

attack on Wilberforce, where ECOMOG forces were based, was discussed.⁹³³ After the capture of the State House, the Accused Brima ordered that Pademba Road Prison should be opened and the prisoners released. The Accused Kamara participated in the release of the prisoners. The Accused Kamara ordered that the released prisoners should move to State House. Some prisoners followed this order, others did not.⁹³⁴ The Accused Kamara spoke with Sam Bockarie on the radio prior to the capture of State House.⁹³⁵ The Accused Kamara was present at the State House when the Accused Brima announced to the battalion commanders and others, that they were likely to lose “the ground totally” and that the burning of Freetown should start.⁹³⁶ After the loss of State House, the Accused Kamara gave an order to the AFRC troops to burn houses.⁹³⁷ Following the retreat from Freetown, the Accused Kamara took part in a second attack on Freetown that took place with the participation of RUF commanders.⁹³⁸

(a) Findings

474. The Trial Chamber concludes that the Accused Kamara was Deputy Commander of the forces invading Freetown on 6 January 1999, and that he remained in that position throughout. It is further satisfied that in this position he had a significant degree of authority.

7. Kamara’s Role in Port Loko District (February 1999 – July 1999)

475. The Prosecution submits that the Accused Kamara was the overall Commander of the fighters in the area commonly referred to as “the West Side.”⁹³⁹ The Defence position is that other known individuals were the commanders in the area.⁹⁴⁰

⁹³³ Gibril Massaquoi, Transcript 7 October 2005, pp. 119-120.

⁹³⁴ George Johnson, Transcript 16 September 2005, pp. 27-29.

⁹³⁵ TF1-184, Transcript 29 September 2005, p. 61.

⁹³⁶ TF1-334, Transcript 14 June 2005, p. 47.

⁹³⁷ TF1-184 Transcript 30 September 2005, p. 9

⁹³⁸ George Johnson, Transcript 16 September 2005, pp. 60-61.

⁹³⁹ *See for example*, Prosecution Final Brief, paras 1753-1754; Gibril Massaquoi, Transcript 10 October 2005, p. 44: the witness testified that when he arrived on the West Side in early June 1999, ‘Bazzy’ was the commander there. TF1-334, Transcript 15 June 2005, pp. 13-24: The witness testified that following the retreat from Freetown the Accused Brima remained the commander of the retreating troops, including during the month that the troops spent at Newton on the West Side. Soon after ECOMOG attacked, the Accused Brima and Kamara went to join Denis Mingo (Superman) in Makeni. Soon after the Accused Kamara received a phone call from Sam Bockarie telling him that the Accused Brima was no longer commander and that he, the Accused Kamara, would now be commander on the West Side. During this short period Kamara moved from Newton in the Western Area to Port Loko District. George Johnson, Transcript 16 September 2006, pp. 62-64: the witness corroborated the evidence that from Newton, the Accused Brima and the Accused Kanu went to Makeni, and the Accused Kamara moved to Mamah/Mamamah in Port Loko District. At this point he became overall commander of these troops. TF1-153, Transcript 23 September 2005, p. 27: witness says that he saw Brima and Kanu at Masiaka following the retreat from Freetown. At this time, Bazzy was at Gberibana, at a place called the West Side with Tito, Bomb Blast, and Junior Lion. Bazzy separated from Brima and Kanu because he was disgruntled with the RUF, and decided it was better to work without them

(a) The Presence of the Accused in Port Loko District(i) Prosecution Witnesses

476. Witness George Johnson testified that all three Accused retreated with the troops to Benguema in the Western Area.⁹⁴¹ They then moved to Waterloo where together with the RUF they planned a second attack on Freetown.⁹⁴² The attack was unsuccessful and from Waterloo the RUF pulled back to Lunsar, while Brima and Kanu went to Makeni with a group of RUF commanders.⁹⁴³ George Johnson testified that he accompanied the Accused Kamara and a group of troops to Four Mile, to Mamamah,⁹⁴⁴ near Mile 38.⁹⁴⁵ At this point the Accused Kamara was in command and he gave orders to the troops at Mamamah which were obeyed.⁹⁴⁶ From Mamamah they went to Gberibana, an area in Port Loko District colloquially known as the 'West Side'.⁹⁴⁷

477. Witness Gibril Massaquoi retreated from Freetown to Waterloo. On his arrival he met with RUF troops and approximately a week later he went to Lunsar with Denis Mingo.⁹⁴⁸ He testified that while he was at Waterloo, troops from Freetown arrived in successive groups and all three Accused eventually came to Waterloo.⁹⁴⁹

478. From Lunsar, the witness travelled to Waterloo with Mingo on several occasions.⁹⁵⁰ He also testified about the second unsuccessful attack on Freetown. Subsequently, at Lunsar in early April, infighting broke out between Issa Sesay and Denis Mingo of the RUF, the eventual result of which

⁹⁴⁰ DAB-033, Transcript 25 September 2006 p. 10: stating that the overall commander at Westside was Foday Kallay and his second in command was George Johnson (Junior Lion). DBK-012, 6 October 2006, pp: 43-44: the Witness and George Johnson (Junior Lion) led the troops in Rogberi on the West Side. However, once there FAT Sesay was the overall commander and Junior Lion was second in command. DBK-131, Transcript 10 October 2006: witness said he arrived on the West Side during May/June 1999. At that time, George Johnson (Junior Lion) was the overall commander in the area, and Tito was the second in command. Foday Kallay arrived later and took over command when he arrived. DBK-037, Transcript 4 October 2006, p. 42: the commanders on the West Side were FAT Sesay, George Johnson (Junior Lion) and Junior Sherriff. DBK-129, Transcript 9 October 2006, pp. 19, 85, 88-90, 95: The Witness arrived at Four Mile on the West Side in February 1999. George Johnson (Junior Lion) was the overall commander in the area and did not report to the Accused Kamara. Johnson issued the order to make the area of Mamamah fearful. The witness was present when he issued the order. The second in command was Tito. Johnson remained in charge of the West Side until Foday Kallay arrived. Witness was there until the ceasefire was announced. The witness never saw Kamara and said Kamara had no command over any troops on the West Side. DAB-095, Transcript 28 September 2006, pp. 71-72: the witness stated that Foday Kallay was the commander of the West Side

⁹⁴¹ George Johnson, Transcript 16 September 2005, p. 58-59.

⁹⁴² George Johnson, Transcript 16 September 2005, pp. 60-61. Gibril Massaquoi corroborated the evidence of George Johnson regarding the second and unsuccessful attempt to capture Freetown: Transcript 10 October 2005, pp. 34-35.

⁹⁴³ George Johnson, Transcript 16 September 2005, pp. 62-63.

⁹⁴⁴ Also referred to as Mammah.

⁹⁴⁵ George Johnson, Transcript 16 September 2005, p. 63.

⁹⁴⁶ George Johnson, Transcript 16 September 2005, pp. 64-66.

⁹⁴⁷ George Johnson, Transcript 16 September 2005, p. 67.

⁹⁴⁸ Gibril Massaquoi, Transcript 10 October 2005, pp. 30-32.

⁹⁴⁹ Gibril Massaquoi, Transcript 10 October 2005, pp. 31-32.

⁹⁵⁰ Gibril Massaquoi, Transcript 10 October 2005, pp. 33-34.

was that Mingo controlled Lunsar and Makeni and Sesay fled to Kono.⁹⁵¹ At an unspecified time in April, Mingo contacted the Accused Brima and requested his assistance in the fight against Sesay. The Accused Brima and Kanu, as well as 'O-Five' and others then travelled to Masiaka and Makeni in Bombali District to assist.⁹⁵²

479. Massaquoi testified that around this time, Kamara's troops were pushed back by ECOMOG from Mile 38 to the Okra Hills Area.⁹⁵³ Witness Gibril Massaquoi subsequently travelled to Okra Hills in June and said that at that time Kamara was the commander of the troops there known as 'the West Side Boys'.⁹⁵⁴

480. Witness TF1-153 corroborates evidence of a split between the Accused Brima and Kanu and the Accused Kamara stating that the Accused Brima and Kanu went to Masiaka while Kamara went to the Westside because he was 'disgruntled' and did not want to assist the RUF.⁹⁵⁵

(ii) Defence Witnesses

481. As with Bombali and the Freetown areas, Defence witnesses on Port Loko District described an alternate command structure involving FAT Sesay, Junior Lion and Foday Kallay. Witness DBK-037 testified that Foday Kallay was not in the West Side.⁹⁵⁶ Witness DAB-095 testified that Foday Kallay was the commander in the West Side.⁹⁵⁷ Witness DAB-033 testified that Foday Kallay was the overall commander and Junior Lion was second in command.⁹⁵⁸ However, under cross examination he conceded that he only went once to the West Side and did not know who the commander was in that location.⁹⁵⁹ Witnesses DBK-037 and DBK-012 were in the West Side and testified that Junior Lion was second in command to overall commander FAT Sesay.⁹⁶⁰ Witnesses DBK-131 and DBK-129 were in the West Side and testified that Junior Lion was the overall commander and Tito was second in command but Foday Kallay arrived later and took over command.⁹⁶¹ Witness DBK-129 stated that he never saw Kamara and said Kamara had no command over any troops in the West Side.⁹⁶²

⁹⁵¹ Gibril Massaquoi, Transcript 10 October 2005, pp. 35-38.

⁹⁵² Gibril Massaquoi, Transcript 10 October 2005, pp. 39-40.

⁹⁵³ Gibril Massaquoi, Transcript 10 October 2005, pp. 40.

⁹⁵⁴ Gibril Massaquoi, Transcript 10 October 2005, p. 44.

⁹⁵⁵ TF1-153, Transcript 23 September 2005, pp. 26-28.

⁹⁵⁶ DBK-037, Transcript 4 October 2006, p. 42.

⁹⁵⁷ DAB-095, Transcript 28 September 2006, p. 74.

⁹⁵⁸ DAB-033, Transcript 25 September 2006, pp. 108-109.

⁹⁵⁹ DAB-033, Transcript 2 October 2006.

⁹⁶⁰ DBK-037, Transcript 4 October 2006, pp. 18-19, 50-51; DBK-012, Transcript 6 October 2006, pp. 43-44.

⁹⁶¹ DBK-131, Transcript 10 October 2006, p. 93; DBK-129, Transcript 9 October 2006, pp. 19, 85, 88-90, 95.

⁹⁶² DBK-129, Transcript 9 October 2006, pp. 19, 85, 88-90, 95.

482. Witness DBK-012 testified that Prosecution Witness George Johnson, also known as 'Junior Lion,' was the commander who organised the attack on Port Loko, calling a muster parade and selecting the commanders to go on the attack, including Junior Lion, who was the Operations Commander, the witness and Sheriff alias 'Cambodia'. They went on the operation around 27 April 1999.⁹⁶³ This witness denied that AFRC troops attacked Mamamah, stating that they bypassed it to avoid ECOMOG forces stationed there.⁹⁶⁴

(iii) Findings

483. As the witnesses who testified about Port Loko are the same witnesses who testified about parts of the journey of the three Accused over the period covered by the Indictment, the Trial Chamber refers to its previous assessments on the credibility and reliability of relevant Defence and Prosecution witnesses.⁹⁶⁵

484. The Trial Chamber is satisfied that upon withdrawing from Newton in late February or early March 1999, the Accused Kamara retreated to the region of Okra Hills in Port Loko District. During this same period, the Accused Brima and the Accused Kanu went to Makeni, Bombali District.

(b) Command of the AFRC troops in the 'West Side'

(i) Prosecution Witnesses

485. Witness TF1-334 testified that in approximately early April 1999, after the retreat from Mamamah and Mile 38, the Accused Kamara called a meeting at Magbeni at which he created a new command structure for the AFRC troops in the 'West Side'.⁹⁶⁶ The AFRC fighting forces then under the Accused Kamara, including the abducted civilians, numbered over 700.⁹⁶⁷ 'Bazzy' appointed himself the Chief Commander.⁹⁶⁸ The witness added that Prosecution witness George Johnson, known as 'Junior Lion,' was the Operational Commander.⁹⁶⁹

486. George Johnson's testimony on the command structure in Port Loko District, although less detailed, generally corroborates that of witness TF1-334. He testified that Kamara was in command

⁹⁶³ DBK-012, Transcript 6 October 2006, pp. 44-45.

⁹⁶⁴ DBK-012, Transcript 6 October 2006, p. 93.

⁹⁶⁵ See Role of the Accused, Brima, paras 355-377, *supra*.

⁹⁶⁶ TF1-334, Transcript 15 June 2005, pp. 24-25.

⁹⁶⁷ TF1-334, Transcript 15 June 2005, p. 31.

⁹⁶⁸ TF1-334, Transcript 15 June 2005, pp. 25-27.

⁹⁶⁹ TF1-334, Transcript 15 June 2005, p. 26.

of a group of AFRC troops that went to Four Mile and Mamamah, near Mile 38.⁹⁷⁰ The witness describes a series of orders given by the Accused Kamara to the troops at Mamamah which were obeyed.⁹⁷¹ From Mamamah they went to Gberibana, in the 'West Side.'⁹⁷² At the 'West Side', Kamara called a meeting at which he restructured the troops and made appointments.⁹⁷³

487. The Trial Chamber notes that Witness TF1-153 also testified that 'Bazzy' was the commander in the West Side. In cross-examination it emerged that the witness, in a prior statement, stated that 'Papa' was the commander and 'Bazzy' and Bio were his deputies, although he also stated that all three were commanders.⁹⁷⁴ The Trial Chamber notes that witness TF1-153 was not present in Port Loko District and therefore relies on the more detailed and consistent evidence of witnesses George Johnson and TF1-334.

(ii) Defence Witnesses

488. Defence witnesses DAB-095, DAB-033, DBK-037, DBK-012, DBK-131 and DBK-129 testified that FAT Sesay, George Johnson and Foday Kallay were the senior commanders at the West Side and not the Accused Kamara.

489. Witness DAB-095, an SLA infantry soldier,⁹⁷⁵ in cross-examination stated that he did not know whether the Accused Kamara was the commander of the West Side Boys but that he knew Foday Kallay was the commander in the West Side.⁹⁷⁶ The witness testified that he only travelled to Port Loko District to surrender, an assertion which casts some doubt on his credibility as Port Loko remained a rebel stronghold.⁹⁷⁷

490. Witness DAB-033, a soldier with the SLA promoted to the rank of corporal in 1996,⁹⁷⁸ testified that in February 1999, he went together with Prosecution witness George Johnson to Four Mile.⁹⁷⁹ George Johnson was in charge of the troops at Four Mile. A religious council requested that the AFRC release child soldiers, and the witness testified that he sought permission to do so from Johnson. The children were released although other commanders, including 'Gunboot' disagreed and threatened the witness. The witness subsequently travelled to Makeni, Bombali

⁹⁷⁰ George Johnson, Transcript 16 September 2005, p. 63.

⁹⁷¹ George Johnson, Transcript 16 September 2005, pp. 64-67.

⁹⁷² George Johnson, Transcript 16 September 2005, p. 67.

⁹⁷³ George Johnson, Transcript 16 September 2005, p. 69.

⁹⁷⁴ TF1-153, Transcript 23 September 2005, pp. 90-91.

⁹⁷⁵ DAB-095, Transcript 20 September 2006, pp. 4-7.

⁹⁷⁶ DAB-095, Transcript 28 September 2006, pp. 70-74.

⁹⁷⁷ DAB-095, Transcript 20 September 2006, pp. 15-18.

⁹⁷⁸ DAB-033, Transcript 25 September 2006, pp. 38, 83.

⁹⁷⁹ DAB-033, Transcript 25 September 2006, pp. 77-78.

District where he stayed for two months.⁹⁸⁰ On cross-examination, the witness testified that he went to the West Side after the Lomé Peace Accord was signed and at that time Foday Kallay was the overall commander and George Johnson was his second in command. The witness testified that he knew this from radio communications he heard from February through April 1999.⁹⁸¹ However, the witness also testified in cross-examination that as he was not at the West Side, he did not know if Kamara was the commander.⁹⁸²

491. Witness DBK-037, a soldier in the SLA⁹⁸³ testified that at Four Mile, “FAT” was the overall commander but that he was not at the “point section” which he left for Junior Lion to command. He knew this because the appointment was made by FAT Sesay in public and the witness was present.⁹⁸⁴ On cross-examination, the witness stated that after the retreat from Freetown, he worked with George Johnson in the area known as the ‘West Side’ in Port Loko District up until the day the Lomé Peace Accord was signed in Togo.⁹⁸⁵ According to the witness, during that time Junior Lion was under the authority of “FAT” who was the commander at West Side, not Kamara.⁹⁸⁶

492. Considering the structure of the AFRC troops at that time, the Trial Chamber notes the evidence of Defence witness DBK-012 who testified that he was both present in Port Loko District throughout the relevant period and held a relatively important position within the AFRC forces at that time.

493. The witness, a member of the SLA since 1989/1990,⁹⁸⁷ testified that after the invasion of Freetown in 1999, he retreated to Benguema for 2 to 4 weeks, went on an operation in Tumbo, and then went to Lumpa for two weeks before moving to Four Mile with Junior Lion, “05” and other AFRC commanders,⁹⁸⁸ placing him in Port Loko District in approximately mid-March or early April 1999. He testified that the Accused Kamara was not at Four Mile at this time.⁹⁸⁹ The witness testified that he was a company commander and he, together with Junior Lion, led civilians and troops through Magbeni to Rogberi, also known as the ‘West Side’.⁹⁹⁰ The witness testified that at West Side, it was FAT Sesay who was in command and George Johnson who was second in

⁹⁸⁰ DAB-033, Transcript 25 September 2006, pp. 80-81.

⁹⁸¹ DAB-033, Transcript 25 September 2006, pp. 108-110.

⁹⁸² DAB-033, Transcript 2 October 2006, p. 106.

⁹⁸³ DBK-037, Transcript 3 October 2006, pp. 75-80.

⁹⁸⁴ DBK-037, Transcript 4 October 2006, pp. 18-19.

⁹⁸⁵ DBK-037, Transcript 4 October 2006, p. 51.

⁹⁸⁶ DBK-037, Transcript 4 October 2006, pp. 50-54.

⁹⁸⁷ DAB-012, Transcript 5 October 2006, pp. 74-75.

⁹⁸⁸ DAB-012, Transcript 6 October 2006, pp. 38-41.

⁹⁸⁹ DAB-012, Transcript 6 October 2006, p. 41.

command;⁹⁹¹ however, on cross-examination he testified that Johnson was overall commander at the West Side.⁹⁹² He testified that Johnson organised the operation to Port Loko to combat ECOMOG, called a muster parade prior to the attack, gave the order to launch the offensive at Manaarma, ordered the witness to kill a woman who was suspected of having distributed arms and ammunition to the Gbethis, and was present during the offensive against ECOMOG in Port Loko.⁹⁹³ The witness testified that he did not see the Accused Kamara at West Side nor did he hear that he was there.⁹⁹⁴

494. DBK-131 testified that he was a commander with the AFRC fighting forces during the attack on Freetown and thereafter.⁹⁹⁵ On cross-examination he testified that he was one of the “West Side Boys” under the command of Foday Kallay and that he did not hear that Kamara was a commander in the West Side.⁹⁹⁶

495. Witness DBK-129 testified that he was present in the ‘West Side’ and that George Johnson was the overall commander, that ‘Tito’ was second in command, but that Foday Kallay arrived later and took over command. He stated that he never saw the Accused Kamara and that Kamara did not have command over any troops on the ‘West Side’.⁹⁹⁷

496. In reconciling the evidence examined above, the Trial Chamber generally accords greater weight to the evidence of witnesses who were present in Port Loko District over that of witness DAB-095 who testified that he was only present in Port Loko District immediately prior to the cease fire and DAB-033 who testified that he was primarily in Makeni, Bombali District during the relevant period.

497. Defence witnesses DAB-095, DAB-033, DBK-131 and DBK-129 all testified that Foday Kallay was overall commander at the West Side. However, the Trial Chamber is satisfied that the evidence only indicates Foday Kallay may have assumed the position of senior command but only following the relevant period. Witness DAB-095 testified that Foday Kallay was the commander in the West Side, but the witness only arrived in Port Loko District immediately prior to the ceasefire. Witness DAB-033 testified that he went to the West Side after the Peace Accord was signed and that Foday Kallay was overall commander at that time. Witness DBK-129 testified that initially

⁹⁹⁰ DAB-012, Transcript 6 October 2006, pp. 41-43.

⁹⁹¹ DAB-012, Transcript 6 October 2006, pp. 43-44.

⁹⁹² DAB-012, Transcript 9 October 2006, p. 76.

⁹⁹³ DAB-012, Transcript 6 October 2006, pp. 44-49.

⁹⁹⁴ DAB-012, Transcript 6 October 2006, p. 49.

⁹⁹⁵ DBK-131 26 October 2006, p. 59.

⁹⁹⁶ DBK-131 26 October 2006, pp. 61-62.

Junior Lion was overall commander and that Foday Kallay arrived later and took over command. Witness DBK-131 testified that he was a “West Side Boy” under the command of Foday Kallay which the Trial Chamber finds consistent with the evidence of Prosecution Witness TF1-334 who testified that “Kallay” was a battalion commander at the time but which does not suggest that Foday Kallay was a senior commander.

498. The Trial Chamber notes further that none of the witnesses described the presence of Foday Kallay in Port Loko District outside of the ‘West Side’ nor did any of the witnesses provide evidence of the day to day exercise of authority or active role played by Foday Kallay. The evidence thus amounts to the mere assertion of his position, late in the relevant period, which the Trial Chamber gives little weight in light of more detailed evidence which suggests a different command structure.

499. Defence witness DBK-037 stated that FAT Sesay was the overall commander at Four Mile and the ‘West Side’. Witness DBK-012 testified that FAT Sesay was the overall commander at the ‘West Side’. However, the Trial Chamber finds the evidence of Witness DBK-012 unreliable on this point as on cross-examination he accepted that it was Junior Lion who was overall commander at the ‘West Side’.⁹⁹⁸ The Trial Chamber finds the testimony of witness DBK-037 regarding the command structure unreliable in that he insisted throughout his testimony that FAT Sesay was the overall commander from the death of SAJ Musa in Benguema throughout the invasion and retreat from Freetown in January 1999. While the Trial Chamber does not discount the possibility that FAT Sesay was a commander during these periods, it finds that more senior commanders were also active.

(iii) Findings

500. The Trial Chamber is satisfied beyond reasonable doubt that the Accused Kamara was the overall commander of the AFRC forces in Port Loko District, and that he had substantial authority in this position.

⁹⁹⁷ DBK-129, Transcript 9 October 2006, pp. 19, 85, 88-90, 95.

⁹⁹⁸ DBK-012, Transcript 18 October 2006, p.17.

D. Santigie Borbor Kanu

1. Allegations and Submissions

501. The Indictment alleges that “at all times relevant to the Indictment” the Accused Kanu was a “senior member of the AFRC, Junta and AFRC/RUF forces.”⁹⁹⁹ It also alleges that he was a “member of the Junta governing body, the AFRC Supreme Council.”¹⁰⁰⁰ It further charges that he was “a senior commander of the AFRC/RUF forces in Kono District”¹⁰⁰¹ between mid February 1998 and about 30 April 1998¹⁰⁰² and “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 District between about mid February 1998 and 31 December 1998.”¹⁰⁰³ Finally, it alleges that the Accused Kanu, together with the Accused Brima and Kamara “was also one of three commanders of AFRC/RUF forces during the attack on Freetown on 6 January 1999.”¹⁰⁰⁴

502. In its Final Brief, the Kanu Defence submits that the Prosecution failed to establish that Kanu had any form of command and control over the perpetrators of the crimes outlined in the Indictment¹⁰⁰⁵ It further argues that from the arrival of the Accused in Koinadugu District, the Accused Kanu was responsible for protecting and taking care of civilians, particularly family members of soldiers.¹⁰⁰⁶

2. Personal Background of Kanu

503. The Defence did not challenge the personal information adduced by the Prosecution regarding the Accused Kanu. The Prosecution alleges that Kanu was born in March 1965 in Maforki Chiefdom, Port Loko District or in Freetown.¹⁰⁰⁷ Kanu joined the Sierra Leone Army on 3 December 1990 at the Benguema Training Camp, Freetown, Western Area.¹⁰⁰⁸ He was a Corporal at the time of the coup in May 1997.¹⁰⁰⁹

⁹⁹⁹ Indictment para. 28.

¹⁰⁰⁰ Indictment para. 29.

¹⁰⁰¹ Indictment para. 30.

¹⁰⁰² Indictment para. 30.

¹⁰⁰³ Indictment para. 30.

¹⁰⁰⁴ Indictment para. 30.

¹⁰⁰⁵ Kanu Final Brief, para. 366.

¹⁰⁰⁶ Kanu Final Brief, paras 267-279.

¹⁰⁰⁷ Indictment, para. 5.

¹⁰⁰⁸ Exhibit D 11, “Discharge Book”.

¹⁰⁰⁹ Exhibit D 11, “Discharge Book”.

504. The Kanu Defence does not dispute that the Accused Kanu was nicknamed ‘Five-Five’ after the last two digits of his regimental identification number SLA/18164955. The Kanu Defence does, however, argue that ‘Five-Five’ was an extremely common nickname, and therefore that any Prosecution witnesses referring to ‘Five-Five’ should have been required to specify whether or not they were referring to the Accused Santigie Kanu.¹⁰¹⁰

3. Positions of Responsibility in the AFRC Government (25 May 1997 – 14 February 1998)

505. The Indictment alleges that the Accused was a senior member of the Junta government, and a member of the Junta governing council.¹⁰¹¹ The Prosecution, in its Final Trial Brief, submits that as a member of the Supreme Council “the third Accused was only beneath Johnny Paul Koroma, SAJ Musa, and the three PLOs in the Junta hierarchy.”¹⁰¹² It therefore asks the Chamber to find that the Accused was liable for planning, instigating or otherwise aiding and abetting enslavement and the crimes committed in Kenema, Bo and Kailahun Districts.¹⁰¹³

506. In its Final Trial Brief, the Kanu Defence submits that the Prosecution failed to adduce evidence that the Accused Kanu was ever present in Bo, Kenema or Kailahun Districts.¹⁰¹⁴ In addition, he was not in a position to command and/or control the individuals responsible for the commission of the crimes.¹⁰¹⁵

(a) Involvement in the 25 May 1997 Coup

507. The Trial Chamber notes that numerous witnesses, both for the Prosecution and for the Defence, testified that the Accused Kanu was one of the individuals who planned and took part in the coup.¹⁰¹⁶ The Trial Chamber is therefore satisfied that Kanu was involved in the 1997 Coup.

508. The Trial Chamber is satisfied that in return for his participation in the coup, the Accused Kanu was rewarded with a position on the AFRC Supreme Council. He remained in this position until that government was ousted by the ECOMOG forces in February 1998.

¹⁰¹⁰ Kanu Defence Closing Arguments, Transcripts 8 December 2006, p. 3-6.

¹⁰¹¹ Indictment, paras 29-30.

¹⁰¹² Prosecution Final Brief, para. 515.

¹⁰¹³ Prosecution Final Brief, para. 520.

¹⁰¹⁴ Kanu Defence Final Brief, para. 367.

¹⁰¹⁵ Kanu Defence Final Brief, paras 366-384.

¹⁰¹⁶ TF1-033, Transcript 11 July 2005, p. 6; Gibril Massaquoi, Transcript 7 October 2006, p. 76; TF1-334, Transcript 17 June 2005, p. 69; TF1-114, Transcript 14 July 2005, p. 118-119; DAB-079, Transcript 28 July 2006, p. 62, DAB-025, Transcript 28 July 2006, p. 112; TRC-01, Transcript 16 October 2006, p. 101; DAB-085, Transcript 20 July 2005, p. 52; DAB-079, Transcript 28 July 2006, pp. 62, 68, 69; DAB-085, Transcript 20 July 2006, p. 52; DAB-063, Transcript 2 August 2006, pp. 60-62.

(b) Council Membership

509. The Trial Chamber finds that the Accused Kanu was a member of the Supreme Council during the AFRC junta.¹⁰¹⁷ It further concludes the Accused was an ‘Honourable.’¹⁰¹⁸

(c) Other Activities

510. There is further evidence of the presence of the Accused Kanu at coordination meetings between high level members of the AFRC and RUF in Freetown.¹⁰¹⁹ In addition, TF1-019 testified that he saw Sam Bockarie and “Honourable Five-Five” address a meeting at the Koidu community centre during the Junta period. The men told those present that they were now in control of the government and that they wanted the support of the youth.¹⁰²⁰ Defence witness DAB-042 also testified that Kanu addressed a meeting in Koidu town in which he encouraged the cleaning and upkeep of the town.¹⁰²¹ The Trial Chamber concludes that while this evidence corroborates documentary evidence that the Accused had a position in the AFRC government, it provides no indication of his seniority within that government.

511. The Prosecution has adduced no evidence that the Accused Kanu held a ministerial or other high ranking government position. In addition, there is no evidence regarding his role and/or contributions at coordination meetings. Thus, while the Trial Chamber concludes that the Accused Kanu was a member of the Supreme Council, and that he attended coordination meetings with high level members of the AFRC and RUF, it is unable to determine whether he played an influential role in the running or policy-making of the AFRC Government

512. The Accused Kanu was in Freetown during the February attack of ECOMOG on Freetown and on 13 February 1998 retreated along the same route as the Accused Kamara. He was present when the troops reconvened at Masiaka and later at Makeni.¹⁰²²

¹⁰¹⁷ Exhibit P- 6, “The Sierra Leone Gazette,” 4 September 1997, listing members of the Armed Forces Revolutionary Council *Secretariat*; exhibit P- 7, “The Sierra Leone Gazette,” 18 September 1997, listing members of the Armed Forces Revolutionary *Council*; Gibril Massaquoi, Transcript 7 October 2005, p. 77;

¹⁰¹⁸ DAB-063, Transcript 2 August 2006, pp. 60-62; DAB-005, 12 October 2006, pp. 17-18.

¹⁰¹⁹ TF1-045, Transcript 19 July 2005, pp. 64-66, 71-72; Gibril Massaquoi, Transcript 7 October 2005, pp. 37, 83, 86, 93 ; exhibit P-69, “AFRC Secretariat, Minutes of Meeting held on 9 December 1997.” TF1-184, Transcript 30 September 2005, p. 36.

¹⁰²⁰ TF1-019, Transcript 30 June 2005, pp. 85-87.

¹⁰²¹ DAB-042, Transcript 15 September 2006, pp. 89, 96.

¹⁰²² TF1-334, Transcript 17 May 2005, pp. 70-71, 86.

4. Kanu's Role in Kono and Kailahun Districts (February 1998 – May 1998)

513. The Indictment alleges that the Accused Kanu was “a senior commander of the AFRC/RUF forces in Kono District. In addition, Santigie Borbor Kanu was a commander of AFRC/RUF forces which conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone [...]”.¹⁰²³ However, in its closing arguments, the Prosecution stated that “it is the case of the Prosecution that only Kamara was present when the crimes were committed. Brima and Kanu, however, can still be held liable for those crimes under a theory of joint criminal enterprise,”¹⁰²⁴ a point it reiterates in its Final Brief.¹⁰²⁵

514. In its Final Brief, the Kanu Defence argues that the Prosecution evidence fails to prove that the Accused stayed more than a few days in Kono after the fall of the AFRC regime.¹⁰²⁶

515. Both parties have agreed that the Accused Kanu was not present during the relevant period. The Prosecution does not argue that Kanu had command responsibilities. Thus, having dismissed Joint Criminal Enterprise as a mode of individual criminal responsibility, the Trial Chamber makes no findings on the Role of the Accused in Kono District.

5. Kanu's Role in Koinadugu and Bombali Districts (June 1998 – November 1998)

516. The Indictment alleges that the Accused Kanu 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.”¹⁰²⁷ In its Final Brief, the Prosecution clarifies that the case of the Prosecution is that from the advance to Mansofinia to Camp Rosos, the First Accused was at all times the commander of the SLA troops, while the Second Accused was second in command to the First Accused and the Third Accused held a senior command position.

517. The Kanu Defence submits that Kanu was not part of the advance team moving with Prosecution witness George Johnson from Mansofinia to Camp Rosos further arguing that several groups of AFRC soldiers passed through the area over a period of months.¹⁰²⁸ The Kanu Defence

¹⁰²³ Indictment, para. 30.

¹⁰²⁴ Prosecution Closing Arguments, Transcript 7 December 2006, pp. 34-35.

¹⁰²⁵ Prosecution Final Trial Brief, para. 1279.

¹⁰²⁶ Kanu Final Brief, para. 386.

¹⁰²⁷ Indictment, para. 30.

¹⁰²⁸ Kanu Final Brief, para. 392-394.

also contends that the Accused Kanu was responsible for protecting civilians and not for exploiting them.¹⁰²⁹

(a) Kanu's Position within the AFRC Troops from Mansofinia to Rosos

(i) Prosecution Witnesses

518. The Trial Chamber recalls that following the retreat of the AFRC fighting forces from Kono District, SAJ Musa instructed the Accused Brima to find a base in Bombali district.¹⁰³⁰ Kanu joined Brima on SAJ Musa's instructions.¹⁰³¹

519. Witness TF1-334 testified that the Accused Kanu was Chief of Staff during this journey and that he was directly subordinate to the Accused Kamara and superior to the battalion commanders.¹⁰³²

520. Witness George Johnson testified that the Accused Kanu held the G-5 position, and that he was in charge of all abductees.¹⁰³³ While George Johnson corroborated TF1-334's evidence that at Mansofinia the Accused Brima was the overall commander and the Accused Kamara his Deputy, his testimony suggests that FAT Sesay was third in command, and that a known AFRC commander¹⁰³⁴ was fourth in command. The Trial Chamber observes that in cross-examination it emerged that the witness had given conflicting information about the G5 position in Mansofinia.¹⁰³⁵ The Trial Chamber has found that the evidence of witness George Johnson in relation to the G4 and G5 positions in Kono District was unreliable, and in the absence of the corroboration of other witnesses it does not accept this aspect of the witnesses' evidence in relation to Bombali District.

(ii) Defence Witnesses

521. The Trial Chamber refers to its findings above on the credibility and reliability of witnesses testifying about the command structure during the advance of the AFRC fighting forces from Mansofinia in Koinadugu to Camp Rosos in Bombali District.¹⁰³⁶

¹⁰²⁹ Kanu Final Brief, para. 267.

¹⁰³⁰ Context of Alleged Crimes, para. 379, *supra*.

¹⁰³¹ TF1-334, Transcript 20 May 2005, p. 87.

¹⁰³² TF1-334, Transcript 20 May 2005, pp. 92-93, 100-101; TF1-334, Transcript 16 June 2005, pp. 20-21.

¹⁰³³ George Johnson, Transcript 15 September 2005, pp. 50, 59.

¹⁰³⁴ Named admitted under seal: Exhibit P-12.

¹⁰³⁵ George Johnson, Transcript 21 September 2005, pp. 15-16.

¹⁰³⁶ Role of the Accused, Brima, paras 356-377, *supra*.

(b) Findings

522. The Trial Chamber finds that the Prosecution evidence with regard to Kanu being third in command in Koinadugu and Bombali Districts was insufficient. Witness TF1-334 does not specifically state that as Chief of Staff, the Accused Kanu was third in command in Bombali District. He testified that the Accused Kanu was third in command while Chief of Staff in Freetown.¹⁰³⁷ Moreover, the other witnesses who testify that the Accused Kanu was Chief of Staff in Bombali District do not state that this made him third in command.¹⁰³⁸ In his testimony on Bombali District, witness TF1-334 stated that as Chief of Staff the Accused Kanu passed on orders from the Accused Brima to the Operations Commander.¹⁰³⁹ However, he also stated in cross-examination that the Accused Kanu's role as Chief of Staff was to enforce orders given by the Accused Brima, the Accused Kamara and the Operations Commander.¹⁰⁴⁰ The Operations Commander reported to the Accused Kamara and Brima.¹⁰⁴¹

523. Prosecution Witnesses TF1-334 testified that the Accused Kanu was "in total control" of abducted women.¹⁰⁴² After the operation at Karina, in which women were abducted, the Accused Kanu informed commanders that they would have to "sign for these women."¹⁰⁴³ The witness also explained that any man who had a problem with his "wife" would notify Kanu, and vice-versa. As will be described in further detail below, in cases in which a soldier had a problem with his "wife," the Accused would contact the "Mammy Queen." If the Accused Kanu found that the "wife" was guilty of misbehaviour, she would either be beaten or locked "for some time" in a box in which bags of rice were usually stored.¹⁰⁴⁴

524. The witness further explained that the Accused Kanu issued written disciplinary orders for abducted women which he gave to the Mammy Queen." The witness recalled one such disciplinary order for women who were alleged to have "misbehav[e]d] to her husband."¹⁰⁴⁵ Kanu implemented the disciplinary system on at least one occasion, ordering the "Mammy Queen" to give a woman he

¹⁰³⁷ TF1-334, Transcript 13 June 2005, pp. 58-61. *See also* George Johnson, Transcript 16 September 2005, pp. 12-13; TF1-184, Transcript 27 September 2005, pp. 55-56.

¹⁰³⁸ Role of Accused, para 522, *supra*.

¹⁰³⁹ TF1-334, Transcript 20 May 2005, p.100- 101.

¹⁰⁴⁰ TF1-334, Transcript 16 June 2005, p. 67.

¹⁰⁴¹ TF1-334, Transcript 20 May 2005, pp. 99-100, 102.

¹⁰⁴² TF1-334, Transcript 24 May 2005, pp. 62.

¹⁰⁴³ TF1-334, Transcript 24 May 2005, pp. 62.

¹⁰⁴⁴ TF1-334, Transcript 24 May 2005, 62-64.

¹⁰⁴⁵ TF1-334, Transcript 24 May 2005, pp. 65-66.

found guilty “twelve lashes’ which she received.¹⁰⁴⁶ No evidence has been adduced suggesting that this system also applied to former soldiers who treated their abducted wives badly.

525. Witness TF1-334 testified that the Accused Kanu was also in charge of military training at Camp Rosos, including the training of abducted civilians.¹⁰⁴⁷ George Johnson testified that Kanu and FAT Sesay were in charge of providing military training to civilians, including children, at Camp Rosos.¹⁰⁴⁸

526. The Trial Chamber is satisfied that regardless of whether the Accused Kanu held the post of G-5, or was third in command in Koinadugu and Bombali Districts, he was a senior commander of the AFRC fighting force. In addition, he was the Commander of the AFRC fighting force in charge of abducted civilians including women and children. Whether he had effective control over the AFRC fighting forces will be assessed elsewhere in this Judgement.¹⁰⁴⁹

(c) Kanu’s Alleged Detention in ‘Colonel Eddie Town’

527. The Trial Chamber has found that, while the three Accused were arrested for an indeterminate period at Colonel Eddie Town, they were released and reinstated by SAJ Musa at Newton, on the outskirts of Freetown.¹⁰⁵⁰

6. Kanu’s Role in Freetown and the Western Area (January 1999 – February 1999)

528. The Prosecution, in its Final Brief submits that the Accused Kanu was present in Freetown during the January 1999 invasion and that the invasion was planned. As the third in command, it asks the Trial Chamber to infer that he actively participated in the planning phase.¹⁰⁵¹ It further alleges that the Accused Kanu personally committed at least two unlawful killings in the Freetown area, ordered the commission of specific crimes, and aided and abetted others.¹⁰⁵²

529. In its Final Brief, the Kanu Defence makes no specific submissions on Kanu’s role in Freetown and the Western Area.

¹⁰⁴⁶ TF1-334, Transcript 24 May 2005, pp. 68-69.

¹⁰⁴⁷ TF1-334, Transcript 24 May 2005, p. 24.

¹⁰⁴⁸ George Johnson, Transcript 15 September 2005, pp. 64-65.

¹⁰⁴⁹ Responsibility of Accused, Kanu, paras 2034-2040, *infra*.

¹⁰⁵⁰ Role of Accused, Brima, paras 385-388, *supra*.

¹⁰⁵¹ Prosecution Final Brief, para. 1629.

¹⁰⁵² Prosecution Final Brief, paras 1630-1636.

530. The Trial Chamber refers to its discussion above about the credibility and reliability of the witnesses who testified about the invasion of Freetown in January 1999.¹⁰⁵³

531. Witness TF1-184 testified that while SAJ Musa was alive, 'Five-Five' was one of a number of commanders and his rank was lieutenant colonel.¹⁰⁵⁴ Both witnesses TF1-184 and TF1-334 testified that following the death of SAJ Musa, Five-Five was promoted to brigadier and made army Chief of Staff.¹⁰⁵⁵ Witness Gibril Massaquoi testified that after his release from Pademba Road prison on 6 January 1999, he attended a meeting at State House at which he learnt that the Accused Kanu was "Chief of Army Staff".¹⁰⁵⁶ Witness TF1-334 testified that on 6 January 1999, he heard the Accused Kanu on the local radio. Kanu identified himself as the Chief of Staff and stated that the army had taken over the government of President Kabbah and their commander was Lieutenant General Alex Tamba Brima.¹⁰⁵⁷ Witness TF1-334 stated that this made him third in command.¹⁰⁵⁸

532. The Trial Chamber finds that he was active in his position as Chief of Staff. George Johnson testified that at the meeting in Orugu village, chaired by Brima and attended by the AFRC commanders, in which the movement to Freetown was planned, Kanu reiterated Brima's orders to the commanders. Kanu specifically reminded them about Brima's order that police stations should be burnt down and that targeted persons should be executed.¹⁰⁵⁹

533. As will be discussed elsewhere in this Judgement, there is credible evidence that the Accused Kanu personally committed crimes during this period and that he ordered the commission of crimes and that his orders were obeyed.¹⁰⁶⁰

534. The Trial Chamber notes that the Accused Kanu was based at State House, the headquarters of the AFRC fighting forces.¹⁰⁶¹ He attended the meeting of commanders held there on the evening of 6 January at which an attack on Wilberforce was discussed.¹⁰⁶² The Trial Chamber further observes that the evidence shows that Kanu was almost always at Brima's side during the Freetown invasion and retreat.¹⁰⁶³

¹⁰⁵³ See Role of the Accused, Brima, paras 396-419, *supra*.

¹⁰⁵⁴ TF1-184, Transcript 27 September 2005, pp. 42-43.

¹⁰⁵⁵ TF1-184, Transcript 27 September 2005, p. 56; TF1-334, Transcript 13 June 2005, pp. 58-60.

¹⁰⁵⁶ Gibril Massaquoi, Transcript 7 October 2005, p. 120.

¹⁰⁵⁷ TF1-334, Transcript 14 June 2005, pp. 19-20.

¹⁰⁵⁸ TF1-334, Transcript 13 June 2005, p. 60.

¹⁰⁵⁹ George Johnson, Transcript 16 September 2005, pp. 16-17.

¹⁰⁶⁰ Responsibility of Accused, paras 2050-2061, *infra*.

¹⁰⁶¹ TF1-334, Transcript 14 June 2005, pp. 4-5; Transcript 13 June 2005 p. 105; Gibril Massaquoi, Transcript 7 October 2005, p. 122; Transcript 10 October 2005, p. 3; TF1-153, Transcript 23 September 2005, p. 3.

¹⁰⁶² Gibril Massaquoi, Transcript 7 October 2005, p. 120; Transcript 11 October 2005, pp. 5, 65.

¹⁰⁶³ George Johnson, Transcript 16 September 2005, pp. 13, 17.

(a) Findings

535. The Trial Chamber is satisfied that the Accused Kanu was Chief of Staff and also the commander in charge of civilian abductees throughout the attack on Freetown on 6 January 1999 and the retreat to Newton.

7. Kanu's Role in Port Loko District (February 1999 – July 1999)

536. In its Final Brief, the Prosecution concedes that the Accused Kanu was not present in Port Loko during the Indictment period, and alleges instead that during this period he and the Accused Brima "fled with the RUF leadership to Makeni" in Bombali District.¹⁰⁶⁴

537. The Trial Chamber is satisfied that the Accused Kanu remained in the Western Area until early April 1999 when he went to Makeni, Bombali District. The Trial Chamber therefore makes no findings with regards to the Role of the Accused Kanu in Port Loko District.

¹⁰⁶⁴ Prosecution Final Brief, para. 34.

VIII. MILITARY STRUCTURE OF THE AFRC FIGHTING FORCE

A. Preliminary Remarks

538. All three Accused are charged with individual criminal responsibility for the crimes alleged in the Indictment pursuant to Article 6(3) of the Statute, which provides that:

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.

It is established in the jurisprudence that one of the requisite elements for a finding of superior responsibility pursuant to Article 6(3) is the existence of a superior-subordinate relationship between the accused and the perpetrator/s of the crime. This requirement has been widely referred to as the ‘effective control test’.¹⁰⁶⁵

539. The doctrine of effective control was traditionally applied to commanders in regular armies, which tend to be highly structured and disciplined forces. The AFRC was less trained, resourced, organised and staffed than a regular army. However, it mimicked one.¹⁰⁶⁶ It was largely composed of former government soldiers. As will be seen below, it had a command structure, although this underwent change as the authority of key personalities, including RUF commanders when the two groups worked together, waxed and waned. Rules and systems facilitating the exercise of control existed, yet these rules and systems were legitimated not by law but by the authority of the individual commanders. The commanders were not ultimately accountable to any individual or body external to the AFRC, as it existed independently of any State structure.

540. This does not mean that individual AFRC commanders were necessarily less effective in their control of their subordinates. The three Accused were senior members of the AFRC and any ability they had to control their subordinates would have been derived at least in part by virtue of their positions within this organisation. As a result, the Trial Chamber is of the view that analysing the structure of the AFRC is necessary in determining whether the three Accused are liable as superiors pursuant to Article 6(3). The Trial Chamber will examine the evidence relevant to this

¹⁰⁶⁵ See Applicable Law, paras 784-790, *infra*.

¹⁰⁶⁶ See further Exhibit D36, Major-General Prins, “Military Expert Witness Report on the Armed Forces Revolutionary Council Faction” [hereinafter “Prins Report”], para. 65.

question below, without predetermining the individual criminal responsibility of the three Accused, the Trial Chamber's findings on which are set out elsewhere in this Judgement.¹⁰⁶⁷

B. Submissions of the Parties

541. The Prosecution submits that the AFRC faction was a military organisation with effective command and control in the context of the Sierra Leone war. It contends that although the AFRC was not a perfect military organisation, it was nonetheless a military organisation with a clearly recognisable military hierarchy and structure upon which a strong command capability was based. The AFRC, it is alleged, had the functional characteristics of a military organisation, and it had internal coherence as a military organisation.¹⁰⁶⁸ According to the Prosecution, the AFRC as a military organisation was probably the most 'effective' one in Sierra Leone prior to the 6 January 1999 invasion.¹⁰⁶⁹

542. The Defence jointly submit that the history of the SLA prior to May 1997 shows a total breakdown of military organisation and as the AFRC faction consisted mostly of former members of this dysfunctional SLA, it too had only the semblance of a military structure and hierarchy.¹⁰⁷⁰ The Defence jointly submit that these fundamental military deficiencies form a *prima facie* basis for the absence of effective command and control within the AFRC faction.¹⁰⁷¹

543. The Defence jointly submit that the AFRC faction was an irregular military force which lacked the strong, clearly defined chain of command and disciplinary system evident in regular armies and that by virtue of this the three Accused did not have the material ability to control their subordinates.¹⁰⁷² The Kanu Defence argues that forces engaged in guerrilla combat generally do not have a proper disciplinary system and chain of command and without these features, a commander's authority remains merely "a powerful influence over an unstructured, intimidating and oppressive force".¹⁰⁷³

¹⁰⁶⁷ Responsibility of the Accused, *infra*.

¹⁰⁶⁸ Prosecution Final Brief, para 802; Exhibit P-36, Iron Report, para.E6.2.

¹⁰⁶⁹ Prosecution Final Brief, para 801, Colonel Iron, Transcript 13 October 2005, p. 65.

¹⁰⁷⁰ Kanu Final Brief, paras 243-247; Brima Final Brief, para. 103; Kamara Final Brief, para. 64.

¹⁰⁷¹ Brima Final Brief, para. 323; Kamara Final Brief, paras 64, 67; Kanu Final Brief, para. 247.

¹⁰⁷² Brima Final Brief, paras 100-102; Kamara Final Brief, paras 64-65; Kanu Final Brief, paras 228-247.

¹⁰⁷³ Kanu Final Brief, para. 228.

544. The Kanu Defence also submitted that the Prosecution Military Expert Report lacks probative value since he relied on a selection of the Prosecution witnesses, some of whom were clearly inconsistent with each other.¹⁰⁷⁴

C. Military Uniforms

545. In conflicts involving irregular forces or non-formal militaries, international criminal jurisprudence has relied in some cases on distinctive uniforms, patches or insignia worn by personnel to identify groups as military organisations. In the Trial Chamber's view, the wearing of military uniforms or identifying insignia may also have identified the AFRC as a separate military organisation within the conflict. This is so because the AFRC soldiers were mostly former members of the SLA who retained their military uniforms as long as possible.

546. In the conflict in Sierra Leone it was sometimes difficult for the public to identify with certainty the group responsible for crimes committed in their communities. Many of the witnesses referred to persons wearing combat uniform as 'soldiers'¹⁰⁷⁵ and those wearing mixed civilian and combat, often with red headbands, as 'rebels'.¹⁰⁷⁶ However, the witnesses' conclusions were not always accurate, as members of both factions regularly wore civilian clothes or mixed civilian/combat clothes.¹⁰⁷⁷ Some even wore stolen ECOMOG uniforms.¹⁰⁷⁸

547. The Trial Chamber is often able to distinguish actions committed by the various groups during the conflict, as many witnesses were able to identify members of the AFRC/SLA, RUF and CDF that were personally known to them. The use of unique pseudonyms such as 'Superman' and 'Savage' also facilitated identification of the faction responsible for particular incidents. Even where the witness only knew the participant in the conflict by their ordinary name, the Trial

¹⁰⁷⁴ Kanu Final Brief, para. 260.

¹⁰⁷⁵ Witness TF1-072 stated that "the soldiers were dressed in soldier uniforms": Transcript 1 July, p. 7. Witness TF1-216 also testified that "the soldiers all had uniforms and were armed": Transcript 27 June 2005, pp. 78-79.

¹⁰⁷⁶ Witness DBK-089 described a rebel as someone who does not wear a uniform, who attacks and cuts people: Transcript 14 July 2006, pp. 20, 45-46. Witness DAB-123 stated that the rebels who attacked his village were wearing a mix of military and civilian clothing. He was referring to the RUF: Transcript 12 September 2005, pp. 24-28; DAB-090 stated that the rebels wore mixed civilian and combat clothes: Transcript 17 July 2006, p.55.

¹⁰⁷⁷ George Johnson testified during the February 1998 retreat from Freetown, members of the RUF were mainly wearing civilian clothes, but some wore military clothes. Some of the AFRC troops were dressed in military fatigues, but some wore civilian attire: Transcript 15 September 2005, p. 27. Witness Gibril Massaquoi testified that in the January 1999 attack on Freetown, fighters wore a mixture of clothing. Some wore ECOMOG military uniforms and others wore T-shirts with military trousers. He stated that it was difficult to distinguish between RUF and AFRC unless you knew them before: Transcript 7 October 2005, p. 125. *See also* TF1-062, Transcript 27 June 2005, p. 8; TF1-206, Transcript 28 June 2005, p. 88; DAB-098, Transcript 4 September 2006, p. 14; DSK-103, Transcript 13 September 2006, p. 10.

¹⁰⁷⁸ Witness TF1-334 testified that AFRC commander 'Savage' and his men wore Nigerian ECOMOG uniforms during the attack on Tombodu: Transcript 20 May 2005, p. 12.

Chamber is often able to infer to which group that participant belonged through other pieces of evidence, such as the location and timing of the relevant incident.

D. Evidentiary Considerations

(a) Military Expert Witnesses

548. Both the Prosecution and the Defence commissioned Military Expert Reports on the structure of the AFRC faction, which were admitted as evidence under Rule 89(c) of the Rules, and both experts gave oral evidence.¹⁰⁷⁹ Prosecution Military Expert was Colonel Richard Iron, an officer in the British Army currently assigned to NATO. The Defence Military Expert was Major-General Prins of the Royal Netherlands Marine Corps. While both witnesses had impressive military backgrounds,¹⁰⁸⁰ the Trial Chamber found Colonel Iron to be a more credible expert witness for the following reasons.

549. First, Colonel Iron had more experience in land forces than Major-General Prins, whose experience was mostly naval.¹⁰⁸¹ Secondly, Colonel Iron had more operational experience than Major-General Prins.¹⁰⁸² Thirdly, Major-General Prins visited none of the places or battle sites to which Colonel Iron referred. Fourthly, Colonel Iron's report was based primarily on interviews with witnesses who appeared before the court, whereas Major-General Prins' report relied heavily on secondary sources. Fifthly, the primary sources which Major-General Prins did rely on were all high ranking officers, because in his view junior ranked officers have only limited knowledge of matters such as the overall structure of a military organisation.¹⁰⁸³ In the context of the AFRC, the Trial Chamber disagrees. The AFRC coup was a coup by junior ranks and, as a result, the AFRC in the jungle was made up of lower ranking officers. In contrast, Colonel Iron interviewed lower ranking AFRC members who were actually involved in the fighting, although most of his report was based on interviews with only three such individuals.¹⁰⁸⁴

550. Moreover, Major-General Prins' evidence was largely discredited in cross-examination. Throughout cross-examination he was inflexible in shifting from the position taken in his report, even when confronted with new evidence which, had he been aware of it previously, may have

¹⁰⁷⁹ Exhibit P-36, Iron Report; Exhibit D-36, Prins Report. Col. Iron testified on 12, 13 and 14 October 2005 and Major-General Prins testified on 17, 19, 20 and 24 October 2006.

¹⁰⁸⁰ Col. Iron, Transcript 12 October 2005, pp. 5-8; Major-General Prins, Transcript 17 October 2006, p. 3-18.

¹⁰⁸¹ Major-General Prins, Transcript 19 October 2006, pp. 41-43.

¹⁰⁸² Major-General Prins, Transcript 19 October 2006, p. 37.

¹⁰⁸³ Major-General Prins, Transcript 17 October 2006, pp. 55 – 56.

¹⁰⁸⁴ Witnesses George Johnson, TF1-334 and TF1-184.

altered his findings. For instance, he was reluctant to accept the new evidence of witness TRC-01 and other Defence witnesses which contradicted his own position.¹⁰⁸⁵

551. Ultimately, however, the Trial Chamber considers both military expert reports to be of limited use in examining the organisational structure of the AFRC faction. This is firstly because their reports are primarily relevant for only a short temporal and geographic period in the Indictment, as both experts focused on the organisation of the AFRC troops from Colonel Eddie Town to Freetown (November 1998 through January 1999). However, throughout the Indictment period (May 1997 through January 2000), the AFRC underwent significant organisational changes at certain key points and it is therefore erroneous to assume that the structure at one point in time is reflective of the structure throughout the entire period.

552. In addition, the Trial Chamber found the methodology used by the experts of little assistance. Both experts examined the AFRC with a view to determining whether it was a traditional military organisation, using a four pronged test devised by Colonel Iron.¹⁰⁸⁶

553. The experts defined a number of structural features of traditional military organisations which, in the Trial Chamber's view, were present in the AFRC in only a rudimentary form. For example, the experts discussed the importance of the span of command, which refers to the number of units or sub-units at any one level that one person might command.¹⁰⁸⁷ Colonel Iron explained that the establishment of sub-units at each hierarchical level of command increases the control that each individual commander possesses.¹⁰⁸⁸ The evidence indicates that AFRC troops were divided into battalions, but the number of battalions varied at different times and the number of men in each battalion appears to have fluctuated.¹⁰⁸⁹ In a regular army, a "staff" is appointed to assist the commander.¹⁰⁹⁰ While SAJ Musa established some kind of staff structure at Colonel Eddie Town,¹⁰⁹¹ the evidence establishes that the AFRC officers lacked sufficient military training to properly fulfil staff functions.¹⁰⁹²

¹⁰⁸⁵ Major-General Prins, Transcript 24 October 2006, p. 53.

¹⁰⁸⁶ Major-General Prins adopted Colonel Iron's methodology: Exhibit D-36, Prins Report para. 10. The four elements of the test were whether the AFRC had a recognisable military hierarchy and structure; whether it exhibited the characteristics of a traditional military organisation; whether there was coherent linkage between strategic, operational and tactical levels; and whether command was effective.

¹⁰⁸⁷ Exhibit D-36, Prins Report, para. 66; Exhibit P-36, Iron Report, para. B3.1.

¹⁰⁸⁸ Iron report, p. B-2, para. B3.1.

¹⁰⁸⁹ TF1-334, Transcript 16 June 2005, p. 48.

¹⁰⁹⁰ "Staff" is the generic term for those officers and other personnel who support and assist the commander: Exhibit P-36, Iron Report, paras B3.2 – B3.7; Colonel Iron, Transcript 12 October 2005, p. 18.

¹⁰⁹¹ Exhibit D-36, Prins Report, paras 71 and 89.

¹⁰⁹² Exhibit D-36, Prins Report, paras 74-80, 89; Colonel Iron, Transcript 13 October 2005, p. 83; George Johnson, Transcript 15 September 2005, p. 10.

554. The experts also considered whether the characteristics typically present in a traditional army were exhibited by the AFRC. The characteristics which they discussed included the intelligence process; communications system; lessons learnt system; recruitment and training; system for promotions and appointments; logistic supply; repair and maintenance of equipment; medical system; pay or reward system for soldiers; religious welfare system and fundraising and finance system.¹⁰⁹³ In the Trial Chamber's view it is of doubtful value to examine some of these characteristics, since they are inapplicable to most irregular militaries. For instance, instead of a pay or reward system for soldiers, AFRC commander Johnny Paul Koroma announced 'Operation Pay Yourself' in February 1998, encouraging soldiers to loot civilian property since the AFRC could not pay them wages.¹⁰⁹⁴ Other characteristics - intelligence process,¹⁰⁹⁵ communications system,¹⁰⁹⁶ lessons learnt system,¹⁰⁹⁷ recruitment and training¹⁰⁹⁸ and medical system¹⁰⁹⁹ – were present in the AFRC only to a limited extent.

555. The Prins Report also examined the SLA prior to May 1997, concluding that it was in a state of disarray when SLA officers staged the coup and established the AFRC.¹¹⁰⁰ Evidence was adduced which established that the main cause of this deterioration was the government's decision in 1992 to rapidly expand the army, as a result of which some ten thousand new soldiers were recruited over four years without adequate background checking or personality profiling.¹¹⁰¹ The level of recruits was poor and the organisation was not capable of training these recruits into effective, disciplined soldiers.¹¹⁰² The Trial Chamber accepts that the dysfunctional state of the SLA at the time of the coup in 1997 had a detrimental impact on the future military organisation of the AFRC faction.

¹⁰⁹³ Exhibit P-36, Iron Report, paras B4.1-B4.14; Exhibit D-36, Prins Report, paras 94-140.

¹⁰⁹⁴ TF1-334, Transcript 17 May 2005, pp. 72-73. Witness TF1-334 testified that the operation continued up to Kono District: Transcript 20 June 2005, pp. 104-105. Witness TF1-216 testified that soldiers referred to 'Operation Pay Yourself' following the capture of Koidu Town in March 1998: Transcript 27 June 2005, pp. 78-80, 96. Witness TF1-157 testified that looting AFRC soldiers referred to 'Operation Pay Yourself' in Bombali District in April/May 1998: Transcript 22 July 2005, p. 68.

¹⁰⁹⁵ Exhibit D-36, Prins Report, paras 95-97;

¹⁰⁹⁶ Exhibit P.36, Irons Report, paras E3.1-E3.2; Exhibit D.36, Prins Report, paras 98-105.

¹⁰⁹⁷ Exhibit P.36, Irons Report, paras E3.1-E3.2; Exhibit D-36, Prins Report, paras 112-115.

¹⁰⁹⁸ Exhibit P.36, Irons Report, paras E3.1-E3.2; Exhibit D-36, Prins Report, paras 120-122.

¹⁰⁹⁹ Exhibit P.36, Irons Report, paras E3.1-E3.2; Exhibit D-36, Prins Report, paras 131-132.

¹¹⁰⁰ Exhibit P.36, Irons Report, paras E3.1-E3.2; Exhibit D.36, Prins Report, para. 172.

¹¹⁰¹ TRC-01, Transcript 16 October 2006, pp. 62, 73. These numbers included both regular forces, trained to serve in the SLA, and irregular forces, namely the Sierra Leone border guards and vigilantes and the CDF.

¹¹⁰² Prins report para 26; TRC-01, Transcript 16 October 2006, p. 89.

556. Both experts ultimately agreed that the AFRC was an irregular military force, that is, not a traditional army.¹¹⁰³ Neither Colonel Iron nor Major-General Prins are experts in irregular military conflict. However, an irregular force can also be an organised force, and it can act in a structured and co-ordinated way.¹¹⁰⁴ The fact that the AFRC was not a traditional army does not *per se* permit inferences to be drawn regarding the ability of the AFRC commanders to effectively control their men. Insofar as a developed structure exists within an organisation, this is an important indicium of the superior's ability to exercise effective control and weight must be given to it accordingly. The Trial Chamber therefore considers that the conclusion of the experts' reports is the starting point for an analysis of the structure of the AFRC.

557. In the Trial Chamber's view, three of the structural factors which the experts considered are generic features which are critical to facilitating control and may be equally present in irregular armed groups such as the AFRC. These factors are a functioning chain of command, a sufficiently developed planning and orders process,¹¹⁰⁵ and a strong disciplinary system¹¹⁰⁶

558. The Trial Chamber will therefore consider the evidence pertaining to each of these three structural features during four separate periods, which correspond with major changes in the AFRC as the troops moved through the different Districts.¹¹⁰⁷ These periods are Kono District (14 February 1998 through approximately end April 1998); Bombali District (approximately May 1998 through November 1998); Freetown and Western Area District (January through approximately February 1999); and Port Loko District (approximately February through April 1999).

559. The Trial Chamber recalls that throughout certain periods covered by the Indictment, the AFRC was operating in separate factions in different geographical areas.¹¹⁰⁸ The Trial Chamber will only consider the evidence concerning the military organisation of the AFRC factions associated with the Accused – that is, the military organisation of SAJ Musa's faction during the time he was not accompanied by any of the Accused will not be considered.

560. Given that the AFRC was not a regular army and its organisational structure was somewhat unique, the best evidence on its command structure came from Prosecution and Defence witnesses

¹¹⁰³ Exhibit D-36, Prins Report, paras 174, 179; Colonel Iron, Transcript 13 October 2005, pp. 83-84, Major-General Prins, Transcript 17 October 2006, p. 68.

¹¹⁰⁴ See Major-General Prins, Transcript 20 October 2006, pp. 95, 75.

¹¹⁰⁵ Colonel Iron explained that military activity is usually the result of a coherent plan that all or parts of the organisation will attempt to implement. The key part is the decision – the selection of a course of action. Once a decision has been made, it is transmitted to those responsible for its implementation through an orders process: Exhibit P-36, Iron Report, para. B4.4

¹¹⁰⁶ Exhibit P-36, Iron Report, p. B-6, para. B4.6.

¹¹⁰⁷ See Context of Alleged Crimes, *supra*.

who were members of the AFRC in the jungle or associated with it. In its findings below, the Trial Chamber therefore relies primarily on the factual witnesses and considers the opinions of the experts where these are deemed of assistance in analysing the witnesses' testimony.

(b) Factual Witnesses

561. The Trial Chamber notes that the evidence of Prosecution witnesses on the military structure of the AFRC, in particular witnesses TF1-334 and George Johnson, was much more detailed than that of the Defence witnesses. Prosecution witnesses were able to describe a hierarchy with identified positions ascribed to particular commanders, while Defence witnesses tended to state that one individual was the overall commander, another was the deputy and then other individuals were referred to collectively as 'commanders'.¹¹⁰⁹ The Trial Chamber correspondingly placed more weight on the evidence of the Prosecution witnesses as they were able to give an overall view of the dynamics and functioning of the troop.

562. Another factor leading the Trial Chamber to place more weight on the evidence of Prosecution witnesses' evidence regarding the command structure was that even the lower ranked witnesses had access to the commanders. For instance, Witnesses TF1-334 and TF1-184 were close assistants to senior AFRC commanders.¹¹¹⁰ Witness George Johnson was the Chief Security Officer to the Accused Kamara in Kono District and later a senior commander himself.¹¹¹¹ These positions required them to remain close to the commanders and gave them the opportunity to regularly observe their interactions. The Trial Chamber observes that this opportunity was heightened by the environment in which the troops functioned. In contrast to a traditional army, the AFRC commanders were generally located together in the one camp and nearly all decisions were taken orally. Witness TF1-334 explained that "[t]he jungle is not like the city. Myself and other immediate soldiers that we are under the other commanders, they were present whenever there was a meeting in which decisions were taken."¹¹¹²

563. In light of these considerations, the Trial Chamber found the Prosecution witnesses generally more reliable than those of the Defence in arriving at its findings on the military structure of the AFRC.

¹¹⁰⁸ See Context of Alleged Crimes, *supra*.

¹¹⁰⁹ See for example DBK-113, Transcript 16 October 2006, pp. 28-29, 32; DBK-131, Transcript 10 October 2006, pp. 88-91. The Defence witness to give the most detail was witness DBK-012, who was himself a senior AFRC commander: Transcript 5 October 2006, pp. 107-112; Transcript 6 October 2006, pp. 6-18.

¹¹¹⁰ The names of these commanders were provided to the Trial Chamber: Exhibit P-12 (under seal); Transcript 26 September 2005, p. 71 (closed session).

E. Findings on the Military Structure of the AFRC Fighting Force

(a) Kono District (14 February 1998 through 30 June 1998)

(i) The Chain of Command

564. While the AFRC faction in Kono District was subordinate to RUF command,¹¹¹³ the two forces retained separate command structures. Witness George Johnson testified that the AFRC command structure for Kono was decided at a meeting in Koidu Town chaired by RUF commander Denis Mingo, who was the overall commander in the District.¹¹¹⁴ The Accused Kamara, as the senior most AFRC member in Kono District, “automatically” became the commander in charge of the AFRC troops upon the departure of Johnny Paul Koroma.¹¹¹⁵ A known AFRC commander, whose name was given to the Court in closed session, was the Operations Commander, subordinate to Kamara.¹¹¹⁶ The Accused Kamara appointed Colonel Foday Kallay as Deputy Operations Commander.¹¹¹⁷ George Johnson corroborated the existence of a Deputy Operations Commander, but he ascribed this role to RUF commander ‘Rambo’.¹¹¹⁸ Witness TF1-334 testified that ‘Rambo’ was initially an RUF battalion commander, but when Denis Mingo subsequently became the Operations Director for both the RUF and the AFRC, ‘Rambo’ became acting RUF Operations Commander. The Trial Chamber is satisfied that the position of Deputy Operations Commander existed within the AFRC, and it appears that the discrepancy between the testimonies is explicable on the basis that George Johnson failed to recall the changes in position.

565. The AFRC troops were divided into six battalions which also included some RUF soldiers.¹¹¹⁹ Witness TF1-334 testified that the battalion commanders were Captain ‘Junior’, ‘Savage’, Lieutenant Kallay, SLA Lieutenant ‘Mosquito’, Lieutenant ‘Tito’ and Lieutenant Bakarr. Each commander had a soldier appointed as their second in command.¹¹²⁰ Witness TF1-334 stated that the number of men in a battalion was not stable, as over time men would be added or

¹¹¹¹ George Johnson, Transcript 15 September 2005, pp. 7-11.

¹¹¹² TF1-334, Transcript 15 June 2005, pp. 67-68.

¹¹¹³ Context of the Alleged Crimes, paras 183-185, *supra*.

¹¹¹⁴ George Johnson, Transcript 15 September 2005, pp. 35-36, 46-47; George Johnson, Transcript 20 September 2005, p. 14.

¹¹¹⁵ TF1-334, Transcript 18 May 2005, pp. 21-22; George Johnson, Transcript 15 September 2005, pp. 37-38. *See further* Role of Accused, Kamara, paras 451-452, 461, *supra*.

¹¹¹⁶ TF1-334, Transcript 18 May 2005, pp. 22-23, Transcript 19 May 2005, p. 15; George Johnson, Transcript 15 September 2005, pp. 39-40.

¹¹¹⁷ TF1-334, Transcript 19 May 2005, p. 16.

¹¹¹⁸ George Johnson, Transcript 15 September 2005, pp. 39-40.

¹¹¹⁹ George Johnson, Transcript 15 September 2005, pp. 37-38.

¹¹²⁰ TF1-334, Transcript 19 May 2005, pp. 16-26; George Johnson, Transcript 15 September 2005, pp. 37-38.

TF

withdrawn from battalions depending on the changing military threats in each location. He estimated that a battalion could range in size from 55 to 100 men.¹¹²¹

566. Witness TF1-334 testified that the battalion commanders were subordinate to the Operations Commander and reported directly to him.¹¹²² In addition, the witness named several AFRC military supervisors as well as an AFRC artillery commander, Lieutenant Lagah, that reported to the Operations Commander.¹¹²³ The Accused Kamara also appointed a Political Adviser, 'Coachy Borno'.¹¹²⁴

567. Witness George Johnson testified that the Accused Kamara was the G4 in charge of arms and ammunition, the Accused Kanu was the G5 in charge of civilians and FAT Sesay was the G1 in charge of administration.¹¹²⁵ Colonel Iron explained that this terminology is a very widely used shorthand, which began as standard NATO and US Army practice, for the various positions in the team which acts as support staff to the commander.¹¹²⁶

568. The Trial Chamber notes that the existence of positions according to this NATO terminology was not put to witness TF1-334, whose account of the command structure was otherwise significantly more detailed than that of George Johnson. However, George Johnson was not the only witness to employ the terminology. There is evidence of a G5 and G4 position within the RUF.¹¹²⁷ The Trial Chamber notes that in one of Johnson's prior statements, introduced in cross-examination, he stated that the AFRC adopted the NATO system from the RUF.¹¹²⁸ Other witnesses refer to a G5 position existing in the AFRC structure at various points in time.¹¹²⁹

569. The Trial Chamber notes that witnesses who did not use the NATO nomenclature described positions in the same substantive terms, for example, referring to FAT Sesay as the 'Brigade

¹¹²¹ TF1-334, Transcript 19 May 2005, p. 18.

¹¹²² TF1-334, Transcript 19 May 2005, p. 21.

¹¹²³ TF1-334, Transcript 19 May 2005, pp. 27-28, 36-37.

¹¹²⁴ TF1-334, Transcript 19 May 2005, pp. 48.

¹¹²⁵ George Johnson, Transcript 15 September 2005, pp. 39-41.

¹¹²⁶ Colonel Iron explained the system as follows: "G1 branch, for example, looks after personnel issues; everything to do with administration, recruitment, pay, welfare issues. G2 looks after the intelligence function, providing intelligence advice to the commander. G3 helps to run operations on behalf of the commander; he coordinates operational activity. G4 is responsible for logistics; ensuring, for example, that troops do not run out of ammunition during a battle. And G5 is called civil military relations...[in the AFRC] the G5 is essentially the staff branch responsible for looking after civilians, abducted civilians usually, and their care for -- deal with welfare and the tasking of abducted civilian who were used by these organisations": Colonel Iron, Transcript 12 October 2005, pp. 17-18. *See also* Exhibit P36, Iron Report, para. B3.4.

¹¹²⁷ TF1-114, Transcript 14 July 2005, p. 130; TF1-113, Transcript 18 July 2005, p. 76; Gibril Massaquoi, Transcript 7 October 2005, pp. 8-9.

¹¹²⁸ George Johnson, Transcript 21 September 2005, p. 42.

Administrator' instead of the G1.¹¹³⁰ While witness George Johnson stated that G2 and G3 positions did not exist in the AFRC,¹¹³¹ Colonel Iron testified that the Operations Commander in the AFRC was equivalent to the G3 position.¹¹³² In light of the occasional use of the terminology by several different witnesses; the apparent existence of some of the staff positions (G1, G4 and G5) but not others (G2 and G3); and the fact that similar positions existed with different names (Brigade Administrator, Operations Commander), the Trial Chamber considers it plausible that the terminology may have been employed by persons who were familiar with its use, while others referred to the same position without the NATO-style title. In this regard, the Trial Chamber recalls that witness TF1-334 was a low ranked soldier, without extensive training, who may well not have been cognisant of the common nomenclature.

570. Accordingly, the Trial Chamber finds that the testimony of George Johnson regarding the existence of staff positions is generally consistent with witness TF1-334's evidence regarding the command structure.

571. The foregoing evidence establishes that the AFRC faction had an overall commander, who was superior to the Operations Commander, who was superior to the Deputy Operations Commander. Subordinate to the Operations Commander were the military supervisors and six battalion commanders, who were deputised by their '2IC's. The Trial Chamber therefore finds that the AFRC faction in Kono District had a chain of command.

(ii) Planning and Orders Process

572. The evidence adduced does not provide substantial detail on the processes by which orders were given and operations planned within the AFRC faction. Witness TF1-334 testified that the Accused Kamara gave orders through the Operations Commander.¹¹³³ It appears from the available evidence, in particular that of Defence witnesses present throughout this period,¹¹³⁴ that much of the planning and decision making may have been the prerogative of the RUF. Witness TF1-334 stated that whenever an operation took place, 'Superman' would call 'Bazzy' and the AFRC commanders

¹¹²⁹ Witness TF1-153 testifying that during the advance to Freetown, he assisted 'Coachy Gibono' with G5 responsibilities: Transcript 23 September 2005, p. 100. *See also* TF1-184, Transcript 29 September 2005, p. 69; DBK-012, Transcript 6 October 2005, p. 42.

¹¹³⁰ TF1-334, Transcript 14 June 2005, pp. 20-21 ; George Johnson, Transcript 16 September 2005, p. 39.

¹¹³¹ George Johnson, Transcript 15 September 2005, p. 41; Transcript 21 September 2005, pp. 38-39. *See also* Colonel Iron, Transcript 13 October 2005, p. 12.

¹¹³² Colonel Iron, Transcript 13 October 2005, pp. 12.

¹¹³³ TF1-334, Transcript 18 May 2005, pp. 22-23, Transcript 19 May 2005, p. 15.

¹¹³⁴ *See* discussion of their evidence: Role of Accused, Kamara, paras 454-459 *supra*.

to his residence and they would listen to whatever he told them.¹¹³⁵ The two factions participated in a number of joint operations.¹¹³⁶ One example is the joint attack to Sewafe to destroy a bridge in order to prevent ECOMOG forces advancing to Koidu Town.¹¹³⁷ In addition, commanders went on patrols and maintained contact with battalion commanders situated in different villages.¹¹³⁸

573. In the Trial Chamber's view, despite the absence of specific evidence detailing the process by which orders were transmitted in the AFRC faction, it is inferable from the fact that operations were successfully coordinated in cooperation with the RUF that a functioning planning and orders process existed. The Trial Chamber finds it unnecessary to determine the extent to which the AFRC commanders were actively involved in high level strategic planning of AFRC/RUF operations, as the mere implementation of orders from the RUF commanders would have required an effective process in place to ensure that these orders reached lower level commanders and troops.

(iii) Disciplinary System

574. The evidence adduced provides no detail on specific rules in place among the AFRC faction in Kono District, nor systems or personnel responsible for enforcing such rules. The Trial Chamber is thus unable to conclude that a disciplinary system existed among the AFRC faction in Kono.

(iv) Conclusion

575. The Trial Chamber accordingly finds that the AFRC faction in Kono District had a functioning chain of command and a planning and orders process.

(b) Bombali District (May 1998-November 1998)

(i) The Chain of Command

576. Witness TF1-334 testified that he attended an open meeting at Mansofinia at which the Accused Brima, in front of all the soldiers, restructured the troops, made promotions and delineated the responsibilities of the various commanders. The Accused Brima promoted himself to Brigadier and announced that he was Chief in Command. He promoted the Accused Kamara to Brigadier and made him Deputy Chief in Command.¹¹³⁹ The Accused Kanu, who was already a Colonel, was

¹¹³⁵ TF1-334, Transcript 18 May 2005, p. 24.

¹¹³⁶ TF1-334, Transcript 18 May 2005, pp. 24-33; Transcript 19 May 2005, pp. 3-4; TF1-019, Transcript 30 June 2005, p. 89; TF1-217, Transcript 17 October 2005, pp. 4-7, 14, 32; TF1-074, Transcript 05 July 2005, pp. 9, 11, 27-30.

¹¹³⁷ TF1-334, Transcript 18 May 2005, pp. 33-34.

¹¹³⁸ George Johnson, Transcript 15 September 2005, pp. 45-46.

¹¹³⁹ TF1-334, Transcript 20 May 2005, pp. 87-91; TF1-334, Transcript 23 May 2005, pp. 5-6.

promoted to Chief of Staff.¹¹⁴⁰ Witness TF1-334's superior was the Operations Commander and he reported to the Accused Brima and Kamara.¹¹⁴¹ The Operations Commander's deputy was Captain 'Junior Sheriff'.¹¹⁴²

577. The troops were divided into four companies, namely Company A, B, C and D. Brima appointed Lieutenant 'Tito', Foday Bah Marah, Captain Arthur and 'Junior Lion' as the respective commanders for each company.¹¹⁴³ It is apparent from the witness' testimony that, as in Kono District, each company also had a '2IC' or second in command.¹¹⁴⁴ Military supervisors were appointed for each company and their role was to brief the troops before they left on any operation. The military supervisors worked closely with the Operations Commander, to whom they would report any problems that arose in the company. If the Operations Commander could not resolve the problem, the military supervisors would then take it to the Brigade Commander 'Gullit'.¹¹⁴⁵

578. Witness TF1-334 testified that there was a chain of command in which the Chief of Command gave orders to the Chief of Staff, who then told the Operations Commander, who then passed on orders to the company commanders.¹¹⁴⁶ The witness testified that the military supervisors were inferior to the Chief of Staff and equal in rank but inferior in appointment to the Operations Commander.¹¹⁴⁷

579. Witness TF1-334 also testified about a number of individuals being part of the 'brigade administration', which he explained to be the persons responsible for direct command of the brigade. The individuals were 'Gullit', Ibrahim 'Bazzy' Kamara, 'Five-Five', Colonel Woyoh, Colonel Ibrahim Bioh Sesay, Colonel Abdul Sesay and the Operations Commander.¹¹⁴⁸ Major FAT Sesay was appointed as Brigade Administrator.¹¹⁴⁹ The witness detailed a number of other more minor appointments, including a Brigade Adjutant; Military Police Commander; Brigade Major;

¹¹⁴⁰ TF1-334, Transcript 20 May 2005, pp. 92-93.

¹¹⁴¹ TF1-334, Transcript 20 May 2005, pp. 99-100, 102. The name of the Operations Commander was admitted under seal: Exhibit P-12.

¹¹⁴² TF1-334, Transcript 23 May 2005, pp. 38-39.

¹¹⁴³ TF1-334, Transcript 20 May 2005, p. 103-105; Transcript 23 May 2005, pp. 25-26. George Johnson, Transcript 15 September 2005, p. 38.

¹¹⁴⁴ TF1-334, Transcript 23 May 2005, pp. 82-83.

¹¹⁴⁵ TF1-334, Transcript 23 May 2005, pp. 4, 6, 20, 26.

¹¹⁴⁶ TF1-334, Transcript 20 May 2005, p. 101, 107.

¹¹⁴⁷ TF1-334, Transcript 23 May 2005, pp. 4-5.

¹¹⁴⁸ TF1-334, Transcript 20 May 2005, p. 90; Transcript 23 May 2005, pp. 2-3, 6, 26. The name of the Operations Commander was admitted under seal: Exhibit P-12.

¹¹⁴⁹ TF1-334, Transcript 23 May 2005, pp. 32-33.

Intelligence Officer; Task Force Commander; Brigade Regimental Sergeant Major (“RSM”) and Political Advisor.¹¹⁵⁰

580. The testimony of witness George Johnson corroborates in large part the account of witness TF1-334. He stated that the Accused Brima publicly restructured the troop into four ‘battalions’ at Mansofinia.¹¹⁵¹ He confirmed that the Accused Kamara was second in command and named the same individual as Operations Commander. He states that FAT Sesay was the ‘G1 commander’ in charge of administration, while the ‘G4’ in charge of arms and ammunition was the Accused Kamara and the ‘G5’ in charge of civilian abductees was the Accused Kanu.¹¹⁵² The Trial Chamber recalls its discussion of this terminology and reiterates its conclusion that the available evidence does not prove that these positions were additional to those described by witness TF1-334.

581. The Trial Chamber notes that Witness George Johnson testified that the brigade was divided into four ‘battalions’, while witness TF1-334 referred to the creation of four ‘companies’. Witness TF1-334 stated that both battalions and companies are composite units of a brigade, with the difference being that battalions are larger than companies.¹¹⁵³ On occasion, witness TF1-334 used the two words interchangeably.¹¹⁵⁴ He explained that when reinforcements from SAJ Musa joined the troop at Rosos, the companies became battalions by virtue of their increased size.¹¹⁵⁵ Colonel Iron refers to this change and opines that ‘this retitling was less to do with size, but more an opportunity to promote the commanders’.¹¹⁵⁶ Be that as it may, the Trial Chamber is satisfied that the different terminology used by the witnesses, neither of whom had received substantial military training,¹¹⁵⁷ does not affect the substance of their evidence, which the Trial Chamber finds to be reliable.

582. Finally, the witnesses also differ on the point in time at which ‘Junior Lion’ assumed command of the fourth battalion or company. Witness TF1-334 testified that ‘Junior Lion’ was appointed commander of Company D at Mansofinia. However, ‘Junior Lion’ stated that the Accused Brima appointed him Provost-Marshal, in which capacity he was responsible for taking

¹¹⁵⁰ TF1-334, Transcript 23 May 2005, pp. 28-38.

¹¹⁵¹ George Johnson, Transcript 15 September 2005, p. 48.

¹¹⁵² George Johnson, Transcript 15 September 2005, pp. 50-51.

¹¹⁵³ TF1-334, Transcript 20 May 2005, p. 91.

¹¹⁵⁴ TF1-334, Transcript 23 May 2005, p. 5.

¹¹⁵⁵ TF1-334, Transcript 20 May 2005, pp. 91- 92.

¹¹⁵⁶ Exhibit P-36, Iron Report, para. E2.1.

¹¹⁵⁷ George Johnson had received only basic training in tactics and weapons handling while in the SLA: Transcript 15 September 2006, p. 6. Witness TF1-334 was a low-ranked soldier: Transcript 16 May 2005, pp. 6-10 (closed session).

disciplinary action against fighters who disobeyed the laws in place.¹¹⁵⁸ He testified that he was appointed commander of the fourth battalion by Brima upon arrival at Rosos.¹¹⁵⁹

583. The Trial Chamber notes that witness George Johnson, in a prior statement to the Court introduced by the Defence in cross-examination, corroborated witness TF1-334's evidence regarding the identity of the other three commanders but does not state who the fourth commander was.¹¹⁶⁰ Further, witness TF1-033 named the same four individuals as company commanders as witness TF1-334.¹¹⁶¹ The Trial Chamber is of the view that witness George Johnson was evasive on occasion with regard to his own role in the conflict and finds that, in addition to being Provost-Marshal, he was also the commander of the fourth company of troops throughout the journey to Rosos.

584. Finally, witness TF1-033 corroborated generally the evidence of witnesses George Johnson and TF1-334, although he stated that the troop restructure occurred at Yaya, from where the troops moved to attack Yifin.¹¹⁶² The Trial Chamber notes that according to witness TF1-334, the first stop of the troops after Mansofinia was a village called Yaya.¹¹⁶³ Given that witness TF1-033 omits mention of Mansofinia, the Trial Chamber is of the view that witness TF1-033's recollection of the location is mistaken. This conclusion is supported by the fact that the witness was also confused in relation to the home town of the Accused Brima, which he stated was the village 'Yaya', when in fact it is 'Yarya', one of a number of villages the troops passed through on their way to Mansofinia.¹¹⁶⁴

585. The foregoing evidence establishes that the AFRC faction had an overall commander, a deputy commander, a Chief of Staff, who was superior to the Operations Commander, who in turn was superior to the Deputy Operations Commander. Subordinate to the Operations Commander were the military supervisors and four battalion commanders, who were deputised by their '2IC's. In addition, the Brigade, as the troop was collectively known, was supported by numerous individuals in more minor positions. The Trial Chamber therefore finds that the AFRC faction in Bombali District had a well-developed chain of command.

(ii) Planning and Orders Process

¹¹⁵⁸ George Johnson, Transcript 15 September 2005, pp. 48-49.

¹¹⁵⁹ George Johnson, Transcript 15 September 2005, p. 67.

¹¹⁶⁰ George Johnson, Transcript 21 September 2005, pp. 52-55.

¹¹⁶¹ TF1-033, Transcript 11 July 2005, pp. 13-15.

¹¹⁶² TF1-033, Transcript 11 July 2005, pp. 13-15.

¹¹⁶³ TF1-334, Transcript 23 May 2005, p. 39.

¹¹⁶⁴ George Johnson, Transcript 15 September 2005, p. 44.

586. Witness George Johnson testified that the three Accused were based at headquarters at Rosos with the other senior commanders. The headquarters was in charge of planning all operations and giving military orders.¹¹⁶⁵ In the AFRC faction, planning was conducted by the Operations Commander, who would approve his plan through the Commander in Chief.¹¹⁶⁶ As Chief of Staff, Kanu's role was to enforce orders given by Brima, Kamara and the Operations Commander.¹¹⁶⁷ There is also evidence of the Operations Commander ordering operations.¹¹⁶⁸

587. Witness TF1-334 described in detail various incidents from which it is evident that an orders process functioned effectively. On one occasion near Mateboi, prior to arriving at Rosos, troops reported an enemy threat at their rear to the Accused Brima. The Accused Brima sent a message to the Operations Commander and the witness to gather troops and report to him. The Operations Commander called on the Deputy Operations Commander, Captain Junior Sheriff. The Accused Brima ordered the Deputy Operations Commander to take the troops, including the witness, to the rear and dislodge the enemy threat.¹¹⁶⁹ The operation was completed and the troops reported to Gullit on their return.¹¹⁷⁰

588. On one occasion while at Rosos, the Accused Brima called together the Deputy Brigade Commander 'Bazzy', the Chief of Staff 'Five-Five', the Operations Commander, the military supervisors and the company commanders and informed them that he wanted the troops to go on an operation to Gbomsamba to prove to the outside world that they were active.¹¹⁷¹ 'Gullit' ordered the company commanders to send men to headquarters for this operation. Witness TF1-334 stated that by that evening, all the company commanders and their men had reported to headquarters.¹¹⁷² 'Gullit' then issued a public order in front of the assembled troops that they should attack Gbomsamba and return with no civilians but with military equipment. He also stated that civilians should be amputated and the town burned down to record their presence there.¹¹⁷³ The Accused Brima did not go on this operation, but rather the troops were led by Kamara and four other commanders.¹¹⁷⁴

¹¹⁶⁵ George Johnson, Transcript 15 September 2005, p. 60.

¹¹⁶⁶ George Johnson, Transcript 16 September 2005, pp. 3, 16-17.

¹¹⁶⁷ TF1-334, Transcript 16 June 2005, p. 67.

¹¹⁶⁸ George Johnson, Transcript 15 September 2005, p. 63.

¹¹⁶⁹ TF1-334, Transcript 23 May 2005, pp. 91-93.

¹¹⁷⁰ TF1-334, Transcript 23 May 2005, p. 94.

¹¹⁷¹ TF1-334, Transcript 24 May 2005, pp. 5-6.

¹¹⁷² TF1-334, Transcript 24 May 2005, p. 9.

¹¹⁷³ TF1-334, Transcript 24 May 2005, pp. 9-10.

¹¹⁷⁴ TF1-334, Transcript 24 May 2005, pp. 9-10.

589. The attack on Gbinti while the troops were at Rosos was similarly orchestrated. In the presence of witness TF1-334, 'Gullit' ordered the Operations Commander to order the company commanders to report. The company commanders reported to the Operations Commander who then took them to the Accused Brima.¹¹⁷⁵ 'Gullit', in the presence of 'Bazzy', 'Five-Five' and the military supervisors, ordered the company commanders to burn down Gbinti using the tactic of pretending to surrender, favoured by SAJ Musa.¹¹⁷⁶ The company commanders returned later that evening with their men and 'Gullit' addressed them publicly in the field used on such occasions.¹¹⁷⁷ After the operation, the soldiers returned to Rosos and reported to the Accused Brima.¹¹⁷⁸ This evidence is corroborated by that of witness TF1-033, who also stated that 'Gullit' ordered an attack on Gbinti in July 1998 and the troops reported back to him at its completion.¹¹⁷⁹

590. As is apparent from the above evidence, orders were not written, but given orally in briefings.¹¹⁸⁰ Orders were usually given to the command group, but it was not unusual for the Accused Brima to brief the entire force.¹¹⁸¹

591. In the Trial Chamber's view, the above evidence establishes beyond reasonable doubt that the AFRC faction had a planning and orders process while they were in Bombali District.

(iii) Disciplinary System

592. According to witness TF1-334, the Accused Brima gave a strict warning to the troops at Mansofinia that as they moved onwards throughout Bombali District, the rule applied would be "minus you, plus you".¹¹⁸² The witness stated that this meant that the troop would continue with or without anyone who was disobedient, explaining that "when an order is given and you refuse to obey that order you're declared an enemy. And at that time if you say you were going to retreat to go to the ECOMOG forces, you will be considered an enemy and you'll be killed. So there was no way you could disobey".¹¹⁸³

593. The witness referred to the phrase "minus you, plus you" several times in his evidence, from which the Trial Chamber infers that it was not a one-off warning to the troops, but rather a well-

¹¹⁷⁵ TF1-334, Transcript 24 May 2005, pp. 45-46.

¹¹⁷⁶ TF1-334, Transcript 24 May 2005, pp. 46-47.

¹¹⁷⁷ TF1-334, Transcript 24 May 2005, pp. 47-48.

¹¹⁷⁸ TF1-334, Transcript 24 May 2005, p. 50.

¹¹⁷⁹ TF1-033, Transcript 11 July 2005, pp. 29-30.

¹¹⁸⁰ George Johnson, Transcript 16 September 2005, pp. 3, 16-17.

¹¹⁸¹ Iron report, p. E-2 para E3.1; TF1-334, Transcript 23 May 2005, pp. 16-17; TF1-033, Transcript 11 July 2005, p.

14. See further Responsibility of Accused, para. 1724, *infra*.

¹¹⁸² TF1-334, Transcript 23 May 2005, p. 16.

¹¹⁸³ TF1-334, Transcript 14 June 2005, p. 90.

known rule of the Accused Brima.¹¹⁸⁴ The Accused Brima denied any knowledge of this phrase.¹¹⁸⁵ However, in light of the evidence below, which establishes that a brutal disciplinary system was employed against troops and abducted civilians, the Trial Chamber does not give weight to the evidence of the Accused Brima.

594. Laws existed at Rosos which prohibited the theft of ‘government properties’, meaning arms and ammunition and medical supplies belonging to the troops, and the commission of rapes during operations, as this would distract the troops from the operation. Punishments for disobeying these laws included public flogging and killing.¹¹⁸⁶ Upon arrival at Colonel Eddie Town these laws, which had been in existence at Rosos, were written on cards by the Accused Brima and distributed to the various commanders. In addition to the laws prohibiting rape and theft, the witness recalled another law which stipulated that fighters reluctant to go on ambush would be publicly flogged.¹¹⁸⁷ This system was known as ‘jungle justice’.¹¹⁸⁸

595. Extensive evidence was adduced on the established system at Rosos which governed relationships between the soldiers and the abducted women.¹¹⁸⁹ If soldiers wanted a woman, they had to sign for her beforehand. Any problem with the women was to be reported to the AFRC command. If a soldier abused a woman, and a complaint was made, then the AFRC command could take the woman back.¹¹⁹⁰ Witness TF1-033 testified that according to the “jungle justice” rules, any fighter who raped another fighter’s ‘wife’ would be killed. The witness recalled an incident in which Alhaji Kamanda alias ‘Gunboot’ killed a fighter for raping another fighter’s ‘wife’.¹¹⁹¹

596. The Trial Chamber recalls that a Military Police Commander was appointed at Mansofinia.¹¹⁹² While no further evidence was adduced on his functions, the Trial Chamber infers from this fact that a military police force of some type existed within the AFRC faction. In addition, the Provost-Marshal, George Johnson, testified that he was responsible for making sure the soldiers stayed ‘on the right path’ and attacked only designated villages.¹¹⁹³

¹¹⁸⁴ TF1-334, Transcript 23 May 2005, p. 16; TF1-334, Transcript 14 June 2005, p. 90; Transcript 16 June 2006, p. 16; Transcript 17 June 2005, p. 92.

¹¹⁸⁵ Alex Tamba Brima, Transcript 13 June 2006, p. 3.

¹¹⁸⁶ George Johnson, Transcript 15 September 2005, pp. 48-49, 76-77.

¹¹⁸⁷ George Johnson, Transcript 15 September 2005, p. 78.

¹¹⁸⁸ George Johnson, Transcript 15 September 2005, pp. 48-49.

¹¹⁸⁹ See Factual Findings, Outrages on Personal Dignity, paras 1137-1141, *infra* for more detail on the rules applied to the women at Camp Rosos.

¹¹⁹⁰ TF1-334, Transcript 23 May 2005, pp. 76-77.

¹¹⁹¹ TF1-033, Transcript 12 July 2005, p. 9.

¹¹⁹² See Military Structure of AFRC Fighting Force, para 578, *supra*.

¹¹⁹³ George Johnson, Transcript 15 September 2005, pp. 48-49.

597. Major-General Prins opined that it is unlikely the Provost-Marshal ever functioned properly because there were no trained staff officers who could establish a system to try and punish offenders.¹¹⁹⁴ The Trial Chamber agrees that, on the evidence adduced, the AFRC commanders dispensing “jungle justice” were not trained in military law and no formal procedures were in place for trying offenders and determining appropriate penalties. Rather, the system appears to have been fairly arbitrary. ‘Junior Lion’ testified that he ordered the arrest of one of his troops in Colonel Eddie Town on the suspicion that the man had been stealing ammunition. However, a confrontation broke out and so ‘Junior Lion’ simply shot him.¹¹⁹⁵

598. This evidence supports Colonel Iron’s view that the practice of justice in the AFRC faction was based on the whim of the commander: if the commander wanted to exert discipline to control the behaviour of his officers and men, the system was there for him to do it. If he decided not to, then wrongdoings could go unpunished.¹¹⁹⁶ ‘Junior Lion’ testified that no discipline was ever imposed for carrying out amputations, for instance, those carried out by ‘Adama Cut Hand’.¹¹⁹⁷ The Trial Chamber notes in this regard that the selective application of the disciplinary system did not undermine its effectiveness.

599. The evidence establishes that the AFRC faction had ‘laws’ in place; penalties for disobedience; and individuals responsible for meting out discipline. The Trial Chamber accordingly finds that despite its brutal nature, the AFRC faction in Bombali District had a functioning disciplinary system.

(iv) Conclusion

600. The Trial Chamber finds that a well-developed chain of command, an effective planning and orders process and a functioning disciplinary system existed within the AFRC faction in Bombali District.

(c) Freetown and the Western Area (January 1999)

(i) Chain of Command

601. The Trial Chamber recalls that during the month or so between SAJ Musa’s arrival at Colonel Eddie Town and his death on 23 December 1998 at Benguema, he was the overall

¹¹⁹⁴ Exhibit D-36, Prins Report, para. 118.

¹¹⁹⁵ George Johnson, Transcript 15 September 2005, p. 77.

¹¹⁹⁶ Exhibit P-36, Iron Report, para. E3.1.

¹¹⁹⁷ George Johnson, Transcript 15 September 2005, p. 83.

commander of the AFRC.¹¹⁹⁸ Brima himself testified to a clearly identified hierarchy in this period, established by SAJ Musa at Colonel Eddie Town, with a Deputy Commander, an Operations Commander, four company commanders, a Task Force Commander, an Adjutant and an OC military police.¹¹⁹⁹ Most of these appointments correlated to positions in the traditional army.¹²⁰⁰

602. Prosecution witnesses testified that following the death of SAJ Musa and prior to the advance on Freetown, the Accused Brima restructured the troops. He appointed himself Commander in Chief and promoted himself to Lieutenant-General. The Accused Kamara became second in command, with his rank remaining Brigadier General. Brima promoted the Accused Kanu to Brigadier. He remained Chief of Staff and was third in command.¹²⁰¹ The battalion commanders were each promoted to colonel.¹²⁰²

603. The Accused Brima created a new position, called the Operations Director. He promoted Colonel Woyoh to Brigadier and appointed him to this position, in which capacity he would be in charge of all operations and report directly to the Chief of Staff.¹²⁰³ 'O-Five' remained the Operations Commander, to whom the Missions Commander Foyoh reported.¹²⁰⁴ 'O-Five' in turn reported to Operations Director Woyoh.¹²⁰⁵ Colonel 'Junior Sheriff' remained Deputy Operations Commander.¹²⁰⁶ The Brigade Administrator was FAT Sesay.¹²⁰⁷ This last appointment was corroborated by witness Gibril Massaquoi, who testified that on arrival at State House on 6 January he saw FAT Sesay and was told that he was "Colonel Admin" for the AFRC.¹²⁰⁸

604. The Accused Brima stated that the battalions were to remain the same as under SAJ Musa. The 1st battalion was commanded by Lieutenant Colonel Tito; the 2nd battalion by Lieutenant Colonel Kallay; the 3rd battalion by Colonel Osman Sesay, alias 'Changabulanga'; the 4th battalion by Lieutenant Colonel Foday Marah, alias 'Bulldoze', the 5th battalion by Colonel Saidu Kambolai, alias 'Basky'; and the 6th battalion by a commander whose name witness TF1-334 could not recall. In addition, there were two battalions created under SAJ Musa, named the Red Lion Battalion and

¹¹⁹⁸ See Context of Alleged Crimes, paras 198-201 *infra*.

¹¹⁹⁹ Alex Tamba Brima, Transcript 13 June 2006, pp. 6-11.

¹²⁰⁰ Colonel Iron, Transcript 13 October 2005, p. 4.

¹²⁰¹ TF1-334, Transcript 13 June 2005, pp. 58-61; George Johnson, Transcript 16 September 2005 pp. 12-13; TF1-184, Transcript 27 September 2005, pp. 55-56. See also Gibril Massaquoi, Transcript 7 October 2005, p. 120-121.

¹²⁰² TF1-334, Transcript 13 June 2005, p. 60.

¹²⁰³ TF1-334, Transcript 13 June 2005, p. 62.

¹²⁰⁴ TF1-334, Transcript 13 June 2005, pp. 63-66; Gibril Massaquoi, Transcript 7 October 2005, p. 120-121.

¹²⁰⁵ TF1-334, Transcript 13 June 2005, pp. 66-67.

¹²⁰⁶ TF1-334, Transcript 13 June 2005, p. 76.

¹²⁰⁷ TF1-334, Transcript 13 June 2005, p. 79; TF1-184, Transcript 27 September 2005, p. 59.

¹²⁰⁸ Gibril Massaquoi, Transcript 7 October 2005, p. 115.

the RDF Battalion, which were commanded by 'Med Bajehjeh' and 'NPFL' respectively.¹²⁰⁹ The battalion commanders were to report to the Operations Commander.¹²¹⁰ The Accused Brima also appointed 'Colonel Junior Lion' as Task Force Commander and Colonel Ibrahim, alias 'Road Block', as Military Police Commander, both of whom were to report to the Chief of Staff.¹²¹¹

605. The Trial Chamber notes that witnesses DAB-033 and DBK-012, who gave the most detailed testimony regarding the command structure in this period out of the Defence witnesses, corroborated to a large extent the identity of the battalion commanders.¹²¹²

606. In addition, witness TF1-334 named the various members of the Brigade Administration, which included the three Accused, the Operations Director, the Military Police Commander and the Task Force Commander, as well as the military supervisors, a Brigade Adjutant and a Brigade RSM. Most of these individuals were required to report to the Chief of Staff. A number of other minor appointments were made.¹²¹³ Brima then ordered that the other positions would remain the same as under SAJ Musa, although he promoted several individuals in rank.¹²¹⁴ He clarified that individuals who reported to SAJ Musa now reported directly to him.¹²¹⁵

607. While the Defence witnesses testified that different individuals occupied the senior command positions,¹²¹⁶ Defence witnesses also testified that there was structure within the troop. Witness DBK-131, a battalion commander during the Freetown invasion, testified that during the advance on Freetown his battalion, and all other battalions, had their own battalion staff as well as three companies.¹²¹⁷ Companies were divided into platoons and every platoon had four sections.¹²¹⁸ The witness stated he kept an effective chain of command in his battalion.¹²¹⁹ Witness DBK-131 said that each battalion had its own structure.¹²²⁰

¹²⁰⁹ TF1-334, Transcript 13 June 2005, pp. 67-69. 'NPFL' is also the acronym for Charles Taylor's fighters, the National Patriotic Front of Liberia. The witness clearly used the term in reference to an individual and the Trial Chamber therefore presumes that it was this person's pseudonym. The Trial Chamber notes in this regard that there were a number of Liberian fighters in Sierra Leone throughout the conflict.

¹²¹⁰ TF1-334, Transcript 13 June 2005, p. 73.

¹²¹¹ TF1-334, Transcript 13 June 2005, pp. 70-71; George Johnson, Transcript 16 September 2005, p. 14.

¹²¹² DAB-033, Transcript 25 September 2006, pp. 63-68, 70-71; Transcript 2 October pp. 94-95; DBK-012, Transcript 6 October 2006, pp. 4-6, 22-23.

¹²¹³ TF1-334, Transcript 13 June 2005, pp. 78-84.

¹²¹⁴ TF1-334, Transcript 13 June 2005, pp. 62-63.

¹²¹⁵ TF1-334, Transcript 13 June 2005, p. 63.

¹²¹⁶ See Role of Accused, paras 406-419, *supra*, for discussion of this testimony.

¹²¹⁷ DBK-131, Transcript 26 October 2006, pp. 59-60.

¹²¹⁸ DBK-131, Transcript 26 October 2006, p. 8.

¹²¹⁹ DBK-131, Transcript 26 October 2006, p. 59.

¹²²⁰ DBK-131, Transcript 26 October 2006, p. 60.

608. The above evidence establishes that, as it advanced on Freetown, the AFRC had a first, second and third in command, followed by the Operations Director, who was superior to the Operations Commander, who was superior to the Deputy Operations Commander and the Missions Commander. The senior command was supported by the other members of the Brigade Administration. The individual battalion commanders presided over battalions with their own sub-units.

609. The troops captured the seat of government in Freetown, State House, on 6 January 1999. However, ECOMOG recaptured it several days later and the following days saw the AFRC troops in continual retreat throughout eastern Freetown. Colonel Iron's report notes that the command structure began to break down in Freetown, resulting in the failure of the chain of command, after the capture of State House, since commanders gave orders to soldiers nearest them without using the battalion structure.¹²²¹ This conclusion is supported by the testimony of factual witnesses.

610. Witness TF1-334, who remained mostly with the brigade administration while in Freetown, stated that after the loss of State House, 'the troops were all scattered, everybody was just about'.¹²²² If the commanders needed reinforcements to go on a battle, the witness and his supervisor were forced to move around raising soldiers to go on the mission.¹²²³ This evidence was corroborated by witness TF1-184, who was ordered by 'Gullit' to find manpower to carry out a mission¹²²⁴ and witness Gibril Massaquoi, who recalled 'Five-Five' issuing a similar order.¹²²⁵ George Johnson stated that after the headquarters lost State House, arms and ammunition were nearly finished and were no longer being distributed by the responsible commander, but 'everybody had his or her own arms and ammunition'.¹²²⁶ Witness TF1-184 agreed with Colonel Iron's conclusion that the battalion structure was no longer operating. He stated that 'everyone was disorganised' and 'everybody was just doing what he want [sic]'.¹²²⁷

611. In light of this evidence, the Trial Chamber is satisfied beyond reasonable doubt that from the death of SAJ Musa until around the time the troops lost control of State House, the AFRC faction had a chain of command. However, the Trial Chamber finds that after the loss of State House, this chain of command was interrupted until the troops regrouped. In the interim, individual commanders gave orders to the troops in their proximity.

¹²²¹ Exhibit P-36, Iron Report, para. D4.

¹²²² TF1-334, 14 June 2005, p. 41.

¹²²³ TF1-334, 14 June 2005, pp. 41-42.

¹²²⁴ TF1-184, Transcript 30 September 2005, pp. 8-9.

¹²²⁵ Gibril Massaquoi, Transcript 7 October 2005, pp. 13-15.

(ii) Planning and Orders Process

612. Brima testified to a clearly identified structure of movement on the march to Freetown: the “task force” team in the advance and a “back-up” team as reinforcement leaving Colonel Eddie Town in advance of the rest of the troop.¹²²⁸ The rest of the troop would include the “headquarters” team – including family members, a medical team or medical orderly, and the signallers – secured by a company at the rear.¹²²⁹ They successfully engaged in major battles, including at Lunsar, Benguema, Hastings and Kossoh Town, where complex military planning and manoeuvres were required.¹²³⁰

613. Witness TF1-334 described operations to Waterloo and York from which it is apparent that there was a planning and orders process. On both occasions, the Accused Brima called one of his subordinate members of the brigade administration and ordered the attack. The subordinate then issued orders to implement the attack. After each operation, the commander of the returning troops reported to the Accused Brima.¹²³¹ The troops conducted several other small operations, the execution of which involved commanders including the Accused Brima issuing orders which were obeyed.¹²³²

614. A number of witnesses testified that ‘Gullit’ chaired a meeting of commanders at Orugu village on 4 January 1999 at which he gave the order to attack Freetown.¹²³³ The Chief of Staff, the Accused Kanu, ran the meeting and reiterated the orders to the troops.¹²³⁴ Specifically, the troops were ordered to loot Freetown and burn down the Kissy and Eastern police stations, capture State House, open Pademba Road prison, kill anyone who opposed the troops and abduct civilians in

¹²²⁶ George Johnson, Transcript 16 September 2005, p. 48.

¹²²⁷ TF1-184, Transcript 29 September 2005, pp. 104-105.

¹²²⁸ Alex Tamba Brima, Transcript 13 June 2006, pp. 16-17; DBK-012, Transcript 6 October 2006, p. 9.

¹²²⁹ Alex Tamba Brima, Transcript 13 June 2006, p. 18. *See also* DBK-012, Transcript 6 October 2006, p. 9; TF1-033, Transcript 11 July 2005, pp. 114 – 115; and TF1-153, Transcript 22 September 2006, p. 86.

¹²³⁰ *See* Exhibit P-36, Iron Report, pp. C-13 – D-1; TF1-033, Transcript 11 July 2005, p. 45; DBK-131, Transcript 10 October 2006, p. 72; George Johnson, Transcript 22 September 2005, p. 86; George Johnson, Transcript 16 September 2006, pp. 14 and 16; TF1-033, Transcript 11 July 2005, p. 55.

¹²³¹ TF1-334, Transcript 13 June 2005, pp. 85-87, 89-90.

¹²³² TF1-334, Transcript 13 June 2005, pp. 93-100; TF1-184, Transcript 27 September 2005, pp. 57-61; TF1-153, Transcript 22 September 2005, pp. 95-98; George Johnson, Transcript 16 September 2005, pp. 14-16.

¹²³³ TF1-334, Transcript 13 June 2005, p. 100, 110-112; George Johnson, Transcript 16 September 2005, pp. 16-17; TF1-153, Transcript 22 September 2005, pp. 97-98; TF1-033, Transcript 11 July 2005, p. 59.

¹²³⁴ George Johnson, Transcript 16 September 2005, p. 17.

order to attract the attention of the international community.¹²³⁵ As discussed in greater detail below, these orders were carried out.¹²³⁶

615. The Trial Chamber considers that the transmission of these orders to the troops and their subsequent implementation, in addition to the smaller operations described immediately above, proves the existence of a functioning planning and orders process within the AFRC faction from Colonel Eddie Town to State House in Freetown.

616. However, it is apparent from the evidence pertaining to the break down in the chain of command that at this point commanders began issuing orders to whomever was nearest to them and willing to listen.¹²³⁷ The Trial Chamber accordingly finds that the planning and orders process was also interrupted around the time that the troops lost control of State House.

(iii) Disciplinary System

617. The Trial Chamber recalls that a disciplinary system was in place in Colonel Eddie Town, from where the troops departed towards Freetown.¹²³⁸ The structure established by the Accused Brima after the death of SAJ Musa included a Military Police Commander.¹²³⁹ There is evidence of the military police at State House receiving civilian complaints regarding the troops' conduct, but no evidence of any disciplinary action being taken.¹²⁴⁰ There was also a special unit named Task Force whose role it was to ensure that troops did not escape from the front to the rear.¹²⁴¹ It seems, however, that this unit was ineffective. Colonel Iron testified that the disciplinary system broke down in Freetown and soldiers attempted to slip away to the east to avoid fighting.¹²⁴²

618. Commanders in Freetown responded to the misconduct of their troops with force rather than relying on any formal disciplinary system. For instance, 'Gullit' shot one of his commanders, Colonel 'Road Block' in the foot at Shankardass.¹²⁴³ In a prior written statement introduced in

¹²³⁵ TF1-334, Transcript 13 June 2005, pp. 100-104; TF1-334, Transcript 14 June 2005, pp. 62-64; TF1-033, Transcript 11 July 2005, pp. 59-64; TF1-153, Transcript 22 September 2005, p. 98; George Johnson, Transcript 16 September 2005, pp. 22, 24, 27, 29, 31; TF1-184, 27 September 2005, p. 76.

¹²³⁶ Responsibility of Accused, Brima, paras 1767-1780, *infra*.

¹²³⁷ See Military Structure of the AFRC Fighting Force, para. 609, *supra*.

¹²³⁸ See Military Structure of the AFRC Fighting Force, paras 591-598, *supra*.

¹²³⁹ TF1-334, Transcript 13 June 2005, pp. 70-71; George Johnson, Transcript 16 September 2005, p. 14.

¹²⁴⁰ Gibril Massaquoi, Transcript 10 October, pp. 10-12.

¹²⁴¹ Gibril Massaquoi, Transcript 7 October 2005, pp. 126-127; Gibril Massaquoi, Transcript 10 October 2005, pp. 21-22.

¹²⁴² Exhibit P-36, Iron Report, para. D4-7.

¹²⁴³ Witness TF1-334 stated this was for allegedly passing on information to Tina Musa (the wife of SAJ Musa): TF1-334, Transcript 14 June 2005, p. 95. Witness TF1-184 testified that 'Road Block' was shot because he refused to obey 'Gullit's order to burn down a nearby oil refinery on the ground that this would be too dangerous: TF1-184, Transcript 27 September 2005, pp. 79-80.

cross-examination, witness TF1-153 stated that if the soldiers did not follow Brima's commands in Freetown, he would shoot them and he did this many times.¹²⁴⁴ Witness TF1-184 describes one of the commanders throwing a grenade at a soldier accused of stealing money.¹²⁴⁵ When asked in cross-examination about the penalty for disobeying orders, witness TF1-334 reiterated that Brima's rule was "plus you, minus you".¹²⁴⁶ The witness explained that this meant "[i]f you fail to obey then if you are lucky they will fire you on the leg. But if you are not lucky...you are killed. Indeed, if you are not fired on the leg, you will have the big task which will be given to you".¹²⁴⁷

619. It is clear from this evidence that punishment was meted out for disobedience. While the disciplinary system in Bombali District sanctioned the use of violence by commanders on their subordinates, in contrast, the evidence adduced in relation to Freetown is insufficient to prove that any sort of system was operational. Accordingly, the Trial Chamber is of the view that the evidence is insufficient to make a finding that a disciplinary system existed within the AFRC in Freetown and the Western Area.

(iv) Conclusion

620. In light of the foregoing evidence, the Trial Chamber finds beyond reasonable doubt that the AFRC had a functioning chain of command and an effective planning and orders process throughout the advance on Freetown, until the troops lost control of State House several days after its capture on 6 January 1999. After this point, the chain of command and the planning and orders process was interrupted. The Trial Chamber further finds that the Prosecution has failed to establish beyond reasonable doubt that a disciplinary system was in place within the AFRC in Freetown and the Western Area.

(d) Port Loko District (February through April 1999)

621. Following the retreat from Freetown, the three Accused regrouped with their troops at Benguema in the Western Area.¹²⁴⁸ They then moved to Waterloo where, together with the RUF, they planned a second attack on Freetown.¹²⁴⁹ The attack was unsuccessful.¹²⁵⁰

¹²⁴⁴ TF1-153, Transcript 23 September 2005, p. 52.

¹²⁴⁵ TF1-184, Transcript 27 September 2005, p. 63; TF1-184, Transcript 30 September 2005, p. 18 (closed session).

¹²⁴⁶ See Military Structure of the AFRC Fighting Force, paras 592-593, *supra* for discussion of this rule.

¹²⁴⁷ TF1-334, Transcript 17 June 2005, p. 92.

¹²⁴⁸ George Johnson, Transcript 16 September 2005, pp. 58-59.

¹²⁴⁹ George Johnson, Transcript 16 September 2006, pp. 59-62; Gibril Massaquoi, Transcript 10 October 2005, pp. 31-32.

¹²⁵⁰ George Johnson, Transcript 16 September 2005, pp. 62-63.

622. Subsequently, in Lunsar in early April, infighting broke out between Issa Sesay and Denis Mingo of the RUF.¹²⁵¹ Mingo contacted the Accused Brima and requested his assistance. As a result, the Accused Brima and Kanu, as well as 'O-Five' and others then travelled to Masiaka and Makeni in Bombali District.¹²⁵² Witness TF1-153 corroborates evidence that the Accused Brima and Kanu separated from the Accused Kamara, stating that Brima and Kanu went to Masiaka, while Kamara went to the Westside because he was 'disgruntled' and did not want to assist the RUF.¹²⁵³

623. Around this time, the Accused Kamara was based with some troops in the area around Mile 38. These troops were pushed back by ECOMOG to Mamamah and from there to Gberibana, an area in Port Loko District colloquially known as the 'West Side'.¹²⁵⁴

624. There was no evidence adduced on the structure of the AFRC troops who accompanied the Accused Brima and Kanu to fight with the RUF. The Trial Chamber will therefore focus solely on the structure of the AFRC faction associated with the Accused Kamara in Port Loko District.

(i) Chain of Command

625. The evidence shows that early April 1999, the Accused Kamara called a meeting, attended by witnesses TF1-334 and George Johnson, as well as other commanders, at which he created a new command structure for the AFRC troops in the 'West Side'.¹²⁵⁵ 'Bazzy' appointed himself the Chief Commander. A known AFRC member was appointed second in command and Director of Operations.¹²⁵⁶ Ibrahim Bioh Sesay was third in command. 'Junior Lion' was promoted to Lieutenant-Colonel and appointed the Operations Commander, in which position he was subordinate to the Operations Director. 'Colonel Tito' was 'Camp Commandant' and 'Bio' was appointed medical officer.¹²⁵⁷ The Accused Kamara structured the troops into three battalions and appointed battalion commanders.¹²⁵⁸

¹²⁵¹ Gibril Massaquoi, Transcript 10 October 2005, pp. 35-38.

¹²⁵² Gibril Massaquoi, Transcript 10 October 2005, pp. 39-40; George Johnson, Transcript 16 September 2005, pp. 62-63.

¹²⁵³ TF1-153, Transcript 23 September 2005, pp. 26-28.

¹²⁵⁴ Gibril Massaquoi, Transcript 10 October 2005, pp. 40, 44; George Johnson, Transcript 16 September 2005, pp. 63, 67. Witness TF1-334 testified that the AFRC faction in the West Side numbered around 700 people, including abducted civilians: TF1-334, Transcript 15 June 2005, p. 31.

¹²⁵⁵ TF1-334, Transcript 15 June 2005, pp. 24-25; George Johnson, Transcript 16 September 2005, p. 69.

¹²⁵⁶ George Johnson, Transcript 16 September 2005, pp. 69-72. The name of this commander was admitted under seal: Exhibit P-12.

¹²⁵⁷ TF1-334, Transcript 15 June 2005, p. 26.

¹²⁵⁸ George Johnson, Transcript 16 September 2005, pp. 69-72; TF1-334, Transcript 15 June 2005, pp. 31-32.

626. The Trial Chamber notes that Defence witnesses testified that different known AFRC commanders occupied the senior command positions in Port Loko District. Critically, however, the testimony of these witnesses supports the conclusion that there was a structure in place.¹²⁵⁹

627. The Trial Chamber finds that there was a basic chain of command within the AFRC faction in Port Loko District.

(ii) Planning and Orders Process

628. Witness George Johnson testified that in the West Side, the Operations Commander and the Operations Director planned operations together and both reported to the Accused Kamara. In his position as Operations Commander, he went on all operations personally or sent one of his subordinates to go on his behalf.¹²⁶⁰

629. There was relatively little evidence adduced on the day-to-day functioning of the troops in the West Side. Witness George Johnson testified about a meeting that was held to plan a major attack on Port Loko to capture arms and ammunition from the Malian ECOMOG soldiers stationed there.¹²⁶¹ Among those present were battalion commander Tamba Foyo and his second in command, 'Sheriff', as well as battalion commander Stanty aka 'Cake'.¹²⁶² Kamara selected George Johnson to lead the operation.¹²⁶³ The operation was a success and while the troops were returning, Johnson established communication with 'Bazzy' who sent 'Tito' with some civilians to collect the arms and ammunition. Upon the troops' return to the West Side, Johnson reported to Kamara.¹²⁶⁴

630. In the Trial Chamber's view, the evidence regarding the attack on Port Loko establishes that the AFRC commanders employed an effective planning and order process in their operations in Port Loko District.

(iii) Disciplinary System

631. The evidence adduced establishes that the Accused Kamara imposed disciplinary measures on his troops. Witness TF1-334 testified about an incident involving one of the commanders, Lieutenant Kallay. According to the witness, Kallay went on an operation to Gberi Junction and returned with stolen items. 'Bazzy' ordered an investigation and it was discovered that Kallay had

¹²⁵⁹ See Role of Accused, paras 488-499, *supra* for discussion of their testimony.

¹²⁶⁰ George Johnson, Transcript 16 September 2005, pp. 69-72.

¹²⁶¹ George Johnson, Transcript 16 September 2005, pp. 72-74, 79.

¹²⁶² George Johnson, Transcript 16 September 2005, pp. 72-73.

¹²⁶³ TF1-334, Transcript 15 June 2005, p. 35.

¹²⁶⁴ George Johnson, Transcript 16 September 2005, pp. 76-79.

not attacked Gberi Junction as instructed but had gone looting instead. 'Bazzy' ordered that Lieutenant Kallay should be beaten as punishment and in the presence of the witness, Lieutenant Kallay was given 24 'lashes'.¹²⁶⁵

632. However, there is no evidence that specific positions, such as Military Police Commander or Provost-Marshal, existed for the enforcement of discipline. It also appears that there were no defined rules governing the soldiers' conduct. Witness George Johnson testified that "[o]n arrival at Gberibana there were not laws that were placed. No laws were given by the senior commander. There were no laws that were given to fighters at Gberibana like us, Mansofinia to Camp Rosos".¹²⁶⁶

633. Johnson testified that on another occasion, he reported misbehaviour on the part of one of the troops and the Accused Kamara did nothing in response.¹²⁶⁷ It is therefore clear from the evidence that the imposition of discipline was solely at the discretion of Kamara and there was no established system that governed incidences of misconduct.

634. In the Trial Chamber's view, the AFRC faction did not have a disciplinary system in Port Loko District.

(iv) Conclusion

635. In light of the foregoing evidence, the Trial Chamber finds that the AFRC faction in Port Loko District had a basic chain of command and a planning and orders process effective for its needs. The Trial Chamber further finds that the AFRC faction did not have an established disciplinary system.

¹²⁶⁵ TF1-334, Transcript 15 June 2005, pp. 32-34.

¹²⁶⁶ George Johnson, Transcript 20 September 2005, p. 59.

¹²⁶⁷ George Johnson, Transcript 16 September 2005, pp. 76, 78-79.

IX. APPLICABLE LAW

A. Introduction

636. Article 1(1) of the Statute empowers the Special Court 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.

It is not in dispute between the Parties that the offences alleged in the Indictment fall within the requirements of time and place prescribed by Article 1.

637. Rule 72*bis* of the Rules provides that the applicable laws of the Special Court include

- (i) the Statute, the Agreement¹²⁶⁸, and the Rules;
- (ii) where appropriate, other applicable treaties and the principles and rules of international customary law;
- (iii) general principles of law derived from national laws or legal systems of the world, including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognised norms and standards.

638. The crimes over which the Special Court has jurisdiction are specified in Articles 2, 3, 4, and 5 of the Statute. In the instant case, only Articles 2, 3 and 4 of the Statute, which deal with crimes under international law, are relevant. Regarding such crimes, the Secretary-General of the United Nations (“Secretary-General”) in his “Report on the Establishment of a Special Court for Sierra Leone” noted that

In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have the character of customary international law at the time of the alleged commission of the crime.¹²⁶⁹

639. The Trial Chamber is entirely in agreement with that statement and recognizes that the elements of the crimes charged in the Indictment are to be interpreted in accordance with customary

¹²⁶⁸ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2000, annexed to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, entered into force on 12 April 2002 pursuant to Article 21 of the Agreement.

¹²⁶⁹ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, para. 12.

international law.¹²⁷⁰ Since the ICTY and ICTR also apply customary international law, the Special Court will, where appropriate, be guided by decisions of those tribunals for their persuasive value¹²⁷¹, with necessary modifications and adaptations in view of the particular circumstances of the Special Court.¹²⁷²

B. The ‘Greatest Responsibility Requirement’

640. As mentioned above, Article 1(1) of the Statute empowers the Special Court to prosecute “persons who bear the greatest responsibility” for the crimes over which it has jurisdiction. The Special Court consists of 3 organs: the Chambers, the Prosecutor and the Registry.¹²⁷³ Pursuant to Article 15(1) of the Statute, the Prosecutor is the organ responsible for prosecuting the persons mentioned in Article 1(1). Article 15(1) provides:

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.

1. Jurisdictional Requirement or Prosecutorial Discretion

641. The question of whether the reference to ‘persons who bear the greatest responsibility’ creates a jurisdictional requirement rather than a prosecutorial discretion is a subject of dispute between the parties.

(a) Submissions

642. At the close of the Prosecution case, the Prosecution disputed that the qualification of the ‘greatest responsibility requirement’ was a jurisdictional requirement.¹²⁷⁴ In its Final Brief, the

¹²⁷⁰ Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 24. See also Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras 17 et seq.

¹²⁷¹ See Article 20(3) of the Statute. Although it explicitly addresses only the Appeals Chamber, the Trial Chamber finds that as a matter of course, the provision equally applies to triers of fact at first instance. Regarding the ICTY’s application of customary international law, see Blaškić Appeal Judgement, paras 110, 139, 141; Prosecutor v. Hadžihasanović et al., Case No IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (“Hadžihasanović Appeal Decision of Command Responsibility”), paras 12, 35, 44-46, 55.

¹²⁷² Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, paras 24-25.

¹²⁷³ Article 11 of the Statute.

¹²⁷⁴ Prosecution Response to Defence Motion for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, para. 14.

Prosecution submits that “the evidence establishes that the three Accused were all senior members of the AFRC holding leadership positions within that organisation. As such, they participated in the crimes set out in the Indictment. There can therefore be no doubt that the three Accused are in actuality persons bearing the greatest responsibility for the acts charged.”¹²⁷⁵

643. The Prosecution further explained its position in its closing argument. It submits that in order to convict an accused it is not necessary to prove that he was one of those bearing the greatest responsibility. That is because the determination of who bears the greatest responsibility is a discretion that is exercised by the Prosecutor based on investigations and evidence gathered, together with sound professional judgement. Such a discretion could not, for example, be exercised by the designated judge who approves the indictment, because the designated judge would not have before him or her all of the evidence gathered by the Prosecution. The Prosecution concedes that this discretion might be reviewable in extreme cases, such as abuse of process, but excepting that kind of review, the discretion is one that falls to the Prosecutor. The Prosecution points out that it would be ‘inconceivable’ for a long and expensive trial to proceed to its end and for the Trial Chamber to then conclude that serious crimes have been proved beyond reasonable doubt, but that the accused should be acquitted because it has not been shown that they were among those bearing the greatest responsibility. As an alternative, the Prosecution submits that even if this were a matter that the Trial Chamber could look at, the Accused in this case clearly do fall within the category of ‘persons who bear the greatest responsibility’¹²⁷⁶.

644. Both the Kanu and Kamara Defence submit that the ‘greatest responsibility requirement’ should be understood to be a jurisdictional requirement.¹²⁷⁷

645. The Kanu Defence adopts the finding of Trial Chamber I, which held that

the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted.¹²⁷⁸

In the ultimate analysis, whether or not in actuality the Accused is one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law and Sierra Leonean law is an evidentiary matter to be determined at the trial stage.¹²⁷⁹

¹²⁷⁵ Prosecution Final Brief, para. 153.

¹²⁷⁶ See Prosecution closing arguments, transcript 7 December 2006 pages 63 – 66.

¹²⁷⁷ Kamara Final Brief, paras 73-75; Kanu Final Brief, paras 107-109.

¹²⁷⁸ Kanu Final Brief, para. 107, which contains an incorrect statement that “Trial Chamber I in the case of Prosecutor v. Norman held that the issue of personal jurisdiction is a jurisdictional requirement. This was affirmed by Trial Chamber II in the Rule 98 Decision”; see also Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-PT, Decision on the Preliminary Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004 (“Fofana Decision on Lack of Personal Jurisdiction”), para. 27.

646. On this basis, the Kanu Defence submits that the Prosecution has not satisfied its burden of establishing that Kanu was part of the group characterised as “at a minimum, political and military leaders and implies an even broader range of individuals.”¹²⁸⁰ The Kanu Defence thereby submits that the Trial Chamber should either find that it does not have jurisdiction over Kanu, or that Kanu should be acquitted on the basis that the Prosecution has not met the evidentiary threshold of ‘greatest responsibility’.¹²⁸¹

647. The Kamara Defence submits that, although the Prosecution has a wider discretion to investigate and prosecute persons who bear the greatest responsibility, the Court has “the ultimate decision of determining, based on available evidence at the end of the trial, whether the Prosecution in fact satisfied that threshold requirement of selecting the three Accused among many senior military officers in the AFRC government and ‘faction’, as bearing that utmost liability.”¹²⁸²

648. According to the Kamara Defence, the ‘greatest responsibility requirement’ is within the exercise of the Prosecution’s discretion under the control of the Trial Chamber. The Kamara Defence submits that the Trial Chamber’s role, at this stage of the proceedings, is “to determine the selective application, prudent use and evidential efficacy” of the Prosecution’s exercise of discretion and strategy.¹²⁸³ It concludes that Kamara does not, either legally or factually, qualify as one of those who bear the ‘greatest responsibility’.¹²⁸⁴

649. The Brima Defence does not make any legal submission as to the nature of ‘the greatest responsibility requirement’. As to the scope of this requirement, it submits that it covers only ‘political or military leaders’ and under no circumstance can it stretch to include low ranking military personnel such as Brima.¹²⁸⁵

(b) Findings

650. The Special Court was established by an agreement between the United Nations and the Government of Sierra Leone and is therefore treaty-based, unlike the ICTY and ICTR, which were established by resolution of the Security Council.¹²⁸⁶ It is a well established principle of

¹²⁷⁹ Fofana Decision on Lack of Personal Jurisdiction, para. 44.

¹²⁸⁰ Kanu Final Brief, para. 108, referring to Rule 98 Decision, para. 34.

¹²⁸¹ Kanu Final Brief, para. 109.

¹²⁸² Kamara Final Brief, para. 73.

¹²⁸³ Kamara Final Brief, para. 75, citing incorrectly Rule 98 Decision, para. 39.

¹²⁸⁴ Kamara Final Brief, para. 88.

¹²⁸⁵ Brima Final Brief, para. 114.

¹²⁸⁶ See Report of the Secretary General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, para. 9; see also Prosecutor v. Morris Kallon, Sam Hinga Norman and Brima Bazzy Kamara, Case No.

international law, codified in the “Vienna Convention on the Law of Treaties” of 23 May 1969, that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and *purpose*.”¹²⁸⁷ In interpreting the meaning of ‘the greatest responsibility requirement’, it is helpful to look at the drafting history of Article 1 of the Statute.

651. When, initially, the United Nations Security Council (“Security Council”) made recommendations as to the ‘personal jurisdiction’ of the Special Court,¹²⁸⁸ the United Nations Secretary General (“Secretary General”) saw the personal requirement, which he suggested should be ‘those most responsible’, not as “a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.”¹²⁸⁹ The Security Council maintained its view that the *personal jurisdiction* of the Special Court should be restricted, and rejected the ‘most responsible’ formulation in favour of the ‘greatest responsibility’ formulation.¹²⁹⁰

652. Finally, the intentions of the Secretary General, the Security Council and the Government of Sierra Leone coincided in three stages. First, the Secretary General acknowledged that while “the determination of the meaning of the term ‘persons who bear the greatest responsibility’ in any given case falls initially to the prosecutor”, it is ultimately a matter for the Special Court itself.¹²⁹¹ The President of the Security Council then confirmed that

[t]he members of the Council share your analysis of the importance and role of the phrase ‘persons who bear the greatest responsibility’. The members of the Council, moreover, share your view that the words beginning with ‘those leaders who [...]’ are intended as guidance to the Prosecutor in determining his or her prosecutorial strategy.¹²⁹²

Thereafter, the Government of Sierra Leone accepted this position.¹²⁹³

SCSL-2004-15-AR72(E)/SCSL-2004-14-AR72(E)/SCSL-2004-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 42.

¹²⁸⁷ Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969, entered into force on 27 January 1980, Article 31(1), emphasis added; see also Prosecutor v. Moris Kallon, Sam Hinga Norman and Brima Bazzy Kamara, Case No. SCSL-2004-15-AR72(E)/SCSL-2004-14-AR72(E)/SCSL-2004-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 43.

¹²⁸⁸ Resolution 1315(2000), 14 August 2000, p. 2.

¹²⁸⁹ Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000 (“Secretary General’s 2000 Report”), para. 30.

¹²⁹⁰ Letter dated 22 December 2000 from the President of the Security Council to the Secretary General, S/2000/1234, p. 1.

¹²⁹¹ Letter dated 12 January 2001 from the Secretary General to the President of the Security Council, S/2001/40.

¹²⁹² Letter dated 31 January 2001 from the President of the Security Council to the Secretary General, S/2001/95.

¹²⁹³ Letter dated 12 July 2001 from the Secretary General to the President of the Security Council, S/2001/693, p. 1.

653. In the opinion of the Trial Chamber, the intent of the drafters of the Statute clearly emanates from the aforementioned extracts. The ‘greatest responsibility requirement’ (initially ‘the requirement of those most responsible’) solely purports to streamline the focus of prosecutorial strategy. The Trial Chamber, with the greatest respect, does not agree with the finding of Trial Chamber I in the ‘CDF Decision on Lack of Personal Jurisdiction’ referred to earlier that “the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted.”¹²⁹⁴ The Trial Chamber cannot accept the idea that the drafters of the Statute purported to make ‘the greatest responsibility requirement’ a jurisdictional threshold which, if not met, would oblige a Trial Chamber to dismiss the case without considering the merits.

654. Article 15 of the Statute vests the Prosecutor with responsibility “for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law [...]”. In doing so, the Prosecutor shall “act independently as a separate organ of the Special Court”. The Trial Chamber is therefore not called upon to review the prosecutorial discretion in bringing a case against the Accused, nor would it be in a position to do so. Therefore, no issue arises for the Trial Chamber’s determination as to whether, within the meaning of Article 1 of the Statute, the Accused in the present case bear the ‘greatest responsibility’ for the crimes alleged against them.

2. Scope of “the greatest responsibility requirement”

655. Although it is not necessary to do so, the Trial Chamber will nevertheless examine the scope the drafters purported to give to Article 1 of the Statute, when the initial ‘most responsible’ requirement developed into a ‘greatest responsibility’ requirement.

656. While the Security Council recommended ‘the greatest responsibility requirement’ from the start of the discussions on the Statute, the Secretary General first preferred the requirement of ‘persons most responsible’, understood to

include the political and military leadership, others in command authority down the chain of command may also be regarded ‘most responsible’ judging by the severity of the crime or its massive scale. ‘Most responsible’, therefore, denotes both a leadership or authority position of the accused, and a sense of gravity, seriousness or massive scale of the crime.¹²⁹⁵

¹²⁹⁴ Fofana Decision on Lack of Personal Jurisdiction, para. 44.

¹²⁹⁵ Secretary General’s 2000 Report, para. 30.

657. The Security Council maintained its position that ‘the greatest responsibility requirement’ limited the “focus of the Special Court to those who played a leadership role”.¹²⁹⁶ Acknowledging the choice of the ‘greatest responsibility requirement’, the Secretary General subsequently expressed the view that Article 1 of the Statute was not limited to political and military leaders only. The Security Council, and later the Government of Sierra Leone, concurred with this approach.¹²⁹⁷

658. The Trial Chamber notes that in light of the foregoing that the ‘greatest responsibility’ requirement necessarily was intended to restrict the number of accused to appear before the Special Court to a small category of individuals. Yet, the Statute needs to be read in its totality. Indeed, Article 7 of the Statute provides for the jurisdiction of the Special Court over alleged perpetrators between the age of 15 and 18 years.¹²⁹⁸ ‘The greatest responsibility requirement’ set out in Article 1 must therefore be interpreted in a manner broad enough to include such alleged perpetrators.

659. It is the Trial Chamber’s view that ‘the greatest responsibility requirement’ could potentially apply to an array of individuals ranging from military and political leaders down to individuals as young as 15 years of age.

C. Law on the Charges

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

660. The Prosecution alleges that the Accused committed the crimes set forth in paragraphs 42 to 79 of the Indictment, and charged in Counts 3 to 14, “as part of a campaign to terrorise the civilian population of the Republic of Sierra Leone, and [which] did terrorise that population.” Count 1 thus

¹²⁹⁶ Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary General, S/2000/1234, p. 1.

¹²⁹⁷ Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary General, S/2001/95; Letter dated 12 July 2001 from the Secretary General addressed to the President of the Security Council, S/2001/693, p. 1.

¹²⁹⁸ Statute, 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 and reintegration or programmes of child protection agencies.”

charges the Accused with acts of terrorism, a violation of Common Article 3 and Additional Protocol II, punishable under Article 3(d) of the Statute.¹²⁹⁹

661. Article 3(d) of the Statute, which is the verbatim reproduction of Article 4(2)(d) of Additional Protocol II, prohibits acts of terrorism. The latter provision is tied to Article 13(2) of Additional Protocol II, which provides that “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

662. The prohibition and criminalisation of the intentional use of ‘terror violence’ in armed conflict against a civilian population for strategic purposes is well settled in customary international law.¹³⁰⁰ Such prohibition was first explicitly evoked after the First World War, when a deliberate use of a “system of general terrorisation” of the population to secure control of a region was found to be contrary to the rules of civilised warfare.¹³⁰¹ Later, the prohibition of terror as a means of warfare was gradually introduced in a number of international conventions as well as in domestic military manuals.¹³⁰²

663. Terror against a civilian population was first referred to as a war crime in a report published in 1919 by the Commission of Responsibilities.¹³⁰³ While ‘terrorism’ was not explicitly criminalised by the Nuremberg Charter, evidence of terror violence was considered in the context of

¹²⁹⁹ Indictment, para. 41; see also Indictment, para. 20, explaining that “[t]he words civilian or civilian population used in this Indictment refer to persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities.”

¹³⁰⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić Appeal Judgement*”), para. 86, holding that “it is satisfied that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, was a part of customary international law from the time of its inclusion in those treaties. The Appeals Chamber, by majority, Judge Schomburg dissenting, is further satisfied that a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary international law at the time of the commission of the offences for which Galić was convicted [1992-1993].”

¹³⁰¹ Report of the Bryce Committee, 1914, extract in E. Stowell, H. Munro, *International Cases* (Boston: Houghton Mifflin Company, 1916), p. 173; see also United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), pp. 34-35, stating that “[n]ot even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance.”

¹³⁰² With regard to international conventions, see Draft Convention for the Protection of Civilian Populations Against New Engines of War, Amsterdam, 1938; Declaration of Minimum Humanitarian Standards, reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session, Commission on Human Rights, 51st Session., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995); with regard to domestic military manuals, see *Galić Appeal Judgement*, fn. 286, referring to, *inter alia*, Germany, Humanitarian Law in Armed Conflicts, Manual DSK VV207320067, edited by the Federal Ministry of Defence of the Federal Republic of Germany, VRII 3, August 1992; Nigeria, The Laws of War, by Lt. Col. L. Ode PSC, Nigerian Army, Lagos, undated (*Manuals on the Laws of War*), para. 20; Russia, Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR, Appendix to Order of the USSR Defence Minister No. 75, 1990 (*Military Manual*), para. 5(n).

¹³⁰³ UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), Chapter III, see also *Galić Appeal Judgement*, para. 93, explaining that the

murder and mistreatment of the civilian population under Article 6 of the Nuremberg Charter.¹³⁰⁴ Further, post World War II domestic tribunals incorporated the crimes of ‘systematic terrorism’¹³⁰⁵ and ‘systematic terror’¹³⁰⁶ in their statutes. Finally, provisions criminalising terror against the civilian population as a method of warfare were incorporated into numerous domestic legislations.¹³⁰⁷

Commission on Responsibilities was created by the Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies during the First World War.

¹³⁰⁴ London Agreement and Annexed Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, London, 8 August 1945 (“Nuremberg Charter”).

¹³⁰⁵ United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London: HSMO, 1947-1948), Vol. 5, pp. 94-97; Vol. 14, pp. 35-38.

¹³⁰⁶ Decree No. 44 91946), in *Staatsblad van Nederlandsch-Indië*, Article 2 1(2), Trial of *Shigeki Motomura*, United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London: HSMO, 1947-1948), Vol. 13, p. 138.

¹³⁰⁷ *Galić* Appeal Judgement, fn. 297: “Czech Republic, Trestní zákon (Criminal Code), Act No. 140/1961 Coll. 29 November 1961, as amended by Act No. 305/1999 Coll. of 18 November 1999, art. 263(a)(1); Slovakia, Trestní zákon (Criminal Code), Act. No. 140/1961 Coll. 29 November 1961, as amended, art. 263(a)(1). The Appeals Chamber notes the continuing trend of nations criminalising terror as a method of warfare. See, e.g., Argentina, Draft Code of Military Justice (1998), art. 291, introducing a new article 875(1) in the Code of Military Justice as amended (1951): punishes “acts or threats of violence whose primary aim is to terrorise”; Bosnia & Herzegovina, Criminal Code of the Federation of Bosnia and Herzegovina No. 327, adopted on 29 July 1998, published in *Službene Novine Federacije Bosne i Hercegovine*, No. 43/98, 20 November 1998, art. 154(1): criminalises “the application of measures of intimidation and terror” against civilians (1998); Colombia, Ley 599 de 2000 (julio 24) por la cual se expide el Código Penal (Penal Code), published in *Diario Oficial*, No. 44.097, 24 July, 2000, art. 144: imposes criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of [...] acts or threats of violence whose primary purpose is to terrorise the civilian population”; Croatia, Criminal Code (1997), art. 158(1): imposes criminal sanctions on “whoever, in violation of the rules of international law, at a time of war, armed conflict or occupation, [...] orders [...] the imposition of measures of intimidation and terror”; El Salvador, Código Penal de la Republica de El Salvador, Decreto No. 1030, Título XIX, (Criminal Code, as amended 1998), art. 362: criminalises violations of “international laws [...] of war” (El Salvador ratified Additional Protocols I and II, in their entirety, on November 23, 1978); Finland, Penal Code, Act. No. 39/1889, as amended by Act No. 578/1995 of the Finnish legislative gazette (*Suomen säädöskokoelma*), issued 21 April 1995, Chapter 11, art. 1: imposes criminal sanction on “a person who in an act of war [...] otherwise violates the provisions of an international agreement on warfare binding on Finland” (Finland ratified Additional Protocols I and II, in their entirety, on August 7, 1980); Ireland, Geneva Conventions Act (1962), as amended by Act No. 35 of 13 July 1998, published in *The Acts of the Oireachtas* as promulgated, sec. 4: criminalises any “minor breach” of Additional Protocol I, including violations of Article 51(2), as well as any “contravention” of Additional Protocol II, including violations of Article 13(2) (Ireland ratified Additional Protocols I and II, in their entirety, on May 19, 1999); Lithuania, Lietuvos Respublikos baudžiamas kodeskas (Criminal Code of the Republic of Lithuania), 26 June 1961, published in *Valstybes zinios*, No. 18-147, 1961, as amended 9 June 1998, art. 336: criminalises “the use of intimidation and terror” in time of war, armed conflict or occupation; Mauritius, Geneva Conventions (Amendment) Act, Act No. 2 of 2003, Government Gazette, 17 May 2003, General Notice 722, section 4(e), amending section 3 of the Geneva Conventions Act of 1970: criminalises breaches of the Additional Protocols under Mauritian law (Mauritius ratified Additional Protocols I and II, in their entirety, on March 22, 1983); Mexico, Código Penal Federal (Federal Criminal Code as amended 2006), First Book, Preliminary Title, art. 6: criminalises acts which are an offence under an international treaty to which Mexico is a party (Mexico ratified the entirety of Additional Protocol I on March 10, 1983); Russia, Criminal Code of the Russian Federation, No. 63-FZ, 13 June 1996, promulgated in *Collection of legislation of the Russian Federation*, No. 25, 17 June 1996, art. 356(1): punishes the “cruel treatment of [...] the civilian population” and the use in an armed conflict of “means and methods prohibited by an international treaty of the Russian Federation” (Russia ratified Additional Protocols I and II, in their entirety, on September 29, 1989); Spain, Ley Orgánica 10/1995, de 23 de Noviembre, del Código Penal (Penal Code), published in *Boletín Oficial del Estado*, No. 281, 24 November 1995, art. 611(1): punishes anyone who, during an armed conflict, makes the civilian population the object of “acts or threats of violence whose primary purpose is to terrorise them”; Yemen, Military Criminal Code, Law No. 21/1998 relative to military offences and penalties, 25 July 1998, published in *Official Gazette of the Republic of Yemen*, No. 18, 20 September 1999: criminalises all acts which constitute an

664. In the wake of the Second World War, Article 33 of Geneva Convention IV was adopted. It provides that “all measures of intimidation or of terrorism are prohibited.” As Article 33 is applicable only to persons in the hands of a party to the conflict, it was subsequently complemented by Article 51(2) of Additional Protocol I and Articles 4(2)(d) and 13(2) of Additional Protocol II, to include acts of terrorism committed against the civilian population in international and internal armed conflict, respectively.

665. A provision prohibiting acts of terrorism can be found in Article 4(2) of the ICTR Statute.¹³⁰⁸ Although not expressly included in the ICTY Statute, the infliction of terror upon the civilian population has been adjudicated in a number of cases before that Tribunal.¹³⁰⁹

666. In light of the foregoing, the Trial Chamber finds that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population at the time relevant to the Indictment.

(a) Elements of the Crime

667. In addition to the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute, the Trial Chamber adopts the following elements of the crime of acts of terrorism:

1. Acts or threats of violence directed against persons or their property;
2. The perpetrator wilfully made persons or their property the object of those acts and threats of violence; and
3. The acts or threats of violence were committed with the primary purpose of spreading terror among those persons.¹³¹⁰

668. The ICTY Appeals Chamber in the *Galić* case provided further clarification as to these elements of the crime. With regard to the *actus reus*, it held that

offence against persons or property protected under international agreements to which Yemen is a party (Yemen ratified Additional Protocols I and II, in their entirety, on April 17, 1990).”

¹³⁰⁸ No charges of terrorism have been adjudicated before the ICTR to date.

¹³⁰⁹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement, 5 December 2003 (“*Galić* Trial Judgement”); *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006; *Prosecutor v. Zejnil Delalić, Zdravko Mucić aka “Pavo”, Hazim Delić and Esad Landžo aka “Zenga”*, Case No. IT-96-2-T, 16 November 1998 (“*Čelebići* Trial Judgement”); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić* Trial Judgement”); *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 (“*Krstić* Trial Judgement”).

the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population can comprise attacks or threats of attacks against the civilian population. The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof. [...] Further, the crime of acts or threats of violence the primary purpose of which it to spread terror among the civilian population is [...] rather a case of “extensive trauma and psychological damage” being caused by “attacks which were designed to keep the inhabitants in a constant state of terror.” Such extensive trauma and psychological damage form part of the acts or threats of violence.¹³¹¹

669. Actual terrorisation of the civilian population is not an element of the crime. The requisite *mens rea* is composed of the specific intent to spread terror among the civilian population. In the words of the ICTY Appeals Chamber,

[t]he fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.¹³¹²

670. The Kanu Defence argues that the crime of acts of terrorism does not encompass acts or threats of violence targeted at protected *property* but only protected *persons*.¹³¹³ While the Trial Chamber agrees that it is not the property as such which forms the object of protection from acts of terrorism, the destruction of people’s homes or means of livelihood and, in turn, their means of survival, will operate to instil fear and terror. The attacks on, or destruction of, property thus plays an important role in defining the contours of this crime. What places acts of terrorism apart from other crimes directed against property is the specific intent to spread terror among the population. The acts or threats of violence committed in furtherance of such a purpose are innumerable and may well encompass attacks on property through which the perpetrators intend to terrorise the population.¹³¹⁴

671. Therefore, this Trial Chamber endorses the finding of Trial Chamber I that the ambit of acts of terrorism “extends beyond acts or threats of violence committed against protected persons to acts

¹³¹⁰ See Rule 98 Decision, para. 49; see also *Prosecutor v. Norman et al.*, SCSL-2004-14-T-473, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, para. 112.

¹³¹¹ *Galić* Appeal Judgement, para. 102 (footnotes omitted), referring to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Indictment, paras 4(b), 4(c).

¹³¹² *Galić* Appeal Judgement, para. 104.

¹³¹³ Kanu Defence Trial Brief, paras 7-18.

¹³¹⁴ In this regard, see Kanu Defence Trial Brief, para. 16, submitting that “another reason why the definition should exclude the ‘property’ element is that terrorism should be directed at sowing terror. The question raised here is whether an attack on someone’s property can actually be categorised as terrorising people.” As demonstrated above, the Trial Chamber holds that it can.

directed against installations [...]” where such acts were committed with the primary purpose of spreading terror amongst the civilian population.¹³¹⁵

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

672. The Indictment alleges that the Accused committed the crimes set forth in paragraphs 42 to 79 of the Indictment, and charged in Counts 3 to 14, “to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF.” Count 2 thus charges the Accused with collective punishments, a violation of Common Article 3 and of Additional Protocol II, punishable under Article 3(b) of the Statute.¹³¹⁶

673. Article 3(b) of the Statute, which is based on Article 4(2)(b) of Additional Protocol II, prohibits collective punishments. The notion of ‘collective punishments’ goes back to Article 50 of the 1899 Hague Regulations, according to which “[n]o general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.”¹³¹⁷ This prohibition was later incorporated in Article 33(1) of Geneva Convention IV,¹³¹⁸ Article 75(2)(d) of Additional Protocol I and Article 4(2)(b) of Additional Protocol II. It is now firmly enshrined in a variety of international documents¹³¹⁹ and in domestic military legislations.¹³²⁰

¹³¹⁵ *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No. SCSL-04-14-T, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, para. 112. See also Prosecution Final Brief, para. 978.

¹³¹⁶ Indictment, para. 41.

¹³¹⁷ Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 29 July 1899, The Hague (“1899 Hague Regulations”).

¹³¹⁸ “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”

¹³¹⁹ Hague Convention (IV), Respecting the Laws and Customs of War on Land, and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (“1907 Hague Regulations”), Article 50: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible [...]”; see also Declaration on the Protection of Women and Children in Emergency and Armed Conflict, United Nations General Assembly, Res. 3318 (XXIX), 14 December 1975, para. 5, according to which “[a]ll forms of [...] collective punishment [...] committed by belligerents in the course of military operation or in occupied territories shall be considered criminal [...]”; African Charter on Human and People’s Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 LL.M 58 (1982), entered into force on 21 October 1986 (“African Charter on Human Rights”), Article 7(2) providing that “[p]unishment is personal and can be imposed only on the offender [...]”; Doc A/46/10, Report of the International Law Commission on the Work of its 43rd Session, 29 April-19 July 1991, Official Records of the General Assembly, 46th Session, Supplement No. 10, extract from the Yearbook of the International Law Commission-1991, vol. II(2), the Draft Code of Crimes Against the Peace and Security of Mankind, Article 22(2)(a), wherein ‘collective punishment’ is characterised as an ‘exceptionally serious war crime’.

¹³²⁰ United Kingdom Military Manual (1958), para. 647, stating that “the Hague Rules forbid collective punishment, in the form of a general pecuniary or other penalty, of the population for acts of individuals for which the population as a whole cannot be regarded as jointly or severally responsible [...]”; Argentina, Law of War Manual (1969), para. 4.012,

674. Upon the inception of the Special Court, the United Nations Secretary General (“Secretary General”) declared that “[v]iolations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognised as customarily entailing the individual criminal responsibility of the accused.”¹³²¹

675. In light of the foregoing, the Trial Chamber finds that at the time relevant to the Indictment, customary international law imposed individual criminal liability for the crime of collective punishments, as a violation of Common Article 3 and of Additional Protocol II.

(a) Elements of the Crime

676. In addition to the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute, the Trial Chamber adopts the following elements of the crime of collective punishments:

1. A punishment imposed indiscriminately and collectively upon persons for acts that they have not committed; and
2. The intent on the part of the perpetrator to indiscriminately and collectively punish the persons for acts which form the subject of the punishment.¹³²²

677. In respect of the first element, The Kanu Defence submits that the Prosecution is obliged to lead evidence that the punishment was imposed for acts which the victims did not in actual fact commit.¹³²³ In contrast, the Prosecution argues that “[c]ivilian victims were punished arbitrarily by the AFRC because part of the population was, in the AFRC’s view, supposedly failing to support them” and that “the punishments inflicted in the present instance are equally unlawful when committed against civilians who might have indeed resisted against the AFRC/RUF.”¹³²⁴

678. The prohibition of collective punishments in international humanitarian law is based on one of the most basic tenets of criminal law, the principle of individual responsibility. This principle

wherein “collective punishments of the civilian population” is prohibited; Belgium, Law of War Manual (1983), p. 50, according to which “it is prohibited to impose collective punishments.”

¹³²¹ United Nations Secretary General, Report on the Establishment of a Special Court for Sierra Leone, UN. Doc. S/2000/915, 4 October 2000 (“Secretary General’s 2000 Report”), para. 14.

¹³²² See also Rule 98 Decision, para. 62.

¹³²³ Kanu Final Brief, para. 22. See also *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005 (“CDF Rule 98 Decision”), para. 118.

¹³²⁴ Prosecution Final Brief, para. 986.

affirms that responsibility is personal in nature and that no one may be punished for an act he or she has not personally committed.¹³²⁵

679. Article 3 of the Statute is a reproduction of Article 4(2) of Additional Protocol II (which includes ‘collective punishments’ – Article 4(2)(b) - among its fundamental guarantees). Article 4(2)(b) of Additional Protocol II is based on Article 33 of the Fourth Geneva Convention, which provides that: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” Thus punishments imposed upon protected persons who are not individually responsible for the act which forms the object of the punishment are absolutely prohibited.

680. The first element mentioned above concerns punishments which are not based on individual responsibility but which are inflicted upon persons by wrongfully ascribing collective guilt to them. Such punishments are imposed upon persons for acts which they may or may not have committed. In other words, the punishments are imposed indiscriminately without establishing individual responsibility through some semblance of due process and without any real attempt to identify the perpetrators, if any. It is in this context that the first element is understood to mean: “A punishment imposed upon protected persons for acts that they have not committed.” The Trial Chamber therefore rejects the submission of the Kanu Defence that the Prosecution is obliged to prove that the victims of the punishment did not actually commit the acts for which they were punished.

681. The Trial Chamber further notes that this crime covers an extensive range of possible ‘punishments’.¹³²⁶ The ICRC Commentary of Article 75.2(d) of Additional Protocol I advocates an extensive interpretation of the crime of collective punishments, to include

not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) [...]. [I]t is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation.¹³²⁷

¹³²⁵ See International Committee of the Red Cross, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of 12 August 1949, J. Pictet ed., (Geneva: Martinus Nijhoff Publishers, 1958) at 225.

¹³²⁶ See ICRC Commentary of the Additional Protocols, para. 1374 regarding Article 75.2(d) of Additional Protocol I: “[Collective punishments include] not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) [...]. [I]t is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation.”

¹³²⁷ ICRC Commentary of the Additional Protocols, para. 1374; *see also* ICRC Commentary of Geneva Convention IV, Article 33, para. 225, stating that “[the term of collective punishments] does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.”

3. Counts 3, 4 and 5: Unlawful Killings

682. In Count 3, the Prosecution charges the Accused with extermination as a crime against humanity, punishable under Article 2(b) of the Statute. In addition, or in the alternative, Count 4 charges the Accused with murder, a crime against humanity, punishable under Article 2(a) of the Statute. In addition, or in the alternative, Count 5 charges the Accused with violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute.¹³²⁸

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

683. Extermination as a crime against humanity has been defined in international humanitarian law as “the intentional mass killing or destruction of part of a population as part of a widespread or systematic attack upon a civilian population.”¹³²⁹ The Trial Chamber endorses the view expressed by the ICTR that a perpetrator may be guilty of the crime of Extermination if he kills or destroys one individual as long as that killing of that individual is part of a mass killing event.¹³³⁰ However, knowledge of a “vast scheme of collective murder” is not an element required for extermination.¹³³¹ Unlike the crime of Genocide, the crime of Extermination does not require a discriminatory intent.¹³³²

684. In addition to the chapeau requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the Trial Chamber adopts the following elements of the crime of extermination:

1. The perpetrator intentionally caused the death or destruction of one or more persons by any means including the infliction of conditions of life calculated to bring about the destruction of a numerically significant part of a population; and
2. The killing or destruction constituted part of a mass killing of members of a civilian population.¹³³³

¹³²⁸ Indictment, paras 42-50.

¹³²⁹ *Akayesu* Trial Judgement, paras 590-592; *Kayishema* Trial Judgement, paras 137-147; *Rutaganda* Trial Judgement, paras 82-84; *Prosecutor v. Krstić*, ICTY IT-98-33-T, Trial Chamber Judgement, 2 August 2001, (“*Krstić* Trial Judgement”), para. 503.

¹³³⁰ *Kayishema* Trial Judgement, para. 147.

¹³³¹ *Prosecutor v. Milomir Stakić*, IT-97-24-A, Judgement, 22 March 2006, (“*Stakić* Appeal Judgement”), para. 259; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 29 October 2003 (“*Stakić* Trial Judgement”), para. 640.

¹³³² *Krstić* Trial Judgement, para. 500.

¹³³³ Rule 98 Decision, para. 73.

685. With regard to the *actus reus* of extermination, it must be demonstrated that a large number of individuals were killed. The accused's participation may be remote or indirect, and include conduct which creates conditions provoking the victim's death and ultimately mass killings, such as the deprivation of food and medicine, calculated to cause the destruction of part of the population.¹³³⁴ Further, the Prosecution is not required to establish that the accused had *de facto* control over a large number of individuals because of his position of authority.¹³³⁵

686. The requisite scale of killings for extermination has been described as 'vast', 'massive' or 'large'.¹³³⁶ In this context, the Kanu Defence submits that the Prosecution carries the burden of establishing that 'mass' killings occurred.¹³³⁷ The Trial Chamber notes that, although most cases from the Second World War employed the term of 'extermination' to address thousands of killings,¹³³⁸ no minimum number of victims is required as long as it is a numerically significant part of any given population.¹³³⁹ Furthermore, the element of massiveness required for a finding of extermination may result from an aggregate of all killing incidents charged in an indictment. It is not required that the mass murder occur in a concentrated manner and over a short period.¹³⁴⁰

687. The *mens rea* for extermination clearly reflects the *actus reus*, in so far that the Prosecution is required establish the intent either to kill on a large scale or to systematically subject a large number of individuals to living conditions which would, more likely than not, result in their

¹³³⁴ *Brđanin* Trial Judgement, para. 389; *Vasiljević* Trial Judgement, para. 227.

¹³³⁵ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98bis, 28 November 2003, para. 74; but see *Vasiljević* Trial Judgement, para. 222.

¹³³⁶ *Vasiljević* Trial Judgement, para. 228 ('vast'); *Brđanin* Trial Judgement, para. 388 ('massive'); *Brđanin* Trial Judgement, para. 389 ('large').

¹³³⁷ Kanu Defence Trial Brief, para. 40; see also Kamara Final Trial Brief, para. 109.

¹³³⁸ *Vasiljević* Trial Judgement, fn. 587, wherein the Trial Chamber states that "in one case, the court used the expression 'extermination' when referring to the killing of 733 civilians (Unites States v. Ohlendorf and others ("Einsatzgruppen case"), IV Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10, 421). The Trial Chamber is not aware of cases which, prior to 1992, used the phrase 'extermination' to describe the killing of less than 733 persons. The Trial Chamber does not suggest, however, that a lower number of victims would disqualify that act as 'extermination' as a crime against humanity, nor does it suggest that such a threshold must necessarily be met."

¹³³⁹ *Brđanin* Trial Judgement, para. 465, being satisfied that the killing of 1669 Bosnian Muslims fulfils the massiveness requirement of 'extermination'; *Stakić* Trial Judgement, paras 654, 655, finding that the killing of more than 1500 individuals also fulfil the element of massiveness; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement"), para. 720, finding that an incident in which 17 people were killed reached the requisite element of massiveness of extermination. See also *Ntakirutimana* Appeal Judgement, para. 516; *Stakić* Appeal Judgement, paras 260-261; *Brđanin* Appeal Judgement, para. 471, stating that there is "no numerical threshold" with respect to the *actus reus* of extermination.

¹³⁴⁰ *Brđanin* Trial Judgement, para. 391; *Stakić* Trial Judgement, para. 640; but see *Krajišnik* Trial Judgement, para. 716, according to which "[t]he killings constituting the extermination must form part of the same incident, taking into account such factors as the time and place of the killings, the selection of the victims and the manner in which they are targeted." Applying this rationale, the *Krajišnik* Trial Chamber, para. 720, found that "the element of mass scale is fulfilled, considering the number of deaths in each incident and the circumstances surrounding the deaths [...]" in respect of specific locations, including a village where 17 people were killed.

death.¹³⁴¹ Consistent with the approach that a numerical minimum does not exist to establish the *actus reus* of extermination, there is no further requirement of an intent to kill a certain number of individuals.¹³⁴²

(b) Count 4 (Article 2(a) of the Statute) and Count 5 (Article 3(a) of the Statute): Murder

688. Murder is charged under Article 2(a) of the Statute (Count 4 - Crime against Humanity) and Article 3(a) of the Statute (Count 5 - Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II). The Trial Chamber observes that the elements defining murder are identical regardless of the provision under which it is charged.¹³⁴³ Thus, in addition to the chapeau requirements of Crimes against Humanity pursuant to Article 2 of the Statute (for Count 4) and the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute (for Count 5), the Trial Chamber adopts the following elements of the crime of murder:

1. The perpetrator by his acts or omission caused the death of a person or persons; and
2. The perpetrator had the intention to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.¹³⁴⁴

689. For the *actus reus* of murder to be satisfied, the Prosecution is required to establish beyond reasonable doubt that the perpetrator's conduct substantially contributed to the death of the person.¹³⁴⁵ This does not necessarily require proof that the dead body of that person has been recovered.¹³⁴⁶ The death of the victim may be demonstrated through circumstantial evidence, provided it is the only inference that may reasonably be drawn from the acts or omissions of the perpetrator.¹³⁴⁷ Such circumstantial evidence may include factors such as proof of incidents of mistreatment against the alleged victim, pattern of mistreatment and disappearances of individuals

¹³⁴¹ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić* Appeal Judgement”), para. 260; *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Cases No. ICTR-97-10-A and ICTR-97-14-A, 13 December 2004 (“*Ntakirutimana* Appeal Judgement”), para. 522.

¹³⁴² *Stakić* Appeal Judgement, paras 260-261; *Ntakirutimana* Appeal Judgement, para. 516.

¹³⁴³ *Krstić* Trial Judgement, paras 484-485; *Stakić* Trial Judgement, para. 631; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 (“*Brđanin* Trial Judgement”), para. 380; *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006 (“*Orić* Trial Judgement”), para. 345; *Krajišnik* Trial Judgement, para. 848.

¹³⁴⁴ Rule 98 Decision, para. 74.

¹³⁴⁵ *Orić* Trial Judgement, para. 347; see also *Čelebići* Trial Judgement, fn. 435, providing the results of its examination of various domestic legal systems, including that of England, Australia, Belgium and Norway.

¹³⁴⁶ See *Krnolejac* Trial Judgement, para. 326; *Tadić* Trial Judgement, para. 240.

¹³⁴⁷ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR77, Judgement on Allegation of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 91; *Čelebići* Appeal Judgement, para. 458; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 (“*Krnolejac* Trial Judgement”), para. 327; *Vasiljević* Appeal Judgement, para. 120.

in the location in question, general climate of lawlessness, length of time which has elapsed since the person disappeared and the fact that the alleged victim has not been in contact with others whom he would have been expected to contact.¹³⁴⁸

690. The *mens rea* required for murder is intent to kill or cause serious bodily harm in the reasonable knowledge that it would likely result in death. Premeditation is not a *mens rea* requirement.¹³⁴⁹

4. Counts 6, 7, 8 and 9: Sexual Crimes

691. In Count 6, the Prosecution charges the Accused with rape, a crime against humanity, punishable under Article 2(g) of the Statute. Count 7 charges the Accused with “sexual slavery and any other form of sexual violence”, a crime against humanity, punishable under Article 2(g) of the Statute. In Count 8, the Prosecution charges the Accused with other inhumane acts, a crime against humanity, punishable under Article 2(i) of the Statute. In addition, or in the alternative, Count 9 charges the Accused with outrages upon personal dignity, a violation of Common Article 3 and of Additional Protocol II, punishable under Article 3(e) of the Statute.¹³⁵⁰

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

692. The prohibition of the crime of rape in armed conflict is firmly enshrined in customary international law.¹³⁵¹ Rape was proscribed as a crime against humanity in the Allied Control

¹³⁴⁸ Krnojelac Trial Judgement, para. 327, fn. 857, providing an extensive list of case-law from the European Court of Human Rights, the Inter-American Court of Human Rights and domestic legal systems.

¹³⁴⁹ Akayesu Trial Judgement, para. 588; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 (“*Kayishema* Appeal Judgement”), para. 151; Brđanin Trial Judgement, para. 386; Oric Trial Judgement, para. 348.

¹³⁵⁰ Indictment, paras 51-57. With regard to the law on Count 8 (Other Inhumane Acts), see para. 697 et. seq, *infra*.

¹³⁵¹ The prohibition against rape is codified as far back as the Lieber Code of 1863, Francis Lieber, *Laws of War: Instructions for the Government of Armies of the United States in the Field*, General Orders No: 100, Adjutant General’s Office, 24 April 1863 (“Lieber Code”), Articles 44, 47. Rape was implicitly prohibited in the 1907 *Hague Regulations* which state at Article 46 that [f]amily honour and rights [...] must be respected, *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land*, 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. T.S. 227, entered into force 26 January, 1910.; Article 27 of *Geneva Convention IV, 1949*, states, “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, entered into force 21 October 1950.; Rape is prohibited by Article 76(1) of Additional Protocol I, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 1125 U.N.T.S. 3, entered into force 7 December 1978, and by Article 4(2)(e) of Additional Protocol II, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 U.N.T.S. 609, entered into force 7 December 1978. Rape was recognised as a “grave breach” of the Geneva Conventions by the UN Security Council in 1994, *Final Report of the Commission of experts established pursuant to Security Council Resolution 780*, UN Doc. S/1994/674, paras 58-60 and 232-253.

Council Law No. 10 and prosecuted as ‘inhuman acts’ before the Tokyo Tribunal.¹³⁵² Rape as a crime against humanity is found in the statutes of the ICTY, the ICTR and the ICC¹³⁵³ and has been defined largely through the jurisprudence of the ICTY and the ICTR.¹³⁵⁴

693. In addition to the chapeau requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the Trial Chamber adopts the following elements of the crime of rape:

1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
2. The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.¹³⁵⁵

694. Consent of the victim must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.¹³⁵⁶ Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape and there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.¹³⁵⁷ This is necessarily a contextual assessment. However, in situations of armed conflict or detention, coercion is almost universal. ‘Continuous resistance’ by the victim, and physical force, or even threat of force by the perpetrator are not required to establish coercion.¹³⁵⁸ Children below the age of 14 cannot give valid consent.¹³⁵⁹

¹³⁵² Control Council Law No. 10, Article II(1)(c); M. Boot, C.L. Hall, R. Dixon, “Article 7, Crimes Against Humanity” in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 1999, pp. 140-141.

¹³⁵³ ICTY Statute, Article 5(g); ICTR Statute, Article 3(g); Rome Statute, Article 7(1)(g). Rape is also designated as a crime against humanity in Article 18(j) of the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission (“ILC”) at its 48th session, 1996, submitted to the General Assembly as part of ILC Report covering the work of that session.

¹³⁵⁴ See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras 596-598; *Prosecutor v. Zejnir Delalić, Zdravko Mučić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Judgement, 16 November 1998; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 185; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000, paras 228-229; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras 438 *et seq.*; *Kunarac Appeal Judgement*, 12 June 2002, paras 128-130; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, paras 344-45.

¹³⁵⁵ Rule 98 Decision, para. 106, referring to *Kunarac Appeal Judgement*, para. 127.

¹³⁵⁶ *Kunarac Appeal Judgement*, para. 127.

¹³⁵⁷ *Kunarac Appeal Judgement*, paras 129-130.

¹³⁵⁸ *Kunarac Appeal Judgement*, paras 128-130, 133; see also Gay J. McDougall, *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, Final Report submitted to the Commission on Human Rights Sub-commission on Prevention of Discrimination and Protection of minorities, 50th session, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 25, stating that “[t]he manifestly coercive circumstances that exist in all

695. The Trial Chamber acknowledges that the very specific circumstances of an armed conflict where rapes on a large scale are alleged to have occurred, coupled with the social stigma which is borne by victims of rape in certain societies, render the restrictive test set out in the elements of the crime difficult to satisfy. Circumstantial evidence may therefore be used to demonstrate the *actus reus* of rape.¹³⁶⁰

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

696. As detailed above in *Chapter II, Defects in the Indictment*, Count 7 is duplicitous and has been struck out.¹³⁶¹

(c) Count 8: Other Inhumane Acts (Article 2(i) of the Statute)

(i) Elements of the Crime

697. The offence of ‘other inhumane acts’ pursuant to Article 2(i) of the Statute is a residual clause which covers a broad range of underlying acts not explicitly enumerated in Article 2(a) through (h) of the Statute. In light of the exhaustive category of sexual crimes particularised in Article 2(g) of the Statute, the offence of ‘other inhumane acts’, even though residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity.¹³⁶² Listing the underlying acts exhaustively would only create undesirable opportunities to evade the letter of the prohibition.¹³⁶³ The crime of ‘other inhumane

armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish the lack of consent as an element of the crime.”

¹³⁵⁹ See Article 5.a. of the Statute, which provides that “[t]he 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.”

¹³⁶⁰ *Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 (“*Muhimana* Appeal Judgement”), para. 49; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 (“*Gacumbitsi* Appeal Judgement”), para. 115.

¹³⁶¹ *Alleged Defects in the Form of the Indictment*, paras 92-95, *supra*.

¹³⁶² *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 19(iii).

¹³⁶³ *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić aka “Vlado”*, Case No. IT-95-16-T, Judgement, 14 January 2000 (“*Kupreškić* Trial Judgement”), para. 563; *Akayesu* Trial Judgement, para. 582; *Rutaganda* Trial Judgement, para. 76; *see also* Report of the ILC on the work of his 40th session, 6 May-26 June 1996, UNGAOR 51st Session Supp. No. 10 (A/51/10) (Crimes against the Peace and Security of Mankind), para. 17, p. 103, commenting that “[t]he Commission recognised that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.”

acts' was first inserted in Article 6(c) of the Nuremberg Charter and Article II(1)(i) of Control Council Law No. 10 and its prohibition is well-established in customary international law.¹³⁶⁴

698. In addition to the chapeau requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the Trial Chamber adopts the following elements of the crime of other inhumane acts:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
2. The act was of a gravity similar to the acts referred to in Article 2(a) to (h) of the Statute; and
3. The perpetrator was aware of the factual circumstances that established the character of the gravity of the act.¹³⁶⁵

699. The seriousness of a particular act or omission and the sufficiency of its gravity must be examined on a case-by-case basis, taking into consideration the personal circumstances of the victim including age, sex and health as well as the physical and mental consequences of the conduct.¹³⁶⁶ The act or omission must have a direct and seriously damaging, though not necessarily long-term, effect on the victim.¹³⁶⁷

700. As regards *mens rea*, it must be established that the perpetrator had the intent to inflict serious physical suffering, or serious injury to body or to mental or physical health, or to conduct a serious attack on human dignity. This includes situations where the perpetrator knew that his acts or omissions would more likely than not cause serious physical suffering, or serious injury to body or to mental or physical health, or constituted a serious attack on human dignity and nevertheless accepted that risk.¹³⁶⁸

(ii) Submissions on the alleged crime of 'forced marriage'

¹³⁶⁴ *Stakić* Appeal Judgement, para. 315, with further references.

¹³⁶⁵ See Rome Statute, Elements of Crimes, Article 7(1)(k).

¹³⁶⁶ *Kayishema* Trial Judgement, para. 148-151; *Čelebići* Trial Judgement, para. 536; *Kunarac* Trial Judgement, para. 504.

¹³⁶⁷ *Re P.*, Appellate Court, Judgement of 20 May 1948, Criminal Chamber 3/48: "[T]he act which was committed must affect the human being in the depths of his being. That is the physical and spiritual domain of being and acting which constitutes the value and dignity of the person according to the moral convictions of civilised humanity [...]"; *Kunarac* Trial Judgement, para. 501; *Krnojelac* Trial Judgement, para. 144.

¹³⁶⁸ *Vasiljević* Trial Judgement, para. 236; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement"), para. 56; *Kayishema* Trial Judgement, para. 153.

701. The Prosecution submits that ‘forced marriages’ qualify as ‘Other Inhumane Acts’ punishable under Article 2(i) of the Statute and are of similar gravity to existing crimes within the Special Court’s jurisdiction. In its Final Brief, the Prosecution claims that this crime “consists of words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.”¹³⁶⁹ According to the Prosecution, such acts are distinct from sexual acts, because they force a person into the appearance of marriage by threat or other coercion. Thus, even if forced marriage usually involves sex, it has its own distinctive features and is sufficiently serious to qualify as an inhumane act. The Prosecution submits that sexual slavery does not necessarily amount to forced marriage, in that a sexual slave is not necessarily obliged to pretend that she is the wife of the perpetrator. Similarly, a victim of sexual violence is not necessarily obliged to perform all the tasks attached to a marriage. Thus, says the Prosecution, forced marriage as an “inhumane act” can include sexual violence or slavery, but it involves distinct elements as well. The Prosecution maintains that the question of the status of forced marriage as a crime under customary international law does not arise, since the crime charged is “other inhumane acts”, the customary law status of which is clearly established.

702. The Kanu Defence, by contrast, submits that “forced marriages cannot be qualified as an international crime (against humanity), as it is not of ‘a gravity similar to any other act referred to in Article 2(a) to (h) of the Statute’.”¹³⁷⁰ The Kanu Defence is “of the view that if the conduct described by the Prosecution cannot be categorized as sexual slavery, this conduct will not constitute a crime against humanity. The exercising of force on a woman to enter into a relationship similar to marriage, is not of ‘a gravity similar to any other act referred to in Article 2(a) to (h) of the Statute’ especially in view of the more nuanced and complicated relation between the ‘husband’ and ‘wife’ as discussed in the expert report of Dr. Thorsen.”¹³⁷¹

(iii) Findings

703. As described above, the crime of ‘other inhumane acts’ exists as a residual category in order not to unduly restrict the Statute’s application with regard to crimes against humanity.¹³⁷² “Forced

¹³⁶⁹ See Prosecution Final Brief, para. 1009-1012.

¹³⁷⁰ Kanu Final Brief, para. 56.

¹³⁷¹ Kanu Final Brief, para. 48.

¹³⁷² See, e.g., *Stakić* Appeal Judgement, paras 313-316; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003 (“Niyitegeka Trial Judgement”), para. 460; *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-

marriage” as an ‘other inhumane act’ must therefore involve conduct not otherwise subsumed by other crimes enumerated under Article 2 of the Statute.

704. At the Motion for Acquittal Stage, the Trial Chamber found that there was *prima facie* evidence of a non-sexual nature relating to the abduction of women and girls forced to submit to ‘marital’ relationships and to perform various conjugal duties.¹³⁷³ Having now examined the whole of the evidence in the case, the Trial Chamber by a majority¹³⁷⁴ is not satisfied that the evidence adduced by the Prosecution is capable of establishing the elements of a non-sexual crime of “forced marriage” independent of the crime of sexual slavery under article 2(g) of the Statute.

705. Sexual slavery is a specific form of slavery.¹³⁷⁵ The prohibition against slavery is a customary norm of international law and the establishment of enslavement as a crime against humanity is firmly entrenched.¹³⁷⁶ Thus, slavery for the purpose of sexual abuse is a *jus cogens* prohibition in the same manner as slavery for the purpose of physical labour.¹³⁷⁷

706. While sexual slavery is not specifically contained in the statutes of the ICTY or the ICTR, the underlying crimes of enslavement and rape are included in both statutes and have been developed through a significant body of jurisprudence. The accused in the *Kunarac* case were charged with and convicted of enslavement as a crime against humanity for holding girls in slavery-like conditions for the purpose of sex.¹³⁷⁸

707. The jurisprudence of the ICTY and the ICTR is reflected in the Rome Statute of the International Criminal Court which, like the Statute of the Special Court, now separates gender crimes into an isolated paragraph and codifies sexual slavery as a crime against humanity.¹³⁷⁹

(iv) Elements of the Crime of Sexual Slavery

98-44A-T, Judgement and Sentence, 1 December 2003 (“*Kajelijeli* Trial Judgement”), para. 931; *Kupreškić* Trial Judgement, para. 563.

¹³⁷³ Rule 98 Decision, para. 165.

¹³⁷⁴ Dissenting Opinion of Justice Doherty, Separate and Concurring Opinion of Justice Sebutinde.

¹³⁷⁵ Special Rapporteur on Contemporary forms of Slavery, *Final report on Contemporary forms of Slavery: Systemic rape, sexual slavery and slavery-like practices during armed conflict*, E/CN.4/Sub.2/1998/13, 22 June 1998, at para. 29.

¹³⁷⁶ The state of the law of slavery is discussed in relation to Count 13 (enslavement) at paras 739-749, *infra*.

¹³⁷⁷ Special Rapporteur on Contemporary Forms of Slavery, *Update to the final report on Systematic rape, sexual slavery and slavery-like practices during armed conflict* E/CN.4/Sub.2/2000/21, 6 June 2000, at para 51.

¹³⁷⁸ The Prosecution in the *Kunarac* case grouped charges of enslavement and rape as crimes against humanity together due to the inter-related factual basis (systemic rape and enslavement of women in the city of Foča) of the crimes, *Kunarac*, Case No. IT-96-23-PT, Amended Indictment, 1 December 1999, Counts 14 to 17. A conviction was entered for enslavement as a crime against humanity involving rape, treatment of girls as private property and forced performance of household chores: *Kunarac* Trial Judgement paras 542, 543, 728 *et seq*. The definition of the crime of enslavement was upheld on appeal, *Kunarac* Appeal Judgement paras 106-124.

708. In addition to the chapeau requirements of Crimes Against Humanity pursuant to Article 2 of the Statute, the elements of the crime of sexual slavery are as follows:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.¹³⁸⁰

709. The powers of ownership listed in the first element of sexual slavery are non-exhaustive. There is no requirement for any payment or exchange in order to establish the exercise of ownership.¹³⁸¹ Deprivation of liberty may include extracting forced labour or otherwise reducing a person to servile status.¹³⁸² Further, ownership, as indicated by possession, does not require confinement to a particular place but may include situations in which those who are captured remain in the control of their captors because they have no where else to go and fear for their lives.¹³⁸³ The consent or free will of the victim is absent under conditions of enslavement.¹³⁸⁴

¹³⁷⁹ Rome Statute, Article 7(1)(g)-2 (crime against humanity). The Rome Statute also recognises sexual slavery as a war crime in Article 8(2)(b)(xxii)-2 (other serious violation of the laws or customs of an international armed conflict) and Article 8(2)(e)(vi)-2 (serious violation of Common Article 3).

¹³⁸⁰ See Rome Statute Elements of Crimes, Article 7(1)(g)-2.

¹³⁸¹ Special Rapporteur on Contemporary Forms of Slavery, Update to the Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, E/CN.4/Sub.2/2000/21, 6 June 2000, para 50.

¹³⁸² With reference to the Rome Statute Article 8(2)(b)(xxii) - which lists sexual slavery as a crime against humanity - delegates to the Working Group on the Elements of Crime took the view that the word "similar" in the first element (i) of the crime should not be interpreted as referring only to commercial character of the examples of selling, purchasing, or bartering. These delegates insisted that Footnote 18 be appended to the Article, which states "[i]t is understood that such a deprivation of liberty may, in some circumstances, include extracting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.", Rome Statute of the International Criminal Court, Elements of Crimes, Art. 8(2)(b)(xxii), fn. 18.; Commentary documented by Eve La Haye, Article 8(2)(b)(xxii) – 2 – Sexual Slavery, in Roy S. Lee, Ed., The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (2001: Transnational Publishers, Ardsley) at p. 191.

¹³⁸³ This distinction was also insisted upon by some delegations to the Rome Statute Working Group on Elements of Crimes to ensure that the provision did not exclude from prohibition situations in which sexually abused women were not locked in a particular place but were nevertheless "deprived of their liberty" because they have no where else to go and fear for their lives, Commentary documented by Eve La Haye, Article 8(2)(b)(xxii) – 2 – Sexual Slavery, in Roy S.

710. The Prosecution evidence in the present case does not point to even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery. Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental. Moreover, in the opinion of the Trial Chamber, had there been such evidence, it would not by itself have amounted to a crime against humanity, since it would not have been of similar gravity to the acts referred to in Article 2(a) to (h) of the Statute.

711. The Trial Chamber finds that the totality of the evidence adduced by the Prosecution as proof of “forced marriage” goes to proof of elements subsumed by the crime of sexual slavery. As exhaustively examined in *Chapter X, Factual Findings, infra*,¹³⁸⁵ so-called “forced marriages” involved the forceful abduction of girls and women from their homes or other places of refuge and their detention with the AFRC troops as they attacked and moved through various districts. The girls and women were taken against their will as “wives” by individual rebels.¹³⁸⁶ The evidence showed that the relationship of the perpetrators to their “wives” was one of ownership and involved the exercise of control by the perpetrator over the victim, including control of the victim’s sexuality, her movements and her labour; for example, the “wife” was expected to carry the rebel’s possessions as they moved from one location to the next, to cook for him and to wash his clothes.¹³⁸⁷ Similarly, the Trial Chamber is satisfied that the use of the term “wife” by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband wife relationship. In fact, while the relationship of the rebels to their “wives” was generally one of exclusive ownership, the victim could be passed on or given to another rebel at the discretion of the perpetrator.¹³⁸⁸

712. None of the witnesses gave evidence that they considered themselves to be in fact “married”. (One witness testified that she had been “married” to her rebel “husband” in a

Lee, Ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001: Transnational Publishers, Ardsley) pp. 191-192.

¹³⁸⁴ *Kunarac* Trial Judgement, para. 542; *Kunarac* Appeal Judgement, paras 129-131; Special Rapporteur on Contemporary Forms of Slavery, Update to the Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict E/CN.4/Sub.2/2000/21, 6 June 2000, para. 51.

¹³⁸⁵ *Factual Findings, Sexual Slavery, infra*.

¹³⁸⁶ *Factual Findings, Sexual Slavery, infra*.

¹³⁸⁷ Exhibit P-32, Mrs. Zainab Bangura, “Expert Report on Phenomenon of ‘Forced Marriages’ in the Context of the Conflict in Sierra Leone and, more specifically, in the Context of the Trials against the RUF and AFRC Accused Only”, p. 14.

¹³⁸⁸ Exhibit P-32, “Expert Report of on phenomenon of ‘forced marriages’ in the context of the conflict in Sierra Leone and, more specifically, in the context of the trials against the RUF and AFRC Accused only”, pp. 13, 15.

ceremony,¹³⁸⁹ but no consent could be inferred given the environment of violence and coercion.) Rather, the repeated assertion of the witnesses was that they had been “taken as wives”.¹³⁹⁰ They were held against their will and a number tried to escape.¹³⁹¹ There was no evidence that any of the women taken as “wives” stayed on with their rebel “husbands” following the end of hostilities.¹³⁹²

713. In light of the foregoing, the Trial Chamber finds, by a majority,¹³⁹³ that the evidence adduced by the Prosecution is completely subsumed by the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime of “forced marriage” as an ‘other inhumane act’. In view of the Trial Chamber’s findings that Count 7 is bad for duplicity, the Trial will in the interests of justice consider the evidence of Sexual Slavery under Count 9.

714. The Trial Chamber further finds that alleged offences of a residual, non-sexual nature do not belong under the part of the Indictment entitled “Counts 6-9: Sexual Violence”. The Trial Chamber finds by a majority¹³⁹⁴ that Count 8 is redundant insofar as the crime of sexual slavery will be dealt with in Count 9. Other residual crimes of a non-sexual nature are dealt with in Count 11. Count 8 is therefore dismissed.¹³⁹⁵

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

(i) Elements of the Crime

715. Article 3(e) of the Statute safeguards the highly important value of human dignity¹³⁹⁶ by prohibiting “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”. The crime of outrages upon personal dignity must be interpreted in light of the purpose behind Common Article 3 of the Conventions, which is: “to uphold the inherent human dignity of the individual”;¹³⁹⁷ or to safeguard “the principles of humane treatment.”¹³⁹⁸ The said crime is formulated in a manner which ensures broad and flexible interpretation. The list of offences subsumed under outrages against personal dignity

¹³⁸⁹ TF1-085, Transcript 7 April 2005, p. 37.

¹³⁹⁰ Factual Findings, Sexual Violence, *infra*.

¹³⁹¹ See for example, Witness TF1-085, Transcript 7 April 2005, pp. 43-44, 121; Witness TF1-334, Transcript 20 May 2005, pp. 4-5; TF1-282, Transcript 13 April 2005, pp. 15-18; Transcript 14 April 2005, p.39.

¹³⁹² Factual Findings, Sexual Violence, *infra*.

¹³⁹³ Justice Doherty dissenting.

¹³⁹⁴ Justice Doherty dissenting.

¹³⁹⁵ See Rule 98 Decision, Separate Concurring Opinion of Hon. Justice Julia Sebutinde, paras 10-14.

¹³⁹⁶ See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999, at para. 54.

¹³⁹⁷ *Aleksovski Appeal Judgement*, para. 56.

¹³⁹⁸ Patricia Viseur Sellers in: O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, (Baden-Baden: Nomos Verl.-Ges, 1999), (Commentary on Rome Statute), at

constitutes a “non-exhaustive list of conduct”, with humiliating and degrading treatment, rape, enforced prostitution and indecent assaults of any kind given by way of example.”¹³⁹⁹ The *ICRC Commentary on the Fourth Geneva Convention* notes that: “[i]t seems useless and even dangerous to attempt to make a list of all the factors that make treatment ‘humane’” and that treatment which degrades human dignity can take innumerable forms¹⁴⁰⁰. The crime of outrages upon personal dignity was first articulated in the 1949 Geneva Conventions and is firmly entrenched in customary international law.

716. In addition to the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute, the Trial Chamber adopts the following elements of the crime of outrages upon personal dignity:

1. The perpetrator committed an outrage upon the personal dignity of the victim;
2. The humiliation and degradation was so serious as to be generally considered as an outrage upon personal dignity;
3. The perpetrator intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity; and
4. The perpetrator knew that the act or omission could have such an effect.¹⁴⁰¹

(ii) Findings

717. Count 9 has been charged in addition to or in the alternative to Count 6 (Rape), Count 7 (Sexual Slavery and Any Other Form of Sexual Violence) and Count 8 (Other Inhumane Act, Forced Marriage).¹⁴⁰²

margin No. 195. The ICRC’s Commentary on Geneva Convention IV also notes: “What [common] Article 3 guarantees such persons is *humane treatment*.”

¹³⁹⁹ Commentary on Rome Statute, note 2 at margin No. 190.

¹⁴⁰⁰ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Commentary, Common Article 3, online: International Committee of the Red Cross.

¹⁴⁰¹ Rule 98 Decision, para. 115; *see also* Rome Statute, Elements of Crimes, Article 8(2)(b)(xxi).

¹⁴⁰² Indictment, paras 51-57.

718. Rape (Count 6) is an offence which is specified in Article 3(e) of the Statute as being an outrage upon personal dignity. As stated by the ICTR Trial Chamber in *Akayesu*, “[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity”.¹⁴⁰³

719. With reference to the elements of sexual slavery set out in the discussion of Count 8 above, the Trial Chamber is similarly satisfied that sexual slavery is an act of humiliation and degradation so serious as to be generally considered an outrage upon personal dignity. The Trial Chamber in *Kvočka* held that “perform[ing] subservient acts,” and “endur[ing] the constant fear of being subjected to physical, mental or sexual violence” in camps were outrages upon personal dignity.¹⁴⁰⁴ Sexual slavery, which may encompass rape and/or other types of sexual violence as well as enslavement, entails a similar humiliation and degradation of personal dignity.

720. “Any other form of Sexual Violence” in the context of crimes against humanity is a residual category of sexual crimes listed under Article 2(g) of the Statute, and may encompass an unlimited number of acts. The Trial Chamber agrees with the conclusion of the ICTY Trial Chamber in *Kvočka* that “sexual violence is broader than rape”.¹⁴⁰⁵ The prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation.¹⁴⁰⁶

721. The Indictment fails to provide any particulars as to the specific form of sexual violence alleged. One of the fundamental rights guaranteed to an accused under Article 17(4)(a) of the Statute is the right to be informed “of the nature and cause of the charge against him”. An Indictment is defective if it does not state the material facts underpinning the charges with enough detail to enable an accused to prepare his or her defence.¹⁴⁰⁷ In the present case, given the broad scope of the offence of ‘any other form of sexual violence’, it was essential for the Indictment to clearly identify the specific offence or offences which the Accused are required to answer. The Trial Chamber finds that the Indictment is defective in this respect because it fails to plead material facts with sufficient specificity. For this reasons, the charge of ‘any other form of sexual violence’ is dismissed and thus will not be considered additionally or alternatively under Count 9.

¹⁴⁰³ *Akayesu* Trial Judgement, para. 597.

¹⁴⁰⁴ *Kvočka* Trial Judgement, para. 173.

¹⁴⁰⁵ *Kvočka* Trial Judgement, para. 180.

¹⁴⁰⁶ *Furundžija* Trial Judgement, para. 186; *Akayesu* Trial Judgement, para. 688.

¹⁴⁰⁷ See *Kamuhanda* Appeal Judgement, para. 17; *Kupreškić* Appeal Judgement, para. 88; see also *Alleged Defects in the Form of the Indictment*.

722. Finally, as Count 8 has been dismissed for redundancy, the Trial Chamber will not consider it additionally or alternatively under Count 9.

5. Counts 10 and 11: Crimes Relating to Physical Violence (Articles 3(a) and 2(i) of the Statute)

723. In Count 10, the Accused are charged with violence to life, health and physical or mental well-being of persons, in particular mutilation, a violation of Common Article 3 and of Additional Protocol II, punishable under Article 3(a) of the Statute. In addition, or in the alternative, Count 11 charges the Accused with other inhumane acts, a crime against humanity, punishable under Article 2(i) of the Statute.¹⁴⁰⁸

(a) Count 10 – Violence to Life, Health and Physical or Mental Well-Being of Persons, in Particular Mutilation

(i) Elements of the Crime of ‘Mutilation’

724. Regarding the specific act of mutilation, in addition to the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute, the Trial Chamber adopts the following elements of the crime of ‘mutilation’:

1. The perpetrator intentionally subjected the victim to mutilation, in particular by permanently disfiguring the victim, or by permanently disabling or removing an organ or appendage of the victim;
3. The perpetrator’s conduct was neither justified by the medical, dental or hospital treatment of the victim, nor carried out in the victim’s interest.¹⁴⁰⁹

725. The Trial Chamber notes that in its ‘Rule 98 Decision’ an additional element was given requiring that “the perpetrator’s conduct caused death or seriously endangered the physical or mental health of the victim”. The Prosecution submits that this additional element is superfluous and should not be retained.¹⁴¹⁰ The Trial Chamber agrees that such a requirement is superfluous and will not retain it.

¹⁴⁰⁸ Indictment, paras 58-64.

¹⁴⁰⁹ Rule 98 Decision, para. 172; see also Elements of Crime for art. 8(2)(c)(i)-2 of the Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF. 183/9 (entered into force 1 July 2002), arts. 7(1)(f), 8(2)(c)(i)-2.

¹⁴¹⁰ Prosecution Final Brief, para. 1020.

(b) Count 11 – Other Inhumane Acts

726. The elements of Count 11, a crime against humanity as “other inhumane acts”, have been discussed earlier.¹⁴¹¹ With regard to particular acts of physical violence, the seriousness of the act or omission and its degree of gravity must be examined on a case-by-case basis. The Trial Chamber notes that the particulars mentioned in paragraphs 58 through 64 mainly identify acts of mutilations which are covered by Count 10. Paragraph 60 of the Indictment particularises beatings and ill-treatment. The Trial Chamber will consider these acts solely under Count 11, as considering mutilations and ill-treatment under the same count would result in a duplicitous charge. Therefore, with regard to acts of violence other than ‘mutilation’, such as beatings and ill-treatment,¹⁴¹² the Trial Chamber will assess the seriousness of a particular conduct and its sufficient gravity on a case-by-case basis. In that regard consideration must be given to all the factual circumstances, including the nature of the act or omission which forms the factual basis of the charges, the context in which it occurred, including the personal circumstances and the effects on the victim.¹⁴¹³

6. Count 12: Crimes Relating to Child Soldiers (Article 4(c) of the Statute)

727. In Count 12, the Indictment alleges that the AFRC/RUF “at all times relevant to this Indictment, throughout the Republic of Sierra Leone routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities.” The Accused are thus charged with conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (“conscripting, enlisting or using child soldiers”), an ‘other serious violation of international humanitarian law’, punishable under Article 4(c) of the Statute.¹⁴¹⁴

728. The question of whether this crime is recognised as a crime entailing individual criminal responsibility under customary international law was examined by the Appeals Chamber,¹⁴¹⁵ which found that, prior to November 1996, the crime had crystallised as customary law, regardless of whether committed in internal or international armed conflict,¹⁴¹⁶ and held that

¹⁴¹¹ See para 698, *supra*.

¹⁴¹² Indictment, para. 60.

¹⁴¹³ *Čelebići* Trial Judgement, para. 536; *Kunarac*, Trial Judgement, para. 501; see *Brđanin* Trial Judgement, para. 1005: “The Trial Chamber finds that ‘physical violence’ may comprise treatment that does not amount to torture as defined above”, and para. 481.

¹⁴¹⁴ Indictment, para. 65.

¹⁴¹⁵ *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004 (“Appeal Decision on Child Recruitment”).

¹⁴¹⁶ Appeal Decision on Child Recruitment, paras 10-24, referring to the 187 States parties to the 1949 Geneva Conventions, including Sierra Leone, the 137 States parties to Additional Protocol II, including Sierra Leone, the fact

[c]hild recruitment was criminalised before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld.¹⁴¹⁷

(a) Elements of the Crime

729. Guided once more by the Rome Statute, the Trial Chamber adopts the following elements of the crime of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities;
2. Such person or persons were under the age of 15 years;
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years;
4. The conduct took place in the context of and was associated with an armed conflict;
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁴¹⁸

(b) Submissions

730. The Kanu Defence submits that the age of 15 years is ‘arbitrary’ as “the ending of childhood [in the traditional African setting] has little to do with achieving a particular age and more to do with physical capacity to perform acts reserved for adults.”¹⁴¹⁹ Moreover, the Kanu Defence claims that the age for recruitment into the military in Sierra Leone is flexible, and that there has been a

that all but six States had ratified the Conventions on the Rights of the Child, including Sierra Leone, the adoption of the African Charter on the Rights and Welfare of the Child, and the widespread prohibition of recruitment or voluntary enlistment of children under the age of 15 in domestic legislations; *see also* Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S.3; African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), adopted on 11 July 1990, entered into force on 29 November 1999.

¹⁴¹⁷ Appeal Decision on Child Recruitment, para. 53; *but see* Appeal Decision on Child Recruitment, Dissenting Opinion of Justice Robertson, para. 45, finding “that it would breach the *nullem crimen* rule to impute the necessary intention to create an international law crime of child enlistment to states until 122 of them signed the Rome Treaty [...]”; para. 47, holding “that the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998. That it exists for all present and future conflicts is declared for the first time by the judgements in this Court today.”

¹⁴¹⁸ See Rome Statute, Elements of Crimes, Article 8(2)(b)(xxvi); *see also* Rule 98 Decision, para. 194.

practice by various governments in Sierra Leone of recruiting persons under the age of 15 into the military prior to the Indictment period.¹⁴²⁰ According to the Kanu Defence, this practice impacts on the Accused Kanu's awareness as to the unlawfulness of conscripting, enlisting or using child soldiers below the age of 15. As such conduct was not, it is submitted, on its face manifestly illegal, no conviction should be entered on Count 12 on the grounds of mistake of law.¹⁴²¹

(c) Findings

731. The Trial Chamber recalls that the Appeals Chamber has found that the crime charged in Count 12 of the Indictment has attained the status of customary international law. The Appeals Chamber also confirmed the customary status of the requirement that the victim must be below the age of 15.¹⁴²² Moreover, the Trial Chamber notes that the domestic law of Sierra Leone defines a 'child' as a person under 16 years of age.¹⁴²³ Therefore, the Trial Chamber dismisses what appears to be an argument by the Kanu Defence to construe the age requirement flexibly.

732. Furthermore, the Trial Chamber is not persuaded that the defence of mistake of law can be invoked here. The rules of customary international law are not contingent on domestic practice in one given country.¹⁴²⁴ Hence, it cannot be argued that a national practice creating an appearance of lawfulness can be raised as a defence of conduct violating international norms. The submission by the Kanu Defence is therefore dismissed.

733. The *actus reus* of the crime can be satisfied by 'conscripting' or 'enlisting' children under the age of 15, or by 'using' them to participate actively in the hostilities.

734. 'Conscription' implies compulsion, in some instances through the force of law.¹⁴²⁵ While the traditional meaning of the term refers to government policies requiring citizens to serve in their armed forces,¹⁴²⁶ the Trial Chamber observes that Article 4(c) allows for the possibility that children be conscripted into "[armed] groups". While previously wars were primarily between well-established States, contemporaneous armed conflicts typically involve armed factions which may

¹⁴¹⁹ Kanu Final Brief, para. 75, referring to exhibit D-37, Expert report on Child Soldiers by Mr. Gbla, paras 9-11, 39.

¹⁴²⁰ Kanu Final Brief, paras 76, 124, referring to exhibit D-37, Expert report on Child Soldiers by Mr. Gbla, paras 33-39.

¹⁴²¹ Kanu Final Brief, paras 124-132.

¹⁴²² Appeals Chamber Decision on Child Recruitment, para. 53.

¹⁴²³ Prevention of Cruelty to Children Act (1926), which states in Article 1.2. that "For the purposes of this Ordinance, unless the context otherwise requires, 'child' means a person under the age of sixteen years; [...]".

¹⁴²⁴ See *Orić* Trial Judgement, para. 563.

¹⁴²⁵ Dissenting Opinion of Justice Robertson to Appeals Chamber Decision on Child Recruitment, para. 5.

¹⁴²⁶ See, e.g., Australia: Defence Act, No 20 of 1903 (as amended by Defence Legislation Amendment Act 1992, No. 91 of 1992), Art. 59(c); Germany: Wehrpflichtgesetz, BGBl. I 1956, 651, § 1.

not be associated with, or acting on behalf, a State. To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict ‘conscripting’ to the prerogative of States and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations.¹⁴²⁷ Rather, the Trial Chamber adopts an interpretation of ‘conscripting’ which encompasses acts of coercion, such as abductions¹⁴²⁸ and forced recruitment¹⁴²⁹, by an armed group against children, committed for the purpose of using them to participate actively in hostilities.

735. ‘Enlistment’ entails accepting and enrolling individuals when they volunteer to join an armed force or group.¹⁴³⁰ Enlistment is a voluntary act, and the child’s consent is therefore not a valid defence.¹⁴³¹

736. ‘Using’ children to “participate actively in the hostilities” encompasses putting their lives directly at risk in combat.¹⁴³² As a footnote attached to the Preparatory Conference on the establishment of the International Criminal Court states

The words “using” and “participate” have been adopted in order to cover both participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and use of children as decoys, couriers or at military checkpoints.”¹⁴³³

737. It is the Trial Chamber’s view that the use of children to participate actively in hostilities is not limited to participation in combat. An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.

738. The elements of ‘armed forces or groups’ entail that the armed forces or groups must be under responsible command, which entails a degree of organization which should be such as to

¹⁴²⁷ See *Tadić* Appeal Judgement, para. 96.

¹⁴²⁸ See Secretary-General’s Report on the Establishment of the Special Court, UN Doc. S/2000/915, para. 18: “While the definition of the crime as ‘conscripting’ or ‘enlisting’ connotes an administrative act of putting one’s name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; [...]”. This proposal was however rejected by the Security Council.

¹⁴²⁹ See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007 (“*Dyilo* Confirmation Decision”), para. 246.

¹⁴³⁰ Dissenting Opinion of Justice Robertson to Appeals Chamber Decision on Child Recruitment, para. 5; see also French Code of National Service, Art. L111-3; Military Selective Act (US), 10 USC ¶ 513.

¹⁴³¹ *Dyilo* Confirmation Decision, para. 247.

¹⁴³² Dissenting Opinion of Justice Robertson to Appeals Chamber Decision on Child Recruitment, para. 5.

¹⁴³³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF. 183/2/Add. 1, 14 April 1998, p. 21 at footnote 12.

enable the armed groups to plan and carry out concerted military operations and to impose discipline within the armed group.

7. Count 13: Abductions and Forced Labour (Article 2(c) of the Statute)

(a) Introduction

739. Count 13 alleges the crime of enslavement by abductions and forced labour, not sexual slavery. Although sexual slavery can lead to a conviction for enslavement, the Trial Chamber has considered the crime of sexual slavery under Count 9 (Outrages upon Personal Dignity).

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

741. The Indictment alleges that the abductions and forced labour included the districts of Kenema, Kono, Koinadugu, Bombali, Kailahun, Freetown and the Western Area and Port Loko. It is alleged that the Accused, by their acts or omissions in relation to these events, pursuant to Article 6(1) and, or alternatively, Article 6(3) of the Statute, are individually criminally responsible for the said crimes.

742. The crime of ‘enslavement’ has long been criminalised under customary international law.¹⁴³⁴ The Slavery Convention of 1926 defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”¹⁴³⁵ Being an

¹⁴³⁴ Art. 4(2)(f) of Additional Protocol II prohibits ‘slavery’ and ‘slave trade’ in all their forms. Both ‘enslavement’ and ‘slavery’ are constituted of the same elements: *Krnojelac* Trial Judgement, para. 356.

¹⁴³⁵ Slavery Convention, 25 September 1926 (entry into force on 9 March 1927), Article 1(1), Article 2(b): “The High Contracting Parties undertake [...], so far as they have not already taken the necessary steps to bring about , progressively and as soon as possible, the complete abolition of slavery in all its forms”; see also Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, entered into force on 30 April 1957, Article 6(1): “The act of enslaving another person or inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the State parties to this convention and persons convicted thereof shall be liable to punishment”; Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 (A)(III) of 10 December 1948, Article 4: “No one shall be held in slavery or servitude; servitude and the slave trade shall be prohibited in all their forms”; International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December 1966, entered into force on 23 March 1976, Article 8(1): “No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited. (2) No one shall be held in servitude. (3) No one shall be required to perform forced or compulsory or forced labour”; African Charter on Human and Peoples Rights, adopted on 27 June 1981, entered into force on 21 October 1986, Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly [...] slavery, slave trade [...] shall be prohibited.”

indication of ‘enslavement’,¹⁴³⁶ forced labour has been defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹⁴³⁷

743. ‘Enslavement’ was listed both as a war crime and a crime against humanity in the Nuremberg Charter,¹⁴³⁸ with convictions entered on this count in a number of cases.¹⁴³⁹ The International Law Commission consistently included ‘enslavement’ as a crime against humanity in its Draft Codes of Crimes Against the Peace and Security of Mankind.¹⁴⁴⁰ The ICTY Trial Chamber in the *Krnjelac* case held that

the express prohibition of slavery in Additional Protocol II of 1977, which relates to internal armed conflicts, confirms the conclusion that slavery is prohibited by customary international humanitarian law outside the context of a crime against humanity. The Trial Chamber considers that the prohibition against slavery in situations of armed conflict is an inalienable, non-derogable (sic) and fundamental right, one of the core rules of general customary and conventional international law.¹⁴⁴¹

(b) Elements of the crime

744. In *Kunarac*, the ICTY Trial Chamber held that “enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person”¹⁴⁴² (*actus reus*), while the *mens rea* of the violation consists in the intentional exercise of such powers”.¹⁴⁴³

¹⁴³⁶ *Krnjelac* Trial Judgement, para. 359.

¹⁴³⁷ Convention Concerning Forced or Compulsory Labour, International Labour Organisation (“ILO”), No. 29, 39 U.N.T.S. 55 (entry into force 1 May 1932), Article 2(1): “For the purposes of this convention, the term ‘forced or compulsory labour’ shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”; see also Convention Concerning the Abolition of Forced Labour, adopted on 25 June 1957 by the General Conference of the ILO at its fortieth session, (entry into force 17 January 1959).

¹⁴³⁸ Nuremberg Charter, Article 6, providing, *inter alia*, that “[t]he following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, [...] deportation to slave labour: (c) Crimes against Humanity: namely [...] enslavement[...].”

¹⁴³⁹ *United States v. Erhard Milch* (Case II), Judgement of 31 July 1948, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. II (1997), p. 773; *United States v. Oswald Pohl and Others* (Case IV), Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. V (1997), pp. 958-970. See also M. Lippman, War Crimes Trials of German Industrialists: the “other Schindlers”, 9 *Temple International and Comparative Law Journal*, p. 180.

¹⁴⁴⁰ Draft Code of Crimes Against the Peace and Security of Mankind, Yearbook of the ILC (1954), Vol. II, Documents of the sixth session including the report of the Commission to the General Assembly, p. 150; Report of the ILC on the work of its 43rd session, 29 April-19 July 1991, GA, Supplement No. 10 (A/46/10), p. 265; Report of the ILC on the work of its 48th session, 6 May-26 July 1996, GA, Supplement No. 10 (A/51/10), p. 93.

¹⁴⁴¹ *Krnjelac* Trial Judgement, para. 353.

¹⁴⁴² *Kunarac* Judgement, para. 540.

¹⁴⁴³ *Kunarac* Judgement, para. 540.

745. The *Kunarac* Trial Chamber held that “[u]nder this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.”¹⁴⁴⁴

746. The ICTY Appeals Chamber further clarified this definition by finding that “lack of consent” is not an element of the crime of enslavement, although it may be a significant issue in terms of evidence of the status of the alleged victim.¹⁴⁴⁵

747. The definition set forth in *Kunarac* was later reiterated in *Krnojelac*, in which it was stated that enslavement as a crime against humanity was the “exercise of any or all of the powers attaching to the right of ownership over a person. The *actus reus* of enslavement is the exercise of those powers, and the *mens rea* is the intentional exercise of such powers.”¹⁴⁴⁶

748. In *Krnojelac*, the allegations concerned enslavement for the purpose of forced labour.¹⁴⁴⁷ It was held by the Chamber that to establish forced labour constituting enslavement, the Prosecutor must demonstrate that “the Accused (or persons for whose actions he is criminally responsible) forced the detainees to work, that he (or they) exercised any or all of the powers attaching to the right of ownership over them, and that he (or they) exercised those powers intentionally.”¹⁴⁴⁸

749. In addition to the chapeau requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the Trial Chamber therefore adopts the following elements of the crime of enslavement:

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

¹⁴⁴⁴ *Kunarac* Judgement, para. 542.

¹⁴⁴⁵ *Kunarac* Appeal Judgement, para. 120.

¹⁴⁴⁶ *Krnojelac* Trial Judgement, para. 350.

¹⁴⁴⁷ *Krnojelac* Trial Judgement, para. 357.

¹⁴⁴⁸ *Krnojelac* Trial Judgement, para. 358.

2. the intentional exercise of such powers.¹⁴⁴⁹

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

750. In Count 14 of the Indictment, the Prosecution alleges that “[a]t all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property.” The Accused are thus charged with pillage, a violation of Common Article 3, punishable under Article 3(f) of the Statute.¹⁴⁵⁰

751. The prohibition of the unlawful appropriation of public and private property in armed conflict is well-established in customary international law where it has been variously referred to as ‘pillage’,¹⁴⁵¹ ‘plunder’,¹⁴⁵² and ‘looting’,¹⁴⁵³. It was charged both as a war crime and as a crime against humanity in many of the trials based on the Nuremberg Charter and Control Council Law No. 10, including the trial of the major war criminals in Nuremberg.¹⁴⁵⁴ Pillage has been adjudicated in a number of cases before the ICTY.¹⁴⁵⁵

¹⁴⁴⁹ See Rule 98 Decision, paras 212-215; see also *Krnjelac* Trial Judgement, para. 350; Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text for the Elements of the Crimes, New-York, 13-31 March 2000/12-30 June 2000 (“ICC Elements of the Crimes”), p. 10, noting that “[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.”

¹⁴⁵⁰ Indictment, paras 74-79.

¹⁴⁵¹ 1907 Hague Regulations, Article 47: “Pillage is formally prohibited”; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 2 (“Geneva Convention IV”), Article 33(2): “Pillage is prohibited”; Additional Protocol II, Article 4 prohibits pillage of “all persons who do not take a direct part or who have ceased to take part in hostilities whether or not their liberty has been restricted”; Statute of the ICTR, Article 4(f).

¹⁴⁵² Nuremberg Charter, Article 6: “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: b) War Crimes, namely violations of the laws and customs of war. Such violations shall include, but not be limited to, [...] plunder of public or private property”; Allied Control Council Law No. 10, 20 December 1945, reprinted in 1 CCL No. 10 Trials, at xvi (“Control Council Law No. 10”), Article 2: “Each of these is recognised as a crime, (1)(b) War Crimes. Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to [...] plunder of public or private property.”

¹⁴⁵³ Article 103 of the United States Uniform Code for Military Justice provides for punishment of persons engaged in “looting or pillaging”.

¹⁴⁵⁴ Indictment in the case *United States et al. v. Hermann Göring et al.*, International Military Tribunal (6 October 1945), in 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Nuremberg 1947, pp. 27, 55-60, 65; indictment in the case *United States v. Ulrich Greifelt et al.* (*RuSHA* case), American Military Tribunal (July 1947), in 4 TWC 608, 610, 616, 618; indictment in the case *United States v. Oswald Pohl et al.* (*Pohl* case), American Military Tribunal (Indictment, 13 January 1947), in 5 TWC 200, 204, 207.

¹⁴⁵⁵ *Čelebići* Trial Judgement, para. 591; *Kordić* Trial Judgement, para. 352; *Prosecutor v. Mladen Naletilić aka “Tuta” and Vinko Martinović aka “Stela”*, Case No. IT-98-34-T, Judgement, 31 March 2003 (“*Naletilić* Trial Judgement”), para. 612.

(a) Elements of the Crime

752. Trial Chamber I was of the opinion that the crime of pillage included the following constitutive elements in addition to the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute :

- (1) The perpetrator appropriated private or public property;
- (2) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
- (3) The appropriation was without the consent of the owner.¹⁴⁵⁶

753. That definition of the crime of pillage is apparently based on the Rome Statute, Elements of Crimes, Article 8(2)(b)(xvi). The inclusion of the words “private or personal use” excludes the possibility that appropriations justified by military necessity might fall within the definition. Nevertheless, the definition is framed to apply to a broad range of situations. As was stated by Trial Chamber I,

“the ICTY in the case of *Čelebići* noted that ‘plunder’ should be understood as encompassing acts traditionally described as ‘pillage’, and that pillage extends to cases of ‘organised’ and ‘systematic’ seizure of property from protected persons as well as to ‘acts of looting committed by individual soldiers for their private gain’”.¹⁴⁵⁷

754. Inclusion of the element of “private or personal use” in the definition appears to be at variance with *Čelebići*, since it may not include ‘organized’ and ‘systematic’ seizure of property. The Trial Chamber is therefore of the view that the requirement of “private or personal use” is unduly restrictive and ought not to be an element of the crime of pillage.

755. Accordingly and in addition to the chapeau requirements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3 of the Statute, the Trial Chamber concludes that the crime of pillage within the meaning of Article 3(f) of the Statute is comprised of the following specific elements:

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

(b) Submissions

756. The Prosecution submits that “destroying property by burning, as part of a series of acts involving ruthless plundering to remove anything of value followed by the total removal of the value of the buildings themselves, falls within the concept of ‘wilful and unlawful appropriation of property’.”¹⁴⁵⁸ All three Accused contend that ‘burning’ does not fall under the definition of ‘pillage’.¹⁴⁵⁹

(c) Findings

757. In its Rule 98 Decision, the Trial Chamber deferred a final decision on this issue until the end of the trial.¹⁴⁶⁰ Having carefully examined all relevant sources, the Trial Chamber is of the opinion that the inclusion of ‘burning’ in the crime of ‘pillage’, as suggested by the Prosecution, is untenable. First, a review of military manuals shows that most countries do not regard the destruction of enemy property as pillage.¹⁴⁶¹ Second, the jurisprudence is unambiguous in requiring that the property be *appropriated*,¹⁴⁶² an element which is not satisfied in the event that property is burned and destroyed. The Rome Statute also makes a distinction between appropriation and destruction of property.¹⁴⁶³

758. Moreover, the destruction of civilian property may be brought and adjudged under a number of other provisions,¹⁴⁶⁴ which the Prosecution has not done in this case.

¹⁴⁵⁶ See *Norman* Judgement of Acquittal, para. 102.

¹⁴⁵⁷ See *Norman* Judgement of Acquittal, para. 102; and *Čelebići* Trial Judgement, para. 590.

¹⁴⁵⁸ Prosecution Final Brief, para. 1037.

¹⁴⁵⁹ Brima Final Brief, para. 319; Kamara Final Brief, para. 332, Kanu Final Brief, paras 98-104.

¹⁴⁶⁰ Rule 98 Decision, paras 262-268.

¹⁴⁶¹ Canada, Law of Armed Conflict Manual, Glossary, p. GL-15, pp. 5-6, para. 50, stating that “pillage, the violent acquisition of property for private purposes, is prohibited. Pillage is theft.”; France, Law of Armed Conflict Manual, 2001, pp. 36, 85, stating that “pillage constitutes an act of spoliation by which one or several military personnel appropriate objects for a personal or private use, without the consent of the owners of that object”; Netherlands, Military Manual (1993), p. IV-5: “Pillage is the taking of goods belongings to civilians during an armed conflict It is a form of theft [...]”; Socialist Federal Republic of Yugoslavia, Military Manual (1988), p. 92: “The manual considers unlawful appropriation of private property as pillage [...]”; Georgia, Criminal Code, 1999, Article 413(a), stating that “[p]illage, i.e seizure in a combat situation of the private property of civilians left in the region of hostilities, in an internal or international armed conflict is a crime [...]”; Algeria, Code of Military Justice, 1971, Article 286, punishing pillage and damage to commodities, goods or belongings committed by soldiers as a group; see also Burkina Faso, Code of Military Justice, 1994, Article 193; Cameroon, Code of Military Justice, 1928, Article 221; ICRC Archive Document, Commentary, p. 114, fn. 809, reporting “looting by the armed forces of a State in government controlled areas” and that “pillage has become systematic and much more vicious. What is not pillaged is destroyed or burnt [...]”.

¹⁴⁶² *Naletilić* Trial Judgement, para. 612; *Kordić* Trial Judgement, para. 352; *Jelisić* Trial Judgement, para. 48.

¹⁴⁶³ See Art. 8(2)(a)(iv) of the Rome Statute refers to “[e]xtensive destruction and appropriation of property”; Art. 8(2)(b)(xiii) refers to “[d]estroying or seizing the enemy’s property”.

¹⁴⁶⁴ Rule 98 Decision, paras 263-264, referring to Article 4(a) of the Statute (attacks against the civilian population), which is not charged in the instant case, and to the non-exhaustive nature of Common Article 3 (see *Tadić* Jurisdiction Decision, paras 87, 127), and by extension, Article 3 of the Statute.

D. Law on Individual Criminal Responsibility

1. Introduction

759. The Indictment cumulatively charges each of the Accused for the crimes in counts 1 through 14 under different modes of liability. These are:

- 1. Individual criminal responsibility pursuant to Article 6(1) of the Statute in that
 - a. each of the Accused planned, instigated, ordered, or committed the said crimes, or
 - b. each Accused otherwise aided and abetted in the planning, preparation, or execution of the said crimes, or
 - c. the said crimes were within a joint criminal enterprise, or were a reasonably foreseeable consequence of the joint criminal enterprise, in which each Accused participated;

2. In addition, or in the alternative, individual criminal responsibility pursuant to Article 6(3) of the Statute for the crimes committed by their subordinates whilst each of the Accused was holding a position of authority.¹⁴⁶⁵

2. Individual Criminal Responsibility Pursuant to Article 6(1) of the Statute

760. Article 6(1) of the Statute lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute.¹⁴⁶⁶ Article 6(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 4 of the present Statute shall be individually responsible for the crime.

761. The principle that an individual may be held criminally responsible under one of these modes of responsibility is enshrined in customary international law.¹⁴⁶⁷ The Trial Chamber in the

¹⁴⁶⁵ Indictment, paras 35-36.

¹⁴⁶⁶ *Vasiljević* Appeal Judgement, para. 95.

¹⁴⁶⁷ *Kvočka* Appeal Judgement, para. 79; *Vasiljević* Appeal Judgement, para. 95.

ICTY case of *Kordić*¹⁴⁶⁸ made the following observations on the object of the ICTY equivalent to Article 6(1) (that is, Article 7(1) of the International Statute):

The principle that an individual may be held criminally responsible for planning, assisting, participating or aiding and abetting in the commission of a crime is firmly based in customary international law. Article 7(1) reflects the principle of criminal law that criminal liability does not attach solely to individuals who physically commit a crime but may also extend to those who participate in and contribute to a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability. The various forms of liability listed in Article 7(1) may be divided between principal perpetrators and accomplices. Article 7(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.

(a) Committing

762. The *actus reus* of 'committing' primarily covers "the physical perpetration of a crime by the offender himself."¹⁴⁶⁹ An accused will be held responsible under Article 6(1) of the Statute for having committed a crime charged enumerated in the Statute when he "participated, physically or otherwise directly, in the material elements" of the said crime.¹⁴⁷⁰ Committing also covers situations where the accused engenders "a culpable omission in violation of a rule of criminal law."¹⁴⁷¹ There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence.¹⁴⁷²

763. In addition, an accused must either possess the relevant *mens rea* for the crime in question, or be aware that the act or omission will more likely than not result in the commission of a crime in the Statute and accept this risk.¹⁴⁷³

764. In light of the foregoing, the Trial Chamber rejects the argument of the Brima and Kamara Defence that in the absence of physical perpetration of a crime by an accused, any submission that the accused should be held culpable for 'committing' a crime ought to be dismissed, or at least weakened.¹⁴⁷⁴

¹⁴⁶⁸ *Kordić* Trial Judgement, para. 373.

¹⁴⁶⁹ *Tadić* Appeal Judgement, para. 188; *Krnojelac* Trial Judgement, para. 73.

¹⁴⁷⁰ *Galić* Trial Judgement, para. 168; *Kvočka* Trial Judgement, para. 250.

¹⁴⁷¹ Prosecution Final Brief, para. 427; *Orić* Trial Judgement, para. 302; *Kunarac* Trial Judgement, para. 390; *Krstić* Trial Judgement, para. 601; *Vasiljević* Trial Judgement, para. 62.

¹⁴⁷² *Kunarac* Trial Judgement, para. 390.

¹⁴⁷³ *Kvočka* Trial Judgement, para. 251; *Orić* Trial Judgement, para. 279; *Galić* Trial Judgement, para. 172.

¹⁴⁷⁴ *Brima* Final Brief, para. 89; *Kamara* Final Brief, para. 29.

(b) Planning

765. “Planning” implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.¹⁴⁷⁵ Proof of the existence of a plan may be provided by circumstantial evidence.¹⁴⁷⁶ Responsibility is incurred when the level of the accused’s participation is substantial, even when the crime is actually committed by another person.¹⁴⁷⁷

766. The *actus reus* requires that the accused, alone or together with others, designated the criminal conduct constituting the crimes charged. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.¹⁴⁷⁸ The *mens rea* requires that the accused acted with direct intent in relation to his or her own planning or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime.¹⁴⁷⁹

767. 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,¹⁴⁸⁰ even though his or her involvement in the planning may be considered an aggravating factor.¹⁴⁸¹

768. Both the Brima and the Kamara Defence, relying on the *Brđanin* Trial Judgement, contend that responsibility for planning a crime only arises when an accused is “substantially involved at the preparatory stage of the crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance.”¹⁴⁸² The Trial Chamber does not agree with such a narrow construction of the responsibility for planning, although it cannot be denied that there must be a sufficient link between the planning of a crime both at the preparatory and the execution phases. In the opinion of the Trial Chamber, it is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.¹⁴⁸³

¹⁴⁷⁵ *Akayesu* Trial Judgement, para. 477; *Brđanin* Trial Judgement, para. 268; *Stakić* Trial Judgement, para. 443; Krstić Trial Judgement, para. 601.

¹⁴⁷⁶ *Blaškić* Trial Judgement, para. 279.

¹⁴⁷⁷ *Bagilishema* Trial Judgement, para. 30.

¹⁴⁷⁸ *Kordić* Appeal Judgement, para. 26.

¹⁴⁷⁹ *Kordić* Appeal Judgement, paras 29, 31.

¹⁴⁸⁰ Rule 98 Decision, para. 285, referring to *Kordić* Trial Judgement, para. 386; see also *Brđanin* Trial Judgement, para. 268.

¹⁴⁸¹ Prosecution Final Brief, para. 416; *Stakić* Trial Judgement, para. 443.

¹⁴⁸² Brima Final Brief, para. 80; Kamara Final Brief, para. 17, referring to *Brđanin* Trial Judgement, para. 357.

¹⁴⁸³ Rule 98 Decision, paras 284, 290-291.

(c) Instigating

769. “Instigating” means prompting another to commit an offence.¹⁴⁸⁴ This requires more than merely facilitating the commission of the principal offence, which may suffice for aiding and abetting. It requires some kind of “influencing the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the crime”.¹⁴⁸⁵ Both acts and omissions may constitute instigating, which covers express as well as implied conduct.¹⁴⁸⁶ A nexus between the instigation and the perpetration must be proved, but it is not necessary to demonstrate that the crime would not have been perpetrated without the involvement of the accused.¹⁴⁸⁷

770. The *actus reus* requires that the accused prompted another person to commit the offence¹⁴⁸⁸ and that the instigation was a factor substantially contributing to the conduct of the other person(s) committing the crime.¹⁴⁸⁹ 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.¹⁴⁹⁰

771. If a principal perpetrator has definitely decided to commit the crime, further encouragement or moral support may still qualify as aiding and abetting.¹⁴⁹¹

(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.¹⁴⁹² 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.¹⁴⁹³ The order need not be given in writing or in any particular form,¹⁴⁹⁴ nor does it have to

¹⁴⁸⁴ *Akayesu* Trial Chamber Judgement, para. 482.

¹⁴⁸⁵ *Orić* Trial Judgement, paras 270-271; *Kordić* Appeal Judgement, para. 27; *Kajelijeli* Trial Judgement, para. 762.

¹⁴⁸⁶ *Brđanin* Trial Judgement, para. 269.

¹⁴⁸⁷ *Brđanin* Trial Judgement, para. 269; *Galić* Trial Judgement, para. 168; *Orić* Trial Judgement, para. 274-276;

Akayesu Trial Judgement, para. 482.

¹⁴⁸⁸ *Kordić* Appeals Judgement, para. 27.

¹⁴⁸⁹ *Kordić* Appeals Judgement, para. 27.

¹⁴⁹⁰ *Kordić* Appeals Judgement, paras 29, 32. See also *Orić* Trial Judgement, para. 279.

¹⁴⁹¹ *Orić* Trial Judgement, para. 271.

¹⁴⁹² Rule 98 Decision, para. 295, referring to *Krstić* Trial Judgement, para. 601; *Brđanin* Trial Judgement, para. 270.

¹⁴⁹³ *Strugar* Trial Judgement, para. 331; *Kordić* Appeal Judgement, para. 28; *Brđanin* Trial Judgement, para. 270; see also *Akayesu* Trial Judgement, para. 480.

¹⁴⁹⁴ *Blaškić* Trial Judgement, para. 281.

be given directly to the perpetrator.¹⁴⁹⁵ The existence of an order may be proven through circumstantial evidence.¹⁴⁹⁶

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.¹⁴⁹⁷ The state of mind of an accused may also be inferred from the circumstances, provided that it is the only reasonable inference to be drawn.¹⁴⁹⁸

774. The Trial Chamber agrees with the Prosecution that an accused may be responsible for “reissuing illegal orders”, *i.e.*, for receiving a criminal order from a superior and, in turn, instructing subordinates to act upon it.¹⁴⁹⁹

(e) Aiding and abetting

775. The *actus reus* of ‘aiding and abetting’ requires that the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of a crime.¹⁵⁰⁰ “Aiding and abetting” may be constituted by contribution to the planning, preparation or execution of a finally completed crime.¹⁵⁰¹ Such contribution may be provided directly or through an intermediary¹⁵⁰² and irrespective of whether the participant was present or removed both in time and place from the actual commission of the crime.¹⁵⁰³ Mere presence at the scene of crime without preventing its occurrence does not *per se* constitute aiding and abetting.¹⁵⁰⁴ However, the presence

¹⁴⁹⁵ *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.

¹⁴⁹⁶ *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.

¹⁴⁹⁷ *Kordić* Appeal Judgement, paras 29, 30; *Blaškić* Appeal Judgement, para. 42.

¹⁴⁹⁸ *Vasiljević* Appeal Judgement, para. 120; see also *Strugar* Trial Judgement, para. 333.

¹⁴⁹⁹ Prosecution Final Brief, para. 423, referring to *Kupreškić* Trial Judgement, para. 862.

¹⁵⁰⁰ *Blaškić* Appeal Judgement, para.46.

¹⁵⁰¹ *Blaškić* Appeal Judgement, paras 45, 48; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement, 23 January 2003 (“*Kamuhanda* Trial Judgement”), para. 597; *Orić* Trial Judgement, para. 282.

¹⁵⁰² *Limaj* Trial Judgement, para. 516; *Orić* Trial Judgement, para. 282.

¹⁵⁰³ *Orić* Trial Judgement, para. 282; *Blaškić* Appeal Judgement, para. 48.

¹⁵⁰⁴ *Orić* Trial Judgement, para. 283.

at a crime scene of a person who is in a position of authority may be regarded as an important indication for encouragement or support.¹⁵⁰⁵

776. The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed.¹⁵⁰⁶

777. The Prosecution contends that a “persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting.”¹⁵⁰⁷ The Trial Chamber agrees that, while such failure entails a superior’s responsibility under Article 6(3) of the Statute, it may also be a basis for his liability for aiding and abetting, subject to the *mens rea* and *actus reus* requirements being fulfilled.¹⁵⁰⁸

(f) Participation in a Joint Criminal Enterprise

778. The Trial Chamber has already found that the pleading of common purpose in the Indictment was defective and that joint criminal enterprise as a mode of liability cannot be relied upon by the Prosecution.

3. Individual Criminal Responsibility Pursuant to Article 6(3) of the Statute

779. In addition, or alternatively, the Indictment charges pursuant to Article 6(3) of the Statute that the Accused, while holding positions of superior responsibility and exercising effective control over their subordinates, are each individually criminally responsible for the said crimes in that each Accused is responsible for the criminal acts of his subordinates which he knew or had reason to know that the subordinate was about to commit or had done so and which each Accused failed to take the necessary and reasonable measures to prevent or to punish the perpetrators thereof.¹⁵⁰⁹

780. Article 6(3) of the Statute provides:

¹⁵⁰⁵ *Kayishema* Appeal Judgement, para. 201; *Orić* Trial Judgement, para. 283; see also *Aleksovski* Trial Judgement, para. 65; *Kajelijeli* Trial Judgement, para. 769; see also Brima Final Brief, para. 92; Kamara Final Brief, para. 31.

¹⁵⁰⁶ *Blaškić* Appeal Judgement, para. 50.

¹⁵⁰⁷ Prosecution Final Brief, para. 431.

¹⁵⁰⁸ On the relationship between Article 6(1) and 6(3), see para. 800 *infra*.

¹⁵⁰⁹ Indictment, para. 36.

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.

(a) Elements of Superior Responsibility

781. As is evident from its terms, Article 6(3) of the Statute requires a three-pronged test for criminal liability to attach:

1. The existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime;
2. The accused knew or had reason to know that the crime was about to be or had been committed; and
3. The Accused failed to take necessary and reasonable measures to prevent the crime or punish the perpetrators thereof.¹⁵¹⁰

782. The principle that an individual may be held responsible as a superior in the course of an armed conflict is enshrined in customary international law.¹⁵¹¹ The scope of Article 6(3) does not only include military commanders, but also political leaders and other civilian superiors in possession of authority.¹⁵¹²

783. Under Article 6(3) of the Statute, a superior is held responsible for an omission, *i.e.*, for the failure to perform an act required by international law.¹⁵¹³ The culpable omission of a superior consists of his or her failure to prevent or punish crimes under the Statute committed by subordinates. Hence, a superior is responsible not for the principal crimes, but rather for what has been described as a ‘dereliction’ or ‘neglect of duty’ to prevent or punish the perpetrators of serious

¹⁵¹⁰ Rule 98 Decision, para. 328, referring to *Čelebići* Trial Judgement, para. 346.

¹⁵¹¹ *Čelebići* Trial Judgement, para. 333, stating “[t]hat military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary international law.” See also *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (“*Hadžihasanović* Appeal Decision on Jurisdiction”), para. 31, holding that “[i]n the opinion of the Appeals Chamber, the Trial Chamber was correct in holding, after a thorough examination of the matter, that command responsibility was at all times material to this case a part of customary international law in its application to war crimes committed in the course of an internal armed conflict.”

¹⁵¹² *Aleksovski* Appeal Judgement, para. 76; *Stakić* Trial Judgement, para. 459; *Orić* Trial Judgement, para. 308; *Bagilshema* Appeal Judgement, para. 51; *Kajelijeli* Appeal Judgement, para. 85.

¹⁵¹³ *Halilović* Trial Judgement, para. 54.

crimes.¹⁵¹⁴ Responsibility of a superior is not limited to crimes committed by subordinates in person, but encompasses any modes of criminal liability proscribed in Article 6(1) of the Statute. It follows that a superior can be held responsible for failure to prevent or punish a crime which was planned, ordered, instigated or aided and abetted by subordinates.¹⁵¹⁵

(i) Existence of a Superior-Subordinate Relationship

784. The doctrine of command responsibility is “ultimately predicated upon the power of the superior to control the acts of his subordinates.”¹⁵¹⁶ It is immaterial whether the power of the superior over the subordinates is based on *de jure* or on *de facto* authority,¹⁵¹⁷ as long as the superior possessed the material ability to prevent or punish the commission of the offence.¹⁵¹⁸ This requirement has been widely referred to as the exercise of ‘effective control’.¹⁵¹⁹ It may be presumed that the existence of *de jure* authority *prima facie* results in effective control unless proof to the contrary is produced.¹⁵²⁰ Substantial influence over the conduct of others falls short of effective control.¹⁵²¹

785. Indications for effective control include the formality of the procedure used for appointment of a superior,¹⁵²² the power of the superior to issue orders¹⁵²³ or take disciplinary action,¹⁵²⁴ the fact

¹⁵¹⁴ *Halilović* Trial Judgement, paras 42-54; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Judgement, 15 March 2006 (“*Hadžihasanović* Trial Judgement”), para. 75; see Judge Shahabuddeen’s partly dissenting opinion in the *Hadžihasanović* Appeal Decision on Jurisdiction, stating that “[t]he position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander ‘guilty of an offence committed by others even he neither possessed the applicable mens rea nor had any involvement whatsoever in the actus reus.’ No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so”; *Orić* Trial Judgement, para. 293. See also Brima Final Brief, para. 65.

¹⁵¹⁵ *Orić* Trial Judgement, paras 301-302; see also *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion to Amend the Indictment, 26 May 2006, paras 18 et seq.

¹⁵¹⁶ *Čelebići* Trial Judgement, para. 377.

¹⁵¹⁷ *Orić* Trial Judgement, para. 309, stating that “the broadening of this liability as described above is supported by the fact that the borderline between military and civil authority can be fluid. This is particularly the case with regard to many contemporary conflicts where there may be only *de facto* self-proclaimed governments and/or *de facto* armies and paramilitary groups subordinate thereto” (footnotes omitted); see also *Kordić* Trial Judgement, paras 419, 422; *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli* Appeal Judgement”), para. 87; *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. 67.

¹⁵¹⁸ *Čelebići* Appeal Judgement, para. 256; see also *Halilović* Trial Judgement, para. 58.

¹⁵¹⁹ *Čelebići* Appeal Judgement, para. 256; *Brđanin* Trial Judgement, para. 276; *Orić* Trial Judgement, para. 311; *Limaj* Trial Judgement, para. 522.

¹⁵²⁰ *Čelebići* Appeal Judgement, para. 197; Prosecution Final Brief, para. 437.

¹⁵²¹ *Čelebići* Appeal Judgement, para. 266; *Blagojević* Trial Judgement, para. 791; *Ntagerura* Trial Judgement, para. 628; Brima Final Brief, para. 100; Kamara Final Brief, para. 61.

¹⁵²² *Halilović* Trial Judgement, para. 58.

¹⁵²³ *Aleksovski* Trial Judgement, paras 101, 104; *Blaškić* Trial Judgement, para. 302; *Kordić* Trial Judgement, para. 421; see also *Kajelijeli* Trial Judgement, paras 403-404.

¹⁵²⁴ *Blaškić* Trial Judgement, para. 302; *Hadžihasanović* Trial Judgement, paras 83 et seq.

that subordinates show greater discipline in the superior's presence,¹⁵²⁵ the level of profile, manifested through public appearances and statements,¹⁵²⁶ or the capacity to transmit reports to competent authorities for the taking of proper measures.¹⁵²⁷

786. A superior may be held responsible for crimes committed by individuals temporarily subordinated to him, provided he exercises effective control over them.¹⁵²⁸ Further, superior responsibility is not excluded by the concurrent responsibility of other superiors in a chain of command.¹⁵²⁹ If a superior has functioned as a member of a collegiate body with authority shared among various members, the power or authority actually devolved on an accused may be assessed on a case-by-case basis, taking into account the cumulative effect of the accused's various functions.¹⁵³⁰

787. However, in a conflict characterised by the participation of irregular armies or rebel groups, the traditional indicia of effective control provided in the jurisprudence may not be appropriate or useful. As the Trial Chamber has observed, the formality of an organisation's structure is relevant to, but not determinative of, the question of the effective control of its leaders. The less developed the structure, the more important it becomes to focus on the nature of the superior's authority rather than his or her formal designation.

788. The Trial Chamber considers that indicia which may be useful to assess the ability of superiors in such irregular armies to exercise effective control over their subordinates, include that the superior had first entitlement to the profits of war, such as looted property and natural resources; exercised control over the fate of vulnerable persons such as women and children; the superior had independent access to and/or control of the means to wage war, including arms and ammunition and communications equipment; the superior rewarded himself or herself with positions of power and influence; the superior had the capacity to intimidate subordinates into compliance and was willing to do so; the superior was protected by personal security guards, loyal to him or her, akin to a modern praetorian guard; the superior fuels or represents the ideology of the movement to which the subordinates adhere; and the superior interacts with external bodies or individuals on behalf of the group.

¹⁵²⁵ *Čelebići* Appeal Judgement, para. 206, endorsing the findings of *Čelebići* Trial Judgement, para. 743.

¹⁵²⁶ *Kordić* Trial Judgement, para. 424; *Stakić* Trial Judgement, para. 454.

¹⁵²⁷ *Aleksovski* Trial Judgement, para. 78; *Blaškić* Trial Judgement, para. 302.

¹⁵²⁸ *Halilović* Trial Judgement, paras 61, 62; *Kunarac* Trial Judgement, para. 399; *Orić* Trial Judgement, para. 313; *Aleksovski* Trial Judgement, para. 106; Prosecution Final Brief, para. 438.

¹⁵²⁹ *Blaškić* Trial Judgement, paras 296, 302, 303; *Krnjelac* Trial Judgement, para. 93; *Naletilić* Trial Judgement, para. 69; *Halilović* Trial Judgement, para. 62; Prosecution Final Brief, paras 439, 440.

789. Nonetheless, the key traditional indicia of effective control remain central, although they may be more loosely defined. For example, the power of the superior to issue orders is crucial, although these orders may be criminal in nature. Similarly, the superior must be capable of taking disciplinary action, even though the measures taken may be more brutal and arbitrarily utilised.

790. Identification of the principal perpetrator, particularly by name, is not required to establish a superior-subordinate relationship. It is sufficient to identify the subordinates as belonging to a unit or group controlled by the superior.¹⁵³¹

(ii) Actual or Imputed Knowledge

791. For a superior to be held responsible pursuant to Article 6(3) of the Statute, it must be established that he knew or had reason to know that the subordinate was about to commit or had committed such crimes.

a. Actual Knowledge

792. Actual knowledge may be defined as the awareness that the relevant crimes were committed or about to be committed.¹⁵³² There is no presumption of such knowledge but, in the absence of direct evidence, it may be established through circumstantial evidence.¹⁵³³ Factors indicative of actual knowledge include, first of all, an individual's superior position and the superior's geographical and temporal proximity to the crimes;¹⁵³⁴ also, the type and scope of crimes, the time during which they occurred, the number and type of troops and logistics involved, the widespread occurrence of crimes, the tactical tempo of operations, the *modus operandi* of similar illegal acts and the officers and staff involved.¹⁵³⁵

793. The evidence required to demonstrate actual knowledge may differ depending on the position of authority held by a superior and the level of responsibility in the chain of command. The membership of the accused in an organised and disciplined structure with reporting and monitoring

¹⁵³⁰ *Brđanin* Trial Judgement, para. 277, referencing *Bagilishema* Appeal Judgement, para. 51; *Musema* Trial Judgement, para. 135; *Stakić* Trial Judgement, para. 494.

¹⁵³¹ *Blaškić* Appeal Judgement, para. 217; referring to *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46; *Orić* Trial Judgement, para. 311; see also Prosecution Final Brief, para. 444.

¹⁵³² *Kordić* Trial Judgement, para. 427.

¹⁵³³ *Kordić* Trial Judgement, para. 427; *Čelebići* Trial Judgement, para. 386; see also *Brđanin* Trial Judgement, para. 278; *Hadžihasanović* Trial Judgement, para. 94.

¹⁵³⁴ *Aleksovski* Trial Judgement, para. 80.

¹⁵³⁵ *Čelebići* Trial Judgement, para. 386; *Galić* Trial Judgement, para. 174; *Limaj* Trial Judgement, para. 524; *Bagilishema* Trial Judgement, para. 968; see also Prosecution Final Brief, para. 446; Brima Final Brief, para. 107.

mechanisms has been found to facilitate proof of actual knowledge. Conversely, the standard of proof of the actual knowledge of a superior exercising a more informal type of authority will be higher.¹⁵³⁶

b. Imputed Knowledge

794. In determining whether a superior “had reason to know”, or imputed knowledge, that his or her subordinates were committing or about to commit a crime, it must be shown that specific information was available which would have put the superior on notice of crimes committed or about to be committed.¹⁵³⁷ The superior may not be held liable for failing to acquire such information in the first place.¹⁵³⁸ However, it suffices for the superior to be in possession of sufficient information, even general in nature, written or oral, of the likelihood of illegal acts by subordinates.¹⁵³⁹ In other words: failure to conclude, or conduct additional inquiry, in spite of alarming information amounts to imputed knowledge.¹⁵⁴⁰ It is not necessary that the information would compel the conclusion of the existence of concrete crimes.¹⁵⁴¹ Rather, the information must have put the accused on notice of the ‘present and real risk’ that crimes under the Statute were committed, or about to be committed.¹⁵⁴² Examples of such information include that a subordinate has a violent or unstable character and that a subordinate has been drinking prior to being sent on a mission.¹⁵⁴³ Furthermore, reports addressed to the superior, the level of training and instruction of subordinate officers are factors to be taken into account when determining imputed knowledge.¹⁵⁴⁴

795. The Brima Defence objects to an expansive interpretation of the imputed knowledge standard, especially to hold “a commander [...] liable for the most serious of crimes under a mere negligence standard.”¹⁵⁴⁵ Similarly, the Kamara and Kanu Defences oppose the application of strict

¹⁵³⁶ *Kordić* Trial Judgement, para. 428; *Galić* Trial Judgement, para. 174; *Orić* Trial Judgement, para. 320; see also Prosecution Final Brief, para. 446.

¹⁵³⁷ *Blaškić* Appeal Judgement, para. 62; *Čelebići* Appeal Judgement, para. 241.

¹⁵³⁸ *Blaškić* Appeals Judgement, paras 62-63, *Čelebići* Appeals Judgement, para 226.

¹⁵³⁹ *Čelebići* Appeal Judgement, para. 238; *Čelebići* Trial Judgement, para. 393; *Kordić* Trial Judgement, para. 437; *Strugar* Trial Judgement, para. 370.

¹⁵⁴⁰ *Čelebići* Appeal Judgement, para. 232.

¹⁵⁴¹ *Čelebići* Trial Judgement, para. 393; *Naletilić* Trial Judgement, para. 74; *Halilović* Trial Judgement, para. 68; *Orić* Trial Judgement, para. 322.

¹⁵⁴² *Brđanin* Trial Judgement, para. 278, referring to *Čelebići* Appeal Judgement, paras 223, 241; see also *Strugar* Trial Judgement, paras 417-420, wherein it was considered insufficient that the information known to the commander at the time of the offence indicated that illegal acts might occur but rather required that the information indicates that such crimes would occur.

¹⁵⁴³ *Čelebići* Appeal Judgement, para. 238.

¹⁵⁴⁴ International Committee of the Red Cross (“ICRC”), Commentary to the Additional Protocols, para. 3545.

¹⁵⁴⁵ Brima Final Brief, para. 65, 69-75.

liability.¹⁵⁴⁶ The Kamara Defence says that superiors are not under a duty to know, and are only liable when they had “information which should have enabled them to conclude in the circumstances at the time, that [the perpetrator] was committing or was going to commit such a breach and if they did not take feasible measures within their power to prevent or repress the breach”.¹⁵⁴⁷

796. It is clear from the case law referred to above that solely negligent ignorance is insufficient to attribute imputed knowledge. What is required is the superior’s factual awareness of information which should have prompted him or her to acquire further knowledge.¹⁵⁴⁸ Responsibility pursuant to Article 6(3) of the Statute will attach when the superior remains wilfully blind to the criminal acts of his or her subordinates.¹⁵⁴⁹

(iii) Failure to Prevent or Punish

797. It must be established that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his or her subordinates. These are two distinct duties: it is the superior’s primary duty to intervene as soon as he or she becomes aware of crimes about to be committed, while taking measures to punish will only suffice if the superior did not become aware of these crimes until after they were committed.¹⁵⁵⁰

798. As regards the duty to prevent the crimes of subordinates, the type of necessary and reasonable measures a superior must take is a matter of evidence rather than one of substantive law.¹⁵⁵¹ Generally, it can be said that the measures required of the superior are limited to those within his or her material ability under the circumstances,¹⁵⁵² including those that may lie beyond his or her formal powers.¹⁵⁵³ The kind and extent of measures to be taken depend on the degree of effective control exercised by the superior at the relevant time, and on the severity and imminence of the crimes that are about to be committed.¹⁵⁵⁴ A superior must prevent not only the execution and completion of a subordinate’s crimes, but also their earlier planning and preparation. The superior must intervene as soon as he becomes aware of the planning or preparation of crimes to be

¹⁵⁴⁶ Kamara Final Brief, para. 69; Kanu Final Brief, para. 192.

¹⁵⁴⁷ Kamara Final Brief, para. 69.

¹⁵⁴⁸ *Orić* Trial Judgement, para. 324.

¹⁵⁴⁹ *Čelebići* Trial Judgement, para. 387; *Halilović* Trial Judgement, para. 69.

¹⁵⁵⁰ *Orić* Trial Judgement, para. 326; *Limaj* Trial Judgement, para. 527; *Strugar* Trial Judgement, para. 373.

¹⁵⁵¹ *Blaškić* Appeal Judgement, paras 72, 77; *Čelebići* Trial Judgement, para. 394.

¹⁵⁵² *Limaj* Trial Judgement, para. 528; Prosecution Final Brief, paras 453-454.

¹⁵⁵³ *Čelebići* Trial Judgement, para. 395.

¹⁵⁵⁴ *Orić* Trial Judgement, para. 329.

committed by his subordinates and as long as he has the effective ability to prevent them from starting or continuing.¹⁵⁵⁵

799. The duty to punish only arises once a crime under the Statute has been committed.¹⁵⁵⁶ A superior is bound to conduct a meaningful investigation with a view to establish the facts, order or execute appropriate sanctions, or report the perpetrators to the competent authorities in case the superior lacks sanctioning powers.¹⁵⁵⁷ According to the ICTY Appeals Chamber, there is no support in customary international law for the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.¹⁵⁵⁸

4. Relationship Between Article 6(1) and 6(3) of the Statute

800. Article 6(1) and 6(3) of the Statute denote different categories of individual criminal responsibility. Where both Article 6(1) and Article 6(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, it would constitute a legal error invalidating a judgement to enter a concurrent conviction under both provisions.¹⁵⁵⁹ Where a Trial Chamber enters a conviction on the basis of Article 6(1) only, an accused's superior position may be considered as an aggravating factor in sentencing.¹⁵⁶⁰

¹⁵⁵⁵ *Orić* Trial Judgement, para. 329; *Halilović* Trial Judgement, para. 79.

¹⁵⁵⁶ *Blaškić* Appeal Judgement, paras 83, 85.

¹⁵⁵⁷ *Limaj* Trial Judgement, para. 529; *Orić* Trial Judgement, para. 336; *Strugar* Trial Judgement, para. 376.

¹⁵⁵⁸ *Hadžihasanović* Appeal Decision on Command Responsibility, paras 45-46, but see Partial Dissenting Opinion of Judge Shahabuddeen, para. 43; Separate and Partially Dissenting Opinion of Judge David Hunt – Command Responsibility Appeal, para. 8; *Orić* Trial Judgement, para. 335.

¹⁵⁵⁹ *Blaškić* Appeal Judgement, para. 91; *Kordić* Appeal Judgement, para. 34.

¹⁵⁶⁰ *Blaškić* Appeal Judgement, para. 91; *Aleksovski* Appeal Judgement, para. 183; see also *Orić* Trial Judgement, paras 339-343.

X. FACTS AND FINDINGS

A. Unlawful Killings (Counts 3-5)

1. Allegations and Submissions

801. The Indictment alleges that members of the AFRC/RUF subordinate to and/or acting in concert with the Accused carried out unlawful killings of civilians who were “routinely shot, hacked to death and burned to death”¹⁵⁶¹ in various locations in the territory of Sierra Leone, including Bo District between about 1 June to 30 June 1997; Kenema District between about 25 May 1997 and about 19 February 1998; Kono District about 14 February 1998 and 30 June 1998; Kailahun Districts between about 14 February 1998 and 30 June 1998; Koinadugu District between about 14 February 1998 and 30 September 1998; Bombali District between about 1 May 1998 and 30 November 1998; Freetown and the Western Area between 6 January 1999 and 28 February 1999; and Port Loko District between about February and April 1999.¹⁵⁶²

802. Submissions by the Parties in respect of particular incidents or witnesses have been discussed as they arise on the evidence below.

803. The Trial Chamber has considered the available evidence below to determine whether the *actus reus* of the acts of murder under Article 2(a) and Article 3(a) of the Statute and extermination under Article 2(b) of the Statute is proved beyond reasonable doubt in respect of the locations and time frames pleaded in the Indictment. The Trial Chamber finds that where the *actus reus* of the crime has been established, the only reasonable inference on the evidence adduced is that the perpetrators intentionally killed the victim or caused serious bodily harm in the knowledge that death would likely result.

804. Where findings have been made of murder as crimes against humanity, the Trial Chamber is further satisfied that the perpetrators of the crimes were aware that their acts were part of the widespread and systematic attack on the civilian population of Sierra Leone which was taking place at the time.

805. Where findings have been made of murder as a war crime, the Trial Chamber is further satisfied that the perpetrators were aware of the protected status of the victims and were acting in furtherance of the armed conflict, as the victims were either fighters from opposing forces but *hors*

¹⁵⁶¹ Indictment, para. 42.

¹⁵⁶² Indictment, paras 43-50.

de combat or civilians, whom the AFRC/RUF targeted on the basis of their perceived support for the opposing forces. The Trial Chamber recalls that the judicial notice was taken of the fact that the CDF, including the Kamajors, were a party to the armed conflict in Sierra Leone.¹⁵⁶³ On the evidence adduced, the Trial Chamber is satisfied that ECOMOG was also a party to the armed conflict.

2. Evidence and Deliberations

(a) Bo District (1 June 1997 – 30 June 1997)

806. The Prosecution alleges that “[b]etween about 1 June 1997 and 30 June 1997, AFRC/RUF attacked Tikonko, Telu, Sembehun, Gerihun, and Mamboma, unlawfully killing an unknown number of civilians”.¹⁵⁶⁴

807. No evidence of unlawful killings has been adduced with respect to the villages of Telu, Sembehun and Mamboma, as alleged in the Indictment.¹⁵⁶⁵

808. The Brima Defence submits that no evidence was led by the Prosecution of any attack by the AFRC in Bo District, implying that the perpetrators of the crimes in Bo District were exclusively members of the RUF.¹⁵⁶⁶

809. In arriving at the following factual findings, the Trial Chamber has examined the entirety of the evidence and relies on Prosecution Witnesses TF1-004, TF1-053 and TF1-054 and Defence Witness DBK-137, as well as Exhibit P-66.

(i) Tikonko

810. Witness TF1-004 testified that on or around 25 June 1997, two groups of more than 200 “soldiers” in military fatigue and red head bands attacked Tikonko.¹⁵⁶⁷ He stated that after the two attacks the streets of Tikonko were full of dead bodies and that as many as 200 persons may have lost their lives.¹⁵⁶⁸ Given the general nature of this evidence and the possibility that some of the persons killed were not protected persons, the Trial Chamber will make findings only on the specific incidents described by the witness below.

¹⁵⁶³ Indictment, para. 10; Judicial Notice Decision, Fact D.

¹⁵⁶⁴ Indictment, para. 43.

¹⁵⁶⁵ Rule 98 Decision, paras 89, 96.

¹⁵⁶⁶ Brima Final Brief, para. 241.

¹⁵⁶⁷ TF1-004, Transcript 23 June 2005, pp. 8, 35-36, 95-99.

¹⁵⁶⁸ TF1-004, Transcript 23 June 2005, pp. 17-18, 21-22, 28-31, 82.

811. The witness testified that he was at Tikonko Junction when the first group of soldiers came from the direction of Bo. The first group of soldiers said that they were coming to kill Kamajors; he heard this from some market women who were fleeing and, later, from the soldiers themselves.¹⁵⁶⁹ One of the soldiers from the group asked the witness who he was and the witness replied that he was “with them” so that the soldiers would not kill him. The soldier said they had come for Kamajors and did not kill the witness.¹⁵⁷⁰

812. Witness TF1-004 testified that a second group of soldiers followed the first and that they were “not selecting” meaning that they were killing people indiscriminately.¹⁵⁷¹ The witness observed the soldiers kill five civilians and three Kamajors.¹⁵⁷²

813. The burden of proof as to whether a combatant is *hors de combat* rests with the Prosecution.¹⁵⁷³ The witness did not describe with precision the circumstances in which the three Kamajors were killed. The Trial Chamber is therefore unable to determine whether they were taking active part in the hostilities at the time. The Trial Chamber accordingly finds that five civilians were intentionally killed during the attack on Tikonko.

814. Some time later, the witness came out of his hiding spot and saw an unknown number of dead people at Tikonko Junction. The corpses were dressed in civilian clothing.¹⁵⁷⁴ The Witness walked into Tikonko proper, towards his house and saw more corpses, both women and men.¹⁵⁷⁵ He heard a woman calling from a house. The witness entered the house and the woman asked him for water. The woman had been shot in the knee and her belly had been split open. She told the witness that the “soldiers” were responsible. The witness also observed approximately ten other bodies in the room with bullet wounds. In the next room, the witness saw the body of a man who had been shot in the back of the neck. A child was lying next to him, shot dead through the chest. The witness moved into a third room of the house where he observed another two bodies; one of a man who had been shot in the side and through the ears.¹⁵⁷⁶

¹⁵⁶⁹ TF1-004, Transcript 23 June 2005, pp. 5-6.

¹⁵⁷⁰ TF1-004, Transcript 23 June 2005, p. 12.

¹⁵⁷¹ TF1-004, Transcript 23 June 2005, pp.12-15.

¹⁵⁷² TF1-004, Transcript 23 June 2005, pp.15-16.

¹⁵⁷³ *Blaškić* Appeal Judgement, para. 111.

¹⁵⁷⁴ TF1-004, Transcript 23 June 2005, p. 17.

¹⁵⁷⁵ TF1-004, Transcript 23 June 2005, p. 18.

¹⁵⁷⁶ TF1-004, Transcript 23 June 2005, pp. 18-20.

815. The witness left the house and continued walking towards his home. He saw the corpse of a man whose legs had been broken and whose skin appeared to have been removed from his forehead with a knife as well as the corpse of another man with bullet wounds lying in the gutter.¹⁵⁷⁷

816. The witness entered another house, next to his home and saw the bodies of two dead women. One woman had a gunshot wound to the ear and her stomach had been split open so that the intestines had slipped out. The second woman had a gunshot wound in her side. The bodies were piled one on top of the other.¹⁵⁷⁸

817. The witness testified that he did not know anyone in the village who owned guns that could have killed these individuals.¹⁵⁷⁹

818. Two to three days after the attacks, the witness, together with some youths and elders from the village dug a mass grave, collected bodies from around the town and buried them. The witness estimates that they buried 20 bodies.¹⁵⁸⁰

819. The Trial Chamber is satisfied on the basis of the witness's evidence that at least 18 to 20 civilians were killed by "soldiers" during the attack on Tikonko.

820. The Brima and Kanu Defence submit that the witness in cross-examination accepted that the soldiers who attacked Tikonko in June 1997 were members of the RUF.¹⁵⁸¹ The Trial Chamber notes that while witness TF1-004 testified that the "soldiers" attacking Tikonko identified themselves as belonging to the AFRC faction,¹⁵⁸² he also stated that some of them were the "rebels" or RUF who had been stationed in Tikonko prior to the May 1997 coup.¹⁵⁸³ In light of this evidence, the Trial Chamber finds that the above-established incidents were committed by members of either the AFRC faction or the RUF, but it cannot be determined beyond reasonable doubt to which of the two factions the perpetrators belonged.

(ii) Gerihun

821. Witness TF1-053 testified that on 26 June 1997, eight "soldiers" with guns, among them a certain AF Kamara, one AB Kamara and one Boysie Palmer, arrived in vehicles and entered the

¹⁵⁷⁷ TF1-004, Transcript 23 June 2005, p. 22.

¹⁵⁷⁸ TF1-004, Transcript 23 June 2005, pp. 25-26.

¹⁵⁷⁹ TF1-004, Transcript 23 June 2005, p. 27.

¹⁵⁸⁰ TF1-004, Transcript 23 June 2005, pp. 29-31.

¹⁵⁸¹ Brima Final Brief, para. 241; Kanu Final Brief, paras 39, 369, referring to TF1-004, Transcript 23 June 2005, p. 99.

¹⁵⁸² TF1-004, Transcript 23 June 2005, pp. 96, 98.

¹⁵⁸³ TF1-004, Transcript 23 June 2005, pp. 99, 100.

house of Paramount Chief Sandy Demby in Gerihun.¹⁵⁸⁴ The witness approached the veranda of the house and while he did not see what occurred inside, he heard a gunshot, upon which he fled the scene.¹⁵⁸⁵

822. Witness TF1-054 had come to Paramount Chief Demby's house to warn him of the imminent arrival of the soldiers. He testified that Paramount Chief Demby was in his bedroom recovering from an operation and with him was his caretaker, Sumaila. Paramount Chief Demby told the Witness and his caretaker to hide in the bathroom and they did so. The witness then decided to step outside and he hid next to Paramount Chief Demby's bedroom window. He watched as a group of soldiers shot Paramount Chief Demby in the stomach. Having realised that Paramount Chief Demby was not dead yet, another soldier stabbed him in the neck.¹⁵⁸⁶ At this point the Witness ran away. When he returned to the house the next morning, he found the dead body of the caretaker, Sumaila, lying in the bathtub. Witness TF1-054 did not give further information as to who killed Sumaila.¹⁵⁸⁷ Given the strong circumstantial evidence, the Trial Chamber is satisfied beyond reasonable doubt that Sumaila was also killed by the soldiers.

823. The Brima Defence submits that the evidence of witness TF1-053 should not be relied upon and alleges that his testimony contradicted his earlier pre-trial statements.¹⁵⁸⁸ In addition, Defence witness DBK-137 testified that he heard that Kamajors were responsible for the death of Chief Demby.¹⁵⁸⁹ The Trial Chamber notes that the testimony of witness TF1-053 regarding the killing of Chief Demby was corroborated by witness TF1-054 and was not shaken on cross-examination.¹⁵⁹⁰ The Trial Chamber thus dismisses the version of events presented by witness DBK-137 which is based on hearsay.

824. On the same day, 26 June 1997, witness TF1-053 observed a "soldier" shoot and kill a boy who used to run errands for him, named Kamo Lahai.¹⁵⁹¹ The witness also saw a dead woman lying on Old Bo Road. The witness was told by mourners that her name was Sukie and that she had been

¹⁵⁸⁴ TF1-053, Transcript 18 April 2005, pp. 103-106; TF1-053, Transcript 19 April 2005, pp. 18-20, 22, 34.

¹⁵⁸⁵ TF1-053, Transcript 18 April 2005, pp. 105-107.

¹⁵⁸⁶ TF1-054, Transcript 19 April 2005, pp. 90-93.

¹⁵⁸⁷ TF1-054, Transcript 19 April 2005, p. 94 *See also* exhibit P-66, "Sierra Leone Country Report on Human Rights Practices for 1997 Released by the Bureau of Democracy, Human Rights and Labour," 30 January 1998, CMS p. 16528.

¹⁵⁸⁸ Brima Final Brief, paras 243, 245; Statement of Witness TF1-053 dated November 2002, CMS, p. 7285 [Confidential]. The witness stated that on 26 June 1997, he saw Kamajors entering Gerihun, but they passed and went to another place. Although he did not see them firing gun shots, at 4.30 pm he heard two gunshots.

¹⁵⁸⁹ DBK-137, Transcript 2 October 2006, p. 126.

¹⁵⁹⁰ TF1-053, Transcript 19 April 2005, pp. 35-40, 42, 43; TF1-054, Transcript 19 April 2005, pp. 92-93.

¹⁵⁹¹ TF1-053, Transcript 18 April 2005, pp. 103, 107-108.

shot in the breast by a “soldier”.¹⁵⁹² Although witness TF1-053 did not mention the name Sukie in his pre-trial statement, the Trial Chamber finds that this does not affect the credibility of the witness as he explained that he only recalled her name when giving evidence at trial.¹⁵⁹³ The Trial Chamber is satisfied Sukie was unlawfully killed by a soldier during the attack on Gerihun.

825. On 26 or 27 June 1997, in the vicinity of the market in Gerihun, Witness TF1-053 encountered at least five corpses, both male and female.¹⁵⁹⁴ Given that no further particulars were given regarding this incident, the Trial Chamber is unable to establish with certainty the identity of the perpetrators or whether the victims were protected persons. The Trial Chamber accordingly makes no findings on this incident.

(iii) Findings

826. By virtue of the foregoing, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 1 June 1997 and 30 June 1997, a minimum of 27 civilians were unlawfully killed in Bo District as charged under Counts 4 and 5. On the evidence adduced, the Trial Chamber has been unable to establish beyond reasonable doubt whether the perpetrators were members of the AFRC and/or RUF.

(b) Kenema District (25 May 1997 – 19 February 1998)

827. The Prosecution alleges that “[b]etween about 25 May 1997 and about 19 February 1998, in locations including Kenema town, members of AFRC/ RUF unlawfully killed an unknown number of civilians.”¹⁵⁹⁵

828. In making the following factual findings, the Trial Chamber has considered the entirety of the evidence and relies on Prosecution Witnesses TF1-122 and Defence Witnesses DAB-063 and DAB-147, as well as Exhibit P-24.

(i) Kenema Town

829. Following the coup in May 1997, both “RUF rebels” and “AFRC Juntas” took control of Kenema Town.¹⁵⁹⁶ These groups were present in Kenema until February 1998.¹⁵⁹⁷

¹⁵⁹² TF1-053, Transcript 18 April 2005, p. 110; TF1-053, Transcript 19 April 2005, p. 55.

¹⁵⁹³ TF1-053, Transcript 19 April 2005, pp. 61-63, 67-68.

¹⁵⁹⁴ TF1-053, Transcript 19 April 2005, p. 94.

¹⁵⁹⁵ Indictment, para. 44.

830. Not long after the takeover of Kenema Town, witness TF1-122 saw the house of one Pa Mansaray at Mambu Street on fire. According to the witness, the house had previously been occupied by Kamajors.¹⁵⁹⁸ Thereafter, he saw three dead bodies dressed in plain cloth – two elderly men and one younger man – lying on the street. Witness TF1-122 insisted that they were civilians and not Kamajors.¹⁵⁹⁹ However, in the absence of further evidence, the Trial Chamber cannot establish beyond reasonable doubt that these individuals were killed by members of the AFRC/RUF.

831. Witness TF1-122 gave evidence that at the end of May 1997 or shortly thereafter, a certain Ms. Doweï reported to the Kenema Police that “AFRC Juntas” and “RUF rebels” shot dead her husband who intervened while they were looting his property.¹⁶⁰⁰

832. The testimony of witnesses TF1-122 and DAB-147, as well as Exhibit P-24, establish that in late January or early February 1998, a number of persons, among them BS Massaquoi, Brima Kpaka and Andrew Quee were arrested on the orders of Sam Bockarie of the RUF and brought to the AFRC Secretariat in Kenema. Bockarie announced that these persons were Kamajor supporters and would be killed.¹⁶⁰¹ The detainees were then transferred to the Kenema Police Station. BS Massaquoi and Brima Kpaka were subsequently released on bail.¹⁶⁰² Within a couple of days, BS Massaquoi was re-arrested by “AFRC juntas”. He was then taken away, along with the other detainees, to an unknown location.¹⁶⁰³ Thereafter, at Lambaya stream near a waterfall called Dorwala, witness TF1-122 found the corpses of BS Massaquoi, Andrew Quee and four other individuals. Their bodies were covered with gunshot wounds, and the cranium of BS Massaquoi had been crushed by a cement block.¹⁶⁰⁴

833. Referring to the evidence given by witnesses DAB-063 and DAB-147, the Brima and Kamara Defence submit that Sam Bockarie was responsible for the killing of BS Massaquoi.¹⁶⁰⁵ The Trial Chamber notes that the evidence on precisely who carried away BS Massaquoi, Andrew

¹⁵⁹⁶ TF1-122, Transcript 24 June 2005, p. 5; DAB-147, Transcript 3 October 2006, p. 27.

¹⁵⁹⁷ TF1-122, Transcript 24 June 2005, p. 7.

¹⁵⁹⁸ TF1-122, Transcript 24 June 2005, pp. 63-67.

¹⁵⁹⁹ TF1-122, Transcript 24 June 2005, pp. 64, 68.

¹⁶⁰⁰ TF1-122, Transcript 24 June 2005, pp. 26-28, 102-103.

¹⁶⁰¹ TF1-122, Transcript 24 June 2005, pp. 35-37; DAB-147, Transcript 3 October 2006, pp. 30-35; Exhibit P-24, “CID Office Station Diary, opened on 13 January 1998 and closed on 7 February 1998”, p. 112.

¹⁶⁰² TF1-122, Transcript 24 June 2005, pp. 38-42.

¹⁶⁰³ TF1-122, Transcript 24 June 2005, pp. 43-45; DAB-147, Transcript 3 October 2006, p. 33; Exhibit P-24, “CID Office Station Diary, opened on 13 January 1998 and closed on 7 February 1998”, p. 155.

¹⁶⁰⁴ TF1-122, Transcript 24 June 2005, pp. 45-49.

¹⁶⁰⁵ Brima Final Brief, para. 254; Kamara Final Brief, para. 130; DAB-063, Transcript 2 August 2006, p. 27; DAB-147, Transcript 3 October 2006, pp. 30-35.

Quee and the other detainees is inconclusive. There is also no direct evidence on who killed the individuals found at Lambaya stream.¹⁶⁰⁶ Nonetheless, the Trial Chamber is satisfied on the evidence that unidentified members of AFRC/RUF were responsible for these killings.

834. In late June 1997, a certain Bonnie Wailer was detained at the Kenema police station. One day, witness TF1-122 saw Sam Bockarie arriving at the police station, accompanied by an unidentified AFRC Lieutenant and others.¹⁶⁰⁷ In the presence of police officers and civilians, witness TF1-122 heard Bockarie ordering that Bonnie Wailer and two other detained persons should be killed. Witness TF1-122 was present when “Bockarie’s men” and “AFRC juntas” shot dead the three individuals.¹⁶⁰⁸ Their bodies were taken away on a military pickup van.¹⁶⁰⁹

835. After the end of the rainy season in 1997, the Kenema police were investigating the burglary of the warehouse of the International Committee of the Red Cross (“ICRC”) in Kenema. Witness TF1-122 heard Sam Bockarie announce that he would take the investigation into his own hands.¹⁶¹⁰ As a result, Bockarie had two individuals arrested, one of whom was named Santos.¹⁶¹¹ On the same evening, Witness TF1-122 found the dead bodies of these two persons at his doorstep.¹⁶¹² Two days later, Sam Bockarie and “his boys” loaded the corpses onto a vehicle and drove off.¹⁶¹³ Although Witness TF1-122 in a pre-trial statement stated that the burglary concerned the warehouse of ‘Médecins Sans Frontières’, not of the ICRC,¹⁶¹⁴ the Trial Chamber is satisfied that this inconsistency can be attributed to the lapse of time and that the credibility of Witness TF1-122 remains unshaken.

836. One morning in late December 1997, when ‘Operation No Living Thing’ was launched in Kenema, Witness TF1-122 saw the dead body of a man dressed in civilian clothes near the Sierra Leone Telecommunication Building on Hangh Road in Kenema Town.¹⁶¹⁵ “RUF rebels” and “AFRC juntas” were dancing around the body and singing that they would kill all Kamajors. They split open the dead man’s abdomen with a bayonet and stretched his intestines across Hangh Road and established a checkpoint around it. The body stayed there for three days.¹⁶¹⁶

¹⁶⁰⁶ TF1-122, Transcript 24 June 2005, pp. 43-45; DAB-147, Transcript 3 October 2006, pp. 33-34.

¹⁶⁰⁷ TF1-122, Transcript 24 June 2005, pp. 18-20.

¹⁶⁰⁸ TF1-122, Transcript 24 June 2005, pp. 21-22.

¹⁶⁰⁹ TF1-122, Transcript 24 June 2005, p. 23.

¹⁶¹⁰ TF1-122, Transcript 24 June 2005, pp. 28-29, 115.

¹⁶¹¹ TF1-122, Transcript 24 June 2005, p. 29.

¹⁶¹² TF1-122, Transcript 24 June 2005, pp. 29-30.

¹⁶¹³ TF1-122, Transcript 24 June 2005, pp. 30, 31.

¹⁶¹⁴ TF1-122, Transcript 24 June 2005, p. 109.

¹⁶¹⁵ TF1-122, Transcript 24 June 2005, pp. 32-34.

¹⁶¹⁶ TF1-122, Transcript 24 June 2005, pp. 33-34.

837. At an unspecified time between May 1997 and February 1998, Sam Bockarie personally killed a farmer near the NIC Building in Kenema town with two gunshots. Witness TF1-122 heard the gunshots and arrived at the scene when the farmer was dying. Sam Bockarie remarked that all Kamajors must be “finished”. Bockarie’s “boys” then threw the farmer’s dead body into a hole.¹⁶¹⁷

838. The Kanu Defence submits that the evidence of witness TF1-122 is unreliable as regards the identification of perpetrators of unlawful killings, and that “crimes committed in Kenema District during the AFRC regime fall clearly within the responsibility of the RUF”.¹⁶¹⁸

839. The Trial Chamber accepts on the evidence that some of the above killings can be attributed to Sam Bockarie of the RUF. However, it dismisses the Kanu Defence submission that none of the killings can be attributed to the AFRC faction as the testimony of witness TF1-122 implicating “AFRC juntas” in these incidents was not shaken on cross-examination.

(ii) Findings

840. By virtue of the foregoing evidence, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 25 May 1997 and about 19 February 1998, members of the AFRC/RUF unlawfully killed a minimum of 17 civilians in Kenema Town in Kenema District, amounting to the elements of Counts 4 and 5.

(c) Kono District (14 February 1998 – 30 June 1998)

841. The Prosecution alleges that “[a]bout mid February 1998, AFRC/RUF fleeing from Freetown arrived in Kono District. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya.”¹⁶¹⁹

842. No evidence has been led on unlawful killings with respect to the villages of Foindu, Willifeh and Biaya.¹⁶²⁰

843. In reaching its factual findings and having examined the entire evidence, the Trial Chamber relies on the evidence of Prosecution witnesses TF1-334, George Johnson, TF1-216 and Defence witnesses DBK-129, DAB-018, and DAB-023.

¹⁶¹⁷ TF1-122, Transcript 24 June 2005, pp. 23-26, 101-102, 114-115.

¹⁶¹⁸ Kanu Final Brief, para. 371.

844. The evidence establishes that between February and June 1998, AFRC/RUF forces were in control of Kono District.¹⁶²¹ Defence witnesses testified that the AFRC soldiers present in Kono were under the overall command of RUF.¹⁶²²

(i) Koidu

845. In early March 1998, Johnny Paul Koroma declared Koidu Town a “no go area” for civilians. This declaration was reiterated by Issa Hassan Sesay of the RUF.¹⁶²³ Many civilians were killed following this order by AFRC and RUF troops in Koidu Town and surrounding villages.¹⁶²⁴ This testimony is generally corroborated by witnesses TF1-206 and TF1-217, who heard about killings in Koidu Town.¹⁶²⁵

846. Documentary evidence suggests that in mid-June 1998, more than 650 civilians were killed as a result of the fighting in the area around Koidu.¹⁶²⁶ Again, the Trial Chamber is unable to attribute those killings to a specific faction.

847. The Trial Chamber therefore finds that an unknown number of civilians were unlawfully killed in Koidu, but is unable to determine beyond reasonable doubt whether these killings are attributable to AFRC and/or RUF forces in Kono District.

(ii) Tombodu

848. In or about April 1998, upon the orders of a certain ‘Staff Alhaji Bayo’, 53 people were burnt alive by “juntas” in a big house near late Sahr Fania’s compound at Tombodu.¹⁶²⁷

849. In mid-May 1998, ‘Savage’ locked 15 civilians into a house in Tombodu town which he then set ablaze. None of them escaped.¹⁶²⁸ Another 47 people were beheaded by ‘Savage’ and ‘Guitar boy’ and then thrown into a diamond pit.¹⁶²⁹ Witness George Johnson corroborated this

¹⁶¹⁹ Indictment, para. 45.

¹⁶²⁰ Rule 98 Decision, paras 89, 96.

¹⁶²¹ TF1-217, Transcript 17 October 2005, pp. 12-14; TF1-334, Transcript 18 May 2005, pp. 21-30.

¹⁶²² DAB-023, Transcript 3 August 2006, pp. 56, 63, 64; DBK-129, Transcript 9 October 2006, pp. 69-73; DAB-018, Transcript 7 September 2006, pp. 7-9.

¹⁶²³ TF1-334, Transcript 20 May 2005, pp. 4-6.

¹⁶²⁴ TF1-334, Transcript 20 May 2005, pp. 4-5, 7-8; Exhibit P-54, Amnesty International, “Sierra Leone, A Year of Atrocities Against Civilians”, 1998, CMS p. 15806.

¹⁶²⁵ TF1-206, Transcript 28 June 2005, pp. 81-82; TF1-217, Transcript 17 October 2005, pp. 13-14.

¹⁶²⁶ Exhibit P-54, Amnesty International Report on Sierra Leone, A Year of Atrocities Against Civilians,” 1998, CMS p. 15807.

¹⁶²⁷ TF1-216, Transcript 27 June 2005, p. 92; TF1-217, Transcript 17 October 2005, pp. 17-21, 36-37, 46-47.

¹⁶²⁸ TF1-334, Transcript 20 May 2005, p. 14; DAB-023, Transcript 3 August 2006, p. 75, 78. The witness stated that he did not report the atrocities to ‘Superman’ because ‘Savage’ was the commander at Tombodu.

¹⁶²⁹ TF1-334, Transcript 20 May 2005, p. 15; DAB-023, Transcript 3 August 2006, p. 78.

evidence generally, testifying that ‘Changabulanga’ aka ‘Savage’ killed more than 150 people who were then thrown into a pit. He stated that all were civilians and had all been killed by machete.¹⁶³⁰ Several other witnesses testified that massive killings took place at the hands of AFRC/RUF fighters in Tombodu town between February and June 1998.¹⁶³¹

850. Witness TF1-033 testified that in or about March 1998, the Accused Brima ordered ‘Savage’ to attack Tombodu, which resulted in the killing of “hundreds of civilians”.¹⁶³² In the presence of AFRC commanders including the Accused Kamara and Kanu, many civilians were burned alive as they were locked up in houses which were then set on fire.¹⁶³³

851. The Defence vigorously contests the testimony of witness TF1-033 with regard to this incident. The Kamara Defence submit that the witness’s testimony is exaggerated, inconsistent and contradictory to other Prosecution witnesses.¹⁶³⁴ The Brima Defence claim that the testimony of witness TF1-033 is unsupported and cannot be relied upon, stating that although George Johnson gave evidence of the presence of the Accused Brima in Tombodu at a particular time, this was a transient stop on their withdrawal from the district. George Johnson did not state that he saw Brima order atrocities on their way out of Kono District.¹⁶³⁵

852. The following issues are in dispute amongst the parties regarding the testimony of witness TF1-033: the number of persons killed in Tombodu, the time frame when the killings took place and whether the Accused Brima ordered or was present while the crimes were committed.

853. In cross-examination, witness TF1-033 stated that ‘Savage’ was the sole commander of Tombodu at the time of the atrocities described and he was subordinate commander to ‘Gullit’.¹⁶³⁶ Prosecution witness George Johnson testified that the Accused Brima arrived after the commission of crimes in Tombodu.¹⁶³⁷ Further, witness TF1-033 gave only very general information in relation to the alleged order and his testimony is inconsistent and contradicts the evidence of other reliable witnesses.¹⁶³⁸ For example, witness TF1-033 testified that the Accused Kanu was present in Tombodu in March 1998, at a time that other witnesses locate the Accused Kanu in Koinadugu District. Further, witness TF1-033 testified that the Accused Brima ordered Savage to attack

¹⁶³⁰ George Johnson, Transcript 15 September 2005, p. 45.

¹⁶³¹ George Johnson, Transcript 15 September 2005, p. 45; DAB-023, Transcript 3 August 2006, p. 75; DAB-098, Transcript 4 September 2005, p. 33.

¹⁶³² TF1-033, Transcript 11 July 2005, pp. 11-13.

¹⁶³³ TF1-033, Transcript 11 July 2005, pp. 11-13.

¹⁶³⁴ Kamara Final Brief, para. 144.

¹⁶³⁵ Brima Final Brief, para. 256.

¹⁶³⁶ TF1-033, Transcript 11 July 2005, pp. 145-148.

¹⁶³⁷ George Johnson, Transcript 15 September 2005, pp. 44-45.

Tombodu at a time where Tombodu was already the base of an AFRC Battalion in Kono District.¹⁶³⁹

854. The Trial Chamber is thus of the view that the witness's evidence that the Accused Brima gave an order to 'Savage' to kill civilians in Tombodu is not probative and does not rely on it in making a finding on unlawful killings in Tombodu.

855. The Trial Chamber is satisfied that in the Indictment period for Kono District 'Staff Alhaji Bayo' intentionally killed 53 people in Tombodu; that 'Savage' intentionally killed 15 civilians in Tombodu; that Savage and Guitar boy intentionally killed another 47 people in Tombodu.

(iii) Mortema

856. The Trial Chamber notes that the Prosecution has not led any evidence of unlawful killings in Mortema. However, the Defence witnesses DAB-025 and DAB-101 testified that on an unspecified day in 1998, the RUF attacked and took control of Mortema and an unknown number of people were killed as a result of the attack.¹⁶⁴⁰ As the attack was conducted by the RUF, the Trial Chamber will not make a final determination on the reliability of the evidence.

(iv) Findings

857. On the basis of the foregoing evidence, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied beyond reasonable doubt that between about 14 February 1998 and 30 June 1998, members of the AFRC unlawfully killed a minimum of 265 civilians in Tombodu, Kono District, as charged under Counts 4 and 5. The Trial Chamber is further satisfied that these large scale killings satisfy the element of massiveness for the crime of extermination charged under Count 3 of the Indictment. The indiscriminate manner in which the victims were targeted and the fact that the killings occurred in a single village over a relatively short period of time establishes that the principal perpetrators of the individual killings intended to contribute to the overall and massive result of these killings.

¹⁶³⁸ TF1-334, Transcript 20 May 2005, p. 56.

¹⁶³⁹ George Johnson, Transcript 15 September 2005, p. 40.

¹⁶⁴⁰ DAB-025, Transcript 28 July 2006, pp. 95, 107-108; DAB-101, Transcript 12 September 2006, pp. 96-98.

(d) Kailahun District (14 February 1998 – 30 June 1998)

858. The Prosecution alleges that “[b]etween about 14 February 1998 and 30 June 1998, in locations including Kailahun town, members of AFRC/RUF unlawfully killed an unknown number of civilians.”¹⁶⁴¹

859. In reaching its factual findings and having examined the entire evidence, the Trial Chamber relies on Prosecution witnesses TF1-045, TF1-113, TF1-334 and Gibril Massaquoi and Defence witness DAB-147, DAB-140 and DAB-142.

(i) Kailahun Town

860. Sam Bockarie was the senior commander of RUF troops which were in Kailahun District between February and June 1998.¹⁶⁴² Witness TF1-113 testified that on his orders, a total of 67 persons were arrested in several villages in Kailahun District and detained at the G5 office in Kailahun Town. The persons were accused of being Kamajors.¹⁶⁴³ Some time later witness TF1-113 saw Sam Bockarie personally kill two individuals at the roundabout in Kailahun town. Eight dead bodies were already lying on the ground when he arrived at the scene.¹⁶⁴⁴ From the witness’s testimony, the Trial Chamber is satisfied that these eight persons were also killed by Bockarie. The ten persons killed were part of the group of 67 detained ‘Kamajors’.

861. Following the incident at the roundabout, Sam Bockarie ordered the killing of the remaining 57 detained ‘Kamajors’.¹⁶⁴⁵ In the witness’s presence, Bockarie instructed the Military Police Commander Joe Fatoma to kill these individuals, threatening him with death if the order was not obeyed. The 57 individuals were shot following that order.¹⁶⁴⁶ Witness TF1-113’s evidence is generally corroborated by a number of Defence Witnesses, although some of them testified that Sam Bockarie killed the 57 persons himself.¹⁶⁴⁷ Given that Witness TF1-113 was not shaken on cross-examination and the Defence Witnesses’ accounts of events were less detailed than her own, the Trial Chamber relies on her evidence. Witnesses DAB-142 and DAB-147 corroborated the evidence that the civilians killed were alleged Kamajors.¹⁶⁴⁸

¹⁶⁴¹ Indictment, para. 46.

¹⁶⁴² DAB- 147, Transcript 3 October 2006, pp. 48-50.

¹⁶⁴³ TF1-113, Transcript 18 July 2005, pp. 84-86.

¹⁶⁴⁴ TF1-113, Transcript 18 July 2005, pp. 87-88.

¹⁶⁴⁵ TF1-113, Transcript 18 July 2005, pp. 85-88.

¹⁶⁴⁶ TF1-113, Transcript 18 July 2005, pp. 89-90.

¹⁶⁴⁷ DAB-147, Transcript 3 October 2006, p. 47; DAB-140, Transcript 19 September 2006, pp. 94-95; DAB-142, Transcript 19 September 2006, pp. 36-37.

¹⁶⁴⁸ DAB-142, Transcript 19 September 2006, pp. 19, 35-36; DAB-147, Transcript 3 October 2006, p. 47.

862. As witness TF1-113 testified that the above incidents occurred shortly after Johnny Paul Koroma arrived in Kailahun Town and left for Kangema,¹⁶⁴⁹ the Trial Chamber is able to infer that the killings described occurred in the last half of March 1998.

863. However, it appears from the evidence that the 67 persons killed were combatants. The Trial Chamber recalls that if a victim is “a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.”¹⁶⁵⁰ Accordingly, the Trial Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that the detained and alleged ‘Kamajors’ were part of the civilian population.

(ii) Findings

864. By virtue of the foregoing, and leaving aside for the present the individual responsibility of the three Accused, the Trial Chamber is satisfied that between 14 February 1998 and 30 June 1998, Sam Bockarie and his subordinates unlawfully killed 67 persons in Kailahun Town in Kailahun District. As the Prosecution has not proved beyond reasonable doubt that the detained ‘Kamajors’ were part of the civilian population but only that they were *hors de combat*, the Trial Chamber concludes that only the elements of murder (Count 5) are established in respect of the killings in Kailahun Town.

(e) Koinadugu District (14 February 1998 – 30 September 1998)

865. The Prosecution alleges that “[b]etween about 14 February 1998 and 30 September 1998, in several locations including Heremakono, Kabala, Kumalu (or Kamalu), Kurubonla, Katombo, Koinadugu, Fadugu and Kamadugu, members of the AFRC/RUF unlawfully killed an unknown number of civilians.”¹⁶⁵¹

866. No evidence on unlawful killings was led in respect of Heremakono, Kumalu (or Kamalu), Katombo, Kamadugu¹⁶⁵² and Kurubonla.

867. In reaching its factual findings and having examined the entire evidence, the Trial Chamber relies on Prosecution witnesses TF1-334, TF1-209 and TF1-147 and Defence witnesses DAB-081, DAB-083, DAB-077, DAB-078 and DAB-085, as well as Prosecution Exhibits P-57 and P-54 and Defence Exhibit D-24 (under seal).

¹⁶⁴⁹ Also referred to as ‘Kangama’.

¹⁶⁵⁰ *Blaškić* Appeal Judgement, para. 114.

¹⁶⁵¹ Indictment, para. 47.

¹⁶⁵² Rule 98 Decision, para. 96.