

1998. In its Final Brief, the Prosecution asserts that the “three Accused are individually criminally responsible under the theory of joint criminal enterprise” and does not refer to other modes of liability.³³⁴⁰ The Prosecution then submits that only Kamara bears liability under Articles 6(1) and (3) of the Statute.³³⁴¹ Furthermore, the Prosecution submits in its Closing Arguments that

for Kono, during the crimes committed in the Indictment period after the intervention, 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 the theory of a JCE.³³⁴²

1999. In its Final Brief, the Kanu Defence submits that the Prosecution failed to provide evidence that the Accused Kanu was present in Kono District for “more than a few days” and that it failed to show that Kanu had any authority during the Indictment period.³³⁴³

(ii) Findings

2000. The Prosecution has not adduced any evidence that the Accused Kanu committed, ordered, planned, instigated or otherwise aided and abetted any of the crimes committed in Kono District. The Trial Chamber finds that the Prosecution has not proved any of these modes of individual criminal responsibility against the Accused Kanu for the crimes committed in Kono District.

(b) Responsibility of the Accused Kanu Under Article 6(3) of the Statute

(i) Submissions

2001. The Prosecution makes no submission in its Final Brief that the Accused Kanu bears superior responsibility for crimes committed in Kono District. The Prosecution case is that the Accused Kanu was shuttling between SAJ Musa in Koinadugu and the Accused Kamara in Kono in order to keep SAJ Musa informed of the developments on the ground in Kono.³³⁴⁴

2002. The Kanu Defence cites witness TF1-033 to demonstrate that Kanu was only *one* of the commanders present in Tombodu in 1998, the others being Hassan Papa Bangura, Franklyn Woyo Conteh alias ‘Woyo’, ‘Savage’, Ibrahim Bazy Kamara, Ibrahim Sesay alias ‘Biyoh’, and Abdul Sesay.³³⁴⁵ The Kanu Defence asserts that thus, the “evidence is insufficient in holding the Third

³³⁴⁰ Prosecution Final Brief, para. 1279.

³³⁴¹ Prosecution Final Brief, para. 1279.

³³⁴² Transcript 7 December 2006, p. 34-35.

³³⁴³ Kanu Final Brief, paras 386-391.

³³⁴⁴ TF1-334, Transcript 18 May 2005, pp. 19-20, Transcript 16 June 2005, p. 37.

³³⁴⁵ Kanu Final Brief, para. 406; TF1-033, Transcript 11 July 2005, pp. 11-12.

Accused responsible for superior responsibility for the crime of collective punishment, as his mere presence as a commander, one of many, is mentioned".³³⁴⁶

(ii) Findings

2003. The Trial Chamber has already found that the evidence regarding the role of the Accused Kanu in Kono District is inconclusive.³³⁴⁷ The evidence adduced is insufficient to establish that the Accused Kanu occupied a particular position in the AFRC command structure established by the Accused Kamara or that he had any troops under his effective control.

2004. The Trial Chamber accordingly finds the Prosecution has not established that the Accused Kanu was in a superior-subordinate relationship with the perpetrators of the crimes committed in Kono District. In the absence of this first element of superior responsibility, it is unnecessary to consider whether the Accused Kanu had actual or imputed knowledge of the crimes committed and failed to prevent or punish the perpetrators thereof.

2005. The Trial Chamber finds that the Prosecution has not established beyond reasonable doubt that the Accused Kanu is liable as a superior under Article 6(3) for crimes committed in Kono District.

4. Kailahun District

2006. The Trial Chamber found that an unknown number of civilians were unlawfully killed by RUF forces in or around February 1998, as charged under Count 5,³³⁴⁸ and that RUF troops or troops not established beyond a reasonable doubt to be members of the AFRC abducted civilians and used them as forced labour in Kailahun District in the period following 14 February 1998.³³⁴⁹

(a) Responsibility of the Accused Kanu Under Article 6(1) of the Statute

(i) Submissions

2007. In its Final Brief, the Prosecution alleges that the Accused Kanu was liable for crimes committed in Kailahun as a principal in a joint criminal enterprise and does not refer to any other form of liability.³³⁵⁰

³³⁴⁶ Kanu Final Brief, para. 408.

³³⁴⁷ Role of Accused, para. 515, *supra*.

³³⁴⁸ Factual Findings, Unlawful Killings, para 864, *supra*.

³³⁴⁹ Factual Findings, Enslavement, para 1394, *supra*.

³³⁵⁰ Prosecution Final Brief, para. 1406.

2008. The Kanu Defence submits that Kailahun District was under the exclusive control of the RUF and that the Accused Kanu was never present there.³³⁵¹

(ii) Findings

2009. The Prosecution has not adduced any evidence that the Accused Kanu committed, ordered, planned, instigated, or otherwise aided and abetted any of the crimes committed in the Kailahun District. The Trial Chamber finds that the Prosecution has not proved any of these modes of individual criminal responsibility against the Accused Kanu for the crimes committed in the Kailahun District.

(b) Responsibility of the Accused Kanu Under Article 6(3) of the Statute

(i) Submissions

2010. The Prosecution makes no submission in its Final Brief that the Accused Kanu has superior responsibility for crimes committed in Kailahun District in this period. The Kanu Defence does not make submissions specific to Kailahun District in its Final Brief arguments on the superior responsibility of the Accused Kanu.

(ii) Findings

2011. The Trial Chamber recalls its findings that the only proven perpetrators of crimes committed in Kailahun District during this period were members of the RUF. The Trial Chamber also recalls its finding that the AFRC and the RUF were not working together in Kailahun during this period.³³⁵²

2012. The Trial Chamber found that there is conflicting evidence regarding the activities of the Accused Kanu in the period February-May 1998, when he joined the group of SLA troops led by the Accused Brima in Mansofinia. The Trial Chamber is not satisfied on the evidence adduced that the Accused Kanu exercised effective control over any members of the RUF in Kailahun District after February 1998.

2013. In the absence of this first element of superior responsibility, it is not necessary to consider whether there is any evidence that the Accused Kanu had actual or imputed knowledge of the crimes committed and failed to prevent or punish the perpetrators.

³³⁵¹ Kanu Final Brief, paras 376-384.

³³⁵² Context of the Alleged Crimes, paras 187-188, *supra*.

2014. The Trial Chamber accordingly finds that the Accused Kanu is not liable under Article 6(3) for crimes committed in Kailahun District.

5. Koinadugu District

2015. The Trial Chamber found that AFRC/RUF forces unlawfully killed or inflicted sexual or physical violence on an unknown number of civilians in Koinadugu District in the period February through September 1998, as charged under Counts 4 through 5, 6 through 9 and 10 respectively.³³⁵³ In addition, an unknown number of civilians were abducted and used as forced labour, as charged under Count 13.³³⁵⁴ Children were used for military purposes, as charged under Count 12.³³⁵⁵ Finally, AFRC/RUF forces also engaged in looting of civilian homes, as charged in Count 14.³³⁵⁶

(a) Responsibility of the Accused Kanu Under Article 6(1) of the Statute

(i) Submissions

2016. In its Final Brief, the Prosecution alleges that the three Accused are liable for planning and instigating or otherwise aiding and abetting the crimes committed in Koinadugu District. It argues that the crimes followed a consistent pattern.³³⁵⁷

2017. In its Final Brief, the Kanu Defence submits that several AFRC groups moved from Koinadugu District to Bombali District, and that the Accused Kanu was not part of the group that included Prosecution Witness George Johnson.³³⁵⁸

(ii) Findings

2018. The Prosecution has not adduced any evidence that the Accused Kanu committed, ordered, planned, instigated, or otherwise aided and abetted any of the crimes that occurred in Koinadugu District. The Trial Chamber finds that the Prosecution has not proved any of these modes of individual criminal responsibility against the Accused Kanu for the crimes committed in the Koinadugu District.

³³⁵³ Factual Findings, Unlawful Killings, para. 879, *supra*; Sexual Violence, paras 1026, 1133, *supra*; Physical Violence, para. 1218, *supra*.

³³⁵⁴ Factual Findings, Enslavement, para. 1350, *supra*.

³³⁵⁵ Factual Findings, Child Soldiers, para. 1277, *supra*.

³³⁵⁶ Factual Findings, Pillage, para. 1409, *supra*.

³³⁵⁷ Prosecution Final Brief, paras 1412-1413.

³³⁵⁸ Kanu Final Brief, paras 392-395.

(b) Responsibility of the Accused Kanu Under Article 6(3) of the Statute(i) Submissions

2019. The Prosecution submits that the Accused Kanu has superior responsibility for all crimes committed in the attack on Yifin.³³⁵⁹

2020. The Kanu Defence makes no submissions on the superior responsibility of the Accused Kanu specifically in relation to crimes committed in Koinadugu District.

(ii) Findings

2021. The Trial Chamber notes that the Prosecution did not specify Yifin as a location in the Indictment under Counts 3 through 6, 8 through 11, and 14 and therefore, no findings have been made in this regard. No evidence has been adduced that the crimes committed under Counts 9, 12 or 13 in Koinadugu District are attributable to the Accused Kanu.³³⁶⁰

2022. The Trial Chamber has found that the crimes under Counts 3 to 6, 8 to 11, and 14 committed in other locations in Koinadugu District were perpetrated by AFRC/RUF forces associated with groups led by SAJ Musa and 'Superman'. The evidence on the activities of the Accused Kanu between February and late April or early May 1998 is inconclusive.³³⁶¹ The Accused Kanu was then sent by SAJ Musa to accompany the Accused Brima's group from Mansofinia to Rosos.³³⁶² The Prosecution has not submitted, nor is there evidence to the effect that, the Accused Kanu was in a command position in relation to the troops of SAJ Musa or Superman, either between February and late April or early May, or while he was with the Accused Brima's group thereafter.

2023. In the absence of the existence of a superior-subordinate relationship between the Accused Kanu and the perpetrators of the crimes in Koinadugu District, it is unnecessary to consider whether there is any evidence that the Accused Kanu had actual or imputed knowledge of the crimes committed and failed to prevent or punish the perpetrators.

2024. The Trial Chamber accordingly finds that the Prosecution has not established beyond reasonable doubt that the Accused Kanu is liable as a superior under Article 6(3) for crimes committed by AFRC/RUF troops in Koinadugu District.

³³⁵⁹ Prosecution Final Brief, paras 1414-1416.

³³⁶⁰ Factual Findings, paras 1126, 1350.

³³⁶¹ Role of Accused, para 522, *supra*.

³³⁶² Role of Accused, para 518, *supra*.

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6. Bombali District

2025. The Trial Chamber found that AFRC troops in Bombali District engaged in unlawful killings of civilians as charged under Counts 3 through 5³³⁶³ and inflicted sexual and physical violence on civilians as charged under Counts 6 to 9 and 10 and 11 respectively.³³⁶⁴ AFRC troops also abducted civilians and used them as forced labour and used children illegally recruited for military purposes, as charged under Counts 13 and 12 respectively.³³⁶⁵ Finally, AFRC troops terrorised the civilian population, as charged under Count 1, and committed collective punishments, as charged under Count 2.³³⁶⁶

(a) Responsibility of the Accused Kanu Under Article 6(1) of the Statute

(i) Submissions

2026. In its Final Brief, the Prosecution contends that the Accused Kanu was present when the order was given to burn Karina and kill its inhabitants and that he assisted in the planning phase. The Prosecution submits that Kanu also helped to lead the attack on Bornoya where numerous civilians were killed.³³⁶⁷ The Prosecution further argues that it is inferable from the position of the Accused Kanu, coupled with the systematic nature of the crimes committed in Bombali District, that he prompted or encouraged these acts. Additionally, he either intended such acts or was aware of the substantial likelihood that such crimes would be committed.³³⁶⁸ Finally, the Prosecution asserts that at Camp Rosos, the Accused Kanu was in charge of training child soldiers and was in total control of the women at the camp.³³⁶⁹

2027. In its Final Brief, the Kanu Defence submits that several AFRC groups moved from Koinadugu District to Bombali District, and that the Accused Kanu was not part of the group that included Prosecution Witness George Johnson.³³⁷⁰ The Kanu Defence further contends that the Prosecution has led no evidence regarding the involvement of the Accused Kanu in the illegal recruitment of child soldiers and that the evidence regarding his involvement in training these children for military purposes is vague.³³⁷¹

³³⁶³ Factual Findings, Unlawful Killings, para 897, *supra*.

³³⁶⁴ Factual Findings, Physical Violence, para 1224, *supra*.

³³⁶⁵ Factual Findings, Sexual Violence, paras 1253-1254, *supra*.

³³⁶⁶ Factual Findings, Pillage, paras 1568, 1571, *supra*.

³³⁶⁷ Prosecution Final Brief, para. 1511.

³³⁶⁸ Prosecution Final Brief, para. 1512.

³³⁶⁹ Prosecution Final Brief, para. 1512.

³³⁷⁰ Kanu Defence Final Brief, paras 392-395.

³³⁷¹ Kanu Defence Final Brief, paras 427-434.

(ii) Findings

23592

a. Committing/Ordering

2028. The Prosecution has not adduced any evidence that the Accused Kanu committed or ordered any of the crimes that occurred in Bombali District. The Trial Chamber finds that the Prosecution has not proved either of these modes of individual criminal responsibility against the Accused Kanu for the crimes committed in the Bombali District.

b. Planning

2029. The Prosecution has not adduced any evidence that the Accused Kanu planned any crimes under Counts 3 to 6, 10 to 11 and 14 in Bombali District. The Trial Chamber finds that the Prosecution has not proved this mode of individual criminal responsibility against the Accused Kanu for the crimes committed under those counts. The Accused Kanu's criminal responsibility for Counts 9, 12 and 13, which are crimes of a continuing nature spanning various districts, will be discussed below.³³⁷²

c. Instigating

2030. The Prosecution has not adduced any evidence that the Accused Kanu prompted or influenced the perpetrators of the crimes committed in Bombali District. The Trial Chamber finds that the Prosecution has not proved this mode of individual criminal responsibility against the Accused Kanu for the crimes committed in the Bombali District.

d. Otherwise aiding and abetting

2031. The Prosecution has not adduced any evidence that the Accused Kanu gave practical assistance, encouragement or moral support which had a substantial effect on the perpetration of crimes in Bombali District. The Trial Chamber finds that the Prosecution has not proved this mode of individual criminal responsibility against the Accused Kanu for the crimes committed in Bombali District.

(b) Responsibility of the Accused Kanu Under Article 6(3) of the Statute

(i) Submissions

³³⁷² Responsibility of the Accused, Kanu, paras 2091-2095, *infra*.

2032. The Prosecution submits that the Accused Kanu bears superior responsibility for all crimes committed in Bombali District from 1 May 1998 until 30 November 1998 by virtue of the high level of authority he possessed as third in command.³³⁷³ The Prosecution further submits that the Accused Kanu was in charge of training child soldiers and was in total control of women at the camp.³³⁷⁴

2033. The submissions of the Kanu Defence were comparatively detailed and will be discussed further as they arise in the findings below. However, the Kanu Defence's position can be summarised as follows. First, it argues that the Prosecution evidence conflicts on whether the Accused Kanu was Chief of Staff or G5 and that he cannot have occupied both positions. The Kanu Defence further submits that neither position entails command authority, since the Prosecution has not established that the Accused Kanu ever functioned as an operational commander, which it defines as "a military leader in command and control of a fighting unit".³³⁷⁵ The Kanu Defence then accepts that the Accused Kanu was responsible for civilians but argues that in this role he protected them and this does not equate to command responsibility for operations conducted by the SLAs.³³⁷⁶

(ii) Findings

a. Existence of a superior-subordinate relationship

2034. The Trial Chamber found that the AFRC faction had a functioning chain of command, planning and orders process and disciplinary system in Bombali District.³³⁷⁷ The Trial Chamber found that the Accused Kanu was Chief of Staff, commander in charge of civilians and commander in charge of military training.

2035. The Trial Chamber finds the evidence that the Accused Kanu was Chief of Staff does not of itself permit conclusions to be drawn as to his ability to control his subordinates. Prosecution Military Expert Colonel Iron testified that in traditional military organisations, the Chief of Staff is the person that heads the staff of the commander and is essentially responsible for implementing the commander's decisions.³³⁷⁸ Colonel Iron stated that from the evidence that he was given, the Accused Kanu appeared to have performed the same function for the Accused Brima.³³⁷⁹

³³⁷³ Prosecution Final Brief, para 1513.

³³⁷⁴ Prosecution Final Brief, para 1512.

³³⁷⁵ Kanu Final Brief, para. 188.

³³⁷⁶ See Kanu Final Brief, paras 186-279.

³³⁷⁷ Military Structure of the AFRC Fighting Force, para 600, *supra*.

³³⁷⁸ Colonel Iron, Transcript 12 October 2005, p. 59.

³³⁷⁹ Colonel Iron, Transcript 13 October 2005, p. 3.

2036. The Trial Chamber does not find this conclusion particularly helpful, as this description of the Accused Kanu's role does not indicate whether he had effective control over any of the AFRC troops that committed crimes in Bombali District. However, there is other evidence which goes to prove that the Accused Kanu commanded troops on military operations, thus establishing the existence of a superior/subordinate relationship.

2037. Witness TF1-334 testified that while the troops were at Rosos, the Accused Kanu led an operation to Gbinti.³³⁸⁰ The plan, formulated at Rosos, was to capture the town by pretending to surrender. The soldiers captured a civilian en route, who told them that ECOMOG soldiers were in the town. The Accused Kanu decided that the surrendering tactic would not work. He ordered that the men attack the town immediately, which they did.³³⁸¹ The ECOMOG forces withdrew and the Accused Kanu ordered that the town be looted and burned. Soldiers wrote, among other epithets, the words 'Five-Five in town' on the walls.³³⁸² After this operation, the soldiers returned to Rosos and reported to the Accused Brima.³³⁸³

2038. Witness George Johnson testified that the Accused Kanu was one of the commanders who led the troops into Karina when the town was burnt and its inhabitants killed.³³⁸⁴ According to the Witness, the Accused Kanu was a member of the headquarters group who "take care of all the operations, and all the orders come from the headquarters". The Witness also said that "headquarters [was] in charge of planning all operations and giving military orders".³³⁸⁵ Witness TF1-334 confirmed that the Accused Kanu, as chief of staff, was present when the Accused Brima gave orders to attack and burn Karina, amputate the citizens, and capture strong men, as a demonstration "to shock the whole country."³³⁸⁶

2039. Witness TF1-158 gave evidence that the Accused Kanu was one of the leaders of the troops who attacked Bornoya, where looting took place and civilians were amputated and killed.³³⁸⁷

2040. The Trial Chamber is satisfied that this evidence proves beyond reasonable doubt that the Accused Kanu had effective control over his AFRC subordinates in Bombali District.

b. Actual or Imputed Knowledge and Failure to Prevent or Punish

³³⁸⁰ TF1-334, Transcript 24 May 2005, p. 48.

³³⁸¹ TF1-334, Transcript 24 May 2005, pp. 48-49.

³³⁸² TF1-334, Transcript 24 May 2005, p. 50.

³³⁸³ TF1-334, Transcript 24 May 2005, p. 50.

³³⁸⁴ George Johnson, Transcript 15 September 2005, p. 54.

³³⁸⁵ George Johnson, Transcript 15 September 2005, p. 60.

2041. The Trial Chamber is also satisfied on the evidence beyond reasonable doubt that in his role as leader of the attacks, the Accused Kanu knew or should have known of the crimes committed by his troops and that it was within his ability to have prevented such crimes or to have punished his subordinates for committing them, but that he failed to take the necessary and reasonable measures to do so.

2042. The Kanu Defence submits that the Accused Kanu's responsibilities with respect to civilians was 'protective'.³³⁸⁸ The Trial Chamber rejects this submission. The factual findings demonstrate that the Accused Kanu presided over a system that institutionalised serious abuse of civilians. The characterisation of the Accused Kanu's function as 'protective' is incorrect and unacceptable.

2043. The Trial Chamber thus finds that the Prosecution has established beyond reasonable doubt that the Accused Kanu knew or ought to have known of the commission of crimes by his subordinates in Bombali District and failed to prevent or punish the perpetrators thereof.

c. Conclusion

2044. The Trial Chamber finds that the Prosecution has established beyond reasonable doubt that the Accused Kanu is liable as a superior under Article 6(3) for crimes committed in Bombali District.

7. Freetown and the Western Area

2045. The Trial Chamber had found that AFRC troops engaged in unlawful killings of civilians as charged under Counts 3 through 5³³⁸⁹ and inflicted sexual and physical violence on civilians as charged under Counts 6 through 9 and 10 respectively.³³⁹⁰ AFRC troops also abducted civilians and used them as forced labour and used children illegally recruited for military purposes in the attack on Freetown, as charged under Counts 13 and 12 respectively.³³⁹¹ Finally, AFRC troops engaged in widespread looting, as charged under Count 14, terrorised the civilian population, as charged under Count 1, and committed collective punishments, as charged under Count 2.³³⁹²

³³⁸⁶ TF1-334, Transcript 23 May 2005, p. 58.

³³⁸⁷ TF1-158, Transcript 26 July, 2005, p. 32.

³³⁸⁸ Kanu Final Brief, paras 267-279.

³³⁸⁹ Factual Findings, Unlawful Killings, para. 951, *supra*.

³³⁹⁰ Factual Findings, Sexual Violence, para. 1243, *supra*, Physical Violence, para. 1170, *supra*.

³³⁹¹ Factual Findings, Enslavement, para. 1389, *supra*, Child Soldiers, para. 1278, *supra*.

³³⁹² Factual Findings, Pillage, para. 1429, *supra*, Acts of Terror and Collective Punishments, para. 1609, *supra*.

(a) Responsibility of the Accused Kanu under Article 6(1) of the Statute(i) Submissions

2046. In its Final Brief, the Prosecution submits that the Accused Kanu personally executed and amputated civilians, burned property, forced civilians to work and committed or aided and abetted acts of sexual violence in Freetown and the Western Area.³³⁹³ The Prosecution argues that the Accused Kanu ordered amputations and executions of civilians.³³⁹⁴ The Prosecution contends that the Accused Kanu was present during the planning of the attack on Freetown, and that it can be inferred from his position as third in command that he actively participated in this planning phase.³³⁹⁵ Finally, the Prosecution submits that based on the Accused Kanu's authority and the widespread nature of the crimes committed, it can be reasonably inferred that he prompted or encouraged these acts, and that he intended the acts or was aware of the substantial likelihood that such acts would be committed.³³⁹⁶

2047. In its Final Brief, regarding the role of the Accused Kanu in killings at a mosque at Kissy, the Kanu Defence argues that the victims were ECOMOG soldiers and therefore that the Accused cannot be held liable for any crimes under the Statute.³³⁹⁷ The Kanu Defence further submits that the evidence of Prosecution witness TF1-282, who testified that she had been raped by the Accused Kanu, was unreliable.³³⁹⁸ The Kanu Defence contends that the Prosecution witness George Johnson's evidence regarding Kanu's order at Kissy Mental Home to amputate civilians is unsafe.³³⁹⁹ It further contends that Prosecution witness TF1-184's evidence that the Accused Kanu demonstrated a method for carrying out amputations does not suffice to hold him liable under Counts 10 and 11. Finally, it submits that Prosecution witness TF1-334's testimony as a whole, including his testimony regarding the role of the Accused in amputations committed in Freetown, is unreliable.³⁴⁰⁰

(ii) Findingsa. Committingi. Fourah Bay: The killing of civilians

³³⁹³ Prosecution Final Brief, paras 1634-1636.

³³⁹⁴ Prosecution Final Brief, para. 1631.

³³⁹⁵ Prosecution Final Brief, para. 1629.

³³⁹⁶ Prosecution Final Brief, para. 1630.

³³⁹⁷ Kanu Final Brief, paras 412-414. *See also* Kanu Closing Arguments, 8 December 2006, p. 37.

³³⁹⁸ Kanu Final Brief, paras 415-416.

2048. The Trial Chamber has found that AFRC troops killed an unknown number of civilians at Fourah Bay in retaliation for the alleged murder of a soldier during the 1999 attack on Freetown.³⁴⁰¹ While witness TF1-334 testified that the Accused Kanu “partook” in the attack, the witness does not further clarify the manner of his participation.³⁴⁰²

2049. The Trial Chamber has found that this evidence does not establish that the Accused Kanu personally killed any civilians.³⁴⁰³

ii. Kissy Road: “Demonstration” of an amputation to the troops

2050. The Trial Chamber has found that the Accused Kanu amputated a civilian near Kissy Old Road during the 6 January 1999 invasion in order to “demonstrate” to his troops how best to carry out amputations.³⁴⁰⁴ He explained that there were two types of amputation possible, one called a long sleeve, meaning an amputation of the arms, and the other a short sleeve, meaning an amputation of the arm up to the bicep.³⁴⁰⁵ The Indictment does not provide any of the particulars of the incident and is therefore defective in this regard.

2051. The Trial Chamber must determine whether this defect in the Indictment was cured by clear, timely and consistent notice to the Kanu Defence. The Prosecution Supplemental Pre-Trial Brief and the Prosecution’s Opening Statements do not refer to this incident. Nevertheless, the Kanu Defence did not object to the evidence when led and in fact cross-examined the witness on this specific incident during trial. The Trial Chamber therefore finds that the failure to give notice did not materially impair the ability of the Kanu Defence to prepare its case.

2052. The Trial Chamber accordingly finds the Accused Kanu individually criminally responsible for committing an act of physical violence.

iii. Uppun: “Demonstration” of an amputation on a civilian

2053. The Trial Chamber has found that subsequently the Accused Kanu demonstrated how to perform amputations on two other civilians at Uppun during the retreat from Freetown in January

³³⁹⁹ Kanu Final Brief, paras 420-421.

³⁴⁰⁰ Kanu Final Brief, paras 422-424.

³⁴⁰¹ TF1-334, Transcript 14 June 2005, pp. 66-67.

³⁴⁰² Factual Findings, Unlawful Killings, para 919, *supra*.

³⁴⁰³ Factual Findings, Unlawful Killings, para 926, *supra*.

³⁴⁰⁴ Factual Findings, Physical Violence, para 1230, *supra*; TF1-184, Transcript 27 September 2005, pp. 72-74.

³⁴⁰⁵ TF1-184, Transcript 27 September 2005, p. 74.

1999.³⁴⁰⁶ The Trial Chamber is satisfied that this is a separate incident to the act of physical violence described above. The Indictment does not provide any of the particulars of the incident and is therefore defective in this regard.

2054. The Trial Chamber must determine whether this defect in the Indictment was cured by clear, timely and consistent notice to the Brima Defence. The Prosecution Supplemental Pre-Trial Brief and the Prosecution's Opening Statements do not refer to this incident. The Trial Chamber observes that the relevant information did not come into the Prosecution's possession until March or April 2005, and that on 22 April 2005 it disclosed a statement to the defence in which the witness said that

Whilst we were at Upgun, 55 came with a commander, Major Mines and Captain Kabila and some people were amputated. 55 demonstrated by amputating two people. From then on the amputations started.³⁴⁰⁷

2055. Thus, the Defence was not put on notice of this allegation until over one month after the trial commenced. The Trial Chamber does not consider that this constitutes timely notice. Nevertheless, the Kanu Defence did not object to the evidence when led and in fact cross-examined the witness on this specific incident during trial. The Trial Chamber therefore finds that the failure to give timely notice did not materially impair the ability of the Kanu Defence to prepare its case.

2056. The Trial Chamber accordingly finds the Accused Kanu individually criminally responsible for committing an act of physical violence.

iv. State House: Looting of vehicles

2057. Witness Gibril Massaquoi testified that vehicles were looted by AFRC troops in Freetown and that the Accused Kanu arrived at State House with a stolen vehicle during the 6 January 1999 Freetown invasion.³⁴⁰⁸ The Trial Chamber is satisfied beyond a reasonable doubt on this evidence that the Accused Kanu personally looted at least one vehicle in Freetown. The Trial Chamber accordingly finds the Accused Kanu individually criminally responsible for committing an act of pillage.

b. Ordering

³⁴⁰⁶ TF1-334, Transcript 14 June 2005, pp. 68-70.

³⁴⁰⁷ Statement of witness TF1-334 dated 16 March 2005-20 April 2005, CMS p. 7880 [confidential].

³⁴⁰⁸ Gibril Massaquoi, Transcript 7 October 2005, p. 126.

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i. Order at State House to kill captive Nigerian ECOMOG soldiers

2058. The Trial Chamber found that the Accused Brima ordered the execution of fourteen to sixteen captive ECOMOG soldiers at State House, and that the Accused Kanu then took the soldiers outside, killed one ECOMOG soldier himself, and ordered his soldiers to execute the remaining captives. The Trial Chamber is satisfied that the executions were carried out³⁴⁰⁹ and that the Accused Kanu ordered the commission of this crime in full awareness that the crime was likely to be committed.

ii. Order to kill civilians at a mosque in Kissy

2059. The Trial Chamber found that the Accused Kanu reissued an order given by the Accused Brima on the day after the troops withdrew from Kissy Mental Home that an unknown number of civilians at a mosque were to be killed. The Accused Kanu is not relieved of criminal responsibility for ordering this massacre simply because he was reissuing an order originally made by his commander, the Accused Brima. The Trial Chamber has found that the executions were carried out.³⁴¹⁰ The Trial Chamber is further satisfied that the Accused Kanu ordered the commission of this crime in full awareness that the crime was likely to be committed.

iii. Order to commit amputations in Eastern Freetown

2060. The Trial Chamber has found that when AFRC troops arrived at Kissy Mental Home, during the retreat from Freetown, the Accused Kanu ordered his fighters to go to Eastern Freetown and amputate 200 civilians and then send them to Ferry Junction. The witness George Johnson was present when the order was given, and saw the troops leave towards Eastern Freetown and return with severed arms and blood covered machetes.³⁴¹¹ The Trial Chamber is satisfied that the amputations were carried out and that the Accused Kanu ordered the commission of this crime in full awareness that the crime was likely to be committed.

2061. The Trial Chamber has found that when the troops reached Upgun during the retreat from Freetown, the Accused Kanu told his commanders, including Col. Mines and Kabila, that it was time for amputations to begin, and that he would begin by demonstrating. Later two civilians were captured and the Accused amputated their arms. The Accused explained that he had begun the

³⁴⁰⁹ Gibril Massaquoi, Transcript 7 October 2005, pp. 115-116.

³⁴¹⁰ Factual Findings, Unlawful Killings, para 936, *supra*; Gibril Massaquoi, Transcript 7 October 2005, pp. 115-116.

³⁴¹¹ George Johnson, Transcript 16 September 2005, p. 53-54.

amputations as an example to his troops of how to proceed. He then told the victims that they should go to President Kabbah to ask for new hands. Later that day, ten other civilians were captured and amputated by Kabila and Mines in Kanu's presence. Mines repeated Kanu's instruction to the victims to seek new hands from President Kabbah.³⁴¹² The Trial Chamber recalls its finding that the Accused is liable for committing two amputations at Uppun. It additionally finds that he ordered the commission of further amputations which were then carried out. The Trial Chamber is satisfied that the Accused Kanu ordered the commission of this crime in full awareness that the amputations were likely to be committed. The Trial Chamber therefore finds that the Prosecution has proved this particular mode of individual criminal responsibility beyond reasonable doubt.

c. Planning

2062. The Prosecution has not adduced any evidence that the Accused Kanu planned any crimes under Counts 3 through 6, 10 through 11 and 14 in Freetown and the Western Area. The Trial Chamber finds that the Prosecution has not proved this mode of individual criminal responsibility against the Accused Kanu for any crimes committed under those Counts. The Accused Kanu's criminal responsibility for Counts 9, 12 and 13, which involve crimes of a continuing nature spanning various districts, will be discussed below.³⁴¹³

d. Instigating

2063. The Trial Chamber recalls that on the eve of the 6 January 1999 invasion of Freetown, the Accused Brima chaired a meeting at which the Accused Kanu reminded the AFRC troops present about orders to burn down police stations and kill "targeted persons"/collaborators.³⁴¹⁴ The Trial Chamber has found that a number of civilians were subsequently killed in Freetown. The Trial Chamber is satisfied that the Accused Kanu prompted the perpetrators to kill civilians in Freetown. The Trial Chamber therefore finds that the Prosecution has proved this mode of liability against the Accused Kanu.

e. Otherwise aiding and abetting

2064. The Prosecution has not adduced any evidence that the Accused Kanu aided and abetted any crimes in Freetown and the Western Area. The Trial Chamber finds that the Prosecution has not

³⁴¹² TF1-334, Transcript 14 June 2005, 68-71.

³⁴¹³ Responsibility of the Accused, Kanu, para. 2095, *infra*.

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proved this mode of individual criminal responsibility against the Accused Kanu for the crimes committed in Freetown and the Western Area.

(b) Responsibility of the Accused Kanu Under Article 6(3) of the Statute

(i) Submissions

2065. The Prosecution submits that the Accused Kanu has superior responsibility for all crimes committed by his subordinates in Freetown from 6 January until about 28 January. The Prosecution argues that the Accused Kanu's actual or imputed knowledge of the crimes can be inferred from the fact that crimes were often ordered by him or in his presence and that as one of the key commanders in the field, the Accused Kanu had the material ability to prevent the commission of crimes or to punish the perpetrators.³⁴¹⁵

2066. The Kanu Defence submits that the positions of Chief of Staff and commander in charge of civilians are not operational command positions and therefore do not entail superior responsibility.³⁴¹⁶

(ii) Findings

a. Existence of a superior-subordinate relationship

2067. The Trial Chamber has found that the Accused Kanu was Chief of Staff and the commander in charge of civilians throughout the attack on Freetown on 6 January 1999 until the retreat to Newton in the Western Area.³⁴¹⁷ The Trial Chamber has also found that the AFRC faction had a functioning chain of command and planning and orders process during the initial invasion of Freetown, but that this command structure failed when the troops lost control of State House.³⁴¹⁸

2068. The Trial Chamber notes that Accused Kanu's functions as Chief of Staff in the Western Area involved responsibilities which did not require the exercise of command over troops. For example, Prosecution witness George Johnson testified that the Accused Kanu ran the meeting at Orugu Village at which the Accused Brima ordered the attack on Freetown.³⁴¹⁹ The Prosecution Military Expert Colonel Iron opined that it is customary in regular armies for the Chief of Staff to

³⁴¹⁴ George Johnson, Transcript 16 September 2005, p. 17.

³⁴¹⁵ Prosecution Final Brief, paras 1637-1640.

³⁴¹⁶ Kanu Final Brief, para. 188.

³⁴¹⁷ Role of Accused, para. 535, *supra*.

³⁴¹⁸ Military Structure of the AFRC Fighting Force, para. 620, *supra*.

³⁴¹⁹ George Johnson, Transcript 16 September 2005, p. 17.

run meetings and for the commander to act as chair, only interjecting when necessary to stress particular points. He also testified that this was the regular practice in the AFRC.³⁴²⁰

2069. As with its findings in Bombali District, the Trial Chamber reiterates that it cannot be presumed that the Accused Kanu performed the same role as a Chief of Staff in a regular army. The Trial Chamber accepts the expert evidence of Colonel Iron in this specific regard since it is consistent with the testimony of witness George Johnson. However, as was also demonstrated in Bombali District, there is other evidence upon which the Trial Chamber is satisfied that, in addition to assisting the commander in an administrative capacity, the position of Chief of Staff placed the Accused Kanu in a position of effective control over troops.

2070. The Trial Chamber has found that as Chief of Staff, the Accused Kanu was third in command in Freetown.³⁴²¹ The Trial Chamber further recalls its findings that the Operations Director, the Operations Commander, the Task Force Commander and the head of Military Police were all required to report to the Accused Kanu. These men were senior to the battalion commanders.³⁴²² Thus, although he did not have a particular unit of men under his command, the Trial Chamber rejects the Kanu Defence's submission that as Chief of Staff and commander in charge of civilians, the Accused Kanu was relegated to the role of a non-operational commander.

2071. The Accused Kanu's seniority is also evidenced by the fact that, like the Accused Kamara, he was based at the AFRC headquarters at State House.³⁴²³ He attended the meeting of commanders held there on the evening of 6 January at which an attack on Wilberforce was discussed.³⁴²⁴ In addition, the Accused Kanu made an announcement over the local radio on 6 January 1999 that the troops had captured Freetown, identifying himself as Chief of Staff.³⁴²⁵

2072. The Accused Kanu's *de jure* position, taken together with the following evidence of the Accused Kanu giving orders which were obeyed, establishes that as Chief of Staff he possessed the material ability to effectively control troops in Freetown until the loss of State House.

2073. During the advance towards Freetown, the Accused Kanu commanded a body of troops that went on an operation to attack Tumbo.³⁴²⁶ While in Freetown, one morning prior to the loss of State

³⁴²⁰ Exhibit P-36, para. D3-1.

³⁴²¹ Role of Accused, para 535, *supra*.

³⁴²² Military Structure of the AFRC Fighting Force, para 608.

³⁴²³ TF1-334, Transcript 14 June 2005, pp. 4-5 OR 13 June 2005 p. 105; Gibril Massaquoi, Transcript 7 October 2005, p. 122; Gibril Massaquoi Transcript 10 October 2005, p. 3; TF1-153 Transcript 23 September 2005, p. 3.

³⁴²⁴ Gibril Massaquoi, Transcript 7 October 2005, p. 120; 11 October 2005, pp. 5, 65.

³⁴²⁵ TF1-334, Transcript 14 June 2005, p. 19

³⁴²⁶ TF1-153, Transcript 22 September 2005, p. 95.

House, the Accused Kanu ordered the military police to move the dead bodies that were piling up in the vicinity, as the area was beginning to smell.³⁴²⁷

2074. Witness Gibril Massaquoi testified that while the senior commanders were still at State House, he observed a soldier coming from the front line who encountered the Accused Kanu near State House. The soldier reported to the Accused Kanu on the current positions of the advancing ECOMOG troops. The witness overheard the Accused Kanu ordering some officers to find men to reinforce that particular area. The officers did so and the Accused Kanu ordered the assembled troops to 'put the war candle on', by which he meant to burn the houses. The Accused Kanu then ordered some kerosene to be brought from State House. This kerosene was distributed by the officers among the troops, who then began setting houses alight.³⁴²⁸

2075. Finally, the fact that the Accused Kanu ordered the commission of crimes in Freetown is evidence of his ability to control AFRC troops subordinate to him.

2076. The Trial Chamber therefore finds that a superior-subordinate relationship existed between the Accused Kanu and the AFRC troops in Freetown.

b. Knowledge

2077. The Trial Chamber is satisfied that the Accused Kanu had reason to know of the commission of crimes committed before the loss of State House in which he was not directly involved. He directly participated in the commission of a number of crimes.³⁴²⁹ The crimes were committed on a wide scale in physical proximity to the Accused Kanu at State House.

2078. The Trial Chamber therefore finds that there can be no reasonable doubt that the Accused Kanu was in possession of information to put him on notice that crimes were being committed by his subordinates before the loss of State House, although he was not directly involved in such crimes.

c. Failure to prevent or punish

³⁴²⁷ Gibril Massaquoi, Transcript 10 October 2005, p. 12.

³⁴²⁸ Gibril Massaquoi, Transcript 10 October 2005, pp. 13-15; see also testimony of Witness TF1-184 on what appears to be the same incident: Transcript 27 September 2005, p. 6

³⁴²⁹ See the Trial Chamber's findings on the individual criminal responsibility of the Accused Brima in Freetown and Western Area under Article 6(1): Findings on the Responsibility of the Accused, paras 1750-1785.

2079. There is no evidence that the Accused Kanu took any measures to prevent the troops under his control in Freetown from committing crimes against or punish the perpetrators of such crimes.

d. Conclusion

2080. The Trial Chamber finds that the Prosecution has established beyond reasonable doubt that the Accused Kanu is liable as a superior under Article 6(3) for crimes committed in the Western Area.

8. Port Loko District

2081. The Trial Chamber has found that AFRC/RUF troops unlawfully killed a number of civilians in Port Loko District as charged under Counts 4 through 5.³⁴³⁰ In addition, AFRC troops held persons in sexual slavery as charged under Count 9.³⁴³¹ AFRC/RUF troops used abducted civilians for forced labour, as charged under Count 13.

(a) Responsibility of the Accused Kanu Under Article 6(1) of the Statute

(i) Submissions

2082. In its Final Trial Brief, the Prosecution argues only that the Accused in Kanu is liable for the crimes committed in Port Loko District as a principal in a joint criminal enterprise.³⁴³²

2083. The Kanu Defence makes no specific submissions regarding the alleged liability of the Accused for crimes committed in Port Loko District in its Final Brief.

(ii) Findings

2084. The Prosecution has not adduced any that the Accused Kanu individually committed, ordered, planned, instigated, or otherwise aided and abetted any of the crimes that occurred in Port Loko District. The Trial Chamber finds that the Prosecution has not proved any of these modes of individual criminal responsibility against the Accused Kanu for the crimes committed in Port Loko District.

³⁴³⁰ Factual Findings, Unlawful Killings, para. 965, *supra*.

³⁴³¹ Factual Findings, Outrages upon Personal Dignity, para. 1187, *supra*.

³⁴³² Prosecution Final Brief, para. 1755.

(b) Responsibility of the Accused Kanu Under Article 6(3) of the Statute

(i) Submissions

2085. The Prosecution makes no submission in its Final Brief that the Accused Kanu has superior responsibility for crimes committed in Port Loko District between January and April 1999.

2086. The Kanu Defence makes no submissions specific to the superior responsibility of the Accused Kanu in Port Loko District.

(ii) Findings

2087. The Trial Chamber has found that following the second unsuccessful attack on Freetown staged jointly by AFRC/RUF commanders, the Accused Kanu accompanied the Accused Brima to Lunsar to assist Superman, who was fighting against Issa Sesay at the time.³⁴³³ No reliable evidence has been adduced on the organisation of the AFRC troops associated with the Accused Kanu in this period or whether this group fought alongside Superman or under his overall command. It has not been established beyond reasonable doubt that the Accused Kanu had troops under his effective control during this period.

2088. The Trial Chamber finds that the Prosecution has not established beyond reasonable doubt that the Accused Kanu is liable as a superior under Article 6(3) for crimes committed in Port Loko District.

9. Responsibility for Crimes of Enslavement under Article 6(1)

2089. The Trial Chamber has found that civilians were subjected to sexual slavery as charged under Count 9; that children under the age of 15 were conscripted into the AFRC forces and/or used to participate in active hostilities as charged under Count 12; and that civilians were enslaved as charged under Count 13.

2090. As with the Accused Brima, the Trial Chamber will examine the evidence in relation to the responsibility of the Accused Kanu for each of the enslavement crimes as a whole. The Trial Chamber recalls its finding that the only reasonable inference available from the systemic commission of these crimes on a large scale is that these crimes were planned.³⁴³⁴ The Trial

³⁴³³ Role of Accused, para 537, *supra*.

³⁴³⁴ Findings on Responsibility, Brima, para. 1826, *supra*.

Chamber will consider the evidence in order to determine whether the Accused Kanu substantially contributed to the planning of these crimes.

2091. The Trial Chamber has found that the Accused Kanu was Chief of Staff and commander in charge of abducted civilians in Bombali District and the Western Area.³⁴³⁵ As the AFRC troops depended heavily on these civilians for a multitude of tasks, the Accused Kanu's position was a critical one.

2092. In Bombali District the Accused Kanu designed and implemented a system to control abducted girls and women. All abducted women and girls were placed in the custody of the Accused. Any soldier who wanted an abducted girl or woman to be his "wife" had to "sign for her". The Accused informed his fighters that any problems with the women were to be immediately reported back to him, and that he would then monitor the situation.³⁴³⁶ The Accused issued a disciplinary instruction ordering that any woman caught with another woman's husband should be beaten and locked in a box.³⁴³⁷ In one instance, Witness TF1-334 observed a Staff Sergeant reporting to Kanu that he suspected his "wife" of misbehaving and the Accused Kanu called the woman before him and found her guilty. He ordered that she be sent to the Mammy Queen, be given a dozen lashes and be locked in the box.³⁴³⁸

2093. The Trial Chamber has also found that the Accused Kanu was in charge of the forced military training of civilians at Camp Rosos. Among those forced to undergo training were children below the age of 15 years old.³⁴³⁹

2094. The Trial Chamber has found that the Accused Kanu continued in his positions as Chief of Staff and commander in charge of civilians in Freetown and the Western Area. The Trial Chamber has found that the Accused Kanu had approximately ten child combatants in his charge in Benguema following the retreat from Freetown.³⁴⁴⁰

2095. The Trial Chamber is satisfied that the Accused Kanu planned, organised and implemented the system to abduct and enslave civilians which was committed by AFRC troops in Bombali and Western Area. It is further satisfied that the Accused Kanu had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual

³⁴³⁵ Role of the Accused, para 535, *supra*.

³⁴³⁶ TF1-334, Transcript 23 May 2005, pp. 75-77.

³⁴³⁷ TF1-334, Transcript 24 May 2005, pp. 63-65.

³⁴³⁸ TF1-334, Transcript 24 May 2005, pp. 67-69.

³⁴³⁹ TF1-334, Transcript 24 May 2005, pp. 24-25.

slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour.

(a) Responsibility under Article 6(1) for Count 9 (Sexual Slavery)

2096. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Kanu is individually criminally responsible under Article 6(1) of the Statute for planning the commission of the crime of sexual slavery in Bombali District and the Western Area.

(b) Responsibility under Article 6(1) for Count 12 (Child Soldiers)

2097. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Kanu is individually criminally responsible under Article 6(1) of the Statute for planning the commission of conscription of children under the age of 15 into the armed group or using them to participate actively in hostilities in Bombali District and the Western Area.

(c) Responsibility under Article 6(1) for Count 13 (Enslavement)

2098. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Kanu is individually criminally responsible under Article 6(1) of the Statute for enslavement in Bombali District and the Western Area.

³⁴⁴⁰ Factual Findings, Child Soldiers, para 1263; TF1-227, Transcript 8 April 2005, pp. 95-96; 11 April 2005, pp. 2-3, 16, 21.

XII. CUMULATIVE CONVICTIONS

A. Introduction

2099. The issue of cumulative convictions arises when more than one charge stems out of what is essentially the same criminal conduct. Cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.³⁴⁴¹

2100. Where this test is not met, the Trial Chamber must decide in relation to which offence it will enter a conviction on the basis of the principle that the conviction under the more specific provision should be upheld.³⁴⁴² In other words, where a fact forms the basis of two charges under different provisions of the Statute, and where the test set out above is not met, the provision “which contains an additional materially distinct element” should be the one under which a conviction will be entered.³⁴⁴³

2101. The *Kunarac* Appeals Chamber observed that in considering cumulative convictions the Trial Chamber must balance the “very real risk of prejudice to an accused” with its obligation to describe the “full culpability of a particular accused.”³⁴⁴⁴ The Chamber went on to caution that the *Celibići* test was “deceptively simply. In practice, it is difficult to apply in a way that is conceptually coherent and promotes the interests of justice.”³⁴⁴⁵ Thus it concluded that although the question of whether the same conduct violates two distinct statutory provisions is one of law, nevertheless the Chamber must take into account “the entire situation so as to avoid a mechanical or blind application of its guiding principles.”³⁴⁴⁶

B. Submissions of the Parties

2102. The Prosecution has made the following submissions:

³⁴⁴¹ *Čelebići* Appeal Judgement, para. 412.

³⁴⁴² *Čelebići* Appeal Judgement, para. 413.

³⁴⁴³ *Čelebići* Appeal Judgement, para. 413.

³⁴⁴⁴ *Kunarac* Appeal Judgement, para. 169.

³⁴⁴⁵ *Kunarac* Appeal Judgement, para. 172.

³⁴⁴⁶ *Kunarac* Appeal Judgement, para. 174.

(i) that multiple convictions must be entered when they are admissible, because they “serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct”,³⁴⁴⁷

(ii) that multiple convictions for Crimes against Humanity (Article 2) and for War Crimes (Articles 3 and 4) are permissible as they have separate chapeau requirements;³⁴⁴⁸

(iii) that cumulative convictions on the basis of the same acts under one Article of the Statute – for example, conduct which violates at the same time the prohibition of pillage, acts of terrorism and collective punishments under Article 3 - are permissible provided that each provision has a materially distinct element;³⁴⁴⁹

2103. The Defence has made no submissions on the question of cumulative convictions.

C. Discussion

2104. The Accused Brima has been found individually criminally responsible pursuant to 6(1) of the Statute for offences committed in Bombali District and Freetown and the Western Area as charged under Count 1, Count 2, Count 3, Count 4, Count 5, Count 9, Count 10, Count 12, Count 13 and Count 14. He has also been found individually criminally responsible pursuant to Article 6(3) for offences committed by his subordinates in Bombali District and Freetown and the Western Area as charged under Count 1, Count 2, Count 3, Count 4, Count 5, Count 6, Count 9, Count 10, Count 12, Count 13 and Count 14.

2105. The Accused Kamara has been found individually criminally responsible pursuant to Article 6(1) of the Statute for offences committed in Bombali District and Freetown and the Western Area as charged under Count 3, Count 4, Count 5, Count 9, Count 10, Count 12 and Count 13. He has also been found individually criminally responsible pursuant to Article 6(3) for offences committed by his subordinates in Kono District, Bombali District, Freetown and the Western Area and Port Loko District as charged under Count 1, Count 2, Count 3, Count 4, Count 5, Count 6, Count 9, Count 10, Count 12, Count 13 and Count 14.

2106. The Accused Kanu has been found individually criminally responsible pursuant to Article 6(1) of the Statute for offences committed in Bombali District and Freetown and the Western Area as charged under Count 3, Count 4, Count 5, Count 9, Count 10, Count 12, Count 13 and Count 14.

³⁴⁴⁷ Prosecution Final Brief, para. 1921, citing *Kunarac* Appeal Judgement, para. 169.

³⁴⁴⁸ Prosecution Final Brief, para. 1923.

He has also been found individually criminally responsible pursuant to Article 6(3) for offences committed by his subordinates in Bombali District and Freetown and the Western Area as charged under Count 1, Count 2, Count 3, Count 4, Count 5, Count 6, Count 9, Count 10, Count 12, Count 13 and Count 14.

2107. Crimes against humanity constitute distinct offences from war crimes under Article 3 and 4 of the Statute as each category of crimes has distinct chapeau elements. Thus convictions are permissible under Articles 2 and 3 of the Statute of the Special Court, and/or Articles 2 and 4 of the Statute.³⁴⁵⁰ Therefore, the issue of cumulative convictions under Articles 3 and 4 does not arise in the instant case. It is therefore permissible to enter convictions based on the same conduct for charges of murder brought pursuant to Article 2(a) and 3(a), rape and outrages upon personal dignity pursuant to Article 2(g) and 3(e).

2108. The Trial Chamber considers that collective punishments and acts of terror pursuant to Articles 3(b) and 3(d) both require a specific purpose - either to terrorise or to punish. These crimes do not necessarily require evidence of violence to life, health and physical well-being of persons pursuant to Article 3(a) or Outrages upon Personal Dignity under Article 3(e). As mentioned, each of the acts under Count 1 and 2 have a material distinct element, *i.e.* the intent to terrorise or to punish collectively. Therefore, the Trial Chamber finds that it is permissible to convict an accused under Article 3(b) or 3(d), as well as the underlying crimes charged in Articles 3(a) (murder and mutilation) and Article 3(e) (outrages upon personal dignity).

2109. It is not permissible to convict both for murder and extermination under Article 2(a) and (b) based on the same conduct. The issue was settled by the Appeals Chamber in *Ntakirutimana*, which concluded that convictions for both murder and extermination, as crimes against humanity, based on the same conduct were impermissible as the crime of murder was subsumed by the crime of extermination.³⁴⁵¹ However, the Trial Chamber finds that it is permissible to convict on both counts if each count is based not on the *same* but on *distinct* conduct. Thus, one killing, or series of killings, may have been committed as part of a widespread or systematic attack against any civilian population, constituting murder under Article 2(a) of the Statute. A separate killing, or series of killings, committed with the intent to bring about the destruction of a numerically significant part of a population may be found to constitute extermination under Article 2(b) of the Statute. In the

³⁴⁴⁹ Prosecution Final Brief, para. 1924.

³⁴⁵⁰ *Kunarac* Appeals Judgement, paras 176-178; *see also Kupreškić* Appeals Judgement, para. 388, and *Jelisić* Appeals Judgement, para. 82.

³⁴⁵¹ *Ntakirutimana* Appeals Chamber, para. 542.

instant case, the Trial Chamber is satisfied that each of the Accused is individually criminally responsible for Extermination based on a distinct set of killings, and also responsible for murder as a crime against humanity based on a different set of killings.

2110. On the issue of concurrent convictions under separate modes of liability, the Appeals Chamber in *Blaskić* concluded that

in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing.³⁴⁵²

2111. The Trial Chamber finds no reason to depart from this practice. The Trial Chamber has made extensive findings on all the modes of liability in respect of the evidence that led to a finding under each count in *Chapter XI: Responsibility of the Accused*. The extent of the participation of the Accused is therefore adequately described and can be taken into consideration at the sentencing stage.

³⁴⁵² *Blaskić* Appeals Judgement, para. 91.

XIII. DISPOSITION

2112. Having considered all of the evidence and the arguments of the Parties, the Statute and the Rules, and based upon the findings as determined by the Trial Chamber in this Judgement, the Trial Chamber finds as follows:

A. The Accused Brima

2113. The Trial Chamber unanimously finds the Accused **ALEX TAMBA BRIMA GUILTY** of the following crimes pursuant to Article 6(1) of the Statute:

Count 1: Acts of Terrorism, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(d) of the Statute;

Count 2: Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(b) of the Statute;

Count 3: Extermination, a Crime against Humanity, punishable under Article 2(b) of the Statute;

Count 4: Murder, a Crime against Humanity, pursuant to Article 2(a) of the Statute;

Count 5: 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, pursuant to Article 3(a) of the Statute;

Count 9: Outrages upon personal dignity, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(e) of the Statute;

Count 10: Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute;

Count 12: Conscription of children under the age of 15 years into an armed group and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law, pursuant to Article 4(c) of the Statute;

Count 13: Enslavement, a Crime against Humanity, pursuant to Article 2(c) of the Statute; and

Count 14: Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(f) of the Statute.

2114. The Trial Chamber unanimously finds the Accused **ALEX TAMBA BRIMA GUILTY** of the following crimes pursuant to Article 6(3) of the Statute:

Count 6: Rape, a Crime against Humanity, pursuant to Article 2(g) of the Statute.

2115. The Trial Chamber unanimously finds the Accused **ALEX TAMBA BRIMA NOT GUILTY** on:

Count 11: Other inhumane acts, a Crime against Humanity, pursuant to Article 2(i) of the Statute.

2116. A **CONVICTION IS NOT ENTERED** against the Accused **ALEX TAMBA BRIMA** on:

Count 7: Sexual slavery and any other form of sexual violence, a Crime against Humanity, pursuant to Article 2(g) of the Statute; and

Count 8: Other inhumane act, a Crime against Humanity, punishable under Article 2(i) of the Statute.

B. The Accused Kamara

2117. The Trial Chamber unanimously finds the Accused **IBRAHIM BAZZY KAMARA GUILTY** of the following crimes pursuant to Article 6(1) of the Statute:

Count 3: Extermination, a Crime against Humanity, punishable under Article 2(b) of the Statute;

Count 4: Murder, a Crime against Humanity, pursuant to Article 2(a) of the Statute;

Count 5: 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, pursuant to Article 3(a) of the Statute;

Count 9: Outrages upon personal dignity, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(e) of the Statute;

Count 10: Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute;

Count 12: Conscripting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law, pursuant to Article 4(c) of the Statute; and

Count 13: Enslavement, a Crime against Humanity, pursuant to Article 2(c) of the Statute.

2118. The Trial Chamber unanimously finds the Accused **IBRAHIM BAZZY KAMARA GUILTY** of the following crimes pursuant to Article 6(3) of the Statute:

Count 1: Acts of Terrorism, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(d) of the Statute;

Count 2: Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(b) of the Statute;

Count 6: Rape, a Crime against Humanity, pursuant to Article 2(g) of the Statute; and

Count 14: Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(f) of the Statute.

2119. The Trial Chamber unanimously finds the Accused **IBRAHIM BAZZY KAMARA NOT GUILTY** on:

Count 11: Other inhumane acts, a Crime against Humanity, pursuant to Article 2(i) of the Statute.

2120. A **CONVICTION IS NOT ENTERED** against the Accused **IBRAHIM BAZZY KAMARA** on:

Count 7: Sexual slavery and any other form of sexual violence, a Crime against Humanity, pursuant to Article 2(g) of the Statute; and

Count 8: Other inhumane act, a Crime against Humanity, punishable under Article 2(i) of the Statute.

C. The Accused Kanu

2121. The Trial Chamber unanimously finds the Accused **SANTIGIE BORBOR KANU GUILTY** of the following crimes pursuant to Article 6(1) of the Statute:

Count 3: Extermination, a Crime against Humanity, punishable under Article 2(b) of the Statute;

Count 4: Murder, a Crime against Humanity, pursuant to Article 2(a) of the Statute;

Count 5: 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, pursuant to Article 3(a) of the Statute;

Count 6: Rape, a Crime against Humanity, pursuant to Article 2(g) of the Statute;

Count 9: Outrages upon personal dignity, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(e) of the Statute;

Count 10: Violence to life, health and physical or mental well-being of persons, as mutilation, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute;

Count 12: Conscripting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law, pursuant to Article 4(c) of the Statute;

Count 13: Enslavement, a Crime against Humanity, pursuant to Article 2(c) of the Statute; and

Count 14: Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(f) of the Statute.

2122. The Trial Chamber unanimously finds the Accused **SANTIGIE BORBOR KANU GUILTY** of the following crimes pursuant to Article 6(3) of the Statute:

Count 1: Acts of Terrorism, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(d) of the Statute;

Count 2: Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(b) of the Statute; and

Count 6: Rape, a Crime against Humanity, pursuant to Article 2(g) of the Statute;


2123. A **CONVICTION IS NOT ENTERED** against the Accused **SANTIGIE BORBOR KANU** on:

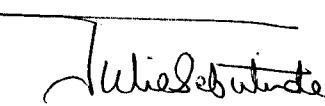
Count 7: Sexual slavery and any other form of sexual violence, a Crime against Humanity, pursuant to Article 2(g) of the Statute; and

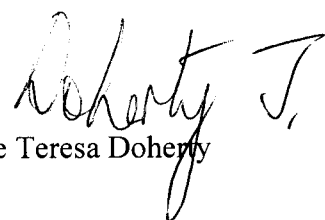
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Count 8: Other inhumane act, a Crime against Humanity, punishable under Article 2(i) of the Statute.

Dated this 20th day of June 2007, at Freetown, Sierra Leone.


Justice Richard Lussick


Justice Julia Sebutinde
Presiding Judge


Justice Teresa Doherty

Justice Teresa Doherty appends a partly dissenting opinion to the Judgement.

Justice Julia Sebutinde appends a separate concurring opinion to Judgement.



**SEPARATE CONCURRING OPINION OF THE HON. JUSTICE JULIA
SEBUTINDE APPENDED TO JUDGEMENT PURSUANT TO RULE 88 (C)**

A. INTRODUCTION

1. Let me begin by stating that I agree fully and unreservedly with the findings and disposition of the Trial Chamber in the Judgement on all Counts in the Indictment. This opinion only examines the phenomenon of “forced marriage” in the context of the Sierra Leone Conflict and its characterisation as a crime under international humanitarian law.

2. I do however, feel compelled to expound on one area in the Judgment, namely the phenomenon of “forced marriage” in the context of the Sierra Leone conflict. The Trial Chamber has, to some extent, dealt with this subject in the Chapter on Applicable Law. It is my considered view however, that given the fact that the subject of “forced marriage” as a crime committed in the context of an armed conflict is a relatively novel area that has hitherto not received much attention in the jurisprudence of the International Tribunals³⁴⁵³, it merits a deeper analysis of the evidence adduced before the Trial Chamber during the trial in order to appreciate the Trial Chamber’s characterisation of this crime as a form of Sexual Slavery as defined in Article 7(1)(g)2 of the Rome Statute. That is what I seek to do in this Separate opinion.

B. PROCEDURAL HISTORY

3. It will be recalled that in February 2004 the Prosecution in this case successfully applied for and was granted leave by Trial Chamber I to amend the Consolidated Indictment by adding a new Count 8 entitled “*the crime against humanity of other inhumane acts*” to cater for alleged acts of

³⁴⁵³ Hitherto, International Criminal Tribunals have charged that acts associated with ‘forced marriage’ under such crimes against humanity as Sexual Slavery or rape. No International Criminal Tribunal has yet recognised “forced marriage” as separate or distinct crime under International Humanitarian Law. For example in the ICTR case of the *Prosecutor vs. Muhimana, ICTR-95-IB-T* the Trial Chamber found that a witness who had been abducted and ‘forcibly married’ had in fact suffered multiple rapes. In the *Prosecutor vs. Akayesu ICTR-96-4-T* the Trial Chamber called upon the Prosecution to initiate an investigation into allegations of ‘forced marriage’ with a view to charging the crime against humanity of sexual violence, as the Prosecution had not in the Indictment. In the ICTY case of *Prosecutor vs. Kunarac, IT-96-23-T & IT-96-23/I-T*, THE Trial Chamber dealt with a situation akin to forced marriage whereby the victims comprising a number of women had been detained in a private residence and repeatedly raped by the perpetrators. The perpetrators resided with the women and guarded them to the extent that the women had no means of escape. The women also did household chores such as cooking, cleaning. The Trial Chamber did not consider the possibility of recognising ‘forced marriage’ as a distinct crime against humanity, preferring instead to convict the accused of multiple rapes.

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Forced Marriage³⁴⁵⁴. The Prosecution further sought to amend the Consolidated Indictment *inter alia*, by making “corrections and/or modifications to the other counts including the expansion of time periods, an additional location for all counts related to sexual violence crimes, and the change of spellings of certain place names.”³⁴⁵⁵ In granting its leave, Trial Chamber I observed

“In the present motion, the Prosecution is seeking our leave to amend the already existing consolidated indictment on which the proceedings are now based, in order to add one more count, and one count only, based on Forced Marriage. The question to be addressed in these circumstances is whether this additional count or offence as the case is, is new in terms of its being a complete novelty in the arsenal of all the counts that constitute the entire consolidated indictment.

Our immediate reflection on this issue that we have raised is that the count related to forced marriage which the Prosecution is seeking our leave to add to the consolidated indictment is as much sexual, indeed, a gender offence as those that were included in the initial individual indictments and that feature in the current consolidated indictment on which this application to amend is based.

We would like to say here that Forced Marriage is in fact what we would like to classify as a ‘kindred offence’ to those that exist in the indictment in the view of the commonality of the ingredients needed to prove offences of this nature [...]”³⁴⁵⁶ [emphasis added]

4. From the above quotation, it is clear that in their assessment, Trial Chamber I classified the phenomenon of “Forced Marriage” within the Sierra Leonean conflict as a sexual or gender crime akin to rape, sexual slavery or sexual violence. The Prosecution in fact went ahead and introduced the present Count 8 and related amendments in the Indictment.

5. In a subsequent decision in which the Prosecution sought leave to introduce new evidence of ‘Forced Marriages’ under the crime against humanity of “other inhumane acts” (rather than as evidence of a sexual or gender crime),³⁴⁵⁷ Trial Chamber I considered and rejected the proposition that sexual offences including ‘forced marriages’, do fall in the broad category of “other inhumane acts”.³⁴⁵⁸ Trial Chamber I found *inter alia*, that

“...the particulars embodied in the Consolidated Indictment in respect of Counts 3 and 4 cannot be validly interpreted to be of an inclusive nature and as not excluding the broad range of unlawful acts which can lead to serious physical and mental harm, especially having regard to the formula “*and any other form of sexual violence*” in Article 2.g. [of the Statute] creating a separate specific residual category of sexual violence, of the same kind as rape, sexual slavery, enforced prostitution and forced pregnancy.

³⁴⁵⁴ *Prosecutor v. Alex Tamba Brima, et al.*, Case No. SCSL-04-16-PT, Trial Chamber Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, para.58.

³⁴⁵⁵ *Ibid.* para.8

³⁴⁵⁶ *Ibid.* paras.50-51

³⁴⁵⁷ In an earlier motion, Trial Chamber I had denied a Prosecution leave to amend the indictment to include sex crimes. In the absence of a count embodying crimes of a sexual nature, the Prosecution sought to lead evidence of “forced marriages” under “other inhumane acts”.

³⁴⁵⁸ *Prosecutor v. Sam Hinga Norman et. al.*, Case No. SCSL-04-14-PT, Trial Chamber, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005

In light of the separate and distinct residual category of sexual offences under Article 2.g., it is impermissible to allege acts of sexual violence (other than rape, sexual slavery, enforced prostitution and forced pregnancy) under Article 2.i. since “other inhumane acts”, even if residual, must logically be restrictively interpreted as covering only those acts of a non-sexual nature amounting to an affront to human dignity.

The clear legislative intent behind the statutory formula “*any other form of sexual violence*” in Article 2.g. is the creation of a category of offences of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged as “other inhumane acts” offends against the rule against multiplicity and uncertainty....³⁴⁵⁹

6. In my Separate Concurring Opinion on the Trial Chamber’s Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98³⁴⁶⁰, I did observe that-

“I am strongly persuaded by the above decisions of Trial Chamber I in holding that view that the acts of “forced marriage” that occurred within the context of the Sierra Leonean conflict, are in fact a form of sexual violence pursuant to Article 2.g. of the Statute and could equally qualify as a form of sexual slavery pursuant to Article 2.g. of the Statute. This is because the sexual element inherent in these acts tends to dominate the other elements therein such as forced labour and other forced conjugal duties. In an Indictment such as the present one, that charges specific sexual crimes including rape, sexual slavery and other forms of sexual violence pursuant to Article 2.g. of the Statute, I am not persuaded that acts of “forced marriage” which are clearly sexual in nature, can be properly charged under the general regime of “other inhumane acts” pursuant to Article 2.i. of the Statute. It is my considered opinion that given the evidence on record, all alleged sex-related acts covered by the Indictment can be properly accommodated under Counts 6, 7, and 9 of the Indictment. In my opinion, any acts or offences that are of a residual, non-sexual nature and that could arguably be contained under the general regime of “other inhumane acts” do not belong under the part of the Indictment entitled “COUNTS 6-9: SEXUAL VIOLENCE”. They properly belong under Count 11. Accordingly, I find that Count 8 is redundant and would recommend that it be struck out in favour of retaining only one count of “other inhumane acts” under Count 11.”

7. However, at that stage of the trial, I did not have the benefit of considering all the evidence adduced during this trial relating to “forced marriage” as only the Prosecution had closed its case and the Defence had not opened theirs. My opinion was therefore based on a cursory consideration of the Prosecution evidence as it then stood on the record. The Trial Chamber has since heard extensive evidence including that of Expert witnesses on the crime that commonly came to be known in Sierra Leone as “forced marriage” and its victims as “bush wives” or “rebel wives”.

C. EXPERT OPINION ON “FORCED MARRIAGE”

1. Drawing a distinction between early or arranged marriages of minors in peacetime and ‘forced marriage’ during armed conflict:

8. Both the Prosecution and the Defence called expert witnesses who tendered in evidence reports that were intended to assist the Trial Chamber in its understanding and characterisation of

³⁴⁵⁹ *Ibid.*, para 19 (iii).

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the phenomenon of “forced marriage” in the context of the Sierra Leone conflict. Mrs. Zainab Hawa Bangura was the Prosecution Expert. Her Report was admitted in evidence as Prosecution Exhibit P 32³⁴⁶¹. Dr. Dorte Thorsen was the Expert called jointly by the Brima Defence, Kamara Defence and Kanu Defence. Her Report was admitted as Defence Exhibit D 38.

9. I find Dr. Thorsen’s report and evidence of little relevance to the issue at hand given the fact that she declined to write on the topic requested of her by the Defence, and instead chose to write on a topic unrelated to the phenomenon of “forced marriage” within the Sierra Leone Conflict. I do however find her reasons for declining to undertake the research in that form quite instructive.³⁴⁶² As an expert in the field of traditional customary or arranged marriages in a sociological context, she makes a clear distinction between the notion of customary or “forced marriages” as understood from a rights-based perspective on the one hand, and the coercion of women into being ‘bush wives’ during the civil war in Sierra Leone, on the other. She was not willing to make straightforward linkages or comparisons between the two because in her opinion it would be inappropriate and misleading to do so.

10. In this regard I fully agree with Dr. Thorsen that “forced marriages” or arranged or inheritance marriages, from a human rights perspective as applied in the framework of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), are not to be equated to or confused with a situation during armed conflict, where combatants routinely abduct women and force them to become ‘wives’, essentially obliging them to cook, clean, wash clothes and have sex against their will (and often as a consequence to bear children) all of which are stereotyped, gender-specific forms of labour. The latter relationships, whereby no marriage transactions have been made or ceremonies held, mimic peacetime situations in which forced marriage and expectation of free female labour are common practice. This stereotyped perception of women persists in war-time and puts such women at great risk of abduction and violence.

11. In contrast, I do find the Report and testimony of Mrs. Zainab Bangura, the Prosecution Expert relevant and very instructive on the subject of forced “marriage” within the Sierra Leone

³⁴⁶⁰ *Prosecutor v. Brima et al*, SCSL-04-16-T, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde on the Trial Chamber’s Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, para 14

³⁴⁶¹ “Expert Report on the phenomenon of “Forced Marriage” in the context of the Sierra Leone Conflict, and more specially, in the context of the trials against the RUF and AFRC Accused only”: May 2005, Prosecution Exhibit P 32.

³⁴⁶² Dr. Thorsen stated that she was requested to “carry out a research on the concept of forced marriage in the West African region, the purpose of which was to outline the history and practice of forced marriage in the region and possibly also the way in which this practice is embedded in local culture and practice”. She explains in the introduction to her report that she declined to carry out the research in that form because she was “concerned with the long-term consequences of making straightforward links between complex social practices of arranging marriages between kin groups, international conceptualisations of ‘forced marriages’ and the coercion of women into being bush wives during the civil war in Sierra Leone.”

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Conflict³⁴⁶³. Like Dr. Thorsen, Mrs Bangura also draws a clear distinction between the traditional or customary practice of early or arranged marriages where young girls or minors are forced by their parents or family into early marriages in times of peace, on the one hand; and the phenomenon of forced “marriage” during the Sierra Leone conflict, on the other. She observes that during the whole process of early or arranged marriage in times of peace, the consent and participation of both parents and families is paramount and the union is marked by religious or traditional ceremonies. She warns that this type of union is not to be equated to or confused with “forced marriage” during armed conflict. She writes in her Report:

“The fundamental difference between an early or arranged marriage in times of peace and a forced ‘marriage’ during the war is that family members were not involved in the arrangement of the latter so-called ‘marriage’, no official ceremony of any form took place and nor was the consent of the parents sought. Instead, girls were forcefully abducted from their homes, schools or hiding places and taken to the bush where they were informed that they had become ‘wives’. Moreover, rebel ‘husbands’ did not show their ‘bush wives’ respect. They were constantly flogged, physically and psychologically abused and their husbands always had the final say. Because it was a marriage without consent and no intermediaries were present, the ‘wives’ had no protection or family support they could count on. Some of these ‘bush wives’ actually lost their parents who were trying to prevent their abduction. Forced marriage during the conflict had no security. The ‘husband’ could abandon his ‘wife’ whenever he wanted to and get a new one whenever he felt like it. The ‘wives’ were led to believe that their ‘husbands’ had the right to kill them, without fear of any repercussions. There were no formal or informal institutions available to address the brutality of the ‘husbands’. The ‘bush wife’ was at the mercy of her rebel husband and had no justice neither could she seek redress. Most of their children did not go to school.”

12. From the opinion of both Experts, it is clear that in understanding and characterising the phenomenon of ‘forced marriage’ in the Sierra Leone conflict, a clear distinction should be drawn between traditional or religious marital unions involving minors (early or arranged marriages), during times of peace; and the forceful abduction and holding in captivity of women and girls (‘bush wives’) against their will, for purposes of sexual gratification of their ‘bush husbands’ and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties). In my view, while the former is proscribed as a violation of human rights under international human rights instruments or treaties like CEDAW, it is not recognised as a crime in International Humanitarian law. The latter conduct on the other hand, is clearly criminal in nature and is liable to attract prosecution.

³⁴⁶³ Bangura’s primary sources of information included in-depth interviews of over 100 former victims of ‘forced marriage’ and commonly called ‘bush wives’ from locations mentioned in the Indictment as crime bases, including the Districts of Kailahun, Kenema Kono, and Freetown; and interviews of ex-combatants, parents of ‘bush wives’ as well as local traditional and religious leaders. See also Transcript, 3 October 2005, pp 35-37.

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2. Characterisation of 'forced marriage' during armed conflict as a crime under International Humanitarian law:

13. In order to assist the Trial Chamber's understanding and characterisation of 'forced marriage' in the Sierra Leone conflict as a crime, Mrs. Bangura described the relationship between the abductor or 'bush husband' and the abductee or 'bush wife' and the expectations that flowed from that relationship in the following terms:

"The conflict in Sierra Leone affected women directly in diverse ways. In addition to being displaced, raped or used as secondary combatants, women and girls were also used as spies, sex slaves, carriers of looted goods and smuggled weapons. Women suffered multiple traumas during the war. They were physically and psychologically abused. However, the most devastating effect on women of the war was the phenomenon called 'bush wife', rebel wife or jungle wife. This was a phenomenon adopted by rebels whereby young girls or women were captured or abducted and forcibly taken as wives [...] The use of the term 'wife' by the perpetrator was deliberate and strategic. The word 'wife' demonstrated a rebel's control over a woman. His psychological manipulations of her feelings rendered her unable to deny him his wishes. 'Wife' showed that the woman belonged to a man and could not be touched by another. By calling a woman 'wife', the man or 'husband' openly staked his claim and she was not allowed to have sex with any other person. If she did, she would be deemed unfaithful and the penalty was severe beating or death. Similarly if the 'wife' were raped by another rebel, his act was punishable by death."

14. Regarding the role expected of a 'bush wife' Mrs. Bangura writes:

"'Bush wives' were expected to carry out all the functions of a wife and more. A 'bush wife' carried her 'husband's' possessions on her head and trekked across the countryside with him; she was expected to gratify her 'husband's' sexual wishes whenever he so desired without question; she cooked for him when food was available, did his laundry and generally protected his possessions in his absence; she was expected to show undying loyalty to her husband for his protection and reward him with 'love and affection'; she was not expected to attempt to escape as this was deemed disloyal. Punishment for disloyalty was always severe and so, women were led to believe, in most cases would be met with death."

15. On the underlying element of sexual abuse as an inherent component of forced 'marriage' Mrs. Bangura stated that all the victims or 'bush wives' interviewed, without exception, admitted to having been repeatedly raped or sexually abused or molested by their 'rebel husbands' while in captivity. She writes:

"'Bush wives' were constantly sexually abused, physically battered during and after pregnancies, and psychologically terrorised by their husbands, who thereby demonstrated their control over their wives. Physically, most of these girls experienced miscarriages, and received no medical attention at the time. They bled excessively because they lived in some of the remotest parts of the country with little or no access to medical services. Some now experience diverse medical problems such as severe stomach pains which they are reluctant to discuss; some have had their uterus removed; menstrual cycles are irregular; some were infected with sexually transmitted diseases and others tested HIV positive."

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D. CONCLUSION

16. From the above excerpts of the Report, as well as the oral evidence of numerous Prosecution witnesses that testified before the Trial Chamber, I am of the firm view that the phenomenon of forced ‘marriage’ during the Sierra Leone conflict bears all the hallmarks or characteristics of the crime against humanity of Sexual Slavery. The general and specific elements of the crime against humanity of Sexual Slavery are satisfied in that forced ‘marriage’ invariably occurred as part of a widespread or systematic attack on the civilian population in Sierra Leone. In addition-

- (i) The ‘bush husband’ exercised any or all the powers attaching to the right of ownership over his ‘bush wife’ whereby not only was she was held under captivity and not at liberty to leave but, in addition, she was forced to render gender-specific forms of labour (conjugal duties) including cooking, cleaning, washing clothes and carrying loads for him, for no genuine reward.
- (ii) Invariably, the ‘bush husband’ regularly subjected his ‘bush wife’ to sexual intercourse, often without her genuine consent and to the exclusion of all other persons;
- (iii) The ‘bush husband’ abducted and forcibly kept his ‘bush wife’ in captivity and sexual servitude with the intention of holding her indefinitely in that state or in the reasonable knowledge that it was likely to occur.³⁴⁶⁴

17. Neither the Prosecution nor the Defence in their respective submissions draw the same conclusions from Mrs. Bangura’s Report³⁴⁶⁵. Interestingly, the Prosecution who called Mrs Bangura as its Expert witness on the subject did not once, refer to her Report or testimony in support of its case, insisting instead, that the crime of ‘forced marriage’ is subsumed under the crime against humanity of “other inhumane act”, a view the Trial Chamber has dismissed.

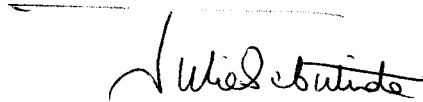
18. I would conclude this Separate Concurring Opinion by reiterating that I fully endorse the Trial Chamber’s finding that the crime of “forced marriage” is completely subsumed in the crime against humanity of Sexual Slavery and that there is no lacuna in the law which would necessitate a separate crime of “forced marriage” as an “other inhumane act”. I further endorse the Trial Chamber’s decision, in the interests of justice, to consider the overwhelming body of evidence of sexual slavery under Count 9 (Outrages upon Personal Dignity). Although it would ideally have been more appropriate to consider the evidence of forced marriage under a count of Sexual Slavery,

³⁴⁶⁴ See the elements of the crime of Sexual Slavery as stated by the Trial Chamber in the Applicable Law Chapter of the Judgement.

³⁴⁶⁵ The Parties respective submissions on ‘forced marriage’ are outlined in the Applicable Law Chapter of the Judgement.

that option does not arise in this case as Count 7 of the Indictment was dismissed as bad for duplicity. To throw out the overwhelming body of evidence of 'forced marriage' as a consequence of the Prosecution's procedural error would, in my opinion, be doing a great injustice to the hundreds of victims of 'forced marriage' who look to this Court for redress.

Dated this 20th June 2007, at Freetown Sierra Leone



Justice Julia Sebutinde



~~PARTLY DISSENTING OPINION OF JUSTICE DOHERTY ON COUNT 7
(SEXUAL SLAVERY) AND COUNT 8 ('FORCED MARRIAGES')~~

1. I agree with my learned colleagues on the findings of the Judgement on Counts 1 to 6 and 9 to 14. However, my concerns about their findings on Counts 7 and 8 compels me to write this dissenting opinion on those counts.

A. COUNT 7

2. The majority rejects Count 7 as bad for duplicity and my learned colleagues provide compelling arguments for such a conclusion. However, in my respectful opinion, their reasons are formalistic and disregard the fundamental issue, which is whether the right of the Accused to be informed promptly and in detail about the nature and the cause of the charges against them has been violated.³⁴⁶⁶

3. I share the majority's view that the second limb of Count 7 viz "other forms of sexual violence" was not particularised by the Prosecution. I do not, with respect, agree that if Count 7 as pleaded is duplicitous, the Trial Chamber must dismiss it in its entirety.

4. The history of the challenges to the Indictments is detailed in Chapter II of this Judgement and I do not need to repeat it here.³⁴⁶⁷

5. In their Final Briefs, the Accused Kamara and Brima submit, for the first time and in almost identical terms, that Count 7 offends the rule against duplicity. Counsel rely on the decision of the *Prosecutor v. Karemera* to support the general principle that the allegations within an indictment are defective if they are not sufficiently clear and precise to enable an accused to fully understand the nature and the cause of the charges against him.³⁴⁶⁸ Counsel further cite the Separate Opinion of Honourable Justice Sebutinde in the Rule 98 Decision, arguing that Count 7 in its current state has made it difficult for the Accused Kamara and Brima to "fully understand the nature and the cause of the charges against him".³⁴⁶⁹

³⁴⁶⁶ This right is found in Article 17 of the Statute of the Special Court.

³⁴⁶⁷ See *Alleged Defects in the Form of the Indictment, supra*.

³⁴⁶⁸ *Prosecutor v. Karemera* ICTR-98-44-T Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment.

³⁴⁶⁹ Brima Final Brief para. 149; Kamara Final Brief para. 96.

6. ~~Despite this submission, neither Counsel made any applications relating to Count 7 before opening the Defence case. Instead the Defence presented evidence on all counts, including Count 7.~~

7. The Prosecution did not deal with the issue of duplicity in Count 7 of its Final Brief but orally addressed the Trial Chamber in Closing Arguments, stating “[...] we say, barring exceptional circumstances, and the Defence has not demonstrated any, and barring a showing of actual prejudice to the Defence, and, we would add, barring and showing that this has been raised at the earliest opportunity, we would submit that it is far too late to raise this at this stage of the proceedings [...] but as Judge Sebutinde pointed out in paragraph 9 of her Separate Opinion in the Rule 98 Decision, no prejudice to the Defence has been established arising out of this”.³⁴⁷⁰

8. The rule against duplicity is one of elementary fairness. The accused must know the nature of the case against him. Hence the rule evolved that a count must allege one offence and a count alleging more than one offence should be quashed before arraignment. Objections on the ground of duplicity are normally made prior to the indictment being put but can be made in the course of the hearing. As stated in Blackstone’s on Criminal Practice, “rejection of a Defence motion to quash a count bad for duplicity is a good ground of appeal, although it may be open to the Court of Appeal to apply the proviso and dismiss the appeal if there has been no miscarriage of justice”³⁴⁷¹

9. The learned author further noted “that although the objection can be taken at a later stage, the Court of the Appeal has disapproved of the Defence postponing the application to quash for purely tactical reasons”.³⁴⁷²

10. Whilst I do have no doubt of the fundamental nature of the accused’s right to be informed of the nature and cause of the charge against him, the defence is under a corresponding duty to raise the issue prior to the commencement of trial or at the earliest opportunity thereafter. I do not consider it to be in the interests of justice to allow the accused to invoke this right to quash an indictment after the case has closed, without showing that he was materially prejudiced. This is particularly so in cases such as the present, when the Accused were not only silent on the issue throughout the trial, but proceeded to adduce evidence and defended themselves on the charge.

³⁴⁷⁰ Transcript, 7 December 2006 p. 61.

³⁴⁷¹ Blackstone’s Criminal Practice, 2002 Edition, para D10.16.

³⁴⁷² Blackstone’s Criminal Practice, para D10.23.

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11. ~~I am accordingly obliged to disagree with my learned colleagues, who have held that justice~~ in this case is met by dismissing Count 7 in its entirety. As stated by the Trial Chamber in *Prosecutor v. Kupreškić*, “[...] the efficient discharge of the Tribunal’s functions in the interest of justice warrants the conclusion that any possible errors of the Prosecution should not stultify criminal proceedings whenever a case nevertheless appears to have been made by the Prosecution and its possible flaws in the formulation of the charge are not such as to impair or curtail the rights of the Defence”.³⁴⁷³

12. On the facts and submissions before me, I do not consider that there has been a miscarriage of justice. I would not have dismissed the count but would have considered evidence relating to sexual slavery only.

13. I regret that the very short time available has precluded me from more fully addressing this issue.

B. Count 8

14. I dissent on the majority decision on Count 8, other inhumane acts, particularised as forced marriage. The majority, after considered deliberations, held that the evidence pleaded by the Prosecution is completely subsumed by the crime of sexual slavery and accordingly dismissed Count 8 for redundancy. Having considered the evidence, I respectfully disagree.

15. The majority, in adopting this approach, has consequently declined to determine whether ‘forced marriage’ is of sufficient gravity to meet the requirements of an ‘other inhumane act’ as per Article 2(i) of the Statute.

1. Submissions of the Parties

16. In its Final Brief, the Prosecution undertook a comprehensive review of the evidence which in its view proves that the phenomenon of forced marriage is an ‘other inhumane act.’ In particular, the Prosecution considers the factual elements of forced marriage to include sexual slavery in a marital type union; the imposition of conjugal status by coercion or threat; forced labour; reduction to a servile status; the practical impossibility of seeking familial assistance or attempting escape and the widespread discrimination against bush wives which fuels prejudice against them in the community.

³⁴⁷³ *Kupreškić* Trial Judgement, para 741.



17. The Prosecution submits that the Trial Chamber “ought to look beyond the label and examine the substance of the relationships between the “wives” and their captors”,³⁴⁷⁴ namely the coercive environment in which these women were placed, which made genuine consent impossible and which exposed the women to severe mental suffering.³⁴⁷⁵ The Prosecution submit that the crime of forced marriage as an other inhumane act “consists of words or other conduct intended to confer a status of marriage by 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”.³⁴⁷⁶

18. The Kamara Defence submits that Count 8 is “redundant, defective and violates against [sic] the rule of multiplicity of counts [...]”³⁴⁷⁷ or alternatively, on a review of the evidence, that “Count 8 lacks evidential merit and should not be sustained even from a factual notion”.³⁴⁷⁸

19. The Brima Defence submits that no evidence was adduced to show that the Accused Brima was individually responsible for the crimes charged under Counts 6-9 or bears the greatest responsibility for those crimes. The Brima Defence also appear to suggest that the allegations relating to Count 8 should be dealt with under Count 11.³⁴⁷⁹

20. The Kanu Defence submit that forcing a woman to enter a marital type relationship is not of ‘a gravity similar to any other act referred to in Article 2(a) to (h) of the Statute.’ In support of this submission, the Kanu Defence refer to “the more nuanced and complicated relation” between ‘husband’ and ‘wife’ discussed by Defence Expert Dr. Thorsen.³⁴⁸⁰ The Kanu Defence question the expertise of the Prosecution Expert and submit that her findings are flawed and should not be given any weight.³⁴⁸¹ The Kanu Defence, after reviewing some examples of witness testimony, submit that no conviction can be entered for Count 7 and 8.

21. The Trial Chamber adopted the following elements of the crime against humanity of “other inhumane acts” as charged under Count 11, namely that:

³⁴⁷⁴ Prosecution Final Brief, para. 1876.

³⁴⁷⁵ Prosecution Final Brief, paras 1876-1888.

³⁴⁷⁶ Prosecution Final Brief, paras 1009-1012.

³⁴⁷⁷ Kamara Final Brief, para. 241.

³⁴⁷⁸ Kamara Final Brief para. 244.

³⁴⁷⁹ Brima Final Brief, paras 150-152.

³⁴⁸⁰ Exhibit D-38, Dr. Dorte Thorsen, “Expert Report on Forced Marriages” [hereinafter “Thorsen Report”].

³⁴⁸¹ Kanu Final Brief, paras 48, 50.

- (a) ~~The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;~~
- (b) The act was of a gravity similar to the acts referred to in Article 2(a) to (h) of the Statute;
- (c) The perpetrator was aware of the factual circumstances that established the character or gravity of the act;
- (d) The act was committed as part of a widespread or systematic attack directed against a civilian population; and
- (e) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.³⁴⁸²

2. Expert Evidence

22. Both the Prosecution and Defence called expert evidence, tendering reports by Mrs. Zainab Bangura and Ms Dorte Thorsen respectively.³⁴⁸³

23. Mrs. Bangura in her report examined the traditional patterns of marriage in Sierra Leone, concluding that “traditionally in Sierra Leone, young ladies have been forced into early marriages by their parents. They have had no say in accepting or rejecting such marriages which were mostly arranged. Various reasons have underlain this practice”.³⁴⁸⁴

24. She notes that such early or arranged marriages are no longer common as girls have become more aware of their options and Islam, the dominant religion amongst the majority of the illiterate population, preaches against forced marriages. Increasingly, young men and women marry a person of their choice, particularly in urban areas.

25. Dr. Thorsen declined to undertake research on the concept of forced marriage in the West African region. The Defence expert did not interview any women who had been subject to a forced marriage during the period of the Indictment or any person who had undergone a traditional arranged marriage in Sierra Leone, but reviewed other research and writings about both traditional and forced marriages in Sierra Leone. Her report shows that girls and young women are commonly

³⁴⁸² Rule 98 Decision, paras 112, 174.

³⁴⁸³ Exhibit P-32, Mrs. Zainab Bangura, “Expert Report on the Phenomenon of “Forced Marriage” 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” [hereinafter “Bangura Report”]; exhibit D-38, Thorsen Report.

³⁴⁸⁴ Exhibit P-32, CMS p. 15266.

coerced into arranged marriage by the bride and groom's kin and "seniors"³⁴⁸⁵ The practice is not universal and many men and women marry a person of their own choice.

26. The experts, in both their written and oral evidence, stressed that arranged marriages entail the involvement and agreement of the families and seniors of the prospective bride and groom, and in particular the approval of the family of the female spouse, as well as the fulfilment of certain ceremonies and rituals relating to the marriage.

27. The Prosecution Expert had interviewed women and girls who had been "married" to combatants in the course of the conflict. The Prosecution Expert found that all the girls and women interviewed for the report had been abducted and informed by their abductors that they had become 'wives'. Unsurprisingly, in such circumstances, the woman or girl's family was not involved in the arrangement and the consent of her parents or guardians was not sought.

28. No official ceremony of any kind took place.

29. Women and girls who were parties to these marriages became known as "bush wives" or "rebel wives". The status of bush wife or rebel wife meant that the girl 'belonged' to one person and was not required to have sex with different rebels. Forced marriage became a means of survival for most girls in the bush. 'Bush wives' were spared gang rapes, were ensured regular meals and were protected by their 'husbands'. However, their situation was precarious. When the 'husband' decided to take a second 'bush wife', the first one was rejected and she no longer enjoyed his protection.³⁴⁸⁶

30. The Prosecution Expert Report states that many 'bush wives' became pregnant and were forced to give birth and rear children to the men that had taken them by force.³⁴⁸⁷ Miscarriages were common and medical attention limited or unavailable. Some women were infected by sexually transmitted diseases or became HIV positive.

31. A 'bush wife' was obliged to work for her 'husband', carrying his possessions on her head for long distances across the countryside, cooking and doing his laundry and generally minding his

³⁴⁸⁵ The expert declined "founded on a deep concern with the longer-term consequences of making straightforward links between complex social practices of arranging marriages between kin groups, international conceptualisations of "forced marriages", and the coercion of women into being "bush wives" during the civil war in Sierra Leone" and because "I am worried that the requested research with its focus on "forced marriage" in West Africa a general view on rural population as backwards [...] this is not a view I would want to support": Exhibit D. 38, CMS p.18861.

³⁴⁸⁶ Exhibit P-32, CMS p. 15271. This is also recorded in exhibit P-53, Human Rights Watch Report, "We'll Kill you if you Cry, Sexual Violence in the Sierra Leone Conflict" [hereinafter "HRW Report"].

³⁴⁸⁷ Exhibit P-53, HRW Report, CMS p. 15753.

possessions in his absence. The 'wife' was expected to gratify his sexual wishes whenever he so desired without question.

32. In return for his protection, a 'bush wife' was expected to show undying loyalty to her 'husband' and reward him with 'love' and affection. Any attempt to escape was deemed disloyal. Punishment for disloyalty was always severe and in most cases would be met by death, or so women were led to believe.³⁴⁸⁸

33. Most of the "bush wives" interviewed by the Prosecution expert experienced long-term stigmatisation and were rejected by their families and/or communities. They were often unable to return to their school or community for fear of reprisals, due to a widespread belief that any person who lives with a rebel leader for more than a day becomes tainted and acquires 'rebel behaviour'.

34. I note the expert opinion and the evidence that the phenomenon of forced marriage was widespread throughout Sierra Leone in the period between 14 February 1998 and 28 February 1999.

35. The Defence expert comprehensively reviewed the rights and duties arising out of traditional arranged marriages and the rights, duties and status involved in such marriage.

36. Having considered the description of traditional marriage in parts of West Africa given by the Defence expert and the evidence of both the Prosecution expert and the witnesses, I am of the view that the abduction of girls and their coercion into marital unions, as described by the Prosecution expert and by witnesses, is not the same nor comparable to arranged or traditional marriages. In particular the consent of the girl and/or her parents are not sought, there is no involvement of the family of either "spouse" and there is no ceremony or ritual fulfilled. Hence I do not agree with the Kanu Defence submission that the phenomenon of "bush wives" is a replication of customary marriage³⁴⁸⁹ On the evidence of traditional marriages described by both experts, I find the phenomenon of forced marriage has little or no similarity to traditional marriage.

3. Witness Evidence

37. Witnesses were called by both the Prosecution and Defence, who gave evidence of being abducted and forced into marriage. Given the detailed recount of their testimony in the majority Judgement,³⁴⁹⁰ I will give only a brief synopsis of particular witnesses.

³⁴⁸⁸ Exhibit P-53, HRW Report, CMS p. 14492.

³⁴⁸⁹ Kanu Final Brief, para 55.

³⁴⁹⁰ See Factual Findings, Outrages on Personal Dignity, *supra*.

38. Witness TF1-209 was repeatedly raped in Koinadugu Town over a period of three months by a member of the AFRC named 'Jabie'. 'Jabie' forced her to work for him, namely: cooking and laundering; and made her into his "wife."³⁴⁹¹

39. Witnesses TF1-334, and TF1-033, gave evidence that women captured in Bombali District were brought to Camp Rosos and subjected to sexual slavery by members of the AFRC. The captured women were distributed to the members of the AFRC to be their "wives" and were detained with the troops until the AFRC invaded Freetown. The evidence of the witnesses show that the members of the AFRC made the captured women into their "wives".

40. Witness TF1-023 gave evidence of being abducted at gun-point during the AFRC invasion of Freetown in 1999. The witness was forcibly abducted, given against her will to a Colonel as his "wife", she was raped by him and was detained and forced to move with the troops.

41. I note that in evidence in chief, witness TF1-023 stated that she was not forced to do "anything". She clarified on cross-examination that she was not forced to do any work; she was not forced to cook or clean, for example,³⁴⁹² and other people respected her because of her position of "wife" to a commander. The witness testified that "people of lower ranks" deferentially called her "De Mammy" because of the status of Colonel.³⁴⁹³ Whilst the status of "wife" conferred upon the Witness is a relative benefit as compared to other women who may have been forcibly married to persons of lower ranks, in my opinion this in no way diminishes the seriousness of the acts committed against the witness.

42. Witness TF1-094 gave evidence that she was abducted from her village by 'Andrew' who detained her and forced her to be his 'wife.' The witness stated that when she became pregnant, 'Andrew' told her not to abort the pregnancy and offered to marry her. I agree with the Prosecution that this indicates that they were not legally married, and I would have found that this has no impact on the proof of the crime of forced marriage which is concerned with the mental and physical trauma of being forced unwillingly into a marital arrangement, the stigma associated with being labelled a rebel 'wife' and the corresponding rejection by the community.

43. Prosecution witness TF1-085 was forcibly abducted and taken as the 'wife' of 'Colonel Z' in Port Loko District in the early months of 1999. The witness became pregnant and miscarried twice as a result of the rapes. In Masiaka, 'Colonel Z' "married" the witness in a ceremony,

³⁴⁹¹ TF1-209, Transcript 7 July 2006, p. 38.

³⁴⁹² TF1-023, Transcript 9 March 2005, p. 57; Transcript 11 November 2005, p. 13.

³⁴⁹³ TF1-023, Transcript 9 March 2005, pp. 57-58.

although I consider that given the environment of coercion, there could be no valid consent on the part of the witness and therefore, this "marriage" could not have been legal. The witness was not forced to do any work for 'Colonel Z', but she was detained against her will for several months and punished and threatened with death by him when she tried to escape.

44. Prosecution witness TF1-282 gave evidence that she was captured and brought to the troops then forced into marriage by a rebel whose name was given in closed session [hereinafter "the named rebel"] in early 1999 in Port Loko District. The named rebel made the witness into his "wife". In Masiaka, the named rebel "married" the witness in a ceremony, although I consider that given the environment of coercion, there could be no valid consent on the part of the Witness and therefore, this "marriage" could not have been legal. The witness was not forced to do any work for the named rebel, but she was detained against her will for several months and punished and threatened with death by the named rebel when she tried to escape.

45. I have also taken into account the experts' testimonies that some of the victims may remain in the forced marriage after the war for various reasons including inability to find an alternative life style, an obligation to rear the children born of the forced marriage, rejection by their family or community or acceptance of their lot. However, I am of the opinion that a decision to remain in the forced marriage or its transformation into a consensual situation does not retroactively negate the original criminality of the act.

46. The evidence shows 'forced marriage' in the context of the armed conflict of Sierra Leone 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 moved through the various Districts. The girls and women, without their consent, were taken as 'wives' by individual rebels.³⁴⁹⁴ Some girls and women forced into marriage benefited from their 'marriage' insofar as their ownership by a particular rebel may have offered them some protection from rape and other forms of abuse by the other rebels. However, given the overwhelming environment of coercion, I consider this to be a relative benefit or a means of survival, which cannot be understood as indicative of consent or the exercise of autonomous power within the relationship by the victims and which in no way diminishes the severity of the acts.³⁴⁹⁵

³⁴⁹⁴ See Exhibit P-32, Bangura Report, pp. 13,15.

³⁴⁹⁵ Exhibit D-38, Thorsen Report, pp. 16- 17.

47. ~~Women and girls subjected to 'forced marriage' are often very young, and thus particularly vulnerable. Their vulnerability is heightened by their removal from their families and placement in a context of physical and sexual violence.~~³⁴⁹⁶

48. Serious psychological and moral injury follows 'forced marriage'. Women and girls are forced to associate with and in some cases live together with men whom they may fear or despise. Further, the label 'wife' may stigmatise the victims and lead to their rejection by their families and community, negatively impacting their ability to reintegrate into society and thereby prolonging their mental trauma.

49. On the evidence I find that the intention of the "husband" was to oblige the victim to work and care for him and his property, to fulfil his sexual needs, remain faithful and loyal to him and to bear children if the "wife" became pregnant. In return, he would protect the "wife" from rape by other men, give her food when food was available and, depending on his status, confer a corresponding status upon the wife. In effect, these are rights and obligations of the type referred to by the Defence expert as being involved in traditional marriages but in there is no agreement of the family or kin of the "wife" and the status is forced by violence or coercion upon the female partner.

50. I would therefore distinguish the phenomenon from sexual slavery. The evidence of witnesses shows that victims had no protection from rape and were available to any rebel but were not stigmatised as "rebel wives" or "bush wives".

51. Additionally, I am satisfied on the basis of the testimony of the Prosecution expert witness that the use of the term 'wife' is indicative of forced marital status which had lasting and serious impacts on the victims. I find the label of 'wife' to a rebel caused mental trauma, stigmatised the victims and negatively impacted their ability to reintegrate into their communities.³⁴⁹⁷ I would therefore have found that the *actus reus* and *mens rea* of an Other Inhumane Act, Forced Marriage, are satisfied with regards to the foregoing evidence.

52. I reiterate that the conduct contemplated as "forced marriage" does not necessarily involve elements of physical violence such as abduction, enslavement or rape, although the presence of these elements may go to proof of the lack of consent of the victim. The crime is concerned

³⁴⁹⁶ Exhibit P-32, Bangura Report, p. 13.

³⁴⁹⁷ Exhibit P-32, Bangura Report, pp. 13, 16-20.

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~~primarily with the mental and moral suffering of the victim. As stated by the Trial Chamber in Akayesu:~~

An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.³⁴⁹⁸

53. The crucial element of ‘forced marriage’ is the imposition, by threat or physical force arising from the perpetrator’s words or other conduct, of a forced conjugal association by the perpetrator over the victim.

54. As set out in the majority Judgement, the crime of ‘other inhumane acts’ exists as a residual category so that the Statute’s application is not unduly limited with regard to crimes against humanity.³⁴⁹⁹ When presented with pleadings which suggest that certain conduct falls within this category, the fundamental question which falls to the Trial Chamber is whether such conduct inflicts great suffering, or serious injury to body or to mental or physical health, and is of a gravity similar to the acts referred to in Article 2(a) to (h) of the Statute.

55. In assessing the seriousness of an act or omission the factual circumstances must be taken into account. The assessment includes the nature of the act or omission which forms the factual basis of the charges, the context in which it occurred, the personal circumstances of the victim including sex, age, and health as well as the mental, physical and moral effect upon the victim.³⁵⁰⁰

56. As the suffering of the alleged victim is inherently subjective, the personal circumstances of the victim must include the cultural environment in which the act or omission took place and in which the effects of the act are felt.

57. I am satisfied on the evidence that the conduct considered as ‘forced marriage’ results in serious harm to the mental and physical health of the victim and meets this threshold.

4. Forced Marriages as a Crime against Humanity

58. Forced marriage as a crime against humanity has not been specified in any treaty provision nor recognised as a separate crime by the other International Tribunals. Rule 72bis of the Rules of

³⁴⁹⁸ Akayesu Trial Judgement, para. 581.

³⁴⁹⁹ See, for example, Stakić Appeals Judgement, paras 313-316.

³⁵⁰⁰ Kunarac Trial Judgement, para. 501.

Procedure and Evidence permits the Court to consider, 'where appropriate, applicable treaties and principles and rules of international law customary law,' as well as 'general principles of law derived from national laws of legal systems of the world [...] provided those principles are not inconsistent with the Statute, and the Agreement, and with the international customary law and internationally recognised norms and standards.'

59. Professor Werle considered that

As part of the international order, international criminal law originates from the same legal sources as international law. These include international treaties, customary international law, and general principles of law recognized by the world's major legal systems. Decisions of international courts and international legal doctrine can be used not as sources of law, but subsidiary means for determining the law. Decisions of national courts apply international law can also be referred to here.³⁵⁰¹

60. Cassese, when reviewing the general principles of international law and in particular international criminal law, found:

General principles of international law consist of principles inherent in the international legal system. Hence, their identification does not require an in-depth comparative survey of all major systems of the world, but can be carried out by way of generalization and induction from the main features of the international legal order.³⁵⁰²

He further stated that

clearly, a principle of criminal law may belong to this class only if a court finds that it is shared by common law and civil law systems as well as other legal systems such as those of the Islamic world, some Asian countries such as China and Japan, and the African continent.³⁵⁰³

61. Domestic law in many common and civil law jurisdictions criminalises the abduction of any person or any female person with intent to have that person marry. For example, the Penal Code of Nigeria provides:

Any person who, with the intent to marry or carnally know a female of any age, or to cause her to be married, or carnally known by any other person, takes her away, or detains her, against her will, is guilty of a felony, and is liable to imprisonment for seven years.

62. Similar penal laws have been enacted in Bulgaria,³⁵⁰⁴ Papua New Guinea,³⁵⁰⁵ India,³⁵⁰⁶ Singapore,³⁵⁰⁷ Indonesia,³⁵⁰⁸ Venezuela,³⁵⁰⁹ and Brazil.³⁵¹⁰

³⁵⁰¹ Gerhard Werle, *Principles of International Criminal Law*, TMC Asser Press (2005), para. 123.

³⁵⁰² Antonio Cassese, *International Criminal Law*, Oxford University Press (2003), p. 31.

³⁵⁰³ Antonio Cassese, *International Criminal Law*, Oxford University Press (2003), p. 32.

³⁵⁰⁴ Article 177(2), Bulgarian Penal Code.

³⁵⁰⁵ S. 238, Criminal Code of Papua Guinea.

³⁵⁰⁶ Article 366, Penal Code of India.

³⁵⁰⁷ Article 366, Penal Code of Singapore.

³⁵⁰⁸ Article 332, Penal Code of Indonesia.

5. Non-Criminal International Treaties

63. International treaties and conventions prohibit marriage without the consent of the parties. Article 16(2) of the *Universal Declaration of Human Rights* declares, “[m]arriage shall be entered into only with the free and full consent of the intending spouses.”³⁵¹¹ The *Declaration* is not a binding treaty but member states of the United Nations are called upon to publicise and disseminate it. Sierra Leone became a member State of the United Nations on 27 September 1961.

64. The *International Covenant of Civil and Political Rights* echoes this language at Article 23(2).³⁵¹² Likewise, Article 5.1, 6(a) and 7 of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) require State Parties to recognize the rights of women to choose a spouse and to enter into a marriage only with their free and full consent. Sierra Leone signed this convention on 21 September 1988 and ratified it on 11 November 1988.

65. In addition, the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* Article 1(1) provides:

No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.

66. Regional treaties prohibit discrimination against women. Article 18(3) of the *African (Banjul) Charter on Human and Peoples’ Rights*, ratified by Sierra Leone on 21 September 1983, provides that “[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international conventions and declarations.”

67. The *Protocol to the African Charter on the Rights of Women on Africa* (signed but not ratified by Sierra Leone) provides in Article 11(3):

State Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide, and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

³⁵⁰⁹ Article 384 *Codigo Penal de Venezuela*.

³⁵¹⁰ Article 219-221 *Codigo Penal, Brazil*.

³⁵¹¹ *Universal Declaration of Human Rights*, GA Res, 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR]

³⁵¹² *International Covenant on Civil and Political Rights*, 19 December 1966, 999, U.N.T.S. 171, arts. 9-14, entered into force 23 March 1976, accession by Sierra Leone 23 August 1996 [ICCPR].

6. Decisions of Other Tribunals

68. In *Prosecutor v. Kvočka et. al*, the ICTY ruled “[...] sexual violence is broader than rape and includes such crimes as sexual slavery or molestation”,³⁵¹³ giving as examples:

such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization” and other similar forms of violence.³⁵¹⁴

7. Deliberations

69. I consider that international treaties and domestic law provide that marriage is a relationship founded on the mutual consent of both spouses. In ‘forced marriage’ the consent of the victim is absent. In the absence of such consent, the victim is forced into a relationship of a conjugal nature with the perpetrator thereby subsuming the victim’s will and undermining the victim’s exercise of their right to self-determination.

70. I reiterate that the conduct contemplated as ‘forced marriage’ does not necessarily involve elements of physical violence such as abduction, enslavement or rape, although the presence of these elements may go to prove the lack of consent of the victim. The crime is concerned primarily with the mental and moral suffering of the victim.

7. Conclusion

71. By vitiating the will of one party and forcing him or her to enter into and remain in a marital union the victim is subject to physical and mental suffering the phenomenon of forced marriage transgresses the internationally accepted conventions that both parties must consent to a marriage. It is contrary to principles of criminal law shared by common law and civil law systems alike, as well as Islamic law and the legal systems of some Asian and African states. I consider, on the evidence before me, that the act of forced marriage is of similar gravity and nature to the other enumerated crimes against humanity and that the act causes serious bodily or mental harm. Accordingly, I consider and hold that forced marriage constitutes a crime against humanity.

³⁵¹³ *Kvočka* Trial Judgment, para. 180.

³⁵¹⁴ *Kvočka* Trial Judgement, para. 180, citing the Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 17 July 1998, at Art. 7(1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi).

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Dated this 20th day of June 2007, at Freetown, Sierra Leone.

Doherty J

Justice Teresa Doherty



[Seal of the Special Court for Sierra Leone]

ANNEX A: PROCEDURAL HISTORY

A. Indictment, Arrest, Transfer and Initial Appearance

1. Alex Tamba Brima

1. On 7 March 2003, Justice Thompson approved the Indictment against the Accused Brima and ordered its non-disclosure to the public.³⁵¹⁵ On the same day, Justice Thompson issued a warrant of arrest and an Order for the Accused Brima's transfer and detention.³⁵¹⁶ The Accused Brima was arrested on 10 March 2003 and transferred to the Special Court's temporary detention facility in Bonthe on Sherbro Island. On 14 March 2003, Justice Itoe authorised the disclosure of the Indictment.³⁵¹⁷ On 15, 17 and 21 March 2003, the Accused Brima made his initial appearance before Justice Itoe. He pleaded "not guilty" to all charges against him and was ordered to be detained on remand.³⁵¹⁸

2. Brima Bazzy Kamara

2. On 28 May 2003, Justice Boutet approved the Indictment against the Accused Kamara and ordered its non-disclosure to the public. On the same day, Justice Boutet issued a warrant of arrest and an Order for the Accused Kamara's transfer and detention.³⁵¹⁹ The Accused Kamara was arrested on 29 May 2003 and transferred to the Special Court's temporary detention facility in Bonthe on Sherbro Island. On 3 June 2003, Justice Boutet authorised the disclosure of the Indictment.³⁵²⁰ On 4 June 2003, the Accused Kamara made his initial appearance before Justice Boutet. He pleaded "not guilty" to all charges against him and was ordered to be detained on remand.

3. Santigie Kanu

3. On 16 September 2003, Justice Boutet approved the Indictment against the Accused Kanu and ordered its non-disclosure to the public. On the same day, Judge Boutet also issued a warrant of

³⁵¹⁵ *Prosecutor v. Brima*, SCSL-03-06-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003.

³⁵¹⁶ *Prosecutor v. Brima*, SCSL-03-06-PT, Warrant of Arrest and Order for Transfer and Detention, 7 March 2003.

³⁵¹⁷ *Prosecutor v. Brima*, SCSL-03-06-I, Order for the Disclosure of the Indictment and the Warrant of Arrest and Order for Transfer and Detention, 14 March 2003.

³⁵¹⁸ *Prosecutor v. Brima*, SCSL-2003-06-PT, Adjournment of the Initial Appearance and Detention on Remand, 15 March 2003.

³⁵¹⁹ *Prosecutor v. Kamara*, SCSL-2003-10-PT, Decision Approving the Indictment, the Warrant of Arrest, and Order for Non-Disclosure, 28 May 2003; *id.*, Warrant of Arrest and Order for Transfer and Detention, 28 May 2003.

³⁵²⁰ *Prosecutor v. Kamara*, SCSL-2003-10-I, Order for the Disclosure of the Indictment and the Warrant of Arrest and Order for Transfer and Detention, 3 June 2003.

arrest and an Order for the Accused Kanu's transfer and detention.³⁵²¹ On 17 September 2003, the Accused Kanu was arrested and transferred to the Special Court's temporary detention facility in Bonthe on Sherbro Island. On 19 September 2003, Justice Boutet authorised the disclosure of the Indictment.³⁵²² On 23 September 2003, the Accused Kanu made his initial appearance before Justice Boutet. He pleaded "not guilty" to all charges against him and was ordered to be detained on remand.

B. Pre-Trial Proceedings

1. Joinder

4. On 9 October 2003, the Prosecution brought a motion pursuant to Rule 48(B) of the Rules,³⁵²³ seeking a joint trial of the Accused Sesay, Kallon and Gbao of the Revolutionary United Front (RUF), and the Accused Brima, Kamara and Kanu of the Armed Forces Ruling Council (AFRC) ("Prosecution Motion for Joinder"), who had all been indicted individually. The Prosecution submitted that the alleged crimes against all of these Accused formed part of one common scheme, strategy or plan.³⁵²⁴

5. On 27 January 2004, Trial Chamber I partially granted the Prosecution motion for joinder of the six Accused and ordered that the Accused Sesay, Kallon, and Gbao be tried jointly ('RUF Case'), but separate from the Accused Brima, Kamara and Kanu, who were to be tried jointly as well ('AFRC Case').³⁵²⁵

6. On 3 February 2004, the Prosecution applied for leave to file an interlocutory appeal against the Decision of Trial Chamber I on the Prosecution Motion for Joinder. On 13 February 2004, Trial

³⁵²¹ *Prosecutor v. Kanu*, SCSL-2003-13-I, Decision Approving the Indictment, the Warrant of Arrest and Order for Transfer and Detention and Order for Non-Public Disclosure, 16 September 2003; *id.*, Warrant of Arrest and Order for Transfer and Detention, 16 September 2003.

³⁵²² *Prosecutor v. Kanu*, SCSL-2003-13-I, Order for Disclosure of the Indictment, the Warrant of Arrest and Order for Transfer and Detention, 19 September 2003.

³⁵²³ Rule 48(B) of the Rules provides: "Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by the Trial Chamber pursuant to Rule 73".

³⁵²⁴ *Prosecutor v. Issa Hassan Sesay* (SCSL-2003-05-PT), *Prosecutor v. Alex Tamba Brima* (SCSL-2003-06-PT), *Prosecutor v. Morris Kallon* (SCSL-2003-07-PT), *Prosecutor v. Augustine Gbao* (SCSL-2003-09-PT), *Prosecutor v. Brima Bazy Kamara* (SCSL-2003-10-PT) and *Prosecutor v. Santigie Borbor Kanu*, (SCSL-2003-13-PT).³⁵²⁴

³⁵²⁵ *Prosecutor v. Brima*, SCSL-2003-06-PT, *Prosecutor v. Kamara*, SCSL-2003-10 PT, *Prosecutor v. Kanu*, SCSL-2003-13-PT, *Prosecutor v. Sesay*, SCSL-2003-05-PT, *Prosecutor v. Kallon*, SCSL-2003-07-PT, *Prosecutor v. Gbao*, SCSL-2003-09-PT, Decision and Order on Prosecution Motions for Joinder, 28 January 2004, para 39.

Chamber I dismissed the application on the ground that no showing of ‘exceptional circumstances’ pursuant to Rule 73(B) of the Rules³⁵²⁶ had been made.³⁵²⁷

7. On 30 April 2004, the Prosecution filed a motion pursuant to Rule 48(C) of the Rules³⁵²⁸ for the concurrent presentation of the evidence common to both the RUF Case and the AFRC Case³⁵²⁹ on the grounds that the testimonies of several witnesses were common to both cases and therefore, a concurrent hearing of the evidence was in the interests of justice and of judicial economy. On 11 May 2004, Trial Chamber I dismissed the motion and ruled that a concurrent presentation of evidence, particularly in light of the amount of evidence and in the context of the Decision on the Prosecution Motion for Joinder, was conceptually irreconcilable with the notion of ‘joint separate trials’.³⁵³⁰ On 1 June 2004, Trial Chamber I dismissed an application by the Prosecution seeking leave to appeal the Decision of 11 May 2004 refusing a concurrent presentation of the evidence.³⁵³¹

2. Trial Chamber Composition

8. The case was initially assigned to Trial Chamber I composed of Justices Thompson, Itoe and Boutet. On 17 January 2005, the President of the Special Court assigned the case to the newly formed Trial Chamber II, composed of Justices Doherty, Lussick and Sebutinde.³⁵³²

3. History of Indictments

9. The initial indictments against the Accused Brima, Kamara and Kanu each contained 17 counts of crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law.³⁵³³

³⁵²⁶ Rule 73(B) of the Rules provides: “Decisions rendered on such motions are without interlocutory appeal. However in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.”

³⁵²⁷ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder, 13 February 2004.

³⁵²⁸ Rule 48(C) of the Rules provides: “A Trial Chamber may order the concurrent hearing of evidence common to the trials of persons separately indicted or joined in separate trials and who are accused of the same or different crimes committed in the course of the same transaction. Such a hearing may be granted with leave of a Trial Chamber pursuant to Rule 73.”

³⁵²⁹ *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-PT, Prosecution’s Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-PT and SCSL-2004-16-PT, 30 April 2004.

³⁵³⁰ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 11 May 2004.

³⁵³¹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 4 June 2004.

³⁵³² *Prosecution v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Order Assigning a Case to a Trial Chamber, 17 January 2005.

10. On 7 January 2004, counsel for the Accused Kamara filed a preliminary motion with regard to several alleged defects in the form of the initial indictment.³⁵³⁴ On 1 April 2004, Trial Chamber I rendered a Decision in which it ordered the Prosecution to serve on the Defence a certified true copy of the case summary accompanying the initial indictment.³⁵³⁵

11. On 16 October 2003, counsel for the Accused Kanu filed a preliminary motion with regard to several alleged defects in the form of the initial indictment.³⁵³⁶ On 19 November 2003, Trial Chamber I rendered a Decision in which it ordered the Prosecution to correct certain language in the initial indictment which was found to be ambiguous. Trial Chamber I also found that the dates, locations and offences in the initial indictment were pleaded with sufficient clarity.³⁵³⁷ On 25 November 2003, the Prosecution filed a Bill of Particulars containing additional events in support of the charges against the Accused Kanu.³⁵³⁸

12. On 27 January 2004, having ordered a joint trial of the Accused Brima, Kamara and Kanu, Trial Chamber I ordered the Prosecution to file two consolidated indictments and that new case numbers be assigned to the two joint cases.³⁵³⁹ On 5 February 2004, the Prosecution filed a new indictment (“Consolidated Indictment”) in compliance with the Order of Trial Chamber I.³⁵⁴⁰

13. On 9 February 2004, the Prosecution applied for leave to amend the Consolidated Indictment and add a count of “other inhumane acts” pursuant to Article 2(g) of the Statute for acts of “forced marriage”. Moreover, the Prosecution moved for other modifications of the Consolidated Indictment.³⁵⁴¹ On 1 March 2004, following an Order of Trial Chamber I,³⁵⁴² the Prosecution filed a document setting out in detail its proposed amendments to the Consolidated Indictment.³⁵⁴³

³⁵³³ *Prosecutor v. Brima*, SCSL-03-06-I, Indictment (Annexes: Prosecutor’s Memo to Accompany Indictment, Investigator’s Statement, Draft Order Confirming Indictment), 7 March 2003; *Prosecutor v. Kamara*, SCSL-03-10-PT, Prosecutor’s Memorandum to Accompany the Indictment, 26 May 2003; *Prosecutor v. Kanu*, SCSL-03-13-PT, Indictment, 15 September 2003.

³⁵³⁴ *Prosecutor v. Kamara*, SCSL-2003-10-PT, Brief in Support of Preliminary Motion on Defects in the Form of the Indictment, 7 January 2004; *Prosecutor v. Kamara*, SCSL-2003-10-PT, Relief for the Motion on Defects in the Form of the Indictment, 7 January 2004

³⁵³⁵ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision and Order on Defense Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004.

³⁵³⁶ *Prosecutor v. Kanu*, SCSL-2003-13-PT, Motion on Defects in the Form of the Indictment and for Particularization of the Indictment, 16 October 2003.

³⁵³⁷ *Prosecutor v. Kanu*, SCSL-2003-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003.

³⁵³⁸ *Prosecutor v. Kanu*, SCSL-2004-13-PT, Bill of Particulars, 25 November 2003.

³⁵³⁹ *id.*, Corrigendum – Decision and Order on Prosecution Motion for Joinder, 28 January 2004. See also *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision for the Assignment of a New Case Number, 3 February 2004.

³⁵⁴⁰ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Indictment, 5 February 2004.

³⁵⁴¹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Request for Leave to Amend the Indictment, 9 February 2004.

14. On 6 May 2004, Trial Chamber I granted the proposed amendments to the Consolidated Indictment, which included a new Count 8 of “other inhumane acts”, along with other amendments (“Amended Consolidated Indictment”).³⁵⁴⁴ On 17 May 2004, the three Accused made a further appearance pursuant to Rule 50(B)(i) of the Rules before Justice Boutet to enter a plea on the new Count 8.³⁵⁴⁵ As the three Accused refused to enter a plea, Justice Boutet entered a plea of “not guilty” on their behalf in relation to Count 8 pursuant to Rule 61(iii) of the Rules.

15. On 7 February 2005, the Prosecution requested leave to withdraw Counts 15-18 from the Amended Consolidated Indictment. On 15 February 2005, the Trial Chamber granted the Prosecution’s request.³⁵⁴⁶

16. On 20 January 2005, the Kanu Defence filed a motion requesting the dismissal of counts 15-18 of the indictment on the grounds of an alibi defence and lack of a prima facie case, and requested for the extension of time for the hearing of the defence motion.³⁵⁴⁷ The Trial Chamber dismissed the motion and stated that there should be no further argument on the motion.

17. The operative indictment in this case, the Further Amended Consolidated Indictment, was filed on 18 February 2005.

4. Assignment of Counsel

(a) The Accused Brima and Kamara

18. On 14 April 2003, the Registrar assigned Terence Michael Terry on a temporary basis to the Accused Brima (“Provisional Counsel”).³⁵⁴⁸ On 20 June 2004, Provisional Counsel passed away.

³⁵⁴² *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Order to Submit Indication of Specific Changes to Indictments, 26 February 2004.

³⁵⁴³ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Indication of Specific Changes to Indictments, 1 March 2004.

³⁵⁴⁴ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004; see also *id.*, Consequential Order and Corrigendum to the Decision on the Prosecution Request for Leave to Amend the Indictment, 12 May 2004.

³⁵⁴⁵ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Scheduling Order for the Further Appearance of the Accused on the Amended Consolidated Indictment, 12 May 2004. See Transcript 17 May 2004, pp. 1-25.

³⁵⁴⁶ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on the Prosecution Application to Further Amend the Amended Consolidated Indictment by Withdrawing Counts 15-18, 15 February 2005 and Corrigendum to Decision on the Prosecution Application to Further Amend the Amended Consolidated Indictment by Withdrawing Counts 15-18, 15 February 2005.

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³⁵⁴⁸ *Prosecutor v. Brima*, SCSL-2003-06-I, Decision Appointing Counsel for the Accused, 14 April 2003.

Effective as of 26 October 2004, Kevin A. Metzger was assigned as new counsel for the Accused Brima.³⁵⁴⁹

19. On 18 June 2003, Kenneth Fleming was assigned as counsel for the Accused Kamara on a temporary basis.³⁵⁵⁰ On 15 February 2005, Wilbert Harris was assigned as counsel for the Accused Kamara.³⁵⁵¹

20. On 12 May 2005, the Trial Chamber granted a request by counsel for the Accused Brima and Kamara to withdraw and instructed the Principal Defender to assign new counsel to them.³⁵⁵² However, on 24 May 2005, a motion was filed seeking the re-appointment of Kevin Metzger and Wilbert Harris as counsel for the Accused Brima and Kamara. On 9 June 2005, the majority of the Trial Chamber dismissed the motion, finding that it did not have jurisdiction to revisit its 12 May 2005 decision nor any grounds to re-appoint previous counsel.³⁵⁵³ On 8 December 2005, the Appeals Chamber partially overruled the Trial Chamber's decision of 9 June 2005, finding that the Trial Chamber had erred both in fact and in law.³⁵⁵⁴

(b) The Accused Kanu

21. On 1 October 2003, the Acting Principal Defence provisionally assigned Mr. Geert-Jan Knoops as Counsel to the Accused.³⁵⁵⁵ On 23 February 2004, the Acting Principal Defender named Mr. Knoops as Assigned Counsel to Kanu for the provision of legal services for the duration of the trial.³⁵⁵⁶

³⁵⁴⁹ *Prosecutor v. Brima*, SCSL-04-16, Decision, 25 October 2004.

³⁵⁵⁰ *Prosecutor v. Kamara*, SCSL-2003-10-PT, Decision, 18 June 2003.

³⁵⁵¹ *Prosecutor v. Kamara*, SCSL-2004-16-PT, Decision, 15 February 2005 and *Prosecutor v. Kamara*, SCSL-2004-16-PT Decision, 15 February 2005.

³⁵⁵² Oral Decision on the Application of Lead Counsel to withdrawn from the Case, Transcript 12 May 2005, pp 2-3; see also *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-T, Decision on the Confidential Joint Defence Application by Counsel for Brima and Kamara and on the Request on Further Representation by Counsel for Kanu, 20 May 2005.

³⁵⁵³ *Prosecution v. Brima and Kamara*, Decision on the Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, 9 June 2005.

³⁵⁵⁴ Case No. SCSL-2004016-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazy Kamara, 8 December 2005.

³⁵⁵⁵ *Prosecutor v. Kanu*, SCSL-2003-13-PT, Decision, 2 October 2003.

³⁵⁵⁶ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision, 25 February 2004.

5. Bail

22. On 28 May 2003, Defence Counsel for Brima submitted a motion for bail pursuant to Rule 65 of the Rules.³⁵⁵⁷ According to Rule 65(B) of the Rules the Attorney-General and Minister of Justice of Sierra Leone was heard, who recommended that the motion be rejected.³⁵⁵⁸ On 22 July 2003, Judge Itoe dismissed Brima’s application for bail, based on the likely possibility of the escape of the Accused, the probable impossibility of locating or recapturing him if released, the likelihood of public disorder and the possibility of recriminations.³⁵⁵⁹

23. On 23 June 2004 the Accused Kanu filed a confidential motion for temporary bail in order to visit his mother who was unable to visit him at the Detention Facility due to her physical condition.³⁵⁶⁰ However, following the successful efforts of the Registrar to organize the transport of the Accused’s mother to the Detention Facility, the motion was shortly thereafter withdrawn by means of a letter.³⁵⁶¹

24. The Kanu Defence filed another motion on 07 September 2005 requesting permission to visit his mother’s grave to visit his mother’s grave. The Trial Chamber dismissed the motion on the grounds that it would not interfere with the decision of the Office of the Registry.

6. Habeas Corpus

25. On 28 May 2003, Counsel for Brima filed a motion for leave to issue a writ of *habeas corpus* as well as for an Order for a writ of *habeas corpus ad subjiciendum*, on the basis that the Indictment approved by Judge Thompson on 7 March 2003 was fundamentally flawed, invalid and

³⁵⁵⁷ *Prosecutor v. Brima*, SCSL-2003-06-PT, Defence Motion for Bail or for Provisional Release Pursuant to Rule 65 of the Rules of Procedure and Evidence of the SCSL, 28 May 2003. The motion for bail was filed on the grounds that the Accused was suffering from serious medical problems requiring intensive daily care, that his general health and sight were deteriorating, that the Accused was the sole breadwinner for his wife and son, that his continued detention was highly prejudicial and impaired access to his Counsel and Solicitor regarding his Defence for trial and that the Accused would pose no danger to any victim, witness or other person and would appear at trial. Previously, on 8 March 2004 and 14 March 2004 Counsel for the Accused filed, respectively, a notice and a brief argument for the bail application. Acting as Designated Judge pursuant to Rule 28, Judge Thompson subsequently ordered the consolidation of these document and the filing of a proper application in conformity with the formal requirement provided for by the Court. See *id.*, Order on Filing, 16 May 2004.

³⁵⁵⁸ *Prosecutor v. Brima*, SCSL-2003-06-PT, Submission of the Government of the Republic of Sierra Leone in Response to Motion for Bail or for Provisional Release, 7 July 2003.

³⁵⁵⁹ *Prosecutor v. Brima*, SCSL-2003-06-PT, Ruling on a Motion Applying for Bail or for Provisional Release Filed by the Applicant, 22 July 2003.

³⁵⁶⁰ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kanu-Motion for a Temporary Visit of the Accused to His Mother, 23 June 2004.

³⁵⁶¹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Withdrawal of Motion, 28 June 2004.

tantamount to a miscarriage of justice.³⁵⁶² On 18 June 2003, Judge Itoe, acting as Designated Judge, granted leave to the Defence Counsel for Brima to file an application to obtain a writ of *habeas corpus* and ordered that the writ be served on the Attorney General and Minister of Justice of the Republic of Sierra Leone.³⁵⁶³ The Attorney-General and Minister of Justice recommended that the motion be rejected.³⁵⁶⁴ On 22 July 2003, Judge Itoe dismissed the application for the leave to issue of the writ of *habeas corpus* on the basis that the Prosecution justified the legality of the Accused Brima's detention.³⁵⁶⁵

7. Preliminary Motions

(a) Constitutionality

26. On 26 June 2003 a preliminary motion challenging the lawfulness of the Special Court's establishment was filed by Counsel for Norman.³⁵⁶⁶ On 18 September 2003 the motion was referred to the Appeals Chamber pursuant to Rule 72(E), since the Trial Chamber found that this motion raised "a serious issue relating to jurisdiction."³⁵⁶⁷ Counsel for Kallon³⁵⁶⁸ and Kamara³⁵⁶⁹ filed similar motions, which were referred to the Appeals Chamber by the Trial Chamber.³⁵⁷⁰ Of 13 March 2004 the Appeals Chamber decided on all these issues in its 'Decision on Constitutionality and Lack of Jurisdiction'.³⁵⁷¹

³⁵⁶² *Prosecutor v. Brima*, SCSL-2003-06-PT, Defence Motion for Leave to Issue a Writ of Habeas Corpus, 28 May 2003. Previously, on 8 March 2004 and 14 March 2004 Counsel for the Accused filed, respectively, a notice and a brief argument for the habeas corpus application. Acting as Designated Judge pursuant to Rule 28, Judge Thompson subsequently ordered the consolidation of these document and the filing of a proper application in conformity with the formal requirement provided for by the Court. See *id.*, Order on Filing, 16 May 2004.

³⁵⁶³ *Prosecutor v. Brima*, SCSL-2003-06-PT, Order for Oral Hearing in the Motion Filed by the Defense for Leave to File a Writ of habeas corpus ad subjiciendum, 18 June 2003.

³⁵⁶⁴ *Prosecutor v. Brima*, SCSL-2003-06-PT, Submission of the Government of the Republic of Sierra Leone in Response to Defence Motion for Leave to Issue a Writ of habeas corpus ad subjiciendum and for an Order for the Writ of habeas corpus ad subjiciendum, 7 July 2003.

³⁵⁶⁵ *Prosecutor v. Brima*, SCSL-2003-06-PT, Ruling on the Application for the Issue of a Writ of habeas corpus Filed by the Applicant, 22 July 2003.

³⁵⁶⁶ *Prosecutor v. Norman*, SCSL-2003-08-PT, Preliminary Motion based on Lack of Jurisdiction: Lawfulness of the Court's Establishment, 26 June 2003.

³⁵⁶⁷ *Prosecutor v. Norman*, SCSL-2003-08-PT, Order pursuant to Rule 72(E) – Defence Preliminary Motion in Lack of Jurisdiction: Lawfulness of the Court's Establishment, 18 September 2003.

³⁵⁶⁸ *Prosecutor v. Kallon*, SCSL-2003-07-PT, Preliminary Motion based on lack of Jurisdiction: Establishment of Special Court violates Constitution of Sierra Leone, 16 June 2003.

³⁵⁶⁹ *Prosecutor v. Kamara*, SCSL-2003-10-PT, Application by Brima Bazy Kamara in Respect of Jurisdiction and Defects in Indictment, 22 September 2003.

³⁵⁷⁰ *Prosecutor v. Kallon*, SCSL-2003-07-PT, Order pursuant to Rule 72(E) – Defence Preliminary Motion based on lack of Jurisdiction: Establishment of Special Court violates Constitution of Sierra Leone, 17 September 2003; *Prosecutor v. Kamara*, SCSL-2003-10-PT, Order pursuant to Rule 72(E) – Application by Brima Bazy Kamara in Respect of Jurisdiction and Defects in Indictment, 9 October 2003.

³⁵⁷¹ *Prosecutor v. Kallon*, SCSL-2004-15-AR72(E); *Prosecutor v. Norman*, SCSL-2003-14-AR72(E), *Prosecutor v. Kamara*, SCSL-2004-16-AR72(E); Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004.

27. Counsel for Norman argued that the agreement between the Government of Sierra Leone and the United Nations establishing the Special Court was void, as the Government of Sierra Leone had effectively made amendments to the Constitution without calling a referendum of the people of Sierra Leone, as required by the Constitution. Counsel for Norman further argued that when the Special Court Agreement was concluded, the Government of Sierra Leone controlled only one-third of the country's territory and therefore lacked "effective control" of the majority of the population and was not in a position to negotiate an agreement. Counsel for Kamara argued that the Special Court is not an international court, but a domestic court. Since the Statute of the Court creates crimes which were unknown under Sierra Leone law at the time of the alleged offences, those laws violate the principle in the Constitution of *nullum crimen sine lege*.

28. In its Decision, the Appeals Chamber first held that the Special Court was competent to determine the legality of its own creation, since its Rules provide for a determination of these issues in Rule 72(E).

29. Regarding the merits of the motion, the Chamber confirmed that the Special Court is established by the Agreement between the UN and the Government of Sierra Leone, and that it is a 'treaty-based *sui generis* court of mixed jurisdiction and composition'. The Chamber found that the Special Court does not form part of the Judiciary of Sierra Leone as stated in section 11(2) of the Special Court Agreement Ratification Act of March 2002 and thus cannot violate the Constitution. The Chamber held that the relevant constitutional requirements had been fulfilled and confirmed that the Special Court acts only in an international sphere and is outside the structure of national courts.

30. On the issue of 'effective control', the Chamber observed that it is a fundamental principle of International Law that the occupation and acquisition of territory through the use of force is illegal and territory gained in this manner does not belong to the conqueror. So long as the democratically elected Government exists and is capable of controlling the affairs of the State in the international community, it shall do so. Accordingly, the Government of Sierra Leone had authority to enter the Agreement.

31. In relation to the *nullum crimen* principle, the Appeals Chamber found that, since the Special Court acts only in an international sphere, it is sufficient that the crimes existed under international law at the time of their alleged commission and the fact that crimes were unknown to the national Sierra Leonean law at the time of the alleged offences has no effect on the jurisdiction of the Special Court.

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32. With this reasoning, the Chamber dismissed all motions in their entirety.

(b) Kamara challenge to jurisdiction: Lomé Accord Amnesty

33. On 16 June 2003, Counsel for Kallon (Accused in the RUF case) filed a preliminary motion based on lack of jurisdiction/abuse of process: amnesty provided by the Lomé Accord. On 22 September 2003, Counsel for Kamara requested that the Indictment be discharged and that the Accused be released on the grounds that the Indictment was not an Indictment known to Sierra Leonean law. In the alternative, Counsel requested that all charges other than those pursuant to Sierra Leonean law be struck out on the grounds that Judge Boutet, who approved the Indictment, was not appointed pursuant to the Constitution of Sierra Leone and therefore his exercise of judicial power is invalid in Sierra Leone. In the alternative, Defence Counsel requested that all charges predating 7 July 1999 be struck out pursuant to the Lomé Peace Agreement.³⁵⁷² Counsel for Kallon and Kamara argued that the Government of Sierra Leone was bound to observe the amnesty by the Lomé Agreement between the Government of Sierra Leone and the RUF. They submitted that the Special Court should not assert jurisdiction over crimes committed prior to July 1999 when the amnesty was granted and it would be an abuse of process to allow the prosecution of any of the alleged crimes pre-dating the Lomé Agreement.

34. On 30 September 2003 the Kallon Preliminary Motion was referred to the Appeals Chamber pursuant to Rules 72(E) and (F). On 9 October 2003, the Kamara Preliminary Motion was referred to the Appeals Chamber under Rule 72(E).³⁵⁷³

35. On 13 March 2004, the Appeals Chamber rendered its decision finding that the Lomé Agreement created rights and obligations that are to be regulated by the domestic laws of Sierra Leone. Whether or not it is binding on the Government of Sierra Leone does not affect the liability of the Accused to be prosecuted in an international tribunal for international crimes. Moreover, the Appeals Chamber concluded that an international tribunal, such as the Special Court, cannot be

³⁵⁷² *Prosecutor v. Kamara*, SCSL-2003-10-PT, Application by Brima Bazy Kamara in Respect of Jurisdiction and Defects in Indictment, 22 September 2003. Different issues raised in this motion pertaining to constitutional challenges have been disposed of by the Appeals Chamber in a separate decision rendered on 13 March 2004. See *Prosecutor v. Kallon*, SCSL-2004-15-AR72(E); *Prosecutor v. Norman*, SCSL-2003-14-AR72(E), *Prosecutor v Kamara*, SCSL-2004-16-AR72(E); Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004.

³⁵⁷³ *Prosecutor v. Kamara*, SCSL-2003-10-PT, Order Pursuant to Rule 72(E): Application by Brima Bazy Kamara in Respect of Jurisdiction and Defects in the Indictment, 9 October 2003.

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deprived of its jurisdiction to prosecute an offender by the grant of an amnesty. The Appeals Chamber dismissed the challenge to jurisdiction.³⁵⁷⁴

(c) Kanu motion challenging jurisdiction and alleging abuse of process

36. On 20 October 2003, Defence Counsel for Kanu filed a preliminary motion concerning the lack of jurisdiction of the Special Court, namely with regards to defects as to the international legal foundations of the Court, the lack of jurisdiction due to the amnesty clause in the Lomé Peace Agreement and the lack of jurisdiction with regards to superior responsibility prior to assuming command.³⁵⁷⁵

37. On 22 January 2004, the Preliminary Motion was referred to the Appeals Chamber under Rule 72(E). The reference of the motion to the Appeals Chamber did not operate as a stay of the trial of the Accused.³⁵⁷⁶

38. On 25 May 2004 the Appeals Chamber, noting that it had already dealt with the issue of the Lomé Amnesty in its decision of 13 March 2004, dismissed the Preliminary Motion as being without merit on the grounds that the Special Court is vested with its own specific jurisdiction and competence by the constitutive documents establishing it and that, as a treaty based institution, it operates outside the legal system of Sierra Leone and does not derive its jurisdiction from within the national system.³⁵⁷⁷

39. On 20 October 2003, the Defence for Kanu also filed a preliminary motion contending a potential abuse of process and requesting that the charges against him as envisioned in Counts 3, 4, 6, 7, 10, 12 and 15 in so far as they entail the concept of crimes against humanity, be dismissed by virtue of the principle of non-retroactivity and *nullum crimen sine lege*, and alternatively, by virtue of Article 23 (7) and Article 171 (15) of the Constitution of Sierra Leone. The Defence further requested that Counts 1, 2, 5, 8, 9, 11, 13, 14, 16 and 17 be dismissed insofar as, at the time the alleged crimes were committed, the above mentioned laws and customs of war as envisioned by Article 3 Common to the Geneva Conventions and/or Additional Protocol II and other serious

³⁵⁷⁴ *Prosecutor v. Kallon*, SCSL-2004-15-AR72(E); *Prosecutor v. Kanu*, SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 15 March 2004.

³⁵⁷⁵ *Prosecutor v. Kanu*, SCSL-2003-13-PT, Motion Challenging the Jurisdiction of the Special Court, Raising Serious Issues Relating to Jurisdiction on Various Grounds and Objections Based on Abuse of Process, 20 October 2003.

³⁵⁷⁶ *Prosecutor v. Kanu*, SCSL-2003-13-PT, Order Pursuant to Rule 72 (E)-Defence Motion Challenging the Jurisdiction of the Special Court Raising Serious Issues Relating to Jurisdiction on Various Grounds and Objections Based on Abuse of Process, 22 January 2004.

³⁵⁷⁷ *Prosecutor v. Kanu*, SCSL-2004-16-AR72(E), Decision on Motion Challenging Jurisdiction and Raising Objections Based on Abuse of Process, 26 May 2004.

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violations of international humanitarian law, were not implemented in the national legislation of the Republic of Sierra Leone.³⁵⁷⁸

40. On 8 March 2004 the Trial Chamber dismissed orally this motion during a Status Conference. In its written Decision following thereto on 31 March 2004, the Trial Chamber found that the preliminary motion did not meet the test required that proceeding with the trial of the Accused would contravene the Court’s sense of justice, due to pre-trial impropriety or misconduct.³⁵⁷⁹

8. Disclosure Matters

41. On 10 April 2003, Judge Thompson ordered the Prosecution to disclose to the Defence Counsel for Brima copies of the statements of all witnesses whom the Prosecutor intended to call to testify pursuant to Rule 66 (A)(i), as well as all the evidence to be presented at trial pursuant to Rule 92bis of the Rules. Judge Thompson further ordered the Prosecution to disclose the existence of known evidence as well as any evidence that suggested the innocence or mitigated the guilt of the Accused or which affected the credibility of the Prosecution’s evidence pursuant to Rule 68 (B) of the Rules.³⁵⁸⁰ Judge Thompson also ordered the Prosecution to transmit the materials to the Registrar pursuant to Rule 66 until a final decision on protective measures was rendered.³⁵⁸¹

42. Similarly, on 2 July 2003, pursuant to Rule 66A(i) and Rule 68 (B), Judge Boutet ordered the Prosecution to transmit to the Registrar all the disclosure materials with regards to Kamara one month after the initial appearance of the Accused. The Registry was also ordered to seal and date the disclosure materials until orders for appropriate measures for witnesses, victims and non-public materials were rendered.³⁵⁸²

43. On 16 October 2003, Judge Boutet, acting as Designated Judge also ordered the Prosecution to transmit the disclosure materials in the case of Kanu to the Registrar who was to make disclosure materials available to the Defence Counsel. Disclosure was to take effect when a decision was

³⁵⁷⁸ *Prosecutor v. Kanu*, SCSL-2003-13-PT, Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-retroactivity as to Several Counts, 20 October 2003.

³⁵⁷⁹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-retroactivity as to Several Counts, 31 March 2004.

³⁵⁸⁰ *Prosecutor v. Brima*, SCSL-2003-06-PT, Scheduling Order, 10 April 2003

³⁵⁸¹ *Prosecutor v. Brima*, SCSL-2003-06-PT, Order on Disclosure to the Registry, 17 April 2003.

³⁵⁸² *Prosecutor v. Kamara*, SCSL-2003-10 PT, Interim Order for the Transmission of the Disclosure Materials to the Registrar, 3 July 2003.

rendered on the Prosecution Motion for immediate protective measures for witnesses and victims and for non-public disclosure.³⁵⁸³

44. Following the issuing of each decision on protective measures³⁵⁸⁴ and the assignment of Defence Counsels for all the Accused, the Registrar accordingly made available to each Defence Counsel the relevant disclosure materials.³⁵⁸⁵

45. On 18 March 2004, Defence Counsel for Kanu submitted that the Prosecution had breached its disclosure obligations by failing to comply with Rule 66 (A)(i) and requested that witnesses who gave their statements after 23 October 2003 should not testify for the Prosecution at trial.³⁵⁸⁶ On 23 March 2004 Defence Counsel for Brima filed another motion seeking similar relief.³⁵⁸⁷ On 30 July 2004 Judge Boutet dismissed the motion filed by Kanu,³⁵⁸⁸ and on 2 August 2004 he dismissed the motion filed by Brima.³⁵⁸⁹ Judge Boutet found that the Defence would not be prejudiced in any way as a consequence of the disclosure practice adopted by the Prosecution, that they had been provided with adequate notice of the case against the Accused and that they had sufficient time to adequately prepare for trial.

46. On 4 August 2004, Defence Counsel for Kanu filed an application for leave to appeal this decision on the basis that it constituted exceptional circumstances that may lead to irreparable prejudice to the Accused pursuant to Rule 73(B) of the Rules.³⁵⁹⁰ On 4 February 2005 Trial

³⁵⁸³ *Prosecutor v. Kanu*, SCSL-2003-13-PT, Decision on the Urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 16 October 2003.

³⁵⁸⁴ *Prosecutor v. Brima*, SCSL-2003-06-PT, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, *Prosecutor v. Kamara*, SCSL-2003-10-PT, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003, *Prosecutor v. Kanu*, SCSL-2004-13-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims, 24 November 2003.

³⁵⁸⁵ The Registrar subsequently adopted a Practice Direction pursuant to Rule 33 in order to regulate this procedure: Practice Direction on Disclosure by the Prosecutor pursuant to Rule 66 of the Rules of Procedure and Evidence of the Special Court, 23 February 2004.

³⁵⁸⁶ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kanu-Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statement Pursuant to Rule 5 and 66 (A)(i), 18 March 2004. See also *id.*, Kanu-Additional Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statement Pursuant to Rule 5 and 66 (A)(i), 19 March 2004.

³⁵⁸⁷ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statement Pursuant to Rule 5 and 66 (A)(i), 23 March 2004.

³⁵⁸⁸ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kanu-Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements, 30 July 2004.

³⁵⁸⁹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Brima-Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements, 2 August 2004.

³⁵⁹⁰ *Prosecutor v. Brima, Kamara and Kanu*, Kanu- SCSL-2004-16-PT, Application for Leave to File an Interlocutory Appeal Against the “Decision on Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements” of 30 July 2004, 4 August 2004.

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Chamber II dismissed the application, holding that neither exceptional circumstances nor irreparable prejudice has been shown to the satisfaction of the court.³⁵⁹¹

47. Following the discussions held during the first Status Conference on 8 March 2004, the Trial Chamber issued on 1 April 2004 an order requesting the Prosecution to produce by not later than 26 April 2004, several materials in preparation for the commencement of the trial, including: a list of witnesses it intended to call at trial, and all witness statement in full (that had not yet been disclosed to the Defence).³⁵⁹² The Prosecution accordingly disclosed all the requested materials.³⁵⁹³

48. On 8 March 2005, the Trial Chamber dismissed a request by Brima Defence which sought to disclose the identity of a protected witness.

49. On 4 March 2005, Kanu and Brima filed Motions requesting the Trial Chamber to order the Prosecution to disclose to the Defence all material and/or information relating to rewards given to Prosecution Trial witnesses prior to giving testimony in court. In its Response³⁵⁹⁴ the Prosecution acceded to the request by the Defence. On 16 March 2005, Trial Chamber II accordingly dismissed the two Motions.³⁵⁹⁵

50. On 10 March 2005, Brima, Kamara and Kanu filed a Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68. On 4 May 2005 the Trial Chamber dismissed the motion finding that the Defence had

³⁵⁹¹ *Prosecutor v. Brima, Kamara and Kanu*, Kanu- SCSL-2004-16-PT, Kanu – Decision on Application for Leave to File an Interlocutory Appeal against Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements, 4 February 2005.

³⁵⁹² *Prosecutor v. Brima, Kamara and Kanu*, Kanu- SCSL-2004-16-PT, Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, 1 April 2004.

³⁵⁹³ *Prosecutor v. Brima, Kamara and Kanu*, Kanu- SCSL-2004-16-PT, Materials Filed pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of the Trial of 1 April 2004, 26 April 2004. See also *id.*, Prosecution Chart Indicating the Documentary and Testimonial Evidence by Paragraph of Consolidated Indictment pursuant to Trial Chamber Order dated 1 April 2004, 3 May 2004. See also *id.*, Updated Compliance Report Filed pursuant to Undertaking by the Prosecution in Pre-Trial Conference Held 30 April 2004, 11 May 2004. See also *id.*, Outstanding Exhibit Copies Filed pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of the Trial of 1 April 2004, 11 June 2004. See also *id.*, Supplementary Materials Materials Filed pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of the Trial of 1 April 2004, 30 July 2004.

³⁵⁹⁴ Combined Prosecution Response to Kanu and Brima – Motion to Disclose Prosecution Materials and/or information pertaining to Rewards provided to Prosecution Trial Witnesses, filed on 7 March 2005.

³⁵⁹⁵ *Prosecutor v. Brima, Kamara and Kanu*, Kanu- SCSL-2004-16-PT, Decision on Kanu Motion to Disclose Prosecution Material and/or Other Information Pertaining to Rewards to Prosecution Trial Witnesses and Brima's Motion in Response, 16 March 2005.

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failed to demonstrate or substantiate the allegation of breach by the Prosecution of Rules 66 and 68.³⁵⁹⁶

51. On 19 March 2004, the Defence for Kanu submitted a motion to request an order requiring the governmental authorities of Cockerill Army Headquarters to release exculpatory information and evidence to the Defence on the Accused’s incarceration with respect to a shooting incident.³⁵⁹⁷ The Trial Chamber granted the motion on 1 June 2004.³⁵⁹⁸

9. Protective Measures for Witnesses

52. On 23 May 2003 in the case of Brima, 23 October 2004 in the case of Kamara and 24 November 2003 in the case of Kanu, Judge Thompson, for Brima and Kamara, and Judge Itoe, for Kanu, an Order for immediate protective measures for and non-public disclosure of witnesses and victims. The Prosecution was allowed to withhold identifying data of persons whom it was seeking to protect until twenty-one days before the witness was to testify at trial in the case of Brima and Kamara and forty-two days in the case of Kanu. The Order also required that the names and other identifying information concerning all witnesses be sealed by the Registry and not be included in any existing or future records of the Court.³⁵⁹⁹

53. On 2 April 2004, the Trial Chamber ordered the Prosecution to file a renewed motion for protective measures pursuant to Rules 69 and 75 of the Rules, for each witness who appeared on the Prosecution Witness List.³⁶⁰⁰ On 4 May 2004, the Prosecution filed a renewed motion for protective measures.³⁶⁰¹ On 20 January 2005 Trial Chamber II issued an interim Order on the modification of protective measures instructing the prosecutor to modify the “rolling disclosure period” of unredacted witness statements to the Defence in the case of the Accused Kanu to 42 days and, in

³⁵⁹⁶ *Prosecutor v. Brima, Kamara and Kanu*, Kanu- SCSL-2004-16-PT, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigator’s Notes Pursuant to Rules 66 and/or 68.

³⁵⁹⁷ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kanu-Motion to Request an Order under Rule 54 with Respect to Exculpatory Evidence, 19 March 2004.

³⁵⁹⁸ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kanu-Decision on Defence Motion in Respect of Santigie Borbor Kanu for an Order Under Rule 54 with Respect to Release of Exculpatory Evidence, 9 June 2004.

³⁵⁹⁹ *Prosecutor v. Brima*, SCSL-2003-06-PT, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, *Prosecutor v. Kamara*, SCSL-2003-10-PT, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003, *Prosecutor v. Kanu*, SCSL-2004-13-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims, 24 November 2003.

³⁶⁰⁰ *Prosecution v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Order to the Prosecution for Renewed Motion for Protective Measures, 2 April 2004.

³⁶⁰¹ *Prosecution v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004, 4 May 2004.

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addition, ordered that the Prosecutor shall commence with such disclosure on 24 January 2005.³⁶⁰² In the same Order the Trial Chamber allowed the Parties to file additional submissions.³⁶⁰³ The submissions were heard by Judge Doherty, in open court following a scheduling order on 28 January 2005, which moreover ordered the Prosecution to file a list that indicated which witnesses already protected by an order of another Trial Chamber of the Special Court would be appearing in this case before them.³⁶⁰⁴ The Prosecutor filed such a list on 1 February 2005.³⁶⁰⁵ Due to the list it became apparent that all witnesses had already been granted protective measures due to an order of Trial Chamber I.³⁶⁰⁶ After declaring the motion redundant the Prosecutor withdrew its motion. Judge Doherty ordered the Prosecution to inform the Defence Teams of all variations of protective measures in regard to the witnesses appearing in this case.³⁶⁰⁷

10. Pre-trial Briefs and Agreed Facts

54. On 2 April 2004 the Prosecution requested that the Trial Chamber take judicial notice of certain facts as ‘facts of common knowledge’, including those from official and internationally recognised United Nations documents and various humanitarian reports and admit them in evidence.³⁶⁰⁸ Pursuant to Rule 94(A) the Trial Chamber must take judicial notice of facts of common knowledge. On 25 October 2005 the Trial Chamber issued its decision in which it found that eleven facts qualified for judicial notice.³⁶⁰⁹

55. Following an Order issued on 13 February 2004³⁶¹⁰ for the filing of Pre-Trial briefs, the Prosecution submitted its Pre-Trial brief on 5 March 2004. On 1 April 2004, the Trial Chamber

³⁶⁰² *Prosecution v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Interim Order on Modification of Protective Measures for Witnesses, 20 January 2005.

³⁶⁰³ *Prosecution v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Interim Order on Modification of Protective Measures for Witnesses, 20 January 2005.

³⁶⁰⁴ *Prosecutor v. Brima, Kamara and Kanu*, Kanu- SCSL-2004-16-PT, Scheduling Order, 28 February 2005.

³⁶⁰⁵ List of Protective Measures received from Trial Chamber I and other Information Filed pursuant to Scheduling Order of 28 January 2005, 1 February 2005.

³⁶⁰⁶ *Prosecutor v. Sesay, Kallon and Gboa*, SCSL-2004-15-PT, Decision on Prosecutions Motion for Modification of Protective Measures for Witnesses, 5 July 2004.

³⁶⁰⁷ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Oral Decision on Prosecution’s Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Protective Measures Dated 2 April 2004, 3 February 2005.

³⁶⁰⁸ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Prosecution’s Motion for Judicial Notice and Admission of Evidence, 2 April 2004. See also *id.*, Order to File Outstanding Documents in Support of the Judicial Notice Motion, 4 May 2004.

³⁶⁰⁹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence, 25 October 2005.

³⁶¹⁰ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Order for Filing Pre-Trial Briefs (Under Rules 54 and 73bis), 13 February 2004.

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ordered the Prosecution to file no later than 22 April 2004, a Supplemental Pre-Trial Brief.³⁶¹¹ On 22 April 2004, the Prosecution accordingly submitted its Supplemental Pre-Trial Brief.³⁶¹²

56. On 22 March 2004 Defence Counsel for Kanu also submitted its Pre-Trial brief.³⁶¹³ With the same order by which it requested the Prosecution to supplement its Brief, the Trial Chamber also modified the deadline for the filing of the Defence Pre-Trial Briefs, originally set for 26 March 2004, setting for two weeks prior to the date for the commencement of the trial. Contextually, Defence Counsel for Kanu was given the possibility to file any supplement to its brief with the same deadline.³⁶¹⁴

11. Pre-Trial Case Management

57. A Status Conference was held on 8 March 2004 pursuant to Rule 54 and Rule 65*bis* of the Rules.³⁶¹⁵ A Pre-Trial Conference took place on 30 April 2004 pursuant to Rule 73*bis* of the Rules.³⁶¹⁶

C. Trial Proceedings

1. Overview

58. The Prosecution case-in-chief commenced on 7 March 2005 and closed on 21 November 2005. The Prosecution called 59 witnesses. The reports of the three Prosecution expert witnesses were admitted under Rule 94*bis*. A total of 80 Prosecution exhibits were admitted.

59. The Defence case-in-chief started on 5 June 2006 and finished on 26 October 2006. In total, the Defence called 87 witnesses, including the first Accused Alex Tamba Brima who testified pursuant to Rule 85 (C) of the Rules. The reports of the three Defence expert witnesses were admitted under Rule 94*bis*. A total of 39 Defence exhibits were admitted.

³⁶¹¹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Order to the Prosecution to File a Supplemental Pre-Trial Brief and Revised Order for Filing of Defence Pre-Trial Briefs, 1 April 2004.

³⁶¹² *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004, 22 April 2004.

³⁶¹³ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kanu-Defence Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b), 22 March 2004.

³⁶¹⁴ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Order to the Prosecution to File a Supplemental Pre-Trial Brief and Revised Order for Filing of Defence Pre-Trial Briefs, 1 April 2004.

³⁶¹⁵ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Scheduling Order for Status Conference (Under Rule 65*bis*) 13 February 2004.

³⁶¹⁶ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Scheduling Order Setting a New Date for the Pre-Trial Conference, 28 April 2004. See also *id.*, Order for a Pre-Trial Conference (Under Rule 73*bis*), 2 April 2004.

60. The Trial Chamber called one witness in order to gather information as to the whether the reliability of one document was susceptible of confirmation under Rule 92bis (B).
61. Rebuttal was requested by the Prosecution but denied.³⁶¹⁷
62. Final briefs were filed on 1 December 2006. Closing Arguments were heard on 7 and 8 December 2006.
63. The Trial Chamber sat 176 trial days.

2. Evidentiary Issues

64. The admission of evidence at trial was regulated on the basis of the Rules and case-law of this Tribunal.

(a) Disclosure

65. On 4 April 2005 the Defence filed a motion for disclosure of independent investigator's report on contempt of court proceedings and stay of proceedings. On 30 June 2005, the Trial Chamber dismissed the motion on the grounds that the Defence Counsel were not representing the Accused, nor did they show that non-disclosure would in any way prejudice their case.
66. On 10 March 2005, the Defence filed a joint motion against the Prosecution for disclosure of original witness statements, interview and investigator notes, pursuant to Rule 66 and 68. On 4 May 2005, the Trial Chamber dismissed the motion³⁶¹⁸ The Trial Chamber in its decision stated that the Defence did not prove that the Prosecution did not act in good faith, and that the Prosecution acted in a manner which was reasonable for the circumstances.
67. The Defence filed separate motions on separate dates, but for the common purpose of requesting that photographs and/or videos taken of the Trials should not be disclosed to the public. On 28 February 2005 the Trial Chamber dismissed the motion.³⁶¹⁹
68. On 4 March 2006, the Defence for Kanu and Brima filed motions for disclosure of payments made by Prosecution to its witnesses before evidence in chief. The Prosecution agreed to disclose

³⁶¹⁷ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on confidential motion to call evidence in rebuttal, 14 November 2006

³⁶¹⁸ *Prosecution v. Brima, Kamara, and Kanu*, SCSL-04-16-PT, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interviews Notes and Investigator Notes Pursuant to Rule 66 and/or 68, 4 May 2005.

³⁶¹⁹ *Prosecution v. Brima, Kamara and Kanu*, SCSL-04-16-PT, Decision on Defence Application not to Disclose Photography, Video and Audio Recordings of the Trial to the Public and/or Third Parties, 28 February 2005.

the material required. But the Defence later stated that it did not desire a ruling on this motion anymore, as it did not think there was any contention between the parties any more, the Trial Chamber dismissed the motion on 16 March 2005.³⁶²⁰

69. On 27 July 2006, the Prosecution filed a motion for restriction of contact between the Accused and Defence witnesses and for disclosure of all such contacts. The Prosecution argued based on foreign laws and customs and also that it could affect the evidence that each witness could give. On 10 October 2006, the Trial Chamber dismissed the motion.³⁶²¹

70. On 7 July 2006, the Prosecution seized the Trial Chamber for relief for Defence failure of disclosure of intent to enter the defence of alibi pursuant to Rule 67. On 26 July 2006, the Trial Chamber granted the motion in part and ordered the Defence for the first Accused Brima to make the necessary disclosures in accordance with Rule 67(A)(ii). The order sought against the second and third accused (Kamara and Kanu) was denied.³⁶²²

(b) Judicial Notice

71. On 2 April 2004, the Prosecution seized the Trial Chamber with a motion for judicial notice and admission of evidence, stating a list of facts it wanted the Court to take judicial notice of. In its decision on 25 October 2005 the Trial Chamber took judicial notice of nine facts, modified two and dismissed seven of the facts stated in the Prosecutions motion.

(c) Admission of Documentary Evidence

72. On 18 November 2005, the Trial Chamber made a decision on the Prosecution's notice for admission of information into evidence pursuant to Rule 92*bis*. The Trial Chamber admitted thirty-eight of the documents which the Prosecution stated in its notice; for two other documents, the Trial Chamber stated that they would be admitted as evidence on the condition that the complete

³⁶²⁰ Prosecution v Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on Kanu Motion to Disclose Prosecution Material And/Or Other Information Pertaining to Rewards To Prosecution Trial Witnesses and Brima's Motion in Support, 16 March 2005.

³⁶²¹ Prosecution v. Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on Urgent Prosecution Motion for an Order Restricting Contacts Between the Accused and Defence Witnesses and Requiring Disclosure of Such Contacts, 10 October 2006

³⁶²² Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67, 26 July 2006

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documents are tendered, and for one of the documents the Trial chamber stated that the copied tendered must be legible.³⁶²³

73. On 7 March 2005, the Defence filed a motion on Admissibility of Expert Witnesses/ Expert Evidence and filing of notice pursuant to Rule 94*bis*. The Defence alleged that some particular witnesses for the Prosecution were a hybrid of the two international recognized type of witnesses (witness of facts and expert witnesses) and that this would cause them prejudice, as they would not be able to cross-examine them. On 16 June 2005, the Trial Chamber dismissed the motion on the basis that it was premature, as the witnesses had not yet been called.³⁶²⁴

(d) Protective Measures and Matters not Subject to Disclosure

74. On 25 April 2006 the Defence filed a jointed application for Protective Measures for Defence witnesses. On 9 May 2006, the Trial Chambers granted the motion, having been satisfied that there was reasonable risk of danger to the witnesses.

75. On 9 May 2006, the Defence filed a joint motion, for leave to extend the deadline for presentation of final witness list and on its inability to provide details on certain witnesses. On 17 May 2006, despite the fact the Prosecution contended the motion, the Trial Chamber granted the motion and extended the deadline and ordered that the motion remain confidential.³⁶²⁵

76. On 13 September 2006, the Trial Chamber granted a motion for the Defence and ordered that the Protective Measures ordered in the Decision dated 9 May 2006 be extended to witnesses stated in Defence documents “Kanu- Defence Filing of Witness List Pursuant to Trial Chamber Order of 17 May 2006”³⁶²⁶

77. The Defence on the behalf of Brima Bazy Kamara on 12 May 2005 filed an evidentiary submission to the effect that the Registrar was disseminating confidential documents to the Press and Public Affairs Office. On 17 October 2005, the Trial Chamber ordered that documents filed

³⁶²³ Prosecution v. Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92*bis*, 18 November 2005

³⁶²⁴ Prosecution v. Brima, Kamare and Kanu, SCSL-04-16-PT, Decision on Joint Defence Motion on Admission of Expert Witness/ Expert Evidence and Filing of Notice Pursuant to Rule 94*bis* (B)i and ii, on Re-filed Defence Request for Disclosure and the Joint Defence Motion for Exclusion of Medical Information, Statistics and Abstracts Pertaining to Witnesses TF1-081 and TF1-188, 16 June 2005

³⁶²⁵ Prosecution v. Brima, Kamara and Kanu, SCSL-2004-16-PT, Decision on Confidential Joint Motion of the Defence as to Inability to Provide Details on Certain Witnesses on 10 May 2006 and Anticipation of *subpoenas ad testificandum*, 17 May 2006

³⁶²⁶ Prosecution v. Brima, Kamara and Kanu, SCSL-2004-16-PT, Decision on Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 Onwards, 13 September 2006

confidentially shall only be served to those for whom it was intended and shall not be disseminated to others without the leave of the Court.³⁶²⁷

78. On 18 October 2006 the Prosecution filed a motion for varying the Protective Measures for witnesses. The Prosecution claimed that the Protective measures applicable to the witnesses of the first trial (AFRC case) should be modified for the second trial (Taylor Case), given the fact that the witnesses would have to be moved and this would involve releasing their identity to outsiders. On 15 November 2006, the Trial Chamber dismissed the motion on the grounds that the Protective Measures in the first proceedings shall apply *mutatis mutandis* to the second trial and that the Trial Chamber had already issued decisions to vary the protective measures of the witnesses in the second proceedings.³⁶²⁸

(e) Counsel Issues

79. On 13 May 2005, the Trial Chamber issued an order on the role of Court- appointed counsel. The Chamber in its decision stated what the duties of the Counsel for Alex Tamba Brima and Brima Bazzy Kamara should be until lead Counsel was appointed for them; however, this decision could be modified when deemed necessary.³⁶²⁹

80. On 5 May 2005, the Trial Chamber was seized by a “Confidential Joint Defence Submission on the Withdrawal of Counsel in the AFRC Case” by lead Counsel for Brima and Kamara. On 20 May 2005 the Trial Chamber granted the motion for the withdrawal of Lead Counsel Kevin Metzger and Wilbert Harris as Counsel for Brima and Kamara respectively.³⁶³⁰ However, on 24 May 2005 an extremely urgent and confidential motion was filed for the re-appointment of Kevin Metzger and Wilbert Harris for Alex Tamba Brima and Brima Bazzy Kamara. On 9 June 2005, the Trial Chamber, granted the motion on behalf of Accused Brima and Kamara for the re-appointment of Counsel for them.³⁶³¹

³⁶²⁷ Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on Defence Submission Providing Evidentiary Proof of Registry’s Repeated Dissemination of Confidential Documents to the Press and Public Affairs Office, 17 October 2005.

³⁶²⁸ Prosecution v. Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on Confidential Motion to Vary Protective Measures, 15 November 2006.

³⁶²⁹ Prosecution v. Brima, Kamara and Kanu, SCSL-04-16-T, Consequential Order on the Role of Court Appointed Counsel, 13 May 2005

³⁶³⁰ Prosecution v. Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on the Confidential Joint Defence Application for Withdrawal of Counsel for Brima and Kamara on the Request for further Representation by Counsel for Kanu, 20 May 2005.

³⁶³¹ Prosecution v. Brima, Kamara and Kanu, SCSL-04-16-PT, Decision on Extremely Urgent Confidential Joint Motion for Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima

90. On 5 August 2005, the Trial Chamber granted to the Defence leave for and interlocutory appeal on its decision for re-appointment of lead counsel for Alex Tamba Brima.³⁶³² The Trial Chamber justified its decision by stating Rule 73(B) and an earlier decision of the Appeals Chamber to the effect that interlocutory appeals shall not delay the conclusion of trial.³⁶³³

3. Rule 98 Decision

The Defence filed Motions for Judgement of Acquittal Under Rule 98 on 12 and 13 December 2005. On 31 March 2006 the Trial Chamber rendered its decision dismissing the defence motions in their entirety.³⁶³⁴

Bazzy Kamara, and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Orders of 12 May 2005, 9 June 2005

³⁶³² Prosecutor v. Brima, Kamara and Kanu, Decision on Brima-Kamara Application for Leave to Appeal from the Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel, 5 August 2005.

³⁶³³ Prosecutor v. Hinga Norman, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

³⁶³⁴ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Defence Motions for Judgement of Acquittal Under Rule 98, 31 March 2006

ANNEX B: GLOSSARY

D. List of Abbreviations, Acronyms and Short References

Accused	Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
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 (Protocol II), Geneva, 12 December 1977
a.k.a.	Also known as
Art.	Article
AFRC	Armed Forces Revolutionary Council
CDF	
Common Article 3	Article 3 common to the four Geneva Conventions of 1949
Count	
Charge	
Defence	Counsel for Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.
Defence Final Brief	<i>Prosecutor v. Alex Tamba Brima</i> , Case No. SCSL-2004-16-PT, Confidential Brima Defence Final Brief, filed on 1 December 2007; <i>Prosecutor v. Brima Bazzy Kamara</i> , Case No. SCSL-2004-16-PT, Confidential Kamara Defence Final Brief, filed on 1 December 2006; <i>Prosecutor v. Santigie Borbor Kanu</i> , Case No. SCSL-2004-16-PT, Confidential Kanu Defence Trial Brief, filed on 1 December 2006.

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Defence Pre-Trial Brief	Prosecutor v, Alex Tamba Brima, Brima Bazzy Kamara, Santigie, Case No. SCSL-2000-16-PT, Defence Pre-Trial Brief for Tamba Alex Brima, filed on 17 February 2005; Kamara Defence Pre-Trial Brief, filed on 21 February 2005; Kanu Defence Pre-Trial Brief and Notification of Defences Pursuant to Rule 67(A)(ii) AND (b). Economic Community of West African States
ECOWAS	
ECOMOG	Economic Community of West African States Monitoring Group
exhibit D-	Defence Exhibit
exhibit P-	
fn.	Prosecution Exhibit
	Footnote
1949 Geneva Convention I	Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces in the Field, 12 August 1949, 75 UNTS 31
1949 Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85
1949 Geneva Convention III	Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135
1949 Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 2
Hors de combat	Not taking active part in the hostilities
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTR Statute	Statute of the ICTR, established pursuant to Security Council Resolution 955 (1994) (S/RES/955)
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council Resolution 827 (1993)
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
Indictment	Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara AND Santigie Kanu, Further Amended Consolidated Indictment
inter alia	Amongst others
JCE	Joint Criminal enterprise
Kamajors Mens Rea	Mental Element of a crime
p.	Page
pp.	Pages
para.	Paragraph
Paras	Paragraphs
Parties	Prosecution v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, SCSL-2004-16-PT
PLO Prosecution	Public Liaison Officer Office of the Prosecutor
Prosecution Final Brief	Confidential Prosecution Final Trial Brief
Prosecution Pre-Trial Brief	Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73bis) of 13 February 2004
Rome Statute	Statute of the International Criminal Court, Rome, 17 July 1998
Res judicata, RUF	Revolutionary United Front

Rules	Rules of Procedure and Evidence of the Special Court for Sierra Leone
Special Court	Special Court for Sierra Leone, established on 16 January 2002
Statute	Statute of the Special Court for Sierra Leone, 16 January 2002.
STF	Special Task Force
Supplemental Pre-Trial Brief	Prosecution Supplemental Pre-Trial Brief Pursuant to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004, filed on 21 April 2004

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Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-T, Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92bis, 18 November 2005.

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Prosecutor v. Santigie Borbor Kanu, Case No. SCSL-2003-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003.

Prosecutor v. Brima, Kamara, Kanu, SCSL-04-16-T, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67, 26 July 2006.

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Prosecutor v. Morris Kallon, Sam Hinga Norman and Brima Bazzy Kamara, 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.

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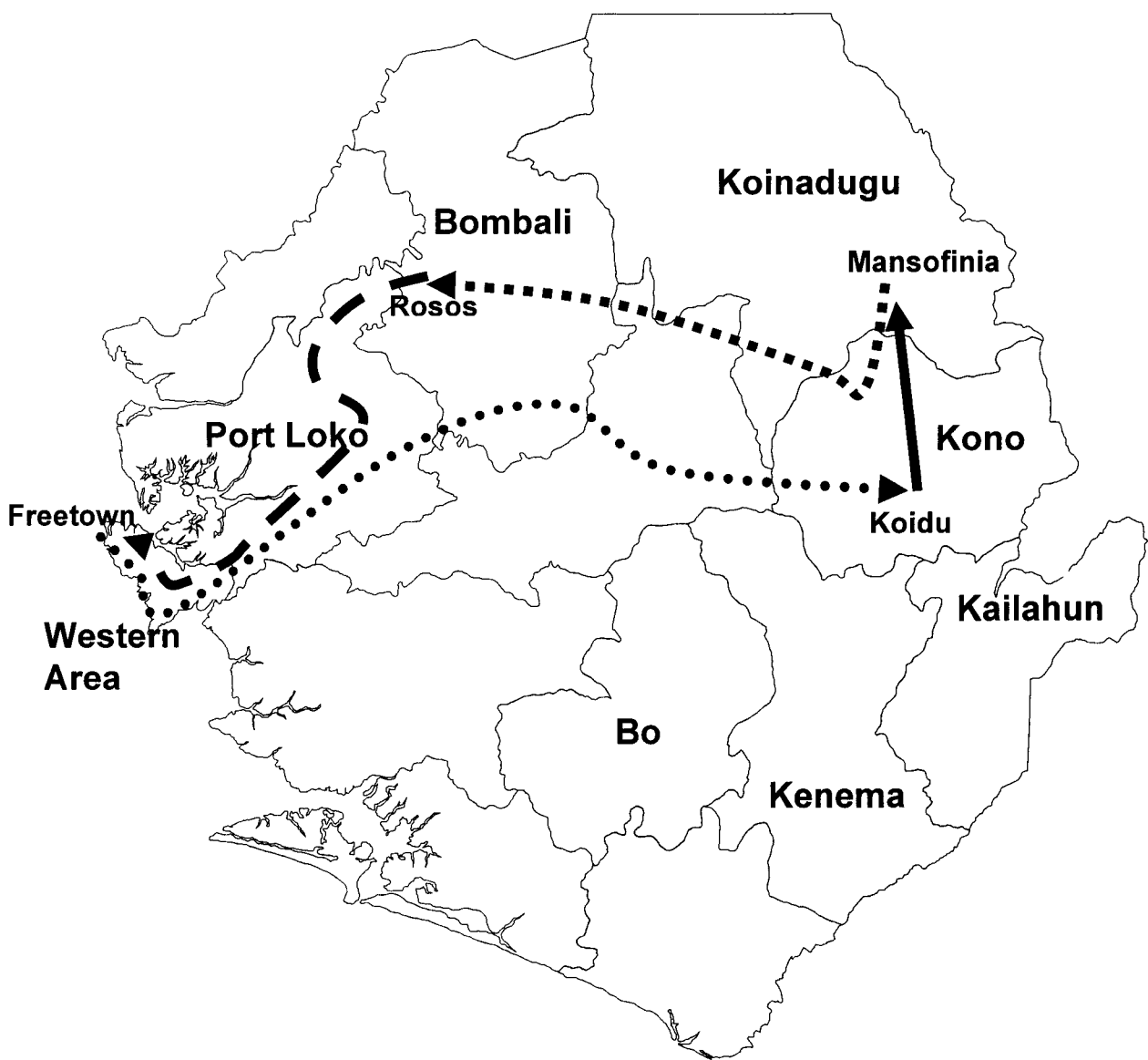
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F. Main Actors in the Conflict

REAL NAME	ALIAS	ORGANISATION
Denis Mingo	Superman	High ranking RUF Commander
FAT Sesay	FAT, Colonel FAT	Brigade Administrator. AFRC fighting forces.
Foday Sankoh.		Leader of the RUF.
George Johnson	Junior Lion	Chief Security Officer to the Accused Kamara; AFRC Commander
Hassan Papa Bangura	Bombblast	AFRC Commander
Issa Sesay	'Issa'	High ranking RUF Commander
Johnny Paul Koroma	JPK	Chairman of the AFRC government.
Sam Bockarie	'Mosquito'	Leader of the RUF in Sankoh's absence.
Solomon Anthony James Musa	SAJ Musa	AFRC, Superior of Alex Tamba Brima
Mohamed Savage, aka, Mr. Die, Changabulanga.	'Savage'	AFRC Commander in Tombodu
Morris Kallon		High ranking RUF Commander.
Real name unknown	Staff Alhaji	AFRC Commander, Deputy to 'Savage' in Tombodu
Real name unknown.	"O-Five."	AFRC fighting forces commander

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ANNEX C: MAP OF SIERRA LEONE



Legend:

-▶ 1998 Freetown retreat – February through March 1998
- ▶ Kono retreat – April/ May 1998
-▶ Mansofinia – Rosos route – May/ April 1998 through November 1998
- ▶ Freetown advance – November/December 1998 through February 1999