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SCSL-03-01-A
(9532-9850)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date filed: 30 November 2012

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

PUBLIC

PROSECUTION'S SUBMISSIONS IN REPLY

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I. OVERVIEW

1. Pursuant to Article 20 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 106 and 113 of the Rules of Procedure and Evidence ("Rules"), the Prosecution files Submissions in Reply ("Reply")[1] to the Respondent's Submissions of Charles Ghankay Taylor ("Taylor Response").[2]

2. The Prosecution relies on all of the submissions in the Prosecution Appellant's Submissions ("Prosecution Appeal").[3] In this Reply, the Prosecution addresses specific points raised in Taylor's Response that warrant further submissions in reply, and does not address Taylor's submissions which are already adequately addressed in the Prosecution Appeal or which merely disagree with the Prosecution submissions. Where the Prosecution omits to address particular paragraphs or points in Taylor's Response, this in no way implies that the Prosecution makes any concession to Taylor's arguments.

3. The full references for abbreviated citations used in the footnotes of this Reply are provided in the Annex, which contains the Book of Authorities.

II. SUBMISSIONS IN REPLY

GROUND ONE: The Trial Chamber erred in law and in fact when it failed to find Charles Taylor individually criminally responsible for ordering the commission of crimes under Article 6(1) of the Statute

A. Overview

4. Taylor's Response to Ground One of the Prosecution Appeal miscites jurisprudence that confirms the Prosecution's recitation of the elements of ordering, and cites examples allegedly showing non-compliance with Taylor's instructions which in fact demonstrate compliance with his instructions and affirm his authority. The Judgement findings clearly establish that Taylor was a person in a position of authority in relation to Sam Bockarie and Johnny Paul Koroma ("JPK") at the time he gave the five instructions at issue such as to

[1] The Prosecution thanks interns Morgen Morrissette and Caitlin Warner for their invaluable assistance in the preparation of this Reply.
[2] Respondent's Submissions of Charles Ghankay Taylor, SCSL-03-01-A-1349, 23 November 2012 ("Taylor Response").
[3] Prosecution Appellant's Submissions, SCSL-03-01-A-1325, 1 October 2012 ("Prosecution Appeal").

successfully compel their compliance with his instructions. The Appeals Chamber should grant Ground One of the Prosecution Appeal and enter convictions for ordering the crimes that resulted from these five instructions.

B. The Trial Chamber erred in law by improperly relying on its finding that Taylor's instructions were "at times" not followed to conclude that he was not criminally responsible for ordering

5. Contrary to Taylor's claims, the Prosecution did not submit that the Trial Chamber considered itself barred from finding Taylor guilty of ordering because his instructions were not always followed,[4] nor did it state that this was the decisive factor in the Chamber's considerations.[5] Rather, the Prosecution submitted that this was "*one of the reasons*" the Chamber gave for not holding Taylor responsible for ordering.[6]

6. Taylor's suggestion that there "are far more than (the) two instances" submitted by the Prosecution as to when his instructions were not followed[7] does not withstand scrutiny. The "sample" six instances of non-compliance cited by Taylor, set out in a footnote, do not show a misreading or misrepresentation of the Judgement by the Prosecution.[8] Rather, the six examples further demonstrate that the only reasonable conclusion from the Trial Chamber's findings is that Taylor was in a position of authority over Bockarie and JPK at the time he gave the five instructions that are the subject of Ground One of the Prosecution Appeal. The six examples cited by Taylor in footnote 28 of his Response are addressed in turn:

(i) **Release of External Delegation**: The first instance of so-called non-compliance cited by Taylor is from the testimony of his witness, Musa Fayia. Fayia and other members of the External Delegation had attempted to change the leadership of the RUF after Sankoh's arrest in 1997 because they were unhappy that Sankoh was undermining efforts to implement the 1996 Abidjan Peace Accord.[9] They were subsequently arrested, mistreated,[10] and kept in detention until the signing of the Lomé Peace Accord ("Lomé

[4] Taylor Response, para. 14.
[5] Taylor Response, para. 14.
[6] Prosecution Appeal, para. 18 (emphasis added).
[7] Taylor Response, para. 15.
[8] Taylor Response, para. 15.
[9] Judgement, para. 40. See also Fayia, T. 15 April 2010 pp. 39056-59.
[10] Fayia, T. 15 April 2010 pp. 39113-17.

Accord") in 1999.[11] Taylor only cites Fayia's testimony that Taylor had sent an emissary to ask Bockarie to release Fayia, but that Bockarie said he would not take anyone's advice.[12] However, Fayia further testified that the emissary's visit occurred "when the Lomé peace process was on",[13] a process which began after April 1999,[14] but prior to the signing of the Accord on 7 July 1999.[15] Fayia testified that he was released in August 1999.[16] Therefore, if there was an instruction from Taylor to release the External Delegation[17] as alleged by the witness, but for which there is no finding in the Judgement, this is yet another instance of compliance with Taylor's instructions, not non-compliance.

(ii) **Telling Foday Sankoh to relocate**: Of the six instances cited in Taylor's Response, this is the only example which actually shows the RUF or AFRC not complying with Taylor's instructions. However, when closely examined, even this instance demonstrates Taylor's authority. The Trial Judgement summarised the testimony of Witness TF1-567, an RUF member, who said that after Sankoh's arrest, Taylor summoned the witness to the Executive Mansion late at night (the witness of course complied). The witness testified that Taylor "appeared to be angry" and said that he had advised Sankoh not to base himself in Freetown but rather in a more secure location.[18] It is noteworthy that the person not complying with Taylor's instruction in this particular instance was Sankoh and not Bockarie or JPK, who were the recipients of the instructions that are the subject of the Prosecution's first Ground of Appeal. Moreover, it is revealing that Taylor's reaction to Sankoh not doing what he had told him to do was anger, demonstrating his own expectation that his authority would be respected and his advice implemented.

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[11] Judgement, para. 3584.
[12] Taylor Response, fn. 28 referring to Fayia, T. 15 April 2010 pp. 39136-37. Taylor omits to include that the witness first testified that "Mosquito said the only thing that he can do for us without anyone's instruction is to kill us", thereby implying that Bockarie had no instructions as to what to do with the witnesses. See Fayia, T. 15 April 2010 pp. 39136-37.
[13] Fayia, T. 15 April 2010 p. 39137.
[14] Judgement, para. 6280.
[15] Judgement, para. 6233.
[16] Fayia, T. 15 April 2010 p. 39141.
[17] It should be noted that Sankoh did not return to Sierra Leone until 3 October 1999, a number of months after the conclusion of the Lomé Accord and after Fayia's release. See Exh. D-023.
[18] Judgement, para. 6358.

(iii) **Capture of peacekeepers:** Taylor claims that because the capture of the peacekeepers was a violation of the Lomé Accord which he helped broker, this somehow demonstrates that his instructions were not followed. However, Taylor's claim to have acted as a peacemaker in the Sierra Leonean war was explicitly rejected by the Trial Chamber, which found that at the same time Taylor was publicly advocating for the Lomé Accord, he was undermining the peace process by engaging in arms transactions with the RUF.[19] Further, the Trial Chamber found that Taylor advised Issa Sesay to say that he would disarm, but that he should "not do it in reality".[20] Thus, the RUF's failure to comply with the terms of the Lomé Accord does not demonstrate non-compliance with Taylor's instructions, as the covert instructions he was giving in reality violated the very Accord he overtly "helped" broker.

(iv) **Release of peacekeepers**: Taylor cites his intervention with Issa Sesay to secure the release of ECOWAS peacekeepers captured by the RUF in May 2000 as demonstrating that his instructions were not always followed. Citing parts of the Trial Judgement out of context, Taylor implies that only some of the peacekeepers were released and that Sesay refused to release them all. This contradicts Taylor's own position at trial,[21] and Issa Sesay's own testimony that all peacekeepers were released.[22] Rather than demonstrating non-compliance, the release of the peacekeepers is powerful evidence of Taylor's authority over the RUF and his ability to compel compliance. Sesay testified that he made no effort to release the peacekeepers until he met with Taylor two to three weeks after the capture of the peacekeepers.[23] Sesay testified that he "had to accept" Taylor's proposal.[24] Thus the Taylor's own witness unequivocally affirmed his authority to compel compliance with his advice and instructions.

(v) **Suggesting Issa Sesay as interim RUF leader**: Taylor cites paragraph 6784 of the Trial Judgement where the Trial Chamber found that at a meeting with ECOWAS

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[19] Judgement, para. 6781.
[20] Judgement, para. 6785.
[21] Judgement, para. 6348.
[22] Judgement, para. 6377, referring to Sesay, T. 26 July 2010 pp. 44537-39 ("they were transported in the evening by the helicopter, all of them were taken to Monrovia because we were in Foya at the airfield when the helicopter came for them, for the first batch, and it went, and it came back for the second batch and took them to Monrovia").
[23] Judgement, para. 6379, fns. 14460-61 citing Sesay, T. 26 July 2010 pp. 44541-43 and T. 23 August 2010 p. 46893.
[24] Judgement, para. 6378, fn. 14456 citing Sesay, T. 6 August 2010 p. 45600.

Heads of State, including Taylor, the suggestion was made that Sesay should become interim leader of the RUF while Sankoh was in detention and Sesay responded that he would have to obtain the approval of the RUF and Sankoh. Taylor omits to mention that in the same paragraph, the Trial Chamber specifically found that this was not a unilateral suggestion by Taylor but rather a process undertaken by ECOWAS Heads of State collectively.[25] Further, Sesay did in fact accept the suggestion and became the RUF's interim leader.[26] This is not an example of non-compliance with Taylor's instructions.

(vi) Suggesting Bockarie's return as RUF leader: Taylor argues that in 2000, Issa Sesay refused his (Taylor's) suggestion to take Bockarie back as leader of the RUF. Taylor fails to mention that his position throughout the trial was that he never asked the RUF to take Bockarie back,[27] though Sesay himself testified that Taylor had asked him to do so.[28] Moreover, the Trial Chamber expressly rejected that this incident occurred.[29]

7. Taylor's attempt to give examples of non-compliance with his instructions in reality makes it *clearer* that the RUF consistently accepted Taylor's authority and implemented his advice and instructions. This is especially apparent during the critical time within the Indictment period when Sankoh was in detention and had instructed Bockarie to heed the advice of Taylor. There is no example in the entire record of any instance where Bockarie did not comply with Taylor's instructions.

8. Taylor's second claim is equally misplaced. The jurisprudential requirement that an accused be in a position "of some authority" over the individual carrying out the order is misread and misstated by Taylor here[30] and throughout his Response.[31] Taylor's claim that the authority of an accused must be such as "to compel" another to commit a crime, which he mistakenly attempts to interpret as meaning to give absolutely no alternative to the listener

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[25] Judgement, para. 6784. See also Judgement, para. 6612.
[26] Judgement, para. 6784.
[27] Judgement, para. 6588, referring to Taylor, T. 19 August 2009 pp. 27192-93.
[28] Sesay, T. 26 August 2010 p. 47198.
[29] Judgement, para. 6610.
[30] Taylor Response, para. 15. The Appeals Chamber at the ICTY has set down that the *actus reus* of ordering requires only a "person in a position of authority instructing another person to commit an offence." *Galić* AJ, para. 176; *Kordić & Čerkez* AJ, para. 28. There is no jurisprudential requirement that an accused must be capable of issuing binding decisions upon the perpetrator.
[31] Taylor Response, paras. 19, 21, 28, 30, 39.

but to comply, is incorrect for two reasons.[32] First, Taylor misstates the language "to compel" used in the jurisprudence in relation to an accused's position of authority. As previously excerpted in paragraph 27 of the Prosecution Appeal, the *Gacumbitsi* Trial Chamber detailed how a Chamber determines whether an accused had sufficient authority to engage his liability for ordering:

> The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be *de jure* or *de facto*. When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis. When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement [...] In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the *de facto* exercise of an administrative function, or even the use of threat or unlawful force. The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6(1) referred to above. Such a situation does not, *ipso facto*, lead to the conclusion that a formal superior-subordinate relationship exists between the person giving the order and the person executing it. As a matter of fact, instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an "order" within the meaning of Article 6(1) of the Statute.[33]

9. This statement was affirmed by the Appeals Chamber.[34] Whether an accused had sufficient authority to be liable for ordering must be determined in light of the circumstances of the case at the time the instruction is given.[35] The findings clearly show that Taylor was an incomparably influential figure to the RUF, RUF/AFRC.[36] Further, Taylor's instructions were enhanced by the fact that he supplied materiel to these groups throughout a period of many years when the rebel forces were internationally ostracised and subject to international arms embargoes.[37] Alternative sources of supplies were unimportant and paled in comparison to those provided by Taylor,[38] with the rebel forces "heavily and frequently relying" on

[32] Taylor Response, para. 15.
[33] *Gacumbitsi* TJ, para. 282.
[34] *Gacumbitsi* AJ, para. 181.
[35] *Gacumbitsi* AJ, para. 182.
[36] Judgement, paras. 6973, 6775, 6945.
[37] Judgement, paras. 4248(xvi), 4256.
[38] Judgement, paras. 5833, 5835(xxxix).

Taylor for the supplies he provided in order to continue their military campaigns.[39] Moreover, the findings in the Trial Judgement show that Taylor made clear to the rebel forces that his materiel support was contingent on their ability to retain control of diamondiferous areas and, consequently, their ability to continue to supply Taylor with diamonds.[40] Such influence and dependency effectively amounted to a coercive element in Taylor's relationship with the RUF, RUF/AFRC.

10. Further, at the time all of the instructions at issue were given, Foday Sankoh, the leader of the RUF, was in detention, and he had specifically instructed Sam Bockarie to "take orders from [Taylor]".[41] The fact that Sankoh remained the leader of the RUF and did not abdicate his position does not detract from the authority he imputed in Taylor at least up until the time he was released.

11. Combined with the numerous findings of compliance by the RUF, RUF/AFRC with Taylor's instructions cited by the Prosecution Appeal,[42] and bearing in mind the jurisprudence of the ICTR that "[t]he position of authority of the person who gave an order may be inferred from the fact that the order was obeyed",[43] Taylor's authority to issue orders to the rebel forces is clear from the Trial Chamber's findings.

12. Finally, the Prosecution correctly relied upon the *Brđanin* case.[44] Taylor's interpretation of the effect of that case is incorrect. In *Brđanin*, the ARK Crisis Staff was a regional authority, not provided for in the Constitution,[45] which existed for a period of only six weeks.[46] It was found by the ICTY Trial Chamber to be able to issue decisions "binding" upon municipalities solely on the evidence that the municipalities had chosen to say they accepted its authority.[47] Such voluntary acceptance was crucial, given that the ARK Crisis Staff had no *de jure* authority, could not enforce its decisions, and had no mechanism for imposing sanctions when the municipalities refused to implement instructions.[48] Further, the

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[39] Judgement, paras. 5831, 5842, 6914.
[40] Judgement, para. 6942.
[41] Judgement, para. 6480.
[42] Prosecution Appeal, para. 36, fn. 70, para. 37.
[43] *Kamuhanda* TJ, para. 594.
[44] *Contra* Taylor Response, para. 16.
[45] *Brđanin* TJ, para. 163.
[46] *Brđanin* TJ, para. 197.
[47] *Brđanin* TJ, para. 202.
[48] *Brđanin* TJ, para. 204.

Brđanin Trial Chamber found that the decisions amounted to orders although not all Crisis Staff decisions were followed and there were instances of municipalities rejecting their validity.[49] *Brđanin* clearly shows that *de facto* authority to order can be established where those who receive instructions to commit crimes accept the authority of those giving the instructions, irrespective of whether each and every instruction is followed. Consequently, contrary to Taylor's claim, the absence of an express finding that Taylor could issue "binding" orders to the RUF, RUF/AFRC is not dispositive of his authority to give orders to the RUF, RUF/AFRC.[50]

13. Taylor misleadingly claims that the Prosecution failed to substantiate its submission that had the Trial Chamber examined whether the elements for ordering were met at the time of the event, it would have found Taylor guilty.[51] Indeed, the Prosecution addressed the issue of Taylor's authority over the relevant listeners, JPK and Sam Bockarie, and the circumstances of their reliance on Taylor which served to enhance his instructions and compelled their adherence as a practical necessity.[52]

C. The Trial Chamber erred in law and fact in finding that Taylor's instructions were "generally of an advisory nature" and therefore he "cannot be held responsible for ordering the commission of crimes"

14. Taylor wrongly argues that the Prosecution's allegation that the Trial Chamber erred in mischaracterising his orders as "generally advisory" in nature is merely an attempt to substitute its own interpretation of the evidence.[53] The Prosecution is not "impermissibly repeating arguments" from the trial phase which have been considered and dismissed.[54] It was not argued at trial argued that Taylor gave instructions that were only "advisory in

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[49] *Brđanin* TJ, paras. 207, 364.
[50] Taylor Response, para. 16. The Trial Chamber in *Brđanin* found that the ARK Crisis Staff had *de facto* authority over the police and issued orders to the police, but nowhere did the Trial Chamber suggest that the Crisis Staff had the authority to issue "binding" orders over the police. Though Brđanin was not convicted on the basis of the orders issued to the police, it is clear that the ICTY Trial Chamber did not require the capability to issue "binding" orders when determining whether the accused had sufficient authority to order. See *Brđanin*, TJ, paras. 211-215, 365. The statement of the ICTR Trial Chamber in *Muvunyi* to the effect that "a person of authority uses that position to issue a binding instruction to *or otherwise* compel another to commit a crime" further demonstrates that the ability to issue "binding" instructions standard for ordering suggested by Taylor is not a requirement of the jurisprudence. See *Muvunyi* I TJ, para. 467 (emphasis added).
[51] Taylor Response, para. 17.
[52] Prosecution Appeal, paras. 28-30.
[53] Taylor Response, para. 18.
[54] Taylor Response, para. 18.

nature". Nor was it argued that advice given by a person in a position of authority that is complied with by the relevant listener does not amount to ordering. Taylor himself denied giving these instructions, so the Prosecution had no reason to address the issue that these instructions were merely advisory until it read the Trial Judgment. Thus, it is not surprising that Taylor fails to show any specific arguments by the Prosecution that had been so raised,[55] considered and dismissed, so as to render it impermissible to argue these points on appeal.

15. Taylor's argument that the Prosecution failed to substantiate its claim that the Judgement findings show that he gave his communications with "*compelling force*" is unconvincing.[56] The Prosecution provided several examples in paragraph 37 of the Prosecution Appeal which amply support this argument.[57] Further, Taylor's position of authority in relation to the RUF/AFRC did not come about by chance, nor was following Taylor's advice something that the RUF/AFRC did "coincidental[ly]".[58] Rather, the relationship had a long history and well-established foundation progressing from the formation of the RUF military force in Liberia,[59] to Taylor's support for the invasion of Sierra Leone[60] and his critical materiel support to the RUF/AFRC.[61] At the time these five orders were given, the relationship was clearly such that Taylor's leadership, guidance and support were critical to the RUF/AFRC's very survival as a military organisation.[62] Bockarie's regular communication to Taylor or Yeaten to report or seek advice on

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[55] See Taylor Response, paras. 25, 26. In paragraph 25, Taylor alleges the Prosecution repeats the point that "Foday Sankoh instructed Sam Bockarie to take orders from Taylor" and that this is considered by the Trial Chamber in paragraph 6774-75 of the Judgement. There is no mention that this issue has been raised before at trial, considered and determined. In paragraph 26, Taylor states that the Prosecution "resorts to repeating its time-worn arguments", and mentions the point about RUF/AFRC's deferential attitude towards Taylor in referring often to him as "my boss", etc, and states that these are arguments Prosecution raised in its Final Trial Brief, paras. 54-60. Again, Taylor makes no mention that this was an issue that had been raised and dismissed at trial. The fact that the issues were first raised in the Prosecution's Final Trial Brief and/or later repeated in the Prosecution Appeal does not put them in the category of matters contemplated by the authorities cited, as they had never been canvassed, determined and dismissed via an interlocutory process before the Trial Chamber, only in the Judgement which is now on appeal. Other than these two examples, no further examples of repeated arguments are provided.

[56] Taylor Response, para. 20.

[57] Prosecution Appeal, para. 37.

[58] *Contra* Taylor Response, para. 20.

[59] Judgement, para. 2337.

[60] Judgement, para. 2390.

[61] Judgement, paras. 6231, 6280, 6283.

[62] Judgement, paras. 6914, 5842: the arms and ammunition supplied or facilitated by Taylor were "*indispensable*" for the RUF/AFRC military offensives and "*critical* in enabling the operational strategy [based on terror] of the RUF and AFRC during the Indictment period." (Emphasis added.)

operational matters of the RUF/AFRC is a clear demonstration of this dependence on Taylor's leadership authority.[63]

16. The Trial Chamber's findings that the relationship between Taylor and the RUF/AFRC "was mainly based on common economic, political and military interest"[64] and that Taylor's advice and instructions to the RUF/AFRC "mainly focused on directing their attention to the diamondiferous area of Kono in order to ensure the continuation of trade, diamonds in exchange for arms and ammunition",[65] in no way diminish Taylor's authority or ability to obtain compliance with his instructions. The fact that Taylor's motive in dealing with the RUF was greed or a desire to enhance his military or political position in no way diminishes his authority, and Taylor's Response does not even try to establish how it could. The Chamber found that Taylor and the RUF/AFRC had "common [...] military interests"[66] and found that the RUF depended on Taylor.[67] These findings only support the evidence that Taylor was viewed as a person of authority by the RUF and AFRC at the relevant times and that his instructions therefore had an element of compulsion. Any failure on the rebels' part to comply risked the support of the one person critical to their military operations and very survival.

17. Taylor's attempt to define his dealings with the RUF/AFRC simply as a "trade relationship"[68] ignores the fact that integral to the dealings in this relationship was his provision of arms and ammunition that were vital to the RUF/AFRC's capability to achieve its military and operational strategy, which was based on a campaign of crimes against civilians including murders, rapes, sexual slavery, looting, abduction, forced labour, conscription of child soldiers, amputations and other forms of physical violence and acts of terror.[69] Taylor tries to argue that Bockarie could not have been the recipient of any order because of his "uncontrollable nature, and general belligerency."[70] Taylor himself, who admitted to multiple dealings with Bockarie and to giving him sanctuary, a home, a vehicle and a salary in Liberia, never testified to any belligerency from Bockarie. Rather, Taylor

[63] Judgement, paras. 3842, 3848, 3871, 4248(iii).
[64] Taylor Response, para. 20, citing Judgement, para. 6778.
[65] Taylor Response, para. 20, citing Judgement, para. 6778.
[66] Judgement, para. 6778.
[67] Judgement, para. 5831.
[68] Taylor Response, para. 21.
[69] Judgement, paras. 6905, 6969; see also Judgement, paras. 6790, 6793, 6936.
[70] Taylor Response, para. 21.

testified Bockarie was like a son to him, and that he "loved that boy."[71] Taylor does not cite even a single instance where Bockarie failed to comply with his instructions.[72]

18. Taylor's argument that a complete reading of the Prosecution's extract from *Gacumbitsi* is more supportive of his position is wrong.[73] The point on which the cited portion was decided was whether a superior-subordinate relationship was necessary to establish the existence of ordering. The Judgement determined that no such relationship was necessary, only the "authority to order" crimes was required. The Trial Chamber also stated that the authority of an influential person could be enhanced in particular circumstances, and, in such cases, his "mere words of exhortation or encouragement would be perceived as orders".[74] Such particular circumstances existed in the case of the five instructions at issue in this Ground of Appeal. They were each given after the RUF/AFRC was expelled from Freetown in February 1998. The leader of the RUF, Sankoh, was in detention, and the RUF/AFRC had no ports or airfields and had access to only two borders – Guinea, which was a member of ECOMOG fighting against the RUF/AFRC, and Liberia. Taylor was thus the one person essential for military supplies and support and his longstanding authority was greatly enhanced during this critical period.

D. The Trial Chamber erred in fact when it failed to draw the only reasonable conclusion that could be drawn from the facts found proven: that Taylor was responsible for ordering the Instructed Crimes

(a) The Prosecution correctly defined the actus reus of ordering

19. Contrary to Taylor's assertion,[75] the definition of ordering that the Prosecution relied upon in its Appeal is based on the correct definition of the *actus reus* and *mens rea* for ordering. The Trial Chamber applied this definition in the Judgement.[76] It is consistent with

[71] Taylor, T. 26 October 2009 p. 30221.
[72] See Taylor Response, fn. 28. None of the six purported instances of non-compliance, addressed earlier in this Reply, even purport to show Bockarie refusing an instruction or not taking the advice of Taylor. The one instance cited in the Prosecution Appeal where Yeaten purportedly on behalf of Taylor told Keita he would command a stand-by force in Sierra Leone, the Scorpion Unit, Bockarie altered with Taylor's approval through Daniel Tamba. (See Prosecution Appeal, para. 19.)
[73] Taylor Response, paras. 23-24.
[74] *Gacumbitsi* TJ, para. 282.
[75] Taylor Response, paras. 29-30 (stating that the Prosecution framed its arguments around its own "erroneously simplistic definition" that "differs wildly" from the established definition at the SCSL and *ad hoc* tribunals).
[76] Prosecution Appeal, para. 40 citing Judgement, paras. 474-75.

the definition set forth in the *RUF* Appeal Judgment and *CDF* and *RUF* Trial Judgements, which all cite the *Kordić and Čerkez* Appeal Judgement that holds "a person who orders an *act or omission* with the awareness of the substantial likelihood that a crime will be committed in the execution of that order" may be held criminally responsible for ordering.[77] The Trial Chamber findings, as articulated in the Prosecution Appeal, demonstrate that the *actus reus* and *mens rea* elements articulated by the Trial Chamber, including causal relationship and compelling nature of the communication, have all been proven.[78]

20. Taylor erroneously argues that the cases the Prosecution relies upon to support the proposition that the order does not have to instruct the commission of an offence *per se* in fact stand for the proposition that the *actus reus* of ordering requires an instruction to commit a crime.[79] The jurisprudence is clear that ordering liability is not limited to orders to commit a crime but may also attach when an order to act is given with the awareness of the substantial likelihood that crimes will be committed in executing the order and such crimes result.[80]

21. Taylor relies on a selective passage from the *Milutinović* Trial Judgement that mentions ordering in passing to argue that the instruction must be to commit "crimes."[81] This distorts *Milutinović*, which, when discussing the elements of ordering, holds:

> The Prosecution establishes the physical and mental elements of ordering by proving that the accused intentionally instructed another to carry out an act or engage in an omission, with the intent that a crime or underlying offence be committed in the execution of those instructions, or with the awareness of the substantial likelihood that a crime or underlying offence would be committed in the execution of those instructions.[82]

22. Taylor's reliance on the Appeal Judgement in *Milošević* is equally misplaced.[83] The *Milošević* Appeals Chamber reversed the ordering conviction because the Trial Chamber had not identified a particular order on the part of the accused, and ordering requires "a positive

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[77] *RUF* AJ, para. 164, fn. 311; *CDF* TJ, para. 225, fn. 285; *RUF* TJ, para. 273, fn. 485. All cite *Kordić & Čerkez* AJ, para. 28, which should be read in conjunction with paragraph 30 of that Judgement, which is quoted in the excerpt above with emphasis added.
[78] *Contra* Taylor Response, para. 30.
[79] Taylor Response, fn. 100.
[80] *Nahimana* AJ, para. 481; *Galić* AJ, paras. 152, 157; *Kordić & Cerkez* AJ, paras. 28, 30; *Blaskić* AJ, para. 42; *Milutinović* TJ (Vol. 1), para. 85 and fn. 94. See also the cases cited by Taylor which further demonstrate the co-existence of the two propositions: *Renzaho* AJ, para. 315; *Nyiramashuhuko* TJ, para. 5593; *Gotovina* TJ (vol. 2), para. 1959.
[81] Taylor Response, para. 36.
[82] *Milutinović* TJ (Vol. 1), para. 85.
[83] Taylor Response, para. 33.

action by a person in position of authority."[84] In this case, there are abundant findings of positive actions by Taylor. As detailed in Ground One of the Prosecution Appeal, the Judgement found five specific instructions Taylor gave which led to the commission of Indictment crimes. Further, the very paragraph that Taylor cites from *Milošević* to demonstrate that his instructions to make the operation "fearful" and to capture Freetown "by all means" were not specific enough to constitute orders,[85] defeats his argument. That Appeals Chamber held that an order "does not necessarily need to be explicit in relation to the consequences it will have."[86] As argued in the Prosecution Appeal, the Judgement findings clearly establish that Taylor gave all five of the instructions at issue, at a minimum, with the awareness of the substantial likelihood that crimes would be committed in executing his instructions.

23. Taylor's reliance on *Brđanin* to demonstrate statements that lack sufficient specificity to constitute orders[87] is inapposite to the facts of this case. Brđanin's statements were public utterances made during a propaganda campaign "suggesting" a campaign of retaliatory ethnicity-based murder.[88] Propaganda statements to the general public are quite different from direct instructions on how to conduct an operation made to a commander over whom Taylor was in a position of authority. Further, Brđanin's ARK Crisis decisions, which discussed an organised resettlement policy,[89] are in no way similar to the specific instructions Taylor gave to Sam Bockarie on how to implement the Bockarie/Taylor plan.[90] As discussed in the Prosecution Appeal,[91] in the context of the terror tactics against civilians regularly used by the RUF/AFRC, Taylor's instructions to Bockarie to make the operation "fearful" and to use "all means" to capture Freetown established he intended or was aware of the substantial likelihood that crimes would be committed given the ongoing criminal campaign that formed part of the RUF/AFRC operational strategy. Thus, the instruction to make an operation "fearful" was effectively shorthand to the troops to destroy property and commit vicious crimes using terror tactics against civilians and opposing troops.[92] Such crimes were

[84] *D. Milošević* AJ, para. 267.
[85] Taylor Response, para. 33.
[86] *D. Milošević* AJ, para. 267.
[87] Taylor Response, para. 33.
[88] *Brđanin* TJ, paras. 327-29, 468.
[89] *Brđanin* TJ, paras. 249, 573.
[90] Prosecution Appeal, para. 53 fns. 150 and 152 citing Judgement, paras. 3117, 3449, 3611(vii), 3615.
[91] Prosecution Appeal, paras. 54-56.
[92] *Contra* Taylor Response, para. 34.

committed as a result of these instructions which were passed from Taylor to Bockarie to the commanders of the forces on the ground who carried them out.

24. Taylor's argument that the Prosecution ignored the critical element of "compulsion" is without basis, as the Prosecution Appeal at paragraphs 25, 26, 30, 36, 38 and 39 discussed both the necessity to show compulsion as well as how Taylor compelled JPK and Bockarie to act pursuant to his instructions.

25. Taylor's assertion that the Prosecution disregarded the causality requirement for ordering is without merit. Although the Prosecution did not use the words "substantially contributed" to demonstrate the causal link between Taylor's instructions and the Indictment crimes, it specifically addressed the chain of causation between the two in Prosecution Appeal paragraphs 45, 46-52, 53-56, 60, 61, 63 and 69.[93]

(b) The Trial Chamber's findings established the requisite mens rea for ordering

26. Taylor erroneously claims that a conviction for ordering requires awareness of the substantial likelihood that a *particular* crime will occur in carrying out the order.[94] Taylor takes out of context, and seeks to rely on, a passage of the ICTY Appeals Chamber Judgement in *Galić*.[95] However, the statement cited by Taylor specifically addresses Galić's *mens rea* only for ordering the crime of murder,[96] and therefore does not support the incorrect proposition that an accused's *mens rea* for ordering must be the commission of a *particular* crime. Similarly, Taylor's reliance on the *Blaškić* Appeal Judgment is misplaced, as it merely reiterates the *mens rea* standard of the substantial likelihood that *a* crime will be committed.[97]

27. As the ICTY Appeals Chamber held in *Milošević*, "an order does not necessarily need to be explicit in relation to the consequences it will have",[98] nor does it have to specifically instruct someone to commit a crime or underlying offence *per se*.[99] As long as the person

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[93] This was in keeping with *CDF* TJ, para. 225 and *RUF* TJ, para. 273 which both state a causal link between the act of ordering and the physical perpetration of a crime needs to be demonstrated.
[94] Taylor Response, para. 44.
[95] Taylor Response, para 44 citing *Galić* AJ, para. 152, where the ICTY Appeals Chamber noted "that Galić was not convicted for committing murder under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that murder would be committed in the execution of his orders."
[96] See *Galić* AJ, paras. 151-53.
[97] Taylor Response, para. 44 citing *Blaskić* AJ, para. 41.
[98] *D. Milošević* AJ, para. 267.
[99] As set forth in fn. 1116 of the Judgement, citing *Milutinović* TJ (Vol. 1), fn. 94.

giving the order was aware of the substantial likelihood that a crime or underlying offence would be committed in carrying out the order,[100] the *mens rea* requirement to establish ordering liability is satisfied.

28. Taylor incorrectly claims that the Prosecution made no submissions regarding Taylor's awareness of the substantial likelihood that crimes would be committed in carrying out his instructions.[101] Moreover, Taylor improperly suggests that there is no finding in the Trial Judgement which establishes the requisite *mens rea* for the mode of liability of ordering.[102] As previously noted by the Prosecution,[103] the Trial Chamber's findings demonstrate that at the time of giving the five instructions to JPK and Bockarie, Taylor "knew" that the RUF/AFRC conducted its military operations by committing the Indictment crimes against the civilian population of Sierra Leone.[104] Taylor himself testified that there was "no one on this planet that would not have heard through international broadcasts or [...] discussions about what was going on in Sierra Leone",[105] and that by April 1998 if someone was providing support to the RUF/AFRC they "would be supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone."[106] Taylor's intention, knowledge, or at the very least, awareness of the substantial likelihood that crimes would be committed in carrying out the five instructions which are the subject of the Prosecution's first Ground of Appeal is therefore manifestly clear.

29. Taylor incorrectly asserts the Prosecution was required to show his awareness of the substantial likelihood that the crimes of terrorism, sexual slavery and pillage would occur when he gave the instruction to "build an airfield" and to "open a training base".[107] As submitted by the Prosecution,[108] Taylor need only have instructed Bockarie to carry out the act, not necessarily a crime, with the awareness of the substantial likelihood that a crime or

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[100] See Judgement, para. 474(ii). See also *Galić* AJ, paras. 152, 157; *Kordić & Čerkez* AJ, para. 30; *Blaškić* AJ, para. 42. See also *Nahimana* AJ, para. 481.
[101] Taylor Response, para. 45. See Prosecution Appeal, paras. 65-69.
[102] Taylor Response, para. 45.
[103] Prosecution Appeal, paras. 65-69.
[104] Judgement, paras. 6883, 6885-86. See also Judgement, paras. 6790, 6905.
[105] Taylor, T. 14 July 2009 p. 24329.
[106] Judgement, para. 6884 referring to Taylor, T. 25 November 2009 p. 32394.
[107] Taylor Response, para. 45.
[108] Prosecution Appeal, paras. 63-64.

underlying offence would be committed,[109] and Taylor knew of the RUF's *modus operandi* in using civilians as forced labour when giving this instruction.[110]

E. Conclusion

30. Based on the application of the correct definition of the *actus reus* and *mens rea* of ordering to the Trial Chamber's findings, Taylor's authority to issue orders and his awareness of the substantial likelihood that crimes would be committed in the execution of his orders is clearly established. Contrary to Taylor's claims, the Trial Chamber erred in not finding that the five instructions raised in Ground One of the Prosecution Appeal were orders and thereby erred in not convicting Taylor of ordering.

GROUND TWO: The Trial Chamber erred in law and in fact when it failed to find Taylor individually criminally responsible for instigating the commission of crimes under Article 6(1) of the Statute

A. Overview

31. Taylor's Response to Ground Two of the Prosecution Appeal ignores the principles established by settled jurisprudence on convictions for multiple modes of liability. The jurisprudence to which he refers is inapposite and often supports the Prosecution's position. Based on the Trial Chamber's findings, instigation was proven – Taylor prompted RUF/AFRC commanders to act in a particular way with the intent, or, at a minimum, the awareness of a substantial likelihood, that crimes would be committed as a result of his prompting. Accordingly, the Appeals Chamber should grant the relief requested in Ground Two of the Prosecution Appeal in its entirety.

B. The Trial Chamber was obligated to enter a finding of instigation liability as instigation was proven

32. Taylor does not advance any relevant challenges to the Prosecution's appeal. Rather, he recites the paragraphs from *Milutinović* on which the Prosecution correctly relied without

[109] As set forth in fn. 1116 of the Judgement, citing *Milutinović* TJ (Vol. 1), fn. 94. See also *Nahimana* AJ, para. 481; *Galić* AJ, paras. 152, 157; *Kordić & Čerkez* AJ, para. 30; *Blaškić* AJ, para. 42.
[110] Judgement, paras. 6883, 6885.

establishing any error in the Prosecution's argument.[111] Taylor ignores the principle established by *Milutinović*, *i.e.* that a Trial Chamber is obligated to examine the modes of liability charged which most accurately describe an accused's conduct.[112] Taylor's questioning of the "reliability of the Prosecution Appeal Brief as a whole" based on an alleged misconstruing of the *Milutinović* case[113] is therefore unfounded.

33. Contrary to Taylor's assertion,[114] the *Taylor* Trial Chamber did not follow *Milutinović*. Unlike the *Taylor* Trial Chamber, the *Milutinović* Trial Chamber declined to analyse other modes of liability because it concluded that Ojdanić's conduct was *most accurately described* by a conviction for aiding and abetting.[115] The single paragraph on instigation in *Taylor*[116] did not state that instigation would not be considered because aiding and abetting most accurately described Taylor's conduct. Even had the Trial Chamber done so, it would have erred since, as submitted in the Prosecution Appeal, instigation is one of the modes of liability which most accurately describes Taylor's conduct.

34. Taylor's reliance on *Kamuhanda*[117] is similarly misplaced since the Trial Chamber rightly entered convictions for both forms of liability and it was the Appeals Chamber which overturned Kamuhanda's conviction for aiding and abetting, only after finding that "[o]n the facts of the case" ordering "fully encapsulate[d]" the accused's conduct.[118] The fact that an Appeals Chamber overturned a Trial Chamber's finding[119] is of no relevance to the principle that a Trial Chamber must consider all those modes of liability that most accurately reflect the conduct of the accused.

35. Other cases relied on by Taylor support the Prosecution Appeal. For example, *Krstić* and *Đorđević*[120] clearly allow for the possibility of convictions on more than one mode of liability, explaining that this serves to reflect the totality of the accused's conduct. Neither are the *Gotovina*, *Martić*, and *Brđanin* Trial Judgements[121] contrary to the Prosecution's position.

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[111] Taylor Response, paras. 47-49.
[112] See Prosecution Appeal, para. 78.
[113] Taylor Response, para. 50.
[114] Taylor Response, para. 50.
[115] *Milutinović* TJ (Vol. 3), para. 619 (emphasis added).
[116] Judgement, para. 6972.
[117] Taylor Response, para. 51.
[118] *Kamuhanda* AJ, para. 77.
[119] See Taylor Response, fn. 133 citing to *Kamuhanda* AJ, para. 77.
[120] which Taylor cites at para. 51, fn. 134 of his Response.
[121] which Taylor cites at para. 51, fn. 135 of his Response.

For example, in *Brđanin*, the Trial Chamber only dismissed other modes of liability after exhaustively analysing and discussing them, contrary to what Taylor asserts.[122]

36. As argued in the Prosecution Appeal, a Trial Chamber's discretion to assess the evidence in respect of the charged form or forms responsibility does not apply when the mode of liability is one of those that most accurately describe the accused's conduct and is proven.[123] The fact that at times, Trial Chambers dismiss additional modes of liability based on the specific facts of the case, as illustrated, for example, by the *Gotovina* and *Martić* Trial Judgements which Taylor cites,[124] does not detract from the Chamber's obligation to consider those modes of liability which most accurately describe the accused's conduct.

37. Contrary to Taylor's unsubstantiated hypothesis,[125] the "real purpose" of Ground Two of the Prosecution's Appeal is to request the Appeals Chamber to correct the error made by the Trial Chamber in failing to find Taylor instigated "some of the most heinous and brutal crimes recorded in human history".[126] Such relief is warranted because, based on the Trial Chamber's findings and the evidence it accepted, all the elements of this mode of liability were proven, and because instigation is one of the forms of responsibility charged in the Indictment that most accurately describes Taylor's conduct.[127] In any event, Taylor's reference to the Appeals Judgement in *Gotovina* is misplaced[128] since in that case the Appeals Chamber declined to consider alternate forms of liability after the JCE conviction was overturned, *inter alia*, because it could not identify any remaining findings that would allow a conviction pursuant to an alternate mode of liability.[129]

C. The Prosecution's Definition of Instigation is in Accordance with Settled Jurisprudence

38. Taylor's unsubstantiated challenge to the Prosecution's definition of instigation[130] amounts to a challenge to the Chamber's definition, since the Prosecution accepted that the

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[122] See *Brđanin* TJ, paras. 340-56 (JCE), 357-58 (planning), 359-61 (instigating), 362-66 (ordering), 367-69 (aiding and abetting), 370-77 (superior responsibility).
[123] See Prosecution Appeal, paras. 78-80.
[124] See Taylor Response, para. 51, fn. 135.
[125] Taylor Response, para. 53.
[126] Sentencing Judgement, para. 70.
[127] See Prosecution Appeal, para. 73.
[128] Taylor Response, para. 53.
[129] *Gotovina* AJ, para. 156, see also paras. 146-55.
[130] See Taylor Response, p. 28, sub-title "B" and paras. 56 *et seq.*

Chamber correctly set out the *actus reus*[131] and *mens rea*[132] for instigating,[133] mirroring the settled jurisprudence.

39. Contrary to Taylor's contention,[134] the Prosecution did not suggest that "prompting" for the purposes of the *actus reus* of instigation is the same as "supplying the means with which a crime may be committed by someone already determined to commit it."[135] Taylor imprecisely defines instigation by wrongly asserting that the accused must prompt to commit "an offence"[136] or "crimes".[137] The Trial Chamber used the correct standard: that it must be proved that the accused prompted another to "act in a particular way".[138] Footnote 1109 of the Judgement elaborates by explaining that:

> The accused need only prompt another to "act in a particular way"—and not necessarily to commit a crime or underlying offence per se—if he has the intent that a crime or underlying offence be committed in response to such prompting, or if he is aware of the substantial likelihood that a crime or underlying offence will be committed.[139]

40. The paragraphs in *Đorđević* which Taylor cites in relation to the required causal connection[140] are inapposite as they deal with the contention that failure to discipline amounts to instigating, an allegation not made by the Prosecution. Taylor distorts the Trial Chamber's statements on instigating in *Orić*[141] which merely uphold established jurisprudence[142] fully endorsed in the Prosecution Appeal.[143]

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[131] Prosecution Appeal, paras. 83, 84.
[132] Prosecution Appeal, paras. 83, 86.
[133] a fact also noted by Taylor, see Taylor Response, para. 52, fn. 138.
[134] Taylor Response, para. 57.
[135] The Prosecution accepts that instigation requires *a causal connection* between the act and the crime whilst aiding and abetting does not as set out at Prosecution Appeal, para. 85.
[136] Taylor Response, paras. 57, 63.
[137] Taylor Response, paras. 57, 63, 64.
[138] Judgement, para. 472 (i) cited at Prosecution Appeal, para. 84, fn. 248. See also *Kvočka* TJ, para. 252; *Blaskić* TJ, para. 280.
[139] See also *Milutinović* TJ (Vol. 1), para. 83, fn. 88. This is consistent with the the *actus reus* requirements of planning (see Judgement, fn. 1105) and ordering (see Judgement, fn. 1116).
[140] Taylor Response, para. 57, fns. 145-46 citing to *Đorđević* TJ, paras. 2165, 2168.
[141] Taylor Response, para. 57.
[142] establishing that (i) the original idea or plan to commit the crime need not be generated by the instigator; (ii) it need not be proven that the crime would not have been committed without the involvement of the accused, it suffices to prove that the instigation of the accused was a substantially contributing factor for the commission of the crime; (iii) even if the principal perpetrator was already pondering on committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator; (iv) if the principal perpetrator has definitely decided to commit the crime, further encouragement or moral support may qualify as aiding and abetting, *Orić* TJ, paras. 271, 274.
[143] See Prosecution Appeal, para. 85.

41. Taylor's analogy to the *CDF* Appeal Judgment is misplaced.[144] In regard to Kondewa, the Appeals Chamber found that the Prosecution failed to prove the causal connection between his words and the crimes because there was no evidence before the Trial Chamber that the Kamajors Kondewa encouraged were the same Kamajors who committed the crimes.[145] In this case, by contrast, Taylor gave the instructions directly to those in command of the RUF/AFRC at the time.[146]

42. Contrary to Taylor's implication, the Prosecution's appeal in *CDF* in respect of Fofana was not rejected on the general basis that aiding and abetting does not require a causal connection whereas instigating does.[147] It was specifically rejected because the Appeals Chamber found there was insufficient evidence to show how Fofana's words influenced the crimes in question.[148] In *CDF*, unlike the situation in this case,[149] there was no finding that the Kamajors had adopted an "operational strategy" to commit crimes against civilians. The Appeals Chamber in *CDF* also noted that Fofana's words were "ambiguous" and open to other possible interpretations,[150] which is not an issue in regard to Taylor's precise encouragement of attacks and strategic military undertakings such as the building of an airstrip and opening a training camp.

43. The Taylor Response[151] ignores that the Trial Chamber also found that he provided "approval...and encouragement".[152] The jurisprudence establishes that words or actions that have an encouraging effect are necessarily tantamount to instigation where, as here, the required causal connection is proven.[153]

44. Contrary to Taylor's contention,[154] the Prosecution's second Ground of Appeal is replete with references to the Chamber's findings that establish how his specific acts of prompting led RUF/AFRC commanders "to act in a particular way".[155] Taylor's statement

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[144] Taylor Response, para. 58.
[145] *CDF* AJ, para. 85.
[146] See Prosecution Appeal, paras. 93-95, 97-98.
[147] Taylor Response, para. 59.
[148] *CDF* AJ, para. 55.
[149] Judgement, para. 6885.
[150] *CDF* AJ, para. 56.
[151] See Taylor Response, para. 61.
[152] Prosecution Appeal, para. 88, fn. 257 citing to Judgement, para. 6945.
[153] See Prosecution Appeal, paras. 84-85.
[154] Taylor Response, para. 62.
[155] See Prosecution Appeal, paras. 93-98.

that the Prosecution "offers no evidence...that the purported instigation caused the crimes"[156] does not adequately reflect the jurisprudence he himself cites, which establishes that the Prosecution need not prove that the accused's contribution was a *sine qua non,* and that it suffices to prove that the instigation of the accused was a substantially contributing factor for the commission of the crime.[157]

45. Contrary to Taylor's contention,[158] his specific instructions throughout the Indictment period differ from the words of Fofana[159] and Kondewa[160] in *CDF*.[161] His instructions to the RUF/AFRC leaders to conduct attacks, capture populated areas, make the Freetown invasion "fearful" and to use "all means", and to undertake strategic military projects such as the building of an airstrip and the opening of a training camp, were made with the awareness of the RUF/AFRC operational strategy[162] which entailed a campaign of terror against the civilian population of Sierra Leone.[163] The Chamber found that the crimes committed by the RUF/AFRC were inextricably linked to the strategy and objectives of the military operations themselves.[164] Therefore, Taylor issued these instructions with, at a minimum, the awareness of a substantial likelihood that his instructions would lead to the commission of crimes.[165] The fact that the RUF/AFRC committed crimes as part of its own *modus operandi* does not exclude a finding that Taylor prompted them to commit crimes.[166]

46. Taylor's contention that his instructions were "more removed from the time and place in which the crimes were committed than Fofana's or Kondewa's"[167] is false. First, paragraph 55 of the *CDF* Appeal Judgment indicates that temporal and geographic removal was one factor considered by the Appeals Chamber that "alone would not be enough to deny a causal

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[156] Taylor Response, para. 62.
[157] See e.g., *Orić* TJ, para. 274 cited to at Taylor Response, para. 57
[158] See Taylor Response, paras. 63-64.
[159] "[n]ow you've heard the National Coordinator [. . .] any commander failing to perform accordingly and losing your own ground, just decide to kill yourself there and don't come to report to us"... "destroy the soldiers finally from where they were . . settled", *CDF* AJ, para. 56.
[160] "a rebel is a rebel; surrendered, not surrendered, they're all rebels...[t]he time for their surrender had long since been exhausted, so we don't need any surrendered rebel...I give you my blessings; go my boys, go", *CDF* AJ, para. 77.
[161] *Contra* Taylor Response, paras. 63, 64.
[162] Judgement, para. 6885.
[163] Judgement, para. 6905.
[164] Judgement, para. 6905.
[165] *Contra* Taylor Response, paras. 63, 64; see Prosecution Appeal, paras. 93-95, 98. See also Judgement, paras. 4109, 4148-52.
[166] *Contra* Taylor Response, para. 65.
[167] Taylor Response, para. 64, fn. 182.

link". Rather, the Appeals Chamber found that there was insufficient evidence to show how Fofana's words influenced the perpetration of crimes,[168] which is clearly not the case with Taylor's instructions. Second, Taylor directly instructed the commanders in charge at the relevant times.[169] Further, his instructions in relation to Kono, Kailahun and Freetown were often repeated several times.[170] Taylor's reliance on *Nahimana* is even more misplaced[171] since *Nahimana* relates to a publication, not the issuing of verbal instructions, and the Appeals Chamber rejected the finding of instigation based on the lack of relevant evidence.[172]

47. Taylor erroneously tries to separate the December 1998 attack on Kono from the attack on Freetown[173] which was part of the same offensive and during which numerous heinous crimes were committed. His argument that the attempt to take Kono in December 1998 came after he told Bockarie to get to Freetown by "all means" and to make the operation "fearful" supports rather than negates the Prosecution's submissions.[174] Furthermore, Taylor misconstrues the Prosecution's submissions which state that he prompted the RUF/AFRC to take Freetown via Kono and Makeni.[175]

48. Taylor's assertion that "the Chamber found Mr. Taylor's encouragement, like that of Fofana, 'was directed at the military campaign and does not include any incitement to perpetrate unlawful acts'"[176] is misleading. This quote which Taylor cites is from the *CDF* Appeal Judgement, not from any finding made by *this* Trial Chamber.[177] Indeed, the Trial Chamber specifically found that Taylor was aware of the RUF/AFRC operational strategy[178] which entailed a campaign of terror against the civilian population of Sierra Leone and which involved the commission of crimes inextricably linked to the strategy and objectives of the RUF/AFRC's military operations themselves.[179]

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[168] *CDF* AJ, para. 55.
[169] See Prosecution Appeal, paras. 93-98.
[170] See Prosecution Appeal, paras. 93-98.
[171] Taylor Response, fn. 182.
[172] *Nahimana* AJ, paras. 518-19.
[173] Taylor Response, para. 65. The Prosecution relies on its arguments at paragraphs 88, 93, and 95-98 of its Appeal in relation to the crimes which resulted from Taylor's prompting.
[174] See Taylor Response, para. 65.
[175] Taylor Response, para. 65.
[176] Taylor Response, para. 66 citing *CDF* AJ, para. 56.
[177] See Taylor Response, fn. 190.
[178] Judgement, para. 6885.
[179] Judgement, para. 6905.

49. Taylor fails to support any departure from settled appellate jurisprudence on the *mens rea* requirements for instigation as set out in the Judgement.[180] Indeed, Taylor misstates the *mens rea* requirements for instigation as set out in *CDF* and *RUF*.[181]

50. SCSL jurisprudence establishes that the "awareness of a substantial likelihood" suffices for instigation,[182] as Taylor himself implicitly acknowledges by stating that "at the ICTY and ICTR, some cases have gone *further* and held that only intent, rather than an awareness of a substantial likelihood, will suffice" or that the standard was one of "intent or of intent and awareness".[183] The cases he cites[184] either do not support this contention[185] or were ambiguous and overturned by more recent jurisprudence.[186]

51. As Taylor acknowledges, either "intent" or "awareness that the accused's instigation would likely provoke the commission of crimes" establishes the *mens rea* for instigating.[187] Taylor's contention that "the accused must be aware that it is his specific act of instigation which results in crimes being committed",[188] or similarly that "the accused must know that

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[180] which required that the accused prompted "With the intent that a crime or underlying offence be committed as a result of such prompting, or with the awareness of the substantial likelihood that a crime or underlying offence would be committed as the result of such prompting", Judgement, para. 471 (ii) citing to *AFRC* TJ, para. 770 which stated that "The *mens rea* requires that the accused acted with direct intent or with the awareness of the substantial likelihood that a crime would be committed in the execution of that instigation."

[181] Taylor incorrectly states that it was required "that the accused must either possess an intention to provoke the commission of a crime, or knowledge that a crime would likely be provoked as a result of that instigation" (Taylor Response, para. 67). Taylor omits and confuses crucial words in the *CDF* AJ: it was required that the accused possess an intention "to provoke *or induce the commission* of the crime," or a "*reasonable* knowledge that a crime would likely *be committed* as a result of that instigation" (*CDF* AJ, para. 51 (emphasis added) citing *CDF* TJ, para. 223). In *RUF*, the Trial Chamber held it must be proved that "the Accused intended to provoke *or induce the commission* of the crime or *was aware of the substantial likelihood* that the crime would be committed as a result of that instigation" (*RUF* TJ, para. 271).

[182] Judgement, para. 471(ii); *AFRC* TJ, para. 770; *RUF* TJ, para. 271. The *CDF* AJ and TJ similarly referred to a "reasonable knowledge that a crime would likely be committed as a result of that instigation" (*CDF* AJ, para. 51 citing *CDF* TJ, para. 223).

[183] Taylor Response, para. 70 (emphasis added).

[184] Taylor Response, para. 70, fns. 202, 203.

[185] *Kordić & Čerkez* TJ, para. 387 contradicts the statement at para. 386 and was overturned on this issue on appeal, see *Kordić & Čerkez* AJ, para. 32. See *Orić* TJ, para. 279 and fn. 773.

[186] *Bagilishema* TJ, a 2001 Judgement, at para. 31 merely notes that "proof is required that whoever planned, instigated, or ordered the commission of a crime possessed criminal intent, that is, that he or she intended that the crime be committed" without elaborating on what is meant by "intended". *Semanza* TJ, a 2003 Judgement, at para. 388 states that "In cases involving a form of accomplice liability, the *mens rea* requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime." With regard to more recent jurisprudence adopting the "intent" or "awareness of the substantial likelihood" standard, see, e.g., the ICTR's 2011 *Gatete* TJ at para. 574 and the ICTY's 2011 *Đorđević* TJ at para. 1870. Note that Taylor cites the *Đorđević* TJ at para. 57 of his Response.

[187] Taylor Response, para. 70.

[188] Taylor Response, para. 68.

the commission of crimes is a result of his instigation",[189] misstates the well-established standard he himself acknowledged. An accused cannot *know* or *be aware* that his act of instigation will result in the commission of crimes as the crimes must necessarily be subsequent in time to his instigation. The cases Taylor cites in support of this misplaced contention merely reiterate SCSL jurisprudence, including the *Taylor* Judgement, by stating that instigating with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation suffices.[190]

52. Contrary to Taylor's assertions,[191] the Trial Chamber's finding that Taylor knew of the RUF/AFRC's operational strategy to commit crimes is *but one* of the findings which establish Taylor either intended or was aware of the substantial likelihood that a crime would be committed as the result of such prompting.[192] The Trial Chamber's findings establish that Taylor did not merely encourage the RUF/AFRC in its military operations,[193] but that he prompted RUF/AFRC commanders to act in a particular way with the knowledge, or the awareness of the substantial likelihood, that crimes would be committed during the military operations and strategic military undertakings he prompted them to implement.

D. Conclusion

53. Taylor's Response to this Ground of Appeal lacks merit. Accordingly, the Appeals Chamber should grant the relief requested in Ground Two of the Prosecution Appeal in its entirety.

GROUND THREE: The Trial Chamber erred in law and in fact by failing to convict Charles Taylor for crimes committed in certain locations in five districts on the ground that they fell outside the scope of the Indictment

A. Overview

54. Taylor's Response to Ground Three of the Prosecution Appeal is devoid of merit for the reasons set out below. Taylor has distorted the arguments in the Prosecution Appeal and has

[189] Taylor Response, para. 70.
[190] See *Kordić & Čerkez* AJ, para. 32; *Đorđević* TJ, para. 1870; *Nahimana* AJ, para. 480.
[191] Taylor Appeal, paras. 70-71.
[192] See Prosecution Appeal, paras. 90-91.
[193] *Contra* Taylor Response, para. 71.

failed to show that the Trial Chamber did not err when it declined to convict him for crimes committed in certain locations in five districts of Sierra Leone on the basis that they fell outside the scope of the Indictment. Significantly, Taylor has not even tried to explain how he was prejudiced by the manner in which the Prosecution pleaded the crimes at issue. Consequently, the Trial Chamber should grant Ground Three of the Prosecution Appeal and enter the relevant convictions.

B. By pleading the occurrence of crimes "throughout" Kailahun District and "in various [district] locations, including", the Prosecution charged their location with sufficient specificity

55. Taylor's summary of the Prosecution argument[194] is distorted in that the Prosecution did not argue that by pleading "throughout" it was pleading a non-exhaustive list of locations. Rather, by pleading that crimes occurred in locations "throughout" Kailahun District, the Prosecution was indicating that every location in Kailahun was in issue. It was only the use of "various locations, including" that the Prosecution submits was non-exhaustive.[195]

56. Taylor's assertion that ICTR and ICTY pleading practice requires an Indictment to contain factual information regarding "the identity of the victim, the place ... of the alleged offence" is incorrect.[196] Taylor relies on two ICTY pre-trial decisions as authority,[197] however, subsequent ICTY and ICTR Appeals Chamber jurisprudence expressly states that the level of specificity with which the Prosecution is required to particularise the facts of its case in an Indictment depends on the nature of the Prosecution's case. Decisive factors include the alleged criminal conduct charged and the accused's proximity to the underlying crime.[198] Specifically, criminal acts that were physically committed by the accused must be specifically set forth in the indictment, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed".[199] Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to

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[194] Taylor Response, para. 73.
[195] Prosecution Appeal, para. 103.
[196] Taylor Response, paras. 78, 79, fn. 220.
[197] Taylor Response, para. 78, fn. 216.
[198] *Kupreškić* AJ, para. 89; *Ntakuritimana* AJ, para. 32, *Ntagerura* AJ, para. 23.
[199] *Seromba* AJ, para. 27; *Muhimana* AJ, para. 76; *Gacumbitsi* AJ, para. 49; *Ntakirutimana* AJ, para. 32 (quoting *Kupreškić* AJ, para. 89).

identify the particular acts or the particular course of conduct on the part of the accused which forms the basis for the charges in question.[200] Less specificity is acceptable where the "sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[201]

57. Taylor's argument that by pleading that the crimes in issue occurred "throughout" and "in various [district] locations, including", the Prosecution pleaded their location in general terms to allow it to mould its case as the evidence unfolded at trial, is misconceived.[202] The Prosecution did not plead these locations with "absolute generality".[203] The Indictment pleading set the parameters within which the Prosecution had to operate. The Prosecution was limited to crimes committed within the districts and time periods it pled in the Indictment. Moreover, the issue is whether by pleading in this manner, the Prosecution pled the charges against Taylor and the material facts supporting those charges with sufficient precision so as to provide him with adequate notice. In other words, did the Indictment provide Taylor with enough detail to prepare his defence. For the reasons stated in the Prosecution Appeal, the Prosecution pled the locations in question with sufficient specificity.[204] However, should the Trial Chamber have been correct in finding that the Indictment lacked specificity regarding locations, the Prosecution Appeal demonstrates that Taylor was further informed of the locations of the crimes in question by pre-trial communications, thereby curing any defects.[205]

58. Taylor's reference to the ICC Pre-Trial Decision in the *Mbarushimana* case is misplaced.[206] ICC jurisprudence is not binding or even guiding on the SCSL. Article 20(3) of the SCSL Statute refers only to the decisions of the ICTR and ICTY as guiding the judges of the SCSL. There has been no amendment to the Statute since the formation of the ICC to incorporate reference to its decisions in Article 20(3). Contrary to Taylor's submission,[207] there is no evidence in the *Mbarushimana* Decision that the ICC Pre-Trial Chamber relied on

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[200] *Seromba* AJ, para. 27 (citing *Ntagerura* AJ, para. 25).
[201] *Ntagerura* AJ, para. 23 (citations omitted).
[202] Taylor Response, paras. 80-82, 87.
[203] *Contra* Taylor Response, para. 81.
[204] See, e.g., Prosecution Appeal, paras. 107-118.
[205] See, e.g., Prosecution Appeal, paras. 119-173.
[206] Taylor Response, para. 83.
[207] Taylor Response, para. 83.

the jurisprudence of the *ad hoc* Tribunals, as none of their case law is referred to in the paragraphs cited by Taylor. Moreover, the *Mbarushimana* case is distinguishable on its facts. In that case, the ICC Pre-Trial Chamber declined to consider locations in the charging document that were prefaced by the phrase "include but are not limited to". This was because it was concerned that it would allow the Prosecution to add additional charges as the evidence unfolded without making a formal application to the Court to do so under ICC Statute Article 61(9).[208] As set out at paragraph 61 below, and in the Prosecution Appeal,[209] the allegations in issue in the *Taylor* case could not have formed the basis of new charges. Therefore, the *Mbarushimana* case is inapposite.[210]

59. Taylor misrepresents and misunderstands the application of the "sheer-scale" exception to specificity. First, Taylor incorrectly states that the "sheer-scale" doctrine does not apply to locations and places and is limited to "non-essential information, such as the names of victims and exact date of the crime."[211] However, as detailed in the Prosecution Appeal, this is incorrect. Specifically, in the *RUF* Appeal Judgment, the SCSL Appeals Chamber expressly held that the "non exhaustive pleading of *locations* may be adequate in light of the 'sheer scale' of the alleged crimes."[212] Moreover, the *Kupreškić* Appeal Judgement that Taylor cites on this point,[213] does not support his position. In *Kupreškić*, the ICTY Appeals Chamber held that "there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity *in such matters as* the identity of the victims and the dates for the commission of crimes.'"[214] The use of the phrase "in such matters as" clearly indicates that this doctrine it is not limited *only* to the identity of victims and dates of crimes.

60. Secondly, Taylor is wrong at law when he argues that the Trial Chamber was not bound to follow the *RUF* Appeal Judgment in respect of the sheer-scale exception. The fact that

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[208] *Mbarushimana* Decision on Confirmation of Charges, paras. 79, 82.
[209] Prosecution Appeal, para. 121.
[210] The Prosecution applies the same reasoning to the ICC *Ruto* Decision on Confirmation of Charges cited by Taylor at para. 83, fn. 233 of his Response. It is clear that the ICC Pre-Trial Chamber wanted to prevent the Prosecutor from expanding the parameters of his case before the Trial Chamber arguably by adding new charges, see *Ruto* Decision on Confirmation of Charges, para. 99. For the same reasons as those set out in relation to the *Mbarushimana* Decision on Confirmation of Charges in paragraph 58 of this Prosecution Reply, this case is inapposite to the situation in this case.
[211] Taylor Response, para. 84.
[212] See Prosecution Appeal, para. 112-13.
[213] Taylor Response, para. 84, fn. 238.
[214] *Kupreškić* AJ, para. 89 (emphasis added).

Kallon's liability was pursuant to a JCE and Taylor was found guilty of planning and aiding and abetting, has no bearing on the principle.[215] Taylor provides no authority for his implication that the sheer-scale exception to specificity is limited to JCE, or at the very least, does not apply to planning or aiding and abetting. Moreover, the *RUF* Appeal Judgment did not set out to limit the application of this doctrine to cases where an accused was held liable for JCE. Contrary to Taylor's submission, this doctrine is about the sheer scale of the crimes and does not depend on their mode of commission. Indeed, as held by the ICTY Appeals Chamber, it can apply to personal commission.[216]

61. Contrary to Taylor's assertion,[217] the Prosecution Appeal demonstrated that the allegations related to locations not specifically pled could not have formed the basis of new charges. As discussed in the Prosecution Appeal, the allegations at issue constituted crimes committed within districts that were specifically pled in the Indictment, and fell within the scope of broader allegations relating to crimes in those districts as charged under counts in the Indictment.[218] Therefore, on their own, these additional locations could not have supported new charges and their inclusion would not have led to a radical transformation of the case against Taylor.[219]

C. Taylor did not challenge the specificity of the pleading of the locations of the crimes in issue at any stage of the proceedings nor allege any prejudice in his ability to defend himself

62. Taylor's contention that he challenged the specificity of the pleading of the locations of the crimes in issue is misguided.[220] The pleadings and testimony cited by Taylor to support his argument that he did object were the only times in a three year trial when the Defence objected to the issue of locations.[221] However, as explained in the Prosecution Appeal, these were actually objections to the fact the Prosecution produced evidence of crimes in districts which were not pleaded in the Indictment or which fell outside of the Indictment time

[215] Taylor Response, paras. 85-86.
[216] *Kupreškić* AJ, para. 89.
[217] Taylor Response, para. 88.
[218] Prosecution Appeal, para. 121.
[219] Prosecution Appeal, para. 121.
[220] Taylor Response, paras. 90-91.
[221] Taylor Response, para. 91.

frame.[222] While such evidence was admissible for a variety of reasons, these objections were on an entirely different issue and not relevant to the issue at hand which concerns evidence led on specific unnamed locations within districts pleaded in the Indictment.[223] Taylor also never objected to the admission of evidence of the crimes that are at issue in this Ground of Appeal.[224]

63. Taylor misrepresents the Prosecution position as the Prosecution has not alleged that the Chamber erred by finding the Indictment defective in the absence of Defence objections during the proceedings.[225] Rather, the Prosecution clearly argued that as Taylor did not challenge the specificity of the crimes at any stage of the proceedings, and never alleged any prejudice in his ability to defend himself against these allegations, any defects found by the Trial Chamber should have been deemed harmless.[226]

D. In the alternative, timely, clear and consistent notice was given to Taylor of the locations by pre-trial communications

64. Taylor misrepresents the Prosecution position at paragraph 95 of his Response. The Prosecution argued *in the alternative* that should the Trial Chamber have been correct in finding that the Indictment lacked specificity regarding locations, the pre-trial communications further informed Taylor of the locations of the crimes in question. The Prosecution never accepted that the locations in issue fell *outside the scope of the Indictment* and its argument that any defects were cured by pre-trial communications was in the alternative to its primary argument that the Indictment pleaded the locations with sufficient specificity. Moreover, at paragraph 95, footnote 260 of his Response, Taylor refers to the wrong section of the Prosecution's submissions.[227]

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[222] Prosecution Appeal, paras. 177-82.
[223] Paras. 29-32, 34-37, 40-41 of the Defence Final Trial Brief cited by Taylor in para. 91, fn. 253, of his Response were the only ones raised by Taylor in his Response that were not expressly dealt with in paras. 177-82 of the Prosecution Appeal. However, these objections were also to the fact the Prosecution produced evidence of crimes in districts which were not pleaded in the Indictment or which fell outside of the Indictment time frame, which as stated in paragraph 62 of this Prosecution Reply, is a different issue. The argument raised in Defence Final Trial Brief, paras. 38-39 relates to JCE so it is not relevant.
[224] Taylor Appeal, paras. 174, 177-82.
[225] Taylor Response, para. 92.
[226] See Prosecution Appeal, paras. 104, 174-82.
[227] The Prosecutions submissions regarding this alternative argument are contained in Prosecution Appeal, paras. 119-173 and the law relied on is cited in the footnotes to Prosecution Appeal, paras. 120-21 rather than those cited by Taylor.

65. Taylor's contention that since the ICTY Appeals Chamber case of *Kupreškić,* other cases have restricted the possibility of curing defective indictments is incorrect.[228] In support of this position, Taylor mistakenly relies on the *Ntagerura* Appeal Judgement and cites it out of context. Contrary to Taylor's submission, the *Ntagerura* Appeal Judgement did not restrict the possibility of curing defective indictments by the provision of "timely clear and consistent" information.[229] Rather, the ICTR Appeals Chamber found that the Trial Chamber had erred by considering material facts of which the accused was not adequately put on notice after it found that the Indictments were defective and when it had declined to consider whether the defects were cured. In reaching this conclusion, the Appeals Chamber emphasised that if the indictment is found to be defective at trial, the chamber *must* consider whether the accused was nevertheless accorded a fair trial by evaluating whether any defects were cured.[230] Therefore, rather than restricting the possibility of curing defective indictments, the *Ntagerura* Appeal Judgement underscored that if a trial chamber finds an indictment defective, it must then consider whether any such defects were cured.

66. The Prosecution does not dispute the AFRC findings cited by Taylor in his Response[231] which are limited to pleading using the terms "various" and "including" as opposed to the use of the word "throughout".[232] However, as argued in the Prosecution Appeal, the Trial Chamber was bound by the *RUF* jurisprudence on this same issue as it was the most recent appellate statement on the specificity required in pleading locations with such terms, as it was rendered after the *AFRC* Appeal Judgment cited by Taylor.[233] Moreover, the Prosecution highlights that in upholding the Trial Chamber's findings regarding notice of locations, the *AFRC* Appeals Chamber noted that in finding the Indictment defective, the Trial Chamber had made an exception for crimes of a continuous nature, *i.e.* sexual slavery and the use of child soldiers which, while not pleaded with sufficient specificity, were permissible. The Appeals Chamber noted that the Trial Chamber had made this exception because the Defence had not specifically objected to the lack of specificity.[234] Therefore, should the Appeals Chamber be persuaded by Taylor's argument and rely on the *AFRC* Appeal Judgment rather

[228] Taylor Response, para. 97.
[229] Taylor Response, para. 97.
[230] *Ntagerura* AJ, paras. 64-67.
[231] Taylor Response, paras. 98-99.
[232] *AFRC* AJ, para. 48.
[233] Prosecution Appeal, paras. 113-14.
[234] *AFRC* AJ, para. 49.

than its latest judgement on this issue, it should consider that Taylor also did not expressly object to the alleged lack of specificity in the pleading of the locations in question as argued in the Prosecution Appeal and this Reply.[235]

67. Taylor's attempt to distinguish "material facts" from "material elements of a crime" and "personal responsibility of the Accused" is confused and misconceived.[236] The law is clear. Defects in an indictment can be "cured" by the provision of "timely, clear and consistent information detailing *the factual basis* underpinning the charge" against the accused.[237] In accordance with this jurisprudence, in all of the examples cited by Taylor in his Response,[238] it was this *factual basis* underpinning the charges against the accused that he was further informed about through pre-trial communications. For example in *Gacumbitsi*, it was the date and the place of the crime and the name of a victim.[239] This is identical to the situation in this case, as locations of crimes are part of the factual basis underpinning the charges against the accused, and thus his criminal responsibility for the crimes charged.

68. Contrary to Taylor's claim,[240] the relevant location information which was contained in the Prosecution Pre-Trial Brief and other pre-trial communications could not have been construed as failing to provide further notice of the crimes charged, as these communications were unambiguous. For example, the Prosecution Pre-Trial Brief and other pre-trial disclosures not only restated the relevant District in the Indictment, but provided further details of the specific locations within these districts that were in issue. As argued in the Prosecution Appeal and contrary to Taylor's claim,[241] these communications were clear and consistent.[242]

69. Contrary to Taylor's submissions,[243] the Prosecution only relied[244] on paragraph 443 of the *CDF* Appeal Judgment's correct statement of the applicable law on curing defects in an

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[235] See Prosecution Appeal, paras. 104, 174-82; Prosecution Reply, para. 62.
[236] Taylor Response, paras. 100-103.
[237] *CDF* AJ, para. 443 (emphasis added); *RUF* AJ, para. 167; *Muvunyi* I AJ, para. 20; *Kupreškić* AJ, para. 114; *Naletilić & Martinović* AJ, para. 26.
[238] Taylor Response, paras. 100-102.
[239] *Gacumbitsi* Appeal Judgement, para. 56.
[240] Taylor Response, paras. 102-03.
[241] Taylor Response, para. 103.
[242] Prosecution Appeal, paras. 124-172.
[243] Taylor Response, paras. 104-05.
[244] Prosecution Appeal, para. 120.

indictment.[245] The Prosecution did not refer to paragraphs 444 and 446 of the *CDF* Appeal Judgment as claimed by Taylor.[246] In any event, paragraph 444 of the *CDF* Appeal Judgment supports the Prosecution position, as the *CDF* Appeals Chamber concluded that notwithstanding its finding that the Indictment was defective in relation to sexual violence crimes,[247] such defects had been cured by the Prosecution's Pre-Trial Brief, Supplemental Pre-Trial Brief and Opening Statement.[248] The Prosecution did not refer to paragraph 446 of the *CDF* Appeal Judgment, which is not relevant as it concerned the Trial Chamber's refusal to admit allegedly prejudicial evidence, which is not at issue in this Ground of Appeal.

70. Taylor distorts the Prosecution's submissions,[249] as the Prosecution did not argue that its Pre-Trial Brief or summaries of anticipated testimony or service of witness statements or its opening statement *alone* further informed Taylor of the locations of the crimes in issue.[250] Rather, in all but three of the locations in issue, the Prosecution submitted that Taylor was put on notice of the locations through clear, consistent and timely communications through its Pre-Trial Brief *in addition to* summaries of anticipated testimony *and* where necessary, pre-trial disclosures which included witness statements, interview notes and prior testimony before the SCSL. In relation to physical violence in Kailahun District, the Prosecution also relied on its Opening Statement which was given on 4 June 2007, more than seven months before the first Prosecution witness testified. In the three exceptions, the Prosecution cured any defects the Appeals Chamber may find existed by reference to summaries of anticipated testimony annexed to its Pre-Trial Brief and in one case an additional pre-trial disclosure.[251] Therefore, contrary to Taylor's argument,[252] the Prosecution never argued that witness statements or its opening statement alone cured any defects in the Indictment. Moreover, contrary to Taylor's implication,[253] whether or not the witness statements disclosed by the Prosecution to the Defence were used at trial is irrelevant for the purpose of assessing whether the disclosure of such statements remedied any defects in the Indictment. In any event, the Defence had the statements and was aware of their contents.

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[245] See, e.g., *RUF* AJ, paras. 167-68; *Ntabakuze* AJ, para. 30.
[246] Taylor Response, para. 105.
[247] *CDF* AJ, para. 442.
[248] *CDF* AJ, paras. 444-45.
[249] Taylor Response, paras. 106-15.
[250] Prosecution Appeal, paras. 124-172.
[251] Prosecution Appeal, paras. 158-59, 171.
[252] Taylor Response, paras. 106-07, 114-15.
[253] Taylor Response, para. 106.

71. Taylor's contention that the Prosecution "expressly conceded (sic) had no intention of providing unambiguous, clear, nor exhaustive information on the charges and material facts related to the alleged crimes" in its Pre-Trial Brief is a complete distortion.[254] As correctly stated by Taylor, the Prosecution only said that it would not discuss every fact it intended to prove or cite every source of evidence on which it intended to rely in its Pre-Trial Brief. In no way can this be read to be a concession that the Prosecution was not providing unambiguous or clear information. Moreover, the Prosecution was limited to 50 pages for its Pre-Trial Brief pursuant to the relevant Practice Direction, so it would have been impossible to discuss every detail of the evidence.[255] Furthermore, Taylor's argument misses the point.[256] The issue at hand is whether the Pre-Trial Brief contained the information needed to cure the Indictment should the Trial Chamber have been correct in finding it defective, rather than whether it cited to every fact the Prosecution intended to prove at trial.

E. Conclusion

72. Taylor's challenge to Ground Three of the Prosecution Appeal should, therefore, be dismissed in its entirety.

GROUND FOUR: The Trial Chamber erred in law and/or fact in sentencing Charles Taylor to a single term of 50 years' imprisonment

A. Overview

73. As discussed below, none of the arguments advanced by Taylor in response to the Prosecution's Fourth Ground of Appeal succeed in countering the Prosecution's appeal submissions seeking an increase in his sentence.[257] Accordingly, the Appeals Chamber should grant the Prosecution's appeal against the sentence in its entirety and revise Taylor's sentence upwards to eighty (80) years in order to properly and accurately reflect the totality of his criminal conduct.

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[254] Taylor Response, para. 109.
[255] Practice Direction on Filing Documents, Art. 6(A).
[256] Taylor Response, paras. 109-110.
[257] Taylor Response, paras. 118-157.

B. The Trial Chamber erred by failing to properly assess the totality of Taylor's criminal conduct

74. The three arguments deployed by Taylor in response to the Prosecution's submission that the Chamber erred in imposing a sentence which is not reflective of his critical and indispensable role are without merit.[258] First, Taylor erroneously asserts that the Prosecution's reliance on references made in the Trial Judgement and Sentencing Judgement to Taylor's conduct undermines the argument that the Trial Chamber failed to give sufficient weight to his conduct in sentencing.[259] This argument is flawed as it seeks to sidestep the essence of the Prosecution's challenge which is that these references underline the Trial Chamber's failure to give *sufficient* weight to its *very own* extensive findings regarding Taylor's critical role and conduct in the overall context of the criminal campaign.[260]

75. Second, Taylor's argument that his conduct was considered by the Trial Chamber as a factor in aggravation, and ultimately rejected as a factor in mitigation, is irrelevant.[261] The matter at issue is the Trial Chamber's proper assessment of *gravity*, not mitigation or aggravation. As outlined in the Prosecution Appeal,[262] the conduct which the Trial Chamber should have taken into account when assessing the second limb of the gravity test[263] is separate and distinct from the conduct which the Chamber considered in its assessment of the other two sentencing factors, *i.e.* mitigation[264] and aggravation.[265] Further, no double-counting occurred.[266]

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[258] Taylor Response, paras. 120-29.
[259] Taylor Response, paras. 121-23.
[260] Prosecution Appeal, paras. 208-09. The Prosecution relied on the Trial Chamber's findings reflecting the reality that Taylor's presence was constant, "indispensable" and "critical" in enabling the RUF, RUF/AFRC alliance continue its campaign of atrocities against the civilian population of Sierra Leone. See also Judgement, paras. 6775, 6945, 6973.
[261] Taylor Response, para. 124.
[262] Prosecution Appeal, paras. 201-07.
[263] See Prosecution Appeal, para. 198 regarding the two prong test for establishing gravity.
[264] The Trial Chamber only considered limited aspects of Taylor's conduct as potentially mitigating, *i.e.*, his role in the Sierra Leone peace process, his lack of a prior criminal record and his conduct in detention. See Sentencing Judgement, paras. 88, 92.
[265] Taylor's use of his position as President of Liberia and member of the ECOWAS Committee of Five to "fan the flames of conflict" was properly held by the Trial Chamber to be an aggravating factor in terms of his criminal conduct, see Sentencing Judgement, para. 96. However, this does not amount to a consideration or the giving of weight to Taylor's criminal conduct in and of itself, which was the basis of the Prosecution's submission that the Trial Chamber erred, see Prosecution Appeal, paras. 201-07.
[266] This argument is a reiteration of the claims which Taylor raised in his Response, para. 125. The Trial Chamber properly assessed Taylor's Head of State status in determining his sentence. The Prosecution relies on its submissions made at para. 748 of the Prosecution Response.

76. Third, the principle that senior members of a command structure, *i.e.*, the leaders and planners of a particular conflict, deserve a higher sentence than low-level perpetrators *does* apply to persons "outside the command structure".[267] Taylor's assertion to the contrary amounts to a fundamental misreading of the jurisprudence.[268] Contrary to Taylor's position, the ICTY Appeals Chamber in *Tadić* did not limit the principle as applying only to persons "in a command structure".[269] Rather, as is clear from a proper and plain reading of the statement,[270] the ICTY Appeals Chamber simply used the words "in the command structure" when noting that the position of the accused in the command structure *in comparison* to his superiors was low.[271] This observation did not amount to a statement of law that the architects of a criminal strategy will only be considered more responsible than those who carry out the crimes if they are within the boundaries of a formalised command structure.

77. Further, Taylor misinterprets the references of the ICTR Appeals Chamber in *Musema* to senior members of a command structure being deserving of greater punishment than foot soldiers carrying out orders.[272] The *Musema* case involved a civilian "figure of authority [...] who wielded considerable power in the region"[273] and does not support the assertion that senior figures deserve higher sentences only if within a formalised command structure. Further, Taylor improperly attempts to narrow this authority to focus only on Musema's superior responsibility.[274] However, the ICTR Appeals Chamber found that senior members of a command structure are "leaders *and planners* of a particular conflict".[275] While Taylor was not convicted as a superior pursuant to Article 6(3) of the Statute, he was convicted of planning atrocities in the Sierra Leone conflict.[276] Therefore, the principle that those who plan or lead operations which encompass the commission of crimes are more criminally culpable than those who carry out the crimes, regardless of the existence or otherwise of a formalised command structure, should apply in this case.

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[267] Taylor Response, para. 126.
[268] Taylor Response, paras. 126-29.
[269] Taylor Response, para. 127.
[270] Taylor quotes the ICTY Appeals Chamber as referring to "in a command structure", see Taylor Response, para. 127. This is incorrect. The phrase actually used is simply "in the command structure", see *Tadić* Sentencing AJ, para. 56.
[271] *Tadić* Sentencing AJ, para. 56.
[272] Taylor Response, para. 127.
[273] *Musema* AJ, para. 384.
[274] Taylor Response, para. 128.
[275] *Musema* AJ, para. 383 (emphasis added).
[276] Judgement, paras. 6971, 6994(b).

78. Taylor's suggestion that the Prosecution is seeking to have his leadership role considered as a factor adding "to the gravity of the offence", and, therefore, is seeking to have this factor improperly double-counted, is unfounded.[277] The Prosecution's submissions that the Trial Chamber should have determined an individualised sentence reflective of the totality of Taylor's criminal conduct including his status as a planner of atrocities should not be conflated or confused with distinct considerations of aggravation taken into account by the Trial Chamber in sentencing.[278]

C. The Chamber erred by failing to give sufficient weight to Taylor's conviction for planning

79. Taylor's first argument under this heading rests on the following three unfounded assumptions: (i) that his planning conviction was limited by reference to the modes of liability for which no convictions were entered; (ii) that his planning conviction was temporally limited; and (iii) that his planning conviction was geographically limited.[279] As discussed below, none of these assumptions warrant Taylor's planning conviction being categorised as "limited".

80. Taylor's claim that his planning conviction was limited "in comparison with the other principal or significant modes of liability with which he was charged"[280] has no basis in the Trial Chamber's findings and is inherently illogical. While Taylor acknowledges that it is a fundamental legal principle that an accused cannot be sentenced for forms of liability for which he was not convicted,[281] he fails to appreciate that it is manifestly inconsistent to determine an accused's sentence by comparison with the forms of liability for which he was not convicted. Further, there is no foundation in the Sentencing Judgement to suggest that the Trial Chamber's categorisation of Taylor's planning conviction as "limited" was *by reference* to modes of liability which should not have been considered at the sentencing stage.[282]

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[277] Taylor Response, para. 129.
[278] See para. 75 above.
[279] Taylor Response, paras. 130-38.
[280] Taylor Response, para. 135. See also Taylor Response, paras. 132-34.
[281] Taylor Response, para. 132.
[282] "[T]he Trial Chamber considers that a sentence of 80 years would be excessive for the modes of liability on which Mr. Taylor has been convicted, taking into account the limited scope of his conviction for planning the attacks on Kono and Makeni in December 1998 and the invasion of and retreat from Freetown between December 1998 and February 1999." See Sentencing Judgement, para. 94.

81. Taylor's second assumption that his planning conviction was temporally limited is also incorrect. Taylor suggests that the Prosecution "failed to point out" that the Trial Chamber considered the timeframe in which crimes were committed, which included the timeframe of the planning conviction, as an aggravating factor.[283] Taylor's response fails to address the Prosecution's point which is that when assessing *gravity* the three month time period does not support a categorisation of the planning conviction as "limited" given the nature of the crimes committed during that period.[284] The Prosecution pointed out that the gravity of the crime, meaning the inherent gravity of the crimes themselves combined with the criminal conduct of the accused, is the "primary consideration" in determining a sentence.[285] The gravity of the crimes committed in Freetown was addressed in the Prosecution Appeal.[286]

82. Taylor's third assumption that his planning conviction was considered geographically "limited" by the Trial Chamber in comparison to "all of the geographic areas in which crimes were alleged" in the indictment[287] is equally incorrect. For reasons of basic fairness, a sentence can only be imposed on the basis of the criminal conduct for which the accused was found guilty. Taylor's reference to areas in which crimes were alleged but for which no conviction was entered as a sentencing consideration is, therefore, incorrect and irrelevant.[288] In any event, the crimes set forth in all eleven Counts of the Indictment were included within the planning conviction and these crimes extended geographically across Sierra Leone, from Kono in the East to Freetown in the West.[289]

83. Taylor's second argument under this head regarding the Prosecution's comparison of the sentences imposed on Taylor and Alex Tamba Brima is also without merit but can be dealt with simply by referring to the Prosecution's submission at footnote 520 of the Prosecution Appeal which explains the scope of Brima's conviction and, thus, establishes the appropriateness of the comparison.[290]

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[283] Taylor Response, para. 136.
[284] Prosecution Appeal, paras. 220-21.
[285] Prosecution Appeal, paras. 198, referring to Sentencing Judgement, para. 19.
[286] Prosecution Appeal, paras. 219-221. See also Prosecution Appeal, paras. 56-60.
[287] Taylor Response, para. 137.
[288] See *AFRC* SJ, para. 66.
[289] Prosecution Appeal, para. 219, referring to Judgement, para. 6994(b) (Disposition).
[290] Taylor Response, paras. 140-42.

D. The Trial Chamber erred by giving undue and erroneous consideration to aiding and abetting as a form of liability

84. Taylor's first argument under this heading mischaracterises the Prosecution's argument in relation to the Chamber's treatment of aiding and abetting for sentencing purposes.[291] Contrary to Taylor's assertion, the Prosecution does not simply argue that the Trial Chamber "failed to assess" Taylor's actual conduct,[292] but that it failed to *properly* assess his conduct.[293] As noted in the Prosecution Appeal, the Trial Chamber entered a plethora of findings regarding Taylor's conduct. However, the Chamber failed to *properly* assess its own findings, or, put another way, failed to give sufficient weight to these extensive findings and, consequently, imposed a sentence which does not adequately reflect Taylor's conduct.

85. Taylor simply disputes, without substantiation, the Prosecution's argument that in determining an appropriate sentence the *form* of conduct is a lesser factor than the *actual* criminal conduct.[294] "Form of conduct" is simply another way of stating "mode of liability".[295] In determining sentence, the bare mode of liability alone must always be a lesser factor compared to the actual criminal conduct of the accused. This is supported by the emphasis placed in the jurisprudence on the individual[296] and that a Chamber's sentencing discretion is ultimately guided by "the individual circumstances of the case".[297]

86. Further, Taylor misconstrues the Prosecution's argument at paragraph 227 of the Prosecution Appeal.[298] Contrary to Taylor's assertion,[299] the Prosecution does not accept as a "legal principle" the fact that "aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation."[300] Rather, the Prosecution argument is that mode of liability alone does not dictate sentence. Mode must be measured against the particular circumstances of the case which include the nature of the

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[291] Taylor Response, para. 143.
[292] Taylor Response, para. 143.
[293] See Prosecution Appeal, para. 225 stating "A *proper* assessment of the actual conduct..." (emphasis added).
[294] Taylor Response, fn. 348.
[295] See Prosecution Appeal, para. 192.
[296] See, e.g., *CDF* SJ, para. 31.
[297] See, e.g., *AFRC* SJ, para. 11; *CDF* AJ, para. 466.
[298] Taylor Response, paras. 146-48.
[299] Taylor Response, paras. 146-48.
[300] Sentencing Judgement, paras. 21, 36, 100.

crimes and the accused's individual criminal conduct. There is, thus, no acceptance by the Prosecution of any statement of principle.

87. Taylor erroneously relies on one ICTY case, *Krstić*, in support of his argument that "[s]ubstantial reductions in sentences can also be applied to higher level defendants who aid and abet crimes committed over a wide geographical area and affecting numerous victims, compared to those who are principal or direct perpetrators of such crimes."[301] This case is in no way comparable to the instant case and does not provide support for the Trial Chamber's erroneous approach.

88. The ICTY Trial Chamber in *Krstić* noted that the accused "would not likely, on his own, have embarked on a genocidal venture" and that his commander, General Mladić, "was calling the shots".[302] Krstić's participation "consisted primarily of allowing Drina Corps assets to be used in connection with the executions from 14 July onwards and assisting with the provision of men to be deployed to participate in executions that occurred on 16 July 1995."[303] Therefore, Krstić was "guilty, but his guilt is palpably less than others who devised and supervised the executions".[304] Further, the crimes he was convicted of were "committed in a geographically limited territory over a limited period of time".[305] Clearly, *Krstić* is distinguishable from the present case.

89. Significantly, Taylor omits to note that, in reducing Krstić's sentence from 46 to 35 years,[306] the Appeals Chamber accepted *four* factors in mitigation which had not been considered by the Trial Chamber.[307] The extent to which the eleven year reduction reflects these mitigating factors as opposed to the change in mode of liability would call for a speculative exercise. However, the Prosecution submits that these four new mitigating factors could have carried significant weight. The Prosecution also notes that in considering the

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[301] Taylor Response, para. 149.
[302] *Krstić* TJ, para. 724.
[303] *Krstić* TJ, para. 724.
[304] *Krstić* TJ, para. 724 also noting that "His story is one of a respected professional soldier who could not balk his superiors' insane desire to forever rid the Srebrenica area of Muslim civilians, and who, finally, participated in the unlawful realisation of this hideous design."
[305] *Krstić* TJ, para. 725.
[306] *Krstić* AJ, para. 275.
[307] namely: (i) the nature of his provision of the Drina Corps assets and resources; (ii) the fact that he had only recently assumed command of the Corps during combat operations; (iii) the fact that he was present in and around the Potočari for at most two hours; and (iv) his written order to treat Muslims humanely, *Krstić* AJ, paras. 272-73.

general sentencing practice in relation to aiding and abetting, the Appeals Chamber in *Krstić*, like the Trial Chamber in *Taylor*,[308] relied, *inter alia*, on the *Vasiljević* case,[309] which, as argued in the Prosecution Appeal, dealt with an accused whose role was of a typical aider and abettor.[310]

90. Contrary to Taylor's contention,[311] the Trial Chamber *did* reduce his sentence based on the *ad hoc* tribunals' *general* approach to the sentencing of aiders and abettors *and* because he was not found liable through JCE or superior responsibility. The fact that the Trial Chamber separately considered Taylor's special status does not detract from the Chamber's incorrect application of a *general* approach to a case where this should not have been applied. Neither does it detract from the Chamber's irrelevant consideration of modes of liability through which Taylor was not convicted.

E. Conclusion

91. Taylor fails to present any argument which negates the Prosecution's submissions under this Fourth Ground of Appeal. The Appeals Chamber should grant the Prosecution's appeal in its entirety and raise Taylor's sentence to 80 years.

III. CONCLUSION

92. For the reasons given in the Prosecution Appeal and for all of the reasons above, the Prosecution's four Grounds of Appeal should be granted in their entirety.

Filed in The Hague, The Netherlands
30 November 2012

for Brenda J. Hollis
The Prosecutor

[308] Sentencing Judgement, fns. 38, 82. See Prosecution Appeal, para. 229.
[309] *Krstić* AJ, para. 268.
[310] See Prosecution Appeal, para. 229.
[311] Taylor Response, paras. 154-57.

Annex

BOOK OF AUTHORITIES

ANNEX: BOOK OF AUTHORITIES

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A. Statutory and Regulatory Provisions

SPECIAL COURT FOR SIERRA LEONE

Practice Direction on Filing Documents before the Special Court for Sierra Leone

Adopted on 27 February 2003
Amended on 1 June 2004
Amended 10 June 2005

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Documents that are not filed confidentially may be used in press releases and be posted on the official website of the Special Court.

(C) Each page of the document shall have the case number indicated as a footer.

(D) Each page of the document shall be one-sided.

(E) The title of the document shall be as concise as possible.

(F) Documents shall be submitted on A4 or $8^{1/2}$ x 11 inch size paper. Margins shall be at least 2.5 centimeters on all four sides. All documents shall be paginated, excluding the cover sheet.

(G) The typeface shall be 12 point, "Times New Roman" font, with 1.5 line spacing. An average page shall contain a maximum of 300 words.

(H) Documents shall not be bound or stapled and shall not contain dividers, post-it indexes or flags.

(I) Only the original document shall be submitted to Court Management Section. No supplementary copies shall be accepted. Copies of photographs, audio tapes and video tapes which are submitted as part of the filing shall be provided in sufficient number for service on the Judge or Chamber before which the document is filed, the Parties and/or any State, organization or person that shall be served with the document.

(J) The document shall be signed with a clear indication of the name of the person who signed it.

Article 5 – Contents of Documents

Documents filed before a Judge or Chamber shall contain the following:

(i) a brief of the argument;

(ii) affidavit(s) or solemn declaration(s) affirming contentious facts, if the Party, State, organization or person filing the document requires the Judge or Chamber to make a determination on a question of fact; and

(iii) a list of authorities referred to in the document and copies of those authorities, as provided in Article 7 (A) of this Practice Direction.

(iv) any reference to a previously filed document shall include the court record document number in addition to the title and date of that document.

Article 6 – Length of Documents

(A) Pre-trial briefs shall not exceed 50 pages or 15,000 words, whichever is greater.

B. Jurisprudence of the International Tribunals
(Judgements, Decisions, Orders)

B. (1) SCSL Jurisprudence

675)

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

9585
1883

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Herman von Hebel

Date: 22 February 2008

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

JUDGMENT

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

Defence Counsel for Alex Tamba Brima:
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels

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

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that may have been caused by a defective indictment was cured by timely, clear and consistent information provided to the accused by the Prosecution.[89]

45. The Appeals Chamber must ensure that a failure to pose a timely challenge to the form of the indictment did not render the trial unfair. The primary concern at the appeal stage therefore, when faced with a challenge to the form of an indictment, is whether the accused was materially prejudiced.[90]

B. Prosecution's Second Ground of Appeal: Locations Not Pleaded in the Indictment

1. Trial Chamber's Findings

46. The substance of the Prosecution's Second Ground of Appeal is that the Trial Chamber erred in law and in fact in failing to make findings on the responsibility of each Appellant in respect of crimes committed in several locations in Koindugu and Bombali Districts, Freetown and other parts of the Western Area and in Port Loko District including other locations enumerated in the Ground of Appeal, in respect of which evidence had been led.

47. The Trial Chamber in ruling on the submission of Brima complaining among other things, that the Indictment was impermissibly vague, because particulars of where the crimes occurred were not given, stated that:

> "the Prosecution has led a considerable amount of evidence with respect to killings, sexual violence, physical violence, enslavement and pillage which occurred in locations not charged in the indictment [and that] while such evidence may support proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for those crimes may be made in respect of such locations not mentioned in the indictment."[91]

48. It had been pleaded in several paragraphs of the Indictment that particular acts took place in several named locations in named Districts. It was made clear that the named locations were not exhaustive of the locations where the acts took place. An example is paragraph 45 of the Indictment where it was alleged that "members of AFRC/RUF unlawfully killed several hundred civilians in

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[89] *Kupreškić* Appeal Judgment, para. 114 ("The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category."). *See also Ntakirutimana* Appeal Judgment, para. 27.
[90] *Kupreskic* Appeal Judgment, para. 115.
[91] AFRC Trial Judgment, para. 37.

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

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

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

2. Submissions of the Parties

(a) Prosecution's Submissions

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

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

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

(624) SCSL-04-16-T (22984 — 28019)

22984

SPECIAL COURT FOR SIERRA LEONE

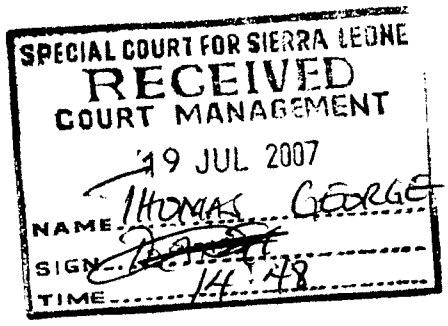
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Date: 19 July 2007

Case No.: SCSL-04-16-T



PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

SENTENCING JUDGEMENT

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

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

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III. APPLICABLE LAW

A. Applicable Provisions

10. Sentencing in the Special Court is regulated by the provisions of Article 19 of the Statute of the Special Court ("Statute") and Rule 101 of the Rules of Procedure and Evidence ("Rules"). Article 19 of the Statute provides:

> 1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
>
> 2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> 3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Rule 101 of the Rules provides:

> (A) A person convicted by the Special Court, other than a juvenile offender, may be sentenced to imprisonment for a specific number of years.
>
> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 19 (2) of the Statute, as well as such factors as:
>
> (i) Any aggravating circumstances;
>
> (ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
>
> (iii) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute.
>
> (C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
>
> (D) Any period during which the convicted person was detained in custody pending his transfer to the Special Court or pending trial or appeal, shall be taken into consideration on sentencing.

11. According to the above provisions the Trial Chamber is obliged to take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. Aggravating and mitigating circumstances and the general practice regarding prison sentences in the International Criminal Tribunal for Rwanda (ICTR) and the domestic courts of Sierra Leone shall, where appropriate, be taken into account. These requirements are not exhaustive and the Trial

Chamber has the discretion to determine an appropriate sentence depending on the individual circumstances of the case.[20]

12. The Trial Chamber agrees with the holding of the ICTR Appeals Chamber in *Prosecutor v. Kambanda*, that "[...] the Statute is sufficiently liberally worded to allow for a single sentence to be imposed. Whether or not this practice is adopted is within the discretion of the Chamber".[21] The governing criteria is that the final or aggregate sentence should reflect the totality of the culpable conduct, or generally, that it should reflect the gravity of the offences and the overall culpability of the offender, so that it is both just and appropriate.[22] In the present case the Trial Chamber finds it is appropriate to impose a global sentence for the multiple convictions in respect of Brima, Kamara and Kanu.

B. Sentencing Objectives

13. The preamble of the United Nations Security Council Resolution 1315 (2000)[23] recognises that

> [...]in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.[24]

14. Retribution, deterrence and rehabilitation have been considered as the main sentencing purposes in international criminal justice.[25]

15. Furthermore, international criminal tribunals have held that retribution is not to be understood as fulfilling a desire for revenge but rather as duly expressing the outrage of the national and international community at these crimes,[26] and that is meant to reflect a fair and balanced

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[20] *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, ("*Momir Nikolić* Appeal Sentencing Judgement"), para. 106: "Sentencing decisions are discretionary and turn on the particular circumstances of each case."

[21] *Kambanda* Appeal Judgement, para. 113

[22] *Čelebići* Appeal Judgement, paras. 429-430

[23] UN Sec Res. 1315(2000), 14 August 2000.

[24] UN Sec Res. 1315(2000), 14 August 2000, para. 7.

[25] See also *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 185; *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga")*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 806; *see also Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001 ("*Todorović* Sentencing Judgement"), paras 28-29; *Gacumbtsi* Trial Judgement, para. 335; *Semanza* Trial Judgement, para. 554; *Kambanda* Trial Judgement, para. 28.

[26] See also *Aleksovski* Appeal Judgement, para. 185; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003, ("*Dragan Nikolić* Sentencing Judgement"), para. 140, stating that retribution should solely be seen as: "an objective, reasoned and measured determination of an appropriate punishment which properly reflects the [...] culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offenders conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more", *R. v. M. (C.A.)* (1996) 1 S.C.R. 500, para. 80 (emphasis in original).

62. The Brima Defence argues that Brima's membership of the Commission for the Consolidation of Peace signifies a contribution to peace in the region which should be treated as a mitigating factor.[93]

63. The Brima Defence further emphasises that Brima was only convicted of offences in the Western Area and Bombali Districts, and was found not guilty for crimes committed in Bo, Kenema, Kailahun, Kono and Port Loko Districts.[94] The Brima Defence further argued that a harsh sentence would not "promote the cause of reconciliation".[95]

(b) Deliberations

64. The Trial Chamber does not consider Brima's service in the Army without incident to be a mitigating factor [96] as this was merely his duty.

65. The Trial Chamber further finds that Brima's alleged acts of philanthropy and alleged involvement in the Commission for the Consolidation of Peace are not mitigating factors.

66. The fact that Brima's convictions relate to crimes committed in two districts, as opposed to the seven districts particularised in the Indictment, in no way lessens the seriousness of the offences.

5. Remorse

67. The Trial Chamber finds that the statement made by Brima at the sentencing hearing, whilst containing a fleeting reference to "remorse to the victims of this situation"[97] cannot be accepted as an expression of genuine remorse. This fact cannot therefore be taken as mitigating his sentence.

[93] Brima Sentencing Brief, para. 30, citing *Plavšić* Trial Judgement, para. 94.
[94] Brima Sentencing Brief, paras 12, 47.
[95] Oral Submissions, Transcript 16 July 2007, p. 47.
[96] Exhibit D-14.
[97] Oral Submissions, Transcript 16 July 2007, p. 51.

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Herman von Hebel, Acting Registrar

Date: 20 June 2007

Case No.: SCSL-04-16-T

PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

JUDGEMENT

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

Defence Counsel for Alex Tamba Brima:
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Mohamed Pa-Momo Fofanah

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

committing the crime.[1487] The *mens rea* requires that the accused acted with direct intent or with the awareness of the substantial likelihood that a crime would be committed in the execution of that instigation.[1488]

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

(d) Ordering

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

773. The *mens rea* for ordering requires that the accused acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.[1495] The state of mind of an accused may also be inferred from the circumstances, provided that it is the only reasonably inference to be drawn.[1496]

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

(829)

SCSL-04-14-A
(968 — 1250)

968

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before:	Justice George Gelaga King, Presiding Judge Justice Emmanuel Ayoola Justice Renate Winter Justice Raja Fernando Justice Jon M. Kamanda
Registrar:	Herman von Hebel
Date:	28 May 2008

PROSECUTOR **Against** MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-A)

JUDGMENT

Office of the Prosecutor:
Stephen Rapp
Christopher Staker
Karim Agha
Joseph Kamara
Régine Gachoud
Elisabeth Baumgartner
Bridget Osho
Francis Banks-Kamara

Defence Counsel for Moinina Fofana:
Wilfred Davidson Bola-Carrol
Mohamed Pa-Momo Fofana

Defence Counsel for Allieu Kondewa:
Yada Williams
Osman Jalloh

49. Fofana submits that the *actus reus* required for aiding and abetting is different from that of instigation and that the Prosecution's arguments are therefore misleading.[109] He further submits that the Trial Chamber found that in order to prove the *actus reus* of instigation "a causal relationship between the instigation and the perpetration must be demonstrated."[110] Thus, for an aider and abetter to be convicted of instigation, his instigation must lead to the perpetration of the crime, and may not merely have a substantial effect on its outcome.[111]

50. Fofana, therefore, asserts that none of the factual findings referred to by the Prosecution establishes a direct causal link between Fofana's conduct and the crimes found by the Trial Chamber to have been perpetrated in Tongo Town.[112] Nothing in Fofana's speech at the First Passing Out Parade in December 1997 could have demonstrated his intent to provoke or induce the commission of the crimes outlined by the Prosecution,[113] or could have been understood by the Kamajors as a direct threat that they would face death or other serious consequences if they failed to carry out Norman's orders.[114] Thus, Fofana submits that "it is not the case that the only inference that can be drawn from the circumstances is that Fofana induced or provoked the Kamajors to commit crimes."[115] The more probable inference is that he encouraged the Kamajors to fight and capture Tongo Town.[116]

b. Discussion

51. The Trial Chamber held that the *actus reus* of instigating requires "an act or omission, covering both express and implied conduct of the Accused, which is shown to be a factor substantially contributing to the conduct of another person committing the crime,"[117] and that there must be a "causal relationship between the instigation and the perpetration of the crime . . . although it is not necessary to prove that the crime would not have occurred without the Accused's

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[109] Fofana Response Brief, paras 23-25, *referring* to the Trial Chamber's finding at paragraph 223 that "proof of a cause-effect relationship between the conduct of the aider and abetter and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required."
[110] *Ibid* at para. 24.
[111] *Ibid* at para. 25.
[112] *Ibid* at paras 26, 29.
[113] *Ibid* at para. 29.
[114] *Ibid* at para. 26.
[115] *Ibid* at para. 30.
[116] *Ibid* at para. 30.
[117] CDF Trial Judgment, para. 223.

involvement."[118] The Trial Chamber also held that the *mens rea* of instigating is an intention "to provoke or induce the commission of the crime," or a "reasonable knowledge that a crime would likely be committed as a result of that instigation."[119] Neither of the parties takes issue with the Trial Chamber's definition of instigation.

52. The Trial Chamber found that Fofana's speech at the First Passing Out Parade substantially contributed to the commission of crimes by the Kamajors in Tongo Town and thereby satisfied the *actus reus* of aiding and abetting. The parties have not challenged this finding. Both aiding and abetting and instigating require the *actus reus* to have a substantial effect on the perpetration of the crime.

53. The Trial Chamber concluded that Fofana's actions had a substantial effect on the perpetration of these crimes.[120] The Trial Chamber found that "Fofana's speech at the [first] passing out parade constitutes aiding and abetting only of the *preparation* [*sic*][121] of those criminal acts which were explicitly ordered by Norman, namely, killing of captured enemy combatants and 'collaborators', infliction of physical suffering or injury upon them and destruction of their houses."[122]

54. The Prosecution argues that because the *actus reus* of aiding and abetting is satisfied, the *actus reus* is also satisfied for instigating. However, the Trial Chamber found, relying on ICTY Appeals Chamber jurisprudence, that unlike the *actus reus* of instigating, the *actus reus* of aiding and abetting does not require a causal link between the act of aiding and abetting and the commission of the crime.[123] The Appeals Chamber holds that the *actus reus* of instigating requires a causal link which aiding and abetting does not and accordingly disagrees with the Prosecution's proposition.

55. Fofana's speech at the First Passing Out Parade at Base Zero was removed both temporally and geographically from the unlawful acts committed by the Kamajors in Tongo Town in January 1998. This alone would not be enough to deny a causal link between the speech and the crimes

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[118] *Ibid.*
[119] *Ibid.*
[120] *See ibid* at paras 723, 724.
[121] Apparent mistyping for "perpetration." *See also* Fofana Response Brief and Kondewa Response Brief.
[122] *See* CDF Trial Judgment, para. 727 (emphasis added).
[123] *See ibid* at para. 229, *referring* to *Blaškić* Appeal Judgement, para. 48.

alleged. However, in this case the Appeals Chamber is of the view that there is insufficient evidence to show how Fofana's words influenced the perpetration of crimes which took place at a significantly different place and time. Fofana's speech may have substantially contributed to the military effort, but not to the crimes as such. Therefore, the Appeals Chamber is satisfied that the Trial Chamber was not in error in finding that Fofana's speech did not have a substantial effect on the perpetration of the crimes or that a causal relationship did not exist and that the *actus reus* for instigating was, consequently, not satisfied.

56. With regard to the *mens rea* required for "instigating," the Prosecution submits that Fofana's intent or knowledge that crimes would likely be committed may be inferred from his substantial contribution to the planning, which was done with knowledge of the crimes which Norman had ordered in the execution of the plan. Fofana's words "[n]ow you've heard the National Coordinator [. . .] any commander failing to perform accordingly and losing your own ground, just decide to kill yourself there and don't come to report to us" are ambiguous and may be interpreted not as approving Norman's unlawful orders, but rather as an appeal to each of the commanders to fight hard and not loose his ground. Further, Fofana's call "to destroy the soldiers finally from where they were [. . .] settled"[124] was directed at the military campaign and does not include any incitement to perpetrate unlawful acts. This leads the Appeals Chamber to conclude that there were other possible interpretations of the evidence than the one suggested by the Prosecution. The Appeals Chamber, therefore, finds that a reasonable trier of fact could have found that Fofana did not have the requisite *mens rea*.

57. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in failing to convict Fofana for instigating the commission of crimes in Tongo Town. The Prosecution's Fourth Ground of Appeal, therefore, fails in this respect.

(ii) The Prosecution's Fourth Ground of Appeal: Planning

a. Submissions of the Parties

58. The Prosecution does not take issue with the Trial Chamber's pronouncement on the law on planning, and submits that because planning may be undertaken by one or more persons, an accused

[124] *See ibid* at para. 325.

who according to the Trial Chamber actually made the decisions and nobody could make a decision in their absence.[163]

75. Even though the First Passing Out Parade in December 1997 was temporally and geographically removed from the second and third attacks on Tongo Town, the Appeals Chamber observes that one of the purposes of the Passing Out Parade was for Norman to give instructions to the Kamajors for the second and third attacks on Tongo Town,[164] not just instructions concerning unlawful acts. For this reason temporal and geographic remoteness is not of significance to the question of whether Kondewa's speech substantially contributed to the perpetration of the crimes. Thus, in the light of all the circumstances of this case, a reasonable trier of fact could have concluded that the only inference available on the evidence was that through his blessings and speech at the First Passing Out Parade Kondewa substantially contributed to the perpetration of the crimes in Tongo Town.

76. Regarding the requisite *mens rea*, the Appeals Chamber agrees with Kondewa that the Trial Chamber erroneously relied on the fact that he had received the report to Base Zero of the Kamajors' previous crimes in Tongo. On the contrary, the Trial Chamber found that Norman and Fofana received this report, not Kondewa.[165] Thus, the Appeals Chamber finds that the Trial Chamber erred in fact in relying on this report.[166]

77. It is the unchallenged finding of the Trial Chamber, that Norman at the Passing Out Parade ordered the Kamajors to commit criminal acts in Tongo, and that Kondewa who spoke after Norman, knew of the orders of Norman when he said: "a rebel is a rebel; surrendered, not surrendered, they're all rebels . . . [t]he time for their surrender had long since been exhausted, so we don't need any surrendered rebel ... I give you my blessings; go my boys, go."[167] The Trial Chamber further found that "no fighter would go to war without Kondewa's blessings because they

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[163] *Ibid.*
[164] *Ibid* at para. 721(x).
[165] Kondewa Appeal Brief, para. 141; CDF Trial Judgment, para. 721(ix) ("TF2-079 prepared a situation report on events occurring between 19 September and 13 November 1997 in Zone II Operational Frontline which included Lower Bambara and Dodo Chiefdoms [...]. It [...] narrated crimes which were committed by Kamajors in that area [...]. At Base Zero they gave the report first to Fofana and then to Norman.").
[166] CDF Trial Judgment, para. 737.
[167] *Ibid* at para. 321.

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believed that Kondewa transferred his mystical powers to them and made them immune to bullets."[168]

78. On these findings the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to conclude that Kondewa by his words of encouragement aided and abetted the commission of criminal acts ordered by Norman in Tongo.

79. The Appeals Chamber therefore concludes, Justice King dissenting, that the Trial Chamber did not err in finding Kondewa responsible for aiding and abetting the commission of crimes in Tongo Town. The Appeals Chamber accordingly finds, Justice King dissenting, that Kondewa's Fourth Ground of Appeal must fail and upholds his conviction in relation to violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively).

(ii) Prosecution's Fourth Ground of Appeal: Instigation

a. Submissions of the Parties

80. The Prosecution submits that in finding that the elements of instigating were not satisfied, the Trial Chamber erred in fact and in law in its approach to the evaluation of the evidence concerning Kondewa's involvement in the crimes committed in Tongo Town.[169] The Prosecution argues that the *actus reus* of instigating has effectively been satisfied due to the Trial Chamber's finding that the *actus reus* of aiding abetting was satisfied because "Kondewa's words had a substantial effect on the perpetration of those criminal acts."[170]

81. Regarding the requisite *mens rea*, the Prosecution asserts that based on evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kondewa had the necessary *mens rea* for instigating.[171] The Prosecution specifically points to the Trial

[168] *Ibid* at para. 735.
[169] Prosecution Appeal Brief, para. 3.91.
[170] *Ibid* at para. 3.92, *referring* to CDF Trial Judgment, para. 736.
[171] *Ibid* at para. 3.93.

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Chamber's finding that Kondewa expressly encouraged the crimes,[172] and argues that on occasions prior to the First Passing Out Parade, Kondewa threatened others, including members of the War Council, who accused the Kamajors of committing crimes.[173] In addition, while at Base Zero, Kondewa personally killed a civilian and ordered the killing of another civilian.[174] The Prosecution submits that although this evidence is not directly related to Tongo, it shows that Kondewa supported or advocated the crimes committed by the Kamajors in Tongo.[175]

82. Kondewa responds that he is not liable for instigating because a causal connection has not been shown between his speech at the First Passing Out Parade and the crimes committed in Tongo.[176] He submits that the Prosecution incorrectly stated: that the *actus reus* of instigating and aiding and abetting is the same;[177] that the *actus reus* of these forms of liability is different because proof of a cause-effect relationship is necessary for instigating but not for aiding and abetting;[178] that there is no evidence that the Kamajors who were present at the First Passing Out Parade were the same Kamajors who subsequently committed crimes in Tongo Town;[179] and finally that there is no evidence that any Kamajor was prompted to commit any crime on the basis of his ambiguously phrased words, which he uttered six weeks earlier.[180]

b. Discussion

83. The Trial Chamber's statement of the elements of the *actus reus* and the *mens rea* of instigating has already been noted in paragraph 51.

84. The Trial Chamber found Kondewa's speech at the First Passing Out Parade to have had a substantial effect on the perpetration of crimes in Tongo Town and thereby satisfied the *actus reus* of aiding and abetting. Both aiding and abetting and instigating require the *actus reus* to have a

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[172] *Ibid.*
[173] *Ibid, referring* to CDF Trial Judgment, paras 306, 308.
[174] *Ibid, referring* to CDF Trial Judgment, paras 921(iii) (v), 934. In footnote 238 it is submitted that "In relation to the incident in which Kondewa was found to have ordered a civilian killed, the Trial Chamber was not satisfied that it occurred within the timeframe pleaded in the Indictment ([CDF Trial Judgment], para. 923). It is submitted that while this mean that Kondewa could not be convicted of this crime, the finding that it occurred and that Kondewa ordered it can be taken into account in determining Kondewa's intent at the time of the attacks on Koribondo, Bo and Kenema."
[175] Prosecution Appeal Brief, para. 3.93.
[176] Kondewa Response Brief, para. 2.2.
[177] *Ibid* at para. 2.4.
[178] *Ibid.*
[179] *Ibid* at para. 2.9.
[180] *Ibid*

substantial effect on the perpetration of the crime. A finding that an accused's conduct had a "substantial effect" for the purpose of aiding and abetting will therefore normally also satisfy the "substantial effect" requirement for the purpose of instigating.

85. In this case, in order to show a causal link between Kondewa's speech and the crimes committed in Tongo Town, the Prosecution must lead evidence to show that the Kamajors who were present at the First Passing Out Parade at which Kondewa's speech was made were the same Kamajors who subsequently committed the crimes in Tongo Town. There was no such evidence before the Trial Chamber. For this reason the Appeals Chamber finds that "instigation" for the crimes charged in Tongo Town was not proved.

86. Consequently, the Prosecution's Fourth Ground of Appeal fails in this respect.

4. Liability for Crimes in Koribondo, Bo District and Kenema District

(a) The Findings of the Trial Chamber

87. The Trial Chamber found that Norman, Fofana and Kondewa also addressed the Kamajors at a Second Passing Out Parade in early January 1998 regarding an "all-out offensive."[181] After thanking the Kamajors for the training they had undergone, and talking about the prior and pending operations, Norman said that he had given instructions for the pending operations which the Kamajors should follow.[182] Norman also said that "whoever knows that he is used to fighting with the cutlass, it is time for him to take up the cutlass [; w]hoever knows that he's used to fighting with a gun, it is time for him to take up the gun [; w]however knows that he's used to fight with a stick, it is time to him to take up his stick."[183]

88. Fofana also gave a speech at this meeting, saying that:

> "[T]the advice that Pa Norman had given to us, that the training that we underwent for a long time, the time has come for us to implement what we've learned. Now that we have received the order that we shall attack the various areas where the juntas are located, they have done a lot for the trainees. They've spent a lot on them. So any commander, if you

[181] CDF Trial Judgment, paras 323-337.
[182] *Ibid* at para. 323.
[183] *Ibid*.

3. Discussion

440. In this ground of appeal, the Prosecution alleges that the Trial Chamber committed both an error of law and of fact in refusing to admit evidence of sexual violence under existing Counts 3 and 4 of the Indictment.

441. The Appeals Chamber is of the opinion that acts of sexual violence may constitute "other inhumane acts" as alleged in Count 3 of the Indictment[855] as well as "cruel treatment," as alleged in Count 4 of the Indictment.[856]

442. Counts 3 and 4 of the Indictment do not explicitly list the acts of sexual violence that amounts either to an "other inhumane act" under Article 2.i. of the Statute or "cruel treatment" under Article 3.a. of the Statute. The Indictment on its face was defective with respect to allegations relating to sexual violence.

443. However, case law at the *ad hoc* Tribunals recognizes that in limited circumstances, a defect in the indictment may be "cured" if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.[857] While a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused, the defect may be deemed harmless if the Prosecution can demonstrate that the accused's ability to prepare his defence was not materially impaired. Factors to be considered in this respect include, among others, information provided in the Prosecution's pre-trial brief or its opening statement, the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case.[858] The Appeals Chamber adopts these principles.

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[855] AFRC Appeal Judgment, para. 186; *Akayesu* Trial Judgement, paras 688, 697; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 1 December 2003, para. 936 [*Kajelijeli* Trial Judgement]; *Niyitigeka* Appeal Judgement, para. 465.

[856] *Akayesu* Trial Judgement, paras 711-712; *Kayishema* Trial Judgement, para. 108; *Prosecutor v. Musema*, ICTR-96-13-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 27 January 2000, para. 156; *Čelebići* Trial Judgement, paras 551-552.

[857] *Kupreškić* Appeal Judgement, para. 114; *Kvočka* Appeal Judgement, para. 43; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 7 July 2005, para. 28; *Ntakirutimana* Appeal Judgement, para. 27; *Gacumbitsi* Appeal Judgement, paras 175-179; *Prosecutor v. Seromba*, ICTR-01-66-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 12 March 2008, para. 100. *See also Blaškić* Appeal Judgement, para. 238-239.

[858] *Simić* Appeal Judgement, para. 24.

444. The Appeals Chamber notes that the Prosecution's Pre-Trial Brief, filed on 2 March 2004, clearly notes that in relation to Bonthe District, "[t]he evidence will demonstrate that their daughters and wives [civilians] were systematically raped and held in sexual slavery."[859] The Prosecution's Supplemental Pre-Trial Brief, filed on 22 April 2004, alleged that under Counts 3 and 4 of the Indictment, in relation to Bonthe District, both Fofana and Kondewa were being held responsible pursuant to Article 6(1) of the Statute for subjecting women and girls to "sexual assaults, harassment, and non-consensual sex, which resulted in widespread proliferation of sexually transmitted diseases, unwanted pregnancies and severe mental suffering . . . ,"[860] as well as for "committing unlawful physical violence and mental harm or suffering through sexual assaults as well as other acts during the attacks in Bonthe District."[861] Furthermore, the Prosecution's opening statement, delivered on 3 June 2004, referred to the testimony of several witnesses relating to evidence of sexual violence or forced marriage.[862]

445. The Appeals Chamber therefore is satisfied that by the time the Prosecution filed its Admissibility of Evidence Motion, the Accused had timely and consistent notice for nearly one year

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[859] Prosecution Pre-Trial Brief, para. 62. The Pre-Trial Brief itself does not set out factual allegations in relation to specific Counts or specific individuals. On 1 April 2004, the Trial Chamber ordered the Prosecution to file a Supplemental Pre-Trial Brief, finding that the Prosecution's Pre-trial Brief of 2 March 2004 does not sufficiently address factual issues, does not provide with reasonable sufficiency notice and an overview of the Prosecution's case against each individual accused, and the nexus between the crimes alleged and the individual criminal responsibility of each accused. *See Prosecutor v. Norman et al.*, SCSL-04-14-PT, Special Court for Sierra Leone, Order to the Prosecution to File a Supplemental Pre-Trial Brief, 1 April 2004.

[860] Prosecution Appeal Brief, para. 8.13; Prosecution Supplemental Pre-Trial Brief, paras 91(b), 220(b).

[861] Prosecution Brief, para. 8.13; Prosecution Supplemental Pre-Trial Brief, para. 92.

[862] The Prosecution stated: "At Tihun, one of the Kamajors wanted to be his wife – wanted her to be his wife, but she refused and, in reward, she was threatened with death. The Kamajor had her perform conjugal duties and that witness was held in sexual slavery for a whole year. The witness was unable to escape because at every point in time there was a Kamajor that stood guard to prevent her from doing so. It was at Talia [Bonthe District] the witness met her mother in captivity and it was also the same place that she met the third Accused, Allieu Kondewa, who took her into his bedroom and raped her many times into the night. That witness will be here to testify to that." Referring to another witness who would testify, the Prosecutor further stated: "She will testify that she was raped by one Kamajor, who then forcefully took her as his wife. She spent three months at Talia with the Kamajors and during her captivity she witnessed a lot of killings of innocent civilians who were brought into town by these Kamajors." The Prosecutor also referred to witnesses who would testify that: "The witnesses also testify that some girls and women were brought to Base Zero and they were forced to have sex and they were raped and they were held in sexual slavery and subject to systematic sexual violence with Kamajor commanders like Kamoh Lahai and King Kondewa himself. The Court will hear testimonies of looting, raping and terrorizing civilians committed by this dreadful death squad." CDF Trial Transcript, 3 June 2004, p. 23. *See also* Dissenting Opinion of Judge Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 26.

that acts of sexual violence were being alleged in relation to Bonthe District under Counts 3 and 4 of the Indictment.[863]

446. Fofana argues that the Trial Chamber was correct in refusing to admit evidence of sexual violence because the "evidence sought to be adduced would be prejudicial to the interest of the accused persons. Such evidence would cast a cloak of doubt on the image of innocence that the Accused enjoys under law, until the contrary is proved."[864] The Appeals Chamber is of the view that the right to a fair trial enshrined in Article 17 of the Statute cannot be violated by the introduction of evidence relevant to any allegation in the trial proceedings, regardless of the nature or severity of the evidence.[865] The Appeals Chamber concludes that evidence of sexual violence was relevant to charges in the Indictment and that the Trial Chamber was in error in prospectively denying the admittance of such evidence. Further, the accused were put on notice of such evidence, which is not prejudicial in itself.

447. The Appeals Chamber notes that in filing its Urgent Motion for a Ruling on the Admissibility of Evidence on 15 February 2005, the Prosecution sought "clarification as to the extent to which the [Trial Chamber's Indictment Amendment Decision] limit[ed] the adduction of particular relevant and admissible evidence, under existing counts of the Consolidated Indictment."[866] At that stage of the proceedings, the Prosecution had attempted to tender only one

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[863] The Appeals Chamber notes that there is a distinction between the question of whether the Accused was on notice for the purposes of admitting evidence and whether the Prosecution provided adequate notice upon which a conviction could rest, which can only be made at the end of the trial after taking the totality of the evidence into consideration. *See Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, International Criminal Tribunal for Rwanda, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, Appeals Chamber, 4 October 2004, para. 7.

[864] Fofana Response Brief, para. 149. This argument was argued by Justice Itoe, *see* Separate and Concurring Opinion of Hon. Justice Benjamin Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 65 stating that the admission of evidence of sexual violence constitutes unfair prejudice to the accused because it is considered as being "unfairly compromising of the interests and status of innocence or the good standing of the accused." In so finding, he considered that unfair prejudice occurs where, evidence if adduced, "has the potential of staining the mind of the Judge with an impression that adversely affects his clean conscience towards all parties, and particularly the party who is the victim of that evidence which is tendered, to the extent that it leaves in the mind of the Judge, an indelible scar of bias which could make him ill disposed to the cause of the victim of said evidence [in this case the Accused] as a result of which injustice could be occasioned to the party who after all, may be innocent or have a just cause, and who but for the admission of that contested evidence.

[865] *See* Dissenting Opinion of Judge Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 33. ("[E]vidence of acts of sexual violence are no different than evidence of any other act of violence for the purposes of constituting offences within Counts 3 and 4 of the Indictment and are not inherently prejudicial or inadmissible character evidence by virtue of their nature of characterisation as 'sexual'").

[866] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence, 15 February 2005, para. 1.

also provides that in determining the term of imprisonment the Trial Chamber shall have recourse to the practice regarding prison sentences in the ICTR and the national courts of Sierra Leone, as appropriate. According to Rule 101 of the Rules, aggravating and mitigating circumstances shall, *inter alia,* be taken into account.[899] Rule 101(c) of the Rules provides that the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

466. Appeals against sentence, as appeals from a judgement of a Trial Chamber, are appeals *stricto sensu.* They are not trials *de novo.*[900] Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[901] The Appeals Chamber will not lightly overturn findings relevant to sentencing by the Trial Chamber.[902] As a general rule, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[903]

467. In the AFRC Appeal Judgment, the Appeals Chamber explained that to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion:

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position of leadership, his level in the command structure, or his role in the broader context of the conflict of the former Yugoslavia; (ii) the discriminatory intent or the discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient of the crime; (iii) the length of time during which the crime continued; (iv) active and direct criminal participation, if linked to a high-rank position of command, the accused's role as fellow perpetrator, and the active participation of a superior in the criminal acts of subordinates; (v) the informed, willing or enthusiastic participation in crime; (vi) premeditation and motive; (vii) the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims; (viii) the status of the victims, their youthful age and number, and the effect of the crimes on them; (ix) civilian detainees; (x) the character of the accused; and (xi) the circumstances of the offences generally. *See Blaškić* Appeal Judgement, paras 685-686, 696

[899] In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute and in Rule 101(B)(iii).

[900] *Kupreškić* Appeal Judgement, para. 408; *Prosecutor v. Mucić et al.*, IT-96-21-A*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Čelebići* Appeal Judgement, para. 203.

[901] *See e.g., Čelebići* Appeal Judgement, para. 717. *See also* Article 19(2) of the Statute, Rule 101(B) of the Rules.

[902] AFRC Appeal Judgment, para. 309; *see also Krnojelac* Appeal Judgement, para. 11.

[903] *See Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; Prosecutor v. *Furundžija*, IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 21 July 2000, para. 239 [*Furundžija* Appeal Judgement]; *Čelebići* Appeal Judgement, para. 725; *Kupreškić* Appeal Judgement, para. 408; *Prosecutor v. Jelisić*, IT-95-10-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 5 July 2001, para. 99; *Prosecutor v Krstić*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 19 April 2004, para. 242; *Blaškić* Appeal Judgement, para. 680.

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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe	Presiding Judge
	Hon. Justice Bankole Thompson	
	Hon. Justice Pierre Boutet	
Registrar:	Herman von Hebel	
Date:	9th of October 2007	

PROSECUTOR **Against** MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT ON THE SENTENCING OF MOININA FOFANA AND ALLIEU KONDEWA

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Yada Williams
Ansu Lansana
Susan Wright

> Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be accepted by everyone.[44]

31. In fact, the sentence imposed must be individualized and proportionate to the conduct of the Accused.[45]

3. Sentencing Factors

32. The Chamber notes that Article 19 and Rule 101(B) stipulate that certain factors have to be considered in determining an appropriate sentence. These include the gravity of the offence, the individual circumstances of the Accused, any aggravating and mitigating factors, and where appropriate, the general sentencing practices of the ICTR and of the national courts of Sierra Leone.

3.1. Gravity of the Offence

33. The Chamber is of the view that the "gravity of the offence" is an important principle in determining the sentence to be imposed by the Court. The determination of the gravity of the offence, which has been regarded as the "litmus test for the appropriate sentence",[46] requires a "consideration of the particular circumstances of the case, as well as the form and degree of participation of the Accused in the crime".[47] In considering the gravity of the offence, the Chamber has taken into account such factors as the scale and brutality of the offences committed,[48] the role played by the Accused in their commission,[49] the degree of suffering or

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[44] *Prosecutor v. Dragan Nikolic*, IT-94-2-S, Sentencing Judgement (TC), 18 December 2003, para 139.

[45] *Prosecutor v. Tadic*, IT-94-1-A, Judgement in Sentencing Appeals (AC), 26 January 2000 [*Tadic* Sentencing Appeal], para 22, *Prosecutor v. Todorovic*, IT-95-9/1-S, Sentencing Judgement (TC), 31 July 2001, para 29, *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, IT-95-16-A, Judgement (AC), 23 October 2001 [*Kupreskic* Appeal Judgement], para 445, *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement (AC), 21 July 2000 [*Furundzija* Appeal Judgement], para 249.

[46] *Prosecutor v. Delalic, Mucic, Delic and Landzo*, IT-96-21-T, Judgement (TC), 16 November 1998 [*Celibici* Trial Judgement], para 1225, *Aleksovski* Appeal Judgement, para 182.

[47] *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, IT-95-16-T, Judgement (TC), 14 January 2000 [*Kupreskic* Trial Judgement], para 852, *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Judgement (AC), 17 December 2004, para 1061, *Prosecutor v. Stakic*, IT-97-24-A, Judgement (AC), 22 March 2006 [*Stakic* Appeal Judgement], para 380.

[48] *Stakic* Appeal Judgement, para 380, *Prosecutor v. Oric*, IT-03-68-T, Judgement (TC), 30 June 2006 [*Oric* Trial Judgement], para 729.

[49] *Celibici* Appeal Judgement, para 847, *Prosecutor v. Blagojevic*, IT-02-60-T, Judgement (TC), 17 January 2005, para 833.

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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Herman von Hebel

Date: 2 August 2007

PROSECUTOR **Against** MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT

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SPECIAL COURT FOR SIERRA LEONE
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in the Statute be committed or with reasonable knowledge that the crime would likely be committed in the execution of that plan.

4.1.4. Instigating

222. The Prosecution charges the Accused pursuant to Article 6(1) of the Statute with instigating the crimes referred to in the Indictment.[279]

223. The Chamber is of the view that "instigating" a crime means urging, encouraging or "prompting another to commit an offence".[280] The *actus reus* required for instigating a crime is an act or omission, covering both express and implied conduct of the Accused,[281] which is shown to be a factor substantially contributing to the conduct of another person committing the crime.[282] A causal relationship between the instigation and the perpetration of the crime must be demonstrated; although it is not necessary to prove that the crime would not have occurred without the Accused's involvement.[283] To establish the *mens rea* requirement for "instigating" a crime, the Prosecution must prove that the Accused intended to provoke or induce the commission of the crime, or had reasonable knowledge that a crime would likely be committed as a result of that instigation.

4.1.5. Ordering

224. The Chamber notes that the Prosecution charges the Accused pursuant to Article 6(1) of the Statute with ordering the crimes referred to in the Indictment.[284]

225. The Chamber takes the view that the *actus reus* of "ordering" a crime requires that a person who is in a position of authority orders a person in a subordinate position to commit an offence.[285] It is our opinion that no *formal* superior-subordinate relationship between the superior and the

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[279] Indictment, para. 20.
[280] *Kordic and Cerkez* Appeal Judgement, para. 27; *Semanza* Trial Judgement, para. 381; *Krstic* Trial Judgement, para. 601; *Limaj et al.* Trial Judgement, para. 514.
[281] *Brdjanin* Trial Judgement, para. 269; *Blaskic* Trial Judgement, para. 280; *Limaj et al.* Trial Judgement, para. 514; *Oric* Trial Judgement, para. 273.
[282] *Kordic and Cerkez* Appeal Judgement, para. 27; *Gacumbitsi* Appeal Judgement, para. 129; *Limaj et al.* Trial Judgement, para. 514.
[283] *Kordic and Cerkez* Appeal Judgement, para. 27; *Limaj et al.* Trial Judgement, para. 515; *Brdjanin* Trial Judgement, para. 269; *Bagilishema* Trial Judgement, para. 30.
[284] Indictment, para. 20.
[285] *Kordic and Cerkez* Appeal Judgement, para. 28; *Limaj et al.* Trial Judgement, para. 514.

subordinate is required. It is sufficient that there is proof of some position of authority on the part of the Accused that would compel another to commit a crime in compliance with the Accused's order.[286] Such authority can be *de jure* or *de facto* and can be reasonably implied.[287] The Chamber is of the view that a "causal link between the act of ordering and the physical perpetration of a crime [...] also needs to be demonstrated as part of the *actus reus* of ordering" but that this "link need not be such as to show that the offence would not have been perpetrated in the absence of the order."[288]

226. The Chamber finds that to establish the *mens rea* requirement for "ordering" a crime, the Prosecution must prove that the Accused either intended to bring about the commission of the crime or that the Accused had reasonable knowledge that the crime would likely be committed as a consequence of the execution or implementation of that order.

4.1.6. Aiding and Abetting

227. The Chamber notes that the Prosecution charges the Accused pursuant to Article 6(1) of the Statute with aiding and abetting in the planning, preparation or execution of the crimes referred to in the Indictment.[289]

228. It is the view of the Chamber that "aiding and abetting" consists of the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[290] "Aiding and abetting" can include providing assistance, helping, encouraging, advising, or being sympathetic to the commission of a particular act by the principal offender.[291]

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[286] *Gacumbitsi* Appeal Judgement, paras 181-182; *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 361 [*Semanza* Appeal Judgement], referring to *Kordic and Cerkez* Appeal Judgement, para. 28. *See also Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Judgement (AC), 19 September 2005, para. 75 [*Kamuhanda* Appeal Judgement]: "To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." [Footnotes omitted].

[287] *Limaj et al.* Trial Judgement, para. 515 referring to *Brdjanin* Trial Judgement, para. 270.

[288] *Strugar* Trial Judgement, para. 332.

[289] Indictment, para. 20.

[290] *Krstic* Trial Judgement, para. 601; *Limaj et al.* Trial Judgement, para. 516; *Tadic* Appeals Judgement, para. 229.

[291] *Limaj et al.* Trial Judgement, para. 516; *Kvocka et al.* Trial Judgement, para. 254; *Semanza* Trial Judgement, para. 384; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Judgment (TC), 17 June 2004, para. 286 [*Gacumbitsi* Trial Judgement].

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the superior knew or had reason to know that his subordinate was about to commit or had committed such crimes. Responsibility under Article 6(3) of the Statute is not a form of strict liability.[326]

243. The actual knowledge of the superior, *i.e.* that he knew that his subordinate was about to commit or had committed the crime, cannot be presumed and, in the absence of direct evidence, may be established by circumstantial evidence.[327] Various factors or indicia may be considered by the Chamber when determining the actual knowledge of the superior. Such indicia would include: the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of subordinates involved; the logistics involved, if any; the means of communication available; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time and the proximity of the acts to the location of the superior.[328]

244. The Chamber accepts the jurisprudence of the *Ad Hoc* Tribunals that the "had reason to know" standard will only be satisfied if information was available to the superior which would have put him on notice of offences committed by his subordinates or about to be committed by his subordinates.[329] Such information need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes.[330] It need not, for example, take "the form of specific reports submitted pursuant to a monitoring system" and "does not need to provide specific

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[326] *Celebici* Appeal Judgement, para. 239: "[...] The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict* imputed liability."
[327] *Oric* Trial Judgement, para. 319 and footnoted references.
[328] *Celebici* Trial Judgement, para. 386; *Strugar* Trial Judgement, para. 368; *Limaj et al.* Trial Judgement, para. 524; *Blaskic* Trial Judgement, para. 307 endorsed in *Blaskic* Appeal Judgement, para. 57; *see* also *Oric* Trial Judgement, fn 909: "With regard to geographical and temporal circumstances, it has to be kept in mind that the more physically distant the commission of the subordinate's acts from the superior's position, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, if the crimes were committed close to the superior's duty-station, the easier it would be to establish a significant indicium of the superior's knowledge, and even more so if the crimes were repeatedly committed."
[329] *Galic* Appeal Judgement, para. 184 referring to *Celebici* Appeal Judgement, para. 241; *see also Blaskic* Appeal Judgement, paras 62-63, *Celebici* Trial Judgement, para. 393, *Strugar* Trial Judgement, para. 369, *Krnojelac* Appeal Judgement, para. 154.
[330] *Celebici* Trial Judgement, para. 393; *Strugar* Trial Judgement para. 369; *Limaj et al.* Trial Judgement, para. 525.

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before:	Justice Renate Winter, Presiding Judge Justice Jon M. Kamanda Justice George Gelaga King Justice Emmanuel Ayoola Justice Shireen Avis Fisher
Acting Registrar:	Binta Mansaray
Date:	26 October 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

JUDGMENT

Office of the Prosecutor:
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Reginald Fynn
Elisabeth Baumgartner
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Defence Counsel for Morris Kallon:
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Scott Martin

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(b) Discussion

163. The Appeals Chamber understands Kallon's first argument to pertain to the pleading of his conduct with respect to his liability for ordering or for incurring superior responsibility for the intentionally directed attacks against UNAMSIL peacekeepers.

164. Ordering involves a person in a position of authority instructing another person to commit an offence; a formal superior-subordinate relationship between the accused and the actual physical perpetrator is not required.[311] The Appeals Chamber finds that the very notion of "instructing" requires a positive action by the person in a position of authority.[312] Since ordering can be established by direct or circumstantial evidence,[313] the order itself need not be a material fact pleaded in the indictment since it is a matter for proof from the evidence adduced at trial. In the present case, Kallon's positions of authority were adequately pleaded in paragraphs 24 through 28 of the Indictment, and the charge that he ordered the crime under Count 15 was pleaded in paragraphs 38, 40, 41, 83 and page 21, which provide notice of the charge that (i) by his acts he is individually criminally responsible pursuant to Article 6(1) of the Statute for the crimes he ordered;[314] (ii) he conducted armed attacks in Bombali District targeting humanitarian assistance personnel and peacekeepers assigned to UNAMSIL;[315] (iii) the AFRC/RUF attacks against UNAMSIL peacekeepers and humanitarian assistance workers within Bombali District occurred between 15 April 2000 and about 15 September 2000;[316] (iv) these attacks included unlawful killings of UNAMSIL peacekeepers, abducting them and taking hostages;[317] and (v) and by his acts, Kallon was responsible pursuant to Article 6(1) for Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, punishable under Article 4.b. of the Statute.[318]

165. The Appeals Chamber considers this pleading to have provided sufficient notice of the material facts that Kallon "ordered rebels under his command,"[319] and "used his position of

[311] *Kordić and Čerkez* Appeal Judgment, para. 28; *Semanza* Appeal Judgment, para. 361.
[312] *See Blaškić* Appeal Judgment, para. 660.
[313] *See e.g., Galić* Appeal Judgment, para. 178.
[314] Indictment, para. 38.
[315] Indictment, para. 41.
[316] Indictment, para. 83.
[317] Indictment, para. 83.
[318] Indictment, p. 21.
[319] Trial Judgment, para. 2249.

command and authority to direct his subordinates"[320] through "instructions"[321] to attack UNAMSIL peacekeepers in Bombali District on 1 May 2000 and 3 May 2000.[322] These attacks included the "attack on Maroa,"[323] the "abduction of Mendy and Gjellesdad,"[324] "[t]he abduction of Kasoma and ten peacekeepers" and the attack against Kasoma's convoy of approximately 100 peacekeepers[325] to which Kallon objects in his fourth argument in this sub-ground of his appeal.

166. In relation to the material facts of Kallon's superior responsibility for crimes charged under Counts 15 and 17, the Appeals Chamber notes that the Indictment provided notice that Kallon was the Battle Group Commander from "early 2000,"[326] that "while holding [this] position of superior responsibility and exercising effective control over ... subordinates ... [he] is responsible for the criminal acts of his subordinates,"[327] and that by his acts in relation to the attacks against UNAMSIL peacekeepers, Kallon, pursuant to Article 6(3) of the Statute, is individually criminally responsible for the crimes charged under Counts 15 and 17.[328] The Indictment also alleges that Kallon knew or had reason to know that his subordinates were about to commit the criminal acts for which Kallon was alleged to be responsible.[329] The Appeals Chamber considers that these facts are precisely the material facts underpinning Kallon's convictions for superior responsibility. We, therefore, find that Kallon had sufficient notice of these charges and reject his first and second arguments in this sub-ground of his appeal.

167. With regard to Kallon's third and fourth arguments concerning the defective pleading and cure of his liability for personal commission of the attack against Salahuedin, the Appeals Chamber notes that the Trial Chamber found that the pleading of personal commission lacked requisite specificity and therefore was defective.[330] Such defect may be cured by the provision of timely, clear and consistent information detailing the factual basis underpinning the charges against Kallon, which compensates for the failure of the indictment to give proper notice of the charges.[331] Contrary to Kallon's assertion, defective pleading of personal commission may be cured by the Prosecution

[320] Trial Judgment, para. 2252.
[321] Trial Judgment, para. 2252; *see also* Trial Judgment, paras 2255, 2257 for similar findings.
[322] Trial Judgment, paras 2248, 2253, 2255, 2258.
[323] Kallon Appeal, para. 259.
[324] Kallon Appeal, para. 260.
[325] Kallon Appeal, para. 263.
[326] Indictment, para. 27.
[327] Indictment, para. 39.
[328] Indictment, para. 83 and p. 22.
[329] Indictment, para. 39.
[330] Trial Judgment, para. 399.
[331] *Brima et al.* Appeal Judgment, para. 44; *Kupreškić et al.* Appeal Judgment, para. 114.

through witness statements and additional filings.[332] This has also been the practice at other international tribunals. For example, in *Gacumbitsi*, the ICTR Appeals Chamber relied upon one document which indicated the anticipated testimony of a prosecution witness to find that the defective pleading of personal commission of a killing was cured.[333] In *Ntakirutimana*, the ICTR Appeals Chamber relied upon a witness statement taken together with "unambiguous information" contained in the Pre-Trial Brief and its annexes to determine the defective pleading of personal commission was cured.[334] In *Naletilić and Martinović*, the ICTY Appeals Chamber found that the Prosecution had cured the indictment's failure to provide information about a beating through information provided by a chart of witnesses and the reiteration of those details by the Prosecution in its opening statement.[335]

168. In the present case, the Trial Chamber found that the Prosecution had disclosed on 26 May 2003 a witness statement indicating that "the witness would testify [about material particulars] including the direct participation of Kallon in physically assaulting a peacekeeper."[336] The Prosecution also filed a motion on 12 July 2004 indicating that another witness "would testify about the individual criminal responsibility of Kallon during the abduction of the UN peacekeepers."[337] The Appeals Chamber considers that these statements provided sufficient timely notice of Kallon's personal commission of the attack on Salahuedin, such that they cured the defect in the charge against Kallon under Article 6(1) of the Statute with respect to the attacks against UNAMSIL personnel.[338] Kallon's third and fourth arguments in this sub-ground of appeal are, therefore, dismissed.

(c) Conclusion

169. The Appeals Chamber dismisses Kallon Grounds 23, 24 and 28 in regard to the pleading of crimes under Counts 15 and 17 concerning attacks against UNAMSIL peacekeepers.

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[332] *See Gacumbitsi* Appeal Judgment, para. 56; *Ntakirutimana* Appeal Judgment, para. 32.
[333] *Gacumbitsi* Appeal Judgment, paras 56, 58.
[334] *Ntakirutimana* Appeal Judgment, para. 48.
[335] *Naletilić and Martinović* Appeal Judgment, para. 45.
[336] Trial Judgment, para. 2244.
[337] Trial Judgment, para. 2244, fn 3914.
[338] Indictment, para. 83.

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Benjamin Mutanga Itoe
Hon. Justice Bankole Thompson

Registrar: Herman von Hebel

Date: 2 March 2009

PROSECUTOR **Against** ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

JUDGEMENT

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Scott Martin

269. If an Accused is found guilty of having committed a crime, that Accused cannot also be convicted of having planned the same crime.[475] Involvement in the planning may be considered an aggravating factor.[476]

4.1.4. Instigating

270. The Prosecution charges the Accused pursuant to Article 6(1) of the Statute with instigating the crimes referred to in the Indictment.[477]

271. The Chamber is of the view that "instigating" a crime means urging, encouraging or prompting another person to commit an offence.[478] The *actus reus* required for instigating a crime is an act or omission, covering both express and implied conduct of the Accused,[479] which is shown to be "a factor substantially contributing to the conduct of another person committing the crime."[480] A causal relationship between the instigation and the perpetration of the crime must be demonstrated,[481] although it is not necessary to prove that the crime would not have occurred without the Accused's involvement.[482] To establish the *mens rea* requirement for instigating a crime, the Prosecution must prove that the Accused intended to provoke or induce the commission of the crime or was aware of the substantial likelihood that the crime would be committed as a result of that instigation.

4.1.5. Ordering

272. The Prosecution charges the Accused pursuant to Article 6(1) of the Statute with ordering the crimes referred to in the Indictment.[483]

273. The Chamber considers that "ordering" involves a person in a position of authority using that position to compel another to commit an offence.[484] The *actus reus* of ordering requires that a person who is in a position of authority instructs a person in a subordinate

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[475] *See Brdjanin* Trial Judgement, para. 268; *Kordic and Cerkez* Trial Judgement, para. 386.
[476] *See Brdjanin* Trial Judgement, para. 268; *Stakic* Trial Judgement, para. 443.
[477] Indictment, para. 38.
[478] *Kordic and Cerkez* Appeal Judgement, para. 27.
[479] *Oric* Trial Judgement, para. 273; *Brdjanin* Trial Judgement, para. 269; *Blaskic* Trial Judgement, para. 280.
[480] *Kordic and Cerkez* Appeal Judgement, para. 27. *See also CDF* Appeal Judgement, para. 52.
[481] *CDF* Appeal Judgement, para. 54.
[482] *Kordic and Cerkez* Appeal Judgement, para. 27.
[483] Indictment, para. 38.
[484] *Kordic and Cerkez* Appeal Judgement, para. 28.

position to commit an offence.[485] It is the Chamber's opinion that no *formal* superior-subordinate relationship between the superior and the subordinate is required. It is sufficient that there is proof of some position of authority on the part of the Accused that would compel another to commit a crime in compliance with the Accused's order, command or direction.[486] Such authority can be *de jure* or *de facto* and can be reasonably implied.[487] The Chamber is of the view that a "causal link between the act of ordering and the physical perpetration of a crime [...] also needs to be demonstrated as part of the *actus reus* of ordering" but that this "link need not be such as to show that the offence would not have been perpetrated in the absence of the order."[488]

274. The Chamber finds that to establish the *mens rea* requirement for ordering a crime, the Prosecution must prove that the Accused either intended to bring about the commission of the crime or that the Accused gave an order with the awareness of the substantial likelihood that a crime would likely be committed as a consequence of the execution or implementation of that order, command or direction.[489]

4.1.6. Aiding and Abetting

275. The Chamber notes that the Prosecution charges the Accused pursuant to Article 6(1) of the Statute with aiding and abetting in the planning, preparation or execution of the crimes referred to in the Indictment.[490]

276. The Chamber considers that "aiding and abetting" consists of the act of rendering practical or material assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[491] Aiding and abetting may also consist of an omission,

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[485] *Kordic and Cerkez* Appeal Judgement, para. 28.
[486] *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 361 [*Semanza* Appeal Judgement], referring to *Kordic and Cerkez* Appeal Judgement, para. 28. *See also Gacumbitsi* Appeal Judgement, paras 181-182; *Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Judgement (AC), 19 September 2005, para. 75 [*Kamuhanda* Appeal Judgement]: "To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." [original footnotes omitted].
[487] *Limaj et al.* Trial Judgement, para. 515 referring to *Brdjanin* Trial Judgement, para. 270.
[488] *Prosecutor v. Strugar*, IT-01-42-T, Judgement (TC), 31 January 2005, para. 332 [*Strugar* Trial Judgement].
[489] *Blaskic* Appeal Judgement, para. 42.
[490] Indictment, para. 38.
[491] *See*, amongst others, *Tadic* Appeals Judgement, para. 229; *Limaj et al.* Trial Judgement, para. 516; *Krstic* Trial Judgement, para. 601.

B. (2) ICTR Jurisprudence

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER I

Before: Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Registry: Mr Adama Dieng

Decision of: 7 June 2001

THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA

Case No. ICTR-95-1A-T

JUDGEMENT

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Mr Wallace Kapaya
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Counsel for the accused:

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Mr Maroufa Diabira
Ms Héleyn Uñac
Mr Wayne Jordash

1.1 Responsibility under Article 6(1) of the Statute

Committing

29. The actual perpetrator may incur responsibility for committing a crime under the Statute by means of an unlawful act or omission.[19]

Planning, instigating, ordering

30. An individual who participates directly in planning to commit a crime under the Statute incurs responsibility for that crime even when it is actually committed by another person. The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.[20] An individual who instigates another person to commit a crime incurs responsibility for that crime. By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime. Proof is required of a causal connection between the instigation and the *actus reus* of the crime. The principle of criminal responsibility applies also to an individual who is in a position of authority, and who uses his or her authority to order, and thus compel a person subject to that authority, to commit a crime.[21]

31. Proof is required that whoever planned, instigated, or ordered the commission of a crime possessed criminal intent, that is, that he or she intended that the crime be committed.

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[19] An individual incurs criminal responsibility for an *omission* by failing to perform an act in violation of his or her duty to perform such an act. As stated by the Nuremberg Tribunal, "international law imposes duties and liabilities upon individuals" (*Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, vol. 22, p. 65*), who therefore may be held personally responsible for failing to perform those duties.

[20] See *Prosecutor v. Zlatko Aleksovski*, Judgement of 25 June 1999 [henceforth *Aleksovski* (TC)] para. 61.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **7 July 2006**

SYLVESTRE GACUMBITSI

v.

THE PROSECUTOR

Case No. ICTR-2001-64-A

JUDGEMENT

Counsel for Sylvestre Gacumbitsi:

Mr. Kouengoua
Ms. Anne Ngatio Mbattang

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. Neville Weston
Mr. George Mugwanya
Ms. Inneke Onsea

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practice" would have been for the specific killing of Mr. Murefu to be pleaded as a material fact.[115] It contends, however, that any pleading defect with regard to this killing could not have affected the outcome of the trial because it was only one fact among many supporting the Appellant's genocide conviction.[116]

49. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused. The Appeals Chamber has held that "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible 'the identity of the victim, the time and place of the events and the means by which the acts were committed.'"[117] An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.[118] When an appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired.[119] In cases where an accused has raised the issue of lack of notice before the Trial Chamber, in contrast, the burden rests on the Prosecution to demonstrate that the accused's ability to prepare a defence was not materially impaired.[120]

50. The Indictment, taken alone, does not allege the killing of Mr. Murefu. In the Statement of Facts ("Statement") related to the genocide count, it states that "Sylvestre Gacumbitsi killed persons by his own hand", but provides no further details.[121] The Statement goes on to describe the massacre at Nyarubuye Parish, but does not mention Mr. Murefu and does not suggest that the Appellant participated personally in the killing there.[122] Count 4 of the Indictment (Murder) does allege that the Appellant killed a number of individuals in several separate incidents, but Mr. Murefu is not among them. The Appellant could not reasonably have known, on the basis of the Indictment alone, that he was being charged with the killing of Mr. Murefu. While in certain cases, "the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'",[123] this is not such a case. The Prosecution should have expressly pleaded the killing of Mr. Murefu,

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[115] Prosecution Response, para. 154.
[116] Prosecution Response, para. 155.
[117] *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškic et al.* Appeal Judgement, para. 89.
[118] *Ntakirutimana* Appeal Judgement, para. 27, referring to *Kupreškic et al.* Appeal Judgement, para. 114.
[119] *Niyitegeka* Appeal Judgement, para. 200; *Kvocka et al.* Appeal Judgement, para. 35.
[120] *Niyitegeka* Appeal Judgement, para. 200; *Kvocka et al.* Appeal Judgement, para. 35.
[121] Indictment, para. 4.
[122] Indictment, paras. 15-19.
[123] *Kupreškic et al.* Appeal Judgement, para. 89, referring to *Kvocka* Decision, para. 17.

> ?Ign some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[134]

Here, the Prosecution contends that the vagueness was cured by the witness statement of Witness TAQ, which provided the date and place of the killing as well as the name of the victim,[135] and by a summary of the anticipated testimony of Witness TAQ that was appended to the Prosecution Pre-Trial Brief.[136] The Appellant argues that the Indictment should have been amended accordingly but was not.[137]

56. In advance of the trial, the Prosecution disclosed to the Appellant the witness statement of Witness TAQ, which set forth, *inter alia*, the date and place of the killing as well as the name of one victim, Mr. Murefu. That statement was also included in summary form in the chart of witnesses, appended to the Prosecution Pre-Trial Brief. The summary of the anticipated testimony of Witness TAQ reads:

> On or around 15 April 1994, KARAMAGE arrived at Nyarabuye church with a large group of Hutu attackers armed with sticks. Not long after, Sylvestre GACUMBITSI arrived with a pick-up truck full of machetes. He was accompanied by a vehicle full of *Interahamwe* armed with firearms and grenades. At first, the refugees rejoiced when they saw GACUMBITSI, but he warned them: "If any Hutu has made the mistake of entering that church, let them come out immediately." GACUMBITSI then instructed the Hutus and the *Interahamwe*: "Get machetes! Start killing and surround the church so that no one escapes." An elderly Tutsi teacher named **MUREFU** rose up and asked GACUMBITSI what the Tutsis had done to deserve that fate. GACUMBITSI grabbed a machete and slashed his neck, killing him instantly. Within moments, grenades were being tossed into the church, and shots were fired.[138]

That statement is included in a chart that shows the charges to which each witness's testimony was expected to correspond. The chart makes clear that Witness TAQ's anticipated testimony related to the charge of genocide, specifically referring to paragraphs 4, 15, 16, 17, 18, 21, 22, and 23 of the Indictment.[139] Paragraph 4 of the Indictment, which was part of the "Concise Statement of Facts for Counts 1 and 2", indicates that the Appellant personally participated in killings.[140]

57. The ICTY Appeals Chamber was recently confronted with similar circumstances in the *Naletilic and Martinovic* case: the material facts concerning a particular incident were not pleaded

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[134] *Kupreškic et al.* Appeal Judgement, para. 114.
[135] Prosecution Response, para. 152.
[136] T. 9 February 2006 p. 28.
[137] T. 9 February 2006 p. 78.
[138] *See* Prosecution Pre-Trial Brief, Appendix 3, p. 11 (emphasis added).
[139] *See* Prosecution Pre-Trial Brief, Appendix 3, p. 10.
[140] "[...] Sylvestre GACUMBITSI killed persons by his own hand, ordered killings by subordinates, and led attacks under circumstances where he knew, or should have known, that civilians were, or would be, killed by persons acting under his authority."

E. Authority for Ordering (Ground of Appeal 6)

180. The Trial Chamber found that the Appellant ordered crimes committed by the communal policemen, but did not find that he ordered crimes committed by the *conseillers,* gendarmes, soldiers, and *Interahamwe* who were in his commune at the time of the events under consideration. The Prosecution challenges this. First, it argues that the Trial Chamber erred in law by requiring proof of a formal superior-subordinate relationship in order to find that the Appellant had the authority or power to order.[394] Second, it contends that the Trial Chamber failed to draw the only reasonable conclusion on the evidence: that the Appellant was a superior to, and possessed the capacity to order, not only the communal policemen, but also the other perpetrators of the crimes.[395] The Appellant responds that the Trial Chamber correctly stated the law and that the factual findings and evidence cited by the Prosecution do not show when or how he gave orders to the other assailants.[396]

1. Alleged Error of Law

181. The Appeals Chamber agrees with the Prosecution that ordering does not require the existence of a formal superior-subordinate relationship. But the Trial Chamber did not misapprehend the law in this respect. It held:

> The Trial Chamber is of the opinion that the issue must be determined in light of the circumstances of the case. The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be *de jure* or *de facto*. When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis. When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement. Such words and actions are not necessarily culpable, but can, where appropriate, amount to forms of participation in crime, such as "incitement" and "aiding and abetting" provided for in Article 6(1) of the Statute. In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the *de facto* exercise of an administrative function, or even the use of threat or unlawful force. The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6(1) referred to above. *Such a situation does not, ipso facto, lead to the conclusion that a formal superior-subordinate relationship exists between the person giving the order and the person executing it.* As a matter of fact, instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an "order" within the meaning of Article 6(1) of the Statute.
>
> The Chamber recalls its factual finding that Sylvestre Gacumbitsi had superior authority only over the communal police. *The Prosecution failed to show that he also had superior authority over the conseillers, Interahamwe, gendarmes or any other persons who participated in the attacks. Moreover, the Prosecution failed to demonstrate that, in the absence of a formal superior-*

[394] Prosecution Appeal Brief, paras. 213-218.
[395] Prosecution Appeal Brief, paras. 219-220.
[396] Gacumbitsi Response, paras. 316-327.

> *subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.*[397]

182. Thus, after finding that no formal superior-subordinate relationship existed, the Trial Chamber proceeded to consider whether, under the circumstances of the case, the Appellant's statements nevertheless were perceived as orders. This is in accordance with the most recent judgements of the Appeals Chamber. In the *Semanza* Appeal Judgement, the Appeals Chamber explained:

> As recently clarified by the ICTY Appeals Chamber in *Kordić and Cerkez*, the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[398]

The Appeals Chamber notes that this element of "ordering" is distinct from that required for liability under Article 6(3) of the Statute, which does require a superior-subordinate relationship (albeit not a formal one but rather one characterized by effective control).[399] Ordering requires no such relationship -- it requires merely authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.

183. Accordingly, this sub-ground of appeal is dismissed.

2. Alleged Error of Fact

184. The Trial Chamber found that, as *bourgmestre*, the Appellant was the highest authority and most influential person in the commune, with the power to take legal measures binding all residents.[400] His role in the genocide demonstrated his authority: he convened meetings with the *conseillers*; asked them to organize meetings to tell people to kill Tutsis, and verified that these meetings had been held; and directly instructed *conseillers*, other leaders, and the Hutu population to kill and rape Tutsis.[401] The Trial Chamber pointed to several instances in which the Appellant "instructed", "ordered", or "directed" the attackers in general, not just the communal policemen:

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[397] Trial Judgement, paras. 282, 283 (emphasis added, internal citations omitted).
[398] *Semanza* Appeal Judgement, para. 361, referring to *Kordić and Cerkez* Appeal Judgement, para. 28. *See also Kamuhanda* Appeal Judgement, para. 75 ("To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." (internal citations omitted)).
[399] *See supra* section III.B.3.
[400] Trial Judgement, paras. 241-243.
[401] Trial Judgement, paras. 101, 104.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

ENGLISH
Original: FRENCH

Before Judges: Andresia Vaz, presiding
Jai Ram Reddy
Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 17 June 2004

THE PROSECUTOR

v.

SYLVESTRE GACUMBTSI

Case No. ICTR-2001-64-T

JUDGMENT

Office of the Prosecutor:
Richard Karegyesa
Andra Mobberley
Khaled Ramadan

Counsel for the Defence:
Kouengoua
Anne Ngatio Mbattang

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who gives the order and the one who executes it.[263] The other has held that ordering does not necessarily imply the existence of such a formal superior-subordinate relationship.[264]

282. The Trial Chamber is of the opinion that the issue must be determined in light of the circumstances of the case. The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be *de jure* or *de facto*. When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis. When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement. Such words and actions are not necessarily culpable, but can, where appropriate, amount to forms of participation in crime, such as "incitement" and "aiding and abetting" provided for in Article 6(1) of the Statute. In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the *de facto* exercise of an administrative function, or even the use of threat or unlawful force. The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6(1) referred to above. Such a situation does not, *ipso facto*, lead to the conclusion that a formal superior-subordinate relationship exists between the person giving the order and the person executing it. As a matter of fact, instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an "order" within the meaning of Article 6(1) of the Statute.

283. The Chamber recalls its factual finding that Sylvestre Gacumbitsi had superior authority only over the communal police.[265] The Prosecution failed to show that he also had superior authority over the *conseillers*, *Interahamwe*, *gendarmes* or any other persons who participated in the attacks. Moreover, the Prosecution failed to demonstrate that, in the absence of a formal superior-subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.

284. Accordingly, the Chamber finds that Sylvestre Gacumbitsi ordered communal policemen who were present at Nyarubuye Parish on 15 April 1994 to kill the Tutsi. On the evidence adduced, the participation of those policemen in the massacre was a direct consequence of the orders given by the Accused. Thus, the Accused incurs liability, pursuant to Article 6(1) of the Statute, for having ordered them to so participate in those crimes.

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[263] *Semanza* Judgment (TC), para. 382; *Ntagerura and others* Judgment (TC), para. 624.
[264] ICTY, *Kordić and Cerkez*, Judgment (TC), para. 388. See also *Kajelijeli* Judgment (TC), para. 763.
[265] See *supra*: Chapter II, Part F.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Khalida Rachid Khan, presiding
Judge Lee Gacuiga Muthoga
Judge Aydin Sefa Akay

Registrar: Adama Dieng

Date: 31 March 2011

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:

Richard Karegyesa
Drew White
Adelaide Whest
Didace Nyirinkwaya
Yasmine Chubin
Leo Nwoye

Counsel for the Defence:

Marie-Pierre Poulain
Kate Gibson

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572. In sum, the Chamber concludes that the Indictment and the Prosecution's post-Indictment submissions have provided timely, clear and consistent notice that it would be relying on all modes of liability, including commission through a joint criminal enterprise, with respect to all of the Counts in the Indictment. Accordingly, the Chamber considers all forms of individual criminal responsibility under Article 6 (1), where relevant, in its legal findings.

1.3 Law

573. "Planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[699] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[700] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[701]

574. "Instigating" implies prompting another person to commit an offence.[702] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[703] The *mens rea* for this mode of responsibility is intent to instigate another person to commit a crime or at a miminum, awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[704]

575. "Ordering" requires that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator need exist. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime pursuant to the accused's order. The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for ordering may be informal or of a purely temporary nature.[705]

576. The Appeals Chamber has held that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law.[706] "Committing" has also been interpreted to contain three forms of joint criminal enterprise: basic, systemic, and extended.[707] The Prosecution has

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alleged joint criminal enterprise. The Chamber, however, does not make any findings with respect to such participants.

[699] *Nahimana et al.* Appeal Judgement para 479, citing *Kordić and Čerkez* Appeal Judgement para. 26.

[700] *Nahimana et al.* Appeal Judgement para. 479, citing *Kordić and Čerkez* Appeal Judgement para. 26.

[701] *Nahimana et al.* Appeal Judgement para. 479, citing *Kordić and Čerkez* Appeal Judgement paras. 29, 31.

[702] *Nahimana et al.* Appeal Judgement para. 480, citing *Ndindabahizi* Appeal Judgement para. 117; *Kordić and Čerkez* Appeal Judgement para. 27.

[703] *Nahimana et al.* Appeal Judgement para. 480, citing *Gacumbitsi* Appeal Judgement para. 129; *Kordić and Čerkez* Appeal Judgement para. 27.

[704] *Nahimana et al.* Appeal Judgement para. 480, citing *Kordić and Čerkez* Appeal Judgement paras. 29, 32.

[705] *Bagosora et al.* Trial Judgement para. 2008, citing *Semanza* Appeal Judgement paras. 361, 363.

[706] *Nahimana et al.* Appeal Judgement para. 478.

[707] *Simba* Trial Judgement para. 386, citing *Kvočka et al.* Appeal Judgement paras. 82-83; *Ntakirutimana* Appeal Judgement paras. 463-465; *Vasiljević* Appeal Judgement paras. 96-99; *Krnojelac* Appeal Judgement para. 30. See also *Nahimana et al.* Appeal Judgement para. 478; *Brđanin* Appeal Judgement para. 364.

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Judgement of: 19 September 2005

JEAN DE DIEU KAMUHANDA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-54A-A

JUDGEMENT

Counsel for the Appellant:

Ms. Aïcha Condé

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Amanda Reichman
Mr. Neville Weston
Ms. Inneke Onsea

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authority over the attackers, regardless of their origin. This sub-ground of appeal is therefore without merit and the Appeals Chamber dismisses it.

4. The Appellant's Convictions for Ordering and Aiding and Abetting

77. The factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes. Both modes of participation form distinct categories of responsibility. In this case, however, both modes of responsibility are based on essentially the same set of facts: the Appellant "led" the attackers in the attack and he ordered the attackers to start the killings. On the facts of this case, with the Appeals Chamber disregarding the finding that the Appellant distributed weapons for the purposes of determining whether the Appellant aided and abetted the commission of the crimes, the Appeals Chamber does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting. In this case the mode of responsibility of ordering fully encapsulates the Appellant's criminal conduct at the Gikomero Parish Compound.[156]

B. Genocide

78. The Appellant submits that his intent to destroy the Tutsi ethnic group in whole or in part has not been proven.[157] He argues that the Trial Chamber based its finding on circumstantial evidence which was unreliable.[158] He challenges, in particular, the Trial Chamber's holding that the origin of the attackers was immaterial to his criminal responsibility.[159] The Appellant maintains that the attackers did not come from Gikomero, but from the neighbouring commune of Rubungo, whereas, the Appellant argues, the Trial Chamber found that he had influence only in the Gikomero Commune.[160]

79. Under the heading "Intent to Destroy in Whole or in Part the Tutsi Ethnic Group", the Trial Chamber referred to a number of its earlier findings:

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[156] *Cf. Semanza* Appeal Judgement, paras. 353, 364, Disposition (where the Trial Chamber's convictions for aiding and abetting extermination and complicity in genocide were reversed on appeal and the Appeals Chamber entered convictions for ordering extermination and genocide (ordering) with respect to the same events).
[157] Appeal Brief, para. 194.
[158] Appeal Brief, paras. 196-201.
[159] Appeal Brief, para. 204.
[160] Appeal Brief, paras. 205-210.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

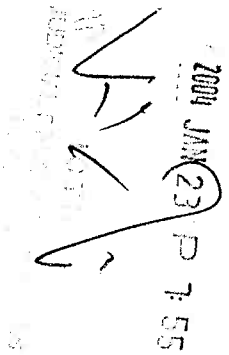
OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 22 January 2003



The PROSECUTOR

v.

Jean de Dieu KAMUHANDA

Case No. ICTR-99-54A-T

JUDGMENT AND SENTENCE

Counsel for the Prosecution

Mr. Marks Moore
Mr. Ibukunolo Alao Babajide
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Ms. Aïcha Condé
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Ms. Seynabou Benga (Legal Assistant)

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omissions may constitute instigation.[1198] Instigation is punishable on proof of a causal connection between the instigation and the commission of the crime.[1199]

(iii) Ordering

594. "Ordering", implies a situation in which an individual with a position of authority uses such authority to impel another, who is subject to that authority, to commit an offence.[1200] No formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order.[1201] The position of authority of the person who gave an order may be inferred from the fact that the order was obeyed.

(iv) Committing

595. To "commit" a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law. In this sense, there may be one or more perpetrators in relation to the same crime where the conduct of each perpetrator satisfies the requisite elements of the substantive offence.[1202]

(v) Aiding and Abetting in the Planning, Preparation, or Execution of an Offence

596. "Aiding and abetting" relate to discrete legal concepts.[1203] "Aiding" signifies providing assistance to another in the commission of a crime. "Abetting" signifies facilitating, encouraging, advising or instigating the commission of a crime.[1204] Legal usage, including that in the Statute and case law of the ICTR and the ICTY, often inter-links the two terms and treats them as a broad singular legal concept.[1205]

597. "Aiding and abetting", pursuant to the jurisprudence of the *ad hoc* Tribunals, relates to acts of assistance that intentionally provide encouragement or support to the commission of a crime.[1206] The act of

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[1198] *Kordic and Cerkez*, Judgment (TC), para. 387.
[1199] *Semanza*, Judgment (TC), para. 381; *Bagileshema*, Judgment (TC), para. 30.
[1200] *Semanza*, Judgment (TC), para. 382; *Bagilishema*, Judgment (TC), para. 30; *Rutaganda*, Judgment (TC), para. 39 ; *Akayesu*, Judgment (TC), para. 483.
[1201] *Kordic and Cerkez*, Judgment (TC), para. 388.
[1202] *Kayishema and Ruzindana*, Judgment (AC), para. 187; *Tadic*, Judgment (AC), para. 188; *Kunarac, Vukovac and Kovac*, Judgment (TC), para. 390; *Semanza*, Judgment (TC), para. 383.
[1203] *Semanza*, Judgment (TC), para. 385; *Akayesu*, Judgment (TC), para. 484.
[1204] *Semanza*, Judgment (TC), para. 384; *Ntakirutimana*, Judgment (TC), para. 787; *Akayesu*, Judgment, para. 484.
[1205] *Semanza*, Judgment (TC), para. 384, referring to Mewett & Manning, *Criminal Law*(3rd ed. 1994), p. 272 (noting that aiding and abetting are "almost universally used conjunctively").
[1206] *Kayishema and Ruzindana*, Judgment (AC), para. 186; *Semanza*, Judgment (TC), para. 385; *Ntakirutimana*, Judgment (TC), para. 787; *Bagilishema*, Judgment (TC), paras. 33 and 36; *Musema*, Judgment (TC), paras. 125 and 126; *Kayishema and Ruzindana*, Judgment (TC), paras. 200-202; *Akayesu*, Judgment (TC), para. 484.

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **21 May 2007**

MIKAELI MUHIMANA

v.

THE PROSECUTOR

Case No. ICTR-95-1B-A

JUDGEMENT

Counsel for Mikaeli Muhimana:

Prof. Nyabirungu mwene Songa
Mr. Kazadi Kabimba
Mr. Mathias Sahinkuye

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Linda Bianchi
Mr. Abdoulaye Seye
Mr. François Xavier Nsanzuwera

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B. Alleged Errors relating to the Attack on Ngendombi Hill

74. The Trial Chamber found that, between 9 and 11 April 1994, the Appellant participated in the search for and attack on Tutsi civilians at Ngendombi Hill and that many Tutsis died or were seriously injured in the attack.[143] The Trial Chamber determined that the Appellant was armed with a gun and grenades and that he threw a grenade into a crowd of Tutsi refugees, causing many deaths.[144] In addition, the Trial Chamber found that, after the attack, the Appellant attacked Witness BC with a machete, cutting off her left hand, and that he killed her three children.[145] In finding that the Appellant participated in the attack on Ngendombi Hill, the Trial Chamber relied on the evidence of Prosecution Witnesses BC, BB, and W, which it considered "consistent and corroborative".[146] The Trial Chamber convicted the Appellant of genocide based in part on his role in this attack.[147] On appeal, the Appellant submits that the Trial Chamber erred in law and in fact in considering the notice provided by paragraph 5(d)(iv) of the Indictment and in assessing the evidence of Witnesses BC, BB, and W.[148]

1. Alleged Defect in the Form of the Indictment

75. The Appellant submits that the Trial Chamber erred in law in failing to address at trial his arguments pertaining to the vagueness of the Indictment.[149] He argues that paragraph 5(d)(iv) of the Indictment lacks precision and fails to plead any physical act of genocide.[150]

76. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused.[151] The Appeals Chamber has held that criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed."[152]

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[143] Trial Judgement, paras. 76, 78, 79.
[144] Trial Judgement, para. 76.
[145] Trial Judgement, para. 77.
[146] Trial Judgement, paras. 69, 74, 76.
[147] Trial Judgement, paras. 513, 519.
[148] Notice of Appeal, pp. 11, 12, paras. 21-25; Appellant's Brief, paras. 106-109, 117-147.
[149] Notice of Appeal, p. 12, para. 23; Appellant's Brief, paras. 127-133. In addition, the Appellant submits that the Trial Chamber erred in law in making findings on the attack at Ngendombi Hill, as alleged in paragraph 5(d)(iv) of the Indictment, because in the concluding paragraph of its findings on this attack it referred to paragraph 5(d)(ii) of the Indictment, which relates to Nyarutovu Hill. *See* Notice of Appeal, p. 12, para. 25; Appellant's Brief, paras. 141, 146, 147. A review of the Trial Judgement reveals that this is simply a typographical error and occasions no miscarriage of justice.
[150] Appellant's Brief, paras. 127-133.
[151] *Gacumbitsi* Appeal Judgement, para. 49. *See also Ndindabahizi* Appeal Judgement, para. 16.
[152] *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreški} et al.* Appeal Judgement, para. 89. *See also Ndindabahizi* Appeal Judgement, para. 16.

An indictment lacking this precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[153]

77. Paragraph 5(d)(iv) of the Indictment reads: "In April 1994 Mikaeli Muhimana, along with Clement Kayishema, Obed Ruzindana and *Interahamwe* participated in [the] search for and attacks on Tutsi civilians taking refuge in Mutiti and Ngendombi hills in Bisesero." In connection with this paragraph, the Trial Chamber found that in April 1994, the Appellant participated in the "search for and attack" on Tutsi civilians at Ngendombi Hill.[154] The Trial Chamber found, more specifically, that the Appellant threw a grenade into a crowd of Tutsi refugees, causing many deaths.[155] The Trial Chamber further found that the Appellant killed Witness BC's three children and cut her on her hands, shoulder and head with a machete, cutting off her left hand.[156] The Appeals Chamber notes that, in its legal findings on genocide, the Trial Chamber only highlighted the wounding of Emmanuel with respect to the attacks on Nyarutovu Hill and Ngendombi Hill.[157] However, it appears that the Trial Chamber also convicted the Appellant of the grenade attack and crimes committed against Witness BC and her children since it made specific factual findings as to these events,[158] referred to Witness BC's anticipated evidence as alleging the Appellant's *actus reus* of genocide,[159] and cross-referenced in the legal findings the entire section encompassing these factual findings.[160]

78. The Trial Chamber considered that the allegation in Paragraph 5(d)(iv) of the Indictment that the Appellant "participated in [the] search for and attacks on *Tutsi* civilians" provided adequate notice of his role in the crime.[161] The Appeals Chamber disagrees. In the *Ntakirutimana* Appeal Judgement, the Appeals Chamber determined that the phrase "participated in an attack on [...] Mugonero Complex" did not provide sufficient notice that the accused was being charged with the murder of a specific individual.[162] The Appeals Chamber reached a similar conclusion in the *Gacumbitsi* Appeal Judgement, where the indictment alleged that the accused "killed persons by his own hands" but failed to mention with respect to a massacre at a church a specific killing or the

[153] *Gacumbitsi* Appeal Judgement, para. 49. *See also Ntagerura et al.* Appeal Judgement, paras. 28, 65.
[154] Trial Judgement, para. 78.
[155] Trial Judgement, para. 76.
[156] Trial Judgement, para. 77.
[157] Trial Judgement, para. 513.
[158] Trial Judgement, paras. 76, 77.
[159] Trial Judgement, para. 73.
[160] Trial Judgement, para. 513 fn. 473, citing to Chapter II, Section E.
[161] Trial Judgement, para. 73.
[162] *Ntakirutimana* Appeal Judgement, paras. 30, 33.

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UNITED NATIONS

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

Case No. ICTR-96-13-A

Date: 16 November 2001

ENGLISH

Original: FRENCH

APPEALS CHAMBER

Before Judges: Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 16 November 2001

ALFRED MUSEMA
(Appellant)
v.

THE PROSECUTOR
(Respondent)

JUDGEMENT

Counsel for the Appellant:
Steven Kay, QC
Michail Wladimiroff
Sylvia de Bertodano

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Mathias Marcussen
Sonja Boelaert-Suominen

ICTR-96-13-A
25 Oct. 2002
(2479/A - 2335/A)

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individual circumstances of the convicted person; any aggravating circumstances; any mitigating circumstances, including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; and the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served. This list is not exhaustive; it was held by the Appeals Chamber of ICTY that it is inappropriate for it "to attempt to list exhaustively the factors that [...] should be taken into account by a Trial Chamber in determining sentence".[639]

381. In *Tadić*, the Appeals Chamber of ICTY also considered the relative position of a convicted person in a command structure to be a relevant factor in determining sentence. In that case, the Appeals Chamber considered that, while Tadic's criminal conduct was "incontestably heinous", his level in the command structure in comparison to his superiors was low",[640] and consequently, the sentence passed by the Trial Chamber was excessive.[641] In subsequent ICTY Appeals Chamber decisions, the need to establish a gradation of sentencing has been endorsed.[642] In the *Čelebići* appeal, the Appeals Chamber held that:

> [e]stablishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime ... the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.[643]

382. It went on to state that "while the Appeals Chamber has determined that it is important to establish a gradation in sentencing, this does not detract from the finding that it is as essential that a sentence take into account all the circumstances of an individual case".[644] It follows that the jurisprudence of ICTY acknowledges the existence of a general principle that sentences should be graduated, that is, that the most senior levels of the command structure should attract the severest sentences, with less severe sentences for those lower down the structure. This principle is, however, always subject to the proviso that the gravity of the offence is the primary consideration for a Trial Chamber in imposing sentence.[645]

383. As to whether this principle should be applicable to the Trial Chambers of this Tribunal, as a general principle, this Appeals Chamber agrees with the jurisprudence of ICTY that the most senior members of a command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out

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[639] *Čelebići* Appeal Judgement, para. 718; *Furundzija* Appeal Judgement, para. 238.

[640] *Ibid.*, para. 56.

[641] The sentences imposed by the Trial Chamber, which ranged from 6 to 25 years, were revised, and a sentence of 20 years' imprisonment was passed in respect of each count, to be served concurrently.

[642] See *Čelebići* Appeal Judgement, para. 849, and *Aleksovski* Appeal Judgement, para. 184.

[643] *Čelebići* Appeal Judgement, para. 847.

[644] *Čelebići* Appeal Judgement, para. 849.

[645] *Čelebići* Appeal Judgement, para. 731; *Aleksovski* Appeal Judgement, para. 182; *Krstić* Trial Judgement, para. 698; *Todorović* Trial Judgement, para. 31; *Kupreskić* Trial Judgement, para. 852; and *Čelebići* Trial Judgement, 1225.

the orders. But this principle is always subject to the crucial proviso that the gravity of the offence is the primary consideration of a Trial Chamber in imposing sentence; if the offence is serious enough, a Trial Chamber should not be precluded from imposing a severe penalty upon the accused, just because he is not at a high level of command.

384. In paragraphs 999 to 1004 of the Trial Judgement, the Trial Chamber sets out the circumstances of the case. It found that Musema was the Director of the Gisovu Tea Factory, one of the most successful tea factories in Rwanda, and that he exercised legal and financial control over his employees. He personally led certain attacks, and was perceived by individuals as a figure of authority and as someone who wielded considerable power in the region, and had powers enabling him to remove, or threaten to remove, an individual from his or her position at the tea factory. These findings show that, while no reference was made to the role played by Musema in the context of the larger political picture in Rwanda, the Trial Chamber *did* consider Musema's role in the Kibuye *préfecture*, and found him to be an influential figure of considerable importance. It follows that Musema was not a low-level figure in the overall Rwandan conflict. Taking into account all the circumstances of the case, including the fact that Musema was an influential figure of considerable importance in the Kibuye *préfecture,* it can be said that the offences were of utmost gravity. The Appellant has therefore failed to demonstrate that the Trial Chamber ventured outside its discretionary framework in imposing the maximum sentence of life imprisonment. Accordingly, the Appeals Chamber finds no error on the part of the Trial Chamber, and rejects this argument.

2. The Trial Chamber erred by failing to pass a sentence commensurate with other sentences passed by ICTR for the crime of genocide

(a) Arguments of the parties

385. The Appellant notes that a conviction for the crime of genocide does not necessarily have to attract a sentence of life imprisonment.[646] He submits that the sentence of life imprisonment imposed upon Musema was "out of proportion with the crimes of which he was convicted", in comparison with the sentence of 15 years' imprisonment imposed upon the Accused Omar Serushago in the case of *The Prosecutor v. Serushago*.[647] While acknowledging that Serushago benefited from pleading guilty and cooperating with the Prosecution, the Appellant argues that the appropriate credit gained by the plea and cooperation should not be such that Serushago received a 15-year sentence, whereas Musema received a life sentence.[648] In comparing the two cases, he notes that Serushago's criminal conduct spanned a three month period, whereas Musema was convicted of crimes occurring on six occasions. Further, Serushago was a leader of a group of *Interahamwe* militia, while Musema had control only over the actions of the Tea Factory workers.[649]

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[646] Appellant's Brief, para. 515. At the time that the Appellant filed his brief, two persons convicted of the crime of genocide at ICTR, Ruzindana and Serushago, had received sentences of imprisonment of 25 and 15 years respectively.
[647] Appellant's Brief, para. 522.
[648] *Ibid.*, para. 521.
[649] *Ibid.*, para. 519.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **29 August 2008**

THARCISSE MUVUNYI

v.

THE PROSECUTOR

Case No. ICTR-2000-55A-A

JUDGEMENT

Counsel for Tharcisse Muvunyi:

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The Office of the Prosecutor:

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Mr. Alex Obote Odora
Mr. Neville Weston
Ms. Linda Bianchi
Ms. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

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Prosecution argues that the date of "sometime after 20 April 1994" fits within the date range of "on or about 15 April 1994" and that paragraph 3.17 of the Indictment provided additional notice that the attack occurred later.[44] With respect to the nature of the attack, the Prosecution asserts that the term "attack" encompasses acts of abducting and murder.[45]

18. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[46] The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.[47] Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment.[48] In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.[49]

19. If the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6(3) of the Statute, the Indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[50]

20. An indictment lacking this precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual

[44] Prosecution Response Brief, paras. 30-34. Paragraph 3.17 of the Indictment provides, in part, that "the massacres did not start until 19 April 1994".
[45] Prosecution Response Brief, para. 35.
[46] *Seromba* Appeal Judgement, paras. 27, 100; *Simba* Appeal Judgement para. 63; *Muhimana* Appeal Judgement, paras. 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49; *Ndindabahizi* Appeal Judgement, para. 16.
[47] *Ntagerura et al.* Appeal Judgement, para. 27. *See also Kvo~ka et al.* Appeal Judgement, para. 30; *Niyitegeka* Appeal Judgement, para. 194; *Kupre{ki} et al.* Appeal Judgement, para. 92.
[48] *Ntagerura et al.* Appeal Judgement, para. 27. *See also Kvo~ka et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 194; *Kupre{ki} et al.* Appeal Judgement, para. 92.
[49] *Nahimana et al.* Appeal Judgement, para. 326; *Ntagerura et al.* Appeal Judgement, para. 28; *Kvo~ka et al.* Appeal Judgement, para. 33.

basis underpinning the charge.[51] However, the principle that a defect in an indictment may be cured is not without limits. In this respect, the Appeals Chamber has previously emphasized:

> [T]he "new material facts" should not lead to a "radical transformation" of the Prosecution's case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.[52]

21. Bearing these principles in mind, the Appeals Chamber addresses whether Muvunyi had sufficient notice of the material facts underpinning his conviction as a superior for the crimes committed by ESO Camp soldiers at the Butare University Hospital. In this assessment, the Appeals Chamber takes into account both the Indictment as well as the Schedule of Particulars, which the Trial Chamber permitted the Prosecution to file "in order to arrange [its] current pleading in a clearer manner" and in particular to set out "the factual allegations which refer specifically to a type of responsibility under Article [...] 6(3) of the Statute."[53]

22. Muvunyi's arguments focus primarily on the notice provided by the Indictment of the material facts related to his role in the crime as well as the criminal acts of the principal perpetrators. In this respect, the Appeals Chamber observes that paragraph 3.29 of the Indictment clearly alleges a specific attack on wounded refugees at the Butare University Hospital around 15 April 1994 where Muvunyi and a section of soldiers allegedly separated and killed Tutsi refugees. In contrast, the evidence which underpins Muvunyi's conviction in relation to paragraph 3.29 refers to an event sometime after 20 April 1994 wherein ESO Camp soldiers – in the absence of Muvunyi – participated in the abduction of Tutsis from the hospital and their subsequent killing elsewhere. The variances between the Indictment and the evidence with respect to the dates of the attack, the soldiers' conduct during the attack, and Muvunyi's presence and participation in the attack reflect that paragraph 3.29 of the Indictment alleges a different criminal event than the one for which he was convicted. As a result, the Appeals Chamber finds that Muvunyi did not have adequate notice of the material facts giving rise to superior responsibility for the abductions and killings at the Butare University Hospital after 20 April 1994. This conclusion is reinforced, as discussed below,

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[50] *See Nahimana et al.* Appeal Judgement, para. 323; *Ntagerura et al.* Appeal Judgement, paras. 26, 152. *See also Naletili} and Martinovi}* Appeal Judgement, para. 67; *Blaški}* Appeal Judgement, para. 218.
[51] *Seromba* Appeal Judgement, para 100; *Simba* Appeal Judgement, para. 64; *Muhimana* Appeal Judgement, paras. 76, 195, 217; *Gacumbitsi* Appeal Judgement, para. 49. *See also Ntagerura et al.* Appeal Judgement, paras. 28, 65.
[52] *Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 30 (internal citations omitted).
[53] *Muvunyi*, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, p. 17 (disposition).

UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 12 September 2006

PROSECUTOR
v.
Tharcisse MUVUNYI

Case No. ICTR-2000-55A-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor

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Ms Adesola Adeboyejo
Ms Renifa Madenga
Ms Memory Maposa
Mr Dennis Mabura

Defence Counsel

Mr William E. Taylor
Ms Cynthia Cline

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Instigating

464. To ground individual responsibility for instigation pursuant to Article 6(1), the Accused must have encouraged, urged, or otherwise prompted another person to commit an offence under the Statute. Such instigation may arise from a positive act or a culpable omission. The instigation of the Accused must have a substantial nexus to the actual commission of the crime. Instigation differs from incitement in that it does not have to be direct or public. Therefore, private, implicit or subdued forms of instigation could ground liability under Article 6(1) if the Prosecution can prove the relevant causal nexus between the act of instigation and the commission of the crime.[660]

465. The *mens rea* required to establish a charge of instigating a statutory crime is proof that the Accused directly or indirectly intended that the crime in question be committed and that he intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts.[661]

466. The instigation of the accused must have a substantial effect on the actual commission of the crime and represents a general form of participation relevant to every crime in the Statute. However, direct and public incitement is only relevant in the context of genocide and it is criminalised as such. The Prosecution must therefore prove that a person accused of direct and public incitement to commit genocide shared the special intent of the principal perpetrator.

Ordering

467. Ordering under Article 6(1) requires that a person in a position of authority uses that position to issue a binding instruction to or otherwise compel another to commit a crime punishable under the Statute.[662] In *Semanza*, the Appeals Chamber held that "no formal superior-subordinate relationship between the Accused and the perpetrator is required" to establish the *actus reus* of "ordering" under Article 6(1).[663] However, proof of such a relationship may be evidentially relevant to show that the person alleged to have issued the order, was in a position of authority.

468. The responsibility for ordering the commission of a crime could also be proved by circumstantial evidence, but as required by the jurisprudence, the Chamber will thoroughly evaluate such evidence and treat it with caution.

Aiding and Abetting

469. Aiding and abetting reflect forms of accomplice liability. The aider and abettor is usually charged with responsibility for providing assistance that furthers the principal perpetrator's commission of a crime. It is therefore required that the conduct of the aider and abettor must have a substantial effect on the commission of the crime by the principal

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[660] *Akayesu*, Judgement (TC), para. 482; *Bagilishema*, Judgement (TC), para. 30; *Kamuhanda*, Judgement (TC), para. 593; *Semanza*, Judgement (TC), para. 381, *Kajelijeli*, Judgement (TC), para. 381.
[661] *Bagilishema*, Judgement (TC), para. 31. See also *Blaskic*, Judgement (TC), para 278; *Kordic and Cerkez*, Judgement (TC), para. 386, 387; *Naletilic and Martinovic*, Judgement, (TC), para. 60.
[662] *Bagilishema*, Judgement (TC), para. 30.
[663] *Semanza*, Judgement (AC), para. 361, citing *Kordic and Cerkez*, para. 28.

UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Adama Dieng

Judgement of: 28 November 2007

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

JUDGEMENT

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James Stewart
Neville Weston
George Mugwanya
Abdoulaye Seye
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Translation certified by LSS, ICTR

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478. The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.[1153] However, it does not appear that the Prosecutor charged the Appellants at trial with responsibility for their participation in a joint criminal enterprise,[1154] and the Appeals Chamber does not deem it appropriate to discuss this mode of participation here.[1155]

479. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[1156] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1157] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[1158]

480. The *actus reus* of "instigating" implies prompting another person to commit an offence.[1159] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[1160] The *mens rea* for this mode of responsibility is the intent to instigate another person to commit a crime or at a miminum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[1161]

481. With respect to ordering, a person in a position of authority[1162] may incur responsibility for ordering another person to commit an offence,[1163] if the person who received the order actually proceeds to commit the offence subsequently. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that

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[1153] *Tadić* Appeal Judgement, para. 188.
[1154] Even if such a charge could possibly be inferred from certain paragraphs of the Indictments, for example: *Nahimana* Indictment, para. 6.27; *Barayagwiza* Indictment, para. 7.13; *Ngeze* Indictment, para. 7.15.
[1155] For a more detailed discussion of this form of participation, see *Brđanin* Appeal Judgement, paras. 389-432; *Stakić* Appeal Judgement, paras. 64-65; *Kvočka et al.* Appeal Judgement, paras. 79-119; *Ntakirutimana* Appeal Judgement, paras. 461-468; *Vasiljević* Appeal Judgement, paras. 94-102; *Krnojelac* Appeal Judgement, paras. 28-33, 65 *et seq.*; *Tadić* Appeal Judgement, paras. 185-229.
[1156] *Kordić and Čerkez* Appeal Judgement, para. 26.
[1157] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément determinant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".
[1158] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 31.
[1159] *Ndindabahizi* Appeal Judgement, para. 117; *Kordić and Čerkez* Appeal Judgement, para. 27.
[1160] *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27. Once again, although the French version of the *Kordić and Čerkez* Judgement reads "*un élément déterminant*", the English version – which is authoritative – reads "factor substantially contributing to".
[1161] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 32.
[1162] It is not necessary to demonstrate the existence of an official relationship of subordination between the accused and the perpetrator of the crime: *Galić* Appeal Judgement, para. 176; *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[1163] *Galić* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras. 28-29.

order, and if that crime is effectively committed subsequently by the person who received the order.[1164]

482. The *actus reus* of aiding and abetting[1165] is constituted by acts or omissions[1166] aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime.[1167] Contrary to the three modes of responsibility discussed above (which require that the conduct of the accused precede the perpetration of the crime itself), the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[1168] The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[1169] It is not necessary for the accused to know the precise crime which was intended and which in the event was committed,[1170] but he must be aware of its essential elements.[1171]

483. The Appeals Chamber concludes by recalling that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.[1172]

B. Responsibility under Article 6(3) of the Statute

484. The Appeals Chamber recalls that, for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been

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[1164] *Galić* Appeal Judgement, paras. 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Bla{ki}* Appeal Judgement, para. 42.

[1165] The French version of some Appeal and Trial Judgements of this Tribunal and of the ICTY mention the term "*complicité*" ("complicity") rather than "*aide et encouragement*" ("aiding and abetting"). The Appeals Chamber prefers "*aide et encouragement*" because these terms are the ones used in Article 6(1) of the Statute. Furthermore, the Statute uses the word "*complicité*" in a very specific context (see Article 2(3)(e) of the Statute); it should thus be reserved for that context.

[1166] *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.

[1167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370 and footnote 740; *Blaškić* Appeal Judgement, paras. 45 and 48; *Vasiljević* Appeal Judgement, para. 102.

[1168] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. See also *Čelebići* Appeal Judgement, para. 352, citing with approval the conclusion of the Trial Chamber in that case that it is not necessary that the assistance in question be given at the time of the commission of the crime.

[1169] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, paras. 45 and 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.

[1170] *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50.

[1171] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50; *Aleksovski* Appeal Judgement, para. 162.

[1172] *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77.

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518. Further, the Trial Chamber considered that, even though "the evidence does not establish a specific link between the publication and subsequent events, [...] a link was clearly perceived by many witnesses such as Witness AHI, Witness ABE and Nsanzuwera, suggesting that *Kangura* greatly contributed to the climate leading to these events, if not causing them directly".[1247] The Trial Chamber then adds that "[a]t times *Kangura* called explicitly on its readers to take action. More generally, its message of prejudice and fear paved the way for massacres of the Tutsi population".[1248] The Appeals Chamber emphasizes, however, that the specific examples given by Witness Nsanzuwera and Witness ABE of attacks on individuals following the publication of *Kangura* articles date back to 1990 and 1991 and do not fall within the temporal jurisdiction of the Tribunal. Moreover, none of the testimonies makes explicit reference to the impact of *Kangura* issues published after 1 January 1994.

519. While there is probably a link between the Appellant's acts, because of his role in *Kangura*, and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained,[1249] the Appeals Chamber considers that there was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the *Kangura* publications in the first months of 1994 susbstantially contributed to the commission of acts of genocide between April and July 1994. Therefore, the Appeals Chamber is of the opinion that the Trial Chamber erred in finding Appellant Ngeze guilty of the crime of genocide under Article 6(1) of the Statute for having "instigated" the killing of Tutsi civilians as founder, owner and editor of *Kangura*.[1250]

(iii) Link between CDR activities and the acts of genocide

520. Appellant Barayagwiza contends that no causal link was established between the activities of the CDR and the acts of genocide.[1251]

521. The Trial Chamber explained in paragraph 951 of the Judgement that:

> [t]he Hutu Power movement, spearheaded by CDR, created a political framework for the killing of Tutsi and Hutu political opponents. The CDR and its youth wing, the *Impuzamugambi*, convened meetings and demonstrations, established roadblocks, distributed weapons, and systematically organized and carried out the killing of Tutsi civilians. The genocidal cry of "*tubatsembatsembe*" or "let's exterminate them", referring to the Tutsi population, was chanted consistently at CDR meetings and demonstrations. As well as orchestrating particular acts of killing, the CDR promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.

[1247] Judgement, para. 242.
[1248] *Ibid.*, para. 243.
[1249] See *Kangura* publications mentioned in paragraphs 136-243 of the Judgement. See also the Trial Chamber's findings in paragraphs 245, 246, 950 and 1036 of the Judgement, which make specific reference to "The Appeal to the Conscience of the Hutu" and "The Ten Commandments", and to *Kangura* No. 26.
[1250] Judgement, para. 977A.
[1251] Barayagwiza Appellant's Brief, paras. 194-195.

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

300/H

ICTR-98-41A-A
8th May 2012
{300/H – 174/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Arlette Ramaroson

ICTR Appeals Chamber
Date: 8th May 2012
Action: R. Guney
Copied To: Concerned Judges, Parties, JPV, LOs

Registrar: Mr. Adama Dieng

Judgement of: 8 May 2012

Aloys NTABAKUZE
v.
THE PROSECUTOR

Case No. ICTR-98-41A-A

JUDGEMENT

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Office of the Prosecutor
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James J. Arguin
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William Mubiru
Aisha Kagabo
Ndéye Marie Ka

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Rosette Muzigo-Morrison
SIGNATURE: DATE: 8/May/12

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29. Ntabakuze also submits that the Trial Chamber erred in law in convicting him of charges that were neither pleaded in the Indictment, nor in any subsequent pre-trial communications.[61] He contends that the Trial Chamber disregarded the relevant applicable principles mandating that new material facts or charges can only be added to the indictment through formal amendment pursuant to Rule 50 of the Rules.[62] Arguing that curing a defective indictment cannot lead to a radical transformation of the Prosecution's case, Ntabakuze submits that the Trial Chamber engaged in an impermissible *de facto* amendment of the Indictment in convicting him as a superior for the crimes allegedly committed at Kabeza, Nyanza hill, the Sonatube junction, and IAMSEA.[63] The Appeals Chamber will address these general contentions together with Ntabakuze's specific arguments in relation to each incident for which he was convicted.

30. Before doing so, the Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[64] Whether a fact is "material" depends on the nature of the Prosecution's case.[65] An indictment which fails to set forth the specific material facts underpinning the charges against the accused is defective.[66] The defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[67] However, a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.[68] While it is possible to remedy the vagueness of an indictment, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.[69] The Appeals Chamber will address Ntabakuze's specific arguments with these principles in mind.

[61] Notice of Appeal, paras. 16-18, 49, 50; Appeal Brief, paras. 28, 100-103. *See also* Notice of Appeal, para. 22.
[62] Notice of Appeal, para. 18; Appeal Brief, para. 29. *See also* Notice of Appeal, paras. 15, 19.
[63] Notice of Appeal, paras. 17, 18, 50; Appeal Brief, paras. 100, 101.
[64] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 188; *Munyakazi* Appeal Judgement, para. 36.
[65] *See, e.g., Renzaho* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 292; *Ntagerura et al.* Appeal Judgement, para. 23.
[66] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Kupreškić et al.* Appeal Judgement, para. 114.
[67] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Kupreškić et al.* Appeal Judgement, para. 114.
[68] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Ntagerura et al.* Appeal Judgement, para. 32.
[69] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Ntagerura et al.* Appeal Judgement, para. 32.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Case No. ICTR-99-46-A

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Adama Dieng

Date: 7 July 2006

THE PROSECUTOR
(Appellant and Respondent)

v.

ANDRÉ NTAGERURA
(Respondent)
EMMANUEL BAGAMBIKI
(Respondent)
SAMUEL IMANISHIMWE
(Appellant and Respondent)

JUDGEMENT

Office of the Prosecutor
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James Stewart

Counsel for André Ntagetura
Benoït Henry
Hamuli Rety

Counsel for Emmanuel Bagambiki
Vincent Lurquin

Counsel for Samuel Imanishimwe
Marie Louise Mbida
Jean-Pierre Fofé

Translation certified by LSS, ICTR

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material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.[68]

22. If an accused is not properly notified of the material facts of his alleged criminal activity until the Prosecution files its Pre-Trial Brief or until the trial itself, it will be difficult for his Defence to conduct a meaningful investigation prior to the commencement of the trial.[69] The question of whether an indictment is pleaded with sufficient particularity is therefore dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence.[70] An indictment which fails to plead material facts in sufficient detail is defective.[71]

23. Whether particular facts are "material" depends on the nature of the Prosecution case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.[72] For example, where the Prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision".[73] However, less detail may be acceptable if the "sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[74]

24. Where the Prosecution relies on a theory of joint criminal enterprise, the Prosecution must specifically plead this mode of responsibility in the indictment; failure to do so will result in a defective indictment.[75] Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 6(1) of the Statute.[76] The Prosecution must also plead the purpose of the enterprise, the identity of the participants, the nature of the accused's participation in the enterprise and

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[68] *Ntakirutimana* Appeal Judgement, para. 470. See also *Semanza* Appeal Judgement, para. 85; *Kvočka et al.* Appeal Judgement, para. 27; *Kupre{ki} et al.* Appeal Judgement, para. 88; *Naletili} and Martinovi}* Appeal Judgement, para. 23.

[69] *Niyitegeka* Appeal Judgement, para. 194.

[70] *Kupre{ki} et al.* Appeal Judgement, para. 88; *Ntakirutimana* Appeal Judgment, para. 470.

[71] *Kupre{ki} et al.* Appeal Judgement, para. 114; *Niyitegeka* Appeal Judgement, para. 195; *Kvo~ka et al.* Appeal Judgement, para. 28.

[72] *Kvo~ka et al.* Appeal Judgement, para. 28.

[73] *Kupre{ki} et al.* Appeal Judgement, para. 89; *Bla{ki}* Appeal Judgement, para. 213.

[74] *Kupre{ki} et al.* Appeal Judgement, para. 89. The Appeals Chamber recalls that "the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. [...] [T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the 'sheer scale' of the crime made it impossible to identify that individual in the Indictment. Quite the contrary: the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual": *Ntakirutimana* Appeal Judgement, paras. 73-74.

[75] *Kvo~ka et al.* Appeal Judgement, para. 42.

[76] *Idem.*

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the period of the enterprise.[77] In order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.[78]

25. Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[79]

26. In relation to an allegation of superior responsibility under Article 6(3) of the Statute, the material facts which must be pleaded in the indictment are: (1) that the accused is the superior of certain persons sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;[80] (2) the criminal acts of such persons, for which he is alleged to be responsible;[81] (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates;[82] and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[83]

27. An indictment may also be defective when the material facts are pleaded without sufficient specificity, for example, when the times mentioned refer to broad date ranges, the places are only vaguely indicated, and the victims are only generally identified.[84] It is of course possible that material facts are not pleaded with the requisite degree of specificity in an indictment because the necessary information was not in the Prosecution's possession. In this respect, the Appeals Chamber emphasises that the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused in the course of the trial depending on how the

[77] *Ibid.*, para. 28, citing *Prosecutor v. Stani{i}*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v. Mejaki} et al.*, Case No. IT-02-65-PT, Decision on Dusko Kneževic's Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 6; *Prosecutor v. Mom~ilo Kraji{nik & Biljana Plav{i}*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 13.

[78] *Kvo~ka et al.* Appeal Judgement, para. 28.

[79] *Bla{ki}* Appeal Judgement, para. 213. *See also Prosecutor v. Milorad* Krnojelac, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 13; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 18; *Prosecutor v. Radoslav Br|anin and Momir Tali}*, Case No. IT-99-36-PT, Decision on Objections by Momir Tali} to the Form of the Amended Indictment, 20 February 2001 ("*Br|anin and Tali}* 23 February 2001 Decision"), para. 20.

[80] *Bla{ki}* Appeal Judgement, para. 218(a).

[81] *Naletili} and Martinovi}* Appeal Judgement, para. 67.

[82] *Bla{ki}* Appeal Judgement, para. 218(b). The Appeals Chamber notes that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue": *Bla{ki}* Appeal Judgement, para. 218 and accompanying references. See also *Naletili} and Martinovi}* Appeal Judgement, para. 67.

[83] *Bla{ki}* Appeal Judgement, para. 218(c). See also *Naletili} and Martinovi}* Appeal Judgement, para. 67.

[84] *Kvo~ka et al.* Appeal Judgement, para. 31.

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on notice that the allegations in that Indictment would underpin the charges in the Indictment against him.

61. The Prosecution further argues that reading the Indictments separately with regard to the factual allegations "negates the rationale for creating the joinder in the first place".[158] This argument cannot prosper. It is not self-evident that distinct indictments should be read together as a whole, in case of a joinder. In joint trials, each accused shall be accorded the same rights as if he were being tried separately.[159] The Prosecution thus remains under an obligation to plead, in each indictment brought, the material facts underpinning the charges against each accused.[160] The Prosecution's argument that the Indictment "became, in law, a single indictment" is dismissed. It was up to the Prosecutor to submit a new, joint and single Indictment against the three Accused.

62. For these reasons, the Appeals Chamber finds that the Prosecution's argument that the Indictments should have been read together as a whole is without merit. Insofar as the Appeals Chamber concludes that the Trial Chamber did not err by refusing to read the Indictments together, it is not necessary to examine the effect that a combined reading of the two Indictments might have had.

63. Turning to the Prosecution's other grounds of appeal, the Appeals Chamber concedes that tt would be logical to now consider whether the Trial Chamber erred in determining that the Indictments were defective. To avoid a double analysis of each contested paragraph – to see whether it was defective and, if it was defective, whether the defect was cured – the Appeals Chamber will first examine whether the Trial Chamber erred in not considering whether the defects identified in the Indictments were cured.[161] Only after this analysis will the Appeals Chamber proceed to examine each Indictment paragraph by paragraph.

3. Curing of defects in the Indictments

(a) Did the Trial Chamber err in not considering whether the defects had been cured?

64. The Trial Chamber concluded that "the operative paragraphs underpinning the charges against Ntagerura, Bagambiki and Imanishimwe, as well as the charges themselves, [were] unacceptably vague". Moreover, the Chamber finds no justifiable reason for the Prosecutor to have pleaded the allegations or charges in such a generic manner.[162] The Trial Chamber took note of the ICTY Appeal Judgement in *Kupre{ki} et al.* and the possibility that, in a limited number of cases, a defective indictment may be cured of its defects.[163] The Trial Chamber went on to note that:

> the supporting materials to the Ntagerura and to the Bagambiki/Imanishimwe Indictments, other pre-trial disclosure, and the Pre-Trial Brief provide additional

[158] Prosecution Brief in Reply, para. 24.
[159] Rule 82(A) of the Rules.
[160] *Cf. Ntakirutimana* Appeal Judgement, para. 470; *Kupre{ki} et al.* Appeal Judgement, para. 88.
[161] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111.
[162] Trial Judgement, para. 64. The Trial Chamber noted that paragraphs 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3, 16, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.12-3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment were defective in one way or the other.
[163] Trial Judgement, para. 65.

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> information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case. However, pre-trial submissions and disclosure are not adequate substitutes for a properly pleaded indictment, which is the only accusatory instrument mentioned in the Statute and the Rules. The indictment must plead all material facts. The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused's alleged crimes, in particular, because some of this material is not made available until the eve of trial.[164]

65. The Appeals Chamber recalls that it is well established in the jurisprudence of both this Tribunal and the ICTY that, in a limited number of cases, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[165] In the present case, it is apparent from the Trial Judgement that the Trial Chamber did not consider whether the defects in the Indictments were cured. The Appeals Chamber recalls that, if an indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must determine whether the accused has nevertheless been accorded a fair trial.[166] In view of the Trial Chamber's statement that some of Prosecution's post-indictment submissions "provide[d] additional information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case",[167] the Appeals Chamber considers that the Trial Chamber, in fulfilling its obligation to consider whether or not the trial was fair, should have evaluated whether the defects were cured. The Trial Chamber erred in failing to do so. As a result, where applicable, the Appeals Chamber will consider the Prosecution's argument that the defects in the Indictments were cured.

(b) The "Strong Evidence Passage" in the *Kupre{ki} et al.* Appeal Judgement

66. After having concluded that the Indictments were defective and declining to consider whether the defects were cured, the Trial Chamber held that:

> in *Kupre{ki}* the Appeals Chamber intimated that it "might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused." The Chamber will thus consider the Prosecutor's evidence against Ntagerura, Bagambiki, and Imanishimwe to see if such strong evidence exists.[168]

67. The Appeals Chamber considers that the statement made by the ICTY Appeals Chamber in *Kupre{ki} et al.* that "it might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused" does not permit a Trial Chamber to consider material facts of which the accused was not adequately put on notice. The "strong evidence passage" arose in relation to whether, having upheld the appellants' objections that the indictment was too vague, the appropriate remedy on appeal was to remand the matter for

[164] Ibid., para. 66 (footnotes omitted).
[165] See *supra*, para. 28.
[166] *Kvo~ka et al.*, Appeal Judgement, para. 33.
[167] Trial Judgement, para. 66.
[168] *Ibid.*, para. 68.

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retrial.[169] This question does not arise at trial. The Appeals Chamber emphasises that if the indictment is found to be defective at trial, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. No conviction may be pronounced where the accused's right to a fair trial has been violated because of a failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.[170]

4. Reading the paragraphs of the Indictments in isolation from one another and conclusions of the Trial Chamber on the defects affecting certain paragraphs of the Indictments

68. The Appeals Chamber notes that the Prosecution's argument that the Trial Chamber erred in reading the paragraphs of each Indictment in isolation from one another mainly relates to the Trial Chamber's finding that several paragraphs of the Indictments failed to describe the criminal conduct of the Accused that was being alleged.[171] With respect to the Trial Chamber's finding that the dates, venues and circumstances of the alleged events were insufficiently pleaded in the Indictments, the Prosecution argues that its post-indictment submissions cured any defects in the Indictments.[172] In order to simplify the analysis, the Appeal Chamber will examine these two arguments together.

69. The Appeals Chamber notes that despite having found defects in some paragraphs of the Indictments, the Trial Chamber continued to make factual findings on the basis of such paragraphs.[173] Accordingly, the Trial Chamber's conclusions on the validity of the Indictments did not have any impact on its final judgement as regards a certain number of allegations. Rather than having been rejected for reasons relating to the form of the Indictments, these allegations were rejected because the Trial Chamber considered them to be unfounded. Although the Prosecution submits that it is not satisfied with the findings the Trial Chamber made in relation to these paragraphs, it does not develop this point. Given that the arguments raised by the Prosecution under its fourth ground of appeal relating to those paragraphs on which the Trial Chamber made factual findings cannot succeed, the Appeals Chamber will limit its discussion to the consideration of Prosecution arguments relating to the paragraphs on which the Trial Chamber did not make any factual findings. These are paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment and paragraphs 3.12 through 3.15 of the Bagambiki/Imanishimwe Indictment. The Appeals Chamber will also examine paragraph 3.28 of the Bagambiki/Imanishimwe Indictment which was only partly discussed.

(a) Ntagerura Indictment

70. The Appeals Chamber recalls that the Trial Chamber made factual findings in relation to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment, and will, accordingly, examine only the alleged errors with regard to paragraphs 11, 12.1, 13 and 16.

(i) Paragraph 11

[169] *Kupre{ki{ et al.* Appeal Judgement, para. 125.
[170] *Kvo~ka et al.*, Appeal Judgement, para. 33. See also para. 30.
[171] Prosecution Appeal Brief, paras. 179-181.
[172] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111; Prosecution Notice of Appeal, para. 22; Prosecution Appeal Brief, para. 126.
[173] To wit, paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.16 to 3.31 of the Bagambiki/Imanishimwe Indictment. See Trial Judgement, para. 69.

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor MERON, Presiding
Judge Florence MUMBA
Judge Mehmet GÜNEY
Judge Wolfgang SCHOMBURG
Judge Inés Mónica WEINBERG DE ROCA

Registrar: Mr. Adama Dieng

Date: 13 December 2004

THE PROSECUTOR

v.

ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA

Cases Nos. ICTR-96-10-A and ICTR-96-17-A

JUDGEMENT

Counsel for the Prosecution

Mr. James Stewart
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Ms. Michelle Jarvis
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Mr. David Jacobs
Mr. David Paciocco
Mr. Ramsey Clark

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> & Charles Sikubwabo, members of the National Gendarmerie, communal police, militia and civilians.
>
> 4.8 The individuals in the convoy, including Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, participated in an attack on the men, women and children in the Mugonero Complex, which continued throughout the day.
>
> 4.9 The attack resulted in hundreds of deaths and a large number of wounded among the men, women and children who had sought refuge at the Complex.
>
> 4.10 During the months that followed the attack on the Complex, Elizaphan Ntakirutimana, Gerard Ntakirutimana & Charles Sikubwabo, searched for an ~~F~~*sic*~~g~~ attacked Tutsi survivors and others, killing and causing serious bodily or mental harm to them.[52]

31. Under this Indictment, the Prosecution alleged and the Trial Chamber found that Gérard Ntakirutimana "procured ammunition and gendarmes for the attack on the Complex" and "killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994."[53] These findings supported the Trial Chamber's conclusion that Gérard Ntakirutimana had the requisite intent for genocide and, in the case of the killing of Ukobizaba, the conclusion that Gérard Ntakirutimana was "individually criminally responsible" for his death and therefore was guilty of genocide.[54] The killing of Ukobizaba also grounded the conclusion that Gérard Ntakirutimana was guilty of murder as a crime against humanity.[55] Gérard Ntakirutimana was therefore found guilty of genocide at Mugonero because of acts committed by him personally, namely the killing of Ukobizaba and the procurement of ammunition and gendarmes. Similarly, Elizaphan Ntakirutimana was pronounced guilty of genocide because the Trial Chamber found that he "conveyed armed attackers to the Mugonero Complex in his vehicle on the morning of 16 April 1994."[56]

32. Under *Kupreškić*, criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed."[57] The Appeals Chamber must therefore consider whether the material facts underlying the Mugonero convictions were sufficiently pled in the Indictment and, if not, whether that failure was cured by other means.

a. The Allegation That Gérard Ntakirutimana Murdered Charles Ukobizaba

[52] Mugonero Indictment, paras. 4.7-4.10 (emphasis omitted).
[53] Trial Judgement, para. 791.
[54] *Id.*, paras. 793-795.
[55] *Id.*, paras. 806-810.
[56] *Id.*, paras. 788, 790.
[57] *Kupreškić et al.* Appeal Judgement, para. 89.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

ORIGINAL: ENGLISH

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Adama Dieng

Date: 24 June 2011

THE PROSECUTOR
v.
Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI
Élie NDAYAMBAJE

Case No. ICTR-98-42-T

JUDGEMENT AND SENTENCE

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Normand Marquis & Mylène Dimitri
For **Sylvain Nsabimana**
Josette Kadji & Pierre Tientcheu Weledji
For **Alphonse Nteziryayo**
Titinga Frederick Pacere &
Gershom Otachi Bw'Omanwa
For **Joseph Kanyabashi**
Michel Marchand & Alexandra Marcil
For **Élie Ndayambaje**
Pierre Boulé & Claver Sindayigaya

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CHAPTER IV: LEGAL FINDINGS

4.1 Criminal Responsibility

4.1.1 Article 6 (1) of the Statute

5590. Article 6 (1) of the Statute provides for individual criminal responsibility for anyone who planned, instigated, ordered, committed, or aided and abetted a crime falling within the Tribunal's jurisdiction.

5591. "Planning" requires that one or more persons design the criminal conduct constituting a statutory crime that is later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The *mens rea* entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[14534]

5592. "Instigating" implies prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime. The *mens rea* is the intent to instigate another person to commit a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[14535]

5593. A person in a position of authority may incur responsibility for "ordering" another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order. There is no requirement of a formal superior-subordinate relationship between the orderer and the perpetrator; it is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime following the accused's order.[14536]

5594. "Committing" covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission.[14537] Physical perpetration can include physical killing, as well as other acts that constitute direct participation in the *actus reus* of the crime. "The question is

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[14534] *Dragomir Milošević*, Judgement (AC), para. 268; *Nahimana et al.*, Judgement (AC), para. 479.
[14535] *Karera*, Judgement (AC), para. 317; *Nahimana et al.*, Judgement (AC), para. 480.
[14536] *Renzaho*, Judgement (AC), paras. 315, 480; *Kalimanzira*, Judgement (AC), para. 213; *Boškoski & Tarčulovski*, Judgement (AC), para. 164; *Nahimana et al.*, Judgement (AC), para. 481; *Semanza*, Judgement (AC), paras. 360-361, 363.
[14537] *Nahimana et al.*, Judgement (AC), para. 478 (which also states commission includes participation in a joint criminal enterprise). As the Prosecution has not charged the Accused with any such alleged participation, the Chamber will not discuss joint criminal enterprise here.

Statute. Accordingly, the Chamber finds that the Prosecution has not proven beyond a reasonable doubt that this incident qualifies as persecution as a crime against humanity, or that Ntahobali or Nteziryayo are responsible for it.

4.3.6.4 Conclusion

Nyiramasuhuko

6120. The Chamber finds Nyiramasuhuko guilty of ordering persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

Ntahobali

6121. The Chamber finds Ntahobali guilty of committing, ordering, and aiding and abetting persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

Nsabimana

6122. For failing to discharge his duty, the Chamber finds Nsabimana guilty of aiding and abetting persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

Nteziryayo

6123. Because the Prosecution has not proven that Nteziryayo is criminally responsible for persecution as a crime against humanity, the Chamber acquits him of this charge.

Kanyabashi

6124. The Chamber finds Kanyabashi guilty of persecution as a crime against humanity, pursuant to Article 6 (3) of the Statute for superior responsibility.

Ndayambaje

6125. The Chamber finds Ndayambaje guilty of instigating and aiding and abetting persecution as a crime against humanity, pursuant to Article 6 (1) of the Statute.

4.3.7 Other Inhumane Acts

4.3.7.1 Introduction

6126. The Accused are charged with other inhumane acts as a crime against humanity under Article 3 (i) of the Statute. This charge comprises Count 9 of the Nyiramasuhuko and Ntahobali Indictment, and Count 8 of the Nsabimana and Nteziryayo, Kanyabashi, and Ndayambaje Indictments.

4.3.7.2 Law

6127. The crime of other inhumane acts was deliberately designed as a residual category for sufficiently serious acts which are not otherwise enumerated in Article 3 of the Statute. For an act or an omission to be "inhumane" under this Article, the victim must have suffered serious

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Carmel Agius, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**1 April 2011**

Tharcisse RENZAHO

v.

THE PROSECUTOR

Case No. ICTR-97-31-A

JUDGEMENT

Counsel for the Appellant

Mr. François Cantier
Mr. Barnabé Nekuie

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. James Arguin
Mr. Alphonse Van
Mr. Abdoulaye Seye

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3. Orders to Kill Tutsis

314. Renzaho submits that the Trial Chamber erred in finding that he ordered the killings of Tutsis at roadblocks. He argues that there is no "explicit evidence" to that effect[684] and that the Trial Chamber's language shows that this conclusion remained uncertain.[685] The Prosecution responds that the only reasonable inference on the evidence is that Renzaho ordered the killings at roadblocks.[686]

315. The Appeals Chamber recalls that a person in a position of authority may incur responsibility for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[687] Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order.[688] A person who orders an act with such awareness has the requisite *mens rea* for establishing liability under Article 6(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[689] No formal superior-subordinate relationship between the accused and the perpetrator is required.[690]

316. The Appeals Chamber recalls that the Trial Chamber found that at the 10 April Meeting, Renzaho ordered local officials to establish roadblocks in Kigali.[691] It further found that, at the 16 April Meeting, Renzaho facilitated the acquisition of weapons by local officials for distribution to the civilian population.[692] Based on Renzaho's orders to establish roadblocks, his sanctioning the conduct at them, and his continued material support for the killings through the distribution of weapons, the Trial Chamber found Renzaho guilty of aiding and abetting genocide.[693]

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[684] Notice of Appeal, para. 75. This argument was not developed in the Appellant's Brief and the Prosecution declined to respond to it. *See* Respondent's Brief, para. 106, fn. 177. Upon request of the Appeals Chamber, the Parties addressed this issue at the Appeal Hearing. *See* AT. 16 June 2010 pp. 22-25 (Renzaho) and AT. 16 June 2010 pp. 41-46 (Prosecution).
[685] Notice of Appeal, para. 75 ("The use of the word 'must' proves that the Chamber was not convinced beyond a reasonable doubt").
[686] AT. 16 June 2010 pp. 42, 46. *See also* AT. 16 June 2010 pp. 43-45.
[687] *Kamuhanda* Appeal Judgement, paras. 75, 76.
[688] *Nahimana et al.* Appeal Judgement, para. 481, and citations therein.
[689] *Blaškić* Appeal Judgement, para. 42.
[690] *Nahimana et al.* Appeal Judgement, fn. 1162; *Semanza* Appeal Judgement, para. 361; *Kordi} and Čerkez* Appeal Judgement, para. 28.
[691] Trial Judgement, para. 763.
[692] Trial Judgement, para. 764.
[693] Trial Judgement, para. 766.

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Tribunal Pénal International pour le Rwanda

International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr Adama Dieng**

Judgement of: **20 May 2005**

LAURENT SEMANZA

v.

THE PROSECUTOR

Case No. ICTR-97-20-A

JUDGEMENT

The Office of the Prosecutor:

Mr James Stewart
Ms Amanda Reichman
Mr Neville Weston

Counsel for the Appellant

Mr Charles Achaleke Taku

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ordering. That being said, in the view of the Appeals Chamber, the evidence before the Trial Chamber in relation to Musha church does not support the Trial Chamber's finding that the Appellant did not possess any form of authority over the attackers.

363. It should be recalled that authority creating the kind of superior-subordinate relationship envisaged under Article 6(1) of the Statute for ordering may be informal or of a purely temporary nature. Whether such authority exists is a question of fact. In the present case, the evidence is that the Appellant directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees at Musha church. According to the Trial Chamber, the refugees "were then executed on the directions" of the Appellant.[767] On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute.

364. Consequently, the Appeals Chamber rejects the Prosecution submission that the Trial Chamber committed a legal error by making the legal qualification of ordering under Article 6(1) of the Statute dependent upon proof of a formal superior-subordinate relationship. The Trial Chamber presented the correct definition for ordering under Article 6(1) of the Statute. However, the Appeals Chamber finds that the Trial Chamber erred in its application of this correct legal standard to the facts. It is clear from the evidence that the Appellant had the necessary authority to render him liable for ordering the attacks and killings at Musha church. The Appeals Chamber, Judge Pocar dissenting, therefore enters a conviction for ordering genocide and for ordering extermination in relation to the massacre at Musha church.

B. War Crimes (Ground 4)

365. The Prosecution's fourth ground of appeal concerns the Trial Chamber's acquittal of the Appellant for serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II under Article 4(a) of the Statute (Counts 7 and 13 of the Indictment). Although the Trial Chamber found that a number of the acts of the Appellant constituted serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute), the Trial Chamber declined to enter convictions for these acts due to the application of the law on cumulative convictions. The Prosecution argues that the Trial Chamber's failure to do so is against

[766] *Ibid.*
[767] Trial Judgement, paras 178, 196.

settled jurisprudence and constitutes a legal error.[768] The Prosecution submits that had the Trial Chamber applied the law correctly in relation to cumulative convictions, a conviction would have been entered against the Appellant under Count 7 for murders at Musha church and Mwulire hill and under Count 13 for instigating the rape and torture of Victim A and the murder of Victim B and for committing torture and murder of Rusanganwa constitutive of serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II. The Prosecution requests that the Appeals Chamber reverse the acquittal of Semanza under Counts 7 and 13 and enter convictions for both these counts.[769] The Prosecution does not seek in this ground of appeal to increase the sentence imposed against the Appellant.

366. The Appeals Chamber notes that in response the Appellant does not specifically address the submissions of the Prosecution under this ground of appeal. Instead, he seems to be challenging the fact-finding process of the Trial Chamber under Counts 7 and 13 of the Indictment, and to be presenting new arguments which are not relevant to determining this ground of appeal.[770]

367. In its Judgement, the Trial Chamber, by majority (Judges Williams and Dolenc), found that the Appellant (i) aided and abetted the intentional murders at Musha church and Mwulire hill,[771] and (ii) instigated the rape and torture of Victim A and the murder of Victim B, and that he committed torture and the intentional murder of Rusanganwa.[772] It ruled by the same majority that these acts constituted serious violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II.[773] No conviction was entered for these acts, as one of the two Judges forming the majority (Judge Dolenc), was of the opinion that it would be impermissible to convict due to the "apparent ideal concurrence of the crimes" with complicity of genocide as charged in Count 3 of the Indictment, and crimes against humanity as charged in Counts 10, 11 and 12 of the Indictment.[774]

368. The jurisprudence on cumulation of convictions is settled. Cumulative convictions "under different statutory provisions but based on the same conduct are permissible only if each statutory

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[768] Prosecution Appeal Brief, paras 5.1-5.12.
[769] The Prosecution notes that if it is successful in relation to its second ground of appeal, then the conviction to be entered under Count 7 against the Appellant should reflect the finding that he directly perpetrated the crimes for which he has been found to have committed, as serious violations of Common Article 3 and Additional Protocol II. It adds that even if the Prosecution is not successful in relation to its second ground of appeal, a conviction should be entered under Count 7 on the basis of the Trial Chamber's findings that the Appellant was guilty of aiding and abetting the murders committed at Musha church and Mwulire hill.
[770] Semanza Response, paras 272-300; T. 14 December 2004, pp. 13-16, 18.
[771] Count 7 of the Indictment.
[772] Count 13 of the Indictment.
[773] Trial Judgement, paras 535, 551.
[774] Trial Judgement, paras 536, 551-552.

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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

UNITED NATIONS

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TRIAL CHAMBER III

Original: English

Before Judges: Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

Registrar: Adama Dieng

Judgement of: 15 May 2003

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ICTR
SEALED BY ORDER OF THE TRIAL CHAMBER

THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

JUDGEMENT AND SENTENCE

Counsel for the Prosecution:

Chile Eboe-Osuji

Counsel for the Defence:

Charles Acheleke Taku
Sadikou Ayo Alao

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commission of the crime, and an accused need not necessarily be present at the time of the criminal act.[642]

386. Criminal responsibility as an "approving spectator" does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.[643] The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement.[644] Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances.[645]

b. *Mens Rea*

387. An individual who "commits" a crime as a principal perpetrator must possess the requisite *mens rea* for the underlying crime.[646]

388. In cases involving a form of accomplice liability, the *mens rea* requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime.[647] The accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*.[648]

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[642] *Bagilishema*, Judgement, TC, para. 33; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, para. 200; *Akayesu*, Judgement, TC, para. 484. Physical presence during the commission of the crime was traditionally the distinguishing factor between aiding and abetting, which required presence, and other forms of complicity such as counselling and procuring. *See generally* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW p. 429 (3rd ed. 1999).
[643] *Bagilishema*, Judgement, TC, para. 36; *Aleksovski*, Judgement, TC paras. 64-65.
[644] *Aleksovski*, Judgement, TC, para. 65.
[645] *Kvocka*, Judgement, TC, para. 257; *Aleksovski*, Judgement, TC, paras. 64-65. *See, e.g., Akayesu*, Judgement, TC, para. 693 (authority and prior words of encouragement); *Tadic*, Judgement, TC, para. 690 (presence and previous active role in similar acts by the *same* group).
[646] *Kayishema and Ruzindana*, Judgement, AC, para. 187.
[647] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Bagilishema*, Judgement, TC, para. 32; *Kayishema and Ruzindana*, Judgement, TC, para. 201.
[648] *Kayishema and Ruzindana*, Judgement, TC, para. 205. *See also Aleksovski*, Judgement, AC, para. 162; *Vasiljevic*, Judgement, TC, para. 71; *Krnojelac*, Judgement, TC, paras. 75, 90; *Kvocka*, Judgement, TC, paras. 255, 262; *Kunarac*, Judgement, TC, para. 392; *Furundzija*, Judgement, TC, para. 249. *But see Ntakirutimana*, Judgement, TC, para. 787 (stating that aiding and abetting under Article 6(1) required proof that an accused possessed the *mens rea* of the underlying crime, for

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Judgement of: 12 March 2008

THE PROSECUTOR

v.

ATHANASE SEROMBA

Case No. ICTR-2001-66-A

JUDGEMENT

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Dior Fall
Ms. Amanda Reichman
Mr. Abdoulaye Seye
Mr. Alfred Orono Orono

Counsel for Athanase Seromba:

Mr. Patrice Monthé
Ms. Sarah Ngo Bihegué

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27. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the indictment so as to provide notice to the accused.[75] Criminal acts that were physically committed personally by the accused must be specifically set forth in the indictment, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed."[76] Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[77] The Appeals Chamber has held that an indictment must be considered as a whole.[78] Where an indictment contains some allegations of a general nature, this alone does not render it defective. Other allegations in the indictment may sufficiently plead the material facts underpinning the charges in the indictment.

28. In the present case, the Trial Chamber found that paragraphs 1, 5, 18, 24, 32, 33, 34, 35, 45, and 50 of the Indictment were of a general nature and did not take them into account when making its factual findings.[79] Athanase Seromba however argues that paragraphs 7, 8, 11, 14, 15, 16, and 17 of the Indictment were also defective. The Appeals Chamber notes that the Trial Chamber took into consideration Athanase Seromba's submissions in relation to the alleged defects in the Indictment and concluded as follows:

> [T]he arguments raised by the Defence do not permit the conclusion that the Indictment contains defects that might have warranted an amendment. The Chamber therefore dismisses the Defence allegations that the Indictment is defective and accordingly, finds that there are no grounds for reopening the hearing.[80]

The Trial Chamber further concluded, with regard to paragraphs 7, 8, 11, 14, 15, 16, and 17 of the Indictment, that the issues raised by Athanase Seromba regarding the allegations in these paragraphs were "unfounded"[81] and that the "material facts are set forth both in the Indictment and in the Prosecutor's pre-trial brief which was disclosed to the Defence in a timely manner".[82]

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[75] *Simba* Appeal Judgement, para. 63, referring to *Muhimana* Appeal Judgement, paras. 76, 167, 195. *See also Gacumbitsi* Appeal Judgement, para. 49; *Ndindabahizi* Appeal Judgement, para. 16.
[76] *Muhimana* Appeal Judgement, para. 76; *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškić et al.* Appeal Judgement, para. 89. *See also Ndindabahizi* Appeal Judgement, para. 16.
[77] *Ntagerura et al.* Appeal Judgement, para. 25.
[78] *Gacumbitsi* Appeal Judgement, para. 123.
[79] Trial Judgement, paras. 29-35.
[80] Trial Judgement, para. 23.
[81] Trial Judgement, para. 22.
[82] Trial Judgement, para. 22.

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B. (3) ICTY Jurisprudence

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14-A

Date: 29 July 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

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41. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's above articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

42. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[76]

2. Aiding and Abetting

43. The Appellant submits that liability for aiding and abetting requires, at a minimum, actual knowledge.[77] He submits that not only must the aider and abettor know that his acts provide support to another person's offence, but he must also know the specifics of that offence. Recklessness or negligence on his part is not sufficient, he asserts, contrary to the Trial Chamber's alleged finding on that point.[78] Furthermore, the Appellant submits that the *actus reus* of aiding and abetting includes a causation requirement which the Trial Chamber failed to acknowledge and to apply.[79] In other words, the contribution must "have a direct and important impact on the commission of the crime."[80] Instead, the Appellant maintains, the Trial Chamber erroneously applied a strict liability standard to find the Appellant guilty as an aider and abettor and reiterates that the Trial Chamber's conclusion that "he could be found guilty if he accepted the possibility that some unspecified crime was a 'possible or foreseeable consequence' of military action effectively eliminates the 'actual knowledge' *mens rea* of aiding and abetting, and is thus erroneous as a matter

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[76] The French translation of this legal standard reads as follows:
> Quiconque ordonne un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre possède la *mens rea* requise pour établir la responsabilité aux termes de l'article 7 alinéa 1 pour avoir ordonné. Le fait d'ordonner avec une telle conscience doit être considéré comme l'acceptation dudit crime.

[77] Appellant's Brief, p. 131.
[78] Appellant's Brief, pp. 131-133.
[79] Appellant's Brief, pp. 133-135.
[80] Appellant's Brief, p. 134.

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of The Former Yugoslavia since 1991

Case No. IT-95-14-T

Date: 3 March 2000

Original: English
French

IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Almiro Rodrigues
Judge Mohamed Shahabuddeen

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 3 March 2000

THE PROSECUTOR

v.

TIHOMIR BLA[KI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

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280. Instigating entails "prompting another to commit an offence"[505]. The wording is sufficiently broad to allow for the inference that both acts and omissions may constitute instigating and that this notion covers both express and implied conduct. The ordinary meaning of instigating, namely, "bring about"[506] the commission of an act by someone, corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.

281. The *Akayesu* Trial Chamber was of the opinion that ordering

> implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence[507].
>
> There is no requirement that the order be in writing or in any particular form; it can be express or implied. That an order was issued may be proved by circumstantial evidence.

It is not necessary that an order be given in writing or in any particular form. It can be explicit or implicit. The fact that an order was given can be proved through circumstantial evidence.

282. The Trial Chamber agrees that an order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence[508]. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order. Therefore, it is irrelevant whether the illegality of the order was apparent on its face.

ii) Aiding and abetting

283. As a starting point, the Trial Chamber concurs with the opinion of the Trial Chamber in the *Furund`ija* case which states that

> the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence[509].

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[505] *Ibid*, para. 482.
[506] The Concise Oxford Dictionary, 10th edition (1999), p. 734.
[507] *Akayesu* Judgement, para. 483.
[508] As to criminal responsibility of commanders for passing on criminal orders, the Trial Chamber notes the *High Command* case in which the military tribunal considered that "to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal" (*U.S.A. v. Wilhelm von Leeb et al.*, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, (hereinafter the "*Trials of War Criminals*") Vol. XI, p. 511)
[509] *Furund`ija* Judgement, para. 249.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-99-36-T

Date: 1 September 2004

Original: English

IN THE TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr. Hans Holthuis**

Judgement of: **1 September 2004**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Anna Richterova
Ms. Ann Sutherland
Mr. Julian Nicholls

Counsel for the Accused:

Mr. John Ackerman
Mr. David Cunningham

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VI. THE REGIONAL LEVEL OF AUTHORITY

A. The Autonomous Region of Krajina

1. The establishment of the ARK

163. Although the law applicable in the SRBH did not provide for any intermediate level of government between the republican level and the municipal level,[415] the Constitution allowed for regional associations of municipalities to be formed for limited purposes, such as that of economic cooperation.[416]

164. In early 1991, the SDS embarked on a programme of regionalisation, the ultimate object of which was the implementation of the Strategic Plan. The SDS established Bosnian Serb controlled areas by linking Bosnian Serb populated municipalities together and by establishing parallel government bodies, with a view to removing that territory from the effective control of the authorities of the SRBH. In this way the foundations for an ethnically pure Bosnian Serb state were laid.[417]

165. On 7 April 1991, the SDS Regional Board decided to create the Community of Municipalities of Bosnian Krajina ("ZOBK").[418] Vojo Kuprešanin was elected President of the ZOBK Assembly, while the Accused was elected First Vice-President and Dragan Knežević was elected Second Vice-President.[419] The ZOBK was composed of sixteen municipalities from the Bosnian Krajina, all of which, except Ključ, had substantial Bosnian Serb majorities.[420] The purported purpose behind the establishment of the ZOBK was to rectify the economic neglect of and discrimination against the municipalities in the Bosnian Krajina by the Bosnian authorities in

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[415] Patrick Treanor, T. 18709-18710.

[416] There was no allowance for associations on the basis of nationality. Prior to 1990, there were two regional associations: Banja Luka and Bihać; Robert Donia T. 851; Patrick Treanor, T. 18709-18711; BT-7, T. 3097 (closed session); BT-13, T. 4591 (closed session).

[417] Robert Donia, T. 850, 1177-1178; ex. P53, "Expert Report of Robert Donia", p. 41; Mevludin Sejmenović, T. 12098, 12136-12142; BT-95, T. 19492-19493 (closed session); Milorad Dodik, T. 20466; Patrick Treanor, T. 18710-18712; Boro Blagojević, T. 21856; Mirsad Mujadžić, ex. P1601, T. 3631-3633; ex. P13, "Transcript of a meeting of the SDS of BiH, held on 12 July 1991"; ex. P20/P2464, "Minutes of SDS Party Council session", 15 October 1991; ex. P17, "Minutes of 2nd session of Assembly of Serbian People of Bosnia-Herzegovina", 21 November 1991; ex. P24, "Transcript of the 3rd session of the Assembly of the SerBiH", 11 December 1991.

[418] The Founding Assembly of the ZOBK was held on 25 April 1991: Robert Donia, T. 1083-1084; ex. P53, "Expert Report of Robert Donia", p. 44. *See* also ex. P160, "*Oslobođenje* newspaper article", including speeches of the Accused and Vojo Kuprešanin at the Founding Session of the ZOBK.

[419] Ex. P66, "Decision on the election of the president of the ZOBK Assembly"; ex. P67, "Decision on the Election of the First Vice-President of the ZOBK Assembly"; ex. P68, "Decision on the Election of the Second Vice-President of the ZOBK Assembly"; Robert Donia, T. 1089.

[420] The founding members of the ZOBK were the municipalities of Banja Luka, Bosanska Dubica, Bosanska Gradiška, Bosanski Petrovac, Bosansko Grahovo, Čelinac, Glamoč, Kupres, Ključ, Laktaši, Mrkonjić Grad, Prnjavor, Titov Drvar, Skender Vakuf, Šipovo and Srbac. *See* ex. P2354, "Statute of the ZOBK", Article 1; Robert Donia, T. 1083-1085; ex. P53, "Expert Report of Robert Donia", pp. 46-48.

ARK Official Gazette.[504] In addition, the decisions of the ARK Crisis Staff were sent to the Banja Luka Radio Station to be read out on air, as well as to the newspaper *Glas* for publication.[505]

196. The ARK Crisis Staff exercised the powers and functions of the ARK, with the proviso that its decisions had to be ratified by the ARK Assembly.[506] On 17 July 1992, all decisions and conclusions adopted by the ARK Crisis Staff and the ARK War Presidency were ratified by the ARK Assembly at its 18th session.[507] There is no indication that the ARK War Presidency was disbanded at this time. On the contrary, the ARK War Presidency continued to meet at least until 8 September 1992, just one week prior to the adoption of the SerBiH constitutional amendment that abolished the ARK as a territorial unit of the SerBiH.[508] However, the trial record does not include any decision or reference to a decision of the ARK Crisis Staff issued after 17 July 1992 and the Trial Chamber is satisfied that by this date, in practice, the ARK Crisis Staff had stopped exercising its powers and functions.

C. Authority of the ARK Crisis Staff

197. The Trial Chamber is satisfied that between 5 May 1992 and 17 July 1992, when the ARK Crisis Staff/War Presidency stopped functioning, the ARK Crisis Staff and later the ARK War Presidency[509] were organs of authority in the ARK with *de facto* authority over the municipalities and the police and with great influence over the army and Serb paramilitary groups. The extent and limits of this authority and influence will be discussed below.

198. In the view of the Trial Chamber, one of the most important indicators of the ARK Crisis Staff's authority lies in its composition and the attendance of meetings by representatives of municipal authorities.[510] This composition and attendance not only secured the ARK Crisis Staff's authority and influence over the various bodies represented on it, but also made sure that in the eyes of the public the ARK Crisis Staff was seen to be vested with such authority and influence.

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[504] Boro Blagojević, T. 21894, 21893-21902; ex. P227, "ARK Official Gazette"; ex. P258, "ARK Official Gazette".
[505] Ex. P491, "Transcript of radio broadcast of ARK Crisis Staff conclusions", dated 10 May 1992; ex. P492 "*Glas* newspaper article", referring to ARK Crisis Staff decisions, dated 11 May 1992.
[506] Ex. P227, "ARK Official Gazette", ARK Crisis Staff decision, dated 26 May 1992, item 1: "Decisions of the Crisis Staff are binding for all crisis staffs in the municipalities. These decisions of the Crisis Staff shall be submitted for ratification to the Assembly of the Autonomous Region of Krajina as soon as it is able to convene".
[507] Ex. P285, "Extract from the minutes of the 18th session of the ARK Assembly", held on 17 July 1992: of the 99 Assembly Members present, 98 voted in favour of this decision and one voted against. *See* also Patrick Treanor, T. 21007-21008; Dobrivoje Vidić, T. 23079-23082.
[508] Ex. P2351, "Expert Report of Patrick Treanor", pp. 30-31, note 107. In mid-September 1992, after the VRS had secured its control over the Posavina Corridor, the ARK and the other four Serbian Autonomous Districts were abolished as territorial units of the SerBiH by way of an amendment of the Constitution of the SerBiH: ex. P2351, "Expert Report of Patrick Treanor", p. 31; BT-95, T. 19619 (closed session).
[509] References to the ARK Crisis Staff in the present and in the following chapters also include the ARK War Presidency.
[510] *See* para. 193 *supra*.

199. Evidence tends to indicate that the meetings of the ARK Crisis Staff were more or less conducted in an informal manner and without many procedural concerns.[511] The Trial Chamber is satisfied that this informality did not affect the executive and binding force of the decisions and the authority of the ARK Crisis Staff. Moreover, the fact that not all core members of the ARK Crisis Staff were present at each and every meeting[512] and the fact that most of the members of the ARK Crisis Staff were from Banja Luka or based in Banja Luka, does not detract from the authority of the ARK Crisis Staff.

1. The authority of the ARK Crisis Staff with respect to municipal authorities

200. The ARK Crisis Staff, assuming all powers and functions of the ARK Assembly, acted as an intermediate level of authority between the SerBiH and the municipalities. Within the area of the ARK's jurisdiction and the framework of the instructions received from the SerBiH, the ARK Crisis Staff exercised *de facto* authority over the municipalities and co-ordinated their work.[513] Although no single document from the SDS SerRBiH leadership or the SerBiH authorities was produced at trial that explicitly addresses the normative relationship between the ARK Crisis Staff and municipal authorities, one document issued by the SDS Main Bord's Executive Committee specifically refers to the role of the ARK Crisis Staff as set out above.[514]

201. It is noted that a number of municipalities, including Prijedor, Bosanska Krupa and Sanski Most, had started implementing certain aspects of the Strategic Plan even before the ARK Crisis Staff was established and before it issued instructions aimed at the implementation of the Strategic Plan.[515] The Trial Chamber is of the view that this fact did not diminish the authority of the ARK Crisis Staff to co-ordinate the municipalities following its establishment. Similarly, the Trial

[511] Dobrivoje Vidić, T. 23072; Predrag Radić, T. 22074; Boro Blagaojević, T. 21787; Boro Blagojević, the secretary of the ARK Crisis Staff, also gave evidence that no minutes of ARK Crisis Staff meetings were kept; T. 21728, 21808, 21887-21890. Other witnesses testified to the contrary that minutes were kept: Pedrag Radić, T. 22074-22076; Branko Cvijić, T. 21442.

[512] Milorad Sajić,T. 23627-23630; Boro Blagojević, T. 21736-21738; Zoran Jokić, T. 23964-23967.

[513] In this context, *see* also A., *supra*, "The Autonomous Region of Krajina".

[514] On 24 February 1992, the Executive Committee of the SDS Main Board appointed Radislav Vukić as the "in-charge co-ordinator" for the ARK. The decision sets out his duties: a) to co-ordinate and take responsibility for the activities of the municipal boards of the SDS in the ARK; b) to ensure the implementation of decisions, conclusions and attitudes of the assembly of the Serbian People of Bosnia and Herzegovina and its Ministerial Council, in cooperation with the presidents of the assembly and the ARK government; c) to take part in the work of the ARK Crisis Staff and d) to keep the Executive Committee of the SDS of Bosnia and Herzegovina duly and comprehensively informed. This decision was copied to all Municipal Boards of the SDS of the ARK as well as to the Presidents of the SerBiH Assembly and the ARK government: ex. P116, "Decision of the SDS Executive Board", dated 24 February 1992.

[515] For example, the Prijedor Crisis Staff enforced dismissals of non-Serbs before any such decision by the ARK Crisis Staff: ex. P1174-P1176, "Decisions of the Prijedor Crisis Staff on dismisslas"; Predrag Radić, T. 22046-22053. The Sanski Most Crisis Staff issued decisions regarding dismissals and disarmament before 5 May 1992: ex. P621, "Decision of the Sanski Most Crisis Staff"; ex. P626, "Decision of the Sanski Most Crisis Staff". The take-over of Bosanska Krupa began on 21-22 April 1992, well before the formation of the ARK Crisis Staff: BT-56, T. 17449; BT-55, T. 17536; *see* also ex. DB118, "Order of the Bosanska Krupa War Presidency"; ex. P2077, "Order of the Bosanska Krupa Crisis Staff on the evacuation of the population". For Bosanski Petrovac, *see* Jovica Radojko, T. 20357.

Chamber is convinced that the fact that some municipal leaders had close connections to and direct interaction with the authorities at the republican level[516] did not detract from the ARK Crisis Staff's role in co-ordinating the implementation of the Strategic Plan by the municipalities.

202. Article 35 of the ARK Statute provided that decisions and conclusions of the ARK Assembly were binding for the member municipalities "only after they had been approved by the assemblies of the respective municipalities".[517] On 15 June 1992, the ARK Crisis Staff amended this article to the effect that decisions and conclusions of the Assembly "must be respected by the municipalities".[518] The amendment of this article did not follow the procedure provided for by the ARK Statute[519] and thus, the above decision of the ARK Crisis Staff was legally *ultra vires*.[520] Nevertheless, as will be shown in the following paragraphs, the Trial Chamber is satisfied that the municipalities accepted the authority of the ARK Crisis Staff to issue decisions that were directly binding on them, regardless of the original wording of Article 35 of the ARK Statute.

203. From the moment the ARK Crisis Staff was established, it was repeatedly affirmed that it was a body superior to municipal authorities. At a press conference, held on 6 May 1992, the Accused stated that the decisions of the ARK Crisis Staff "must be followed unconditionally and unquestioningly"[521] and that these decisions "must be implemented, without objections, in the 38 ARK municipalities".[522] On 9 May 1992, the ARK Crisis Staff issued a decision stating that "[a]ll decisions and conclusions of the Crisis Staff of the ARK are binding for all the municipalities" and that "[o]bjections to or appeals against decrees from the previous paragraph will not delay their implementation".[523] Again, on 26 May 1992, the ARK Crisis Staff concluded that it had "absolute support" and declared itself "the highest organ of authority in the Autonomous Region of Krajina, as the Assembly of the Autonomous Region of Krajina cannot function due to objective and subjective circumstances". It further concluded that "[d]ecisions of the Crisis Staff are binding for all crisis staffs in the municipalities".[524]

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[516] BT-104, T. 18498, 18501 (closed session); Jovica Radojko, T. 20236-20238.
[517] Ex.P80, "ARK Statute", Article 35, second paragraph.
[518] Ex. P258, "ARK Official Gazette", decision of 15 June 1992.
[519] Article 38 of the "ARK Statute" provided as follows: "Proposals to amend the Statute of the Autonomous Region of Krajina may be submitted by the Assembly, the assemblies of the member municipalities and the Executive Council. A proposal referred to in the preceding paragraph shall be communicated to the assemblies of the member municipalities for consideration in order to obtain their opinions. After the opinions have been obtained or after the given deadline has expired, the Assembly shall consider the draft proposal for amendment of the Statute and transmit it to the assemblies of the member municipalities to obtain their consent. Having obtained the consent referring in the preceding paragraph, the Assembly shall declare the amendment to the Statute adopted", ex. P80, "ARK Statute".
[520] Patrick Treanor, T. 20949; Branko Cvijić, T. 21415; Boro Blagojević, T. 21769.
[521] Ex. P177, "*Glas* newspaper article", dated 7 May 1992.
[522] Ex. P2326 (under seal); BT-94, T. 18158.
[523] Ex. P182, "Decision of the ARK Crisis Staff", dated 9 May 1992, item 1.
[524] Ex. P277, "ARK Official Gazette", conclusions of 26 May 1992, p. 29, item 1. *See* also ex. P2326, which contains a *Glas* newspaper article dated 17 July 1992 (under seal). The Accused stated in the context of the ratification of the ARK

204. The *de facto* authority over the municipal authorities that the ARK Crisis Staff exercised in its co-ordinating role was not unlimited, especially since the ARK Crisis Staff could not enforce its decisions.[525] There was no formally established mechanism for imposing sanctions on the municipalities in case of failure to implement ARK Crisis Staff decisions.[526] In some instances, this allowed some municipal authorities to act independently.[527]

205. With the exception of Prijedor municipality, all ARK municipalities unquestionably accepted the authority of the ARK Crisis Staff to issue instructions that were binding upon them. For that reason the municipalities maintained communications with the ARK Crisis Staff commensurate with such a relationship.[528] A strong indicator of the ARK Crisis Staff's authority

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Assembly of all decisions of the ARK Crisis Staff that "these decisions are passed by the ARK Presidency, by all the members of the ARK Presidency and all the presidents of the municipal War Presidencies. Therefore, there could not be a more legitimate organ than that. All presidents across 30-38 municipalities and the complete official ARK leadership".

[525] The Trial Chamber reached this conclusion mainly on the basis of the available evidence of communication between the municipal Crisis Staffs on the one hand and the ARK Crisis Staff and the ARK War Presidency on the other hand, as well as the available evidence on implementation by the municipal bodies of the decisions issued by the regional body. *See, e.g.*, ex. P2351, "Expert Report of Patrick Treanor", pp. 26, 40-62, 71-72. Predrag Radić gave evidence that "the Crisis Staff and the ARK is not something that just turned up... they had received some sort of *de jure* authority. But as to whether they had authority to force someone to implement something like that, I am not aware of this", T. 21976, 21983.

[526] Patrick Treanor, T. 20958-24959; Dobrivoje Vidić, T. 22969. Jovica Radojko, however, gave evidence that there were two informal mechanisms exerting pressure on municipal authorities to implement ARK Crisis Staff decisions – one was through the people: "They would apply various methods to start hounding us, to start protesting against what we did, on various occasions armed men broke into our offices"; the second mechanism was through the army that constantly exerted pressure on the municipal authorities, T. 20132-20133, 20139-20140, 20152.

[527] For example, Predrag Mitraković, a member of the Banja Luka War Presidency stated that "We believe that we have jurisdiction over our municipality, although we do respect hierarchy. That is why we have suspended the decisions of the ARK Crisis Staff in two cases only": ex. P2326, entry of 2 July 1992 (under seal). Ibrahim Fazlagić gave evidence that the decision of the ARK Crisis Staff, dated 9 May 1992, stating that "due to abuses of work, the *Atlas* travel agency is prohibited from further work", has not been implemented, without further consequences, T. 4303-4306; ex. P227 "ARK Official Gazette", decision of 9 May, item 6.

[528] In his expert report, referring to the communication between the ARK Crisis Staff and the ARK municipalities, Patrick Treanor concluded that, with the exception of Prijedor municipality, "explicit references by municipal crisis staffs or war presidencies to a lack of communication, or to an inability or failure to communicate, either upward or downward, are absent" and that "statements by municipal crisis staffs or war presidencies denying a need or obligation to communicate, either upward or downward, are absent", further that "statements by municipal crisis staffs or war presidencies denying an obligation to implement directives of the ARK Crisis Staff or War Presidency (and thus implicitly denying an obligation to communicate), are absent": ex. P2351, "Expert Report of Patrick Treanor", p. 61. *See* Jovica Radojko, the Secretary of Bosanski Petrovac municipality, who considered some of the decisions of the ARK Crisis Staff to be illegal, gave evidence that decisions of the ARK Crisis Staff were formally binding on the municipality and that it would have been very dangerous for the president or for the entire municipal Crisis Staff not to accept or observe the decisions of the ARK Crisis Staff, T. 20151-20152, 20346. *See* also ex. P1879, "Document from the Bosanski Petrovac Crisis Staff", outlining which of the instructions from the ARK Crisis Staff have been implemented. BT-92 gave evidence that the municipal Crisis Staff had to implement the decisions adopted by the ARK Crisis Staff. He stated that decisions of municipal crisis staffs were not taken outside the framework of the decisions of the ARK Crisis Staff, T. 19784-19785, 19908 (closed session). BT-79 gave evidence that in most instances the instructions of the regional level of authority were carried out, T. 11509-11510 (closed session). Amir Džonlić gave evidence that the decisions of the ARK Crisis Staff were binding on the Assembly of Banja Luka Municipality, T. 2473-2475; Predrag Radić gave evidence that the ARK Crisis Staff had direct control over some of the municipalities within the ARK. Depending on the people in the respective municipalities, the extent of this control varied, T. 22266-22268; BT-13, T. 4613-4614 (closed session); ex. P196, "Minutes from the session of the Ključ Crisis Staff" held on 13 and 14 May 1992; ex. P1010, "Report on the work of the Ključ Crisis Staff in the period from 15 May 1992 to July 1992", p. 4: "At every meeting, the Crisis Staff of the Municipal Assembly considered the conclusions of the Banja Luka Regional Crisis Staff which were binding as regards all issues connected with life and work in the Municipality".

municipalities did not question the authority of the ARK Crisis Staff. On the contrary, they expressly stated that the decisions of the ARK Crisis Staff had to be implemented.[533] It is of note that in this same statement, the municipalities point out that most of their previous proposals to the ARK Crisis Staff "have been adopted and have been incorporated into the official positions of the Crisis Staff taken at its 8 June 1992 session".[534]

207. As stated, the sole apparent exception to the municipalities' adherence to the authority of the ARK Crisis Staff is that of Prijedor municipality, where an open dispute between the municipal and the regional Crisis Staffs seems to have occurred.[535] On 23 June 1992, the Prijedor Crisis Staff issued a decision in which it rejected, and claimed to be invalid, decisions of the ARK Crisis Staff enacted prior to 22 June 1992. Yet this same decision stated that the Prijedor Crisis Staff would implement ARK Crisis Staff acts enacted after 22 June 1992.[536] On 25 June 1992, the Prijedor Crisis Staff also challenged the authority of the ARK Government.[537]

208. The Trial Chamber is satisfied that the position of the Prijedor Crisis Staff *vis-à-vis* the authorities of the ARK in general and the ARK Crisis Staff in particular, resulted from a dispute concerning the composition of the ARK Crisis Staff, on which the authorities of Prijedor municipality felt they were underrepresented.[538] Notwithstanding this dispute, the Prijedor Crisis Staff decided to implement the decisions of the ARK Crisis Staff.[539] According to the decision on the establishment of the Prijedor Crisis Staff, dated 20 May 1992, the decisions of the responsible organs of the ARK are explicitly accepted to be one of the foundations for the work of the Prijedor Crisis Staff.[540] On 9 May 1992, four days after the ARK Crisis Staff was officially established,

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Sanski Most. As to the impact of this document on the Accused, *see* VIII., "The Accused's role and his responsibility in general". As to the foundation of the request expressed in this documents, *see* also VI.D., "The role of the ARK Crisis Staff in the Implementation of the Strategic Plan".

[533] Ex. P247, "Inter-municipal agreement, Sansko-Unska Area", dated 14 June 1992. Referring to the 8th session of the ARK Crisis Staff, the document states: "We request that concrete and clear replies be given to each of the conclusions reached at this session and that individuals in charge of these conclusions be held personally accountable for their implementation".

[534] Ex. P247, "Inter-municipal agreement, Sansko-Unska Area", dated 14 June 1992.

[535] In this context it is of note that Prijedor was amongst the municipalities issuing the joint statements referred to in the previous paragraph.

[536] Ex. P1261, "Extract from the Prijedor Official Gazette, decision 116, conclusion of the Prijedor Crisis Staff", dated 25 June 1992.

[537] Ex. P1267, "Extract from the Prijedor Official Gazette, decision 119, conclusion of the Prijedor Crisis Staff", dated 25 June 1992: "The Crisis Staff of Prijedor Municipality shall not implement enactments adopted by the Government of the Autonomous Region of Krajina until the Assembly of the Autonomous Region of Krajina has elected all members of the Government, respecting the principle of equal representation of municipalities through the election of their candidates for members of the Government".

[538] Ex. P2351, "Expert Report of Patrick Treanor", pp. 59, 62.

[539] Prijedor Municipality is one of the seven municipalities referred to in the previous paragraph. Hence, the remarks made in relation to that group also apply to Prijedor Municipality in particular.

[540] Ex. P1268, "Prijedor Official Gazette", decision 18, dated 20 May 1992, Article 11: "The provisions of the Constitution, the law and decisions adopted by the Assembly, the Presidency and the Government of the Serbian Republic of BiH and the responsible organs of the Autonomous Region of the Banja Luka Krajina have been and shall remain the foundation for the work of the Prijedor Municipal Crisis Staff". Article 12 of the same decision states: "The

he believed, Serbs.[387] The Appeals Chamber dismisses summarily this argument under categories 3 and 8, above.

210. Brđanin additionally relies on the testimony of Witness BT-88,[388] who also testified about the work of the Agency. The Appeals Chamber dismisses summarily this argument under category 6, above.

211. For the foregoing reasons, the Appeals Chambers concludes that Brđanin has failed to show why no reasonable trier of fact could find beyond reasonable doubt that the Agency was nothing more than an integral part of the ethnic cleansing plan. Accordingly, Brđanin's arguments are rejected.

(f) Conclusion

212. Brđanin has challenged the overall conclusion of the Trial Chamber that "[t]he ARK Crisis Staff decisions on resettlement ensured the permanent removal of non-Serbs from the territory of the ARK". The Appeals Chamber has held that the Trial Chamber did not give reasons as to why it could infer, at least from Exhibit P717 alone, whether the decision on resettlement by the "Government of the AR Krajina" mentioned in Exhibit P717 is a reference to the resettlement decisions of the ARK Crisis Staff as found by the Trial Chamber. However, the Appeals Chamber has dismissed all other errors alleged by Brđanin relating to the issue of the resettlement of the non-Serb population. The Appeals Chamber considers that the Trial Chamber relied on ample evidence to arrive at its overall conclusion, and Brđanin's own evaluation of Exhibit P717 was not an inference that the Trial Chamber had to consider. The Appeals Chamber concludes that, in any case, Brđanin has failed to demonstrate that no reasonable trier of fact could have reached the impugned conclusion. For the foregoing reasons, Brđanin's arguments related to resettlement under Alleged Error 40 are dismissed. Alleged Error 101, which is related to it,[389] is therefore also dismissed.

[387] Br|anin Appeal Brief, para. 194, referring to T. 22803, 22768, 22770.
[388] Br|anin Appeal Brief, para. 194, Confidential Annex 2 to the Br|anin Appeal Brief.
[389] Brđanin Appeal Brief, para. 282.

K. Brđanin's authority and role in the implementation of the Strategic Plan

213. Brđanin submits that the Trial Chamber committed numerous errors in its findings concerning his power and his role in the events that occurred in the territory of the ARK in 1991 and 1992. The Appeals Chamber will address these challenges under three main categories: (1) Brđanin's power before the creation of the ARK Crisis Staff; (2) Brđanin's role in the implementation of the Strategic Plan; and (3) Brđanin's position after the abolishment of the ARK Crisis Staff.

1. Brđanin's knowledge of, and contribution to, the Strategic Plan

214. Brđanin submits that the Trial Chamber made an erroneous finding concerning his knowledge of and contribution to the Strategic Plan.[390] Brđanin contends that there is no evidence to support the Trial Chamber's conclusion beyond reasonable doubt that, along with the Bosnian Serb leadership, he supported the Strategic Plan, and that he knew that the Strategic Plan could only be implemented by the use of force and fear (Alleged Error 48).[391]

215. Regarding Brđanin's alleged crucial and substantial contribution to the implementation of the Strategic Plan, the Prosecution refers to Exhibit P89 (the same document as Exhibit P22) – an order signed by Brđanin as coordinator for implementing decisions – to show that Brđanin was an essential link between the leadership of the SDS (and hence the SerBiH government) and the municipalities in the ARK.[392]

216. As to Brđanin's knowledge that the Strategic Plan could only be implemented through force and fear, the Appeals Chamber notes that Brđanin has failed to substantiate his claim.[393] Brđanin merely refers to his arguments put forward against the Trial Chamber's finding that the "Bosnian Serb leadership knew that the Strategic Plan could only be implemented by the use of force and fear".[394] The Appeals Chamber has already found that Brđanin has failed to demonstrate that no

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[390] In his Notice of Appeal, Brđanin also alleged a factual error in Paragraph 369 of the Trial Judgement (Brđanin Notice of Appeal, para. 64, Alleged Error 62). The Appeals Chamber considers this argument to have been withdrawn (Brđanin Appeal Brief, para. 2).
[391] Brđanin Appeal Brief, para. 209; Trial Judgement, para. 305.
[392] Prosecution Response Brief, para. 6.193. Regarding Brđanin's assertion that he neither supported the Strategic Plan nor knew that the Strategic Plan could only be implemented by the use of force and fear, the Prosecution referred to the arguments on Alleged Error 1 (Prosecution Appeal Brief, fn. 24).
[393] Brđanin refers only to his arguments challenging the Bosnian Serb leadership's knowledge that the Strategic Plan could only be implemented by the use of force and fear (Brđanin Appeal Brief, para. 209, referring to Brđanin Appeal Brief, paras 5-9; Alleged Errors 1, 48), without challenging the Trial Chamber's finding regarding *his* knowledge of the use of force and fear.
[394] Trial Judgement, paras 65, 67.

the re-population of the area with Bosnian Serb refugees coming from other parts of Bosnia and Herzegovina and Croatia.[668] The resettlement policy within the territory of the Bosnian Krajina was coordinated at the regional level by the ARK Crisis Staff. The ARK Crisis Staff's decisions on the resettlement of non-Serbs are indicative of its involvement in the furtherance of the Strategic Plan. The following analysis supports this finding.

249. The resettlement policy advocated by the ARK Crisis Staff was set out in two decisions issued in May 1992. On 28 May 1992, the ARK Crisis Staff stated:

> If Muslims or Croats or SDA and HDZ members wish to move out of the ARK they must enable endangered Serbs to move into their places.[669]

The following day, on 29 May 1992, the ARK Crisis Staff stated:

> It has been decided that all Muslims and Croats, who so wish, should be able to move out of the area of the Autonomous Region of Krajina, but on condition that Serbs living outside the Serbian autonomous districts and regions are allowed to move into the territories of the Serbian Republic of Bosnia and Herzegovina and the Autonomous Region of Krajina. In this manner, a resettlement of people from one part of the former SRBH/Socialist Republic of Bosnian and Herzegovina/to another would be carried out in an organised manner.[670]

250. Municipal organs within the ARK discussed the ARK Crisis Staff decision of 29 May 1992 and called for its implementation. The Petrovac Municipal Assembly decided on 3 June 1992 to form a board for the implementation of the decision.[671] On 4 June 1992, the Ključ Municipal Assembly issued a decision on the criteria and conditions under which all citizens wishing to leave the municipality would be permitted to leave.[672] On 23 June 1992, the Sanski Most Crisis Staff stated that municipal representatives in charge of the resettlement of population had to report back to the ARK leadership:

> Every municipality on the territory of the Autonomous Region of Krajina, shall appoint one representative for issues connected to removal and exchange of population and prisoners and report/?the name/ by fax to Vojo Kuprešanin.[673]

251. According to a report submitted to the CSB by the Commission for the Inspection of the municipalities and the Prijedor, Bosanski Novi and Sanski Most SJBs, the resettlement of Bosnian Muslims and Bosnian Croats from the Bosnian Krajina occurred in furtherance of both the ARK

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[668] *See* IX.C.2., "Deportation and Inhumane Acts".
[669] *See, e.g.,* ex. P211, "ARK Crisis Staff Decision" of 28 May 1992.
[670] Ex. P227, "ARK Official Gazette", Conclusions reached at the ARK Crisis Staff meeting held on 29 May 1992, p. 41, Item 1; According to Ex. P240, the ARK Crisis Staff issued another decision on 10 June 1992 which provided: "Only children, women and old people may voluntarily, that is, of their own free will, leave the Autonomous Region of Krajina. [...] The above mentioned activities should be carried out in cooperation with humanitarian organisations": ex. P240, "CSB document dated 12 June ordering all the SJBs to implement an ARK Crisis Staff decision dated 10 June 1992".
[671] Ex. P1869. "Minutes of the 24th Session of the Crisis Staff of Petrovac Municipality", dated 3 June 1992.
[672] Ex. P957, "Statement of the Ključ Municipal Assembly of 4 June 1992".
[673] Ex. P690, "Conclusions of the Sanski Most Crisis Staff adopted at a session held on 23 June 1992".

effect were not only limited to the general public, but also targeted specific individuals holding key positions in public enterprises and institutions. While in some public statements the Accused spoke out in favour of the dismissal of individuals not loyal to the SerBiH, eventually the Accused called for dismissals on a purely ethnic basis, participating in and accelerating the process of depriving many Bosnian Muslims and Bosnian Croats of their livelihood.[854]

327. The Accused, in unambiguous terms and in a frightening manner, also called upon the non-Serb population to leave the Bosnian Krajina.[855] He indicated repeatedly that only a small

[854] Ex. P137, "*Glas* newspaper article", dated 4 April 1992. *Glas* published the demands of the SOS and the persons appointed to the Crisis Staff, the creation of which was one of the demands of the SOS, and reported that: "During the negotiations another resolution was reached. The Crisis Staff entrusted a working group consisting of Radoslav Brđanin [and two others] to make arrangements by 15 April this year for initiating legal procedure for the dismissal of all *key* officials in Banja Luka enterprises who are pursuing an anti-Serbian policy"; *see* Pedrag Radić, T. 21946-21971; ex. P2326 (under seal); ex. P138, "Newspaper article", dated 5 April 1992, according to which the Accused stated at a press conference that the Banja Luka Crisis Staff "is resolute in its implementation of all the demands that have so far been decided upon. All the changes in personnel will be decided upon by April 15, so that it is proposed that meetings are held in the vital enterprises of Banja Luka, both public ones and the joint stock companies, and that the boards of directors themselves decide upon replacements for the existing management personnel. (...) Specifically, in the Post Office, we cannot have those people working in telecommunications who voted at the referendum and who are against the interests of the Serbian people. (...) The bank must be headed by a Serb, because it is necessary to prevent monetary shocks"; ex. P139, "Newspaper article", according to which, on 5 April 1992, the Accused and Radislav Vukić held a press conference to discuss the SOS requests already accepted and stated: "Their requests proved to be justified, especially now [...] because their objective is to protect the Serbian people from possible repetitions of the scenario from Bijeljina and Bosanski Brod"; ex. P154, "*Glas* newspaper article", dated 21 April 1992, in which the Accused as head of the "Commission for Standardisation of Personnel" of the Banja Luka Crisis Staff explained to what extent the policy of "ethnic levelling of personnel" has already been implemented and what changes could be expected in the future. The Accused specifically referred to the dismissals of Meho Halimić, Đevad Osmančević, Asim Skorup and others, amongst them a few Serbs. *See* further ex. P2590, "*Glas* newspaper article", dated 24 April 1992, in which the Accused issued a public statement as Vice-President of the ARK Assembly and member of the Banja Luka Crisis Staff reporting that the Crisis Staff had already completed "personnel changes" in managerial positions; ex. P2598, "*Glas* newspaper article", dated 28 April 1992, in which the Accused, as Vice-President of the ARK Assembly and "member of the Banja Luka Crisis Staff's committee responsible for the carrying out of the demands of the Serb Defense Forces" was reported stating: "If any company director refuses to comply with the committee's demands to resign from their position, they will be forcefully replaced because they will no longer tolerate for Banja Luka companies to be run by people who work against the interests of Krajina and the people"; ex. P163, "*Glas* newspaper article", dated 29 April 1992, in which the Accused stated that: "Those Serbs or other personnel who are not loyal to Krajina, who do not agree to transfer to the Serbian Territorial Defence, must leave immediately and seek other employment"; ex. P165, "*Glas* newspaper article", dated 30 April, 1 and 2 May 1992, in which the Accused, giving a press conference speaking as Vice-President of the ARK Assembly and member of the Commission for Levelling of Personnel of the Crisis Staff of Banja Luka, stated: "It has finally become clear that only people loyal to the Serbian Republic of Bosnia and Herzegovina can hold managing positions in Banja Luka and the Bosnian Krajina. [...] the Crisis Staff has no choice, and it must unconditionally meet requests for ethnic-based personnel changes, because that is the only way to preserve peace in this area". In the present statement, the Accused specifically referred to the dismissals of Ilija Zeljković, Ibrahim Fazlagić and Rudolf Karajdžić, all three being Muslim directors. *See* also ex. P169, "*Glas* newspaper article", dated 5 May 1992, in which the Accused, as member of the Banja Luka Crisis Staff and of the Commission for Ethnic Levelling of Staff in the Banja Luka Companies, was reported stating that managers who had "voted for a sovereign BiH" should "leave their positions in the shortest possible time. Otherwise they will be withdrawn by force and by members of the Serbian Defence Forces"; ex. P172, "*Oslobođenje* newspaper article", dated 6 May 1992; ex. P291, "*Glas* newspaper article", dated 26 July 1992.

[855] Ex. P2326, entry of 29 August 1992, recalling that the Accused appeared on television to state: "Those who are not loyal are free to go and the few loyal Croats and Muslims can stay. As Šešelj said about the 7000 Albanians in Kosovo, they will be treated like gold and this is exactly how we are going to treat our 1200 to 1500 Muslims and Croats (...) If Hitler, Stalin and Churchill could have working camps so can we. Oh, come on, we are in a war after all" (under seal). BT-7 gave evidence that the Accused stated in public that "we would cleanse the area of this vermin", T. 2834 (closed session). The Accused told the non-Serb population in unambiguous terms that they had nothing to seek in that area, and that they should all move away, BT-7, T. 2833-2835 (closed session). The Accused also publicly stated that non-Serbs should not store food because they would not need it, BT-21, T. 8557 (closed session); Amir Džonlić, T. 2303.

percentage of non-Serbs would be allowed to stay in the new Bosnian Serb state.[856] According to the Accused, the tiny number that remained would be used for menial work and to perform physical labour generally.[857] Although the evidence relating to the Accused's public utterances calling upon the non-Serbs to leave the Bosnian Krajina is not specific as to dates, the Trial Chamber is satisfied that these statements were at the very heart of the Accused's propaganda campaign and that he made these statements at the same time when he publicly advocated the dismissals of non-Serbs from employment, thus from early April 1992 onwards, until the end of 1992 when the process of dismissals was practically complete.

328. The Accused spoke openly against mixed marriages and on one occasion went as far as to suggest that children of mixed marriages could be thrown into the Vrbas River and those who swam out would be Serbian children.[858]

329. Moreover, he publicly suggested a campaign of retaliatory ethnicity-based murder, declaring that two Muslims would be killed in Banja Luka for every Serb killed in Sarajevo.[859]

330. The Accused's public statements had a disastrous impact on people of all ethnicities. They incited the Bosnian Serb population to commit crimes against Bosnian Muslims and Bosnian Croats. The Trial Chamber is satisfied that the Accused intentionally made a substantial contribution towards creating a climate where people were prepared to tolerate the commission of crimes and to commit crimes,[860] and where well meaning Bosnian Serbs felt dissuaded from extending any kind of assistance to non-Serbs.[861]

BT-9, referring to the speeches of the Accused, stated that: "The messages were very clear and unambiguous, that the Muslims and Croats had nothing to look for there any more, nothing to do, that this was about displacement of population, movement of population", T. 3271 (closed session). During a TV interview, the Accused stated: "I am in favour of migrations of people, I am in favour of acceptance of the factual situation", ex. P463, "Video footage".

[856] Mirsad Mujadžić, T. 13307-13308; Ibrahim Fazlagić, T. 4273; BT-106, T. 21125 (closed session); BT-7, T. 2833-2835, (closed session); BT-22, T. 4410; BT-95, T. 19695-19696 (closed session).

[857] BT-11, T. 3990 (closed session).

[858] Ex. P2326, which contains a *Glas* newspaper article dated 11 August 1992 (under seal). An extract from this article reads as follows: "In Čelinac, Muslims are allowed to move around for not more than four hours a day, and people in mixed marriages are also in disfavour. A Serbian woman married to a Muslim will be fired. The best illustration of the atmosphere in this town is the fact that for a long time their political leader was the former President of the Municipality, Radoslav Brđanin. He is the same person who, without as much as blinking an eye, said to one of his associates here in Banja Luka: "We shall throw them into the Vrbas and those who swim out are certainly Serbs". This was his reply to the question as to what to do with the children from mixed marriages. The politics created by such a man must inevitably bring such results as we find there these days". Predrag Radić, when asked about the worst statements of the Accused, referred to those about mixed marriages, T. 22314.

[859] BT-20, T. 5237 (closed session); BT-94, T. 18118 (private session).

[860] BT-19 stated that "it was terrible (...) to see normal people living together and without (...) any criminal instinct, to become killing machines in a period of weeks and months, through the terrible power of the media, completely under control and used as a propaganda instrument to disseminate hatred", T. 20654 (closed session). BT-94 gave evidence that "it was necessary to demonise the opposite side for – in order to convince me that my neighbours with whom I had lived for years are now my enemies", T. 24673. BT-94 also stated that "the media were not calling for genocide, but were creating an atmosphere which led to the misfortune that occurred", T. 18166. "You could not hear anyone say: "Let's go and kill everyone in the village. Let's raze Srebrenica to the ground. Let's destroy them." (...) Similarly, in

findings in relation to the crimes charged will be addressed below in the sections dealing with these charges.

1. Joint Criminal Enterprise

340. In the Indictment, the Prosecution alternatively pleads the Accused's individual criminal responsibility pursuant to the first and third categories of JCE.[874] With respect to the first category of JCE the Prosecution alleges that "[t]he purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Counts 1 through 12".[875] The alternative pleading of the third category of JCE reads as follows: "[The Accused] is individually responsible for the crimes enumerated in Counts 1 to 7 inclusive and Counts 10, 11 and 12 on the basis that these crimes were natural and foreseeable consequences of the acts described in paragraphs 58 and 59 *infra*."[876] Paragraphs 58 and 59 relate to Count 8 (deportation) and Count 9 (forcible transfer).

341. For both the first and the third categories of JCE the Prosecution must, *inter alia*, prove the existence of a common plan that amounts to, or involves, an understanding or an agreement to commit a crime provided for in the Statute ("Common Plan").[877] The Common Plan pursuant to the first category of JCE charged in the Indictment would amount to, or involve, an understanding or an agreement between the members of the JCE to commit the crimes charged in Counts 1 through 12, while the Common Plan pursuant to the third category of JCE charged in the Indictment would amount to, or involve, an understanding or an agreement between the members of the JCE to commit the crimes charged in Counts 8 and 9. In the context of the third category of JCE, it is alleged that the crimes charged in Counts 1 to 7 inclusive and Counts 10, 11 and 12 were natural and foreseeable consequences of the crimes charged in Counts 8 and 9.

342. While the Common Plan necessarily has to amount to, or involve, an understanding or an agreement between two or more persons that they will commit a crime within the Statute, the underlying purpose for entering into such an agreement (*i.e.*, the ultimate aim pursued by the commission of the crimes) is irrelevant for the purposes of establishing individual criminal responsibility pursuant to the theory of JCE.

343. The Prosecution alleges that in addition to the Accused, "[a] great many individuals participated in this joint criminal enterprise, including [...] Momir Talić, other members of the ARK Crisis Staff, the leadership of the SerBiH and the SDS, including Radovan Karadžić, Momčilo

[874] Rule 98*bis* Decision, para. 24.
[875] Indictment, para. 27.1.
[876] Indictment, para. 27.4.

Krajišnik and Biljana Plavšić, members of the Assembly of the Autonomous Region of Krajina and the Assembly's Executive Committee, the Serb Crisis Staffs of the ARK municipalities, the army of the Republika Srpska, Bosnian Serb paramilitary forces and others."[878]

344. The Prosecution did not allege that the Accused physically perpetrated any of the crimes charged in the Indictment.[879] Therefore, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that between the person physically committing a crime and the Accused, there was an understanding or an agreement to commit that particular crime.[880] In order to hold him responsible pursuant to the third category of JCE, the Prosecution must prove that the Accused entered into an agreement with a person to commit a particular crime (in the present case the crimes of deportation and/or forcible transfer) and that this same person physically committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon.[881]

345. The evidence does not show that any of the crimes charged in the Indictment were physically perpetrated by Momir Talić, other members of the ARK Crisis Staff,[882] the leadership of the SerBiH and the SDS (including Radovan Karadžić, Momčilo Krajišnik and Biljana Plavšić), members of the ARK Assembly and the Assembly's Executive Committee and the Serb Crisis Staffs of the ARK municipalities. As it has not been established that these persons carried out the *actus reus* of any of the crimes charged in the Indictment, the Trial Chamber will not examine the existence of a JCE between the Accused and these individuals. The *actus reus* of the crimes charged in the Indictment that have been established beyond reasonable doubt was perpetrated by members of the army,[883] the Bosnian Serb police, Serb paramilitary groups, Bosnian Serb armed civilians or unidentified individuals ("Physical Perpetrators"). While the names of the perpetrators have been established in a relatively small number of cases, in most cases the Physical Perpetrators have only been identified by the group they belonged to.

346. During the pre-trial stage of this case, the Trial Chamber ruled that if individual criminal responsibility pursuant to the theory of JCE is charged, the indictment must inform the accused, *inter alia*, of the identity of those engaged in the enterprise so far as their identity is known, but at

[877] The second category of JCE is somehow different, but will not be discussed in this Judgement.
[878] Indictment, para. 27.2.
[879] Indictment, para. 33.
[880] Decision on Form of Further Amended Indictment and Prosecution Application to Amend, para. 44. If an Accused entered into an agreement with one person to commit a specific crime and with another person to commit another crime, it would be more appropriate to speak about two separate JCEs. *See* also, para. 264 *supra*.
[881] The Trial Chamber chooses to use the term "physical perpetrators of crimes" in order to refer to the person(s) who carried out the *actus reus* of the crime(s) in question.
[882] The Prosecution has alleged that Nenad Stevandić and Slobodan Dubočanin physically perpetrated some of the crimes charged in the Indictment. The Trial Chamber is not satisfied beyond reasonable doubt that this is the case.

least by reference to their category as a group.[884] In the present Indictment, apart from the individuals for which the evidence does not show that they physically perpetrated any of the crimes charged, a JCE is alleged between the Accused and "the army of the Republika Srpska, Serb paramilitary forces and others". The Indictment does not expressly plead a JCE between the Accused and members of the police. The Trial Chamber is satisfied that the general term "others" used in the Indictment cannot be invoked to include groups that are not specifically identified, as this term does not meet the requirement of specificity in pleading. Accordingly, the Trial Chamber concludes that no JCE between the Accused and the police has been pleaded. For the same reason, the Trial Chamber will not entertain any examination of a JCE between the Accused and Serb armed civilians and unidentified individuals.

347. What remains is an alleged JCE between the Accused and members of the army and Serb paramilitary forces ("Relevant Physical Perpetrators"). The Trial Chamber in this context emphasises that for the purposes of establishing individual criminal responsibility pursuant to the theory of JCE it is not sufficient to prove an understanding or an agreement to commit a crime between the Accused and a person in charge or in control of a military or paramilitary unit committing a crime. The Accused can only be held criminally responsible under the mode of liability of JCE if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the Relevant Physical Perpetrators to commit the particular crime eventually perpetrated or if the crime perpetrated by the Relevant Physical Perpetrators is a natural and foreseeable consequence of the crime agreed upon by the Accused and the Relevant Physical Perpetrators.[885]

348. In order to examine the alleged understanding or agreement between the Accused and the Relevant Physical Perpetrators to commit any of the crimes charged in the Indictment, the Trial Chamber makes reference to the Strategic Plan identified earlier in this Judgement.

349. The Trial Chamber has already established that during the second half of 1991, the Bosnian Serb leadership, including the members of the Main Board of the SDS and other members of the SDS, as well as Serb representatives of the armed forces, elaborated the Strategic Plan, aimed at linking Serb-populated areas in BiH together, gaining control over these areas and creating a separate Bosnian Serb state, from which most non-Serbs would be permanently removed. The

[883] The army includes members of the JNA and later the VRS, the TO and military police units.
[884] Decision on Objections by Momir Talić to the Form of the Amended Indictment, para. 21, quoting from *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, Decision on Form of Second Amended Indictment, 11 May 2000, para 16.
[885] Upon request of the Trial Chamber to the parties to address this legal question, both the Prosecution and the Defence agreed with the present conclusion, Prosecution Final Trial Brief, Appendix A, para. 2; Defence Final Trial Brief, pp. 117-118.

Bosnian Serb leadership was aware that the Strategic Plan could only be implemented by the use of force and fear, thus by the commission of crimes.

350. During the following months and throughout the period relevant to the Indictment, a large number of individuals, including the Accused and many of the Relevant Physical Perpetrators, espoused the Strategic Plan and acted towards its implementation. The Trial Chamber is satisfied that all individuals espousing the Strategic Plan had the requisite *mens rea* for at least the crimes charged in Count 8 (deportation) and Count 9 (forcible transfer), *i.e.*, they intended to wilfully participate in expulsions or other coercive conduct to forcibly deport one or more person to another State without grounds permitted under international law (deportation) and to force persons to leave their territory without ground permitted under international law (forcible transfer).[886]

351. However, the Trial Chamber is of the view that the mere espousal of the Strategic Plan by the Accused on the one hand and many of the Relevant Physical Perpetrators on the other hand is not equivalent to an arrangement between them to commit a concrete crime. Indeed, the Accused and the Relevant Physical Perpetrators could espouse the Strategic Plan and form a criminal intent to commit crimes with the aim of implementing the Strategic Plan *independently from each other* and without having an understanding or entering into any agreement between them to commit a crime.

352. Moreover, the fact that the acts and conduct of an accused facilitated or contributed to the commission of a crime by another person and/or assisted in the formation of that person's criminal intent is not sufficient to establish beyond reasonable doubt that there was an understanding or an agreement between the two to commit that particular crime. An agreement between two persons to commit a crime requires a *mutual* understanding or arrangement with each other to commit a crime.

353. The Trial Chamber is satisfied that there is no direct evidence to establish such an understanding or agreement between the Accused and the Relevant Physical Perpetrators and will therefore examine whether an understanding or agreement to that effect between the Accused and the Relevant Physical Perpetrators can be inferred from the fact that they acted in unison to implement the Strategic Plan.[887] In order to draw this inference, it must be the only reasonable inference available from the evidence.

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[886] The Trial Chamber comes to this conclusion considering the evidence as a whole and particularly the evidence discussed in the following Chapters: IV., "General Overview"; VI., "The Regional Level of Authority"; C.1., *supra*, "The Accused espousal of the Strategic Plan"; IX., "Charges and Findings". This evidence establishes a pattern of criminal conduct which leads to these inferences.

[887] Pursuant to the *Tadić* Appeal Judgement, "[t]he common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise", para. 227.

354. The Trial Chamber is satisfied that the acts and conduct of the Accused, in particular his public speeches and the decisions of the ARK Crisis Staff, which can be attributed to the Accused, were aimed at the implementation of the Strategic Plan and facilitated the commission of crimes by the Relevant Physical Perpetrators. However, given the physical and structural remoteness between the Accused and the Relevant Physical Perpetrators and the fact that the Relevant Physical Perpetrators in most cases have not even been personally identified, the Trial Chamber is not satisfied that the only reasonable conclusion that may be drawn from the Accused's and the Relevant Physical Perpetrators' respective actions aimed towards the implementation of the Common Plan is that the Accused entered into an agreement with the Relevant Physical Perpetrators to commit a crime. Indeed, the Trial Chamber is satisfied that the evidence allows for other reasonable inferences to be drawn. For example, one such reasonable inference would be that both the Accused and the Relevant Physical Perpetrators, all holding the requisite *mens rea* for a particular crime and driven by the same motive to implement the Strategic Plan, furthered the commission of the same crime, without, however, entering into an agreement between them to commit that crime. Yet another reasonable inference to be drawn would be that the Relevant Physical Perpetrators committed the crimes in question in execution of orders and instructions received from their military or paramilitary superiors who intended to implement the Strategic Plan, whereby the Relevant Physical Perpetrators did not enter into an agreement with the Accused to commit these crimes.

355. The Trial Chamber is of the view that JCE is not an appropriate mode of liability to describe the individual criminal responsibility of the Accused, given the extraordinarily broad nature of this case, where the Prosecution seeks to include within a JCE a person as structurally remote from the commission of the crimes charged in the Indictment as the Accused.[888] Although JCE is applicable in relation to cases involving ethnic cleansing, as the *Tadić* Appeal Judgement recognises, it appears that, in providing for a definition of JCE, the Appeals Chamber had in mind a somewhat smaller enterprise than the one that is invoked in the present case.[889] An examination of the cases tried before this Tribunal where JCE has been applied confirms this view.[890]

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[888] The Trial Chamber refers to its previous finding that the Accused was both physically remote from the Physical Perpetrators and the latter were not subject to the structure over which the Accused exercised *de facto* authority.

[889] *Tadić* Appeal Judgement, para. 204: "An example of [the third category of JCE] would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if

356. For the foregoing reasons, the Trial Chamber, considering all the circumstances, dismisses JCE as a possible mode of liability to describe the Accused's individual criminal responsibility.

2. Planning

357. As contended by the Prosecution, the Accused in the present case did not physically perpetrate any of the crimes established.[891] Responsibility for 'planning' a crime could thus, according to the above definition, only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance. This knowledge requirement should not, however, be understood to mean that the Accused would have to be intimate with every detail of the acts committed by the physical perpetrators.

358. Although the Accused espoused the Strategic Plan, it has not been established that he personally devised it.[892] The Accused participated in its implementation mainly by virtue of his authority as President of the ARK Crisis Staff and through his public utterances. Although these acts may have set the wider framework in which crimes were committed, the Trial Chamber finds the evidence before it insufficient to conclude that the Accused was involved in the immediate preparation of the *concrete crimes*. This requirement of specificity distinguishes 'planning' from other modes of liability. In view of the remaining heads of criminal responsibility, some of which more appropriately characterise the acts and the conduct of the Accused, the Trial Chamber dismisses 'planning' as a mode of liability to describe the individual criminal responsibility of the Accused.

3. Instigating

359. Many of the decisions of the ARK Crisis Staff for which the Accused bears responsibility requested that certain acts amounting to crimes be carried out. Most of the decisions did not take immediate effect and required implementation by, *e.g.*, municipal organs. In this context, it is immaterial whether the physical perpetrators were subordinate to the instigator, or whether a number of other persons would necessarily have to be involved before the crime was actually committed, as long as it can be shown that there was a causal link between an act of instigation and

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these deaths were predictable." *See* also, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, paras 44-45.

[890] ICTY cases have applied JCE to enterprises of a smaller scale, limited to a specific military operation and only to members of the armed forces (*Krstić* Trial Judgement, para. 610); a restricted geographical area (*Simić* Trial Judgement, paras 984-985); a small group of armed men acting jointly to commit a certain crime (*Tadić* Appeal Judgement, paras 232 *et seq.*; *Vasiljević* Trial Judgement, para. 208); or, for the second category of JCE, to one detention camp (*Krnojelac* Trial Judgement, para. 84).

[891] Indictment, para. 33.

the commission of a particular crime. Causality needs to be established between all acts of instigation and the acts committed by the physical perpetrators, even where the former are the public utterances of the Accused.

360. The Trial Chamber has found that decisions of the ARK Crisis Staff regarding the disarmament, dismissal and resettlement of non-Serbs were systematically implemented by the municipal Crisis Staffs, the local police, and the military. Moreover, it has been abundantly proved that the Accused made several inflammatory and discriminatory statements, *inter alia*, advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay on the territory of the ARK. In light of the various positions of authority held by the Accused throughout the relevant time, these statements could only be understood by the physical perpetrators as a direct invitation and a prompting to commit crimes. Against this background, the Trial Chamber is satisfied that the Accused instigated the commission of some crimes charged in the Indictment.

361. The relation of this mode of liability to individual crimes will be analysed below in the sections dealing with the responsibility of the Accused for the specific crimes.

4. Ordering

362. The Trial Chamber has already found that the ARK Crisis Staff became the highest organ of civilian authority in the ARK, to which the municipal authorities were *de facto* subordinated. Municipal authorities maintained a clear line of communication with the ARK Crisis Staff commensurate with such a relationship: ARK Crisis Staff meetings were attended on a weekly basis by the Presidents of the member municipalities or their representatives.

363. The ARK Crisis Staff repeatedly stated that its decisions were binding on all municipalities. In addition, the municipal authorities accepted the authority of the ARK Crisis Staff to issue decisions that were directly binding on them.

364. That a number of municipalities had started implementing certain aspects of the Strategic Plan even before the ARK Crisis Staff issued instructions does not detract from the fact that, following its establishment, the ARK Crisis Staff had the authority to issue binding decisions and in fact did so, and that the municipal authorities acted pursuant to these decisions. Furthermore, the Trial Chamber is satisfied that these decisions were binding on municipal authorities even if there was no *formally* established mechanism for imposing sanctions on the municipalities in case of failure to implement ARK Crisis Staff decisions, and even if in some occasions municipal

[892] *See*, C.1, *supra*, "The Accused's espousal of the Strategic Plan".

authorities disregarded these decisions and acted independently, because the municipal authorities did not challenge the authority of the ARK Crisis Staff to issue these decisions or their binding nature.

365. The Trial Chamber has also found that the ARK Crisis Staff, as the highest civilian authority of the ARK, exercised *de facto* authority over the police in the ARK, and that through its decisions it in fact issued orders which the CSB passed down to the SJBs with the instruction to implement them.

366. As shown, ARK Crisis Staff decisions were systematically implemented by the municipal authorities and by the police in three key areas: a) the disarmament of "paramilitary groups" and confiscation of weapons; b) the dismissals of non-loyal/non-Serb professionals; and c) the resettlement of the non-Serb population. The Trial Chamber has also found that the decisions of the ARK Crisis Staff can be attributed to the Accused. Whether the ARK Crisis Staff decisions in these key areas amounted to orders to commit crimes charged in the Indictment is analysed for each crime under the heading of the responsibility of the Accused.

5. Aiding and abetting

367. The Trial Chamber is satisfied that the ARK Crisis Staff practically assisted the commission of crimes by the army, the police and paramilitary organisations by, *inter alia*, demanding the disarmament of non-Serbs through announcements and decisions setting deadlines concerning the surrender of weapons and providing for the eventual forceful confiscation of weapons. These announcements and decisions not only facilitated the Bosnian Serb armed take-over of individual municipalities but on many occasions were used as the pretext for such take-overs. The Trial Chamber has also found that the decisions of the ARK Crisis Staff can be attributed to the Accused.

368. In addition, some of the inflammatory and discriminatory statements made by the Accused, in light of the positions of authority that he held, amount to encouragement and moral support to the physical perpetrators of crimes. Moreover, the Accused made threatening public statements which had the effect of terrifying non-Serbs into wanting to leave the territory of the ARK, thus paving the way for their deportation and/or forcible transfer by others. The establishment by the ARK Crisis Staff of an Agency for the Movement of People and Exchange of Properties in Banja Luka further assisted in this regard.

369. The Trial Chamber is thus satisfied that the Accused carried out acts that consisted of practical assistance, encouragement or moral support to the principal offenders of the crimes, and that he did so in his capacity as member of the SerBiH Assembly and the ARK Assembly before the

ARK Crisis Staff was established, as President of the ARK Crisis Staff, and after it ceased to exist in his capacity as a minister in the RS Government. Whether these acts had a substantial effect on the commission of crimes charged in the Indictment by the principal offenders is analysed for each crime under the heading of the responsibility of the Accused.

6. Superior Criminal Responsibility under Article 7(3) of the Statute

370. In order to hold the Accused criminally responsible pursuant to Article 7(3) of the Statute, the Prosecution must in the first place prove a superior-subordinate relationship between the Accused and the physical perpetrators of the crimes in question. As noted above, the Physical Perpetrators committing the crimes charged in the Indictment that have been established beyond reasonable doubt include members of the Bosnian Serb military,[893] the Bosnian Serb police, Serb paramilitary groups, Bosnian Serb armed civilians and unidentified individuals. Municipal authorities were involved in the commission of the crimes charged.

371. Due to lack of specific evidence, it is not possible to examine whether a superior-subordinate relationship existed between the Accused and Bosnian Serb armed civilians or unidentified individuals. Therefore, the Trial Chamber will only look into whether the Accused had such a relationship with members of the Bosnian Serb military, the Bosnian Serb police and Serb paramilitary groups.

372. As far as the relation between the Accused and the army is concerned, the Trial Chamber is satisfied that, although the ARK Crisis Staff closely co-operated with the army and had great influence over it, the Accused as President of the ARK Crisis Staff or in any of his other positions between April and December 1992 did not have effective control over members of the army, which would entail his material ability to prevent or punish the commission of crimes by these individuals.[894]

373. Similarly, the Trial Chamber is not satisfied that, in spite of the substantial influence he exercised, the Accused as President of the ARK Crisis Staff or as a member of the Banja Luka Crisis Staff was in a superior-subordinate relationship with members of the SOS or other Serb paramilitary organisations.[895]

374. With regard to the police, the Trial Chamber has already found that the Accused, to whom the decisions of the ARK Crisis Staff can be attributed, had *de facto* authority to issue instructions

[893] The army includes members of the JNA and later the VRS, the TO and military police units.
[894] *See*, VI.C.3, "The authority of the ARK Crisis Staff with respect to the army".
[895] *See*, VI.C.4, "The authority of the ARK Crisis Staff with respect to Serbian paramilitary units".

to the police.[896] However, the Trial Chamber is satisfied that the Accused's *de facto* authority to direct the action of the police is not indicative of his alleged material ability to prevent or punish the commission of crimes by members of the police.

375. The Prosecution alleged that the superior-subordinate relationship between the Accused and the police has been established on the basis of the Accused's conferred power to dismiss Stojan Župljanin, the Chief of the CSB. The Trial Chamber acknowledges that on 31 October 1991, the Accused was told by Radovan Karadžić that he had the power to dismiss Stojan Župljanin if he was not pleased with him.[897] However, the Trial Chamber is not satisfied beyond reasonable doubt that the Accused had this power during the time relevant to the Indictment. A reasonable doubt arises in that on 27 March 1992, the SerBiH Assembly established the MUP[898] and at all times relevant to the Indictment, the police maintained a chain of command which led to the Ministry of Interior of the SerBiH.[899] Moreover, the Trial Chamber is satisfied that, in view of the implementation by the police of the Strategic Plan, it is difficult to understand that the Accused's power to dismiss Stojan Župljanin was intended by Radovan Karadžić to be used for the purposes of preventing or punishing the commission of crimes by the police. Therefore, the Trial Chamber concludes that during the time relevant to the Indictment, the Accused did not have effective control over the police which would translate into his material ability to prevent or punish the commission of crimes. There is also no concrete evidence that the Accused at any time between April and December 1992, had the dutyto report crimes as explained in paragraph 281 *supra*.

376. As far as the municipal authorities are concerned, the Trial Chamber has already found that, although the ARK Crisis Staff exercised *de facto* authority over the municipal authorities, there was no formally established mechanism for imposing sanctions on the municipalities in case of failure to implement ARK Crisis Staff decisions and that in some instances, this allowed some municipal authorities to act independently.[900] Moreover, the Trial Chamber is not satisfied beyond reasonable doubt that the *de facto* authority that the ARK Crisis staff had over the municipal authorities was

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[896] *See*, VI.C.2, "The Authority of the ARK Crisis Staff with respect of the police".
[897] Ex. P2357, "Intercepted telephone conversation between Radovan Karadžić and the Accused", dated 31 October 1991. Patrick Treanor interpreted this conversation to mean that Radovan Karadžić is encouraging the Accused to take charge of the situation, T. 18732. In this context, see also, VI.C.2, "The authority of the ARK Crisis Staff with respect to the police"; VI.C.1, "The authority of the ARK Crisis Staff with respect to municipal authorities".
[898] On 31 March 1992, Momčilo Mandić, Assistant Minister of Internal Affairs in SerBiH, sent a telex to all security centers and all the public security stations around the Republic, informing them of the establishment of the Serbian Ministry of Internal Affairs (MUP), decision taken at a meeting of the SerBiH Assembly, held on 27 March 1992, at which the Constitution of the SerBiH was ceremonially promulgated, ex. P2366. *See* also Patrick Treanor, T. 18781. The legislation on the MUP came into effect on 31 March 1992, when a Minister was appointed who answered to the SerBiH Assembly, Patrick Treanor, T. 18774-18775, 18779-18780.
[899] Prior to 31 March 1992, the police forces maintained a chain of command which led to the Ministry of Interior of the SerBiH, Patrick Treanor, T. 18774-18775, 18779-18780; BW-1, T. 23304-23306 (closed session); Milenko Savić, T. 22361-22364.
[900] *See*, VI.C.1, "The authority of the ARK Crisis Staff with respect to municipal authorities".

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sufficient to prevent the municipal authorities from being involved in the commission of the crimes charged.

377. For the foregoing reasons the Trial Chamber dismisses superior criminal responsibility under Article 7(3) of the Statute as a possible mode of liability to describe the individual criminal responsibility of the Accused.

further satisfied that these killings fulfil the element of massiveness for the crime of extermination. It is also proven that the direct perpetrators had an intention to kill or to inflict serious injury, in the reasonable knowledge that their acts or omissions were likely to cause the death of the victim.

3. The Responsibility of the Accused

466. The Trial Chamber has already dismissed JCE, planning and superior criminal responsibility under Article 7(3) of the Statute as possible modes of liability to describe the individual criminal responsibility of the Accused.[1230]

467. There is no evidence to establish that the Accused ordered or instigated the commission of the crimes of extermination and/or wilful killing charged under Counts 4 and 5 of the Indictment.

468. The Trial Chamber is not satisfied that the public utterances of the Accused, in particular his statements with respect to mixed marriages and those suggesting a campaign of retaliatory ethnicity-based murder[1231] prompted the physical perpetrators to commit any of the acts charged under Counts 4 and 5 of the Indictment, because the *nexus* between the public utterances of the Accused and the commission of the killings in question by the physical perpetrators has not been established. Moreover, neither the public utterances of the Accused nor the decisions of the ARK Crisis Staff are specific enough to constitute instructions by the Accused to the physical perpetrators to commit any of the killings charged.

(a) Wilful killing (Count 5)

469. The Trial Chamber recalls its previous finding that the decisions of the ARK Crisis Staff can be attributed to the Accused.[1232] It also found that between 9 May 1992 and 18 May 1992, the ARK Crisis Staff issued a number of decisions demanding the disarmament of "paramilitary formations" and of "individuals who illegally possess weapons", specifying that "[a]ll formations that are not in the Army of the Serbian Republic of Bosnia and Herzegovina or the Banja Luka Security Services Centre and are in the Autonomous Region of Krajina, are considered paramilitary formations and must be disarmed." Moreover, the Trial Chamber has found that, although these decisions on disarmament were not expressly restricted to non-Serbs, the disarmament operations were selectively enforced against them by the municipal civilian authorities, the CSB and the SJBs, and by the army.[1233]

[1230] *See* VIII.D., "The Accused's criminal responsibility in general".
[1231] *See* paras 328-329 *supra*.
[1232] *See* para. 319 *supra*.
[1233] *See* VI.D., "The role of the ARK Crisis Staff in the implementation of the Common Plan".

3. Responsibility of the Accused

571. The Trial Chamber has already dismissed JCE, planning and superior criminal responsibility under Article 7(3) of the Statute as possible modes of liability to describe the individual criminal responsibility of the Accused.[1474]

572. The Trial Chamber recalls its previous findings that the decisions of the ARK Crisis Staff can be attributed to the Accused,[1475] and that the ARK Crisis Staff's decisions of 28 and 29 May 1992, advocating the resettlement of the non-Serb population, were implemented by the municipal authorities and the police.[1476]

573. The Trial Chamber is not satisfied that the Accused ordered the crimes of deportation and forcible transfer. The wording of the ARK Crisis Staff's decisions of 28 and 29 May incites to action, but on its face does not order.[1477] The public utterances of the Accused are not specific enough to constitute orders to commit deportation and forcible transfer.

574. The Trial Chamber is however satisfied that the ARK Crisis Staff's decisions of 28 and 29 May 1992 prompted the municipal authorities and the police, who implemented them, to commit the crimes of deportation and forcible transfer after those dates. Although the two decisions are, not disingenuously, framed in terms of voluntary compliance, to the municipal authorities and the police they could have only meant a direct incitement to deport and forcibly transfer non-Serbs from the territory of the ARK. This is the only reasonable conclusion that may be drawn when the terms of the decisions are considered in the light of the Accused's unambiguous public statements, made repeatedly from early April 1992 onwards, calling upon the non-Serb population to leave the Bosnian Krajina and stating that only a small percentage of non-Serbs would be allowed to stay.[1478]

575. Furthermore, the Accused's espousal of the Strategic Plan, of which the crimes of deportation and forcible transfer formed an integral part, and the implementation of which he coordinated in his position as President of the ARK Crisis Staff, and his awareness that it could only be implemented through force and fear, demonstrate that he intended to induce the commission of the crimes of deportation and forcible transfer.[1479]

[1474] *See* VIII., "The Accused's Role and his Responsibility in General", *supra.*
[1475] *Ibid.*
[1476] Ex. P211, "ARK Crisis Staff Conclusions", 28 May 1992, signed by the President, Radoslav Brđanin; Ex. P227, "Official Gazette of the ARK, ARK Crisis Staff Conclusions", 29 May 1992, with a signature block of the President of the Crisis Staff Radoslav Brđanin. *See* VI.D. *supra.*
[1477] *Ibid.* Ex. P277, "ARK Crisis Staff Conclusions", 20 May 1992: "There are no reasons whatsoever for people of any nationality to move out of the ARK".
[1478] *See* VIII.C.5., "The Accused's propaganda campaign", *supra.*
[1479] *See* VIII.C.1., "The Accused's espousal of the Strategic Plan", *supra.*

3. The Responsibility of the Accused

1051. The Trial Chamber has already dismissed JCE, 'planning' and superior criminal responsibility under Article 7(3) of the Statute as possible modes of liability to describe the individual criminal responsibility of the Accused.[2635]

(a) Wilful killing, torture, destruction of property, religious buildings, deportation and forcible transfer as persecution

1052. The Trial Chamber has previously established the responsibility of the Accused for aiding and abetting certain crimes of wilful killing,[2636] torture,[2637] destruction of property and religious buildings[2638] as well as deportation and forcible transfer.[2639] The Accused has also been found responsible for instigating certain incidents of deportation and forcible transfer.[2640] For the purposes of persecution, the Trial Chamber has also found that these acts were committed with the requisite intent by the physical perpetrators.[2641] To hold the Accused responsible for these crimes under persecution, it needs to be demonstrated that the Accused also acted with discriminatory intent.

1053. The essence of the utterances made by the Accused are, in the Trial Chamber's view, instructive of his attitude towards Bosnian Muslims and Bosnian Croats. The Trial Chamber recalls that the Accused repeatedly used derogatory and abusive language when referring to Bosnian Muslims and Bosnian Croats in public.[2642] Moreover, he openly labelled these people 'second rate'[2643] or 'vermin'[2644] and stated that in a new Serbian state, the few Bosnian Muslims and Bosnian Croats allowed to stay would be used to perform menial work.[2645] The Trial Chamber is thus satisfied that not only the physical perpetrators, but also the Accused possessed the intent to discriminate against the Bosnian Muslim and Bosnian Croat victims.

1054. The Trial Chamber finds that the Accused aided and abetted persecution with respect to wilful killing, torture, destruction of properties, religious and cultural buildings as well as deportation and forcible transfer. The Accused also instigated persecution with respect to deportation and forcible transfer.

[2635] *See* VIII.D., "The Accused's criminal responsibility in general".
[2636] Count 5, *see* para. 476 *supra*.
[2637] Counts 6 and 7, *see* paras 535-538 *supra*.
[2638] Counts 11-12, *see* paras 669, 677-678 *supra*.
[2639] Counts 8 and 9, *see* paras 576-583 *supra*.
[2640] *Ibid.*
[2641] *See* "The facts and findings" earlier in this chapter.
[2642] See VIII.C.5., "The Accused's Propaganda Campaign".
[2643] BT-9, T. 3204 (closed session).
[2644] BT-7, T. 2834 (closed session).
[2645] BT-11, T. 3990 (closed session).

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(b) Appropriations, physical violence, rapes, sexual assaults, constant humiliation and degradation as persecution

1055. Earlier in this chapter, the Trial Chamber has found that Bosnian Muslims and Bosnian Croats were exposed to physical violence, rapes, sexual assaults, as well as to constant humiliation and degradation by Bosnian Serb soldiers and policemen.[2646] In addition, the Trial Chamber has found that there was extensive appropriation of non-Serb property by Bosnian Serb forces.[2647] The Trial Chamber is satisfied that the Accused aided and abetted the commission of these crimes by the physical perpetrators.

1056. The Trial Chamber is satisfied that the ARK Crisis Staff decisions on disarmament issued between 9 May 1992 and 18 May 1992,[2648] which can be personally attributed to Accused,[2649] had the effect of creating an imbalance of arms and weapons favouring the Bosnian Serbs in the Bosnian Krajina. The Trial Chamber finds that the decisions on disarmament were selectively enforced on non-Serbs,[2650] while at the same time, the Bosnian Serb population was arming itself on a massive scale.[2651] Furthermore, at the municipal level, where the ARK Crisis Staff decisions with respect to disarmament were implemented, deadlines to hand over weapons were on occasion used as a pretext to attack non-Serb villages.[2652]

1057. The Trial Chamber is thus satisfied that the ARK Crisis Staff decisions on disarmament had a substantial effect on the commission of said crimes by Bosnian Serb soldiers and policemen during and immediately after the armed attacks on non-Serb towns, villages and neighbourhoods. The Trial Chamber is also satisfied that the Accused was aware that the Bosnian Serb forces were to attack non-Serb towns, villages and neighbourhoods and that through the ARK Crisis Staff decisions on disarmament, he rendered practical assistance and a substantial contribution to the Bosnian Serb forces carrying out these attacks, during which some of the crimes in question were committed.

1058. In addition, the Trial Chamber is satisfied that the Accused aided and abetted the crimes of physical violence, rapes, sexual assaults, and constant humiliation and degradation in camps and detention facilities throughout the ARK by Bosnian Serb soldiers and policemen. It has been established beyond reasonable doubt that the Accused had knowledge of the existence of these

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[2646] *See* paras 999-1020 *supra*.
[2647] *See*, XI.D.2, "Destructions. Facts and Findings".
[2648] *See* paras 242-247 *supra*.
[2649] *See* para. 319 *supra*.
[2650] *See* VI.D., "The role of the ARK Crisis Staff in the implementation of the Strategic Plan".
[2651] *See* IV., "General Overview".
[2652] *See* IV., "General Overview" and IX.D., "Destructions".

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-05-87/1-T

Date: 23 February 2011

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christoph Flügge
Judge Melville Baird

Registrar: **John Hocking**

Judgement of: **23 February 2011**

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC JUDGEMENT
WITH CONFIDENTIAL ANNEX

VOLUME I of II

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5 April 1996 – were solid blue and had an insignia showing the word "milicija".[157] The older uniforms were worn regularly by reserve police throughout the Indictment period because there was an insufficient number of the new style.[158] Evidence of witnesses indicates that sometimes regular police also wore the old solid blue uniforms.[159] Combat vests were also worn by police during the Indictment period; although not all police were issued with them.[160] These were often dark blue or black, however, regular MUP often wore green combat vests with their blue uniforms as there were not enough blue/black to go around.[161]

54. Descriptions provided by some witnesses and the Chamber's assessment of photographic evidence indicates (a) while the camouflage uniform of the police is usually described as blue, being a camouflage pattern, it could be seen by some people or in some light conditions to be predominantly black or grey, and (b) while the older solid blue uniform was a dark shade of navy blue it could appear to be a shade of black in some light conditions.[162]

55. Headwear of the regular police included helmets and dark blue baseball-style caps, with MUP insignia on the front.[163] Evidence suggests that police sometimes wore unauthorised attire, such as "Rambo-style caps and bandannas".[164]

56. The local MUP routinely carried side arms and, on occasion, long-barrel arms too.[165] These included CZ 99 pistols (a short-barrel weapon) and M-70s (automatic rifles).[166] The MUP did not have heavy artillery or tanks.[167]

(b) Special Police Units (PJPs)

57. Special Police Units (*Posebne Jedinice Policije*) ("PJPs") were established pursuant to Article 6 of the Rules on Organisation of the MUP[168] by the former Minister of the Interior, Zoran

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157 Ljubinko Cvetić, T 6700-6701; Karol Drewienkienkiewicz, Exhibit P996, para 26; K25, Exhibit P342 (*Milutinović* transcript) T 4665; K73, T 1514; K86, T 5122; Exhibit P327 (photograph no 6 depicts "milicija" insignia).

158 Ljubinko Cvetić, T 6700-6701.

159 Baton Haxhiu, T 6231; Hysni Berisha, Exhibit P587 (*Milutinović* transcript), T 4017-4018; Hazir Berisha, T 4640; Agim Jemini, Exhibit P637(*Milutinović* transcript), T 4269, 4272; Abdylhaqim Shaqiri, Exhibit P729 (*Milutinović* transcript), T 2822, 2955.

160 K73, Exhibit P331-A, para 13.

161 K73, Exhibit P331-A, para 13; Exhibit P334 (photograph depicts units wearing blue MUP uniforms and green combat vests).

162 *See* Exhibit P1311, pp 1, 5, 6, 8, 9, 10, 11.

163 *See* Exhibits P316 and P1311, p 9 (photographs depicting local MUP wearing baseball style caps and helmets). *See* also the descriptions of police by Emin Kabashi, Exhibit P424, p 4; Emin Kabashi, Exhibit P425 (*Milutinović* transcript), T 2047; K14, Exhibit P1325, p 4; Merita Dedaj, Exhibit P1030, p 4.

164 Exhibit P85, p 3.

165 John Crosland, Exhibit P1201 (*Milutinović* transcript), T 9761.

166 K86, T 5120.

167 John Crosland, Exhibit P1400, paras 16 and 36.

168 Exhibit P357, Article 6.

Sokolović, on 1 August 1993, to carry out "special security tasks" in regular circumstances and in the case of a state of emergency, with an emphasis on "combat tasks and interventions in the case of serious breaches of public law and order".[169] Such tasks included the "detection, arrest and destruction" of rebel and sabotage and terrorist groups or individual members thereof. To carry out such complex security and combat tasks, the PJP units were to be developed into "mobile, rapid, technically well-equipped and professionally trained and drilled units armed with state-of-the-art weapons".[170]

58. Members of PJPs were recruited from among active and reserve policemen in the SUPs, and other Ministry employees,[171] on the basis of age,[172] a stable mental and physical state, and "a strong sense of patriotism, courage, endurance and perseverance, [and] high moral qualities".[173] To encourage a good selection of recruits, PJP members were paid extra.[174] Once a person was on the roster of PJP members, they underwent a special training specific to the task to which they were assigned.[175] 15 PJP detachments were established, five of which were headquartered in Belgrade, and two each in Novi Sad, Priština/Prishtinë, Užice, Kragujevac and Niš.[176] The detachments were formed according to the "assembly principle", or on an *ad hoc* basis, except for the 21st Detachment which was a permanent force within the Belgrade SUP.[177] Therefore, when they were not so engaged, PJP members would perform ordinary police duties.[178] Thus, K25 generally served as a regular policeman except for those occasions when he was assigned to a PJP detachment.[179]

59. Each PJP detachment consisted of four to seven police companies, including support platoons.[180] There were between 500-600 men in each detachment, while each company within the detachment was composed of around 150-180 men.[181] A squad, the smallest unit in a detachment, comprised eight men: a commander, a sniper, a machine-gunner, a grenade-launcher operator, and four riflemen.[182]

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169 Exhibit P58, para 2; Exhibit P1360, pp 1 and 3. *See* also Vlastimir Đorđević, T 9447-9448; Ljubinko Cvetić, T 6603; Exhibit D933, pp 10-12.
170 Exhibit P1360, pp 3-4.
171 Exhibit P58, para 4; Exhibit P1360, p 2.
172 The age limit was 35 years of age, or 45 years in the case of officers. Exhibit P1360, p 2.
173 Exhibit P1360, p 2.
174 Exhibit P58, para 6; Exhibit P1360, p 6.
175 Vlastimir Đorđević, T 9449.
176 Exhibit P58, para 1; Exhibit P1360, p 1.
177 Exhibit P1360, p 1.
178 Zarko Braković, Exhibit P759, para 12.
179 K25, Exhibit P340-A, p 2; K25, Exhibit P342, T 4723.
180 Exhibit P1360, p 1.
181 K79, Exhibit P1260, T 9585; K25, Exhibit P340-A, p 7.
182 Exhibit P1360, pp 1-2.

were a natural and foreseeable consequence of a common criminal purpose (third category of JCE).[6392]

(b) Planning

1869. The *actus reus* of "planning" requires that one or more persons plan or design, at both the preparatory and execution phases, the criminal conduct constituting one or more crimes, provided for in the Statute, which are later perpetrated.[6393] Such planning need only be a feature which contributes substantially to the criminal conduct.[6394] As regards the *mens rea*, the accused must have acted with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed, in the execution of that plan.[6395]

(c) Instigating

1870. The term "instigating" has been defined to mean "prompting another to commit an offence."[6396] Both acts and omissions may constitute instigating, which covers express and implied conduct.[6397] Additionally, liability for instigating does not require that the Accused have "effective control" over the perpetrator or perpetrators.[6398] There must be proof of a nexus between the instigation and the perpetration of the crime, which is satisfied where the particular conduct substantially contributes to the commission of the crime.[6399] It need not be proven that the crime would not have occurred without the instigation.[6400] As regards the *mens rea*, it must be shown that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed as a result of that instigation.[6401]

(d) Ordering

1871. The *actus reus* of "ordering" requires that a person in a position of authority instructs another person to commit an offence.[6402] Closely related to "instigating", this form of liability

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[6392] *Brđanin* Appeal Judgement, paras 410, 411 and 418; *Martić* Appeal Judgement, para 171.
[6393] *Boškoski* Trial Judgement, para 398; *Brđanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443; *Kordić* Appeal Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
[6394] *Kordić* Appeal Judgement, paras 26-31; *Nahimana* Appeal Judgement, para 479; *Limaj* Trial Judgement, para 513.
[6395] *Kordić* Appeal Judgement, para 31; *Blaškić* Appeal Judgement, para 42.
[6396] *Boškoski* Trial Judgement, para 399; *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeal Judgement, para 27; *Kordić* Trial Judgement, para 387; *Limaj* Trial Judgement, para 514.
[6397] *Milutinović* Trial Judgement Volume I, para 83; *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.
[6398] *Milutinović* Trial Judgement Volume I, para 83; *Semanza* Appeal Judgement, para 257.
[6399] *Boškoski* Trial Judgement, para 399.
[6400] *Kordić* Appeal Judgement, para 27.
[6401] *Kordić* Appeal Judgement, para 32.
[6402] *Kordić* Appeal Judgement, para 28, citing *Kordić* Trial Judgement, para 388; *Semanza* Appeal Judgement, para 361.

persons killed in Kosovo and their secret reburial on the territory of MUP facilities in Serbia. Despite his responsibilities for police investigation, not only did the Accused fail to take any measures to investigate the killings, but he took active steps to prevent any investigation into the circumstances of these killings by instructing MUP personnel not to involve the judicial authorities. The Accused played an active role in engaging volunteers and paramilitary units in Kosovo and personally authorised the deployment to Kosovo of a paramilitary unit, notorious for crimes committed during the war in Bosnia and Herzegovina. Upon their deployment to Kosovo, members of this unit murdered 14 women and children in Podujevo/Podujevë. The unit was withdrawn from Kosovo, but no effective investigation followed and within a short time it was redeployed to Kosovo, again with the authorisation of the Accused. The Chamber is satisfied that by acts such as these the Accused had a substantial effect on the perpetration by MUP forces of the crimes of murder, deportation and persecutions in Kosovo in 1999 and that the Accused was aware that his acts were assisting the commission of these crimes.

2164. The Chamber is satisfied beyond reasonable doubt and finds that Vlastimir Đorđević is guilty of aiding and abetting the crimes of deportation, forcible transfer, murder, and persecutions established in this Judgement.

(b) Planning, ordering and instigating

2165. The Prosecution submits that the evidence it relies on in support of Vlastimir Đorđević's responsibility for aiding and abetting the crimes also establishes his criminal responsibility for planning and ordering the crimes.[7329] It submits that the same evidence and the evidence relevant to Vlastimir Đorđević's failure to discipline MUP officials who committed crimes, establish the criminal responsibility of the Accused on the basis of instigating.[7330]

2166. The Defence submits that there is no evidence that Vlastimir Đorđević planned, ordered or instigated the crimes.[7331] It is submitted that he had no knowledge or reason to acquire knowledge about the activities of the MUP Staff or about a plan or policy to expel ethnic Albanians from Kosovo.[7332]

2167. In order to find the Accused guilty of planning the crimes, the Chamber must be satisfied that he planned or designed, at both the preparatory and execution phases, the criminal conduct

[7328] Defence Final Brief, para 637.
[7329] Prosecution Final Brief, para 1300.
[7330] Prosecution Final Brief, para 1300.
[7331] Defence Final Brief, para 637.
[7332] Defence Final Brief, paras 637-638.

constituting one or more of the established crimes.[7333] The Chamber has been able to be satisfied that Vlastimir Đorđević participated in a common plan, the purpose of which was to modify the ethnic balance of Kosovo. While the means by which the common plan was to be implemented involved the commission of the crimes established in this Judgement, the purpose of this common plan was not, in and of itself, a crime. The evidence does not establish that the Accused directly planned any of the crimes that have been committed in furtherance of the common plan. The Chamber, therefore, is not satisfied that Vlastimir Đorđević is guilty of planning any of the crimes established in this Judgement.

2168. No direct evidence has been tendered to prove the allegation that the Accused directly ordered or instigated the crimes charged in the Indictment. With respect to the Prosecution's submission that the Accused's alleged failure to discipline MUP officials who have committed crimes supports a conviction for instigation, the Chamber notes that to establish responsibility for instigating, a nexus between the act of instigation and the perpetration of crime must be established.[7334] No such nexus has been established in the present case. The Chamber is not satisfied, therefore, that Vlastimir Đorđević is guilty of ordering or instigating any of the crimes established in this Judgement.

4. Vlastimir Đorđević's responsibility under Article 7(3) of the Statute

2169. The Prosecution submits that Đorđević, while holding a position of superior authority, is individually criminally responsible for the acts or omissions of his subordinates, pursuant to Article 7(3) of the Statute for the crimes alleged in Counts 1 to 5 of the Indictment.[7335] It alleges that as Chief of the RJB and Assistant Minister of the MUP, Đorđević exercised *de jure* and *de facto* authority over all RJB units in Kosovo.[7336] It submits that he was aware of the crimes committed by such forces and failed to take necessary and reasonable measures to prevent and punish crimes committed by them.[7337]

2170. The Defence does not specifically address the above allegations in relation to liability under Article 7(3) of the Statute. However, the Chamber recalls the Defence contention that the Accused did not have effective control over the use of MUP forces in Kosovo.[7338] According to the Defence, since the creation of the MUP Staff for the Suppression of Terrorism by decision of the Minister on

[7333] *See supra*, para 1869.
[7334] *See supra*, para 1870.
[7335] Indictment, para 22.
[7336] Prosecution Final Brief, para 1302.
[7337] Prosecution Final Brief, paras 1312-1352.
[7338] Closing Arguments, T 14492-14493; Defence Final Brief, paras 379, 382.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-29-A
		Date:	30 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Mr. Mark Ierace
Ms. Michelle Jarvis
Ms. Shelagh Mc Call
Ms. Anna Kotzeva

Counsel for Stanislav Galić:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

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149. The Appeals Chamber has previously held that murder can be committed through an act or an omission.[447] Further, as previously held by the Appeals Chamber regarding Article 7(1) of the Statute[448] and as demonstrated by Article 7(3) of the Statute, the Appeals Chamber reiterates that the commission of a positive act is not an absolute requirement of criminal responsibility.

150. With respect to Galić's second argument, the Appeals Chamber notes that the Statute expressly contemplates attaching criminal responsibility to an accused for the acts of another, and the International Tribunal has done so on numerous occasions. Even if the physical perpetration of the act of murder was committed by another person, Article 7 of the Statute attaches criminal liability for all the crimes articulated in Articles 2 to 5 of the Statute, including murder, to those who did not actually perpetrate the physical act, but either "planned, instigated, ordered [...] or otherwise aided and abetted in the planning, preparation or execution",[449] or, in the case of superiors, "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[450] Galić's argument is therefore rejected.

151. Regarding the *mens rea* requirement of murder, Galić contends that an action cannot be murder if death is a consequence of the infliction of serious injury and the consequence is due to the perpetrator's negligence.[451] In response, the Prosecution contends that specific intent to kill is not part of the *mens rea* for murder[452] and that the Trial Chamber did not apply a negligence standard.[453] In that respect, it argues that the Trial Chamber required a finding of "an intention [...] to kill, or to inflict serious injury, in reckless disregard of human life".[454] It further claims that Stanislav Galić has confused negligence and recklessness, and that recklessness is an appropriate *mens rea* for ordering murder, as held in the *Blaškić* Appeal Judgement.[455]

152. The Appeals Chamber notes that Galić was not convicted for committing murder, but for ordering murder under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that murder would be committed in the execution of his orders.[456]

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[447] *Kvočka et al.* Appeal Judgement, para. 261. Although this holding was made for murder under Article 3 of the Statute, the Appeals Chamber sees no reason why it would be any different for murder under Article 5 of the Statute.
[448] *Blaškić* Appeal Judgement, para. 663.
[449] Article 7(1) of the Statute.
[450] Article 7(3) of the Statute.
[451] Defence Appeal Brief, para. 92.
[452] Prosecution Response Brief, para. 8.16.
[453] Prosecution Response Brief, para. 8.17.
[454] Prosecution Response Brief, para. 8.17.
[455] Prosecution Response Brief, para. 8.18.
[456] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.

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Consequently, there is no reason for the Appeals Chamber to consider on their merits Galić's arguments pertaining to the *mens rea* required for committing murder.[457]

153. For the foregoing reasons, this part of Galić's ground of appeal is dismissed.

C. Inhumane acts

154. Galić submits that the Trial Chamber erred in its definition of "other inhumane acts" pursuant to Article 5(i) of the Statute.[458] His arguments concern both the *actus reus* and the *mens rea* required for the crime of inhumane acts.

155. As regards the *actus reus*, Galić contends that an omission cannot constitute an inhumane act.[459] The Prosecution responds that the jurisprudence of the International Tribunal establishes that inhumane acts can consist of omissions.[460] In that regard, the Appeals Chamber adopts *mutatis mutandis* its above discussion on an accused's criminal responsibility for an act of omission regarding the crime of murder.[461] This part of Galić's ground of appeal is therefore dismissed.

156. As regards the *mens rea* of the crime of inhumane acts, Galić argues that the Prosecution must prove that the perpetrator had the "will to directly produce the consequence".[462] He contends that "[c]onsent to the consequence excludes the intention" and that merely accepting the consequence does not make a person responsible for crimes.[463] The Prosecution responds that Galić is positing a standard of specific intent as the minimum *mens* rea required for the crime of other inhumane acts, without proposing any authority for this view. The Prosecution argues that the jurisprudence of the International Tribunal has required lesser mental states in order to prove other inhumane acts.[464]

157. The Appeals Chamber notes that Galić was not convicted for committing inhumane acts, but for ordering inhumane acts under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that inhumane acts would be committed in the execution of his

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[457] When an error has no chance of changing the outcome of a decision, it may be rejected on that ground. *See Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16; *Krnojelac* Appeal Judgement, para. 10.
[458] Defence Appeal Brief, para. 93.
[459] Defence Appeal Brief, para. 94.
[460] Prosecution Response Brief, para. 8.19.
[461] *See also* the definition of inhumane acts given at paragraph 234 of the *Vasiljević* Trial Judgement, confirmed at paragraph 165 of the *Vasiljević* Appeal Judgement. *See supra* para. 149.
[462] Defence Appeal Brief, para. 95.
[463] Defence Appeal Brief, para. 96.
[464] Prosecution Response Brief, paras 8.21-8.22.

orders.[465] Consequently, there is no reason for the Appeals Chamber to consider Galić's arguments pertaining to the *mens rea* required for committing inhumane acts.

158. The Appeal Chamber further notes that the Trial Chamber did not expressly determine which acts constituted other inhumane acts (the *actus reus*). Although the Trial Chamber did not do so, the Appeals Chamber finds that it did point, in its analysis of the scheduled incidents, to numerous acts that qualify as such. For the scheduled sniping incidents, the Trial Chamber pointed to the serious injuries inflicted and held that those injuries were the result of deliberate sniping by members of the SRK forces for whose acts Galić bore criminal responsibility.[466] The same applies to the scheduled shelling incidents, for which the Trial Chamber made specific findings related to serious injuries and found that the shells were deliberately fired at areas where civilians would be seriously injured as a result.[467]

159. The Appeals Chamber accordingly dismisses Galić's eighth ground of appeal.

[465] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.
[466] *See, e.g.*, Trial Judgement, paras 258, 271, 276, 289, 317, 321, 360, 367, 518, 537, 551, 555.
[467] *See, e.g.*, Trial Judgement, paras 397, 496.

action" is required for responsibility under Article 7(1) of the Statute.[495] He also challenges the holding of the Trial Chamber that "a superior may be found responsible under Article 7(1) [of the Statute] where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met".[496]

174. In response, the Prosecution argues that omissions are an accepted form of liability under the Statute.[497] It also argues that the actual findings of the Trial Chamber indicate active conduct and active ordering.[498] The Prosecution considers that the reference of the Trial Chamber to Galić's failure to act was relevant to his *mens rea,* and could have supported the *actus reus* for ordering.[499] It claims, "The Chamber did not rely on [Galić]'s failure to take certain steps but on all his conduct to find that he ordered the campaign of sniping and shelling. The Chamber's findings on his inaction support its findings regarding [his] *mens rea.*"[500] The Prosecution further argues that ample Tribunal jurisprudence supports the Trial Chamber's proposition that any conduct, whether active or passive, which contributes to or facilitates the commission of a crime, may result in liability under Article 7(1) of the Statute.[501]

175. The Appeals Chamber affirms that the omission of an act where there is a legal duty to act,[502] can lead to individual criminal responsibility under Article 7(1) of the Statute.[503] Galić's argument in this regard is therefore dismissed. Nevertheless, the Appeals Chamber clarifies several points with regard to the mode of responsibility of ordering pursuant to Article 7(1) of the Statute.

176. The Appeals Chamber recalls that the *actus reus* of ordering has been defined as a person in a position of authority instructing another person to commit an offence; a formal superior-subordinate relationship between the accused and the actual physical perpetrator not being required.[504] The Appeals Chamber finds that the very notion of "instructing" requires a positive action by the person in a position of authority.[505] The failure to act of a person in a position of

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[495] Defence Appeal Brief, para. 109.
[496] Defence Appeal Brief, para. 110, citing paragraph 169 of the Trial Judgement. The Trial Chamber continued: "[A] superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions [...] where the effect of such conduct is to commission crimes by subordinates." Trial Judgement, para. 169.
[497] Prosecution Response Brief, paras 8.11, 10.1.
[498] Prosecution Response Brief, paras 10.2-10.3.
[499] Prosecution Response Brief, para. 10.4.
[500] Prosecution Response Brief, para. 10.5.
[501] Prosecution Response Brief, paras 10.7-10.8.
[502] *See Ntagerura et al.* Appeal Judgement, paras 334-335.
[503] *Blaškić* Appeal Judgement, para. 663. *See also Tadić* Appeal Judgement, para. 188: "This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."
[504] *Kordić and Čerkez* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361.
[505] *See Blaškić* Appeal Judgement, para. 660.

authority, who is in a superior-subordinate relationship with the physical perpetrator, may give rise to another mode of responsibility under Article 7(1) of the Statute or superior responsibility under Article 7(3) of the Statute.[506] However, the Appeals Chamber cannot conceive of a situation in which an order would be given by an omission, in the absence of a prior positive act.[507] The Appeals Chamber concludes that the omission of an act cannot equate to the mode of liability of ordering under Article 7(1) of the Statute.[508]

177. In the present case, the Appeals Chamber notes that Galić conflates two separate issues: (1) whether an omission can constitute an act of ordering; and (2) whether an act of ordering can be *proven* by taking into account omissions. The Trial Chamber here employed the latter approach, which does not constitute a legal error. It did not find Galić guilty for having ordered the crimes by his failure to act or culpable omissions. That is, it did not infer from the evidence the fact that he omitted an act and that this omission constituted an order. Rather, where the Trial Chamber mentions failures to act, it took those failures into account as circumstantial evidence to prove the mode of liability of ordering. The Trial Chamber inferred from the evidence adduced at trial, which included, *inter alia*, acts and omissions of the accused, that Galić had given the order to commit the crimes.[509]

178. The Appeals Chamber thus concludes that the mode of liability of ordering can be proven, like any other mode of liability, by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused. The Trial Chamber must be convinced beyond reasonable doubt from the evidence adduced at trial that the accused ordered the crime.[510] Whether or not the Trial Chamber could have inferred from the evidence adduced at trial that Galić had ordered the crimes is a question of fact and will be addressed as part of his eighteenth ground of appeal.

179. For the foregoing reasons, Galić's argument is dismissed.

B. Challenges relating to Article 7(3) responsibility

180. While he does not contest the conditions that must be met before a person can be held responsible pursuant to Article 7(3) of the Statute,[511] Galić raises three challenges to the Trial

[506] When, for example, a person is under a duty to give an order but fails to do so, individual criminal responsibility may incur pursuant to Article 7(1) or Article 7(3) of the Statute.
[507] The Appeals Chamber, however, notes that this has to be distinguished from the fact that a superior may be criminally liable if he orders an omission. The Appeals Chamber has held that a "person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order" has the requisite *mens rea* for ordering. *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.
[508] It would thus be erroneous to speak of "ordering by omission".
[509] Trial Judgement, para. 749: "General Galić is guilty of having ordered the crimes proved at trial."
[510] *Stakić* Appeal Judgement, para. 219.
[511] Defence Appeal Brief, para. 113, referring to paragraph 173 of the Trial Judgement.

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16 November 2012

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-06-90-A

Date: 16 November 2012

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Patrick Robinson
Judge Mehmet Güney
Judge Fausto Pocar

Registrar: **Mr. John Hocking**

Judgement of: **16 November 2012**

PROSECUTOR

v.

ANTE GOTOVINA
MLADEN MARKAČ

JUDGEMENT

The Office of the Prosecutor
Ms. Helen Brady
Mr. Douglas Stringer
Ms. Laurel Baig
Mr. Francois Boudreault
Ms. Ingrid Elliott
Mr. Todd Schneider
Ms. Saeeda Verrall
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Mr. Gregory Kehoe
Mr. Luka Mišetić
Mr. Payam Akhavan
Mr. Guénaël Mettraux

Counsel for Mladen Markač
Mr. Goran Mikuličić
Mr. Tomislav Kuzmanović
Mr. John Jones
Mr. Kai Ambos

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take any action to ascertain if his subordinates were responsible for those crimes.[432] The Prosecution asserts that the Trial Chamber properly considered and discounted evidence concerning Markač's measures to prevent crimes.[433] In particular, the Prosecution dismisses his instructions regarding the laws of war, provided prior to Operation Storm, as "*ex ante*" and "vague".[434] More broadly, the Prosecution submits that Markač's efforts to prevent potential crimes were "obviously insufficient" to address the risks posed by Croatian Forces' desire for revenge against Serbs.[435]

142. Finally, the Prosecution also contends, with minimal elaboration, that the findings which establish Markač's aiding and abetting liability are sufficient to establish additional modes of liability: namely planning, ordering, and instigating.[436]

143. Markač asserts, *inter alia*, that the Trial Chamber's finding of unlawful artillery attacks was a prerequisite to its findings on crimes against humanity and its general findings in relation to his failure to prevent and punish.[437] He further asserts that the Trial Chamber did not make relevant findings on superior responsibility, including whether he possessed effective control over his subordinates,[438] and that the Trial Chamber did not find that he knew about the murders in Oraovac or the plunder of Gračac.[439] Markač maintains that the Trial Chamber did not explain what steps he should have taken to prevent or punish crimes in Donji Lapac and Ramljane and that the measures the Trial Chamber did propose were speculative.[440]

144. Markač submits, *inter alia*, that with respect to aiding and abetting, the Trial Chamber's findings are insufficient to establish either that he possessed the requisite *mens rea* or that his actions were specifically directed towards carrying out relevant crimes.[441]

145. Markač also contends that the Trial Chamber failed to adequately consider exculpatory evidence, noting, *inter alia*, his orders that civilians be treated fairly and that the laws of war be respected.[442]

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[432] Prosecution Response (Markač), paras 100-105.
[433] Prosecution Response (Markač), paras 121-123.
[434] Prosecution Response (Markač), para. 122.
[435] Prosecution Response (Markač), para. 123.
[436] Additional Prosecution Brief (Markač), para. 4 n. 11.
[437] Markač Additional Response, paras 21-25, 45-46.
[438] Markač Additional Response, paras 4, 35-44.
[439] Markač Additional Response, para. 4.
[440] Markač Additional Response, para. 4.
[441] *See* Markač Additional Response, paras 4, 26-31.
[442] Markač Appeal, paras 182-185.

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(c) Analysis

146. Having reversed, Judge Agius and Judge Pocar dissenting, the Trial Chamber's finding that unlawful artillery attacks took place and that a JCE existed,[443] the Appeals Chamber will consider whether, based on the Trial Chamber's factual findings regarding crimes committed after the artillery attacks on Gračac and other evidence on the record, Markač should be found guilty beyond reasonable doubt on the basis of alternate forms of liability pled in the Indictment.

147. As an initial matter, the Appeals Chamber underscores that the liability ascribed to Markač on the basis of his Failure to Act was premised on particular actions committed by members of the Special Police, rather than by Markač personally.[444] Thus, in order to link Markač to the crimes of persecution, murder, inhumane acts, plunder of public and private property, wanton destruction, or cruel treatment, his relationship to the Special Police must be established. The Appeals Chamber again recalls that the modes of liability most relevant to the findings of the Trial Chamber are superior responsibility and aiding and abetting.[445] In this context, the Appeals Chamber recalls applicable elements of these modes of liability[446] and also observes that findings sufficient to demonstrate a significant contribution to JCE are not necessarily sufficient to support convictions under alternate forms of liability.[447]

148. Turning first to superior responsibility, the Appeals Chamber notes that the Trial Chamber did not explicitly find that Markač possessed effective control over the Special Police. The Trial Chamber noted evidence indicative of a superior-subordinate relationship and found that commanders of relevant Special Police units were subordinated to Markač.[448] However, the Trial Chamber was unclear about the parameters of Markač's power to discipline Special Police members, noting that he could make requests and referrals, but that "crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors."[449]

149. With respect to aiding and abetting, the Appeals Chamber notes that the Trial Chamber did not explicitly find whether Markač made a "substantial contribution" to relevant crimes by the Special Police.[450] While the Trial Chamber concluded that the evidence it considered proved that

[443] *See supra*, paras 84, 98.
[444] *See* Trial Judgement, para. 2583.
[445] *See* Trial Judgement, paras 2329-2375. *See also* Indictment, paras 45-47; Order for Additional Briefing, pp. 1-2.
[446] *See supra*, paras 127-128.
[447] *Cf. Krajišnik* Appeal Judgement, para. 194; *Kvočka et al.* Appeal Judgement, para. 104; *Vasiljević* Appeal Judgement, para. 102.
[448] Trial Judgement, para. 194.
[449] Trial Judgement, para. 198. *See generally* Trial Judgement. Judge Agius dissents in relation to this paragraph.
[450] *See generally* Trial Judgement.

Markač's Failure to Act constituted a significant contribution to the JCE,[451] the Appeals Chamber has held that the threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting.[452] Thus the Trial Chamber's finding of a significant contribution is not equivalent to the substantial contribution required to enter a conviction for aiding and abetting.

150. As set out above, the Trial Chamber did not make explicit findings sufficient, on their face, to enter convictions against Markač based on the two alternate modes of liability deemed relevant by the Appeals Chamber.[453] In the absence of such findings, and considering the circumstances of this case, including the full context of the arguments presented by the parties at trial and on appeal, the Appeals Chamber, Judge Agius dissenting, declines to analyse the Trial Chamber's remaining findings and evidence on the record in order to determine whether Markač's actions were sufficient to satisfy the elements of alternate modes of liability. To undertake such an investigation in this case would require the Appeals Chamber to engage in excessive fact finding and weighing of evidence and, in so doing, would risk substantially compromising Markač's fair trial rights.

151. More specifically, the Appeals Chamber recalls that JCE and unlawful artillery attacks have been the central issues in the parties' arguments since the beginning of this case. The Prosecution's Pre-Trial[454] and Final Trial[455] Briefs consistently focus on the existence of unlawful attacks and a JCE.[456] On appeal, the Prosecution devoted a single footnote to alternate modes of liability in each of its response briefs[457] and referred to the matter only briefly during oral arguments.[458]

152. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, also notes that JCE and unlawful artillery attacks underpin all of the material findings of the Trial Judgement. Indeed, the Trial Chamber emphasised its focus on JCE by explicitly declining to enter findings on the Appellants' culpability under alternate modes of liability pled in the Indictment.[459] The Trial Chamber underscored its dependence on unlawful artillery attacks by relying on these attacks as a prism through which to interpret the Appellants' other relevant actions, explicitly stating that it was considering the Appellants' actions "[i]n light" of its finding that they had ordered unlawful

[451] *See supra*, para. 138.
[452] *See Kvočka et al.* Appeal Judgement, para. 97; *Tadić* Appeal Judgement, para. 229. Judge Agius dissents in relation to this paragraph.
[453] *See supra*, paras 148-149.
[454] *See* Prosecution Pre-Trial Brief, paras 16-51, 127-130.
[455] *See* Prosecution Final Trial Brief, paras 121-133, 383-400, 477-479.
[456] Prosecution Final Trial Brief, paras 124-133, 387-400.
[457] Prosecution Response (Gotovina), para. 333 n. 1112; Prosecution Response (Markač), para. 273 n. 958.
[458] *See* AT. 14 May 2012 p. 102.
[459] *See* Trial Judgement, paras 2375, 2587. Judge Agius and Judge Pocar dissent on the Appeals Chamber's assessment of the Trial Judgement.

artillery attacks.[460] More broadly, the Trial Chamber repeatedly recalled the existence of unlawful attacks in framing its discussion of Markač's liability.[461]

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

154. The Appeals Chamber observes that in the context of this case, drawing the inferences needed to enter convictions based on alternate modes of liability would also substantially undermine Markač's fair trial rights, as he would not be afforded the opportunity to challenge evidence relied on by the Appeals Chamber to enter additional convictions. The Appeals Chamber notes that Markač was provided the opportunity to discuss whether the Trial Chamber's findings implicate alternate forms of liability.[462] However the scope of this additional briefing did not extend to challenging evidence presented to the Trial Chamber.[463] Even if the Appeals Chamber had exceptionally authorised Markač to challenge evidence not related to his convictions, the very large scale of potentially relevant evidence on the record would render any submissions by Markač voluminous and speculative. In addition, Markač would almost certainly have been left uncertain about the scope of the case against him on appeal.[464]

155. The Appeals Chamber notes that the foregoing analysis does not *per se* preclude replacing convictions based on JCE with convictions based on alternate modes of liability. Indeed, the Appeals Chamber has on certain occasions revised trial judgements in this way. However the Appeals Chamber notes that in each of these appeals, the trial chamber's errors had a comparatively limited impact.[465] Thus in the *Simić* Appeal Judgement, the Appeals Chamber entered a conviction on the basis of aiding and abetting after finding that the indictment failed to plead participation in a JCE as a mode of liability.[466] In both the *Vasiljević* Appeal Judgement and the *Krstić* Appeal

[460] Trial Judgement, paras 2370, 2583. Judge Agius and Judge Pocar dissent on the Appeals Chamber's assessment of the Trial Judgement.
[461] *See* Trial Judgement, paras 2580-2587.
[462] *See* Order for Additional Briefing, pp. 1-2.
[463] *See* Order for Additional Briefing, pp. 1-2.
[464] The foregoing discussion also applies to other modes of liability that the Prosecution claims are incurred on the same factual basis. *See* Additional Prosecution Brief (Markač), para. 4 n. 11. Judge Agius and Judge Pocar dissent on this entire paragraph.
[465] *See Simić* Appeal Judgement, paras 74-191, 301; *Krstić* Appeal Judgement, paras 134-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, p. 60.
[466] *See Simić* Appeal Judgement, paras 74-191, 301.

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Judgement, the Appeals Chamber entered a conviction on the basis of aiding and abetting after finding that the trial chamber erred in concluding that the relevant appellant shared the common purpose of the JCE.[467] In none of these judgements was the trial chamber's analysis concerning the factual basis underpinning the existence of a JCE materially reversed.[468] By contrast, in the present case, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found that the Trial Chamber committed fundamental errors with respect to its findings concerning artillery attacks and by extension JCE, which stood at the core of findings concerning the Appellants' criminal responsibility.[469]

156. The Appeals Chamber recalls again that the Trial Chamber found that Markač incurred criminal liability on the basis of two sets of actions: i) unlawful artillery attacks on Gračac; and ii) the Failure to Act. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, has now reversed the Trial Chamber's conclusion that artillery attacks on Gračac were unlawful;[470] found that Markač's Failure to Act does not, in itself, satisfy the elements of aiding and abetting or superior responsibility;[471] determined that it is inappropriate, in the circumstances of this case, to make additional inferences from the findings of the Trial Chamber and evidence on the record;[472] and concluded that Markač cannot be held liable for deportation.[473] In this context, the Appeals Chamber, Judge Agius dissenting, can identify no remaining Trial Chamber findings that would allow a conviction pursuant to an alternate mode of liability for the crimes Markač was convicted of: deportation, persecution, murder, and inhumane acts as crimes against humanity, and plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war.[474]

(d) Conclusion

157. Accordingly, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Markač on the basis of alternate modes of liability. Markač's remaining arguments and grounds of appeal are therefore moot and will not be considered.

[467] *See Krstić* Appeal Judgement, paras 134-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, p. 60.
[468] *See Simić* Appeal Judgement, paras 74-191, 301; *Krstić* Appeal Judgement, paras 135-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, p. 60.
[469] *See supra*, paras 84, 98.
[470] *See supra*, para. 84.
[471] *See supra*, paras 148-149.
[472] *See supra*, para. 150.
[473] *See supra*, para. 115.
[474] Trial Judgement, paras 2587, 2622.

UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-06-90-T
		Date:	15 April 2011
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: **Mr John Hocking**

Judgement of: **15 April 2011**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

JUDGEMENT
VOLUME II OF II

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of the substantial likelihood that the crime would be committed as a consequence of his or her conduct.[969]

1959. *Ordering*. Liability may be incurred by ordering the principal perpetrator to commit a crime or to engage in conduct that results in the commission of a crime.[970] The person giving the order must, at the time it is given, be in a position of formal or informal authority over the person who commits the crime.[971] The person giving the order must intend that the crime be committed or be aware of the substantial likelihood that the crime would be committed in the execution of the order.[972]

1960. *Aiding and abetting*. Liability may be incurred by assisting, encouraging or lending moral support to the commission of a crime.[973] Aiding and abetting by omission requires that the accused had the means to fulfil his or her duty to act.[974] Aiding and abetting may occur before, during, or after the commission of the principal crime.[975] The aider and abettor must have knowledge that his or her acts or omissions assist in the commission of the crime of the principal perpetrator.[976] The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind.[977] This includes the specific

[969] *Kordić and Čerkez* Appeal Judgement, paras 29, 32; *Nahimana et al.* Appeal Judgement, para. 480; *Nchamihigo* Appeal Judgement, para. 61.
[970] *Kordić and Čerkez* Appeal Judgement, para. 28; *Galić* Appeal Judgement, para. 176; *Nahimana et al.* Appeal Judgement, para. 481.
[971] *Kordić and Čerkez* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361; *Galić* Appeal Judgement, para. 176; *Nahimana et al.* Appeal Judgement, para. 481; *Milošević* Appeal Judgement, para. 290; *Boškoski and Tarčulovksi* Appeal Judgement, paras 160, 164; *Kalimanzira* Appeal Judgement, para. 213.
[972] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, paras 29-30; *Nahimana et al.* Appeal Judgement, para. 481.
[973] *Tadić* Appeal Judgement, para. 229; *Čelebići* Appeal Judgement, para. 352; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45-46, 48; *Kvočka et al.* Appeal Judgement, para. 89; *Simić et al.* Appeal Judgement, para. 85; *Blagojević and Jokić* Appeal Judgement, para. 127; *Nahimana et al.* Appeal Judgement, para. 482; *Orić* Appeal Judgement, para. 43; *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 81, 146, 159; *Kalimanzira* Appeal Judgement, paras 74, 86.
[974] *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 82, 154.
[975] *Blaškić* Appeal Judgement, para. 48; *Simić et al.* Appeal Judgement, para. 85; *Blagojević and Jokić* Appeal Judgement, paras 127, 134; *Nahimana et al.* Appeal Judgement, para. 482; *Mrkšić and Šljivančanin* Appeal Judgement, paras 81, 200.
[976] *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45-46; *Simić et al.* Appeal Judgement, para. 86; *Brđanin* Appeal Judgement, paras 484, 488; *Blagojević and Jokić* Appeal Judgement, para. 127; *Nahimana et al.* Appeal Judgement, para. 482; *Orić* Appeal Judgement, para. 43; *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 146, 159; *Haradinaj et al.* Appeal Judgement, paras 57-58; *Kalimanzira* Appeal Judgement, para. 86.
[977] *Aleksovski* Appeal Judgement, para. 162; *Simić et al.* Appeal Judgement, para. 86; *Brđanin* Appeal Judgement, paras 484, 487-488; *Nahimana et al.* Appeal Judgement, para. 482; *Orić* Appeal Judgement, para. 43; *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 146, 159; *Haradinaj et al.* Appeal Judgement, paras 57-58.

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commission of violent crimes in the former RSK area,[2588] was common knowledge to those present in Croatia at the time and that Gotovina was aware of this context at the outset of Operation Storm.

2374. The Trial Chamber also recalls Gotovina's presence at a meeting on 2 August 1995, in which the Minister of Defence Šušak gave instructions regarding the risk of uncontrolled conduct, including torching and looting.[2589] This put Gotovina on further notice of the possibility of the commission of crimes during and following Operation Storm. Gotovina's failure to adequately address the commission of crimes also shows his reckless attitude towards crimes falling outside of the common purpose. In relation to unlawful detentions, the Trial Chamber considers that this crime often constitutes a first step in the process of a deportation. Since Gotovina was familiar with the objective of the JCE, attended the 2 August 1995 meeting, and was aware of feelings of revenge amongst his troops, the Trial Chamber finds that he had the awareness that crimes such as destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions (on their own or as underlying acts of persecution) were possible consequences of the execution of the JCE. Gotovina nevertheless contributed to the JCE, reconciling himself with the possibility that these crimes could be committed. Thus, Gotovina knowingly took the risk that these crimes would be committed. The Trial Chamber further finds that the crimes of destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions (on their own or as underlying acts of persecution) were a natural and foreseeable consequence of the JCE's implementation.

2375. On the basis of all of the above findings and considerations, the Trial Chamber finds that Gotovina is liable pursuant to the mode of liability of JCE. Consequently, it is not necessary for the Trial Chamber to make findings on the other modes of liability alleged in the Indictment.

[2588] See chapter 5.1.2.
[2589] See the evidence of D409 reviewed in Chapter 6.2.2.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-14/2-A

Date: 17 December 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Hans Holthuis**

Judgement of: **17 December 2004**

PROSECUTOR

v.

DARIO KORDIĆ
AND
MARIO ČERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Helen Brady
Ms. Marie-Ursula Kind and Ms. Michelle Jarvis

Counsel for Dario Kordić:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr. and Mr. Stephen M. Sayers

Counsel for Mario Čerkez:

Mr. Božidar Kovačić and Mr. Goran Mikuličić

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III. APPLICABLE LAW

A. Planning, instigating and ordering pursuant to Article 7(1) of the Statute

25. The Appeals Chamber notes that the Trial Chamber convicted Kordić for planning, instigating, and ordering crimes pursuant to Article 7(1) of the Statute.[18] The Trial Chamber's legal definitions of these modes of responsibility have not been appealed by any of the Parties. However, the Appeals Chamber deems it necessary to set out and clarify the applicable law in relation to these modes of responsibility insofar as it is necessary for its own decision.

26. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[19] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.

27. The *actus reus* of "instigating" means to prompt another person to commit an offence.[20] While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[21]

28. The *actus reus* of "ordering" means that a person in a position of authority instructs another person to commit an offence.[22] A formal superior-subordinate relationship between the accused and the perpetrator is not required.[23]

29. The *mens rea* for these modes of responsibility is established if the perpetrator acted with direct intent in relation to his own planning, instigating, or ordering.

30. In addition, the Appeals Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute. The Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[24]

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[18] Trial Judgement, paras 829, 834.
[19] See Trial Judgement, para. 386.
[20] See Trial Judgement, para. 387.
[21] *Cf.* Trial Judgement, para. 387.
[22] Trial Judgement, para. 388.
[23] Trial Judgement, para. 388.
[24] *Blaškić* Appeal Judgement, para. 42.

31. The Appeals Chamber similarly holds that in relation to "planning", a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.

32. With respect to "instigating", a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to instigating. Instigating with such awareness has to be regarded as accepting that crime.

B. The responsibility under Article 7(1) and Article 7(3) of the Statute

33. In the *Aleksovski* Appeal Judgement, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences"[25] in relation to those offences of which he was convicted for his direct participation.[26] While the finding of superior responsibility in that case resulted in an aggravation of sentence, there was no entry of conviction under both heads of responsibility in relation to the count in question. In the *Čelebići* Appeal Judgement, the Appeals Chamber stated:

> Where criminal responsibility for an offence is alleged *under one count* pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[27]

34. The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute.[28] Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber

[25] *Blaškić* Appeal Judgement, para. 90, referring to *Aleksovski* Appeal Judgement, para. 183.
[26] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745.
[27] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745 (emphasis added).
[28] *Blaškić* Appeal Judgement, para. 91, referring to the *Blaškić* Trial Judgement, para. 337.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-14/2-T

Date: 26 February 2001

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: **Mr. Hans Holthuis**

Date: **26 February 2001**

PROSECUTOR

v.

DARIO KORDI]
&
MARIO ^ERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Geoffrey Nice, Q.C.
Mr. Patrick Lopez-Terres
Mr. Kenneth R. Scott
Ms. Susan Somers
Mr. Fabricio Guariglia

Counsel for the Accused:

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Mr. Božidar Kova~i} and Mr. Goran Mikuli~i}, for Mario ^erkez

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384. The Kordi} Defence submits that there can be no "ordering" without a superior-subordinate relationship.[524] It also disagrees with the Prosecution concerning the form that the order may take: it is submitted that either written or "spoken speech" are necessarily involved.[525] Having the power to order in general does not suffice. Further the superior must have ordered a particular subordinate to commit a specific crime. Issuance of general orders or orders on general topics will not suffice. There is a causal link between the order and a specific offence – the criterion is the "but for" standard of causation. The Defence asserts a strict *mens rea* requirement to establish criminal responsibility for ordering: the superior must have been aware of the constitutive elements of the crime ordered, and must have desired a crime to be committed by the subordinate. In order for the superior to be held liable for ordering a crime he must possess the very same intent as that required for the guilty subordinate.[526]

(b) Discussion

385. In relation to the involvement of an accused in a crime other than through direct participation, the Trial Chamber in *Tadi}* considered the connection sufficient for an individual to be held criminally liable. Based upon a review of Second World War case-law, the *Tadi}* Trial Chamber concluded that, to hold an individual criminally responsible for his participation in the commission of a crime other than through direct commission, it should be demonstrated that he intended to participate in the commission of the crime and that his deliberate acts contributed directly and substantially to the commission of the crime:

> In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.[527]

386. Referring to the *Akayesu* Trial Judgement, the Trial Chamber in *Bla{ki}* held that "planning implies that 'one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases'".[528] The *Bla{ki}* Trial Chamber also found that the existence of a plan may be demonstrated through circumstantial evidence.[529] The Trial Chamber finds that planning constitutes a discrete form of responsibility under Article 7(1) of the Statute, and thus agrees that an accused may be held criminally responsible for planning alone. However, a person

[524] In the Kordi} Defence submission, this element renders "ordering" different from "instigating". Kordi} Final Brief, pp. 365-366.
[525] Kordi} Final Brief, p. 365, footnote 2135.
[526] Kordi} Final Brief, pp. 365-366.
[527] *Tadi}* Trial Judgement, para. 692. The Trial Chamber held that the requisite intent may be inferred from circumstantial evidence, para. 676. The *Tadi}* findings were endorsed by the *^elebi}i* Trial Judgement, para. 326.
[528] *Bla{ki}* Trial Judgement, para. 279.

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found to have committed a crime will not be found responsible for planning the same crime. Moreover, an accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed.[530]

387. The *Bla{ki}* Trial Chamber held that instigating "entails 'prompting another to commit an offence'."[531] Both positive acts and omissions may constitute instigation,[532] but it must be proved that the accused directly intended to provoke the commission of the crime. Although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e., that the contribution of the accused in fact had an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement.

388. The Trial Chamber is of the view that no formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order.[533] The Trial Chamber agrees with the *Bla{ki}* finding that there is no requirement that an order be given in writing or in any particular form, and that the existence of an order may be proven through circumstantial evidence.[534] In relation to ordering, the *Bla{ki}* Trial Chamber further held that the order "does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order."[535]

4. Aiding and Abetting and Participation in a Common Purpose or Design[536]

(a) Arguments of the parties

(i) Aiding and abetting

389. In the Prosecution's opinion, these two concepts are distinct in that aiding means giving assistance to someone while abetting implies facilitating the commission of an offence. Either one suffices to render an accused criminally responsible under Article 7(1).[537] The Prosecution

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[529] *Bla{ki}* Trial Judgement, para. 279.
[530] *Bla{ki}* Trial Judgement, para. 278.
[531] *Bla{ki}* Trial Judgement, para. 280, endorsing *Akayesu* Trial Judgement, para. 482.
[532] *Bla{ki}* Trial Judgement, para. 280.
[533] The Trial Chamber disagrees with the *Bla{ki}* and *Akayesu* Trial Chambers in this respect. *See Bla{ki}* Trial Judgement, para. 281, citing *Akayesu* Trial Judgement, para. 483.
[534] *Bla{ki}* Trial Judgement, para. 281.
[535] *Bla{ki}* Trial Judgement, para. 282.
[536] Aiding and abetting and participation in a common purpose are addressed in the same section in light of the *Tadi}* Appeal Judgement which, in setting out the elements of the latter, compared it to aiding and abetting.
[537] Prosecution Final Brief, Annex 4, p. 18.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case No: IT-98-33-A

Date: 19 April 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement: **19 April 2004**

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

Counsel for the Prosecution:

Mr. Norman Farrell
Mr. Mathias Marcussen
Ms. Magda Karagiannakis
Mr. Xavier Tracol
Mr. Dan Moylan

Counsel for the Defendant:

Mr. Nenad Petrušić
Mr. Norman Sepenuk

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prison sentences in the courts of the former Yugoslavia;[432] (iii) the individual circumstances of the convicted person;[433] and (iv) any aggravating or mitigating circumstances.[434]

268. Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the *Vasiljević* case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator.[435] This principle has also been recognized in the ICTR and in many national jurisdictions.[436] While Radislav Krstić's crime is undoubtedly grave, the finding that he lacked genocidal intent significantly diminishes his responsibility. The same analysis applies to the reduction of Krstić's responsibility for the murders as a violation of laws or customs of war committed between 13 and 19 July 1995 in Srebrenica. As such, the revision of Krstić's conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence.

269. The Appeals Chamber has also concluded that the Trial Chamber erred in setting aside Radislav Krstić's convictions for Counts Three (extermination as a crime against humanity) and Six (persecution as a crime against humanity) as impermissibly cumulative with the conviction for genocide. The Appeals Chamber concluded, however, that Krstić's level of responsibility with respect to these two offences was that of an aider and abettor and not of a principal perpetrator. While these conclusions may alter the overall picture of Radislav Krstić's criminal conduct, the Prosecution did not seek an increase in sentence on the basis of these convictions.[437] The Appeals Chamber therefore does not take Krstić's participation in these crimes into account in determining the sentence appropriate to the gravity of his conduct.

270. As regards the general sentencing practice of the courts of the former Yugoslavia, the Appeals Chamber has already explained that the Tribunal is not bound by such practice, and may, if the interests of justice so merit, impose a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia. In the above discussion of this factor, the Appeals Chamber has considered the sentencing practice of the courts of the former Yugoslavia applicable in this case, and has taken those practices into account. In particular, the sentence of a person who

[432] Article 24(1) of the Statute, Rule 101(B)(iii).
[433] Article 24(2).
[434] Rules 101(B)(i) and (ii).
[435] *Vasiljević* Appeal Judgement, paras. 181 – 182, n.291.
[436] *Kajelijeli* Trial Judgement, para. 963; *Vasiljević* Appeal Judgement, n. 291 (citing the law of seven common law and civil law jurisdictions).
[437] Prosecution Appeal Brief, para. 3.95.

aided a principal perpetrator to commit a crime can be reduced to a sentence less than the one given to the principal perpetrator.[438]

271. The Trial Chamber has considered the individual circumstances of Radislav Krstić, including aggravating and mitigating circumstances. The Defence submits that the Trial Chamber erred in not according any weight in sentencing to Krstić's poor health, his good personal character, his clear record to date,[439] and his cooperation with the Tribunal and contribution to reconciliation in the former Yugoslavia.[440] The Appeals Chamber adopts the Trial Chamber's findings as to these factors, and concludes that they do not constitute mitigating circumstances in the context of this case. The Appeals Chamber also concludes that no aggravating factors are present in this case.

272. The Appeals Chamber believes, however, that four further factors must be accounted for in mitigation of Krstić's sentence, namely: (i) the nature of his provision of the Drina Corps assets and resources; (ii) the fact that he had only recently assumed command of the Corps during combat operations; (iii) the fact that he was present in and around the Potočari for at most two hours; and (iv) his written order to treat Muslims humanely.

273. First, while Radislav Krstić made a substantial contribution to the realization of the genocidal plan and to the murder of the Bosnian Muslims of Srebrenica, his actual involvement in facilitating the use of Drina Corps personnel and assets under his command was a limited one. Second, while the Appeals Chamber has found that Krstić assumed command of the Drina Corps on 13 July 1995, it accepts that the recent nature of his appointment, coupled with his preoccupation with conducting ongoing combat operations in the region around Žepa, meant that his personal impact on the events described was further limited. Third, Krstić was present in and around the Potočari compound during the afternoon of 12 July 1995 for at most two hours,[441] a period which, the Appeals Chamber finds, is sufficiently brief so as to justify a mitigation of sentence.[442] Finally, as discussed above,[443] Radislav Krstić made efforts to ensure the safety of the Bosnian Muslim civilians transported out of Potočari, he issued an order that no harm befall civilians while guaranteeing their safe transportation out of the Srebrenica area, and he showed similar concerns for the Bosnian Muslim civilians during the Žepa campaign. Krstić's personal integrity as a serious career military officer who would ordinarily not have been associated with such a plan at all, is also a factor in mitigation.

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[438] *See* Art. 24 of the Criminal Code of FRY ("A person, who premedidately aided another person in perpetration of a criminal act, will be punished as if he had committed it, his sentence can also be reduced.").
[439] Defence Response to Prosecution Appeal Brief, para. 69.
[440] *Ibid.*, para.72.
[441] *See* para. 82, *supra*.
[442] *See* para. 272, *supra*.
[443] *See* para. 132, *supra*.

274. The Appeals Chamber notes that the Prosecution requested the imposition of a minimum sentence of 30 years' imprisonment.[444] As the Appeals Chamber explained in the *Tadić* Judgement in Sentencing Appeals, the decision whether to impose a minimum sentence is within the sentencing Chamber's discretion.[445] The imposition of a minimum sentence is ordered only rarely. In the absence of compelling reasons from the Prosecution as to why it should do so, the Appeals Chamber does not believe that a minimum sentence is appropriate in this case.

275. The Appeals Chamber finds that Radislav Krstić is responsible for very serious violations of international humanitarian law. The crime of genocide, in particular, is universally viewed as an especially grievous and reprehensible violation. In the light of the circumstances of this case, as well as the nature of the grave crimes Radislav Krstić has aided and abetted or committed, the Appeals Chamber, taking into account the principle of proportionality, considers that the sentence imposed by the Trial Chamber should be reduced to 35 years.

[444] Prosecution Appeal Brief, 5.3.
[445] *Tadić* Judgement in Sentencing Appeals, paras. 28, 32.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-33-T

Date: 02 August 2001

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

RADISLAV KRSTIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Peter McCloskey
Mr. Andrew Cayley
Ms. Magda Karagiannakis

Counsel for the Accused:

Mr. Nenad Petrušic
Mr. Tomislav Višnji}

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721. As to the role of the accused, the Trial Chamber has affirmed General Krsti}'s conscious and voluntary participation in the crimes of which he has been found guilty. General Krsti} held a high rank in the VRS military hierarchy and was even promoted after the perpetration of the aforementioned crimes. At the time of the crimes, he was third, then second in command after General Mladi}. In this regard, the Trial Chamber finds that the fact that General Krsti} occupied the highest level of VRS Corps commander is an aggravating factor because he utilised that position to participate directly in a genocide.

722. The Trial Chamber also notes that the conduct of General Krsti} during the course of the trial has not been altogether forthcoming. General Krsti} testified under oath before the Trial Chamber. While this could be viewed as a sign of co-operation with the Tribunal, the evidence clearly established that he put up a false defence on several critical issues, most notably, his denial that he or anyone from the Drina Corps was involved in the forcible transfer of Muslim women, children and elderly from Poto~ari; the date upon which he became commander of the Drina Corps, or became aware of the mass executions. General Krsti}'s manner was one of obstinacy under cross-examination. He continually refused to answer directly or forthrightly legitimate questions put to him by the Prosecution or even Judges. Overall, his conduct during the proceedings evidences a lack of remorse for the role he played in the Srebrenica area in July 1995.

723. The Trial Chamber finds no other relevant circumstances. Although sympathetic to General Krsti}'s discomfort throughout the trial because of medical complications he suffered,[1518] the Trial Chamber considers that this circumstance is not related to the objectives of sentence.

724. The Trial Chamber's overall assessment is that General Krsti} is a professional soldier who willingly participated in the forcible transfer of all women, children and elderly from Srebrenica, but would not likely, on his own, have embarked on a genocidal venture; however, he allowed himself, as he assumed command responsibility for the Drina Corps, to be drawn into the heinous scheme and to sanction the use of Corps assets to assist with the genocide. After he had assumed command of the Drina Corps, on 13 July 1995, he could have tried to halt the use of Drina Corps resources in the implementation of the genocide. His own commander, General Mladi}, was calling the shots and personally supervising the killings. General Krsti}'s participation in the genocide consisted primarily of allowing Drina Corps assets to be used in connection with the executions from 14 July onwards and assisting with the provision of men to be deployed to participate in executions that occurred on 16 July 1995. General Krsti} remained largely passive in the face of

[1518] In late December 1994, General Krsti} was seriously injured when he stepped on a landmine. He was evacuated to a military hospital in Sokolac, and subsequently transferred to the Military Medical Academy in Belgrade. As a result of

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his knowledge of what was going on; he is guilty, but his guilt is palpably less than others who devised and supervised the executions all through that week and who remain at large. When pressured, he assisted the effort in deploying some men for the task, but on his own he would not likely have initiated such a plan. Afterwards, as word of the executions filtered in, he kept silent and even expressed sentiments lionising the Bosnian Serb campaign in Srebrenica. After the signing of the Dayton Accords, he co-operated with the implementers of the accord and continued with his professional career although he insisted that his fruitless effort to unseat one of his officers, whom he believed to have directly participated in the killings, meant he would not be trusted or treated as a devoted loyalist by the Bosnian Serb authorities thereafter. His story is one of a respected professional soldier who could not balk his superiors' insane desire to forever rid the Srebrenica area of Muslim civilians, and who, finally, participated in the unlawful realisation of this hideous design.

725. The Prosecutor submits that General Krsti} should be sentenced to consecutive life sentences for each count of the Indictment under which General Krsti} is found guilty. However, in view of the fact that General Krsti} is guilty of crimes characterised in several different ways but which form part of a single campaign or strategies of crimes committed in a geographically limited territory over a limited period of time, the Trial Chamber holds it preferable to impose a single sentence, bearing in mind that the nearly three years spent in the custody of the Tribunal is to be deducted from the time to be served.[1519]

726. In light of the above considerations, the Trial Chamber sentences General Krsti} to Fourty six years of imprisonment.

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the injuries he sustained from the landmine, part of his leg was amputated and he remained in rehabilitation and on leave until mid May 1995.

[1519] Rule 101 (D).

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UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-16-A

Date: 23 October 2001

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patricia Wald, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. Hans Holthuis**

Judgement of: **23 October 2001**

PROSECUTOR

v

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
VLADIMIR ŠANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

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Mr. Anthony Carmona
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Ms. Norul Rashid

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Ms. Jadranka Slokovi}-Glumac, Ms. Desanka Vranjican for Mirjan Kupre{ki}
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupre{ki}
Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovi}
Mr. Petar Pavkovi} for Vladimir [anti}

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at the scene of the crime and thus [could not] draw any inferences as to [their] possible participation in these events."[146]

87. In order to address the complaint raised by Zoran and Mirjan Kupre{ki}, the Appeals Chamber has to determine (i) whether the Trial Chamber returned convictions on the basis of material facts not pleaded in the Amended Indictment; and (ii) if the Appeals Chamber finds that the Trial Chamber did rely on such facts, whether the trial of Zoran and Mirjan Kupre{ki} was thereby rendered unfair. The first aspect of this determination begins with a discussion of the statutory framework relating to indictments and how this body of law has been interpreted in the jurisprudence of the Tribunal.

1. Were the convictions based on material facts not pleaded in the Amended Indictment?

88. An indictment shall, pursuant to Article 18(4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged". Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.[147] Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

89. The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the

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[145] Trial Judgement, paras 426 and 779.
[146] Trial Judgement, paras 786 and 793. The Trial Chamber also rejected the evidence of Witness C who testified with regard to Zoran and Mirjan Kupre{ki}'s presence as HVO members in the Ahmi}i village on 16 April 1993, *see* Trial Judgement, para. 774.
[147] *Furund`ija* Appeal Judgement, para. 147. *See also Krnojelac* Decision of 24 February 1999, paras 7 and 12; *Krnojelac* Decision of 11 February 2000, paras 17 and 18; and *Br|anin* Decision of 20 February 2001, para.18.

accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.[148] Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[149]

90. Such would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment.[150] Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.[151]

91. Despite the broad-ranging allegations in the Amended Indictment, the case against Zoran and Mirjan Kupre{ki} was not one that fell within the category where it would have been impracticable for the Prosecution to plead, with specificity, the identity of the victims and the dates for the commission of the crimes. On the contrary, the nature of the Prosecution case at trial was confined mainly to showing that Zoran and Mirjan Kupre{ki} were present as HVO members in Ahmi}i on 16 April 1993 and personally participated in the attack on two different houses resulting, *inter alia*, in the killing of six people. Clearly, in such circumstances, an argument that the sheer scale of the alleged crimes prevented the Prosecution from setting out the details of the alleged criminal conduct is not persuasive.

92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed.[152] In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material

[148] *See generally Krnojelac* Decision of 11 February 2000, para. 18; *Br|anin* Decision of 20 February 2001, para. 22.
[149] *Kvo~ka* Decision of 12 April 1999, para 17; *Brdanin* Decision of 26 June 2001, para. 61.
[150] *See Prosecutor* v *Erdemovi}*, Case No.: IT-96-22, Indictment, 22 May 1996, para. 12 (identifying the victims as "hundreds of Bosnian Muslim male civilians").
[151] *Kvo~ka* Decision of 12 April 1999, para. 23.

112. Compared to Drago Josipovi}, the Trial Chamber was not as explicit in its legal findings relating to Zoran and Mirjan Kupre{ki}. Nevertheless, it is a reasonable assumption that the Trial Chamber applied the same logic in relation to Zoran and Mirjan Kupre{ki} in returning convictions on the persecution count based upon a factual basis not pleaded in the Amended Indictment. The Appeals Chamber understands the Trial Chamber's reasoning to be as follows. By alleging participation during a seven-month period in (i) the deliberate and systematic killing of Bosnian Muslim civilians; (ii) the comprehensive destruction of Bosnian Muslim homes and property; and (iii) the organised detention and expulsion of Bosnian Muslims, the Amended Indictment pleaded the underlying criminal conduct of the accused with sufficient detail. On that basis, the Trial Chamber was satisfied that Zoran and Mirjan Kupre{ki} had sufficient information to prepare their defence. Consequently, any allegation of specific criminal conduct not pleaded in the Amended Indictment, such as the attack on Suhret Ahmi}'s house, could be taken into account as relevant evidence for the charge of persecution (count 1). This was so regardless of the fact that the specific criminal act constituting the primary basis for holding Zoran and Mirjan Kupre{ki} criminally liable for persecution was not pleaded in the Amended Indictment.

113. The Appeals Chamber is unable to agree with this reasoning. As found above, the attack on Suhret Ahmi}'s house and its consequences constituted a material fact in the Prosecution case and, as such, should have been pleaded in the Amended Indictment. Absent such pleading, the allegation pertaining to this event should not have been taken into account as a basis for finding Zoran and Mirjan Kupre{ki} criminally liable for the crime of persecution. Hence, the Trial Chamber erred in entering convictions on the persecution count because these convictions depended upon material facts that were not properly pleaded in the Amended Indictment.

114. The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. For the reasons that follow, the Appeals Chamber finds that this case is not one of them.

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-30/1-T

Date: 2 November 2001

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

MIROSLAV KVO^KA
MILOJICA KOS
MLA\O RADI]
ZORAN ŽIGI]
DRAGOLJUB PRCA]

JUDGEMENT

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Mr. Daniel Saxon

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Mr. @arko Nikoli} for Mr. Kos
Mr. Toma Fila for Mr. Radi}
Mr. Slobodan Stojanovi} for Mr. @igi}
Mr. Jovan Simi} for Mr. Prca}

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252. The *actus reus* required for "instigating" a crime is any conduct by the accused prompting another person to act in a particular way.[427] This element is satisfied if it is shown that the conduct of the accused was a clear contributing factor to the conduct of the other person(s).[428] It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement.[429] The required *mens rea* is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.[430]

(b) Aiding or Abetting

253. Aiding and abetting are forms of accessory or accomplice liability.[431] The *actus reus* of aiding and abetting consists of providing practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the crime.[432] The *mens rea* required is the knowledge that these acts assist or facilitate the commission of the offence.[433]

254. The *Akayesu* Trial Chamber Judgement emphasized that aiding and abetting, "which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto."[434]

255. There is no requirement that the aider or abettor have a causal effect on the act of the principal.[435] But the aider or abettor must have intended to assist or facilitate, or at least have accepted that such a commission of a crime would be a possible and foreseeable consequence of his conduct.[436] Further, it is not necessary that the aider or abettor know the precise crime that was intended or which was actually committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to assist or facilitate the commission of that crime and is guilty as an aider or abettor.[437] In the *Aleksovski* case,

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[427] *Akayesu* Trial Chamber Judgement, para. 482; *Blaski}* Trial Chamber Judgement, para. 280.
[428] *Kordi}* Trial Chamber Judgement, para. 387.
[429] *Kordi}* Trial Chamber Judgement, para. 387.
[430] *Akayesu* Trial Chamber Judgement, para. 482.
[431] *Kunara}* Trial Chamber Judgement, para. 393.
[432] *Furundzija* Trial Chamber Judgement, para. 249; *Kunara}* Trial Chamber Judgement, para. 391.
[433] *Furund`ija* Trial Chamber Judgement, para. 249. See also *Tadi}* Appeals Chamber Judgement, para. 229.
[434] *Akayesu* Trial Chamber Judgement, para. 484.
[435] *Furund`ija* Trial Chamber Judgement, para. 233; *Aleksovski* Trial Chamber Judgement, para. 61.
[436] *Tadi}* Trial Chamber Judgement, para. 674; *^elebi}i* Trial Chamber Judgement, para. 326; *Aleksovski* Trial Chamber Judgement, para. 61.
[437] *Furund`ija* Trial Chamber Judgement, para. 246.

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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-98-29/1-A

Date: 12 November 2009

Original: English

IN THE APPEAL CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr John Hocking**

Judgement of: **12 November 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

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on the basis of the case record, establish beyond reasonable doubt that Milošević ordered sniping and shelling of the civilian population in Sarajevo during the Indictment period.

(a) Ordering and planning the campaign

265. The Trial Chamber has adopted a very general approach in that it did not analyse whether Milošević ordered every sniping or shelling incident, but rather concluded that those incidents could only take place if ordered by him in the framework of the campaign directed against the civilian population of Sarajevo. In principle, this approach is not erroneous as such, given that both the *actus reus* and the *mens rea* of ordering can be established through inferences from circumstantial evidence, provided that those inferences are the only reasonable ones. The Appeals Chamber underlines, however, that when applying such an approach to the facts of the case, great caution is required.

266. First, the Appeals Chamber emphasizes that, as the Trial Chamber correctly held in its discussion of the widespread or systematic attack, "[a] campaign is a military strategy; it is not an ingredient of any of the charges in the Indictment, be that terror, murder or inhumane acts".[780] The Appeals Chamber notes, however, that in other parts of the Trial Judgement, the Trial Chamber appears to hold Milošević responsible for planning and ordering a campaign of crimes.[781] The Appeals Chamber understands these references as illustrating that the crimes at stake formed a pattern comprised by the SRK military campaign in Sarajevo. Therefore, the "campaign" in the present Appeal Judgement shall be understood as a descriptive term illustrating that the attacks against the civilian population in Sarajevo, in the form of sniping and shelling, were carried out as a pattern forming part of the military strategy in place.

267. Second, the Appeals Chamber notes that the Trial Chamber did not rely on any evidence that would identify a specific order issued by Milošević with respect to the campaign of shelling and sniping in Sarajevo as such. Rather, it relied on the nature of the campaign carried out in the context of a tight command to conclude that it could only "have been carried out on [Milošević's] instructions and orders".[782] The Appeals Chamber recalls that the *actus reus* of ordering cannot be established in the absence of a prior positive act because the very notion of "instructing", pivotal to the understanding of the question of "ordering", requires "a positive action by the person in a

[780] Trial Judgement, para. 927.
[781] Trial Judgement, paras 910-913, 927-928, 932, 938, 953, 966, 975, 978.
[782] Trial Judgement, para. 966.

position of authority".[783] The Appeals Chamber accepts that an order does not necessarily need to be explicit in relation to the consequences it will have.[784] However, the Appeals Chamber is not satisfied that the Trial Chamber established beyond reasonable doubt that Milošević instructed his troops to perform a campaign of sniping and shelling of the civilian population in Sarajevo as such.

268. Although Milošević does not explicitly challenge his responsibility for planning the crimes under this ground of appeal, the Appeals Chamber takes note of his relevant submissions under other grounds[785] and decides to address the issue within the present Section of the Judgement. In this regard, the Appeals Chamber recalls that the *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[786] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[787] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[788]

269. The Appeals Chamber reiterates that the campaign of sniping and shelling civilians in Sarajevo was already in place when Milošević took the SRK command over from Galić.[789] Although this cannot be determinative in the present case, the Appeals Chamber finds it instructive to note that Galić was held responsible for ordering the indicted crimes, but not for planning them. Conversely, Milošević, although found not having "devise[d] a strategy for Sarajevo on his own"[790]

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[783] *Galić* Appeal Judgement, para. 176. See also, *Nahimana et al.* Appeal Judgement, para. 481, referring to *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras 28-30.

[784] *Cf. Nahimana et al.* Appeal Judgement, para. 481: "Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order." See also, *Galić* Appeal Judgement, paras 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[785] See *e.g.*, Defence Appeal Brief, paras 41, 42-99 and p. 94.

[786] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, para. 26.

[787] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément déterminant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".

[788] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, paras 29, 31.

[789] *Galić* Trial Judgement, paras 746-747. The findings remained undisturbed on appeal.

[790] Trial Judgement, para. 960.

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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No.	IT-05-87-T
		Date:	26 February 2009
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Acting Registrar: **Mr. John Hocking**

Judgement of: **26 FEBRUARY 2009**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

JUDGEMENT

Volume 1 of 4

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Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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II. APPLICABLE LAW

A. LEGAL STANDARDS FOR INDIVIDUAL CRIMINAL RESPONSIBILITY

1. Introduction

75. Each of the six Accused is charged with responsibility for the crimes alleged in the Indictment pursuant to Article 7(1) and 7(3) of the Statute. The text of Article 7 is quoted in full below:

> **Article 7**
> **Individual criminal responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

76. Because the Prosecution alleges all possible forms of responsibility in respect of each charge, the Chamber has the discretion, and indeed the obligation, to choose under which form or forms of responsibility to assess the evidence in respect of each Accused.[73] A Chamber is not obliged to make exhaustive factual findings on each and every charged form of responsibility, and may opt to examine only those that describe the conduct of the accused most accurately.[74] Nevertheless, the Chamber is bound in the exercise of its discretion by certain guiding principles on concurrent convictions and forms of responsibility.[75]

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[73] *Krstić* Trial Judgement, para. 602; *Furundžija* Trial Judgement, para. 189; *Semanza* Trial Judgement, para. 397.

[74] *See Krstić* Trial Judgement, para. 602; *Kunarac et al.* Trial Judgement, paras. 388–389.

[75] The Chamber will follow the practice of the Appeals Chamber in using the term "concurrent convictions" to describe simultaneous convictions pursuant to different forms of responsibility enshrined in Articles 7(1) and 7(3), reserving the term "cumulative convictions" to describe simultaneous convictions for more than one substantive crime in respect of the same conduct. *See Jokić* Judgement on Sentencing Appeal, para. 24; *Kordić* Appeal Judgement, paras. 35, 1030; *Blaškić* Appeal Judgement, paras. 89–93; *Kajelijeli* Appeal Judgement, para. 81; *but see Gacumbtsi* Trial Judgement, para. 266 (using the term "cumulative convictions" when referring to simultaneous convictions pursuant to different

82. While the Prosecution need not prove that the crime or underlying offence with which the accused is charged would not have been perpetrated but for the accused's plan, the Appeals Chamber has held that the plan must have been a factor "substantially contributing to ... criminal conduct constituting one or more statutory crimes that are later perpetrated."[87]

3. Instigating

83. The Prosecution establishes the physical and mental elements of instigating by proving that the accused, through either an act or an omission, intentionally prompted another to act in a particular way,[88] with the intent that a crime or underlying offence be committed as a result of such prompting, or with the awareness of the substantial likelihood that a crime or underlying offence would be committed as a result of such prompting.[89] Liability for instigating may ensue through implicit, written, or other non-verbal prompting by the accused,[90] and does not require that the accused have "effective control" over the perpetrator or perpetrators.[91] Additionally, the accused's prompting may occur not only through positive acts, but also through omissions.[92]

84. While the Appeals Chamber has held that the accused's prompting must have been a factor "substantially contributing to the conduct of another person committing the crime", the Prosecution need not prove that the crime or underlying offence would not have been perpetrated but for the accused's prompting.[93]

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considers that an awareness of a *higher likelihood of risk* and a volitional element must be incorporated in the legal standard.

Blaškić Appeal Judgement, para. 41 (emphasis added).

[86] *Kordić* Appeal Judgement, paras. 26, 31; *Nahimana et al.* Appeal Judgement, para. 479; *Semanza* Trial Judgement, para. 380 (planning "envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime").

[87] *Kordić* Appeal Judgement, para. 26.

[88] The accused need only prompt another to "act in a particular way"—and not necessarily to commit a crime or underlying offence *per se*—if he has the intent that a crime or underlying offence be committed in response to such prompting, or if he is aware of the substantial likelihood that a crime or underlying offence will be committed. *Kvočka et al.* Trial Judgement, para. 252.

[89] *Kordić* Appeal Judgement, paras. 27, 32; *Brđanin* Trial Judgement, para. 269.

[90] *Brđanin* Trial Judgement, para. 269; *Blaškić* Trial Judgement, paras. 280–281.

[91] *Semanza* Appeal Judgement, para. 257. "Effective control" has been described as having the material ability to prevent and/or punish the commission of the instigated crimes or underlying offences. *Čelebići* Appeal Judgement, para. 197.

[92] *Brđanin* Trial Judgement, para. 269; *Galić* Trial Judgement, para. 168.

[93] *Kordić* Appeal Judgement, para. 27; *Nahimana et al.* Appeal Judgement, para. 480; *Kvočka et al.* Trial Judgement, para. 252 (holding that it must be shown that "the conduct of the accused was a clear contributing factor to the conduct of the other person(s)"); *Kordić* Trial Judgement, para. 387 (holding that "the contribution of the accused [must have] in fact had an effect on the commission of the crime"); *Tadić* Trial Judgement, para. 674 (holding that "the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act").

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4. Ordering

85. The Prosecution establishes the physical and mental elements of ordering by proving that the accused intentionally instructed another to carry out an act or engage in an omission,[94] with the intent that a crime or underlying offence be committed in the execution of those instructions, or with the awareness of the substantial likelihood that a crime or underlying offence would be committed in the execution of those instructions.[95]

86. While the Prosecution need not prove that there existed a formal superior-subordinate relationship between the accused and the physical perpetrator or intermediary perpetrator,[96] it must provide "proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order."[97] Such authority may be informal and of a temporary nature,[98] and as a consequence the order issued by the accused need not be legally binding upon the physical perpetrator or intermediary perpetrator.

87. The order need not take any particular form; it need not be in writing.[99] However, ordering requires a positive act; it cannot be committed by omission.[100] Because the Appeals Chamber has held that the accused need merely "instruct another person to commit an offence",[101] it is clear that liability for ordering may ensue where the accused issues, passes down, or otherwise transmits the order, and that he need not use his position of authority to "convince" the physical perpetrator or intermediary perpetrator to commit the crime or underlying offence.[102] Furthermore, the accused need not give the order directly to the physical perpetrator,[103] and an intermediary lower down than the accused on the chain of command who passes the order on to the physical perpetrator may also be held responsible as an orderer for the perpetrated crime or underlying offence, as long as he has the requisite state of mind.[104]

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[94] The accused need only instruct another to carry out an act or engage in an omission—and not necessarily a crime or underlying offence *per se*—if he has the intent that a crime or underlying offence be committed in the execution of the order, or if he is aware of the substantial likelihood that a crime or underlying offence will be committed. *Semanza* Appeal Judgement, paras. 359–364.

[95] *Kordić* Appeal Judgement, paras. 28, 30; *Martić* Appeal Judgement, paras. 221–222.

[96] *Kordić* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361.

[97] *Semanza* Appeal Judgement, para. 361; *see also Kordić* Appeal Judgement, para. 28.

[98] *Semanza* Appeal Judgement, paras. 363, 364 (finding that the accused—a civilian mayor with no formal position in the Rwandan military hierarchy—had the necessary authority over Interahamwe fighters to render him liable for ordering them to kill Tutsis at Musha church, and that the Trial Chamber had erred in not convicting him under this form of responsibility).

[99] *Strugar* Trial Judgement, para. 331; *Blaškić* Trial Judgement, para. 281.

[100] *Galić* Appeal Judgement, para. 176.

[101] *Kordić* Appeal Judgement, para. 28.

[102] *See Krstić* Trial Judgement, para. 601; *Blaškić* Trial Judgement, para. 281.

[103] *Kordić* Trial Judgement, para. 388; *Blaškić* Trial Judgement, para. 282.

[104] *Kupreškić et al.* Trial Judgement, paras. 827, 862.

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UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No. IT-05-87-T

Date: 26 February 2009

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Acting Registrar: **Mr. John Hocking**

Judgement of: **26 FEBRUARY 2009**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
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JUDGEMENT

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Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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crimes committed by his subordinates, pursuant to Article 7(3) of the Statute.[1485] The Ojdanić Defence responds that the Prosecution has not established that he participated in any of the crimes alleged in the Indictment, nor that he knew that they had occurred or were about to occur.[1486]

613. According to the Prosecution, Ojdanić was a member of the joint criminal enterprise and significantly contributed to its implementation. The Prosecution submits that Ojdanić shared the intent to carry out this common plan, and that his actions—such as his commanding, ordering, and directing of VJ operations in Kosovo, including joint operations with the MUP—demonstrate that he intended to further the plan, through criminal means.[1487] The Ojdanić Defence, on the other hand, argues that he did not participate in a joint criminal enterprise and that it has not been established that he shared the intent to participate in such an enterprise.[1488]

614. The Chamber notes that it is not obliged to make exhaustive factual findings on each and every charged form of responsibility, and rather may examine only those that describe the conduct of the accused most accurately.[1489] In response to the Prosecution's allegation that Ojdanić was a member of a joint criminal enterprise aimed at the perpetration of crimes in Kosovo, the Chamber first addresses his liability under this form of responsibility. Specific references are provided in relation to issues addressed, but the Chamber notes that these findings are based on all the relevant evidence.

a. Commission through participation in a joint criminal enterprise

615. For Ojdanić's liability to arise pursuant to the first category of joint criminal enterprise, the evidence must show that he participated in at least one aspect of the common purpose to ensure continued control by the FRY and Serbian authorities over Kosovo, through crimes of forcible displacement, which the Chamber has already found existed.[1490] In order to fulfil this element, Ojdanić need not have physically committed the crimes through which the goal was achieved, or any other offence for that matter.[1491] Indeed, he need not even have been present at the time and place of the physical perpetration of these crimes.[1492] His contribution, however, to the plan must

[1485] Indictment, paras. 11, 40–44.
[1486] Ojdanić Final Trial Brief, 29 July 2008 (public version), para. 5.
[1487] Prosecution Final Trial Brief, 29 July 2008 (public version), paras. 8, 725–729, 783.
[1488] Ojdanić Final Trial Brief, 29 July 2008 (public version), paras. 4–5.
[1489] *See Krstić* Trial Judgement, para. 602; *Kunarac et al.* Trial Judgement, paras. 388–389.
[1490] *Brđanin* Appeal Judgement, para. 427; *Vasiljević* Appeal Judgement, paras. 100, 119; *Tadić* Appeal Judgement, paras. 197, 227.
[1491] *Brđanin* Appeal Judgement, para. 427; *Kvočka et al.* Appeal Judgement, para. 99.
[1492] *Krnojelac* Appeal Judgement, para. 81; *see also Simić et al.* Trial Judgement, para. 158.

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from the MUP to discuss a common approach to the investigation of crimes. This evidence runs counter to the allegation that he shared the intent to commit the crimes that were encompassed by the joint criminal enterprise.

618. In light of this evidence, the Chamber finds that the Prosecution has not proved beyond reasonable doubt that Ojdanić shared the intent of the joint criminal enterprise members to maintain control over Kosovo through the forcible displacement of Kosovo Albanians. Because of this finding, the Chamber does not address whether Ojdanić made a significant contribution to the joint criminal enterprise.

619. Recalling that a Chamber need only address those forms of responsibility under Article 7(1) that describe the conduct of the accused most accurately, the Chamber makes the general observation of the physical elements of the other forms of responsibility under Article 7(1) that planning primarily applies to those who design crimes, that instigating primarily applies to those who prompt others to commit crimes, and that ordering primarily applies to those who instruct others to commit crimes; whereas aiding and abetting applies to those who provide practical assistance, encouragement, or moral support to the perpetration of a crime.[1495] On this basis, the Chamber does not consider that planning, instigating, or ordering most accurately describe the conduct of Ojdanić and dismisses these modes of liability to describe his individual criminal responsibility. Accordingly, the Chamber now addresses his responsibility for aiding and abetting the commission of the crimes proved to have occurred.

b. Aiding and abetting

620. In order for Ojdanić to be held responsible for aiding and abetting any of the crimes that have been proved, it must be shown that he provided practical assistance, encouragement, or moral support to the perpetrator of a crime or underlying offence and also that such practical assistance, encouragement, or moral support had a substantial effect upon the commission of a crime or underlying offence.[1496] Furthermore, it must be shown that he intentionally provided this assistance and that he was aware of the essential elements of that crime or underlying offence, including the mental state of the physical or intermediary perpetrator.[1497] The lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime occurs.[1498] An accused may aid and abet through an omission, where (a) there is a legal duty to act, (b) the accused

[1495] For the complete descriptions of the elements of these forms of responsibility, see Section II.
[1496] *Blaškić* Appeal Judgement, paras. 45, 46; *Vasiljević* Appeal Judgement, para. 102.
[1497] *Simić et al.* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.

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only reasonable inference is that he knew of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians.

626. Ojdanić provided practical assistance, encouragement, and moral support to the VJ forces engaging in the forcible displacement of Kosovo Albanians in co-ordinated action with the MUP. He contributed by issuing orders for VJ participation in joint operations with the MUP in Kosovo during the NATO air campaign, by mobilising the forces of the VJ to participate in these operations, and by furnishing them with VJ military equipment.[1507] In addition to issuing orders allowing the VJ to be in the locations where the crimes were committed, he also refrained from taking effective measures at his disposal, such as specifically enquiring into the forcible displacements, despite his awareness of these incidents. Furthermore, Ojdanić contributed to the commission of crimes in Kosovo by the VJ through his role in arming the non-Albanian population and ordering its engagement in 1999.[1508] These contributions had a substantial effect on the commission of the crimes, because they provided assistance in terms of soldiers on the ground to carry out the acts, the VJ weaponry to assist these acts, and encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes.

627. Furthermore, Ojdanić had extensive powers to instigate disciplinary proceedings against any other member of the VJ and was obliged to ensure that VJ members who committed offences and infractions against VJ military discipline were held responsible as soon as possible during a state of war.[1509] After he issued an order at the start of April 1999 that criminal activities be reported to the Supreme Command Staff, Pavković failed to do so.[1510] This under-reporting occurred throughout 1998 and 1999, and Ojdanić was expressly warned by Dimitrijević of such misreporting by Pavković on a number of occasions.[1511] Ojdanić did take certain measures in response to Pavković's actions, including sending members of his Security Administration to find out more information and initiating the 17 May 1999 meeting with Milošević. However, these actions were insufficient to remedy the problem, as discussed above. In light of his knowledge of widespread criminal activity amongst VJ members from the 16 and 17 May meetings, the Arbour letter, the

[1507] 3D690 (VJ General Staff Directive for the engagement of the VJ, *Grom* 3 Directive, 16 January 1999); Vladimir Lazarević, T. 17894–17895 (8 November 2007); P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999), p. 1; P1925 (Order of the VJ General Staff, 23 March 1999).
[1508] P931 (Minutes of the Collegium of the General Staff of the VJ for 2 February 1999), p. 23; P1487 (Suggestions to 3rd Army from Supreme Command Staff, 17 April 1999), p. 1.
[1509] P984 (FRY Law on the VJ), articles 159, 180, 181; 4D532 (VJ Rules on Service, 1 January 1996), articles 291, 313, 314.
[1510] 4D276 (3rd Army Report to General Staff, 3 April 1999).

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publication of the first indictment, and various prior reports of criminal offences by VJ members, Ojdanić's request for a response from Pavković was insufficient.[1512] Subsequently, when information was again presented to the Supreme Command Staff that crimes were still being committed by VJ personnel in Kosovo in June 1999, Ojdanić stuck to his approach of calling for reports and issuing orders to enhance the operation of the military courts.[1513] Again, he did not take disciplinary measures against the 3rd Army Commander, despite the fact that crimes were still not being included in written reports up to the Supreme Command Staff from the 3rd Army.[1514] Ojdanić's failure to take effective measures against Pavković provided practical assistance, encouragement, and moral support to members of the VJ who perpetrated crimes in Kosovo, by sustaining the culture of impunity surrounding the forcible displacement of the Kosovo Albanian population, and by allowing the Commander of the 3rd Army to continue to order operations in Kosovo during which the forcible displacement took place.

628. The Chamber finds that it has been established that all of Ojdanić's actions described above were voluntary. The Chamber finds that, through his acts and omissions, Ojdanić provided practical assistance, encouragement, and moral support to members of the VJ, who were involved in the commission of forcible transfer and deportation in the specific crime sites where it has been found that the VJ participated, that his conduct had a substantial effect on the commission of these crimes, that he was aware of the intentional commission of these crimes by the VJ in co-ordinated action with the MUP, and that he knew that his conduct assisted in the commission of these crimes.

629. While the forcible displacements were part of the VJ and MUP organised campaign, the Chamber is not satisfied beyond reasonable doubt that killings, sexual assaults, or the destruction of religious and cultural property were intended aims of this campaign. Accordingly, although he was aware of VJ members killing Kosovo Albanians in some instances, it has not been proved that Ojdanić was aware that VJ and MUP forces were going into the specific crime sites referred to above in order to commit killings, sexual assaults, or the destruction of religious and cultural property. Consequently, in Ojdanić's case, the mental element of aiding and abetting has not been established in relation to counts 3, 4, and 5.

[1511] P928 (Minutes of the Collegium of the General Staff of the VJ, 30 December 1998), p. 14; P933 (Minutes of the Collegium of the General Staff of the VJ, 4 March 1999), p. 15; P938 (Minutes of the Collegium of the General Staff of the VJ, 18 March 1999), p. 21.

[1512] 3D790 (Pavković Letter responding to accusations of Louise Arbour, 17 May 1999); Milovan Vlajković, T. 16046–16047 (20 September 2007).

[1513] 3D633 (Briefing to the Chief of Staff of the Supreme Command, 2 June 1999), p. 2; 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999), p. 1.

[1514] Radovan Radinović, T. 17323–17325 (19 October 2007).

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630. The Trial Chamber therefore finds that it has been established that Dragoljub Ojdanić is responsible for aiding and abetting, under Article 7(1) of the Statute, the crimes in the following locations:

- Peć/Peja
  - Peć/Peja town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Đakovica/Gjakova
  - Đakovica/Gjakova town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Korenica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dobroš/Dobrosh—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ramoc—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Meja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Other villages in the Reka/Caragoj valley—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Prizren
  - Pirane/Pirana—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Orahovac/Rahovec
  - Celina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Srbica/Skenderaj
  - Turićevac/Turiçec—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Izbica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Tušilje/Tushila—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ćirez/Qirez—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Priština/Prishtina
  - Priština/Prishtina town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Gnjilane/Gjilan
  - Žegra/Zhegra—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Vladovo/Lladova—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

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- Prilepnica/Përlepnica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Uroševac/Ferizaj
  - Sojevo/Sojeva—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Mirosavlje/Mirosala—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Staro Selo—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Kačanik/Kaçanik
  - Kotlina/Kotllina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Kačanik/Kaçanik—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dubrava/Lisnaja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity.

631. In respect of the crimes proved to have been committed for which Ojdanić has not been held responsible as an aider and abettor, the Chamber finds that he also did not plan, instigate, or order them.

c. Superior Responsibility

632. Looking to Ojdanić's responsibility under Article 7(3) of the Statute for counts 1 and 2, the Chamber notes that there are specific crimes of forcible displacement for which he has not been found responsible as an aider and abettor. These specific crimes were those of forcible displacement carried out by the MUP, without the participation of the VJ. As found above, it has not been established that Ojdanić had effective control of the forces of the MUP acting in Kosovo. Consequently, he is not responsible under Article 7(3) for the remaining crimes in counts 1 and 2 that have been proved, those being:

- Dečani/Deçan
  - Beleg—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Prizren
  - Dušanovo/Dushanova, part of the town of Prizren—deportation, crime against humanity; forcible transfer, other inhumane act, crime against humanity;

- Suva Reka/Suhareka
  - Suva Reka/Suhareka town—deportation, crime against humanity; forcible transfer, other inhumane act, crime against humanity;

- Kosovska Mitrovica/Mitrovica

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to appreciate during these meetings the influence exerted by the Joint Command over the MUP and VJ in respect of the implementation of the various stages of the Plan for Combating Terrorism. In 1999, he did not participate in the meetings held in Belgrade on 4, 16, or 17 May between *inter alia* Milošević, Milutinović, Pavković, Ojdanić, and Lukić.[2316] Consequently, the Chamber considers that he was distanced from the policy-makers in Belgrade and that this militates against him being a member of the joint criminal enterprise. Lazarević also took a number of steps in relation to the criminal offences of members of the VJ and MUP in Kosovo, including in some cases issuing written orders to prevent the civilian population from being displaced and requiring that misconduct towards civilians be severely punished. These orders suggest that, although he knew that the VJ was involved in the widespread movement of the Kosovo Albanian population, he took some steps to ameliorate the circumstances in which this occurred.

919. In light of this evidence, the Chamber finds that the Prosecution has not proved beyond reasonable doubt that Lazarević shared the intent of the joint criminal enterprise members to maintain control over Kosovo through the forcible displacement of Kosovo Albanians. Because of this finding, the Chamber does not address whether he made a significant contribution to the joint criminal enterprise.

920. Recalling that a Chamber need only address those forms of responsibility under Article 7(1) that describe the conduct of the accused most accurately, the Chamber makes the general observation on the physical elements of the other forms of responsibility under Article 7(1) that planning primarily applies to those who design crimes, that instigating primarily applies to those who prompt others to commit crimes, and that ordering primarily applies to those who instruct others to commit crimes; whereas aiding and abetting applies to those who provide practical assistance, encouragement, or moral support to the perpetration of a crime.[2317] On this basis, the Chamber does not consider that planning, instigating, or ordering most accurately describe the conduct of Lazarević and dismisses these modes of liability to describe his individual criminal responsibility. Accordingly, the Chamber now addresses his responsibility for aiding and abetting the commission of the crimes proved to have occurred.

b. Aiding and abetting

921. In order for Lazarević to be held responsible for aiding and abetting any of the crimes that have been proved, it must be shown that he provided practical assistance, encouragement, or moral

[2316] Vladimir Lazarević, T. 18134 (12 November 2007), T. 18657 (20 November 2007). The Chamber notes that Lukić did not attend the 16 and 17 May meetings but did attend the 4 May meeting.
[2317] For the complete descriptions of the elements of these forms of responsibility, see Section II.

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support to the perpetrator of a crime or underlying offence and also that such practical assistance, encouragement, or moral support had a substantial effect upon the commission of a crime or underlying offence.[2318] Furthermore, it must be shown that he intentionally provided this assistance and that he was aware of the essential elements of that crime or underlying offence, including the mental state of the physical perpetrator or intermediary perpetrator.[2319] The lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime occurs.[2320] An accused may aid and abet through an omission, where (a) there is a legal duty to act, (b) the accused has the ability to act, (c) he fails to act either intending the criminal consequences or with awareness and consent that the consequences will ensue, and (d) the failure to act results in the commission of the crime.

922. The Chamber has found that, from March to June 1999, VJ and MUP forces carried out a campaign of widespread and systematic forcible displacements in numerous villages across 13 municipalities in Kosovo, which involved the commission of crimes against hundreds of thousands of Kosovo Albanians.

923. Lazarević was aware of this campaign of forcible displacements that was conducted by the VJ and MUP throughout Kosovo during the NATO air campaign. During 1998 and the period leading up to the campaign, Lazarević was provided with information indicating that VJ and MUP personnel were responsible for serious criminal acts committed against ethnic Albanians within Kosovo. The evidence above, including the notes of the Joint Command meetings, some Priština Corps Command orders, the evidence pertaining to Lazarević's presence in the border area between Albania and Kosovo at the time when joint operations were being conducted there, and the evidence of his knowledge of the crimes committed in the village of Gornje Obrinje/Abria e Epërme in Glogovac/Gllogoc municipality in October 1998, as well as in the village of Slapuzne on 8 January 1999, indicates that Lazarević was aware of the fact that crimes were committed against civilians and civilian property during operations conducted by the VJ and the MUP in 1998 and early 1999. He was aware of the humanitarian catastrophe in Kosovo, as described in UN Security Council Resolution 1199, which stated that this was in part caused by the VJ and MUP using excessive force,[2321] and he was aware that the VJ were involved in burning the houses of Kosovo Albanians; indeed, he was present at a meeting of the VJ leadership when Samardžić stated that

[2318] *Blaškić* Appeal Judgement, paras. 45, 46; *Vasiljević* Appeal Judgement, para. 102.
[2319] *Blaškić* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162; *Simić et al.* Appeal Judgement, para. 86.
[2320] *Blaškić* Appeal Judgement, para. 48.
[2321] P1468 (Notes of the Joint Command), pp. 124–125.

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fighting terrorism by torching was "a disgrace".[2322] Consequently, Lazarević was aware that similar excessive uses of force and forcible displacements were likely to occur if he ordered the VJ to operate in Kosovo in 1999.

924. From late March 1999 and throughout the campaign of forcible displacements, Lazarević, as the Commander of the Priština Corps, was present in Kosovo where the campaign was being conducted by his subordinates acting together with the MUP, and was reported as stating of himself that he was on the "front-line" of the action.[2323] From 24 March 1999, continuing for some weeks, the VJ and MUP, operating together, forcibly displaced large numbers of Kosovo Albanian civilians from Priština/Prishtina in an organised manner, which required significant planning and co-ordination. Lazarević was present in Priština/Prishtina throughout most of this time and was aware of these displacements and the atmosphere of terror in the town created by the VJ and MUP. Lazarević indicated that he was aware of the previous forcible displacement of Kosovo Albanians by members of the Priština Corps when he called upon his subordinates to prevent the mistreatment of the civilian population, through practices such as banning civilians from returning to inhabited places.[2324] Furthermore, Lazarević was informed about the massive scale of the displacement of the civilian population in reports sent by his subordinate units. For example, he knew that from 24 March to 2 April over 300,000 Kosovo Albanians left for Albania.[2325] The combination of Lazarević's general knowledge of the widespread displacement of Kosovo Albanians in the course of VJ operations and his specific knowledge of the locations of those operations, including at most of the locations named in the Indictment, lead the Chamber to conclude that the only reasonable inference is that he knew of the campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians.

925. Lazarević provided practical assistance, encouragement, and moral support to the VJ forces engaging in the forcible displacement of Kosovo Albanians in co-ordinated action with the MUP. Throughout the campaign of forcible displacements, Lazarević was the Commander of the Priština Corps, with *de jure* and *de facto* authority over all its members and the power to plan the VJ activities and operations in Kosovo.[2326] Lazarević significantly participated in the planning and

[2322] 4D97 (Minutes from the briefing of the commanders of the PrK and 3rd Army, 7 August 1998), p. 3.
[2323] P1523 (Transcript of a talk show held on 18 July 1999, published on 21 July 1999), p. 2.
[2324] 5D374 (Order of the PrK, 23 April 1999), p. 1.
[2325] 5D885 (Document of the 549th Motorised Brigade Command, 3 April 1999), p. 1.
[2326] The Chamber notes that the military territorial detachments in Kosovo were resubordinated to Lazarević by 8 April at the latest. In respect of the crimes listed below, for which Lazarević is being convicted, the Chamber is satisfied that members of the Priština Corps or VJ units subordinated to the Priština Corps at the time were involved in their commission. In relation to Staro Selo in Uroševac/Ferizaj, the Chamber notes that VJ volunteers were involved. The Chamber recalls the evidence discussed in Section VI.A.2.c.iv, where it is noted that volunteers were sent to training

execution of the joint operations conducted by the VJ, acting solely or in co-ordination with the MUP, on the ground in Kosovo from March to June 1999. His *Grom* 3 and 4 orders, and the Joint Command orders—which the Priština Corps drafted—sent the VJ into actions in Kosovo and provided the authorisation within the VJ chain of command for the VJ to operate in the crime sites where many of the forcible displacements of Kosovo Albanians were conducted. Lazarević's presence in the field, inspecting VJ units that were involved in the commission of crimes against Kosovo Albanians, was expressly noted to improve the morale of soldiers.[2327] Lazarević knew that the military courts were not effectively prosecuting VJ members for expelling Kosovo Albanians from their homes. Despite his knowledge of the campaign of forcible displacements occurring in Kosovo, he reported on 15 May 1999 that only one officer from the Priština Corps was charged with murder.[2328] Furthermore, only one commander of a Priština Corps unit was criminally prosecuted in relation to the events in Kosovo and that was for failing to take measures, resulting in the death of the VJ member. Lazarević knew that his failure to take adequate measures to secure the proper investigation of serious crimes committed by the VJ enabled the forces to continue their campaign of terror, violence, and displacement.

926. These acts and omissions provided a substantial contribution to the commission of the crimes that the Chamber has found to have been committed by VJ members, as specified below, as they provided assistance in terms of soldiers on the ground to carry out the acts, the organisation and equipping of VJ units, and the provision of weaponry, including tanks, to assist these acts. Furthermore, Lazarević's acts and omissions provided encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes by VJ members. As the Commander of the Priština Corps, Lazarević knew that his conduct would assist the implementation of the campaign to forcibly displace Kosovo Albanians.

927. The Chamber finds that it has been established beyond reasonable doubt that all of Lazarević's actions described above were voluntary. Consequently, the Chamber finds that, through his acts and omissions, Lazarević provided practical assistance, encouragement, and moral support to members of the VJ, who were involved in the commission of forcible transfer and deportation in the specific crime sites outlined above, which had a substantial effect on the

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centres in Serbia and then assigned to Priština Corps units in Kosovo. On this basis, the Chamber is satisfied that these volunteers in Staro Selo were under the jurisdiction of the Priština Corps at the relevant time.

[2327] P1903 (PrK Combat Report to 3rd Army, 5 April 1999), p. 3; P2617 (PrK Combat Report to 3rd Army, 4 April 1999), p. 2.

[2328] P1182 (Information sent by PrK to the 52nd Artillery Rocket Brigade, 15 May 1999), p. 4; Radomir Gojović, T. 16694–16695 (2 October 2007), T. 16756 (3 October 2007); P1011 (Ivan Marković, ed., *The Application of Rules of the International Law of Armed Conflicts* (2001)), p. 166.

commission of these crimes, that he was aware of the intentional commission of these crimes by the VJ in co-ordinated action with the MUP, and that he knew that his conduct assisted in the commission of these crimes.

928. While the forcible displacements were part of the VJ and MUP organised campaign, the Chamber is not satisfied beyond reasonable doubt that killings, sexual assaults, or the destruction of religious and cultural property were intended aims of this campaign. Accordingly, although he was aware of VJ members killing Kosovo Albanians in some instances, it has not been proved that Lazarević was aware that VJ and MUP forces were going into the specific crime sites referred to above in order to commit killings, sexual assaults, or the destruction of religious and cultural property. Consequently, in Lazarević's case, the mental element of aiding and abetting has not been established in relation to counts 3, 4, and 5.

929. The Chamber notes here that, in making its findings in relation to the responsibility of Lazarević, it has had regard to all the relevant evidence in relation to Lazarević, including that which supports his plea of not guilty and his own evidence denying any responsibility for events that are the subject of the Indictment. However, the Chamber finds that these denials are overwhelmed in some cases by the evidence identified above that it has accepted and that paints a clear picture of the practical assistance, encouragement, and moral support that Lazarević gave to the perpetrators of some of the underlying offences.

930. The Trial Chamber therefore finds that it has been established beyond reasonable doubt that Vladimir Lazarević is responsible for aiding and abetting, under Article 7(1) of the Statute, the crimes in the following locations:

- Peć/Peja
  - Peć/Peja town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Dečani/Deçan
  - Beleg—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Đakovica/Gjakova
  - Đakovica/Gjakova town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Korenica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dobroš/Dobrosh—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ramoc—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

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- Meja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
- Other villages in the Reka/Caragoj valley—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Prizren
  - Pirane/Pirana—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Orahovac/Rahovec
  - Celina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Srbica/Skenderaj
  - Turićevac/Turiçec—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Izbica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Tušilje/Tushila—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Ćirez/Qirez—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Priština/Prishtina
  - Priština/Prishtina town—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Gnjilane/Gjilan
  - Žegra/Zhegra—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Vladovo/Lladova—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Prilepnica/Përlepnica—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;

- Kačanik/Kaçanik
  - Kotlina/Kotllina—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Kačanik/Kaçanik—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity;
  - Dubrava/Lisnaja—deportation as a crime against humanity; other inhumane acts (forcible transfer) as a crime against humanity.

931. In respect of the crimes proved to have been committed for which Lazarević has not been held responsible as an aider and abettor, the Chamber finds that he also did not plan, instigate, or order them.

c. Superior responsibility

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-98-34-A

Date: 3 May 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 May 2006**

PROSECUTOR

v.

MLADEN NALETILIĆ, *a.k.a.* "TUTA"
VINKO MARTINOVIĆ, *a.k.a.* "ŠTELA"

JUDGEMENT

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter M. Kremer
Ms. Marie-Ursula Kind
Mr. Xavier Tracol
Mr. Steffen Wirth

Counsel for Naletilić and Martinović:

Mr. Matthew Hennessy and Mr. Christopher Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

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expected call for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[90]

26. In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment.[91] If the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial.[92] In some instances, where the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her, the defective indictment may be deemed cured and a conviction may be entered.[93] Where the failure to give sufficient notice of the legal and factual reasons for the charges against the accused has violated the right to a fair trial, no conviction may result.[94] When challenges to an indictment are raised on appeal, amendment of an indictment is no longer possible and so the question is whether the error of trying the accused on a defective indictment "invalidat[ed] the decision" and warrants the Appeals Chamber's intervention.[95]

27. In assessing whether a defective indictment was cured, the issue to be determined is whether the accused was in a reasonable position to understand the charges against him or her.[96] In making this determination, the Appeals Chamber has in some cases looked at information provided through the Prosecution's pre-trial brief[97] or its opening statement.[98] The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment,[99] may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to the disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial.[100] Finally, an accused's submissions at trial, for example the motion for judgement of acquittal, final trial brief or closing arguments, may

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[89] *Kvočka et al.* Appeal Judgement, para. 30; *see* also *Kupreškić et al.* Appeal Judgement, para. 92.
[90] *Kvočka et al.* Appeal Judgement, para. 31; *Kupreškić et al.* Appeal Judgement, para. 92.
[91] *Kvočka et al.* Appeal Judgement, para. 33.
[92] *Kvočka et al.* Appeal Judgement, para. 33.
[93] *See Kupreškić et al.* Appeal Judgement, para. 114; *Kvočka et al.* Appeal Judgement, para. 33.
[94] *Kvočka et al.* Appeal Judgement, para. 33.
[95] Article 25(1)(a) of the Statute; *Kvočka et al.* Appeal Judgement, para. 34.
[96] *See Kordić and Čerkez* Appeal Judgement, para. 142; *Rutaganda* Appeal Judgement, para. 303.
[97] *See e.g. Kupreškić et al.* Appeal Judgement, para. 117.
[98] *Kordić and Čerkez* Appeal Judgement, para. 169.
[99] *See e.g.* Rule 65 *ter* (E) (ii).
[100] *Ntakirutimana* Appeal Judgement, para. 27 (citing *Prosecution v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62).

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No. Date: Original:	IT-03-68-T 30 June 2006 English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Hans Henrik Brydensholt
Judge Albin Eser

Registrar: **Mr. Hans Holthuis**

Judgement of: **30 June 2006**

PROSECUTOR

v.

NASER ORIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Jan Wubben
Ms. Patricia Viseur Sellers
Mr. Gramsci Di Fazio
Ms. JoAnne Richardson
Mr. José Doria

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. John Jones

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the commission of the principal crime(s) must either be instigated or otherwise aided or abetted, and (iii) with regard to the participant's state of mind, the acts of participation must be performed with the awareness that they will assist the principal perpetrator in the commission of the crime.[733] Noting that the meaning and contents of these elements in the case law of the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR") are partly described in different terms, the Trial Chamber will state its position as far as it may become relevant to rule on the crimes charged in the Indictment.

1. Instigation

(a) *Actus Reus*

270. With regard to the participant's conduct,[734] instigating is commonly described as 'prompting' another to commit the offence.[735]

271. On the one hand, this has to be more than merely facilitating the commission of the principal offence, as it may suffice for aiding and abetting.[736] It requires some kind of influencing the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the crime. This does not necessarily presuppose that the original idea or plan to commit the crime was

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Trial Judgement"), para. 267; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda,* Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement"), para. 38; *Prosecutor v. Alfred Musema,* Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement"), paras 116, 120; *Prosecutor v. Laurent Semanza,* Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement"), para. 378; *Prosecutor v. Jean de Dieu Kamuhanda,* Case No. ICTR-99-54A-T, Judgement, 22 January 2003 ("*Kamuhanda* Trial Judgement"), para. 589; *Prosecutor v. Emmanuel Ndindabahizi,* Case No. ICTR-2001-71-T, Judgement, 15 July 2004 ("*Ndindabahizi* Trial Judgement"), para. 456. The same requirement of a completed principal crime applies with regard to aiding and abetting: *see Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 165; *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić* Trial Judgement"), para. 161; *Brđanin* Trial Judgement, para. 271.

[733] When taking steps (i) and (ii) together as constituting the stage of *actus reus* and step (iii) as the stage of *mens rea*, one can also speak of a "two-stage test": *Kayishema* Trial Judgement, para. 198; *Kayishema* Appeal Judgement, para. 186.

[734] *See* step (ii), para. 269 *supra.*

[735] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 27, upholding *Kordić* Trial Judgement, para. 387; *Blaškić* Trial Judgement, para. 280; *Prosecutor v. Radislav Krstić,* Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement"), para. 601; *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragulјub Prcać*, Case No. IT-98-30/1-T, Trial Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"), paras 243, 252; *Prosecutor v. Mladen Naletilić (aka "Tuta") and Vinko Martinović (aka "Štela")*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 60; *Brđanin* Trial Judgement, para. 269; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu,* Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj* Trial Judgement"), para. 514; *Akayesu* Trial Judgement, para. 482; *Prosecutor v. Juvenal Kajelijeli,* Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement"), para. 762; *Kamuhanda* Trial Judgement, para. 593; *Prosecutor v. Sylvestre Gacumbitsi,* Case No. ICTR-2001-64-T, Judgement, 17 June 2004 ("*Gacumbitsi* Trial Judgement"), para. 279. Although differently phrased, the Trial Chamber in *Bagilishema* case speaks of "urging and encouraging", which is obviously meant in the same sense: *Prosecutor v. Ignace Bagilishema,* Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement"), para. 30; *see also Semanza* Trial Judgement, para. 381.

[736] *See* para. 282 *infra.*

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generated by the instigator. Even if the principal perpetrator was already pondering on committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator is an '*omnimodo facturus*' meaning that he has definitely decided to commit the crime, further encouragement or moral support may merely, though still, qualify as aiding and abetting.[737]

272. On the other hand, although the exertion of influence would hardly function without a certain capability to impress others, instigation, different from 'ordering', which implies at least a factual superior-subordinate relationship,[738] does not presuppose any kind of superiority.

273. Instigation can be performed by any means, both by express or implied conduct,[739] as well as by acts or omissions,[740] provided that, in the latter case, the instigator is under a duty to prevent the crime from being brought about.[741] As regards the way in which the perpetrator is influenced, different from 'incitement' to commit genocide (Article (4)(3)(c) of the Statute),[742] instigation to the crimes included in the Statute needs neither be direct[743] and public[744] nor require the instigator's presence at the scene of the crime.[745] Thus, instigating influence can be generated both face to face and by intermediaries as well as exerted over a smaller or larger audience, provided that the instigator has the corresponding intent.[746]

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[737] *See* para. 281 *supra.*
[738] *Blaškić* Trial Judgement, paras 268, 281.
[739] *Blaškić* Trial Judgement, paras 270, 277, 280; *Brđanin* Trial Judgement, para. 269; *Limaj* Trial Judgement, para. 514.
[740] *Blaškić* Trial Judgement, paras 270, 280; *Kordić* Trial Judgement, para. 387; *Naletilić* Trial Judgement, para. 60; *Brđanin* Trial Judgement, para. 269; *Limaj* Trial Judgement, para. 514; *Kamuhanda* Trial Judgement, para. 593. *See also Kajelijeli* Trial Judgement, para. 762, referring to *Semanza* Trial Judgement, para. 381 where this position however is not explicitly stated.
[741] The requirement of a 'duty to act', which the offender must have derelicted in order to be held criminally liable for omission, appears to be considered as so obvious that it is rarely explicitly mentioned when judgements speak of 'acts and omissions' as a way of committing a crime without any differentiation, as *e.g.*, in the reference in fn. 740 *supra.* Even where a "culpable omission" is supposed to require "an act that was mandated by a rule of criminal law", as done in *Tadić* Appeal Judgement, para. 188, it seems to refer only to omission by a principal offender, as *e.g.*, *Limaj* Trial Judgement, para. 509. There is no doubt, however, that participation presupposes a duty to act in the same way as commission by omission as correctly stated in *Rutaganda* Trial Judgement, para. 41.
[742] *See Musema* Trial Judgement, para. 120.
[743] *Kayishema* Trial Judgement, para. 200; *Semanza* Trial Judgement, para. 381; *Kajelijeli* Trial Judgement, para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.
[744] The Trial Chamber in the *Akayesu* case, although not yet with certainty, suggested this position: *see Akayesu* Trial Judgement, para. 481. The Appeal Chamber in the same case clarified this position: *see Akayesu* Appeal Judgement, paras 471 *et seq.*, 478, 483. *See also Kajelijeli* Trial Judgement, para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.
[745] *Kayishema* Trial Judgement, paras 200 *et seq.*
[746] *See* para. 279 *infra.*

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(b) Nexus Between the Instigation and the Principal Crime

274. The necessary link between the instigating conduct[747] and the principal crime committed,[748] commonly described as 'causal relationship',[749] is not to be understood as requiring proof that, in terms of a '*condicio sine qua non*', the crime would not have been committed without the involvement of the accused.[750] Because the commission of a crime may depend on a variety of activities and circumstances, it suffices to prove that the instigation of the accused was a substantially contributing factor for the commission of the crime.[751] If no such effect is present, as in particular in the case of an '*omnimodo facturus*',[752] there may still be room for liability for aiding and abetting.[753]

275. To some degree differing from this position, the Prosecution contends that the conduct of the Accused was a "clear and contributing factor" of the commission of the crime.[754] To the contrary, the Defence submits that the conduct of the Accused must have had a "direct and substantial effect" on the perpetration of the crime.[755]

276. The Trial Chamber will follow neither of the theories put forward by the parties. Whereas, on the one hand, not any contributing factor can suffice for instigation, as it must be a substantial one, on the other hand, it needs not necessarily have direct effect, as prompting another to commit a crime can also be procured by means of an intermediary.

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[747] *See* step (ii), para. 269 *supra*.
[748] *See* step (i), para. 269 *supra*.
[749] *Blaškić* Trial Judgement, para. 280; *Kordić* Trial Judgement, para. 387. In the same sense, the Trial Chamber in the *Brđanin* case speaks of 'nexus': *see, e.g., Brđanin* Trial Judgement, para. 269. The Trial Chambers of the ICTR appear to opt for 'causal connection': *see, e.g., Bagilishema* Trial Judgement, para. 30; *Semanza* Trial Judgement para. 381; *Kajelijeli* Trial Judgement para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.
[750] *Kordić* Trial Judgement, para. 387; *Kvočka* Trial Judgement, para. 252; *Naletilić* Trial Judgement, para. 60; *Brđanin* Trial Judgement, para. 269; *Kordić* Appeal Judgement, para. 27.
[751] *Kordić* Appeal Judgement, para. 27; *Limaj* Trial Judgement, para. 514; *Bagilishema* Trial Judgement, para. 30; *Kamuhanda* Trial Judgement, para. 590; *see also Kamuhanda* Appeal Judgement, para. 65, stating that "a certain influence" enjoyed by the accused in the community was not considered sufficient.
[752] *See* 271 *supra*.
[753] *See* 281 *infra*.
[754] Prosecution Pre-Trial Brief, para. 94. Probably to the same effect, some Trial Chambers required a "clear contributing factor": *see, e.g., Blaškić* Trial Judgment, paras 270, 277; *Kvočka* Trial Judgment, para. 252; *Brđanin* Trial Judgment, para. 269. However the Trial Chamber in the *Kordić* case merely demanded that "the contribution of the accused in fact had an effect on the commission of the crime": *see Kordić* Trial Judgement, para. 387
[755] *Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, Defence Pre-Trial Brief Pursuant to Rule 65*ter*(F) ("Defence Pre-Trial Brief"), Annex I, Element 1.3.1.3. The requirement of direct and substantial effect seems endorsed in *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 ("*Kayishema* Appeal Judgement"), para. 185; *Tadić* Trial Judgement, para. 692; *Ndindabahizi* Trial Judgement, para. 466.

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(c) *Mens Rea*

277. With regard to the usual description of the instigator's *mens rea*,[756] further clarification is required. Whereas the Trial Chamber in the *Kamuhanda* case was satisfied with the 'knowledge' of the instigator that his acts assisted in the commission of the crime,[757] the Trial Chamber in the *Bagilishema* case required that the instigator 'intended' that the crime be committed.[758] Further, while according to the Trial Chamber in the *Kordić* case, the instigator must have "directly intended" to provoke the commission of the crime,[759] for the Trial Chamber in the *Blaškić* case it would not matter whether the instigator "directly or indirectly intended" the crime in question be committed.[760] Again different, whereas the Trial Chamber in the *Semanza* case required the participant to act both "intentionally *and* with the awareness"[761] that he is influencing the principal perpetrators to commit the crime,[762] the Trial Chambers in the *Kvočka*,[763] *Naletilić*,[764] *Brđanin*[765] and *Limaj*[766] cases, found it sufficient that the instigator either "intended to provoke or induce the commission of the crime *or* was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts."[767] Although the Appeals Chamber in the *Blaškić* case reached the same result with regard to 'ordering', it still opened new grounds by requiring for intention, in addition to the cognitive element of knowledge, some sort of acceptance of the final effect (or outcome or result). This volitional element is present if a person, in ordering an act, is aware that the execution of the order will result in a crime, because then he must be regarded as accepting that crime.[768] The same conclusion was also drawn by the Appeals Chamber in the *Kordić* case[769] with regard to instigation.

278. The position of the Parties also differs on the issue of *mens rea*: whereas the Prosecution is satisfied if the instigator was aware that the commission of the crime would likely be the

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[756] *See* step (iii), para. 269 *supra*.
[757] *Kamuhanda* Trial Judgement, para. 599; *see also Kayishema* Trial Judgement, para. 198, speaking of the "awareness by the actor of his participation in the crime".
[758] *Bagilishema* Trial Judgement, para. 31.
[759] *Kordić* Trial Judgement, para. 387. *See also Kordić* Appeal Judgement, para. 29, rephrasing that "the perpetrator acted with direct intent in relation to his own ?...ğ instigating ?...ğ".
[760] *Blaškić* Trial Judgement, para. 278.
[761] Italics added.
[762] *Semanza* Trial Judgement, para. 388, referring to other judgements, all of which, however, do not phrase it in the same way: *see Kayishema* Appeal Judgement, para. 186; *Kayishema* Trial Judgement, para. 201; *Bagilishema* Trial Judgement, para. 32. *See also* fn. 757 *supra*.
[763] *Kvočka* Trial Judgement, para. 252.
[764] *Naletilić* Trial Judgement, para. 60.
[765] *Brđanin* Trial Judgement, para. 269.
[766] *Limaj* Trial Judgement, para. 514.
[767] *Kvočka* Trial Judgement, para. 252 (italics added).
[768] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), paras 41, 42.
[769] *Kordić* Appeal Judgement, paras 32, 112.

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consequence of his conduct,[770] the Defence requires that the Accused 'intended' to prompt another person to commit the crime.[771]

279. Considering this development in the interpretation of the instigator's *mens rea* in light of the type and seriousness of crimes over which the Tribunal has jurisdiction, the Trial Chamber holds that individual criminal responsibility both for the commission of, and the participation through, instigation requires intention. The Trial Chamber further holds that intention contains a cognitive element of knowledge and a volitional element of acceptance, and that this intention must be present with respect to both the participant's own conduct and the principal crime he is participating in. This means that, first, with regard to his own conduct, the instigator must be aware of his influencing effect on the principal perpetrator to commit the crime, as well as the instigator, even if neither aiming at nor wishing so, must at least accept that the crime be committed. Second, with regard to the principal perpetrator, the instigator must be both aware of, and agree to, the intentional completion of the principal crime.[772] Third, with regard to the volitional element of intent, the instigator, when aware that the commission of the crime will more likely than not result from his conduct, may be regarded as accepting its occurrence.[773] Although the latter does not require the instigator precisely to foresee by whom and under which circumstances the principal crime will be committed nor that it would exclude indirect inducement, the instigator must at least be aware of the type and the essential elements of the crime to be committed.[774]

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[770] Prosecution Pre-Trial Brief, para. 93.
[771] Defence Pre-Trial Brief, Annex 1, Element 1.3.1.5.
[772] This requirement of the instigator's 'double intent' with regard to both his own influencing the principal perpetrator and that person's intentional commission of the crime, does not mean, however, that the instigator would also have to share a 'special intent' as it may be required for the commission of certain crimes, such as genocide with regard to "destroying, in whole or in part, an ethnical group" (Article 4 (1) of the Statute). Although this specific aspect, which was addressed in the *Semanza* case as well as in the *Ntakirutimana* case, may not become relevant with regard to the crimes at stake in this case, it should not be confused with the ordinary 'double intent' that the instigator must have with regard to his own conduct and that of the principal: *see Semanza* Trial Judgement, para. 388; *Ntakirutimana* Appeal Judgement, para. 494 *et seq.*
[773] This position includes *dolus eventualis*, if understood as requiring the instigator to reconcile himself with the inducing effect of his conduct as assumed by the Appeal Chamber in *Blaškić* case, while mere recklessness would not suffice if the instigator did not expect and/or accept the conscious risk of his conduct: *see Blaškić* Appeal Judgement, paras 27, 34 *et seq.* The conceptual distinction between these mental states needs no further elaboration here as long as instigation is considered to require both a cognitive element of awareness and a volitional element of acceptance of the crime inducing effect of the instigator's conduct: *see Blaškić* Trial Judgement, para. 267.
[774] *Kamuhanda* Trial Judgement, para. 599. For similar knowledge requirements in case of aiding and abetting, *see* para. 288 *infra.*

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-94-1-A

Date: 15 July 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **15 July 1999**

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

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would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case.

C. Conclusion

56. The Appeals Chamber finds that the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber. This ground of Appeal, accordingly, fails.

B. (4) ICC Jurisprudence

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Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: ICC-01/04-01/10

Date: 16 December 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA

Public Redacted version

Decision on the confirmation of charges

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the truthfulness and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence.

5. Specificity of the Document Containing the Charges

79. The Defence requested that the following words be struck out for lack of specificity where they appear in the DCC as the description of the locations where and dates on which the crimes allegedly occurred:

(i) these locations "include but are not limited to";

(ii) "and neighbouring villages" or "and surrounding villages", and

(iii) "the village of W673 and W674 [...] in Masisi territory in the second part of 2009".[143]

80. The Prosecution responded that use of the words "include but not limited to" allows it to prove other events to establish the same crime, provided that adequate notice has been given to the Defence prior to the confirmation hearing, and assured the Chamber that similar notice would be given prior to the trial.[144] The Prosecution further submitted that it is permissible to charge a pattern of crimes in a defined period and geographical area and to include specific incidents as examples.[145] Finally, the Prosecution argued that redaction of information relating to the date and location of the events which allegedly took place in the village of Witness 673 and Witness 674 was authorised by the Single Judge on 20 May 2011[146] and that the lack of specificity in relation to these events is necessary for the protection of the witnesses in question.[147]

81. Pursuant to articles 61(3)(a) and 67(1)(a) of the Statute, rule 121 (3) of the Rules and regulation 52 of the Regulations of the Court ("Regulations"), the suspect must be informed in detail of the facts underlying the charges against him or her at least 30 days

[143] ICC-01/04-01/10-305.
[144] ICC-01/04-01/10-T-6-Red2-ENG, at pp. 22-3.
[145] *Ibid.*, at p. 23.
[146] ICC-01/04-01/10-167.
[147] ICC-01/04-01/10-T-6-Red2-ENG, at p. 27.

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before the commencement of the confirmation hearing. Article 74(2) of the Statute[148] makes it clear that it is those facts and circumstances that form the basis for the charges confirmed at the pre-trial stage which are determinative of "the factual ambit of the case for the purposes of the trial and circumscribe [the trial] by preventing the Trial Chamber from exceeding that factual ambit".[149] In light of the above provisions, and the mentioned precedent, the approach adopted by the Prosecution is untenable insofar as it attempts to reserve for the Prosecution the right to expand the factual basis of the charges through the addition of entirely new material facts after the charges have been confirmed.

82. The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.

83. For these reasons, the Chamber finds that the words "include but are not limited to" are meaningless in the circumstances of this case. Accordingly, the Chamber will assess the charges only in relation to the locations specified under each count contained in the DCC.

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[148] The Trial Chamber's decision "shall not exceed the facts and circumstances described in the charges and any amendments to the charges".
[149] ICC-02/05-03/09-121-Corr-Red, para. 34.

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Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **1 August 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY, AND JOSHUA ARAP SANG

Public

DOCUMENT CONTAINING THE CHARGES

Source: Office of the Prosecutor

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95. SANG coordinated the violence by using coded language to indicate where to attack, after which attackers gathered and attacked the location. Kass FM also broadcast instructions to close roads in the area.

96. Perpetrators threatened and forced monetary contributions from Kalenjin who were unsupportive of the Network's policy in order to be spared from the violence.

97. PNU supporters sought refuge at a Nandi Hills town police station which eventually housed approximately 32,000 IDPs. 20,000 IDPs from Nandi Hills town sought refuge in Kisii. At least three people were killed, one person was burned alive in his car, while others were cut into pieces. The Network provided perpetrators with food and paid youths to continue their attack.

VI. INDIVIDUAL RESPONSIBILITY: Articles 25(3)(a) [RUTO and KOSGEY]

98. RUTO and KOSGEY are individually criminally responsible, pursuant to Article 25(3)(a) of the Statute, for crimes against humanity as defined in Article 7 of the Statute. RUTO and KOSGEY's responsibility as co-perpetrators includes crimes carried out by the Network's subordinates and direct perpetrators. The crimes alleged resulted from RUTO and KOSGEY's common plan. RUTO and KOSGEY's role in the Network and their essential contributions to the common plan gave them control over the crimes committed.

99. RUTO and KOSGEY intentionally engaged in conduct with the awareness that implementation of their common plan would, in the ordinary course of events, lead to the commission of crimes, and they were aware and accepted the risk involved in implementing their common plan. RUTO and KOSGEY were

mutually aware of the factual circumstances that enabled them to jointly control the crimes.

(i) RUTO AND KOSGEY AGREED AND HAD A COMMON PLAN BETWEEN THEMSELVES AND OTHERS

100. RUTO and KOSGEY, together with SANG and others, adopted and implemented an organizational policy of committing widespread and systematic attacks against PNU supporters in order to: (1) punish PNU supporters by inflicting fear, including committing crimes alleged; and (2) expel the PNU supporters from the Rift Valley.

101. Their organizational policy was criminal--to target PNU supporters and punish and expel them from the Rift Valley. RUTO and KOSGEY, together with SANG and others, including subordinates and direct perpetrators did so by systematically inflicting fear, killing, looting, burning or otherwise destroying their property. Their express purpose was to drive PNU supporters from the Rift Valley by whatever means necessary, including the commission of the alleged crimes.

102. At these preparatory meetings and events, RUTO, KOSGEY and others: (1) encouraged participation in the attacks using derogatory terms to discuss their targets; (2) elected Commanders and assigned specific geographical areas to control; (3) identified areas densely populated by PNU supporters; (4) distributed weapons; (5) planned logistics regarding weapons (materials/storage for traditional weapons); (6) agreed upon transportation and other logistics, such as meeting locations; (7) promised direct perpetrators rewards for their participation; (8) identified callers for future broadcasts of Kass FM; (9) informed

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C. Taylor Trial Record
(Trial Transcripts, Exhibits, Pleadings)

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C. (1) Trial Transcripts

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Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 14 JULY 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Mr Gregory Townsend Ms Advera Nsiima Kamuzora Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Mr Stephen Rapp Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Terry Munyard Mr James Supuwood Ms Salla Moilanen
For the Office of the Principal Defender:	Ms Claire Carlton-Hanciles

common enemy, happening to be ULIMO, we withdrew our men and ceased all, and I mean all, cooperation with the RUF.

Q. Did you thereafter provide any military assistance to the RUF?

09:45:55 A. None whatsoever.

Q. Were you thereafter aware of atrocities being committed in Sierra Leone?

A. Well, I put it this way: There is no one on this planet that would not have heard through international broadcasts or

09:46:29 probably discussions about what was going on in Sierra Leone. I would be the first to say yes, we did hear of certain actions that were going on in Sierra Leone that we - that were a little strange to us because those things did not occur in Liberia.

Q. What things?

09:46:51 A. Well, we heard that people were getting killed, women were getting raped and different things, and we couldn't understand it. I could not understand it, because these are things that we did not tolerate in Liberia and so for me it was unacceptable. But then again we had no way of verifying whether, you know,

09:47:17 these were true because we did not have anyone in there to tell us because, you know, these days when you see reports on television - I'm seeing on television this morning that I ordered people to cannibalise people in Sierra Leone, and when you begin to look at the different slants in the news, well, you hear them,

09:47:37 you cannot verify them, and it was not in my - it was not my duty to verify them, but I would say we did hear about those things in Sierra Leone.

Q. And had you ordered the RUF or any other group in Sierra Leone to carry out such actions?

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 19 AUGUST 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Kate Gibson
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

A. At the Executive Mansion in the conference room that I used.
Q. And where was Sankoh at this time?
A. Sankoh was incarcerated. He was still being held by the
11:26:24 Sierra Leonean government.
Q. So how was contact going to be made with him?
A. Well, that a letter would have to be taken to him, and a letter was taken to him by both Obasanjo and Alpha Konare, the chairman of ECOWAS, agreed that they would take the letter.
11:26:46 They, following that meeting about a week or so later, flew into Sierra Leone with the letter from Issa Sesay; that they met with Tejan Kabbah; Foday Sankoh was brought to that meeting; he received the letter; approved the interim leadership of Issa Sesay; and that was brought back; and Issa Sesay subsequently
11:27:16 returned to Liberia for the confirmation of his interim leadership of the RUF.
Q. When the meeting took place in Monrovia, Mr Taylor, did President Kabbah know: One, that such a meeting was occurring and; two, the purpose of the meeting?
11:27:37 A. Yes, yes. He knew, definitely. Definitely.
Q. And who do you say conveyed the letter to Sankoh?
A. The chairman of ECOWAS at the time, Alpha Oumar Konare, along with the President of Nigeria, Olusegun Obasanjo, flew into Freetown and met with Sankoh while he was incarcerated during
11:28:07 that period. That would be about - I would put that meeting to about the first week of August, they met with Sankoh with Kabbah in Freetown, delivered the letter to Sankoh. The two Presidents did.
PRESIDING JUDGE: Mr Griffiths, despite what that clock

says we've got much less than two minutes of time left. I think the clock is running slow.

MR GRIFFITHS: Very well. That's as good a point as any.

PRESIDING JUDGE: All right. We will resume at 12 noon.

11:28:40 [Break taken at 11.30 a.m.]

[Upon resuming at 12.00 p.m.]

MR GRIFFITHS:

Q. Yes, Mr Taylor. Before we adjourned we were dealing with the appointment of Issa Sesay as interim leader of the RUF.

12:00:43 A. That is correct.

Q. Now, you told us, Mr Taylor, that the initial meeting took place on 26 July.

A. That is correct.

Q. And at that meeting, remind us, who was present apart from

12:01:00 yourself?

A. We had the Presidents of The Gambia, Burkina Faso, Mali, Nigeria, and Togo. I do recall that I mentioned earlier that Ivory Coast did not attend. These were the five states, and I made six.

12:01:25 Q. Now, Bockarie - sorry. Sesay at that stage said: Firstly, he would need to consult with the War Council, is that correct?

A. That is correct.

Q. Secondly, he would want Foday Sankoh's sanction first?

A. That is correct. That's what he said at that meeting, yes.

12:01:47 Q. And it was decided that a letter would be taken to Sankoh?

A. That is correct.

Q. Who wrote the letter?

A. Issa Sesay, to the best of my knowledge, wrote the letter.

Q. And who took it to Sierra Leone?

A. The chairman of ECOWAS, Alpha Oumar Konare and the President of Nigeria, Olusegun Obasanjo.
Q. And how did they travel to Sierra Leone?
A. They flew, I think, on the Nigerian President's plane.
12:02:20 They flew into Sierra Leone.
Q. And where did they meet Mr Sankoh?
A. They met him in Freetown. I was not present. I don't know the precise location, but they met him in Freetown along with President Kabbah.
12:02:34 Q. And Sankoh then approved his appointment?
A. That is correct.
Q. Now, the letter that was written by Issa Sesay, did you see that letter, Mr Taylor?
A. Yes, I saw the letter. I had a copy of the letter.
12:02:55 Q. Was it a typed document, or what?
A. No, it was a handwritten document by Issa Sesay. Handwritten.
Q. Let us have a look behind divider 76 in this volume, please. Do you have it, Mr Taylor?
12:03:41 A. Yes, I do.
Q. Is this the letter, Mr Taylor?
A. Just one minute. Yes, this is the letter.
Q. Now, I have caused to be distributed a better copy of this. Does everyone have the better?
12:04:00 PRESIDING JUDGE: Yes, we have that, thank you, Mr Griffiths.
MR GRIFFITHS: Because the original was rather illegible.
Q. Now, let's see if we can make sense of this letter, Mr Taylor. We see it's dated 1 August 2000, top right-hand

corner.
A. That is correct:
Q. "RUF. Dear Papay, We greet you in the name of Allah and the revolution, and the high command of the RUFP. Your children
12:04:37 are still committed and loyal to you and the revolution. In this respect, and all honour bestowed upon you, we held a general forum inviting all senior commanders and officers of the RUFP" - I am having difficulty with that word - "when we came to a final decision for the revolution to still be moving, both
12:05:18 politically and militarily, until your release from detention; that Brigadier General Issa Sesay will head the RUFP as interim leader until your return and all instructions should be taken from him, both politically and military for the success of the RUFP until you are released, which we are all praying for. We
12:05:50 would like to inform you about such development and your advice and instruction, which will be carried out fully through the high command of the RUFP. We hope upon your release you will meet the revolution more strong, both militarily and politically. We wish you well and hope to see you in good health on your return, when
12:06:29 we are trying to exploit all means for your release through the diplomatic channel which we are presently going through. We wish you all the best and hope to see you soon."
It is signed and then we see, "Your children of the revolution, signed on behalf of the high command of the RUFP",
12:07:01 and then we see the word "interim ".
A. Yes.
Q. Was this the letter, Mr Taylor?
A. This is the letter that Obasanjo and Konare took from Sesay to Foday Sankoh while he was in custody in Freetown, yes.

Q. And how do you come to have a copy of the letter?
A. I was supplied a copy by the RUF after this letter went to Sankoh. Obasanjo had a copy, Konare had a copy.
JUDGE SEBUTINDE: Mr Griffiths, who signed this letter?
12:07:46 THE WITNESS: It is signed by - we can't see the signature, but it is signed by Issa, the interim leader. Where you see it up there - but you can't really. This copy is not quite clear. Maybe --
MR GRIFFITHS:
12:08:02 Q. Where do you see a signature, Mr Taylor?
A. Well, I see some markings between "decision" and here. The signature is in here, but I know it's Issa because I was told that Issa signed the letter as interim leader. That's contestable, but I was told that Issa signed it as interim
12:08:24 leader.
MR GRIFFITHS: Now, can I ask that that document be marked for identification, please.
PRESIDING JUDGE: Document is marked for identification MFI-149.
12:08:53 MR GRIFFITHS:
Q. Now, following the decision by Sankoh to appoint Sesay - General Sesay as the interim leader, Mr Taylor, was that decision made public?
A. That decision was finally made public after the Heads of
12:09:21 State - two of them - after Konare and Obasanjo returned, we discussed Sankoh's agreement by phone. They did not come back to Liberia, because this is all happening around the first week now in August when this happens. They go and we arrange for a meeting to be held three weeks later. They come back to Liberia,

and both Alpha Konare - that's what I mean by "they" - and Obasanjo late - about around about the 21st, 22nd, somewhere of August, for the formal confirmation and we invite Issa Sesay back to Liberia. That confirmation is done, and there is a press statement done at that particular time at Roberts International Airport where the three Heads of State meet. The formal announcements are made. There are press reports, and a press release is done by the RUFP at that particular time.

Q. Did you have a copy of that press report in your archives?

12:10:36 A. Yes, I did. It's - they call it - a press communique, they call it.

Q. Have a look behind divider 74, please.

Can I inquire, Mr President, did I ask for the letter - the handwritten letter to be marked for identification?

12:11:20 PRESIDING JUDGE: Yes, that is MFI-149.

MR GRIFFITHS: I am grateful.

Q. Now, is this the press communique, Mr Taylor?

A. Yes, this is the press communique as done by the RUFP following that situation.

12:11:34 Q. Now, we see handwritten at the top "Presidential Papers 2000"; whose handwriting is that?

A. That could be one of my staff personnel where they are going to make this a part of our publication.

Q. Of the presidential papers, yes?

12:11:52 A. That is correct.

Q. "Press communique.

Press communique issued by the Revolutionary United Front, RUF, following a meeting with His Excellency Alpha Oumar Konare, President of the Republic of Mali and Chairman of ECOWAS; His

Q. The witness goes on:

"First he" - that is you, Mr Taylor - "suggested that he would want to take Mosquito back, and Issa said no. And he said, 'Ah, but Issa, if you would take care as a commander as a leader.' Then Issa said except if he returned and informed the RUF family, he said, because RUF was a family."

Now, did you suggest that Mosquito be taken back?

A. No, I did not suggest that.

12:59:38 Q. What was your knowledge of the relationship between Mosquito, that is, Sam Bockarie, and Issa Sesay?

A. Oh, there was - they had problems. From the issue involving the - what they call disrespect to Sankoh back in 1999 that led to Issa coming - I mean, excuse me, Sam Bockarie leaving

13:00:13 Sierra Leone, they had problems. In fact, Issa was very, very close to Sankoh and I have no proof, but it was even believed that Issa was some distant relative to Sankoh. I have no proof of that, but Issa was extraordinarily close to Sankoh and there was no love between Issa and Sam Bockarie.

13:00:37 Q. And let's just analyse that a little further, shall we. Here is a meeting designed to find a leader for the RUF, yes?

A. Uh-huh.

Q. In order to promote the peace process and, according to this witness, you are seeking to inject into that equation

13:01:06 Mosquito, who had had problems with the same organisation?

A. That is correct.

Q. Do you see any sense in that, Mr Taylor?

A. None whatsoever.

Q. "... he said, because RUF was a family. When he would

inform the RUF family, then he will respond whether he would take the position or he would appoint somebody else.

Q. Now, Mr Witness, let's clear up some of things you said. You said first he suggested that he would take Mosquito back. Who suggested that?

A. Charles Taylor suggested that he wanted to send Mosquito back. He suggested that he wanted to send him back to Sierra Leone as RUF leader."

Did you do that?

13:01:59 A. I did not ever, ever do that, no.

Q. And the witness himself accepts that there were other Presidents present. Do you see any sense in making such a suggestion in front of the other Presidents who were present, Mr Taylor?

13:02:19 A. Total nonsense. No, no sense whatsoever.

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

A. Charles Taylor was saying that to Issa.

13:02:41 Q. Then you said that except if he returned and informed the RUF family, then he will respond whether he would take the position. Who is this who is speaking?

A. Issa was the one speaking to the delegation.

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

13:03:00 What happened next?

A. Later Issa and others returned to the guesthouse where they were in Congo Town."

Now, listen to this, please, Mr Taylor, and listen carefully.

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 26 OCTOBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Mr Silas Chekera

A. Well, when did I leave Liberia? I left in 2003 and by the time I left Liberia, remember, Sam Bockarie was not even in Liberia when the Sierra Leonean court started. He was not in Liberia. Issa Sesay visited Liberia many times throughout 2001, 10:37:23 2002. Why didn't somebody kill him? This is total nonsense. You know, I know lawyers - and this is not - you know, lawyers are well trained and they are trained to turn black to white and white to black. That's what --

Q. Does that include me?

10:37:41 A. Well, you know, I mean, no, not directly. But I mean, you know - but this - you know, sometimes it's just so - look, I loved that boy and I am saying - you didn't ask me this question; I volunteered. I would have never turned him over to Tejan Kabbah, you understand me? And I have my reason, and we'll get 10:38:04 to it, and I will talk about it.

So this thing about wanting Sam Bockarie killed, there was no such thing. I was upset - very, very upset about the death of Sam Bockarie when Moses Blah came and brought the body to Monrovia and reported to me that Sam Bockarie had been killed, 10:38:18 because I sent him there to prevent the killing of Sam Bockarie. I sent him there to prevent that. You go, you are an experienced man, you're the Vice-President, you're a soldier; go and make sure that this matter is done calmly, and you bring Sam Bockarie to Monrovia. If I wanted Sam Bockarie killed, I would have never 10:38:36 sent Moses Blah to Nimba. That lie he told here about he was just in the area, it's a blatant, blatant lie. He was sent by me there to prevent this very situation. I did not want that boy killed.

Q. Very well. That's all I'll ask you about that - the

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 25 NOVEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Mr Nicholas Koumjian Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Terry Munyard

allies, had lost most of their heavy weapons that were in Freetown during the intervention. You knew that, didn't you?
A. No, I did not know.
Q. As the point person on peace, wasn't it important to understand the strategic situation?
A. Well, one could say that. But if your question is did I ask how many guns, how many pieces of artillery did they lose, I didn't get into that. For ECOWAS, driving the junta out of power was something that was agreed upon by ECOWAS. So for me strategically I did not ask for the military and intricacies of loss of equipment. I didn't really get into that.
Q. You understand strategically the junta, the RUF and its AFRC allies, were retreating and weakened, correct?
A. Definitely. We received reports on that, yes.
Q. Sir, let me ask you this: At this point - let's even get a date so it will be clear to you. Let's say by April 1998, was it clear to you that anyone who continued to provide support to the RUF and the AFRC would be supporting a group engaged in a campaign against the civilian population of Sierra Leone?
A. Well, I would say no because I was not aware that - I was not aware of anyone that was giving - as you put the question, giving support to be aware that anyone that would continue. So I really don't know how to answer this question. To the best of my knowledge from reports that reached to the Heads of State, we did not get an indication that they were receiving support from outside.
Q. Sir, my question is: Would anyone who gave support to the RUF be giving support to a force that was carrying out a campaign of atrocities against civilians as of April 1998?

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 15 APRIL 2010
9.30 A.M.
TRIAL

TRIAL CHAMBER II

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

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d'Ivoire, Mr Amara Essy. He was always with us. Then there was a translator there, I don't remember her name but she is an Ivorian. There was a translator, a female. I don't quite remember her name, but there was a translator there.

09:41:24 Q. That's very helpful. Now, I just want to ask you about some of the practicalities involved. First of all this: As one of the leading representatives of the RUF, what were your objectives in those political discussions that you were involved in? What were you seeking to achieve?

09:41:51 A. In the first place, when we met at the table, the table was round, but we sat face-to-face, we were facing one another. I was made the first chairman, it was a rotating chairmanship - the first chairman of the political side of the negotiation aspect. Basically the RUF was seeking, the RUF and the government,

09:42:22 because it was now a negotiation, we were all seeking to achieve a negotiated settlement to the civil conflict. We were seeking to achieve a negotiated settlement to the conflict in our home.

Q. Were there any obstacles to that?

A. Yes.

09:42:48 Q. Such as?

A. The intransigence of Foday Sankoh himself because apart from what he did, there was no other obstacle. He himself created the problem.

Q. Now, was Foday Sankoh personally involved in any of these

09:43:07 discussions? Was he present in the room setting out his own viewpoint?

A. No. Except there was a day - there was one particular day when he went to the negotiation table against the advice of the Foreign Minister, who was actually the moderator.

Q. That's Amara Essy?
A. Amara Essy. Against his advice he went to the room, and he said he had a point to express. Mr Amara, although all of us saw a loft embarrassment on his face, he allowed him to express the
09:43:49 point he had, and the point was that he wanted the talks to be suspended again so that the people of Sierra Leone will go into a referendum as to whether they actually wanted peace or not. That was the point he put across. That was the first and last time he was there.
09:44:09 Q. So this leader of the RUF was wanting a referendum as to whether civilians wanted peace?
A. Yes, basically.
Q. Now, again on the practicalities: At the end of each day's discussions, would you report back to Sankoh and give him a
09:44:40 briefing?
A. Yes, that was what we did at the end of every day. In fact, we were in the same hotel. Every day, whatever we came up with, we reported to him appropriately and we would advise him to sit down and actually read it. So day by day until we concluded
09:45:00 the negotiations, that was what we did.
Q. Did you get the impression from your interaction with Sankoh, during that period following your return until the signing of the agreement, whether he was sincere or not about the negotiations?
09:45:21 A. It was difficult at that time to assess the level of sincerity in him. I actually got shocked at a comment he made the very day he signed the accord in Abidjan. When he went back to the house that day after the signing in the presence of Adjoa Coleman, the representative of the Secretary-General of the OAU,

in her very presence he was able to say that now we have signed Abidjan I. We are now waiting to sign Abidjan II. I said, but hey, why are you saying you have to sign Abidjan II? Why do you have to sign Abidjan I in the first place? That was the question
09:46:09 I asked him. So that was the day we started - I started noticing that he actually was not interested in the peace, but we had to continue.

Q. The final practicality I want to ask you about is this: To what extent were the combatants and supporters on the ground in
09:46:29 Sierra Leone kept abreast of what was happening in the negotiations?

A. We came to notice that Foday Sankoh - not notice. We were told. We heard from the boys that - from the radio operators that their friends in the bush there were expressing
09:46:52 dissatisfaction because they were not getting adequate information from what was happening on the ground. But that was not a strange thing to us, because Foday Sankoh had actually said no information should go to the boys until he himself went there to talk to them. That was what was happening.

09:47:10 Q. Very well. In any event, in due course agreement was reached?

A. Uh-huh.

Q. And signed?

A. Yes.

09:47:23 Q. 29 November 1996?

A. Sorry. It was supposed to have been signed on the 29th, but it did not happen. It happened on the 30th. It was supposed to have been signed on the 29th, but it happened on the 30th. It was a Saturday. But it actually happened on the 30th.

Q. It was a Saturday?
A. Yeah.
Q. And help us: What was your feeling and that of the fellow members of the external delegation when that agreement was
09:47:54 finally signed?
A. It was - for us it was a relief and we were thinking that we had carried the day, because after all the agreement the companies of the agreement, which we ourselves had taken full part in reaching, were very good for the RUF. Because the RUF
09:48:20 was supposed to have been transformed into a political party which, as far as we are concerned, we, the external delegation, was our own main desire.
Q. Now, I would like you, please, to be shown exhibit D-87. Now, this is the Abidjan Accord, okay?
A. Yes.
Q. But before we come to look at its detail - and I want to look at the detail with you, because you were instrumental in bringing this about - can I ask you one final practical question, and it's this: During the negotiations, was President Tejan
09:49:35 Kabbah ever present?
A. During the negotiations, no, he was never present. But after the negotiations the President of Cote d'Ivoire, President Konan Bedie invited him to Abidjan so that - he organised a small meeting. He wanted to - before the signing he wanted Foday
09:50:02 Sankoh and Kabbah to meet again. He wanted to assess Foday Sankoh's seriousness with the accord. So in that meeting, I was present. Mr Deen-Jalloh was present. The two of us were there. Initially he did not want to take us there, Foday Sankoh. He did not want to take us to the meeting. He wanted to take lower

you?
A. Yes. That was where they took all our shoes, our documents and everything from us.
Q. And what about - was it just your shoes or anything else?
12:22:17 A. Yes. Some people lost some other things. Like Mr Palmer's wedding ring was taken from me. Me, I did not go with my own at all because - his wedding ring was taken from him, which was sent later on to the crossing before --
Q. What about your clothes, were they removed?
12:22:37 A. No, the clothes were not removed that moment.
Q. So, in any event, where were you taken?
A. We were taken to Buedu.
Q. What happened to you when you got to Buedu?
A. When we got to Buedu it was late. It was in the morning
12:22:50 that they actually went and fell on us. They gave us a serious beating. We were beaten for up to four hours unbelievably.
Q. Who was beaten?
A. Mosquito gave instruction to his young combatants to give us the beating. He himself did not do it, but he gave the
12:23:09 instructions.
Q. And who was beaten?
A. I was - all of us were beaten. Myself, Mr Deen-Jalloh, Dr Barrie, Juliet James and Palmer. Sorry, I think I did not mention Dr Barrie when I was talking about those who came, but he
12:23:28 came with us, sorry.
Q. So you were all beaten the day after your arrest?
A. Yes. The first thing in the morning, that was what they did.
Q. In Buedu?

A. In Buedu, yes.

PRESIDING JUDGE: Did that include the ambassador?

THE WITNESS: No, no, the ambassador was not beaten. He was not beaten at all. According to them, he was not the target; we were the target.

MR GRIFFITHS:

Q. And following that beating, how were you treated thereafter?

A. Following that beating, there was a day when President Kabbah called Mosquito and - I think I have said that one here, but I have to say it again, when President Kabbah called Mosquito and told him - and begged him to have us released, he said because we are all citizens of the country and that we are needed by all of them. So Mosquito interpreted that one as a confirmation of what Foday Sankoh had told him concerning the $100,000 and the connivance with the UN and the Kabbah government to have him arrested and overthrown.

So he came over to us and asked us to tell him how much Foday Sankoh - sorry, how much President Kabbah had given us, he said because there is no way President Kabbah would have called him to beg him on our behalf if we did not have any arrangements with him, monetary arrangements with him. I told him, if death had come at that time for me, me personally, I said I am prepared to receive it. But I cannot say that - I cannot say what is untrue, because Kabbah did not give me any money. I even told him we did not do this thing to glorify him. I said we did this thing to - as a sign of adherence to our own principles. I said, so we did not receive anything. That was the time he gave instructions to his boys to tie us.

I was tied. Captain Palmer was tied and Mr Deen-Jalloh. Captain Palmer's hand went numb for two months. We were feeding him. He would not feed himself by himself. We were feeding him for two months because the rope did not pierce his skin, so the were nerves that were affected.

12:26:16

Q. So Captain Philip Palmer, following - you described it earlier as being tie-bayed, yes?

A. Yeah.

Q. He was unable to use his hands for two months?

12:26:32

A. Yeah, for two months. We were feeding him.

Q. And apart from being tied, were you also beaten?

A. That particular day we were not beaten. We were just tied. That particular day. Then another day when there was an alleged coup plot in Freetown in which Gibril Massaquoi was allegedly

12:26:57

associated, Gibril Massaquoi was arrested. And when he was released from prison, that was aired by the BBC. As soon as Mosquito heard that one - Mosquito and Issa, as soon as they heard that one, they gave instructions to their boys to go collect us from the prison cells to come for flogging.

12:27:20

When we came, they said, "Go bring all the prisoners." So when they brought all of us, they said, "All political prisoners on one side, then all other prisoners on the other." So we did not know that it was an arrangement to have us beaten. So we - they said we were the ones they were referring to, so we went on

12:27:43

one side.

Then Mosquito said, "Today, we have now seen your group. Gibril Massaquoi is one of you. If he were not one of you, you are not going to be released as easily as he has been, so you are going to bear punishment for that here, just because Gibril

Massaquoi has been released. So we are going to beat you people 150 each, especially you, Fayia, and Palmer. We give you 150 each."

When they were beating us - because they will give you 50 lashes. Then you get up, you rest a bit, they give you another 50. When they were beating us, one of the pets - Mosquito had a pet called Maxwell Khobe. You know the animals here - the pets here; they had a baboon, he had a dog, he had another animal. He named them after the leaders in Sierra Leone. The baboon was called Maxwell Khobe, Mosquito's pet baboon. It was that baboon which - he was so emotional that day. The baboon went and took the stick with which they were beating Palmer from the young men, and he sat right on top of Palmer - because Palmer was lying down on the ground - he sat on top of Palmer so that nobody would beat Palmer. So when all of them saw that one, then that was when the grace of God came on us and they decided to stop. But we had received the 150. They only wanted to give us more. Because any time - by that day, they were smoking and drinking that very moment. So it was a moment of real heartlessness. Then after that in Kangama, by then Johnny Paul also had come there. One day they went to Kangama and met us. They went to Johnny Paul. They asked him to give them instructions to kill us, according to what Johnny Paul told us later when they left. He said they went and told him - Mosquito told him to give him instructions to kill us, but Johnny Paul said no, I cannot do that because these people are your own people. We have just organised a coalition with you. I cannot give you any instruction to have them killed, because I don't know what is going to happen tomorrow. All of us are waiting for Foday Sankoh to come. So when Johnny Paul

refused to give them that instruction, they went to us. They took us out of the cells and organised another beating spree for us. In the court barri they would tell you to go grip the pillar - the pillar of the barri. Then one - this time they told
12:30:52 one SLA young man - this time it was not RUF - it was one SLA woman - sorry, man. An SLA soldier was told to give us the beating with a military belt that has that iron at the buckle. They flogged us until your clothes would get wet with blood. When your clothes get completely wet with blood, then they would
12:31:20 tell the young man to stop. Then they come and loose you, tell you to go sit down. That was what they did with myself, Mr Deen-Jalloh and Palmer that day, the three of us.

Q. Help us, Mr Fayia. On how many occasions were you beaten in that way?

12:31:43 A. In that particular way - we were beaten only twice in that way. Because when we were also taken to Bunumbu, in Bunumbu too there was a day we just heard that they were around, Mosquito and - Mosquito was around. They called us and he said, We are going to give you again your quota. That's what he used to call it.
12:32:07 So he told us to go lie down on the ground, that time without clothes, just your trousers. You lie down on the ground, he gives his combatants - young combatants instruction to give the beating. That happened again in Bunumbu, B-U-N-U-M-B-U, in Nyandehun section.

12:32:30 Q. Now, I want to get one or two other details from you, please. First of all, can you recall the date on which you were arrested?

A. Yes, we were arrested on 29 March 19 --

Q. Of which year?

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

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

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

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

Q. Which peace process?

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

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

A. Yeah.

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

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

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

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

Q. How do you spell his name?

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

Q. And was he a Liberian?

Q. What do you say about the Foreign Minister?
A. I said the Foreign Minister of Togo came for peace arrangements. That was the time they were organising for the peace talks in Togo.
13:23:44 Q. Came where?
A. Came to Buedu to meet Mosquito. That was the day he came with Mr Musa Cisse.
Q. To speak to Mosquito?
A. To speak to Mosquito.
13:23:55 Q. Did you meet the Foreign Minister of Togo?
A. We saw him, but we did not meet him.
Q. Was that the occasion on which you spoke to Musa Cisse?
A. Yes.
Q. To your knowledge, whilst in detention, was Mosquito in
13:24:19 contact with Charles Taylor?
A. No, I don't know about that, because the only thing I can say is, Musa Cisse came from Charles to see Mosquito about us, so it is possible there was some contact.
Q. Now, in due course you were released in 1999, yes?
13:25:12 A. Yeah, August 1999.
Q. August 1999. And was it a condition of the Lome Peace Agreement that you be released?
A. Yes. The condition - that was one of the key conditions, the release of all prisoners of war and political prisoners.
13:25:33 Q. And upon your release, how did you leave Kailahun District?
A. We left Kailahun - the ECOMOG truck came to collect us from Kailahun to Daru. From Daru to Kenema.
Q. And then from Kenema?
A. To Freetown by helicopter.

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 26 JULY 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Ms Brenda Hollis Mr Nicholas Koumjian Ms Kathryn Howarth Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Ms Logan Hambrick Ms Fatiah Balfas

PRESIDING JUDGE: As I was saying, we have heard from both sides. Mr Koumjian, we believe that the parties have a right to organise the order, the call order, of their witnesses. As for the reasons given in this particular instance for Ms Campbell
09:10:53 delayed appearance, I will not go into those now since there is a motion or two pending in relation to that issue and I would not want to pre-empt a ruling in that regard. But I can only say that the leave is granted and the date is postponed accordingly for her appearance, with the hope that it will not be postponed
09:11:18 yet again.

Now, Mr Sesay, good morning. I know it's been a week or more since you last testified, but I will not have you swear again; I will simply remind you of the oath that you initially took at the beginning of your testimony to tell the truth and
09:11:36 that oath is still binding on you today. I believe we were continuing with the examination-in-chief, Mr Griffiths. Please continue.

MR GRIFFITHS: That is correct, Madam President.

WITNESS: DCT-172 [On former oath]

EXAMINATION-IN-CHIEF BY MR GRIFFITHS: [Cont'd]
09:11:52

Q. Mr Sesay, a week last Wednesday, when we last met, we were looking at the adoption of some UNAMSIL individuals, your journey to Monrovia to speak with Mr Taylor, he giving you $5,000 on your request for diesel, and you then returning to Sierra Leone with
09:12:28 that money. Do you remember that?

A. Yes, I remember.

Q. Now, after you returned to Sierra Leone, Mr Sesay, what did you do?

A. Well, when I returned to Sierra Leone, I went to Kono and

I sent for diesel to be bought and I transported UNAMSIL. We travelled from Kono and we came to the Moa River and we crossed into Kailahun, and we travelled to Foya where we met - that is where in Liberia, where we met the commander there and he sent a
09:13:22 message to Monrovia that we had arrived there, that I had got there with the UNAMSIL personnel, and they sent a helicopter and they came to transport them into Monrovia.

Q. Now, some details on that, please, Mr Sesay. First of all, how many UNAMSIL personnel were involved?

09:13:50 A. Well, I would say there were about 315 personnel. I cannot recall the exact number but it's about that.

Q. No need to be precise. That's good enough for my purposes. Now, help us, were they transported from Kono to Foya in one batch or did you have to make several trips?

09:14:20 A. No. Those from Kono - all of us moved on the same day from Kono and we arrived in Foya. We moved from Kono through Kailahun, and we arrived in Foya.

Q. Were there some personnel who were taken from another location to Foya?

09:14:48 A. Well, except the Indians, about 23 of them, they were from Kailahun. They too were taken to Foya but not on the same day, like the ones that I had brought from Kono.

Q. And the helicopters which arrived at Foya to transport them, to whom did those helicopters belong?

09:15:17 A. Mr Taylor owned the helicopters. They were not two helicopters, it was one helicopter that made the first trip and made the second trip. It was just one helicopter.

PRESIDING JUDGE: Is that Mr Taylor's personal helicopter? Is that what you mean?

THE WITNESS: It was the Liberian government that owned the helicopter.

MR GRIFFITHS:

Q. And how long did this whole operation take to transport the UNAMSIL personnel to Foya and for them to be then taken on to Monrovia?

A. Well, when I returned from Monrovia, I passed the night in Kono and the following afternoon, around 2, was when we left Kono for Kailahun. And when we travelled to Kailahun, we passed the night in Kailahun Town and the following morning we went to Foya. I can say it was about two to three days, because when we arrived in Foya, it was on that very day that they were transported in the evening by the helicopter, all of them were taken to Monrovia because we were in Foya at the airfield when the helicopter came for them, for the first batch, and it went, and it came back for the second batch and took them to Monrovia.

Q. Now, Mr Sesay, why did you release the UNAMSIL personnel?

A. Well, when Mr Taylor invited me and the message was sent to Pendembu and I went to meet with him, first he told me that he would want me and my colleague RUF members to know that RUF and Mr Sankoh should abide by the Lome Accord and that two, capturing the UNAMSIL is against the Accord, and that he would want us to know that we cannot fight the United Nations and that was not in the interest of the RUF and therefore they, as ECOWAS leaders had mandate from the Security Council that they should facilitate the immediate release of the UNAMSIL personnel. And so that was why his colleague ECOWAS leaders had given him the mandate to talk to us and that they wanted the people so I should try to bring them come. That's why I came to take the people and to go with them.

Mr Sesay, was that decision accepted by everyone within the RUF?
A. No. Some of my colleagues were against the idea, like Gibril Massaquoi, Superman and others. They said that - because they were in Freetown with Mr Sankoh, when the demonstration took
09:21:44 place against Mr Sankoh at his house they escaped from Freetown and it took over a month before they arrived in Lunsar. And by the time they got there, I had released the UNAMSIL. I had taken them. And they were saying that I had no right to release the UNAMSIL personnel and that it was only Mr Sankoh that had the
09:22:13 right to give that order. And they said instead of the - I release the UNAMSIL, I would have negotiated the release of Mr Sankoh.
Q. Now, Mr Sesay, at this point in time, when you met with Mr Taylor in Monrovia, who was effectively - and I stress that
09:22:40 word - in charge of the RUF at that time, bearing in mind that Mr Sankoh was in prison?
A. Well, at that time, it was myself, Morris Kallon. Then when Superman and Gibril arrived, it was then the four of us who were in charge of the RUF.
09:23:04 Q. And had anyone at that time suggested that you be the person to take decisions on behalf of the RUF?
A. Please repeat the question, sir.
Q. At that time, at the time of the release of the UNAMSIL personnel, had anyone been appointed as a leader to succeed
09:23:40 Mr Sankoh?
A. No, no. That idea hadn't come up yet.
Q. So why did you decide to make that decision? What gave you the authority to take the decision to release the UNAMSIL personnel?

A. Well, if you look at the story on my testimony before this Court, from the initial stage that Mr Sankoh brought the idea in February 2000 in Makeni, I was not supporting that idea so --

Q. Pause there. What idea are you talking about, Mr Sesay?

09:24:36 A. When Mr Sankoh said that the UNAMSIL's mission in Sierra Leone was not in the interests of the RUF. He said the UNAMSIL mission is Sierra Leone was only in the interest of the President of Sierra Leone at that time, and the government, and that is Mr Tejan Kabbah. Alhaji Tejan Kabbah. He said he had disarmed

09:25:07 in Port Loko and he had disarmed in Fadugu and he was planning to carry on disarmament in Segbwema. He said but the way Jetley was forcing him to disarm, and the UN, the UNAMSIL, did not tell President to Kabbah to implement his own part of the agreement and that is the Lome Accord. Instead, General Jetley was just

09:25:34 pushing him and harassing him to disarm the RUF.

So that was why he had given the instruction that we should arrest - I should organise the RUF, some of the RUF, to wear the attire of the Civil Defence Force to set an ambush and arrest some of the military observers and take them into the forest and

09:26:01 I said, "Oh," I said, "Pa, I don't think this idea is in place." I said, "If you think that Pa Kabbah is not implementing the agreement, why can't you complain to the guarantors?" And Pa Sankoh was bitterly annoyed with me in the room. All of us were there together with Gibril Massaquoi, myself, Morris Kallon,

09:26:32 Augustine Gbao, and Jackson Swarray, Rashid Sandy, together with a Sesay, he was a bodyguard to Akim, all of us were in the room. So because of my piece of advice, Mr Sankoh became annoyed. So when he came to Freetown he decided to take me out of Makeni and sent me to Kono.

So when the problem started in Makeni I wasn't there. When I came the problem had already occurred. And I was not really in favour of what happened. Because the thing that made us to support Mr Sankoh against Sam Bockarie in December 1999 was
09:27:20 because we thought that Bockarie did not want to disarm to the Nigerians, the Nigerian UNAMSIL, because he said those were his enemies who had fought against him. And Bockarie left, and just about two months afterwards Mr Sankoh too started bringing the same kind of idea and I said then there was no need for us to go
09:27:43 against Bockarie. So even if UNAMSIL contacted me before that time, even before Mr Taylor had done, I would have listened to UNAMSIL. But nobody, absolutely nobody contacted the RUF. Nobody sent to talk to me until when Mr Taylor sent for me. So even if some other person had sent to talk to me to release
09:28:16 UNAMSIL I would have done so, because I was thinking about their feeding and I was thinking about their medication so --

PRESIDING JUDGE: Mr Griffiths, the simple question you asked the witness was: What idea are you talking about, Mr Sesay? With the way he's going on, I must admit I'm lost now
09:28:35 as to exactly the answer to your question.

MR GRIFFITHS: Can I before we recommence indicate that a name mentioned by the witness does not appear on the transcript. That's the name Jetley. We see that omission on page 12 at line 24, and on page 13 at line 3:

09:29:27 Q. So, Mr Sesay, having taken that decision, and you say there were some within the RUF who were opposed to it, did that have any consequences for you personally?

A. Yes, because Gibril and others started inciting the fighters in Makeni, Lunsar. So when the ECOWAS leaders invited

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 6 AUGUST 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Joseph F Kamara Mr Nicholas Koumjian Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Silas Chekera Mr Michael Herz

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Q. And when you drove to the border, did Abu Keita come along with you?
A. No, no, no. I left Abu Keita in Makeni, and then I came to Foya through Kailahun.
11:27:00 Q. Now, when you came back from Liberia, did you come back with a satellite phone?
A. No, no. On that trip, I did not bring a satellite phone, except the satellite phone that had been given to me by Mr Sankoh. That was what I was using. And after I had answered
11:27:27 to Mr Taylor's call, when Mr Taylor spoke to me about the release of the UNAMSIL, he too made me understand that he had got a mandate from his colleague ECOWAS leaders, and I knew that the ECOWAS leaders were the guarantors to the Lome Accord, so I had to accept, because of what I had heard from Mr Taylor, because of
11:27:51 the guarantors. So, I -

THE INTERPRETER: Your Honours, could the witness be asked to repeat from where I stopped ?

PRESIDING JUDGE: Pause. You said "because of what I had heard from Mr Taylor, because of the guarantors." Now, what did
11:28:08 you say after that? Repeat it please, slowly.

THE WITNESS: I said what I heard from Mr Taylor, and he said it was a mandate from the ECOWAS leaders, and I said during the Lome, I knew that it was the ECOWAS leaders who were the guarantors to the Lome Accord. So that was why I accepted and I
11:28:35 went and released the people.

MR CHEKERA:

Q. Did you bring back 50 boxes of ammunition?
A. Not at all, not at all. I did not bring ammunition. I did not bring a satellite phone. The only thing that Mr Taylor gave

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 23 AUGUST 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Ms Kathryn Howarth Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Silas Chekera Mr Terry Munyard Ms Logan Hambrick

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A. No. Those who were in Kono, I took all of them to Liberia at the same time and then the helicopter transported them from Foya to Monrovia. The only people who were not in this group were the Indians from Kailahun. I had to send a different message for them to be brought.

Q. Mr Sesay, why did you release the hostages who were UN personnel, whose headquarters was in Freetown, who had positions they held in places like Bo, why did you take them to Monrovia and not release them in Sierra Leone?

13:29:57 A. Well, I got the contact from Monrovia. Had I got the contact from Sierra Leone also, I would have released them in Sierra Leone.

Q. You took them to Monrovia on the orders of Charles Taylor to increase his prestige instead of just letting them be driven

13:30:15 back to UN positions in other parts of the country, isn't that true?

A. Well, he told me that he and his colleagues said I should bring them to Liberia. That was the reason why I brought them to Foya and the helicopter transported them to Monrovia.

13:30:38 MR KOUMJIAN: Your Honour, there are two documents that I have not yet MFI-ed. I can do that either now or after the break.

PRESIDING JUDGE: You can do it after the break. I'm aware of one document. You can do it after the break. We will take

13:30:52 the luncheon break and reconvene at 2.30.

[Lunch break taken at 1.31 p.m.]

[Upon resuming at 2.34 p.m.]

PRESIDING JUDGE: Good afternoon. Mr Koumjian, you indicated some documents, a document or documents, that you

I N D E X

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 26 AUGUST 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Erica Bussey
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Ms Kathryn Howarth Mr Nathan Quick
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah Mr Silas Chekera Ms Logan Hambrick

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A. Yes, I see him.
Q. That's Eagle, Karmoh Kanneh, isn't it?
A. Yes.
Q. P-115B is just the back, if we can just quickly see that,
09:50:02 and it states on the back:
"The bearer of this card is a member of the Joint Monitoring Commission. All civilian and military personnel are requested to extend him/her free access to the national territory."
09:50:20 Mr Sesay, you told us that it was on the very last trip that you took to Liberia that Charles Taylor asked you to take Sam Bockarie back to Sierra Leone, correct?
A. Yes. That was the last trip when I met with Mr Taylor, because I went back to Liberia but I did not meet with him.
09:50:56 Q. And there's a reason for that, not wanting to go back to Liberia and meet with Mr Taylor again, because when you learned that Taylor wanted Sam Bockarie back, you realised your life was in serious danger; isn't that true?
A. No. If I realised that my life was in serious danger, I
09:51:22 wouldn't have gone back to Liberia.
Q. Mr Sesay, Sam Bockarie had once told you, "You're a dead man"; isn't that true?
A. Yes, he once told me that.
Q. Sam Bockarie is not the kind of man who'd want to come back
09:51:43 and be a deputy to you. He would have insisted on taking over the leadership; isn't that true?
A. Yes, because he wanted power.
Q. And you know that if Sam Bockarie came back to the RUF, it would have been a matter of time before he made an attempt or

simply arranged for you to be killed, correct?
A. Yes, because the two of us had already had some problem, so he must have had some grudge for me.
Q. So the situation you were facing, the time of Abuja II, May 2001, was that you were fighting a war in Sierra Leone you couldn't win against a much stronger force, and your patron, Charles Taylor, was himself under pressure, you knew if you went to Liberia he was going to replace you or kill you, and that if he was able to get Sam Bockarie back to Sierra Leone, Bockarie was going to kill you. Your survival was at stake at that time; isn't that true?
A. No, my survival was not at stake. Because if I had not agreed to the disarmament, we should have still continued fighting because we believed that whenever we attacked we would receive ammunition from the troops that we would attack.
THE INTERPRETER: Your Honours, can the witness kindly slow down his pace and repeat this part of his answer?
PRESIDING JUDGE: Mr Sesay, you said that whenever you attacked you would receive ammunition from the troops that you would attack. Now, continue from there and repeat your evidence, slowly.
THE WITNESS: Yes, my Lord. I said even whenever we would attack troops we would get ammunition from them because with that we would continue to fight, and RUF had been fighting that way. We were not receiving any supply. And the RUF men --
PRESIDING JUDGE: Mr Sesay, I asked you to continue slowly, not to continue as quickly as you were talking. Slowly, so that we understand what you are saying as it's being interpreted. Now, continue slowly, please.

I N D E X

WITNESSES FOR THE DEFENCE:

C. (2) Admitted Exhibits

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SCSL-2003-01-T

THE PROSECUTOR
V
CHARLES GHANKAY TAYLOR

EXHIBIT NUMBER – **D-23**
SCSL/ERN/134

NAME OF WITNESS: **TF1-334**

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DEFENCE

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Friday, October 1, 1999 Published at 15:55 GMT 16:55 UK

World: Africa

Sierra Leone rebel leader delays return

The peace accord was signed in Lome in July

The Sierra Leone rebel leader, Foday Sankoh, has delayed his return home.

Mr Sankoh, who heads the Revolutionary United Front (RUF), had been expected back in Freetown on Friday along with the head of the former military government, Johnny Paul Koroma.

But Mr Sankoh told the BBC he would not return to Sierra Leone until next week.

The BBC correspondent in Freetown says the country has ground to a standstill in anticipation of their homecoming, which would mark a key stage in the peace process.

But he adds that a growing dispute among the rebels is making their leaders' return difficult.

Jovial mood

Neither Mr Sankoh nor Major Koroma, erstwhile allies, have returned to Sierra Leone since a peace pact was signed with the government of President Ahmad Tejan Kabbah on 7 July, putting an end to a bloody eight-year civil war.

The two men held more than three hours of reconciliation talks in

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Johnny Paul Koroma complained of being left out of the peace accord

Monrovia mediated by Liberian President Charles Taylor on Thursday.

Afterwards the two rebel leaders appeared in jovial mood as they spoke to reporters.

"I am satisfied. Everything is fine now," Major Koroma said.

He would not elaborate on what was decided about his earlier complaints, notably that the accord did not give him and soldiers loyal to him a role in the Sierra Leone army.

Mr Sankoh said the fate of the former soldiers could be discussed with President Kabbah.

"We have no problems with them. They are our brothers," Mr Sankoh said.

Under the peace pact, Mr Sankoh is to become head of a commission for post-war construction and strategic mineral resources.

But members of his own movement have questioned his ability to govern, and said they will seek to replace him if he did not take up his duties.

No delay

Sierra Leonean Foreign Minister Sama Banya called for the swift deployment of a UN peacekeeping force, cautioning that any further delay in the start of the disarmament process would produce "a dangerous void."

The peace is still fragile in Sierra Leone

The Security Council is considering sending in a 6,000-strong peacekeeping force to help monitor the truce and disarm the rebels, although security will be left in the hands of the West African-led Ecomog peacekeepers already in the country.

Speaking at the UN in New York, Mr Banya urged donors to be generous to Sierra Leone to help it rebuild - and also to allow Sierra Leone to follow

South African gays take centre stage

Nigeria's ruling party's convention

UN to return to Burundi

Bissau military hold fire

Nile basin agreement on water cooperation

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African Media Watch

Liberia names new army chief

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through with the more controversial aspect of the peace agreement, an amnesty for fighters.

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C. (3) Pleadings

1229)

SCSL-03-01-T
(34947-35521)

34947

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
Registrar:	Ms. Binta Mansaray
Date:	9 March 2011
Case No.:	SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC, WITH CONFIDENTIAL ANNEX

DEFENCE CORRECTED AND AMENDED FINAL TRIAL BRIEF

Office of the Prosecutor:
Ms. Brenda J. Hollis

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

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addressed by the parties in the final trial Briefs and/ or closing arguments."[56] That being the case, the Defence raises the matter now and incorporates by reference as if set out below herein, all arguments and averments that were advanced in the motion and the Defence's Reply.[57]

29. The geographic jurisdiction of the Special Court is limited to crimes committed in the territory of Sierra Leone and only those committed from 30 November 1996 onwards fall within its temporal jurisdiction.[58] The Indictment naturally follows the Statute in both respects and no crime alleged therein extends in temporal scope beyond 18 January 2002.[59] In assessing the admissibility of evidence which falls outside these boundaries, the following provisions of the Rules are significant:

    a. Rule 89(C) provides that "A Chamber may admit any relevant evidence."[60]
    b. Rule 93 provides that "Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice."[61]
    c. Rule 95 provides that "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."[62]

30. Decisional law is also important and confirms that evidence must be relevant and not adversely prejudicial to be admissible.[63] "Relevant evidence" has been understood to mean "any evidence that could have a bearing on the guilt or innocence of the Accused for the crimes charged under the Indictment."[64] Such relevant evidence may include evidence which falls outside the scope of the Indictment.[65] Indeed, this Court considered evidence relating to events that began prior to the Indictment period in

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[56] *Prosecutor v. Taylor*, SCSL-03-01-T-1101, "Decision on Defence Motion to Exclude Evidence Falling Outside the Scope of the Indictment and/or the Jurisdiction of the Special Court for Sierra Leone", 6 October 2010 [Rule 93 Decision] p. 3.
[57] *Prosecutor v. Taylor*, SCSL-03-01-T-1100, Defence Reply to Prosecution Response to Defence Motion to Exclude Evidence Falling Outside the Scope of the Indictment and/ or the Jurisdiction of the Special Court for Sierra Leone, 5 October 2010.
[58] Statute, Article 1(1).
[59] See "Particulars" of all eleven counts of the Indictment. See, also, *Prosecutor v. Taylor*, SCSL-03-01-T-327, *Prosecution Notification of Filing of Amended Case Summary* [Notification], with "Case Summary Accompanying the Second Amended Indictment" as Annex, 3 August 2007 [Amended Case Summary], para. 6 (a state of armed conflict existed within Sierra Leone between 30 November 1996 and about 18 January 2002).
[60] Rule 89(C) of the Rules.
[61] Rules, Rule 93(A).
[62] Rules, Rule 95.
[63] *Prosecutor v. Ngeze and Nahimana*, ICTR-96-11-AR72, "Decision on the Interlocutory Appeals – Separate Opinion of Judge Shahabuddeen," 5 September 2000, para. 19; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY," 18 September 2003.
[64] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009 ([RUF Trial Judgement], para. 474.
[65] RUF Trial Judgement, para. 482.

arriving at its Rule 98 Decision.[66] Similarly, and in the RUF case, Trial Chamber I considered evidence which occurred prior to the Indictment period and continued into the Indictment period as demonstrating a "consistent pattern of conduct."[67] The Court also noted that:

> [e]vidence which may go to proving an un-pleaded allegation remains admissible if it is relevant under Rule 89(C) to the proof of other allegations in the Indictment or to facts at issue in the proceedings; to the proof of the chapeau requirements for crimes against humanity or the existence of a consistent pattern of conduct relevant to serious violations of international humanitarian law; or, where it provides the Chamber with useful background or contextual information.[68]

31. The foregoing notwithstanding, there are limits to when evidence not coming within the Indictment period may be considered by a Trial Chamber. For example, the RUF Trial Chamber noted that "evidence was adduced of rapes in Kono District without sufficient precision as to the time frame."[69] Consequently, the Chamber limited its "Legal Findings" to incidents that it was satisfied "occurred during the Indictment period."[70] Likewise, this Chamber ruled in the AFRC case that evidence given by two witnesses about diamond mining in the Tombodu area concerned the AFRC government period and thus fell outside the Indictment period for Kono District vis-à-vis Count 13.[71]

32. Regarding events occurring in locations not charged in the Indictment, it was noted in the AFRC case that the Prosecution led "a considerable amount of evidence with respect to killings, sexual violence, physical violence, enslavement and pillage which occurred in locations not charged in the indictment."[72] In concluding that it would "not make any finding on crimes perpetrated in locations not specifically pleaded in the Indictment,"[73] the AFRC Chamber observed that, "While such evidence may support proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for those crimes may be made in respect of such locations not mentioned in the indictment."[74]

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[66] Rule 98 Decision, pp. 24207 – 10.
[67] RUF Trial Judgement, para. 1615 (regarding the use of child soldiers in the RUF).
[68] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment, 26 June 2008, para. 16
[69] *RUF* Trial Judgement, para. 1283.
[70] *RUF* Trial Judgement, para. 1283; see, also, para. 1458 regarding the killing of one Dr. Kamara ("As this killing was committed outside of the Indictment period for unlawful killings in Kailahun District, the Chamber finds that no liability can be attributed to the Accused for this incident").
[71] *AFRC* Trial Judgement, para. 1323.
[72] *AFRC* Trial Judgement, para. 37.
[73] *AFRC* Trial Judgement, para. 38.
[74] *AFRC* Trial Judgement, para. 37.

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33. Turning to the case at bar, the Prosecution has adduced a considerable amount of evidence that falls outside the temporal and geographical scope of the Indictment."[75] The Defence has objected previously to such evidence,[76] including in its Pre-trial Brief which contained a specific section urging "the Trial Chamber to be vigilant in ensuring there is no expansion of the territorial or temporal jurisdiction of the Court via the back door."[77] However, the use of ex-temporal and ex-territorial evidence by the Prosecution was so widespread that it proved impractical for the Defence to raise the same objection at every turn.

34. The Defence submits that much of that evidence is irrelevant to the Indictment, contrary to the interests of justice and, in any event, adversely prejudicial to the Accused such that it contravenes both Rule 95 and Article 17. Accordingly, such evidence should be excluded from the Trial Chamber's deliberations. Support for these averments are decisional law that have highlighted the need to take into account the probative value and prejudicial effect of the evidence in question. The ICTR Appeals Chamber held in *Bagosora et al.* that:

> Rule 93 does not create an exception to Rule 89(C), but rather is illustrative of a specific type of evidence which may be admitted by a Trial Chamber. Rule 93 must be read in conjunction with Rule 89(C), which permits a Trial Chamber to admit any relevant evidence which it deems to have probative value. Even where pattern evidence is relevant and deemed probative, the Trial Chamber may still decide to exclude the evidence in the interests of justice when its admission could lead to unfairness in the trial proceedings, such as when the probative value of the proposed evidence is outweighed by its prejudicial effect...[78]

35. It remains true that Rule 89(C) differs from that of the ICTR and ICTY, in that Rule 89(C) does not explicitly provide for the probative value and prejudicial effect of the evidence in question to be considered; but there is still the requirement to do so where the effect of the evidence would infringe Rule 95.[79] One must also, of course, consider

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[75] "Ex-temporal evidence" and "ex-territorial evidence."

[76] See, e.g., TT, 18 Apr. 2008, p. 8054 (Defence objection during the testimony of TF1-334 to evidence of crimes perpetrated on civilians in Koinadugu District on the basis that such crimes are not alleged in the Indictment). See, also, TT, 21 Apr. 2008, p. 8077; TT, 7 May 2008, p. 9148; and TT, 5 Nov. 2008, p. 19798.

[77] *Prosecutor v. Taylor*, SCSL-03-01-PT-229, "Rule 73*bis* Taylor Defence Pre-trial Brief," 26 April 2007 [Defence Pre-trial Brief], paras 9-23. See, also, *Prosecutor v. Taylor*, SCSL-03-01-PT-243, Corrigendum to Rule 73bis Taylor Defence Pre-Trial Brief, 18 May 2007.

[78] *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR93.2, "Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence", 19 December 2003, para. 13. See, also, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004, para. 18 ("The fact that the evidence may have been admissible pursuant to Rule 89 does not show any error on the part of the Trial Chamber in concluding that in the interests of ensuring the fairness of the trial it should be excluded").

[79] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker," 23 May 2005, para. 6.

the fair trial rights of the Accused guaranteed under Article 17 of the Statute, as well as the requirement under Article 20(3)[80] to follow, where necessary, the guidance provided by the Appeals Chambers of the ICTR and ICTY.

36. There is a fine line between relevance for context and the danger that the evidence serves as the basis for a conviction, especially when one is faced with a mass of "contextual" evidence as in this case. Indeed, and as noted previously, the Trial Chamber has already based some findings in its Rule 98 Decision on such "contextual" evidence.[81] The Defence submits that there is so much evidence outside the scope of the Indictment, it amounts to prejudice of such a nature which far outweighs any probative value to such evidence. In that sense, it contravenes both Rule 95 and Article 17 and should consequently be excluded.[82]

37. To be sure, the exception being taken to such evidence includes the use of Rule 89(C) and Rule 93 by the Prosecution to incorporate ex-temporal and ex-territorial evidence into its case as if it were one with evidence adduced to prove the crimes alleged in the Indictment. In this regard, the Defence particularly has in mind evidence regarding alleged crimes in Liberia and countries other than Sierra Leone (in the geographical sense) and crimes which pre-date 30 November 1996 (in the temporal sense).

Joint Criminal Enterprise: Evidence falling outside the Temporal Scope of the Indictment

38. The Defence particularly draws attention to problems associated with the mode of liability -- JCE. In its Amended Case Summary, the Prosecution made reference to a common plan between the Accused and Foday Sankoh which originated in the late 1980s, which is not merely contextual, but is a crucial element of the alleged JCE.[83] The Trial Chamber will have to determine guilt based on events which occurred up to ten years before the commencement of the Indictment period. The Defence submits that this is not within the Special Court's jurisdiction to decide.

39. Indeed, even were the Trial Chamber merely to consider and not rule on such evidence, the Defence submits that there must be a limit to the extent to which ex-temporal and ex-territorial evidence can be taken into consideration by the Trial Chamber in assessing the guilt of the Accused. Otherwise, there is a real danger that

[80] Statute, Article 20(3).
[81] Rule 98 Decision, pp. 24209-24210.
[82] Rules, Rule 95; Statute, Article 17(2).
[83] Amended Case Summary, paras 1-3, 42 and 44.

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such a sheer mass of evidence will have an impact on the Trial Chamber's findings. Indeed, it becomes so prejudicial to the Accused, that such evidence violates Rule 95 and infringes on fair trial rights guaranteed the Accused under Article 17.

Evidence of Atrocities in Liberia and Elsewhere beyond Sierra Leone: Evidence falling outside the Geographic Scope of the Indictment

40. Evidence adduced by the Prosecution regarding the Accused's alleged involvement in atrocities in Liberia has little relevance or probative force other than to blacken the Accused's character with the Trial Chamber; indeed, it clearly has nothing to do with the charges the Accused faces in respect of Sierra Leone.[84] The same holds true for evidence of the Accused's alleged role in conflicts, arms-dealing and diamond-dealing throughout the African continent. Such evidence was admitted via the back door that is Rule 93 throughout the trial, despite the warning given by the Trial Chamber in *Kupreškić* that Rule 93 cannot be used to simply show the bad character of an accused.[85] The Defence submits that such evidence is contrary to Rule 95, Article 17, and the jurisprudence of the international tribunals.

41. Rule 93 does not provide an unregulated or unrestricted route for the admission of evidence demonstrating a consistent pattern of conduct; rather, such evidence may only be admitted where it is in the interests of justice to do so. This point was raised by defence counsel on 21 April 2008.[86] Nevertheless, the Trial Chamber has on at least one occasion refused to assess the probative value of the evidence in question, despite the fact that an assessment of the interests of justice must invariably include an assessment of the probative value of the evidence against its prejudicial effect.[87]

Evidence which could fall inside the Geographic Scope of the Indictment but which does not

42. The Prosecution has led evidence on the commission of crimes in certain districts of Sierra Leone which form no part of Indictment, but which nevertheless could have

[84] See, e.g., the evidence of TF1-399: TT, 12 March 2008, pp. 5913-5919.
[85] *Prosecutor v. Kupreškić et al.*, IT-95-16-T, "Decision on Evidence of Good Character of the Accused and the Defence of Tu Quoque", 17 Feburary 1999, para. 31.
[86] TT, 21 Apr. 2008, pp. 8079-8080.
[87] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 5 November 2008, p. 19800.

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1239)

SCSL-03-01-T
(36241-36839)

36241

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Date filed: 8 April 2011

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

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION FINAL TRIAL BRIEF

Office of the Prosecutor:
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Mr. Nicholas Koumjian
Mr. Mohamed Bangura
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Mr. James Supuwood

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Taylor was the "Chief"

54. Taylor may have made common cause with Sankoh, but from the beginning and throughout his association with the RUF and later the AFRC/RUF, Taylor was the ultimate authority, the overall leader, the one who truly created and sustained his proxy forces, the RUF and later AFRC/RUF. These proxy forces rightly referred to Taylor as "Chief" or "Commander in Chief,"[186] "Father" or "Papay"/"Pa,"[187] and "Godfather," accurately reflecting his central role in the life of the RUF and later the AFRC/RUF and his overall control of these, his surrogate forces in Sierra Leone. For example, in Libya, Sankoh called Taylor "Chief," as did the others there,[188] and Taylor, the only boss of the NPFL, was the only one making decisions for the Liberian, Gambian and Sierra Leonean groups of fighters.[189] Taylor remained "chief" to Sankoh, even at the time of the Lomé Peace Agreement. Taylor told this Court how, after the talks with Sankoh and Koroma in Monrovia following Lomé, he, Taylor, "sent" Sankoh back to Sierra Leone.[190]

55. Taylor's relationship with the RUF was clear: "...he [Taylor] had command over the RUF and we took it that the RUF belonged to him, although he sent somebody to head the RUF but he was the owner of the RUF... So the RUF was in the hands of Mr Taylor."[191] AFRC/RUF leaders from Foday Sankoh to Issa Sesay and Johnny Paul Koroma, all regarded Charles Taylor as their "boss," "senior brother" or "chief." It was common for the senior officers of the RUF to refer to Charles Taylor as the Chief.[192] Bockarie's ascension to the position of on-the-ground commander of the RUF and then as commander of the AFRC/RUF alliance made Taylor's control even more clear. Toward the end of 1996, Sankoh made it clear that in his absence, Bockarie should take orders from Taylor. Sankoh informed the RUF that they should all take instructions from Bockarie, and that Bockarie should take instructions from Mr. Ghankay. Immediately after his arrest in March 1998, Sankoh reiterated to Bockarie that in his

[186] See for example TF1-274, TT, 3 December 2008, p. 21543; 11 December 2008, p. 22258; Exh. P-65, p. 00029778.
[187] See for example TF1-274, TT, 3 December 2008, p. 21543; TF1-367, TT, 21 August 2008, p. 14300.
[188] TF1-561, TT, 14 May 2008, pp. 9806, 9810, 9815-16.
[189] TF1-561, TT, 14 May 2008, pp. 9804, 9806, 9810, 9814-15.
[190] Accused, TT, 12 August 2009, p. 26665; [redacted]
[191] TF1-532, TT, 31 March 2008, p. 6229.
[192] TF1-516, TT, 8 April 2008, p. 6883; see also TF1-367, TT, 21 August 2008, p. 14300.

absence, Bockarie should take instructions from Charles Taylor.[193] Bockarie indicated he would obey that order[194] and did follow that instruction before, during and after the Junta took power in Sierra Leone in May 1997.

56. But even without this order, Taylor would have been in charge of the RUF once Sankoh was in detention. Sankoh's arrest had created a "vacuum in the leadership of the RUF;"[195] Taylor and Yeaten would have considered – as they did with Bockarie[196] – any new RUF leader as a "little boy."[197] After the Intervention, it was Taylor who, individually or in concert with Johnny Paul Koroma, selected Bockarie to head the alliance after the Intervention and promoted Bockarie to general.[198] After the attack on Freetown had been repelled, with the nature and extent of the horrific crimes known to the international community, it was Taylor who again rewarded Bockarie, promoting him to two-star general.[199]

57. Taylor's position as chief was accepted by other leaders in the AFRC/RUF alliance as well. Bockarie, Sankoh and Johnny Paul Koroma came to Liberia after the Junta period in order for the "chief," Taylor, to settle a dispute between them.[200] Koroma was not satisfied with Taylor's decision but nonetheless accepted it,[201] evidencing Taylor's power to make decisions binding on these leaders. This reality remained unchanged during Issa Sesay's reign. For example, in 2000, Sesay came to Kolahun, Lofa County, and called a muster parade of his subordinates assigned there to assist Taylor. At this muster parade, Sesay informed those present that he had been promoted to three-star general by his chief, Taylor.[202] In the letter Sankoh sent after his arrest in 2000 confirming Issa Sesay as the Interim Leader of the RUF, Sankoh directed that just as Sam Bockarie had taken instructions from Charles Taylor whilst Foday Sankoh was

[193] TF1-338, TT, 1 September 2008, pp. 15114-16; TF1-045, TT, 12 November 2008, pp. 20126-28. See also TF1-571, TT, 8 May 2008, p. 9358.
[194] TF1-045, TT, 12 November 2008, pp. 20126-28.
[195] [redacted]; Accused, TT, 18 August 2009, p. 27044.
[196] Accused, TT, 16 September 2009, p. 29081.
[197] TF1-375, TT, 24 June 2008, p. 12692.
[198] See Section II.B.
[199] [redacted]; Exh. P-572 (Photo of Sam Bockarie wearing a beret with 2 stars).
[200] TF1-561, TT, 15 May 2008, pp. 9953-55; see also para. 202.
[201] TF1-561, TT, 15 May 2008, pp. 9953-55; see also para. 202.
[202] TF1-516, TT, 8 April 2008, pp. 6883-85.

previously detained, in the same way Issa Sesay would take instructions from Charles Taylor.[203] As discussed in Sections II.B, III.B & C below, Sesay complied.

Taylor was the "father," "Papay" or "Pa," and "godfather"

58. Taylor was also referred to as the "father" of the RUF and as the "Godfather."[204] The leader of the Junta understood that Taylor played that role and the significance of that role to all the Junta, not just the RUF. Samuel Kargbo, a close personal aide to Junta leader Johnny Paul Koroma, told the Court that inside Sierra Leone, "Charles Taylor was the godfather for RUF, so whatever the situation was we needed to call him to let him know that that was what was going on."[205] Indeed, the RUF was invited to join in part because of the contacts the RUF had through Charles Taylor, "who was their godfather."[206] Within one to two weeks of the coup, Johnny Paul Koroma placed a call to Charles Taylor in the presence of the witness asking for recognition, and told the Supreme Council members who were present afterwards that he had spoken to Taylor and that Taylor had told him to work with his RUF brothers and to contact Taylor if there were any problems.[207]

59. Bockarie considered Taylor the father of the RUF as well, referring to him as father and Papay.[208] At the time of the savage attack on Freetown in January 1999, Bockarie publicly noted on the BBC Taylor's position as "father" of the alliance, with the superior authority a father has. Bockarie told the BBC that he would not retreat unless his "Father" told him to do so. When asked what "Father" he was referring to, Bockarie replied, "Charles Taylor." This public admission of the superior/subordinate relationship between Taylor and Bockarie annoyed Taylor's subordinates who heard it.[209] Issa Sesay considered Taylor the "big revolutionary father."[210]

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[203] TF1-338, TT, 2 September 2008, pp. 15151-56.
[204] See for example [redacted]; TF1-406, TT, 10 January 2008, pp. 925-26; TF1-367, TT, 21 August 2008, p. 14300; TF1-360, TT, 7 February 2008, p. 3317.
[205] TF1-597, TT, 21 May 2008, p. 10452.
[206] TF1-597, TT, 22 May 2008, pp. 10512-13.
[207] TF1-597, TT, 21 May 2008, pp. 10444-46.
[208] TF1-406, TT, 10 January 2008, pp. 925-26; TF1-577, TT, 5 June 2008, pp. 11072, 11075-76, 11083; TF1-532, TT, 31 March 2008, pp. 6226-27; [redacted]; TF1-274, TT, 2 December 2008, pp. 21433-36, 21512, 21516, 21530 and 3 December 2008, p. 21543; TF1-338, TT, 1 September 2008, pp. 15115-16; TF1-388, TT, 9 July 2008, p. 13357 and 10 July 2008, pp. 13391, 13418; TF1-567, TT, 2 July 2008, p. 12898, 12906-07; TF1-568, TT, 15 September 2008, p. 16175 and 16 September 2008, p. 16328; TF1-532, TT, 11 March 2008, p. 5720 and 7 April 2008, p. 6727; TF1-584, TT, 19 June 2008, p. 12314; TF1-571, TT, 9 May 2008, p. 9432 and 8 May 2008, p. 9395; TF1-045, TT, 12 November 2008, p. 20119. See also Exh. D-8, p. 6.
[209] TF1-406, TT, 9 January 2008, p. 866.

60. Taylor was the father of the RUF in the sense that he created it as a viable organized armed force, nurtured and sustained it as it matured, ensured its continued survival, taught it how to carry out its role and how to treat civilians, directed it in its first endeavours, protected it from outside threats to its existence, and strengthened the basic unity of the group. Taylor performed the same fatherly functions in regard to the later AFRC/RUF alliance. In return, Taylor expected and received benefits from his creations, as discussed at Section III below, including the right and authority to summon and discipline them, and executing those he felt were a threat to his continued role as father.

One family under Taylor's leadership and guidance

61. From the beginning, the RUF and NPFL were one family, brothers and sisters.[211] The NPFL and RUF were "*carbon copies*"[212] modelled by Taylor. At Bomi Hills in November 1991, Charles Taylor and Foday Sankoh addressed NPFL and RUF fighters; Taylor told them they were all fighting for the same freedoms, and Sankoh told them that Taylor would help him continue the war and would provide arms and ammunition.[213]

62. Taylor's NPFL, also moulded by Taylor, was clearly the older brother to the RUF. As will be discussed in more detail below, members of Taylor's NPFL helped train the RUF in Liberia and Sierra Leone, instilling in the trainees the use of terror as a tool in their treatment of civilians in Sierra Leone. Some of the trainers and most of those trained became the future leaders of the RUF, AFRC/RUF. In addition, RUF commanders learned from the NPFL, even if some RUF commanders occasionally complained that NPFL fighters were excessively harassing and killing civilians. For example, Sam Bockarie and Issa Sesay mimicked NPFL commanders by considering the troops trained in Libya, i.e., Special Forces, and those trained under Taylor's auspices in Liberia, i.e., Vanguards, at the top of the RUF military hierarchy.[214]

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[210] TF1-567, TT, 7 July 2008, pp. 13039-40.
[211] TF1-367, TT, 1 September 2008, pp. 15072-73.
[212] [redacted]; TF1-577, TT, 4 June 2008, p. 10937.
[213] TF1-337, TT, 4 March 2008, p. 5252. See also Exh. P-31, p. 00026610.
[214] [redacted]; TF1-532, TT, 7 April 2008, pp. 6784-85; TF1-399, TT, 12 March 2008, pp. 5900-01;