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj* Trial Judgement"), para. 514; *Akayesu* Trial Judgement, para. 482; *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement"), para. 762; *Kamuhanda* Trial Judgement, para. 593; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 17 June 2004 ("*Gacumbitsi* Trial Judgement"), para. 279. Although differently phrased, the Trial Chamber in *Bagilishema* case speaks of "urging and encouraging", which is obviously meant in the same sense: *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement"), para. 30; *see also Semanza* Trial Judgement, para. 381.

[736] *See* para. 282 *infra*.

generated by the instigator. Even if the principal perpetrator was already pondering on committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator is an '*omnimodo facturus*' meaning that he has definitely decided to commit the crime, further encouragement or moral support may merely, though still, qualify as aiding and abetting.[737]

272. On the other hand, although the exertion of influence would hardly function without a certain capability to impress others, instigation, different from 'ordering', which implies at least a factual superior-subordinate relationship,[738] does not presuppose any kind of superiority.

273. Instigation can be performed by any means, both by express or implied conduct,[739] as well as by acts or omissions,[740] provided that, in the latter case, the instigator is under a duty to prevent the crime from being brought about.[741] As regards the way in which the perpetrator is influenced, different from 'incitement' to commit genocide (Article (4)(3)(c) of the Statute),[742] instigation to the crimes included in the Statute needs neither be direct[743] and public[744] nor require the instigator's presence at the scene of the crime.[745] Thus, instigating influence can be generated both face to face and by intermediaries as well as exerted over a smaller or larger audience, provided that the instigator has the corresponding intent.[746]

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[737] *See* para. 281 *supra.*
[738] *Blaškić* Trial Judgement, paras 268, 281.
[739] *Blaškić* Trial Judgement, paras 270, 277, 280; *Brđanin* Trial Judgement, para. 269; *Limaj* Trial Judgement, para. 514.
[740] *Blaškić* Trial Judgement, paras 270, 280; *Kordić* Trial Judgement, para. 387; *Naletilić* Trial Judgement, para. 60; *Brđanin* Trial Judgement, para. 269; *Limaj* Trial Judgement, para. 514; *Kamuhanda* Trial Judgement, para. 593. *See also Kajelijeli* Trial Judgement, para. 762, referring to *Semanza* Trial Judgement, para. 381 where this position however is not explicitly stated.
[741] The requirement of a 'duty to act', which the offender must have derelicted in order to be held criminally liable for omission, appears to be considered as so obvious that it is rarely explicitly mentioned when judgements speak of 'acts and omissions' as a way of committing a crime without any differentiation, as *e.g.*, in the reference in fn. 740 *supra.* Even where a "culpable omission" is supposed to require "an act that was mandated by a rule of criminal law", as done in *Tadić* Appeal Judgement, para. 188, it seems to refer only to omission by a principal offender, as *e.g.*, *Limaj* Trial Judgement, para. 509. There is no doubt, however, that participation presupposes a duty to act in the same way as commission by omission as correctly stated in *Rutaganda* Trial Judgement, para. 41.
[742] *See Musema* Trial Judgement, para. 120.
[743] *Kayishema* Trial Judgement, para. 200; *Semanza* Trial Judgement, para. 381; *Kajelijeli* Trial Judgement, para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.
[744] The Trial Chamber in the *Akayesu* case, although not yet with certainty, suggested this position: *see Akayesu* Trial Judgement, para. 481. The Appeal Chamber in the same case clarified this position: *see Akayesu* Appeal Judgement, paras 471 *et seq.*, 478, 483. *See also Kajelijeli* Trial Judgement, para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.
[745] *Kayishema* Trial Judgement, paras 200 *et seq.*
[746] *See* para. 279 *infra.*

(b) Nexus Between the Instigation and the Principal Crime

274. The necessary link between the instigating conduct[747] and the principal crime committed,[748] commonly described as 'causal relationship',[749] is not to be understood as requiring proof that, in terms of a '*condicio sine qua non*', the crime would not have been committed without the involvement of the accused.[750] Because the commission of a crime may depend on a variety of activities and circumstances, it suffices to prove that the instigation of the accused was a substantially contributing factor for the commission of the crime.[751] If no such effect is present, as in particular in the case of an '*omnimodo facturus*',[752] there may still be room for liability for aiding and abetting.[753]

275. To some degree differing from this position, the Prosecution contends that the conduct of the Accused was a "clear and contributing factor" of the commission of the crime.[754] To the contrary, the Defence submits that the conduct of the Accused must have had a "direct and substantial effect" on the perpetration of the crime.[755]

276. The Trial Chamber will follow neither of the theories put forward by the parties. Whereas, on the one hand, not any contributing factor can suffice for instigation, as it must be a substantial one, on the other hand, it needs not necessarily have direct effect, as prompting another to commit a crime can also be procured by means of an intermediary.

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[747] *See* step (ii), para. 269 *supra*.
[748] *See* step (i), para. 269 *supra*.
[749] *Blaškić* Trial Judgement, para. 280; *Kordić* Trial Judgement, para. 387. In the same sense, the Trial Chamber in the *Brđanin* case speaks of 'nexus': *see, e.g., Brđanin* Trial Judgement, para. 269. The Trial Chambers of the ICTR appear to opt for 'causal connection': *see, e.g., Bagilishema* Trial Judgement, para. 30; *Semanza* Trial Judgement para. 381; *Kajelijeli* Trial Judgement para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.
[750] *Kordić* Trial Judgement, para. 387; *Kvočka* Trial Judgement, para. 252; *Naletilić* Trial Judgement, para. 60; *Brđanin* Trial Judgement, para. 269; *Kordić* Appeal Judgement, para. 27.
[751] *Kordić* Appeal Judgement, para. 27; *Limaj* Trial Judgement, para. 514; *Bagilishema* Trial Judgement, para. 30; *Kamuhanda* Trial Judgement, para. 590; *see also Kamuhanda* Appeal Judgement, para. 65, stating that "a certain influence" enjoyed by the accused in the community was not considered sufficient.
[752] *See* 271 *supra*.
[753] *See* 281 *infra*.
[754] Prosecution Pre-Trial Brief, para. 94. Probably to the same effect, some Trial Chambers required a "clear contributing factor": *see, e.g., Blaškić* Trial Judgment, paras 270, 277; *Kvočka* Trial Judgment, para. 252; *Brđanin* Trial Judgment, para. 269. However the Trial Chamber in the *Kordić* case merely demanded that "the contribution of the accused in fact had an effect on the commission of the crime": *see Kordić* Trial Judgement, para. 387
[755] *Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, Defence Pre-Trial Brief Pursuant to Rule 65*ter*(F) ("Defence Pre-Trial Brief"), Annex I, Element 1.3.1.3. The requirement of direct and substantial effect seems endorsed in *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 ("*Kayishema* Appeal Judgement"), para. 185; *Tadić* Trial Judgement, para. 692; *Ndindabahizi* Trial Judgement, para. 466.

(c) *Mens Rea*

277. With regard to the usual description of the instigator's *mens rea*,[756] further clarification is required. Whereas the Trial Chamber in the *Kamuhanda* case was satisfied with the 'knowledge' of the instigator that his acts assisted in the commission of the crime,[757] the Trial Chamber in the *Bagilishema* case required that the instigator 'intended' that the crime be committed.[758] Further, while according to the Trial Chamber in the *Kordić* case, the instigator must have "directly intended" to provoke the commission of the crime,[759] for the Trial Chamber in the *Blaškić* case it would not matter whether the instigator "directly or indirectly intended" the crime in question be committed.[760] Again different, whereas the Trial Chamber in the *Semanza* case required the participant to act both "intentionally *and* with the awareness"[761] that he is influencing the principal perpetrators to commit the crime,[762] the Trial Chambers in the *Kvočka*,[763] *Naletilić*,[764] *Brđanin*[765] and *Limaj*[766] cases, found it sufficient that the instigator either "intended to provoke or induce the commission of the crime *or* was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts."[767] Although the Appeals Chamber in the *Blaškić* case reached the same result with regard to 'ordering', it still opened new grounds by requiring for intention, in addition to the cognitive element of knowledge, some sort of acceptance of the final effect (or outcome or result). This volitional element is present if a person, in ordering an act, is aware that the execution of the order will result in a crime, because then he must be regarded as accepting that crime.[768] The same conclusion was also drawn by the Appeals Chamber in the *Kordić* case[769] with regard to instigation.

278. The position of the Parties also differs on the issue of *mens rea*: whereas the Prosecution is satisfied if the instigator was aware that the commission of the crime would likely be the

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[756] *See* step (iii), para. 269 *supra*.
[757] *Kamuhanda* Trial Judgement, para. 599; *see also Kayishema* Trial Judgement, para. 198, speaking of the "awareness by the actor of his participation in the crime".
[758] *Bagilishema* Trial Judgement, para. 31.
[759] *Kordić* Trial Judgement, para. 387. *See also Kordić* Appeal Judgement, para. 29, rephrasing that "the perpetrator acted with direct intent in relation to his own ?...ğ instigating ?...ğ".
[760] *Blaškić* Trial Judgement, para. 278.
[761] Italics added.
[762] *Semanza* Trial Judgement, para. 388, referring to other judgements, all of which, however, do not phrase it in the same way: *see Kayishema* Appeal Judgement, para. 186; *Kayishema* Trial Judgement, para. 201; *Bagilishema* Trial Judgement, para. 32. *See also* fn. 757 *supra*.
[763] *Kvočka* Trial Judgement, para. 252.
[764] *Naletilić* Trial Judgement, para. 60.
[765] *Brđanin* Trial Judgement, para. 269.
[766] *Limaj* Trial Judgement, para. 514.
[767] *Kvočka* Trial Judgement, para. 252 (italics added).
[768] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), paras 41, 42.
[769] *Kordić* Appeal Judgement, paras 32, 112.

consequence of his conduct,[770] the Defence requires that the Accused 'intended' to prompt another person to commit the crime.[771]

279. Considering this development in the interpretation of the instigator's *mens rea* in light of the type and seriousness of crimes over which the Tribunal has jurisdiction, the Trial Chamber holds that individual criminal responsibility both for the commission of, and the participation through, instigation requires intention. The Trial Chamber further holds that intention contains a cognitive element of knowledge and a volitional element of acceptance, and that this intention must be present with respect to both the participant's own conduct and the principal crime he is participating in. This means that, first, with regard to his own conduct, the instigator must be aware of his influencing effect on the principal perpetrator to commit the crime, as well as the instigator, even if neither aiming at nor wishing so, must at least accept that the crime be committed. Second, with regard to the principal perpetrator, the instigator must be both aware of, and agree to, the intentional completion of the principal crime.[772] Third, with regard to the volitional element of intent, the instigator, when aware that the commission of the crime will more likely than not result from his conduct, may be regarded as accepting its occurrence.[773] Although the latter does not require the instigator precisely to foresee by whom and under which circumstances the principal crime will be committed nor that it would exclude indirect inducement, the instigator must at least be aware of the type and the essential elements of the crime to be committed.[774]

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[770] Prosecution Pre-Trial Brief, para. 93.
[771] Defence Pre-Trial Brief, Annex I, Element 1.3.1.5.
[772] This requirement of the instigator's 'double intent' with regard to both his own influencing the principal perpetrator and that person's intentional commission of the crime, does not mean, however, that the instigator would also have to share a 'special intent' as it may be required for the commission of certain crimes, such as genocide with regard to "destroying, in whole or in part, an ethnical group" (Article 4 (1) of the Statute). Although this specific aspect, which was addressed in the *Semanza* case as well as in the *Ntakirutimana* case, may not become relevant with regard to the crimes at stake in this case, it should not be confused with the ordinary 'double intent' that the instigator must have with regard to his own conduct and that of the principal: *see Semanza* Trial Judgement, para. 388; *Ntakirutimana* Appeal Judgement, para. 494 *et seq.*
[773] This position includes *dolus eventualis*, if understood as requiring the instigator to reconcile himself with the inducing effect of his conduct as assumed by the Appeal Chamber in *Blaškić* case, while mere recklessness would not suffice if the instigator did not expect and/or accept the conscious risk of his conduct: *see Blaškić* Appeal Judgement, paras 27, 34 *et seq.* The conceptual distinction between these mental states needs no further elaboration here as long as instigation is considered to require both a cognitive element of awareness and a volitional element of acceptance of the crime inducing effect of the instigator's conduct: *see Blaškić* Trial Judgement, para. 267.
[774] *Kamuhanda* Trial Judgement, para. 599. For similar knowledge requirements in case of aiding and abetting, *see* para. 288 *infra.*

UNITED
NATIONS

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

Case No. IT-05-88-T

Date: 10 June 2010

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: **Mr. John Hocking**

Judgement of: **10 June 2010**

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC REDACTED

JUDGEMENT
Volume I

Office of the Prosecutor
Mr. Peter McCloskey

Counsel for the Accused
Mr. Zoran Živanović and Ms. Mira Tapušković for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Christopher Gosnell and Ms. Tatjana Čmerić for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

instigating, if the crime, which the accused is charged with instigating, was not actually committed.[3322]

(c) Ordering

1010. Ordering requires that an accused instructed another person to engage in an act or omission[3323] with the intent that a crime be committed in the realisation of that act or omission,[3324] or with the awareness of the substantial likelihood that a crime would be committed in the realisation of that act or omission.[3325]

1011. The *Blaškić* Appeals Chamber held that "an individual who orders an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the order's execution, may be liable under Article 7(1) for the crime of persecutions."[3326]

1012. The Prosecution need not demonstrate that a formal superior-subordinate relationship existed between the accused and the individual committing the crime.[3327] Instead, it must merely put forth "proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order."[3328] The accused need not give the order directly to the person committing the crime,[3329] and the order need not be in writing or in any particular form.[3330]

1013. While the Prosecution need not prove that the crime at issue would not have been committed absent the accused's order, the Trial Chamber agrees with the ICTR Appeals Chamber that the order must have had "a direct and substantial effect on the commission of the illegal act."[3331] The

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[3322] This conclusion has been explicitly stated by several Trial Chambers, *see, e.g.*, *Orić* Trial Judgement, para. 269 fn. 732; *Brdanin* Trial Judgement, para. 267; *Galić* Trial Judgement, para. 168. *See also Mpambara* Trial Judgement, para. 18.

[3323] *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28. *See also Semanza* Appeal Judgement, para. 361.

[3324] *Kordić and Čerkez* Appeal Judgement, para. 29. *See also Ntagerura et al.* Appeal Judgement, para. 365.

[3325] *Galić* Appeal Judgement, para. 152; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, paras. 41–42.

[3326] *Blaškić* Appeal Judgement, para. 166. *See also Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.

[3327] *Galić* Appeal Judgement, para. 176. *See also Semanza* Appeal Judgement, para. 361; *Kamuhanda* Appeal Judgement, para. 75. (In contrast to superior responsibility under Article 7(3), an accused may incur liability for ordering even though he did not enjoy effective control over the person ordered, *Kamuhanda* Appeal Judgement, para. 75.)

[3328] *Semanza* Appeal Judgement, para. 361. *See also Galić* Appeal Judgement, para. 176; *Kamuhanda* Appeal Judgement, para. 75; *Kordić and Čerkez* Appeal Judgement, para. 30.

[3329] *Strugar* Trial Judgement, para. 331; *Brdanin* Trial Judgement, para. 270; *Naletilić and Martinović* Trial Judgement, para. 61; *Kordić and Čerkez* Trial Judgement, para. 388.

[3330] *Kamuhanda* Appeal Judgement, para. 76.

[3331] *Ibid.*, para. 75. *See also Strugar* Trial Judgement, para. 332; *Galić* Trial Judgement, para. 169.

Case No. IT-04-74-PT

IN TRIAL CHAMBER I

Before:
Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphons Orie

Registrar:
Mr Hans Holthuis

Decision:
18 October 2005

PROSECUTOR

v.

JADRANKO PRLIC
BRUNO STOJIC
SLOBODAN PRALJAK
MILIVOJ PETKOVIC
VALENTIN CORIC
BERISLAV PUSIC

DECISION ON PROSECUTION APPLICATION FOR LEAVE TO AMEND THE INDICTMENT AND ON DEFENCE COMPLAINTS ON FORM OF PROPOSED AMENDED INDICTMENT

The Office of the Prosecutor:

Mr Kenneth Scott

Counsel for the Accused:

Mr Michael Karnavas for the accused Mr. Jadranko Prlic
Mr Tomislav Kuzmanovic for the accused Mr. Bruno Stojic
Mr Bozidar Kovacic for the accused Mr. Slobodan Praljak
Ms Vesna Alaburic for the accused Mr. Milivoj Petkovic
Mr Tomislav Jonjic for the accused Mr. Valentin Coric
Mr Fahrundin Ibrisimovic for the accused Mr. Berislav Pusic

Introduction

1. This Trial Chamber ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seized of the "Prosecution's Submission of Proposed Amended Indictment and Application for Leave to Amend" filed on 2 September 2005 ("Application") and to which are attached the "Proposed Amended Indictment" and *ex-parte* confidential supporting material.

2. The Application is made in accordance with the Chamber's Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment dated 22 July 2005 ("22 July 2005 Decision"), in which the Chamber granted in part the Accused's motions on the form of the

supporting material. Finally, the Chamber reaffirms that the Defence had sufficient time to make appropriate comments, if any, within the deadline set.

9. On 17 October 2005, the Petkovic Defence filed the "Addendum to the Response of the Accused Petkovic Defence to the Prosecution's Submission of Proposed Amended Indictment and Application for Leave to Amend, with Necessary introductory Remarks " ("Addendum") whereby it makes arguments concerning the nature of the amendments proposed by the Prosecution which were already raised in the Petkovic Response[5] and submits without further elaboration that the "new supporting material disclosed to the Defence does not support the impugned amendments."[6]

Rule 50 of the Rules

10. The Application is made pursuant to Rule 50 of the Rules of Procedure and Evidence ("Rules") which governs the amendment of indictments. Rule 50 (A) provides modalities concerning the competent judge and time at which an indictment may be amended. Rule 50 (B) expressly addresses the issue of new charges, without specifying whether new charges can only be based upon new facts, and Rule 50 (C) contemplates that the accused may require additional time to prepare for trial as a result of an amendment that involves adding a further count.[7]

11. The first substantive question the rule is concerned with is the type of amendment which may be made to an indictment. The Defence opposes the Prosecution's submission that the Proposed Amended Indictment does not add any new counts or any new "crime base" and that the "crime base" charged in this case is exactly the same, and the same twenty-six counts are charged and that "a motion to amend an indictment may generally be allowed to clarify or further develop the factual allegations found in the confirmed indictment, and to make minor changes to the indictment".[8]

12. In particular, the Defence for the Accused complain that the Proposed Amended Indictment includes new charges because the amendments to paragraphs 27 and 37 of the Indictment are expanding the allegations.[9] The Praljak and Prlic Defence assert that in such a case, the Prosecution must submit supporting material for those new charges to enable the Chamber to establish a *prima facie* case or if the Chamber finds that the assertions in paragraphs 27 and 37 of the proposed amended indictment are not new charges, then the Defence requests the Prosecution to eradicate these assertions which are unfounded and unsupported speculations prejudicial to the Accused.[10]

13. A similar point of contention arose between the parties in the *Halilovic* case and Trial Chamber III reviewed relevant case-law concerning what constitutes a "new charge" and considered that "When considering whether a proposed amendment results in the inclusion of a "new charge," it is appropriate to focus on the imposition of criminal liability on a basis that was not previously reflected in the indictment. ?...g the key question is, therefore, whether the amendment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment".[11] In other words, a new allegation, even without additional factual allegations, which could be the sole legal basis for an accused's conviction is a "new charge" and if a new allegation does not expose an accused to an additional risk of conviction, then it cannot be considered as a new charge.[12]

14. In relation to the addition of new charges even in the absence of new factual or evidentiary material, this has been accepted in other cases before the ICTY and the ICTR.[13] For instance, in the *Naletilic and Martinovic* case, the Trial Chamber agreed to add a new charge of "Dangerous or Humiliating Labour" in the absence of new evidence.[14] In the *Musema* case, the Trial Chamber allowed a new charge of complicity in genocide as an alternative to the existing charge of genocide rather than as an additional count.[15] Also, in the *Niyitegeka* case, the Trial Chamber said that new charges could be added to an indictment to "allege an additional legal theory of liability with no new acts ".[16] In sum, although the case-law of the ICTY and the ICTR on the exercise of the

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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-9-A
		Date:	28 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **28 November 2006**

PROSECUTOR

v.

BLAGOJE SIMI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Barbara Goy
Mr. Steffen Wirth

Counsel for the Appellant:

Mr. Igor Panteli}
Mr. Peter Murphy

which form of joint criminal enterprise is being alleged.[73] The Appeals Chamber considers that failure to specifically plead joint criminal enterprise in the indictment in a case where the Prosecution intends to rely on this mode of liability will result in a defective indictment.[74]

23. When challenges to an indictment are raised on appeal, the indictment can no longer be amended; the Appeals Chamber must thus determine whether the error of having tried the accused on a defective indictment "invalidatFedğ the decision."[75] In making this determination, the Appeals Chamber does not exclude the possibility that, in certain instances, the prejudicial effect of a defective indictment may be "remedied" if the Prosecution provided the accused with clear, timely and consistent information that resolves the ambiguity or clarifies the vagueness, thereby compensating for the failure of the indictment to give proper notice of the charges.[76] Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of the International Tribunal, there can only be a limited number of cases that fall within this category.[77]

24. Whether the Prosecution has cured a defect in an indictment and whether the defect has caused any prejudice to the accused are questions aimed at assessing whether the trial was rendered unfair.[78] In this regard, the Appeals Chamber reiterates that a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused. The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[79] The Appeals Chamber has previously considered whether notice was sufficiently communicated to the Defence through the information provided in the Prosecution's pre-trial brief or its opening statement.[80] The Appeals Chamber has held that in considering such notice, the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case are relevant.[81] The Appeals Chamber recalls that the mere service of witness statements or of

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[73] *Ntagerura et al.* Appeal Judgement, para. 24; *Kvo~ka et al.* Appeal Judgement, para. 28, referring to *Krnojelac* Appeal Judgement, para. 138.
[74] *Gacumbitsi* Appeal Judgement, paras 162-163; *Ntagerura et al.* Appeal Judgement, para. 24; *see Kvo~ka et al.* Appeal Judgement, para. 42.
[75] *Kvo~ka et al.* Appeal Judgement, para. 34, referring to Article 25(1)(a) of the Statute.
[76] *Gacumbitsi* Appeal Judgement, para. 163; *Ntagerura et al.* Appeal Judgement, para. 29; *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvo~ka et al.* Appeal Judgement, para. 33; *see Kupre{ki} et al.* Appeal Judgement, para. 114.
[77] *Kupre{ki} et al.* Appeal Judgement, para. 114. *See* also *Ntakirutimana* Appeal Judgement, para. 472.
[78] *See Ntagerura et al.* Appeal Judgement, para. 30.
[79] *Ntagerura et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 58; *Kupre{ki} et al.* Appeal Judgement, para. 122.
[80] *See e.g. Kordić and Čerkez* Appeal Judgement, para. 169; *Bla{ki}* Appeal Judgement, para. 242; *Kupreškić et al.* Appeal Judgement, paras 117-118.
[81] *Ntakirutimana* Appeal Judgement, paras 27-28; *see Kupre{ki} et al.* Appeal Judgement, paras 119-121.

potential exhibits by the Prosecution pursuant to the disclosure requirements of the Rules does not, however, suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[82] Finally, an accused's submissions at trial, for example the motion for judgement of acquittal, the final trial brief or the closing arguments, may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[83]

25. In considering whether a defect in the indictment has been cured by subsequent disclosure, the question arises as to which party has the burden of proof on the matter.[84] In general, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party. Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver.[85] However, the importance of the right of an accused to be informed of the charges against him and the possibility that he will incur serious prejudice if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal.[86] Where, in such circumstances, an appellant raises a defect in the indictment for the first time on appeal, he bears the burden of proving that his ability to prepare his defence was materially impaired.[87] On the other hand, when an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare a defence was not materially impaired.[88]

C. Whether the indictment was defective

26. The Appellant submits that the Prosecution failed, until after the close of the Prosecution's case, to specify the nature of its case with respect to the alleged basis of individual criminal responsibility under Article 7(1) of the Statute.[89] He recalls that the expression "joint criminal

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[82] *Naletilić and Martinović* Appeal Judgement, para. 27; *Ntakirutimana* Appeal Judgement, para. 27 referring to *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.
[83] *Naletilić and Martinović* Appeal Judgement, para. 27; *Kvočka et al.* Appeal Judgement, paras 52, 53; *Kordić and Čerkez* Appeal Judgement, para. 148.
[84] *Niyitegeka* Appeal Judgement, para. 198.
[85] *Niyitegeka* Appeal Judgement, para. 199 referring to *Kayishema and Ruzindana* Appeal Judgement, para. 91.
[86] *Niyitegeka* Appeal Judgement, para. 200.
[87] *Ntagerura et al.* Appeal Judgement, para. 31; *Kvo~ka et al.* Appeal Judgement, para. 35; *Niyitegeka* Appeal Judgement, para. 200.
[88] *Ntagerura et al.* Appeal Judgement, para. 31; *Kvo~ka et al.* Appeal Judgement, para. 35, *Niyitegeka* Appeal Judgement, para. 200.
[89] Appeal Brief, paras 8, 13, 20.

enterprise in no way demonstrates that the Appellant was not or did not feel prejudiced given the Trial Chamber's assurance that the objection to the indictment would be considered at the time of Judgement. The Appellant had good grounds for not doing so. In the Appeals Chamber's opinion, the Appellant's "silence" after the filing of the Rule 98*bis* Response, denounced by the Prosecution during the Appeal Hearing, cannot be held against him.

71. The Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial.[232] An accused cannot be expected to engage in guesswork in order to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the Prosecution has failed to make its case clear. Furthermore, the Appeals Chamber reiterates that if indeed it became clear to the Trial Chamber that this was a case of joint criminal enterprise at the time of the third amendment to the indictment in December 2001,[233] when seised of the Appellant's objection to the Prosecution's Motion to Amend the Third Amended Indictment[234] the Trial Chamber was under the obligation to ensure that the Appellant was sufficiently informed of the exact charges against him such that he had an opportunity to conduct investigations and prepare his defence.[235] Any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated.

72. The Appeals Chamber considers that the fact that the Appellant did not seek to recall Prosecution witnesses or ask for an adjournment does not demonstrate that he did not suffer prejudice.

73. Therefore, the Appeals Chamber finds that the Prosecution has not discharged the burden of demonstrating that the Appellant's ability to prepare his defence was not materially impaired by its failure to plead the Appellant's participation in a joint criminal enterprise.

F. Conclusion

74. The Appeals Chamber emphasises that the defect of the indictment in the present case is not a minor one, but rather lies at the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case against him. The Prosecution should have specifically pleaded participation in a joint criminal enterprise in the indictment so as to

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[232] *Naletili} and Martinovi}* Appeal Judgement, para. 25; *Kvo~ka et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 26; *Niyitegeka* Appeal Judgement, para. 194; *Krnojelac et al.* Appeal Judgement, para. 132 referring to *Kupre{ki} et al.* Appeal Judgement, para. 92; *Kupre{ki} et al.* Appeal Judgement, para. 92.
[233] Trial Judgement, para. 154.
[234] *See* Joint Defense Response of 11 December 2001, paras 10 -24.
[235] *See* para. 44 *supra.*

properly inform the Appellant of the charges against him. If such a fundamental defect can be held to be harmless in certain circumstances, it would only be through demonstrating that the accused's ability to prepare his defence was not materially impaired.[236] In the absence of such a showing here, the Appeals Chamber concludes that the trial was rendered unfair. Accordingly, the Appeals Chamber allows the Appellant's first and second grounds of appeal and sets aside the Appellant's conviction under Article 7(1) of the Statute for committing persecutions by way of his participation in a joint criminal enterprise under Count 1 of the Fifth Amended Indictment.

[236] *Kupre{ki} et al.* Appeal Judgement, para. 122.

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

Case No. IT-01-42-T

Date: 31 January 2005

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Judgement of: **31 January 2005**

PROSECUTOR

v.

PAVLE STRUGAR

JUDGEMENT

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

VII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE ACCUSED

A. Ordering

1. Law

331. This form of liability requires that at the time of the offence, an accused possessed the authority to issue binding orders to the alleged perpetrator. A formal superior-subordinate relationship between the person giving the order and the one executing it is not a requirement in itself, nor need the order be given in writing, or in any one particular form, or directly to the individual executing it.[998] The existence of an order may be proven through direct or circumstantial evidence.[999]

332. As this form of liability is closely associated with "instigating," subject to the additional requirement that the person ordering the commission of a crime have authority over the person physically perpetrating the offence, a causal link between the act of ordering and the physical perpetration of a crime, analogous to that which is required for "instigating",[1000] also needs to be demonstrated as part of the *actus reus* of ordering.[1001] The Chamber further accepts that, similar to instigating,[1002] this link need not be such as to show that the offence would not have been perpetrated in the absence of the order.

333. With regard to the requisite *mens rea*, it must be established that the accused in issuing the order intended to bring about the commission of the crime,[1003] or was aware of the substantial likelihood that it would be committed in the execution of the order.[1004] The *mens rea* of the accused need not be explicit, it may be inferred from the circumstances.[1005] Indeed, as *mens rea* is a state of

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[998] *Kordić* Trial Judgement, para 388.

[999] *Blaškić* Trial Judgement, para 281; *Kordić* Trial Judgement, para 388. In this respect, ordering "may be inferred from a variety of factors, such as the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops, the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of the operations, the *modus operandi* of similar acts, the officers and staff involved, the location of the superior at the time and the knowledge of that officer of criminal acts committed under his command", *Galić* Trial Judgement, para 171.

[1000] *Kordić* Trial Judgement, para 387; *Kvočka* Trial Judgement, para 252; *Naletilić* Trial Judgement, para 60.

[1001] The Appeals Chamber has recently stated that a person "who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed *in the execution of that* order, has the requisite *mens* rea for establishing liability under Article 7(1) pursuant to ordering", *Blaškić* Appeals Judgement, para 42 (emphasis added). In this respect, the Chamber refers to the ILC Commentary on Article 6 of the Draft Code of Crimes Against The Peace and Security of Mankind, dealing with the responsibility of a superior for ordering the commission of a crime, which states that "a corps commander must be held responsible for the acts of his subordinate commander *in carrying out his* orders...", Report of the International Law Commission on the work of its 48th session, UN doc.A/51/10, p 36.

[1002] *Kordić* Trial Judgement, para 387; *Kvočka* Trial Judgement, para 252; *Naletilić* Trial Judgement, para 60. The "but for" test was not adopted in this respect.

[1003] *Kvočka* Trial Judgement, para 252.

[1004] *Blaškić* Appeals Judgement, para 42; *Kordić* Appeals Judgement, para 30.

[1005] *Galić* Trial Judgement, para 172. *Čelebići* Trial Judgement, para 328.

UNITED
NATIONS

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

Case No.: IT-94-1-T*bis*-R117
Date: 11 November 1999
Original: English

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Lal Chand Vohrah
Judge Patrick Lipton Robinson

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgment of: **11 November 1999**

PROSECUTOR

v.

DU[KO TADI]

SENTENCING JUDGMENT

The Office of the Prosecutor:
Mr. Upawansa Yapa
Ms. Brenda Hollis
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for Du{ko Tadi}:
Mr. William Clegg
Mr. John Livingston

(b) The Respondent

53. The Respondent submits that the Appellant has failed to provide any basis in fact or law to support his contention that the Trial Chamber erred in its determination of an appropriate sentence or that the sentence was manifestly excessive. Specifically, the Respondent contends that the Appellant has failed to offer any real comparison between the circumstances of his own case and those of other cases determined by the International Tribunal, or to provide any indication from the Sentencing Judgment of 11 November 1999 to demonstrate that the Trial Chamber did not give appropriate consideration to the full range of sentences available. Contrary to the Appellant's submissions, the Respondent contends that the sentence imposed upon the Appellant is entirely consistent with the sentences given to other persons convicted by the International Tribunal.[66]

54. The Respondent further argues that the Appellant's reference to the case law of the Second World War is inapposite, as the sentences handed down by those tribunals were imposed in an entirely different context, and reflect the views on sentencing of that time. The Respondent submits that the appropriate sentence in respect of the Appellant must reflect the values and principles of the international community as they exist today.[67]

2. Discussion

55. In the opinion of the Appeals Chamber, the Trial Chamber's decision, when considered against the background of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda,[68] fails to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.

56. Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when

[66] Response to Appellant's Brief Against Sentencing Judgment of 11 November 1999, p. 9, para. 11; T. 494 (14 January 2000).
[67] *Ibid.*, p. 9, para. 11; T. 496-497 (14 January 2000).
[68] More fully, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.

57. In the circumstances of the case, the Appeals Chamber considers that a sentence of more than 20 years' imprisonment for any count of the Indictment on which the Appellant stands convicted is excessive and cannot stand.

3. Conclusion

58. The Appeals Chamber, revising the Sentencing Judgment of 11 November 1999, imposes a sentence of 20 years for each of Counts 29, 30 and 31 of the Indictment.

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

Case No. IT-94-1-T

Date: 7 May 1997

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Ninian Stephen
Judge Lal Chand Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Opinion and Judgment of: **7 May 1997**

PROSECUTOR

v.

DU[KO TADI] a/k/a/ "DULE"

OPINION AND JUDGMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. William Fenrick
Ms. Brenda Hollis
Mr. Michael Keegan
Mr. Alan Tieger

Counsel for the Accused:

Mr. Michaïl Wladimiroff
Mr. Alphons Orie
Mr. Steven Kay
Ms. Sylvia de Bertodano
Mr. Milan Vujin
Mr. Nikola Kosti}

had been no poison gas or gas chambers in the *Zyklon B* cases, mass exterminations would not have been carried out in the same manner. The same analysis applies to the cases where the men were prosecuted for providing lists of names to German authorities. Even in these cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions.

689. The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.

690. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.

691. However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nürnberg war crimes trials if he is found to be "concerned with the killing". However, the acts of the accused must be direct and substantial.

692. In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

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PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25[8]
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

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8 As amended by resolution RC/Res.6 of 11 June 2010 (adding paragraph 3 *bis*).

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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Date: **16 December 2011**

PRE-TRIAL CHAMBER I

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA

Public Redacted version

Decision on the confirmation of charges

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the truthfulness and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence.

5. Specificity of the Document Containing the Charges

79. The Defence requested that the following words be struck out for lack of specificity where they appear in the DCC as the description of the locations where and dates on which the crimes allegedly occurred:

(i) these locations "include but are not limited to";

(ii) "and neighbouring villages" or "and surrounding villages", and

(iii) "the village of W673 and W674 [...] in Masisi territory in the second part of 2009".[143]

80. The Prosecution responded that use of the words "include but not limited to" allows it to prove other events to establish the same crime, provided that adequate notice has been given to the Defence prior to the confirmation hearing, and assured the Chamber that similar notice would be given prior to the trial.[144] The Prosecution further submitted that it is permissible to charge a pattern of crimes in a defined period and geographical area and to include specific incidents as examples.[145] Finally, the Prosecution argued that redaction of information relating to the date and location of the events which allegedly took place in the village of Witness 673 and Witness 674 was authorised by the Single Judge on 20 May 2011[146] and that the lack of specificity in relation to these events is necessary for the protection of the witnesses in question.[147]

81. Pursuant to articles 61(3)(a) and 67(1)(a) of the Statute, rule 121 (3) of the Rules and regulation 52 of the Regulations of the Court ("Regulations"), the suspect must be informed in detail of the facts underlying the charges against him or her at least 30 days

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[143] ICC-01/04-01/10-305.
[144] ICC-01/04-01/10-T-6-Red2-ENG, at pp. 22-3.
[145] *Ibid.*, at p. 23.
[146] ICC-01/04-01/10-167.
[147] ICC-01/04-01/10-T-6-Red2-ENG, at p. 27.

before the commencement of the confirmation hearing. Article 74(2) of the Statute[148] makes it clear that it is those facts and circumstances that form the basis for the charges confirmed at the pre-trial stage which are determinative of "the factual ambit of the case for the purposes of the trial and circumscribe [the trial] by preventing the Trial Chamber from exceeding that factual ambit".[149] In light of the above provisions, and the mentioned precedent, the approach adopted by the Prosecution is untenable insofar as it attempts to reserve for the Prosecution the right to expand the factual basis of the charges through the addition of entirely new material facts after the charges have been confirmed.

82. The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.

83. For these reasons, the Chamber finds that the words "include but are not limited to" are meaningless in the circumstances of this case. Accordingly, the Chamber will assess the charges only in relation to the locations specified under each count contained in the DCC.

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[148] The Trial Chamber's decision "shall not exceed the facts and circumstances described in the charges and any amendments to the charges".
[149] ICC-02/05-03/09-121-Corr-Red, para. 34.

84. With regard to the Defence challenge to the references to "Busurungi and surrounding villages" and "Busurungi and neighbouring villages", the Chamber finds the description of the location in question to be sufficiently precise, particularly given the relatively narrow geographic area involved and the fact that the relevant details as to the wider locations surrounding Busurungi are to be found when the DCC is read in conjunction with the LoE.[150]

85. In relation to the last Defence challenge, the Chamber recalls that redaction of information from witness statements must not be "prejudicial to or inconsistent with the rights of the suspect, including the right to a fair and impartial trial."[151] The information which has been provided to the Defence in relation to the location and dates of the incidents in question is limited to "the village of W673 and W674 in Masisi territory, during the second half of 2009." In the view of the Chamber, such broad geographic and temporal parameters are not sufficiently detailed to inform the Suspect as to the location and dates of the alleged crimes. As highlighted above, the location and dates of the alleged crimes are material facts which, pursuant to regulation 52(b) of the Regulations, must be pleaded in the DCC. In these circumstances, the Suspect cannot be said to have been informed of the charge against him within the meaning of article 67(1)(a) of the Statute. Accordingly, the Chamber will not analyse those crimes alleged to have occurred in "the village of W673 and W674 in Masisi territory, during the second half of 2009".

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[150] For example, EVD-PT-OTP-00703, Statement of Witness 562, at 1094-1095, 1100-1101 and 1104-1105.

[151] ICC-01/04-01/10-167, para. 6; and ICC-01/04-01/07-475, *The Prosecutor v. Germain Katanga*, Appeals Chamber, "Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"", 13 May 2008, para. 72, wherein the Appeals Chamber found that the following factors should be considered in determining whether the rights of the suspect will be restricted only as far as strictly necessary: a) [...] whether an alternative measure short of redaction is available and feasible in the circumstances. If a less restrictive protective measure is sufficient and feasible, that measure should be chosen; b) [...] the non-disclosure is sought at the stage of the proceedings in relation to the hearing to confirm the charges [...]; c) [...] the relevance of the information in question to the Defence. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake; d) if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.

FOR THESE REASONS, the Chamber, by majority, the Presiding Judge, Sanji M. Monageng, dissenting, hereby

DECLINES to confirm the charges against Mr Callixte Mbarushimana;

DECLARES that the Warrant of Arrest against Mr Callixte Mbarushimana ceases to have effect in its entirety;

DECIDES that Mr Callixte Mbarushimana shall be released from the custody of the Court immediately upon the completion of the necessary modalities;

ORDERS the Registrar to make necessary arrangements for the release of Mr Callixte Mbarushimana pursuant to rule 185 of the Rules;

ORDERS the Registrar to arrange for an expedited translation of the present Decision into French; and

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Original: **English**

No.: **ICC-01/04-01/10**
Date: **22/07/2011**

PRE-TRIAL CHAMBER I

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR
v. CALLIXTE MBARUSHIMANA

Public Document
URGENT

Defence request to strike out portions of the document containing the charges for lack of specificity

Source: **Defence for Mr. Callixte Mbarushimana**

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence
Mr. Nicholas Kaufman
Ms. Yaël Vias-Gvirsman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms. Silvana Arbia

Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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1. The Defence awaits the decision of the learned Pre-Trial Chamber on the requests to exclude the document containing the charges ("DCC") and the list of evidence ("LoE") on the basis of inappropriate form and late submission.

2. Should the Pre-Trial Chamber, nevertheless, permit the Prosecution to rely on the DCC as it stands, the Defence requests that certain portions thereof be altered or struck out for lack of specificity. In addition, the Defence requests that those elements of the LoE supporting the non-specific elements of the DCC be struck out.

3. The DCC is the principal document informing a suspect of the nature of the charges against him. On the basis of this document, the suspect is able to formulate his defence bringing evidence where necessary to counter accusations brought by the Prosecution as to his participation in criminal activity at a certain place and at a certain time. Requiring the suspect to mount a defence without his being informed of the exact nature of the charges against him would infringe his right under Article 67(1)(a) of the Rome Statute *"to be informed promptly and in detail of the nature, cause and content of the charge..."* and would render the proceedings wholly unfair.

4. In the *Krnojelac Decision as to Form*, the International Criminal Tribunal for the Former Yugoslavia found as follows: *"an indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which it was committed"*.[1] Although the Rome Statute does not provide for the notion of an indictment, the DCC is, similarly,

[1] IT-97-25-PT, T. Ch II, 24 Feb 1999 at paragraph 12 as cited in Kip & Sluiter; "The International Criminal Court for the former Yugoslavia 1997-1999".

intended to be the means to ensure that a suspect is not surprised by factual allegations against which he will be unprepared to defend himself. While the Defence recognises that the degree of particularity required at the International Criminal Tribunals is, by nature of its material jurisdiction, less stringent than would be expected in domestic jurisdictions, this does not mean that a suspect should be charged with default or "catch-all" crimes lacking both specific location and time.

5. Specificity as to the times and locations of alleged crimes in the case against Mr. Mbarushimana is essential. As will be recalled, the Prosecution alleges that Mr. Mbarushimana was jointly conspiring to use the FDLR in order to "*create a humanitarian catastrophe*" in the Kivus. The North and South Kivus, however, encompass a vast geographical territory in which many militias were fighting at the time of the offences alleged. Mass criminality has been reported in this region as having been committed by FADRC, PARECO, Mai-Mai and CNDP forces, among others, throughout 2009.[2] Without being informed of the town or specific location of alleged crimes, Mr. Mbarushimana has no ability whatsoever to present evidence (**as is his right at the confirmation hearing**) in support of the assertion that the alleged perpetrators were troops other than those of the FDLR.

6. In light of all the aforementioned, the Defence reiterates it request set out in paragraph 2 above and petitions the learned Pre-Trial Chamber to alter the language of every one of the 13 counts listed in the DCC as follows:

[2] *c.f.*; Prosecution list of evidence: HRW, UNJHRO, ICG reports and others.

a) striking out the words *"These locations include but are not limited to:"* replacing them with *"These locations are:"*;

b) striking out the words *"Busurungi and neighbouring villages"* or *"Busurungi and surrounding villages"* replacing them with *"Busurungi"*, and;

c) striking out *"the village of W673 and W674"* and *"in Masisi territory in the second part of 2009"*.

Nicholas Kaufman

Nicholas Kaufman
Counsel for Callixte Mbarushimana

Jerusalem, Israel
Friday, July 22, 2011

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Original: **English**

No.: **ICC-01/09-01/11**
Date: **23 January 2012**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

Public Document

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute

> The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

97. Further, regulation 52 of the Regulations states that the document containing the charges shall include, *inter alia*, "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".

98. The Chamber considers that the Amended DCC complies with the requirements set out in the Statute and the Rules. The Chamber is of the view that the requirement, whereby the Amended DCC shall contain a "sufficient legal and factual basis", pursuant to regulation 52 of the Regulations, implies that the DCC may not be exhaustive in all the information in support of the charges. However, it has to provide the Defence with a sufficiently clear picture of the facts underpinning the charges against the Suspects and in particular in relation to the crimes, the dates and locations of their alleged commission. A reading of the Amended DCC in light of the evidence disclosed by the Prosecutor, the list of this evidence and the In-Depth Analysis Chart puts the Defence in position to acquire sufficient knowledge of the nature of the crimes charged.[140]

99. With regard to the term 'including' the Chamber considers, on the basis of the Prosecutor's submissions at the confirmation of charges hearing and in the Amended DCC, that the use of the expression "in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town" shall be understood as encompassing exclusively these locations. This does not mean, however, that the Prosecutor is correct, in principle, in using this broad formulation, which might have an impact on expanding the

[140] For an approach along this line see Pre-Trial Chamber II, "Decision on the "Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE" and the "Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute", ICC-01/09-02/11-315, para. 12.

parameters of his case before the Trial Chamber.[141] To the contrary, the Prosecutor should provide a proper degree of specificity in his document containing the charges, which refers to the precise locations of the alleged incidents where crimes took place. Therefore, the Chamber will only assess the evidence with respect to the events that according to the Prosecutor's allegations took place in the locations explicitly referred to in the Amended DCC.

100. As for the charge of "deportation or forcible transfer of population", the Chamber is of the view that this formulation is not prejudicial to the Defence as will be explained in the relevant part dealing with acts constituting crimes against humanity.

101. The Chamber will now turn to alleged defects of the Amended DCC concerning the exclusion of the identities of members, at various levels, of the alleged Network as well as the withholding of the dates of meetings in which the Suspects allegedly participated. With regard to the former, the Chamber considers that this information can be clearly detected from the evidence disclosed to the Defence. There is no requirement for the Prosecutor to spell out the exact composition of the Network in order for the Suspects to challenge the allegations against them. This holds true, *a fortiori*, when other members of the alleged Network are not charged with any crime within the jurisdiction of the Court. As for the redaction of the dates of the preparatory meetings, the Chamber observes that, although information about the exact date of a planning meeting can be of importance to the Defence, the redactions of certain dates within one witness' statement were necessary for security reasons and were authorized under rule 81(4) of the Rules.

102. Moving to the alleged failure of the Prosecutor to specify in the Amended DCC the methods of Mr. Ruto and Mr. Kosgey's essential contributions pursuant to article 25(3)(a) of the Statute, the Chamber underlines that the Prosecutor has duly listed the categories of contributions that Mr. Ruto and Mr. Kosgey are alleged to

[141] See also the findings of Pre-Trial Chamber I in the *Mbarushimana* case, "Decision on the confirmation of charges", ICC-01/04-01/10-465-Red, paras 81-83.

23 October – 6 November 2000
Communication No. 224/98

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Twenty-Eighth Ordinary Session
23 October – 6 November 2000

MEDIA RIGHTS AGENDA
v.
NIGERIA

DECISION

Return Home

BEFORE:	CHAIRMAN: E.V.O. Dankwa VICE CHAIRMAN: K. Rezag-Bara COMMISSIONERS: A. Badawi El Sheikh, Isaac Nguema, N. Barney Pityana, H. Ben Salem, Florence Butegwa, A. Raganayi Chigovera, Vera M. Chirwa, Jainaba Johm
PermaLink:	http://www.worldcourts.com/achpr/eng/decisions/2000.11_Media_Rights_Agenda_v_Nigeria.htm
Citation:	Media Rights Agenda v. Nig., Comm. 224/98, 14th ACHPR AAR Annex V (2000-2001)
Publications:	IHRDA, Compilation of Decisions on Communications of the African Commission On Human and Peoples' Rights Extracted from the Commission's Activity Reports 1994-2001, at 286 (2002); Documents of the African Commission on Human and Peoples' Rights, Vol. 2, at 257 (Malcolm D. Evans & Rachel Murray eds., 2009); (2000) AHRLR 262 (ACHPR 2000)

RAPPORTEUR

25th Ordinary Session: Commissioner Ben-Salem

26th Ordinary Session: Commissioner Ben-Salem

27th Ordinary Session: Commissioner Ben-Salem

28th Ordinary Session: Commissioner Ben-Salem

SUMMARY OF FACTS

1. The communication, which was sent through e-mail is dated 25th May 1998, and was received at the Secretariat on 26th May 1998

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for the reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained.
42. Further to this, the Complainant alleges that until 14 February 1998 (that is, about two months after his arrest) when he was arraigned before a Special Military Tribunal for his alleged involvement in a coup, Mr. Malaolu was neither informed of the reasons for his arrest nor of any charges against him.

43. In its Resolution on the Right to Recourse Procedure and Fair Trial, the Commission had, in expounding on the guarantees of the right to fair trial under the Charter observed thus:

... the right to fair trial includes, among other things, the following:

(b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;

44. The failure and/or negligence of the security agents who arrested the convicted person to comply with these requirements is therefore a violation of the right to fair trial as guaranteed under Article 7 of the Charter.

45. Complainant alleges a violation of article 7 (1) (a) of the African Charter on Human and Peoples' Rights which states:

Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

46. Complainant contends that the decision of the Tribunal which tried and convicted Malaolu is not subject to appeal, but confirmation by the Provisional Ruling Council, the composition of which is clearly partisan. Non-compliance of the competent authorities of Nigeria to this requirement is in breach of the provision of Article 7(1)(a) of the Charter.

47. Complainant alleges a violation of article 7(1) (b) of the Charter which provides that:

Every individual shall have ...the right to be presumed innocent until proven guilty by a competent court or tribunal

The Complainant alleges in this respect that prior to the setting up of the tribunal, the Military Government of Nigeria organised intense pre-trial publicity to persuade members of the public that a coup plot had occurred and that those arrested in connection with it were guilty of treason. In this regard, it alleges further, any possible claim to national security in excluding members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore in breach of the right to fair trial, particularly, the right to presumption of innocence.

48. The Government has not contested the veracity of the Complainant's submissions. In this circumstance, the Commission is obliged to accept this as the

AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA"

Preamble

The American states signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

PART I - STATE OBLIGATIONS AND RIGHTS PROTECTED

CHAPTER I - GENERAL OBLIGATIONS

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

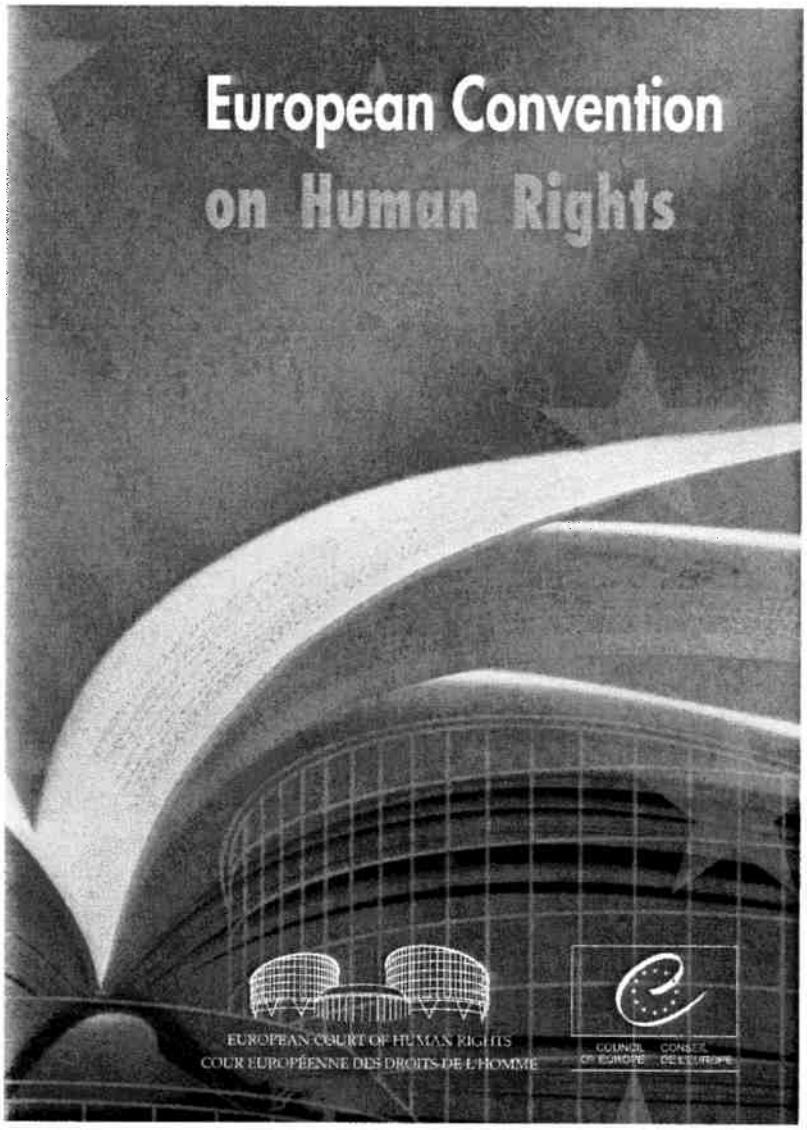
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 10. Right to Compensation

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.


European Convention
on Human Rights
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME
COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

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Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone

WAYNE JORDASH AND SCOTT MARTIN*

Abstract

It was recognized that it was critical to the process of national reconciliation and the maintenance of peace in Sierra Leone that the Special Court for Sierra Leone (SCSL) be a strong and credible court operating in accordance with international standards of justice, fairness, and due process of law. This article assesses the fulfilment of this mandate through an examination of the fairness of the *RUF* trial as illustrated through two issues: the interpretation of the accused's right to be informed of the nature and cause of the charges and the approach taken by the Trial Chamber and the Appeals Chamber in assessing the evidential links between the accused and the crimes pursuant to the joint criminal enterprise (JCE) mode of liability. First, the article discusses the decisions that led to the omission of 250 charges from the indictment and their introduction into the trial through late evidential disclosures after the commencement of the prosecution case. Second, the article examines the way in which the charges, in a majority of cases, were found to be part of a common criminal purpose without a sufficient nexus being established to the accused or any member of the alleged JCE. The article concludes that the judicial approach to these issues abandoned the safeguards contained in the jurisprudence developed at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, giving rise to a trial that failed to adhere to international standards of justice, fairness, and due process, leading to manifestly unjust convictions.

Key words

international criminal law; joint criminal enterprise; membership of a group; right to be informed of charges; Special Court for Sierra Leone

The mandate of the Special Court for Sierra Leone (SCSL) was from conception premised on the completion of fair trials in accordance with international standards of justice. As recognized on 14 August 2000, with the adoption by the UN Security Council of Resolution 1315 as a step towards the creation of the Special Court, it was critical to the process of national reconciliation and the maintenance of peace in

* Wayne Jordash is a UK lawyer based in Doughty Street Chambers, London; he was lead counsel for Issa Sesay in the *RUF* case at the Special Court; co-counsel for Jovica Stanisić at the International Criminal Tribunal for the former Yugoslavia; and co-counsel for Michel Bagaragaza at the International Criminal Tribunal for Rwanda [w.jordash@doughtystreet.co.uk]. Scott Martin is a US lawyer [scottmartin44@gmail.com]. The views expressed herein are solely those of the authors and are not attributable to Doughty Street Chambers.

Sierra Leone that the SCSL be a 'strong and credible court' operating in accordance with 'international standards of justice, fairness and due process of law'.[1] Having begun its trials in 2004, the SCSL could draw on ten years of international criminal jurisprudence from its sister tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Presumably it was this jurisprudence, alongside that reflecting human rights principles as understood in national jurisdictions, which the UN Security Council and the drafters of the court's founding instruments had in mind as defining international standards, reflecting an expectation that the trials would produce just verdicts, where justice was done and seen to be done.

This article assesses the fulfilment of this mandate by examining the trial of ex-members of the Revolutionary United Front (RUF). It focuses on two critical issues: (i) Trial Chamber I's interpretation of an accused's right to be informed of the nature and cause of the charges; and (ii) the approach taken by the Trial Chamber and the Appeals Chamber in assessing the evidential links between the accused and the crimes pursuant to the joint criminal enterprise (JCE) mode of liability. The authors, respectively defence counsel for the first and third accused (Issa Hassan Sesay and Augustine Gbao), conclude that the judicial approach to these issues in the *RUF* trial abandoned the safeguards contained in the jurisprudence developed at the ICTY and the ICTR, giving rise to a trial that failed to adhere to international standards of justice, fairness, and due process, leading to manifestly unjust convictions.

The challenge of trying ex-RUF members alleged to bear the 'greatest responsibility'[2] for crimes committed during the civil war in Sierra Leone ought not to be underestimated, as the rebellion was long and crimes were widespread, and took place in areas with limited contact with the rest of the country, much less the world. Conducting an 11-year campaign from 1991 to 2002 to overthrow a succession of governments, the RUF had deservedly attracted the reputation of a brutal organization preoccupied with committing horrendous crimes against civilians, ranging from senseless murder to sexual violence, mass enslavement, disfiguring physical violence, and the use of child soldiers. Its membership was widely despised and vilified in the national and international media and the perception was that, as a consequence of what was known about the RUF as an organization, the high-ranking commanders had to bear the greatest responsibility for these crimes. The trial of these crimes and individuals in this war-torn and underdeveloped country so soon after the end of the conflict, therefore, presented the most significant logistical and legal challenges for an international or hybrid court.

However, if trials were to be convened of those individuals alleged to be most responsible, it was critical that the SCSL honour its obligation to provide fair trials for all accused. Unfortunately, an examination of the *RUF* trial and the issues that will be dealt with in this article show that both the Trial and Appeals Chambers abandoned international standards of due process, sacrificing the right of the accused

1 UN Doc. S/RES/1315 (2000).

2 Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002 (hereinafter SCSL Statute) Art. I.

to a fair trial in an attempt to overcome the challenges and in pursuit of a successful prosecution.

The first section of this article will discuss Trial Chamber I's approach to the right of the accused to be informed of the nature and cause of the charges and will examine the principal decisions that deprived the *RUF* accused of proper notice of a majority of the charges and the evidence in support. The authors conclude that the approach abandoned the cornerstone principles contained in the ICTY and ICTR jurisprudence, effectively removing the fundamental right and depriving the accused of the opportunity to mount an effective defence.

Section 2 will discuss the approach of the *RUF* Trial Chamber and the Appeals Chamber to the evidential links necessary to convict pursuant to the JCE mode of liability that largely removed the prosecution's obligation to prove a link between the accused and the crimes as a basis for the imputation of criminal liability. While the discussion will (inevitably) critique the SCSL's approach to the prosecution's pleading of a JCE without an unambiguously criminal objective, the discussion will focus on the trial and appellate approach to assessing the criminal responsibility of the JCE members for crimes committed by non-JCE members. In many instances the chambers found the accused responsible for crimes without requiring the establishment of a link showing that the non-JCE members were 'used' to commit the crimes by JCE members in pursuit of their shared common purpose.

The authors conclude that the *RUF* trial process, as a result of the approach taken to these critical procedural and evidential safeguards, undermined or in many instances removed any reasonable opportunity to effectively contest the majority of the charges, resulting in convictions that violated the culpability principle, the principle of legality, and the fair trial rights of the accused.

The authors caution that the legitimacy of international criminal trials rests at least in part on the understanding that the critical objectives underpinning international trials – national reconciliation and the maintenance of peace – depend as much on justice being done and being seen to be done as on the final tally of convictions. In the light of this the *RUF* trial is a worthy subject for the examination of the risks inherent in any international criminal process. It stands as a salutary reminder of the challenges presented by international criminal trials *in situ* and the temptation to adapt or remove procedural safeguards to meet these challenges. This is particularly the case when the hopes for a court rest decisively on the successful prosecution of a mere trio of high-profile accused, as they did in the *RUF* trial. It is in these circumstances that a strict adherence to procedural safeguards is essential to ensure that the presumption of innocence and the prosecution's duty to prove guilt beyond reasonable doubt are rigorously maintained.

1. Denial of the *RUF* accused's right to be informed of the charges

1.1. International standards: prompt and detailed notice

The right to be informed promptly and in detail of the nature and cause of the charges is one of the most fundamental procedural rights of a person facing criminal

prosecution. The right is closely linked to, and perhaps a corollary of, the presumption of innocence, requiring that the prosecution inform the accused of the charges, so that he is able to prepare and present his defence.[3] Accordingly, the Statutes of the SCSL, the ICTY, and the ICTR mirror the major human rights instruments in providing for this guarantee, recognizing the fundamental nature of this right to the maintenance of an effective defence and a fair trial.[4]

As is recognized by prevailing international standards, the notification of the charges must be prompt, intelligible, and formulated with adequate precision.[5] The duty to notify is an active, rather than passive, one and remains the prosecution's continuous duty throughout the course of a trial.[6] An accused must be made aware of the cause (the material facts alleged) and their nature (the legal qualification of those acts) of the charges in the indictment.[7] The 'provision of full, *detailed* information to the defendant concerning the charges against him – and consequently the legal characterization that the court might adopt in the matter – is an essential prerequisite for ensuring that the proceedings are fair'.[8]

The modern jurisprudence at the ICTY and the ICTR has moved decidedly away from the minimalist pleading standards adopted in the early cases such as *Tadić*[9] and *Delalić*[10] and towards a more demanding approach. The general principles today dictate that the indictment must be the 'primary accusatory instrument' and plead with 'sufficient detail the essential aspect of the prosecution case'.[11] The fundamental role of the indictment is to identify each of the essential factual ingredients of the offences.[12] This requires the prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.[13] An accused must be reasonably able to identify the crime and conduct specified in each paragraph of the indictment.[14] The materiality

3 *Babera, Messegue and Jabardo v. Spain*, Series A, No. 146 (App nos. 10588/83; 10589/83;10590/83) ECHR 6 December 1988 (1989) 11 EHRR 360, para. 77.

4 SCSL Statute, *supra* note 2, Art. 17(4)(a); Updated Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/RES/1660(2006), Art. 21(4)(a); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighbouring States, UN Doc. S/RES/955 (1994), Art. 20(4)(a).

5 See, e.g., *Brozicek v. Italy*, (1989) 12 EHRR 371; *Mattoccia v. Italy*, (2003) 36 EHRR 47.

6 *D. Monguya Mbenge et al. v. Zaire*, Communication No. 16/1977 (views adopted on 25 March 1983), in UN Doc. GAOR, A/38/40; *Mattoccia v. Italy*, (App. no. 23969/94) ECHR 25 July 2000, para. 65.

7 *I.H. and others v. Austria*, (App. no. 42780/98) ECHR 20 April 2006, para. 30; *Mattoccia v. Italy*, (App. no. 23969/94) ECHR 25 July 2000, para. 59; and *Kamasinski v. Austria*, (App. no. 9783/82) ECHR 19 December 1989, para. 79.

8 *Soering v. UK*, (App. no. 14038/88) ECHR 7 July 1989, para. 113 (emphasis added); see also, e.g., *Einhorn v. France*, (App. no. 71555/01) ECHR 16 October 2001.

9 *Prosecutor v. Tadić* Appeal Judgement, Case No. IT-94-1-A, 15 July 1999 (hereinafter *Tadić* Appeal Judgement).

10 *Prosecutor v. Delalić et al.*, Decision on the Accused Mućić's Motion for Particulars, Case No. IT-96-21-T, 26 June 1996.

11 *Prosecutor v. Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, 23 October 2001 (hereinafter *Kupreškić* Appeal Judgement), para. 114.

12 *Prosecutor v. Krnolejac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, 24 February 1999, para. 12, n. 19.

13 *Kupreškić* Appeal Judgement, *supra* note 11, para. 88.

14 *Prosecutor v. Hadžihasanović*, Decision on Motion of the Accused Hadžihasanović Regarding the Prosecution's Examination of Witnesses on Alleged Violations Not Covered by the Indictment, Case No. IT-01-47-T, 16 March 2004, at 4.

of a fact depends on the nature of the case at hand[15] – that is, the form of participation alleged in the indictment and the proximity of the accused to the underlying crime.[16]

Where the prosecution alleges that the accused carried out the act(s) in question (personal responsibility), the jurisprudence requires the prosecution to set out 'with the greatest precision' the identity of the victim, the place and approximate date of the alleged criminal act(s), and the means by which they were committed.[17] In cases where the accused is not alleged to have carried out the acts underlying the crimes charged, but may have planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation, or execution of a crime or where superior responsibility is charged, the jurisprudence of the ICTY and the ICTR allows for a lower standard of specificity.[18] However, in all categories the prosecution has an obligation to identify the 'particular acts' or 'the particular course of conduct' of the accused which has given rise to the charges in the indictment.[19] The fundamental question in determining whether an indictment is pleaded with sufficient particularity is whether the accused persons have enough detail to prepare their defence.[20] It is, accordingly, not permissible to delay disclosure of the factual components of the offence(s) until the disclosure of the prosecution's pre-trial brief or the service of the evidence.[21]

Finally, and of particular relevance to the *RUF* trial process, the ICTY and the ICTR pleading standards require that additional material facts 'factually and/or legally distinct from any already alleged in the indictment' that create a basis for conviction must be considered to be a new charge and therefore before forming part of the case against the accused must be subject to an application to amend the indictment.[22]

1.2. The *RUF* trial and the right to be informed: departure from international standards

1.2.1. *The* RUF *indictment*

The indictments at the SCSL were not intended to accord with the modern pleading standards at the ICTY and the ICTR. A comparison of the indictments with those at the ICTY shows that the degree of particularization of the charges and the

15 *Prosecutor v. Rutaganda*, Appeal Judgement, Case No. ICTR-96-3-A, 26 May 2003 (hereinafter *Rutaganda* Appeal Judgement), para. 301; *Prosecutor v. Ntagerura*, Trial Judgement, Case No. ICTR-99-46-T, 25 February 2004, para. 31.

16 *Kupreškić* Appeal Judgement, *supra* note 11, para. 89; *Prosecutor v. Karemera*, Decision on Defects in the Form of the Indictment, ICTR Trial Chamber III, Case No. ICTR-98-44-R72, 5 August 2005, para. 17.

17 *Prosecutor v. Blaškić* Appeal Judgement, Case No. IT-95-14-A, 29 July 2004 (hereinafter *Blaškić* Appeal Judgement), para. 213; *Kupreškić* Appeal Judgment, *supra* note 11, para. 89.

18 *Blaškić* Appeal Judgement, *supra* note 17, para. 211; *Rutaganda* Appeal Judgement, *supra* note 15, para. 301.

19 *Blaškić* Appeal Judgement, *supra* note 17, para. 213.

20 *Kupreškić* Appeal Judgement, *supra* note 11, para. 88.

21 *Prosecutor v. Brđanin and Talić*, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, Case No. IT-99-36-PT, 23 February 2001, para. 9; see also *Prosecutor v. Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, Case No. ICTR-2001-73-PT, 30 September 2005, para. 2.

22 *Prosecutor v. Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, Case No. IT-01-48-PT, 17 December 2004, para. 30; see also *Prosecutor v. Prlić et al.*, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, Case No. IT-04-74-PT, 18 October 2005 (hereinafter *Prlić* Decision), para. 13.

specification of material facts was markedly less than those authorized in the very early cases at the ICTY, such as *Tadić*[23] and *Delalić*.[24] David Crane, the original Chief Prosecutor at the SCSL, described the indictments as a form of 'notice pleading',[25] whereby he intentionally provided fewer details than the prevailing standard at the ICTY and the ICTR. Mr Crane proffered the following justification for that departure:

> Early on in the prosecution plan, I wanted to change the way persons accused of international crimes are charged. My review of indictments coming out of the other tribunals showed that those indictments were too long, inaccurate, and fraught with potential legal landmines. This had to change. What I finally decided was to make the indictment simple and direct. As a prosecutor in the United States, I firmly believe in the principle that if you plead it, you have to prove it. Thus we did something that had never been done before – notice pleading. The indictments are shorter, tighter, and cleaner, yet give the indictees the degree of notice required for them to understand the crimes they committed, where they committed them, and when . . . I firmly believe that this is the appropriate direction that the drafting of indictments needs to take.[26]

The *RUF* indictment alleged that the three accused, Sesay, Kallon, and Gbao, were responsible pursuant to all forms of responsibility (including participation in crimes pursuant to a JCE) for 18 counts of crimes against humanity, war crimes, and other serious violations of international law in seven different provinces of Sierra Leone over a period of five years.[27] The following is a representative sample of the pleading standards referred to by Mr Crane and characteristic of the *RUF* indictment. Regarding Count 13: enslavement as a crime against humanity, the indictment alleged the following against Sesay, the first accused in the *RUF* trial:

> Between about April 1997 and December 1999, ISSA HASSAN SESAY held the position of the Battle Group Commander, subordinate only to the RUF Battle Field Commander, SAM BOCKARIE . . . , the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC [Armed Forces Revolutionary Council], JOHNNY PAUL KOROMA. During the Junta regime, ISSA HASSAN SESAY was a member of the Junta governing body. From early 2000 to about August 2000, ISSA HASSAN SESAY served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.[28]
>
> ISSA HASSAN SESAY, . . . by [his] acts and omissions, [is] individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in this indictment which crimes . . . [he] . . . planned, instigated, ordered, committed, or in whose planning, preparation, or execution . . . [he] . . . otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which each Accused participated or were a

23 *Prosecutor v. Tadić*, Indictment (amended), Case No. IT-94-1-I, 14 December 1995.

24 *Prosecutor v. Delalić*, Decision on the Accused Mucić's Motion for Particulars, Case No. IT-96-21-T, 26 June 1996.

25 D. Crane, 'Symposium: International Criminal Tribunals in the 21st Century: Terrorists, Warlords, and Thugs', (2006) 21 *American University International Law Review* 505; see also T. Cruvellier and M. Wierda, *The Special Court for Sierra Leone: The First Eighteen Months* (2004), International Center for Transitional Justice (ICTJ) Case Study Series, available at www.ictj.org/images/content/1/0/104.pdf (visited 20 April 2010), 5.

26 Crane, *supra* note 25.

27 *Prosecutor v. Sesay, Kallon and Gbao*, Corrected Amended Consolidated Indictment, SCSL-04-15-PT, 2 August 2006 (hereinafter *RUF* Indictment).

28 Ibid., paras. 21, 22.

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> reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated.[29]
>
> Count 13: Abductions and Forced Labour
> 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. The abductions and forced labour included the following:[30]
>
> Kailahun District: At all times [November 1996 to 2001] relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour.[31]
>
> By their acts or omissions in relation to these events [the accused], pursuant to Article 6.1 . . . are individually responsible for the crimes alleged below:
> Count 13: Enslavement, a CRIME AGAINST HUMANITY, punishable under Article 2.c of the Statute.[32]

This form of pleading was replicated throughout the indictment, with each count, as above, consisting of a formulaic legal categorization alongside an equally formulaic iteration that the accused was individually criminally responsible or responsible as a superior under Articles 6(1) and 6(3) of the Court's statute. Crucially, the indictment failed to adhere to the requirement that the material facts of the alleged conduct of the accused (his acts and omissions), or of those alleged to have committed the crimes, be specified, even where a course of conduct is alleged.[33] Instead, the counts consisted of generalized paragraphs listing the crimes committed by the combined forces of two rebel armies (the RUF and AFRC) on specified towns and villages. The material facts particularized failed to explain the proximity of the accused to the underlying crimes, other than describing their *de jure* status in one of the armies. There was nothing to situate the accused in relation to the events, whether through the particularization of behaviour in relation to the respective army or through their approximate location at the time of the generalized criminal events. The indictment failed to describe any detail concerning the manner in which the attacks on the named towns and villages had allegedly taken place – whether through the enunciation of any narrative of the alleged factual events, a description of an identifiable sub-group, an approximation of the numbers participating in the crimes, or the names of *any* direct perpetrators, subordinate commanders, or victims.

As is plain from an examination of the pleading of Count 13 (the example provided above), the outline of mass enslavement alleged to have been committed pursuant to every mode of criminal responsibility over thousands of square kilometres during a period of almost five years, without the particularization of the accused's or his subordinate's acts, could not satisfy the requirement that the indictment allow for the effective preparation of the defence.

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29 Ibid., para. 38.
30 Ibid., para. 69.
31 Ibid., para. 74.
32 Ibid., para. 76.
33 *Kupreškić* Appeal Judgement, *supra* note 11, para. 98.

While the prosecution could have remedied some of the deficiencies in the indictment by providing the required specificity in its pre-trial brief, the problem was instead exacerbated. The pre-trial brief contained only a small fraction of the charges pursued and these were particularized as broad, generalized descriptions of alleged criminal conduct by unknown members of the two armies, again without the alleged proximity of the accused to the underlying crimes or their actual conduct being specified, except in a minority of the crimes alleged. For example, the further particularization of the accused's responsibility for crimes under Count 13 in Kailahun (see example above) was limited to the following additional facts: (i) the forced labour of 200 civilians in Pendembu; (ii) the abduction and detention of 500 civilians in Kailahun District; (iii) the forcing of civilians to carry loads; (iv) the forcing of civilians to work on Bockarie and Kallon's rice farms; and (v) the forcing of civilians to carry out domestic labour.[34]

A full appreciation of the extent of the deficiency of the notice to the accused can be obtained from a comparison of the combined notice provided in Count 13 with the convictions entered against the three *RUF* accused in relation to the Kailahun District. In relation to Count 13 – enslavement, as a crime against humanity – the charges found proven included, *inter alia*, enslavement of (i) 300 civilians on two farms in 1996 and 1998 in Giema; (ii) civilians on a farm located between Benduma and Buedu after February 1998; (iii) civilians on a farm from December 1999 to 2001; (iv) civilians on a farm owned by Sesay and one owned by Gbao in Giema from 1996 to 2001; (v) civilians in 1996, 1997, and 2001 in all ten districts of the Luawa Chiefdom in Kailahun District forced to contribute farm products and fish for the rebel army and carry these goods from Giema to Kailahun town; (vi) 500 civilians regularly forced to trade on behalf of the rebels between 1996 and 2001 in Kailahun province; (vii) civilians forced to mine for diamonds from 1998 to 1999 in Giema, Yandawahun, Mafindo (Mafindor), Nyandehun, Jojoima, Yenga, Jabama and Golahun; and (viii) civilians forced to undergo military training at the Bayama training base and at the Bunumbu training base (Camp Lion).[35]

As is clear, a multitude of new and factually distinct charges (including those listed above, such as forced military training and forced fishing) and the material facts (underpinning the charges) were added after the prosecution case began. The new charges – significantly transforming the previously notified case – were notified to the accused through the prosecution's disclosure of evidence.

This pattern was replicated across the 18 counts of the indictment, leading to conviction of the three accused on more than 250 additional charges, none of which had been particularized in the indictment, the prosecution pre-trial brief, or the

34 *Prosecutor v. Sesay, Kallon and Gbao*, Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73*bis*) of 13 February 2004, Case No. SCSL-04-15-PT, 1 March 2004; see also *Prosecutor v. Sesay, Kallon and Gbao*, Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time for Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004, SCSL-04-15-PT, 21 April 2004, para. 8.

35 *Prosecutor v. Sesay, Kallon and Gbao*, Judgement, Doc. No. SCSL-04-15-T-1234, 2 March 2009 (hereinafter *RUF* Trial Judgement), paras. 1417–1443.

prosecution's opening statement.[36] These charges included a variety of modes of liability (including personal or direct commission) and an extensive range of crimes (including acts of terror, collective punishment, unlawful killing, physical violence (including amputations), sexual violence, pillage, and the use of child soldiers) alleged to have been committed in previously notified locations, as well as new towns and villages throughout Sierra Leone. Further, as explained below, this abandonment of international pleading standards – allowing the vast majority of the charges and material facts to be disclosed for the first time in the evidence rather than in the indictment – was compounded by a judicial acceptance that this evidence could be disclosed *at any time* during the two-year prosecution case.

This unprecedented departure from international standards was the result of an erroneous approach to two legal standards: first, the narrow exception to the specificity requirements at the ICTY and the ICTR, allowing non-essential information to be omitted in cases of mass criminality (such as the identity of victims) and, second, the requirement that evidence in support of the charges be disclosed promptly and prior to the commencement of the case. The reinterpretation of these requirements created a process which allowed charges and material facts to be disclosed in supplemental witness statements just before being adduced in the courtroom, without any judicial inquiry into the potential prejudice arising from the late disclosure. These two errors will be discussed below.

1.2.2. The SCSL's new 'exceptions' to the indictment specificity requirements

The prosecutorial licence to omit charges and evidence from the indictment was born at an early stage in the *RUF* proceedings. At the pre-trial stage of the proceedings the *RUF* Trial Chamber laid the foundations for the departure from international standards by ruling that the *RUF* indictment[37] was valid as to form, despite the fact that it deprived the defence of an opportunity to conduct effective preparation.[38] In response to defence arguments that the indictment was vague and failed to particularize the charges and material facts adequately, the Trial Chamber reinterpreted the salient jurisprudence from the ICTY and the ICTR, leading to an approach that allowed the prosecution to omit charges and material facts in cases involving 'mass criminality'.

In articulating a narrow, case-by-case exception to specificity requirements of international indictments, the *Ntakirutimana* case at the ICTR stated that 'there *may be* instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as *the identity of the victims and the dates* for the commission of the crimes"'.[39] This exception is narrow and allows

36 *Prosecutor v. Sesay, Kallon and Gbao*, Sesay Final Trial Brief, SCSL-04-15-PT, 1 August 2008, at Annexes A1–A3 for comprehensive listing of the pre-trial notice and the additional and amended charges.

37 The indictments of the three accused were subsequently joined.

38 See generally *Prosecutor v. Sesay*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Doc. No. SCSL-2003-05-PT, 13 October 2003 (hereinafter *Sesay* Form of the Indictment Decision).

39 *Prosecutor v. Ntakirutimana*, Judgement, ICTR-96-10 & 96-17-T, 21 February 2003 (hereinafter *Ntakirutimana* Trial Judgement), para. 49 (emphasis added); see also *Kupreškić* Appeal Judgement, *supra* note 11, para. 89, and

non-essential information such as the names of victims and the precise date of the crime in incidents of mass criminality to be omitted from the indictment.

Purporting to rely on the Trial Chamber in *Prosecutor* v. *Ntakirutimana*, the *RUF* Trial Chamber stated that the 'sheer scale of the alleged crimes *made* it impracticable to require a high degree of specificity in such matters as the identity of the victims and the time *and place* of the events'.[40] This blanket articulation and widening of the exception to the specificity requirements was employed to hold the indictment valid as to form, even though its contents provided no meaningful insight into the scale of the distinct criminal events or the impracticability that prevented the prosecution from being able to provide a single name of any perpetrator or victim, the specific location of any crime within a named village or town, or, indeed, any time frame of any crime other than measured in months. Compounding the problem at the final judgment stage, the Trial Chamber, instead of conducting an analysis of the timing of the disclosure of more than 250 additional charges (and an equal number of associated material facts), declined to address the prejudice to the accused, ruling again that the indictment remained valid as to form.[41] The Trial Chamber ruled that in addition to the 'criminogenic setting' of the alleged crimes (the Chamber's presumed exception to the specificity requirements), it had also taken into account 'the particular context in which the *RUF* trial unfolded', namely 'the fact that the investigations and trials were intended to proceed as expeditiously as possible in an immediate post-conflict environment'.[42] Endorsing this approach, the Appeals Chamber upheld this further exception, noting that the Trial Chamber had, nonetheless, stated that the indictment must still be sufficiently detailed to allow the accused to prepare his defence fully and that the prosecution 'may not rely on weaknesses of its own investigation to justify its failure to plead material facts in an Indictment' and therefore no error of law arose in taking this additional factor into consideration.[43]

The Appeals Chamber failed to appreciate, however, that to allow the omission of charges and material facts from an indictment on the basis of a 'need' to start the trials in a post-conflict environment is tantamount to an invitation for the prosecution to rely on its own investigative weaknesses. Worse, it sacrifices an accused's defence to those considerations.

Thus neither the Trial Chamber nor the Appeals Chamber dealt with the critical issue: the obvious contradiction between the admonishment that the accused must be able to prepare his defence fully and the prejudice to that entitlement arising from a Kafkaesque situation whereby the majority of the hundreds of charges and material facts remain hidden until part-way through the prosecution case. Neither did either Chamber seek to explain how the civil war in Sierra Leone differed in terms of its 'mass criminality' from the genocide in Rwanda or the war in the

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Prosecutor v. Sesay, Kallon and Gbao, Appeal Judgement, Case No. SCSL-04-15-A, 26 October 2009 (hereinafter *RUF* Appeal Judgement), para. 52.

40 *Sesay* Form of the Indictment Decision, *supra* note 38, para. 7(xi) (emphasis added).

41 *RUF* Trial Judgement, *supra* note 35, paras. 471, 472.

42 Ibid., para. 330.

43 *RUF* Appeal Judgement, *supra* note 39, para. 60.

former Yugoslavia, both of which also required investigations in the aftermath of a destructive war. In fact, the first indictment at the ICTY was issued in November 1994, while the conflict was still ongoing.[44] Nevertheless, the international standards employed in these institutions mandate that the prosecution provide the accused with the essential aspects of its case (the charges and the material facts) prior to its commencement, irrespective of the undoubted investigative difficulties.

1.2.3. The RUF *test for the admissibility of new evidence*

The notice requirements at the ICTY and the ICTR mandate that evidence in support of the charges is disclosed within a reasonable time, and before the trial begins.[45] Further, an accused is entitled to proceed on the basis that the pre-trial brief contains a count-by-count summary of the evidence and this is the only case which he has to meet in relation to the offence(s) charged. If the prosecution intends to elicit evidence in relation to a particular count additional to that summarized in its pre-trial brief, specific notice must be given to the accused.[46] As determined by the ICTY and the ICTR, this is essential to ensure adequate notice and the validity and legitimacy of the liability assessments required, and to enable the essential task of ensuring that the charges are supported by evidence beyond reasonable doubt before finding the accused guilty of serious violations of international law.[47]

Instead of abiding by these essential prerequisites, Trial Chamber I in the *RUF* trial created an innovative test to permit all new evidence produced by prosecution investigations to be admissible at any time during the prosecution case. The comparative assessment conducted at the ICTY and the ICTR and underpinning the disclosure provisions, designed to assess whether evidence disclosed during trial and sought to be relied on by the prosecution is new, was abandoned. This assessment required the Chamber to conduct an examination of the evidence and the notice provided in the prosecution disclosure, including a comparative analysis of the previous notice provided through the indictment, the pre-trial brief, and previous witness statements. The allegedly new evidence had to be assessed to ascertain the extent to which it altered 'the incriminating quality of the evidence of which the Defence already has notice'.[48] In the event that the evidentiary material was found to be new the Chamber had to determine what period of notice was adequate to give the defence time to prepare.[49] In the event that the new material was determined as constituting a new charge, the prosecution should have been prohibited from relying on it or required to apply to amend the indictment allowing the question

44 Case of Dragan Nikolić. See ICTY website 'ICTY Timeline', available at www.icty.org/action/timeline/254. The initial conflict in Rwanda ended in July 1994 and the first trial started in January 1997: *Prosecutor v. Akayesu*, Indictment, Case No. ICTR-96-4-PT, 12 February 1996.

45 See, e.g., *Prosecutor v. Nyiramusuhuko*, Decision on Defence Motion for Disclosure of Evidence, Case No. ICTR-97-21-T, 1 November 2000, paras. 38–39.

46 *Prosecutor v. Brđanin*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-T, 26 June 2001, para. 62.

47 *Prosecutor v. Brđanin*, Appeal Judgement, Case No. IT-99-36-A, 3 April 2007 (hereinafter *Brđanin* Appeal Judgement), para. 424 (internal citations omitted).

48 See, e.g., *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP, ICTR-98-41-T, 18 November 2003, para. 6.

49 Ibid.

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of any resulting prejudice to the defence to be assessed before it formed part of the case.[50]

Instead of abiding by these essential safeguards the *RUF* Trial Chamber created a novel admissibility test that allowed all evidence, whether constituting a new charge or new material or merely supplementary facts, to be defined as *not new* and therefore automatically admissible. Purporting to rely on the ICTY and ICTR jurisprudence, Trial Chamber I decided that evidence which constituted a 'building block constituting an integral part of, and connected with, the same *res gestae* forming the factual substratum of the charges in the Indictment'[51] was 'not new'.[52] The precise meaning of this test or its jurisprudential origins remained unexplained throughout the *RUF* trial process, although the consequences of dividing 'charges' into 'building blocks' and the '*res gestae* forming the factual substratum' became abundantly clear. This threshold test had the effect of inviting the prosecution to re-investigate the case and allowed all the resulting charges and material facts (omitted from the indictment) to be incrementally disclosed to the accused, often just days before each of the 90 prosecution witnesses were called to testify. In short, provided that the additional evidence constituted crimes committed in Sierra Leone during the five-year temporal framework of the indictment, the Chamber's self-fulfilling test deemed it automatically admissible.[53] The implicit invitation of the *RUF* Trial Chamber to the prosecution to remedy their pre-trial investigations, which no doubt had suffered due to a difficult post-conflict environment, was taken up with a degree of enthusiasm leading to the admission of in excess of 250 new charges and vast swathes of fresh evidence in support. Notwithstanding the addition of this volume of new charges, material facts, and evidence (including new allegations of direct and indirect liability for, *inter alia*, unlawful killings, sexual violence, amputations, enslavement, pillage, and the use of child soldiers) and the overwhelming transformation of the original case disclosed prior to the prosecution's opening, all was deemed admissible. Accordingly, in the *RUF* trial there was no proper notice to the accused of these charges or of the evidence. Neither was there any moment in the case when the allegations stopped and the accused could begin answering in possession of full knowledge of the case to be met.[54]

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50 *Prosecutor v. Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, Case No. IT-01-48-PT, 17 December 2004, para. 30; see also *Prosecutor v. Prlić*, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, Case No. IT-04-74-PT, 18 October 2005, para. 13: '[i]f a new allegation does not expose an Accused to an additional risk of conviction, then it cannot be considered as a new charge.'

51 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, Case No. SCSL-04-15-T, 27 February 2006, para. 10; see also *Prosecutor v. Sesay, Kallon and Gbao*, Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041, Case No. SCSL-04-15-T, 20 March 2006, paras. 11, 13.

52 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, Doc. No. SCSL-04-15-T-396, 1 June 2005, paras. 28(iv), 29(vi).

53 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Decision Regarding the Prosecution's Further Renewed Witness List, Doc. No. SCSL-04-15-T-339, 5 April 2005.

54 *Prosecutor v. Delalić*, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, Case No. IT-96-21-T, 19 August 1998, para. 20.

As noted, the Trial Chamber consistently ruled that the evidence was admissible. It defended this decision in part by arguing that the new charges and evidence in support did not 'significantly alter the incriminatory quality of the evidence' already disclosed to the defence.[55] This curious claim was maintained by both the prosecution and the Trial Chamber until the three accused attended their sentencing hearing, wherein the more than 250 new charges (and corresponding convictions) formed a principal justification for lengthy sentences of imprisonment.[56] Evidence that the prosecution and the Trial Chamber had at one point argued did not 'alter the incriminatory quality' of the evidence suddenly formed the foundation of prosecutorial requests for severe sentences ranging from 40 to 60 years' imprisonment.

On appeal, the Appeals Chamber declined to interfere with the Trial Chamber's approach that had led to this obvious unfairness. Instead of addressing the novel pleading and admissibility threshold invented by the Trial Chamber, the Appeals Chamber struck out the defence complaint on a technicality – ruling that a 50-page annex describing more than 250 new charges and evidence was outside the page limit allowed for appeal.[57]

1.3. Conclusion: denial of a fair opportunity to defend the charges

The final tally of new charges introduced into the *RUF* case was in excess of 250, with a corresponding number of new material facts underpinning the new and the previously notified charges, as well as reams of new evidence in support, adduced piecemeal throughout a two-year prosecution case. This incremental disclosure was matched by a correspondingly large number of lost opportunities for the accused to mount an effective defence. Given the prosecution and the Trial Chamber's illogical claim that the material was not new and did not alter the incriminatory quality of the evidence already disclosed, any defence complaint was foreclosed and any remedial action (e.g., the recalling of witnesses) impossible. The right to be informed of the charges through the indictment and the evidence is a fundamental guarantee that enables an accused to prepare his defence under conditions that do not provide the prosecution with an unfair advantage. The approach of the Trial Chamber and the Appeals Chamber in the *RUF* case, by apparent design, handed the prosecution, whose investigation had perhaps been hampered by the immediate post-conflict environment, the opportunity to bolster its case continuously with new charges, material facts, and evidence and mould it around the case as it unfolded in the courtroom. In these conditions an accused cannot have a fair trial, since there is no real opportunity to prepare an effective defence or any reasonable prospect of rebutting the charges.

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55 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, Doc. No. SCSL-04-15-T-396, 1 June 2005, paras. 28(iv), 29(vi).

56 See *Prosecutor v. Sesay, Kallon and Gbao*, Sentencing Judgement, Doc. No. SCSL-04-15-T-1251, 8 April 2009.

57 *RUF* Appeal Judgement, *supra* note 39, para. 44; see also *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Sesay Public Corrected Redacted Grounds of Appeal, 15 June 2009, Annexes A1-A3; Practice Direction on Filing Documents before the Special Court for Sierra Leone, as amended 16 January 2008, Art. 6(f), which states that '[a]ny appendices or authorities do not count towards the page limit'.

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2. IMPUTATION OF CRIMES TO THE *RUF* ACCUSED: ASSESSING THE EVIDENTIAL LINKS BETWEEN THE ACCUSED AND THE CRIMES PURSUANT TO THE JOINT CRIMINAL ENTERPRISE MODE OF LIABILITY

The approach taken by the SCSL judiciary to the assessment of individual liability and the attribution of responsibility through the JCE mode of liability was critical to the *RUF* judgment and its voluminous convictions. The overwhelming majority of the crimes found proven were those found committed pursuant to the JCE mode of liability, including acts of terror, collective punishments, unlawful killings, sexual and physical violence, pillage, and enslavement. The Trial Chamber found that during the junta regime, high-ranking AFRC (a group of former Sierra Leone military who overthrew the government) and RUF members formed a JCE by making a common plan, to begin on 25 May 1997, to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond-mining areas, and that the 'crimes [within 14 counts in the indictment] were contemplated by the participants of the joint criminal enterprise to be within the common purpose'.[58]

This section will discuss the trial and appellate approach to the assessment of evidence in support of the alleged JCE and the attribution of crimes without proof of the required link between the crime or criminal perpetrator and the accused. This discussion will inevitably address the SCSL's approach to the pleading of a JCE without a criminal objective, but its principal focus is an examination of the finding of individual criminal responsibility of JCE members for crimes committed by non-JCE members. It will explore how the various JCE holdings on this critical attribution issue led to convictions in flagrant breach of the culpability principle.

2.1. Abandonment of the ICTY and ICTR approach to joint criminal enterprise: the attribution to the accused of 'contemplated' crimes

The SCSL adopted an unprecedented approach to JCE pleading by approving indictments that failed to articulate a 'common purpose' with an essential shared criminal intent at the core of the alleged enterprise. Although JCE doctrine requires that the prosecution plead, as a material fact, a common purpose that 'amounts to or involves' a crime within the statute of the Court, none of the Special Court indictments pleaded any crime or criminal intent as a *necessary* part of the common purpose.[59] In the *RUF* case, the purpose was the non-criminal act of participating in a rebellion: 'to take any actions necessary to gain and exercise political power and control over the

58 *RUF* Trial Judgment, *supra* note 35, para. 1985.

59 W. Jordash and P. Van Tuyl, 'Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost Its Way at the Special Court for Sierra Leone', (2010) 8 *Journal of International Criminal Justice* 591; see also *Prosecutor v. Brima, Kamara and Kanu*, Further Amended Consolidated Indictment, Case No. SCSL-04-16-I, 18 February 2005 (hereinafter *AFRC* Indictment), para. 34; *RUF* Indictment, *supra* note 27, para. 37; *Prosecutor v. Norman, Fofana and Kondewa*, Consolidated Indictment, Case No. SCSL-03-14-I, 5 February 2004 (hereinafter *CDF* Indictment), para. 19; *Prosecutor v. Taylor*, Second Amended Indictment, Case No. SCSL-03-01-I, 29 May 2007 (hereinafter Original *Taylor* Indictment), para. 33.

territory of Sierra Leone, in particular the diamond mining areas'.[60] In the paragraph following the articulation of this non-criminal objective,[61] the indictments stated that '[t]he crimes alleged in this indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were *either* actions within the joint criminal enterprise *or* were a reasonably foreseeable consequence of the joint criminal enterprise'.[62]

The indictment thereby pleaded all crimes as either within or outside the non-criminal objective, rather than as a necessary part of it. The obvious consequence of this approach is that the common purpose pleaded the alleged criminality of the joint enterprise as optional – that is, a common purpose that alternatively *either* involved crimes within the Statute of the Court *or* did not.

Rather than rectify these defective pleadings, the SCSL judiciary adopted a new interpretation of 'common purpose' that appeared to mean that to be found a JCE member required only proof of participation in a rebellion, a non-criminal pursuit under international criminal law. The Appeals Chamber, reversing a finding by the AFRC Trial Chamber that such a pleading failed to articulate an unambiguous criminal purpose, determined that there was no requirement that a JCE alleges, and a trier of fact finds, a 'necessary relationship between the objective of a common purpose and its criminal means'. It is sufficient that the 'latter are contemplated to achieve the former'.[63]

One effect of the pleading and the Appeals Chamber's 'innovation' was that they removed the prosecution's obligation to prove the foundational elements of a JCE, namely whether a plurality acted together in the implementation of a criminal objective.[64] This question concerns the assessment and identification of specific material elements that demonstrate the existence of an objectively punishable criminal act, precisely determined in time and space.[65] This analysis requires that the trier of fact assess whether the crimes were the product of concerted action – that is, pursuant to the alleged plan – or whether there was another explanation for their commission. This is a necessary step to the next question: whether the accused had carried out acts that significantly contributed to the furtherance of this criminal purpose, with the knowledge that his acts or omissions facilitated the crimes committed as part of the enterprise.[66]

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60 AFRC Indictment, *supra* note 59, paras. 33-34; *RUF* Indictment, *supra* note 27, para. 36; Original *Taylor* Indictment, *supra* note 59, para. 23.

61 M. N. Shaw, *International Law* (2003), 1040, which states that '[w]hether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide. There is no rule against rebellion in international law.'

62 *AFRC* Indictment, *supra* note 59, para. 35; *RUF* Indictment, *supra* note 27, para. 37; Original *Taylor* Indictment, *supra* note 59, para. 24 (emphasis added).

63 *RUF* Appeal Judgement, *supra* note 39, para. 296, quoting *Prosecutor v. Brima, Kamara and Kanu*, Judgement, Case No. SCSL-04-16-675-A, 22 February 2008, paras. 76, 80 (internal citations omitted).

64 *Brđanin* Appeal Judgement, *supra* note 47, paras. 410, 430.

65 *Prosecutor v. Sagahutu et al.*, Decision on Sagahutu's Preliminary, Provisional Release and Severage Motions, Case No. ICTR-00-56-T, 25 September 2002, para. 39.

66 *Prosecutor v. Kvocka et al.*, Trial Judgement, Case No. IT-98-30/1-T, 2 November 2001, para. 312; *Prosecutor v. Kvocka et al.*, Appeal Judgement, Case No. IT-98-30/1-A, 28 February 2005, paras. 99, 263; *Prosecutor v. Brđanin*, *supra* note 47, para. 427.

Conversely the SCSL's JCE allowed a trier of fact to find the existence of a JCE through the identification of mere concerted action in pursuit of a non-criminal objective (taking power over the country through armed rebellion) while contemplating crimes to achieve this objective. Under this interpretation, the *RUF* accused could be found responsible for crimes as part of a plurality engaged in concerted action in furtherance of the crimes and contributing to them *or* being part of a plurality engaged in furtherance of a rebellion and contributing solely to that non-criminal objective. This meant that a JCE could be found to exist without a nexus between the JCE member's concerted action and a crime – other than the crimes being contemplated by them. Logically, in a bloody civil war awash with crimes, the contemplation nexus – that is, thinking about or being aware of the commission of crimes – is automatically satisfied and impossible to disprove.

In this manifestation of a JCE the trier of fact need not examine concerted action in furtherance of crime (including the pattern of crimes) before being satisfied as to the existence of a JCE and before attributing crimes within the JCE. It is sufficient that a plurality engaged in rebellion was prepared to employ the criminal means if the need arose or, even less, that they thought about them ('contemplated it') but rejected the idea on further contemplation. All crime that the trier of fact considers reasonably foreseeable – that is, contemplated – can be attributed to the shared purpose and to the JCE members.

Further, given Trial Chamber I's explicit presumption in the *RUF* case that JCE members acted with criminal intent in seeking to take power and control over the country of Sierra Leone, the requirement of a finding that they contemplated crimes may have been superfluous, as the finding of JCE liability was a foregone conclusion. As stated by the Trial Chamber,

> It indeed goes without saying and the Chamber so concludes that resorting to arms to secure a total redemption and using them to topple a government which the RUF characterized as corrupt *necessarily* implies the resolve and determination to shed blood and commit the crimes for which the Accused are indicted.[67]

The Trial Chamber provided no explanation as to the exact meaning of this judicial presumption, and the Appeals Chamber declined to comment on it or rule on its legal validity in the light of the presumption of innocence and the burden of proof. However, given that the Trial Chamber assessed individual liability pursuant to a theory of JCE that required only a showing of action in pursuit of the seizure of power in Sierra Leone while contemplating crimes,[68] the attribution of the crimes to the accused *in the light of such a presumption* must have been little other than a foregone conclusion.

67 *RUF* Trial Judgment, *supra* note 35, para. 2016 (emphasis added).
68 Ibid., para. 1985.

2.2. The culpability principle: imputing the crimes of non-JCE members to the accused

To hold an accused responsible for the criminal conduct of another person requires the finding of a link between the accused and the crime as a legal basis for the imputation of criminal liability.[69] As far as the basic form of JCE is concerned (a common criminal purpose shared by a plurality of persons acting in concert), an essential prerequisite is that the crime in question *forms part of the common criminal purpose.*[70]

The ICTY has made it clear that

> [T]o hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[71]

In assessing this connection, the factors indicative of a sufficient link 'include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime'.[72]

Attributing responsibility for the crimes of a non-JCE member to an accused who is a JCE member creates, therefore, a dual requirement. First, the Trial Chamber must evaluate the evidence to assess whether a JCE member procured a non-JCE member to commit a particular crime. In its most simple construction, if a JCE member explicitly or implicitly requested, ordered, instigated, or otherwise encouraged rebel forces to kill innocent civilians, he cannot escape individual criminal responsibility merely because he did not personally commit the crime. Second, the JCE member must be using that non-JCE member to further the shared criminal purpose of the JCE. JCE members should not be individually criminally responsible for the crimes committed by non-JCE members (having been procured by another JCE member) for personal reasons such as revenge, personal financial gain, or otherwise.[73] If a JCE member procures a non-JCE member to steal money for his family's personal use, for example, he would not be likely to be acting in furtherance of the JCE's common criminal objective and the crime therefore ought not to be determined to form part of the common criminal purpose.

As discussed above, in the *RUF* case the three accused – Sesay, Kallon, and Gbao – were found individually criminally responsible *inter alia* as members of a JCE whose objective was 'to take any action necessary to gain and exercise political power and control over the country of Sierra Leone, in particular the diamond mining areas'.[74] It

69 *Prosecutor v. Brdanin*, *supra* note 47, para. 412.
70 Ibid., para. 418.
71 Ibid., para. 413.
72 *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeal Judgement, 17 March 2009 (hereinafter *Krajišnik* Appeal Judgement), para. 226.
73 Of course, a JCE member may be acting for multiple purposes, in which case the crime could be part of the JCE.
74 *RUF* Trial Judgement, *supra* note 35, para. 1985.

was found that, while this objective was not inherently criminal, it became criminal because the implementation of this goal involved contemplating the commission of crimes.[75] The Chamber found that the crimes for which the *RUF* accused were convicted pursuant to the JCE (counts 1–14 in the indictment) were *within* the JCE and intended to further the common purpose to take power and control over Sierra Leone; thus they were all basic-form JCE crimes.[76]

The vast majority of the several hundred charges which led to individual criminal responsibility pursuant to the JCE were committed by non-JCE members. The evaluation of the relationship between the principal perpetrators of crimes and the JCE members and the circumstances that gave rise to the crime was, therefore, crucial to a fair assessment of the individual culpability of each accused.

2.2.1. The SCSL's departure from international standards

In deciding whether crimes committed by non-JCE members could be attributed to JCE members, the Trial Chamber explicitly accepted that the jurisprudence (as pronounced in the *Brđanin* case[77]) required the Trial Chamber to find, on a crime-by-crime basis, that one of the JCE members[78] procured the principal perpetrator of a crime to carry out actions in furtherance of the common criminal purpose.

Nonetheless, it is plain that the Trial Chamber and the Appeals Chamber failed to apply this legal requirement. The analysis employed to attribute crimes within the common purpose, or to uphold such findings, was deficient in two distinct ways, each offending the culpability principle and the fair-trial rights of the accused.

2.2.2. Employment of an incorrect evaluative standard

First, both chambers appeared to misunderstand the analysis required before crimes committed by non-JCE members might be found to be within the common purpose of a JCE and attributed to the accused. The Trial Chamber should have assessed whether each crime was committed at the behest of a JCE member in furtherance of the common criminal purpose. Instead, the Trial Chamber, in a sweeping, catch-all paragraph incorporating the attribution of hundreds of such crimes to the accused, held that

> The Chamber is satisfied that the [principal perpetrators of crimes] were used by said members of the joint criminal enterprise to commit crimes that were *either* intended by the members to further the common purpose, *or* were a natural and foreseeable consequence of the implementation of the common purpose.[79]

The Appeals Chamber reiterated the finding without comment or critique, disregarding the convicted person's complaint and this manifest error of law.[80] Having previously found that the criminal means (counts 1–14) were crimes 'within' their

75 Ibid., paras. 1979–1985.
76 Ibid., paras. 1982–1985.
77 *RUF* Trial Judgement, *supra* note 35, para. 263, citing *Brđanin* Appeal Judgement, *supra* note 47, paras. 413, 430.
78 See *RUF* Trial Judgement, *supra* note 35, para. 1990 for a list of JCE members in the *RUF* case.
79 *RUF* Trial Judgment, *supra* note 35, para. 1992 (emphasis added).
80 *RUF* Appeal Judgement, *supra* note 39, paras. 405, 407, 411.

common criminal purpose, and therefore intended by JCE members to further it,[81] the question of the extended form of JCE and the foreseeability of crimes did not arise for the Trial Chamber's consideration. As a consequence of that finding, JCE responsibility for the *RUF* accused was restricted to the crimes found to have been intended by the JCE members to further their common criminal purpose. This legal enunciation evinced a critical misconception that allowed crimes to be attributed to the accused pursuant to the basic form of JCE without any actual showing that they were intended by any JCE member in furtherance of the common criminal purpose, as required by the JCE doctrine, and, instead, on a mere finding of the crime being foreseeable.

As discussed above, the analysis required to assess crimes committed by non-JCE members as within or intended by JCE members to further the common criminal purpose was that outlined in *Brđanin*; the imputation of crimes to a JCE member relies on establishing that the member – when using the principal perpetrator – acted in accordance with the common plan. Putting aside the tortuous logic of the notion of a JCE member using a non-JCE member to commit a crime that is only foreseen, crimes only foreseen by a JCE member cannot be found to form part of the common criminal purpose and, therefore, could not be attributed to the accused pursuant to the basic form. Unintended crimes that are a natural and foreseeable consequence of the implementation of the common purpose are by definition outside the common purpose.

The full ramifications of this judicial misstep are impossible to know – the judgment was largely silent on how the hundreds of specific crimes were *in fact* found to be linked to a JCE member (see below). It is, nonetheless, plain that this misconception had significant consequences, allowing a multitude of the gravest of crimes to be attributed to the accused without being intended by any JCE member, in violation of the culpability principle. For example, the Trial Chamber explicitly attributed all the crimes committed by four non-JCE members (individuals nicknamed Rocky, Rambo, Savage, and Staff Alhaji), undoubtedly among the worst perpetrators of crimes in the civil war, on the cursory basis that they were 'directly subordinate to and used by members of the joint criminal enterprise to commit crimes that were *either* intended by the members to further the common design, *or* which were a reasonably foreseeable consequence of the common purpose'.[82] The crimes attributed to the accused on this basis included, *inter alia*, the execution of about 200 civilians, an act of terror, collective punishment, and murder;[83] the killing by Savage of an unknown number of civilians by burning them alive in a house in March 1998, found to be acts of terror and murder;[84] the killing of 29 civilians in Penduma on the orders of

81 *RUF* Trial Judgement, *supra* note 35, para. 1985.
82 Ibid., para. 2080 (emphasis added).
83 See generally ibid., paras. 1165–69, 1369, 2063; see also *RUF* Appeal Judgement, *supra* note 39, paras. 429–31.
84 *RUF* Trial Judgement, *supra* note 35, paras. 1167, 1273, 2063; see also *RUF* Appeal Judgement, *supra* note 39, paras. 429–435.

AFRC member Staff Alhaji, found to be acts of terror and murder;[85] and the killing of 47 civilians by Savage in February or March 1998, acts of terror and murder.[86]

It follows that if the crimes committed by these individuals were only a reasonably foreseeable consequence of the common purpose, the three *RUF* accused were wrongly convicted of these crimes.

As will be argued in the following subsection, equally problematic was that, other than noting these direct perpetrators' general subordination to one or more JCE members, the Trial Chamber made no findings to link these specific crimes to any action by a JCE member. These showings were required before finding that the JCE member explicitly or implicitly procured the non-JCE member or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime *in furtherance of the common purpose*. Therefore, even in the instances where the Trial Chamber may have purported to apply the first part of its two-pronged disjunctive test (involving a search for intention), it appears not to have grasped the required analysis and findings demanded by the ICTY jurisprudence which it had explicitly adopted.

2.2.3. Failure to link crimes to a JCE member

The Appeals Chamber's approach to the convicted persons' complaint on these issues is noteworthy. It upheld the lower chamber's factual findings by holding that, while the latter had failed to provide sufficient findings in linking the crimes to JCE members, the hundreds of crimes were clearly committed in furtherance of the JCE's common criminal purpose. Having ignored the ramifications of the erroneous test employed by the Trial Chamber, the Appeals Chamber enumerated the approach demanded by *Brđanin*,[87] and purported to conduct the missing analysis, providing ostensible connections between the crimes and the JCE's common criminal purpose.[88]

However, as regards the assessments made by the Trial Chamber and the Appeals Chamber of the existence of a sufficient nexus between one of the JCE members and crimes committed by non-JCE members, in many of the findings (involving approximately 510 civilian deaths), all found to be within the common purpose, there was no mention of a JCE member at all.[89] The higher chamber's approach was creative – having appreciated that the Trial Chamber's findings on the specific crimes committed by non-JCE members were made largely without reference to a JCE member – it reframed its analysis. The Appeals Chamber abandoned the essential threshold

85 *RUF* Trial Judgement, *supra* note 35, paras. 1192, 1195, 1196, 1278, 2063; see also *RUF* Appeal Judgment, *supra* note 39, paras. 429–435.

86 *RUF* Trial Judgement, *supra* note 35, paras. 1165, 1274, 2063; see also *RUF* Appeal Judgement, *supra* note 39, paras. 429–435.

87 *RUF* Appeal Judgement, *supra* note 39, para. 414.

88 See, e.g., ibid., paras. 416–418.

89 According to para. 1990 of the *RUF* Trial Chamber judgement, JCE members included Foday Sankoh, Sam Bockarie, Issa Sesay, Morris Kallon, Superman, Eldred Collins, Mike Lamin, Isaac Mongor, Gibril Massaquoi, Augustine Gbao, and other unnamed RUF commanders, as well as the following AFRC: Johnny Paul Koroma, Gullt, Bazzy, Five-Five, SAJ Musa, Zagalo, Eddie Kanneh, and others to hold power in Sierra Leone on or shortly after 25 May 1997. See *RUF* Trial Judgement, *supra* note 35, para. 1990.

enquiry, instead restricting its appellate analysis to the question whether the crimes committed were sufficiently widespread or similar to other crimes by JCE members such that all should be considered to be part of the same endeavour.

For example, the Trial Chamber found on more than eight occasions that AFRC and RUF fighters (all non-JCE members) had committed acts of sexual violence in Kono District.[90] While the *existence* of the crimes had not been challenged by the defence, none of these crimes were found to be linked to a named JCE member. The Trial Chamber simply omitted to analyse whether a JCE member procured the perpetrators to commit crimes to further their common criminal purpose. In assessing the correctness of this approach, the Appeals Chamber ruled *inter alia* that the crimes of sexual violence were committed to 'break the will of the population and ensure their submission to AFRC/RUF control', and therefore the crimes were within the common purpose which had been found to include such crimes.[91] However, no JCE member was cited as causing or wanting those *specific* crimes to occur. There was nothing in the findings that could be said to have distinguished the crimes as JCE crimes, rather than crimes arising from other criminal enterprises or random criminality by subordinate members of the rebel groups.

An identical approach was taken by the Trial Chamber and the Appeals Chamber to a large portion of the crimes in other districts, including Bo district. In Bo, the Trial Chamber found that eight different criminal acts were committed and were within the common purpose.[92] In six of the eight no JCE member was linked to the crimes.[93] The six included a finding of unnamed AFRC/RUF rebels killing over 200 civilians in Tikonko village, attributed to the accused as members of the JCE. There were no findings made to identify the perpetrators (by name, *de jure* role, or sub-group) or any link to a JCE member established, other than participating in the same rebellion.[94] The Appeals Chamber found that there was sufficient evidence to justify the Trial Chamber's imputation of the crimes to 'one or more JCE members' on the basis of two facts: (i) that the crimes had been committed by (non-JCE) members of the AFRC/RUF rebel group; and (ii) that the killings followed a similar modus operandi and fitted into the 'widespread and systematic nature of the crimes' committed by the RUF/AFRC.[95] The Appeals Chamber could not identify the JCE member alleged to

90 This includes unnamed AFRC/RUF rebels raping TF1-218 in Bumpeh, ibid., paras. 1206, 1290, 1299, 2063; rape by a man named Staff Alhaji in Tombodu, ibid., paras. 1171, 1288, 1299, 2063; rape of TF1-217's wife, as well as an unknown number of other women in Penduma by AFRC/RUF rebels, ibid., paras. 1193–95, 1290, 1299, 2063; AFRC/RUF rebels' rape of an unidentified female in Bomboafuidu, ibid., paras. 1208, 1289, 1290, 1299, 2063; AFRC/RUF rebels forcing 20 people to have sex with each other in Bomboafuidu, ibid., paras. 1207, 1309, 2063; AFRC/RUF rebels using knives to slit genitals in Bomboafuidu, ibid., paras. 1208, 2063; AFRC/RUF rebels raping TF1-195 five times and five other women in Sawao, ibid., paras. 1181, 1185, 1290, 1299, 2063; AFRC/RUF rebels forcibly marrying an unknown number of women at Wendedu, ibid., paras. 1178–1179, 1294, 1297, 1299, 2063.

91 *RUF* Appeal Judgement, *supra* note 39, para. 440.

92 *RUF* Trial Judgement, *supra* note 35, paras. 991–1041.

93 *RUF* Appeal Judgement, *supra* note 39, paras. 417–18. In regard to the other two crimes, the Trial Chamber found that Sam Bockarie, a JCE member, was one of the principal perpetrators. See *RUF* Trial Judgement, *supra* note 35, paras. 1007, 1023, 1029, 1974.

94 *RUF* Trial Judgement, *supra* note 35, paras. 995-1005, 1974–1975, 1984, for findings on crimes committed in Tikonko Junction in Bo district.

95 *RUF* Appeal Judgement, *supra* note 39, paras. 417, 418.

have been involved in the events (or even retrospectively aware of the commission of the crimes) or in any other manner indicate how *those* specific attacks had been procured by a JCE member in furtherance of the common purpose. The crimes were attributed to the JCE with no nexus other than the perpetrators being identified as members of the same two rebel armies, consisting of over ten thousand combatants.

Clearly, pursuant to the culpability principle that allows the attribution of crimes committed by non-JCE members to JCE members and thereafter to the accused, there must be at least one JCE member associated with a particular crime to allow it to be attributed to the JCE. If a connection cannot be established the crime cannot be attributed to the JCE, even if the act could legitimately be linked to the JCE members' common criminal purpose. A shared common criminal objective in itself is not enough to demonstrate that a plurality of persons acted in concert with each other to further that objective. Different groups, for example, may share the same goals and commit similar crimes in furtherance of those goals.[96]

Putting aside the Appeals Chamber's failure to comment on the erroneous test employed by the Trial Chamber, the approach it took to the facts in ascertaining the required evidential links from the Trial Chamber's findings was remarkably similar to a standard implied by the latter's own foreseeability test. It had little in common with the *Brđanin* requirement of a demonstration that a JCE member intentionally used a non-JCE member to commit crimes in furtherance of the common purpose. In the absence of findings focused on named JCE members, the Chamber's almost total reliance on contextual evidence such as that demonstrating a 'permissive environment created by control exercised by AFRC and RUF where fighters could commit crimes with impunity'[97] and the findings that crimes were widespread and systematic,[98] while not wrong in principle, was a fraction of the analysis required. These factors were a poor substitute for a comprehensive and careful analysis (by a trier of fact) that the crimes could be imputed to at least one member of the JCE and that this member – when using the non-JCE member – acted in accordance with the common plan. This test makes it abundantly clear: if a JCE member in the *RUF* case is not shown to be linked to crimes committed by non-JCE members, then the crimes cannot be imputed to the accused pursuant to the JCE.

2.2.4. Conclusion: punishment for membership of the RUF and the imputation of crimes

Most of the convictions entered against the three accused as JCE members were based on the actions of others, particularly non-JCE members. As outlined above, in terms of unlawful killings, approximately 510 deaths were attributed to the accused without any showing that the non-JCE members implicated were connected in the *Brđanin/Krajišnik* sense to at least one member of the JCE.

Regarding the hundreds of criminal acts of sexual and physical violence, the overwhelming majority were found to have been perpetrated by non-JCE members.

96 *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Trial Judgement, IT-04-84-T, 3 April 2008, para. 139; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Trial Judgement, 27 September 2006, para. 884.

97 *RUF* Appeal Judgement, *supra* note 39, paras. 421–422.

98 Ibid., paras. 424, 440, 449.

The Appeals Chamber upheld many of these convictions without a *Brđanin/Krajišnik* showing.[99] By failing to apply the correct and complete test, the Chamber held the accused responsible for many of the crimes committed by AFRC and RUF fighters regardless of whether any JCE member could be said to have 'used' a non-JCE member to commit a crime in furtherance of the JCE's common criminal purpose. The *RUF* trial's judicial failure to connect these crimes to a JCE member is precisely the type of 'open-ended concept that permits convictions based on guilt by association',[100] which the Appeals Chamber in *Brđanin*, the leading JCE case at the ICTY and the ICTR, repeatedly emphasized was an unacceptable perversion of the JCE doctrine. Attributing crimes without this essential nexus – a common feature of the *RUF* trial and appellate judgments – is to return guilty verdicts for hundreds of the gravest of crimes in clear contravention of the culpability principle.[101]

Moreover, attributing criminal responsibility to the accused for crimes committed by all members of their group, JCE member or otherwise, in these circumstances, punished them for being an RUF member. Whether the Appeals Chamber believed the RUF to be a criminal organization or not, membership in a criminal organization is not prohibited under international criminal law[102] and to de facto attribute criminal liability for this membership was a flagrant infringement of the principle *nullum crimen sine lege.*

3. Conclusion: A Trial Without Due Process

Premised on these fundamental procedural and evidential deficiencies in the trial and appellate processes, the *RUF* trial failed to adhere to international standards of justice, fairness, and due process. The volume of late charges and evidence and the corresponding prejudice are unprecedented in modern international criminal law. While the ICTY and ICTR Appeals Chambers grapple with appellant complaints of a handful of late charges and material facts, the prosecution of the *RUF* accused involved hundreds. There can be no justification for such a process and none was attempted by the SCSL Appeals Chamber. The *RUF* accused had a right to be presumed innocent, and this involves the maintenance of a process that allows a reasonable opportunity to present a defence to every allegation made. A trial in manifest breach of a right to be informed of the charges and evidence ceases to be such a trial, and is rather a process of attrition, with no end to the allegations and the evidence and no real chance of an effective defence. That the SCSL Appeals Chamber struck out the complaint on this matter on a technicality, arguing that the Appellant had breached a page-limit rule (when there were no novel arguments in the annex, its length

99 Ibid.

100 *Brđanin* Appeal Judgement, *supra* note 47, para. 428.

101 *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-279, Appeal Brief for Augustine Gbao, 1 June 2009, Annex I, for a full description of the crimes committed by non-JCE members that were left unconnected to a JCE member.

102 *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, 21 May 2003, para. 25.

corresponding to the number of new charges and material facts),[103] is perhaps an eloquent demonstration of the policy objectives at play in the trial and the sacrifice of fairness in pursuit of them.

Equally, imputing criminal liability to JCE members for crimes committed by non-JCE members (part of the same AFRC/RUF rebel group) without providing an evidentiary nexus between the crimes and the non-JCE and JCE member, is a clear demonstration of a breach of the culpability principle and the principle of legality. This is precisely what occurred for hundreds of crimes in the *RUF* case. Such findings hold the three accused responsible for the acts of all the RUF, independently of whether the crimes were committed to further the JCE's common criminal purpose or not and irrespective of whether the accused intended or even foresaw the crimes. It is the attribution of guilt without fault, akin to collective punishment by an international court.

Consequently the *RUF* trial remains a worthy object for study and reflection. It ought to be soberly examined by those entrusted with the law. It is a reminder of the need to hold tight to basic due process principles and to build on – not ignore – the jurisprudential lessons from the ICTY and the ICTR. The types of demonstrably unsafe convictions may well satisfy those focused only on the immediate policy objectives defined by the need to bring accountability in war-torn countries. Nonetheless, it should also be recalled that the long-term legitimacy of international criminal law rests at least in part on the understanding that these critical objectives – national reconciliation and the maintenance of peace – depend as much on justice being done and being seen to be done as they do on the final tally of convictions.

103 See *Prosecutor v. Sesay, Kallon and Gbao*, Sesay Final Trial Brief, SCSL-04-15-PT, 1 August 2008, at Annexes A1–A3 for comprehensive listing of the pre-trial notice and the additional and amended charges.

SPECIAL COURT FOR SIERRA LEONE
DOKTER VAN DER STAMSTRAAT 1• 2265 BC LEIDSCHENDAM • THE NETHERLANDS

PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

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