

SPECIAL COURT FOR
SIERRA LEONE

Case No. SCSL-2004-16-T

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

Registrar: Lovemore Munlo

Date filed: December 12, 2005

SPECIAL COURT FOR SIERRA LEONE	
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THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

BRIMA – MOTION FOR ACQUITTAL PURSUANT TO RULE 98

Office of the Prosecutor:

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Defence Counsel for Kanu:

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Defence Counsel for Kamara

Andrew K. Daniels
Mohammed Pa-Momo Fofanah

A. INTRODUCTION

1. The three Accused persons in the AFRC case, are jointly indicted and are being jointly tried on a fourteen-Count Indictment that alleges offences relating to Crimes Against Humanity, Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II and other Serious Violations of International Humanitarian Law in violation of Articles 2, 3, and 4 of the Statute of the Special Court for Sierra Leone.
2. The Indictment avers that by reason of their acts or omissions in relation to these events, the three Accused Persons, pursuant to Articles 6.1. and, or 6.3. of the Statute, bear individual criminal responsibility for the crimes alleged in the Indictment.
3. On November 21, 2005, the prosecution closed its case after calling 59 witnesses including three expert witnesses.
4. Pursuant to Prosecution and Defence submissions at the Status Conference held on September 28, 2005, the Trial Chamber on September 30, 2005 made a Scheduling Order¹ (“**Order**”) containing guidelines for the filing of Rule 98 Motions for Acquittal by the Defence teams.
5. Pursuant to the said order the Defence for Brima hereby files this Motion for Acquittal Pursuant to Rule 98 (“**Motion**”) containing additional submissions on facts on behalf of the First Accused.
6. Counsel for Mr Brima hereby moves the Trial Chamber pursuant to Rule 98 of the Rules of Procedure and Evidence (**the “Rules”**) for the entry of a judgment of acquittal on all counts charged in the Indictment.

¹ *Prosecutor v. Brima et al.*, SCSL-04-16-T-404, Trial Chamber II, ‘Scheduling Order on Filing of a Motion for Judgment of Acquittal’, 30 September, 2005.

B. APPLICABLE STANDARD FOR RULE 98 MOTIONS FOR ACQUITTAL

7. Rule 98 defines the standard for determining the merits or otherwise of a Motion for Judgment of Acquittal.² Applying its plain and ordinary meaning, the rule is limited in scope in the sense that it does not envisage a judicial pronouncement on the guilt or the innocence of the Accused.³ The Defence subscribes to the observation of Trial Chamber 1⁴ that the appropriate legal standard envisaged by the Rule is one that limits and restricts a tribunal only to the determination as to whether the evidence adduced by the prosecution at the close of its case, is such as is **legally capable**⁵ of supporting a conviction on one or more of the counts in the Indictment.
8. The Defence submits that for such prosecution evidence to be legally capable of supporting a conviction on one or more counts in the indictment, the Prosecution must provide evidence on all the particular legal elements and ingredients of the crimes charged in the Indictment, otherwise an acquittal in respect of the said counts must be granted. Decisions of both the ICTR and ICTY have established that a consequence of the Jelisic standard is that failure to adduce evidence of an element of a crime charged leads to acquittal on the charge.⁶

² *Prosecution v. Norman et al.*, case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 34.

³ *Ibid.* Para. 34

⁴ *Ibid.*

⁵ emphasis is ours

⁶ *Prosecutor v. Nahimana et al.*, ICTR-96-11-T, Trial Chamber, 'Reasons for Oral Decision of 17 September 2002 on the Motions for acquittal', 25 September 2002, para. 19 ([A] Rule 98bis motion will succeed if an essential ingredient for a crime was not made out in the prosecution's case; for, if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction.); see also *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-T, Trial chamber, 'Decision on Motion for Acquittal', July 3 2000, para. 16; also *Prosecutor v. Sikirica*, IT-95-8-T, trial camber, 'Judgment on defence Motions to Acquit', 3 September 2001, para. 9, 94-97. These decisions reinforce and bolster the basic proposition that all elements of a crime must be proven in order to legally sustain a conviction. This criterion was particularly successful in the *Sikirica* Decision.

9. Further, it is the submission of the Defence that in cases where the Prosecution provides no evidence in support of a charge, and the Trial chamber so finds, then the Accused must be acquitted of the said charges under a Rule 98 application.⁷
10. In addition, where evidence of allegations contained in a count is not adequately established or proven then the Trial chamber must rightfully acquit the Accused of the said allegations or alleged crimes.

C. THEORY AND FORMS OF CRIMINAL OF LIABILITY

11. The Prosecution charges the First Accused with the crimes averred in the Indictment on the basis of his individual criminal responsibility pursuant to Article 6(1) of the Statute and, or superior responsibility as set out in Article 6(3) of the Statute.

Individual Criminal Responsibility – Article 6(1)

12. The Indictment avers that Mr Brima through his acts or omissions, is alleged to have “planned, instigated, ordered, [or] committed” the crimes contained in the Indictment.⁸ Further, the Indictment declares that in the “planning, preparation or execution” of the crimes alleged in the Indictment, Mr Brima “otherwise aided and abetted” the perpetrators of the alleged crimes. Finally, Mr Brima is said to be individually criminally responsible for the alleged crimes that “were within a common purpose, plan or design” in which he participated, or were “a reasonably foreseeable consequence of the joint criminal enterprise” in which the First Accused participated.
13. The Defence will submit here that the Prosecution evidence even if accepted has failed to establish that Mr Brima bears individual criminal responsibility under Article 6.1 for any of the charges against him.

⁷ *Nyiramasuhuko* Decision, para. 177-178; see also *Kvočka* Decision, para. 30-31; *Milosevic* decision, para. 13; *Hadzihasanovic* Decision, para. 17.

⁸ Indictment, para. 35 at pg. 7.

Command Responsibility – Article 6(3)

14. The First Accused is charged with superior or command responsibility for the crimes alleged in the indictment on the strength of Article 6(3) of the Statute.⁹ The Indictment alleges that while “holding positions of superior responsibility and exercising effective control” over his subordinates, the First Accused is said to be “individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute.”¹⁰ In addition, the First Accused is imputed with responsibility for the “criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so” and yet he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

15. The Defence will submit that the Prosecution has failed to adduce evidence capable of supporting the Prosecution case that Mr Brima has superior responsibility as alleged in the indictment. Moreover the Defence will show that the Prosecution failed to establish the three elements necessary:

- I. the existence of a superior-subordinate relationship between the accused and the alleged perpetrators of the underlying offences.
- II. the knowledge of the superior that his subordinate was about to commit, or had committed a crime; and
- III. the failure of the superior to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrators thereof¹¹.

ANALYSIS OF THE INDICTMENT

Counts 1 and 2 – Terrorizing the Civilian Population and Collective Punishments

⁹ Ibid, para. 36

¹⁰ *ibid.*

¹¹ See Prosecutor v Delalic et al, IT-96-21-T, Trial Chamber ‘Judgement’ 16 November 1998; Prosecutor v Kvočka et al IT-98-30/I-T, Trial Chamber ‘Judgement’ 2 November 2001

16. Counts 1 and 2 of the Indictment charges Mr. Brima with the alleged crimes of Terrorizing the Civilian population and Collective Punishment, both a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Articles 3(d) and 3(b) respectively.
17. The Indictment alleges at paragraph 41 that Mr Brima committed the crimes set forth in paragraphs 42 through 79, being unlawful killings, sexual violence, physical violence, use of child soldiers, abductions and forced labour, and looting and burning, as part of a campaign of terror against the civilian population of Sierra Leone during the period covered by the Indictment.
18. It is the Prosecution's case that the matters set out in the Indictment in relation to Counts 3 to 13 is what is being relied upon by the prosecution as establishing the required nexus between Mr Brima and Counts 1 and 2 of the Indictment.¹²
19. The Prosecution avers in paragraph 41 of the Indictment that the First Accused by his acts or omissions in relation to the referred underlying allegations contained in Counts 1 and 2 is individually criminally responsible for the crimes alleged in the Indictment by reason of Article 6(1) and, or alternatively, Article 6(3) of the Statute.

Counts 3-5 Unlawful Killings

20. Counts 3 and 4 of the Indictment charges Mr Brima with the offences of extermination and murder , both being crimes against humanity, punishable under Articles 2.b. and 2.a.of the Statute, respectively. Additionally, or in the alternative, Count 5 charges Mr Brima with the offence of violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, which offence is punishable under Article 3 9a) of the Statute of the Court.

¹² Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to file a Supplemental Pre-Trial Brief, (SCSL-04-16 PT-56) , pg. 6 at para. 15.

21. Paragraph 42 of the Indictment states that victims of the alleged unlawful killings were “ routinely shot, hacked to death and burned to death”, and that these alleged killings occurred in the Districts of Bo, Kenema, Kono, Kailahun, Koinadugu, Bombali, Freetown and the Western Area, and Port Loko, between the period May 1997 to April 1999.
22. The prosecution’s case against Mr Brima in respect of Counts 3, 4, and 5 is that, by his acts or omissions in relation to the alleged unlawful killings, he is individually criminally responsible for the unlawful killings, pursuant to Article 6(1), and, or alternatively, article 6(3) of the Statute.
23. Extermination is defined as mass or large-scale killing¹³, as well as the ‘intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’.¹⁴ The notion of extermination has been examined and considered by the ICTR in a number of cases.¹⁵
24. However, according to Cassese a better definition of extermination was given by the ICTY Appeals Chamber in *Prosecutor v. Krstic*¹⁶, where the Appeals chamber held as follows:
- “ for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted or that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population”
25. Applying the above definition, there has been no evidence adduced by the Prosecution of extermination. There was evidence led that Karina in the Bombali District was targeted purely because it was thought to be President Kabbah’s hometown and inhabited by Madingo people. Even this evidence cannot support

¹³ Antonio Cassese, *International Criminal law* (2003), at p. 74 (hereinafter ‘Cassese’).

¹⁴ Article 7(2)(b) of the ICC Statute.

¹⁵ *Infra* 1, at p. 74.

¹⁶ *Prosecutor v. Krstic*, case No. IT-98-33-A, Judgment, 19 April. 2004, para 225. Also for elements of the crime of extermination refer also John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587 p. 292.

a charge of extermination against this Accused person. This single episode cannot be said to have been widespread and systematic nor can it be said that it was calculated to bring about the destruction of a numerically significant part of the population. In short none of the requirements for extermination has been established.

26. Murder as a crime against humanity has been consistently defined as the death of the victim resulting from an act or omission of the accused committed with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death. It must also be shown that the victims were persons taking no active part in the hostilities.¹⁷

Bo District

27. No evidence was led by the Prosecution of any attack by the AFRC in general or by Mr Brima in particular in the Bo District or specifically in Tikonko, Telu, Sembehun, Gerihun, Mamboma as alleged in paragraph 42 of the indictment. Furthermore in Tikonko the evidence of TF1-004 under cross examination was that the soldiers who went to Tikonko on the two occasions in June were members of the RUF. Whilst in examination in chief he had referred to 'soldiers', he accepted that they were members of the RUF.
28. In the attack at Gerihun of which evidence was given by Witness TF1-053 and which led to the death of Paramount Chief Demby¹⁸ he say soldiers dressed in 'military cloths and carrying guns' go into the Chief's house¹⁹. Under cross examination on the 19th April, the witness accepted that he had seen Boisy Palmer a soldier amongst those who went in to the Chief's house and that Palmer was the Brigade Commander in the area.²⁰

¹⁷ *Prosecution v. Norman et al.*, case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 78.

¹⁸ Evidence of 18th April 2005 at page 103 of the transcript

¹⁹ Page 104 of the Transcript of 18th April 2005

²⁰ Page 20 and 21 of the Transcript of 19th April 2005

29. The evidence of TF1-053 is also littered with contradictions between what he said in court and what he said in his previous statements. It is doubtful whether the Prosecution can rely on the evidence of what transpired in Bo District. Although the witness claimed not to have seen Kamajors in Gerihun on June 1997,²¹ he had earlier told the investigators of the Office of the Prosecutor

- (1) that he decided to leave Gerihun on the night of 25th June 1997
- (2) that he saw Kamajors walk in Gerihun on the 26th of June 1997,
- (3) that he did not see them fire shots
- (4) that they passed Gerihun and walked to another place
- (5) That at about 4:30 to 4:45 pm he heard again two gunshots. ²²

The witness though dissociated himself from his earlier statement, this however goes to demonstrate this witness' unreliability.

30. The Prosecution cannot rely on the evidence of TF1 054 either. This witness who gave evidence on the 19th April identified the Brigade Commander at Bo, as one Boisy Palmer and the Secretary of State as A. F. Kamara and Secretary to the Secretariat was one ABK.²³ There is nothing in this witness' evidence that would indicate that these people took orders from or were directed by Mr Brima in any way whatsoever.

31. In the Prosecution's supplemental Pre trial Brief²⁴, the Prosecution asserted that the evidence will demonstrate that

- a. Sam Bockarie ²⁵ led the attack against Sembahun where at least 8 civilians were killed by soldiers who were described themselves as Peoples Army
- b. Sam Bockarie participated in the attack on Tikonko where SLA soldiers dressed in combat uniform killed at least 19 civilians
- c. S.L.A. soldiers killed at least 3 civilians during the attack on Mambona;

²¹ Page 52 of the transcript of 19th April

²² Page 7285 of statement of

²³ Page 78 of Transcript of 19th April 2005

²⁴ Dated 1st April 2004 and filed 22nd April 2004

²⁵ Page 7 of the said document at paragraph 20

- d. S.L.A. junta forces killed at least 5 civilians during the attack on Gedrihun;
- e. Sam Bockarie was present in Telu and gave orders to his soldiers before the attack in which several civilians were killed by RUF/SLA soldiers.

34. The Prosecution has tried to draw a nexus between Mr Brima and the activities of Sam Bockarie or any of the events in the Bo District. Evidence of Prosecution witnesses demonstrate that Sam Bockarie was law in to himself who took no orders from the AFRC of which Mr Brima was said to be part. Sam Bockarie's activities were never said to be part of any plan of the AFRC government.²⁶ No matters arising out of the evidence of Prosecution witnesses can be said to indicate that Mr Brima planned, instigated, ordered or committed unlawful killings in the Bo District or that he aided or abetted in such killings in Bo District. The Defence further contends that participation of Mr Brima cannot be inferred from any evidence led.

35. The Prosecution failed to adduce any evidence that would indicate that between 1st June 1997 and 30th June 1997, Mr Brima was in a position to prevent unlawful killings or to punish perpetrators of such killings. The Prosecutions own witness said that the Head of the AFRC was Johnny Paul Koroma. Others more senior in the government were S.A.J. Musa. No evidence was adduced to show that Mr Brima was part of the decision making process or was part or present when any decision was taken to effect such policies. The Prosecution's own theory and evidence is that Sam Bockarie was a senior member of another organisation (RUF) and also took no orders from or in concert with the AFRC who he viewed with suspicion and failed to take orders from. It was the Prosecution's own witnesses who created a picture of Sam Bockarie as an uncontrollable outlaw of the RUF over whom the AFRC had no control or command.

Kenema District

36. Evidence led by the Prosecution has been that Sam Bockarie alias Mosquito of the

²⁶ See Evidence of TF1-334, TF1-167, TF1- 045

RUF was the de facto ruler of Kenema. TF1- 122 said there was an AFRC presence in Kenema²⁷. He went on to say however (on the 24.6.05) under cross examination by Counsel for Kamara that Mosquito was in total control of Kenema and was responsible for the deaths of B.S. Massaquoi, Brima Kpaka and Andrew Quee as well as the unlawful killing of an alleged Kamajor who had been caught farming by RUF rebels. This witness also stated that he was present when Mosquito ordered the killing of a man called Bunny Wailer and two others. Mosquito according to the Prosecution evidence led in Court was part of the RUF High Command.

37. Bockarie also extended his rule to Tongo within the Kenema District. Moreover Witness TF1-045 who placed PLO II in Tongo (Evidence of 19.7.05) appears to have been talking about someone else. He recalls Mr Brima being present at a meeting at Spur Road but does not equate him to the PLO II he claims to have seen and was introduced to in Tongo. Furthermore he says 'Gullit' the person the prosecution say is Mr Brima had gone to Kailahun by the time of another meeting at Gandarhun-Kpenh. In his evidence of 21.7.05 the same witness says that his Commander 'B' told him that Gullit was PLO I.

38. Also in the evidence of TF1-045, although he says that Captain Yamo Kati commanded troops of AFRC and RUF, fighting such that there was, was against the Kamajors another fighting faction in the war in Sierra Leone²⁸. This witness said that civilians as well as himself considered Bockarie to be in command and control in Tongo. Also Witness TF1 – 062 under cross examination on the 27th June said that as far as he and the civilians were concerned, Sam Bockarie was in command and control of Tongo²⁹.

39. Furthermore, Witness TF1-167³⁰ accepted that Mosquito was in control of the Eastern part of Sierra Leone which included Kenema, Kono, Kailahun, Tongo Field, Tongo.³¹ Evidence has also been led that when Johnny Paul Koroma and

²⁷ See evidence of 22nd June 2005.

²⁸ Evidence of 19th July 2005 at pages 35-37 of transcript.

²⁹ Page 53 of the Transcript of 27th June 2005

³⁰ This witness was one of the Prosecution witnesses so-called Insider Witness.

³¹ Page 55 of Transcript of 19th September 2005

Mr Brima arrived at Kailahun after February 1998, Mosquito ordered their arrest and detention.³²

40. There is therefore no evidence capable of supporting the Prosecution's case that Mr Brima was individually criminally responsible or had command responsibility for what took place in the Kenema District.

Kono District

41. It was established by the Prosecution witnesses that Tombodu in the Kono District was controlled by Savage an RUF fighter. In the evidence of TF1 -167³³, he accepted that Tombodu was controlled by Savage who was an outlaw and took orders from no one. Savage was an RUF whose immediate superior in Kono District was Denis Mingo alias Superman who was also an RUF Commander. The evidence given by Witness 033³⁴ is unsupported by any other independent testimony and is inconsistent with the other insider witnesses like TF1 – 167 and independent witnesses/victims present at Tombodu during the same period³⁵.
42. Whilst witness TF1-334 and TF1-167 gave evidence of Mr Brima being present in Tombodu at a particular time, it appears that this was a transient stop on their withdrawal from Kono. TF1-167 did go on to say that they saw atrocities in Tombodu on their way out of the District to Mansofinia.³⁶ Furthermore TF1-167 did say that the battalion in Tombodu was commanded by Savage. On their withdrawal Savage stayed at Tombodu under the command of Denis Mingo another RUF.
43. The evidence given by TF1 – 072 also confirms the superiority of Savage in Tombodu area. This witness whose hand was amputated by Savage was captured along with a friend and taken to Savage who accused him of killing soldiers and of not being there when they came to save them.

³² Evidence of TF1-122

³³ Page 41 of the Transcript.

³⁴ Page 12 of the transcript of 11th July 2005

³⁵ Evidence given on the 1st July 2005.

³⁶ Evidence given on the 15th September 2005

44. The Defence submits that in the locations of Foindu, Willifeh, Mortema and Biaya, the Prosecution led no evidence at all in respect of the crimes alleged in Counts 3, 4, and 5.
45. The Defence also submits that no evidence was adduced to indicate that 'Operation No Living Thing' was a philosophy preached or practiced by the AFRC in general or Mr Brima in particular. Evidence from prosecution witnesses was that this was a pronouncement by the RUF.
46. It is the submission of the Defence that no evidence was led to prove the Prosecution assertion that:
- a. Mr Brima was the S.L.A in charge of Kono post the ECOMOG intervention within the AFRC/RUF collaboration;
 - b. The general instruction given by Bockarie to Issa Hasan Sesay at the time of the February 1998 ECOMOG intervention to ensure that the AFRC/RUF did not lose Kono;
 - c. The fact that Issa Sesay passed this instruction to other AFRC/RUF Commanders;
 - d. The arrival of Mr Brima, along with other senior AFRC/RUF commanders in Kono from Bombali District approximately one week after the start of the ECOMOG intervention;
 - e. A meeting in Tombudu Town following the arrival of Johnny Paul Koroma at which all civilians were forced to attend and where four civilian men and two civilian women who attempted to flee were brought to Koroma by Mr Brima and were killed by armed men of the AFRC/RUF in front of the crowd;
 - f. That Mr Brima was present at meetings in February/ March 1998 of senior AFRC/RUF commanders in Kono;
 - g. The fact that senior AFRC/RUF Commanders were in regular contact with Bockarie in Kailahun
 - h. That Mr Brima led a force of AFRC/RUF troops from Koidu to Koinadugu with instructions to revenge on civilian population for failing to support the AFRC/RUF.

47. The Defence submits that no nexus has been adduced to link Mr Brima to any of the atrocities in Kono District. The Prosecution's own witnesses have said that Mr Brima came to Kono quite late and not from Bombali District. Also that Mr Brima had been hitherto his arrival in Kono been arrested and detained by Bockarie in Kailahun.³⁷
48. Furthermore whilst the Prosecution has adduced evidence of movement from Kono, they have failed to adduce evidence of any instruction being passed on to troops during this movement. This movement came by way of an order from S.A.J. Musa, as told to the court by witnesses TF1-167 and TF1-334.
49. The Prosecution has also failed to establish that Mr Brima was in command and control of Kono District post the ECOMOG intervention.

Kailahun District

50. The Prosecution's own evidence was that this was an area controlled during the entire period of the war by the RUF.³⁸ This evidence is supported by witness TF1-045 who said that he was amongst those who effected the arrest of 'Gullit', the person whom the prosecution say is Mr Brima. This witness also said that Mosquito used force on Johnny Paul Koroma the leader of the AFRC and that Issa Sesay another senior RUF figure raped the wife of Johnny Paul Koroma.³⁹ The evidence of Mr Brima's arrest in Kailahun is further supported by witness TF1-167 and TF1-334.
51. Furthermore witness TF1-113 gave evidence that she was based in Kailahun and worked in the RUF hospital. Her evidence described the control exercised by the RUF over that district which included the need to obtain passes from the RUF when moving around and the fact that Sam Bockarie alias Mosquito shot and ordered the killing of some people and personally shot two people in her presence for allegedly being Kamajors. The witness goes on to say that another ten people were killed by a roundabout by Mosquito⁴⁰. Indeed Witness TF1-045 gave evidence under cross examination of Mosquito's extensive control over the

³⁷ See evidence of TF1-334, TF1-167, TF1-045

³⁸ See the evidence of Zainab Bangura and TF1-113 and TF1-046

³⁹ See evidence of TF1-045 of 19th July 2005 pages 96-100 of the Transcript.

Eastern province which included Kono, Kailahun and half of the Kenema District including Tongo.⁴¹

52. Witness TF1-334 also said that Mr Brima had mentioned being detained by Mosquito in Kailahun. This evidence is supported by witness TF1 -045 who said that he was amongst those who effected the arrest of Gullit, the person whom the prosecution say is Mr Brima. This witness also said that Mosquito used force on Johnny Paul Koroma the leader of the AFRC and that Issa Sesay another senior RUF figure raped the wife of Johnny Paul Koroma.
53. It is the submission of the Defence that there is no and there could be no nexus between Mr Brima with any or all the events which took place in Kailahun District even relying on the Prosecution's own evidence.

Koinadugu District

54. The evidence of the Prosecution witnesses is that Koinadugu was the base of S.A.J. Musa, a commander senior in position and rank to Mr Brima and Denis Mingo alias Superman of the RUF. Events in Koinadugu cannot therefore be put on the door step Mr Brima. According to page 61 of the Transcript of TF1-167 Mr Brima took command from SAJ Musa
55. The Prosecution also led evidence from witness TF1-310, who had witnessed indiscriminate killing and had been shot herself. The witness was unable to tell the court which armed faction the armed men belonged to⁴². It would therefore be unfair to the Accused Person if an assumption is made or an inference is drawn from this piece of evidence that the perpetrators belonged to a group or faction over which Mr Brima exercised control.
56. The Defence submits that there was not a scintilla of evidence adduced of any operations carried out in Koinadugu District by the group which Prosecution witnesses have said was being led by Mr Brima, nor have they adduced evidence

⁴⁰ See evidence of witness TF1-113 18th July, 2005 – pages 84 to 90 of the Transcript

⁴¹ See evidence of 21st July 2005 at pages 53 to 54 of the Transcript.

⁴² See evidence of the 5th July 2005

from which this Trial Chamber can rely upon to suggest that Mr Brima had any command responsibility for the events that took place in Koinadugu District.

Bombali District

57. Prosecution witnesses appeared to be contradictory as regards events which are said to have taken place in Bombali District. The identification of Mr Brima is open to question. Witness TF1-157 referred to a person called Gullit, the name the Prosecution says the Accused was known by. However this is only because he heard others say so. He provides no positive identification of this person.⁴³ Moreover, his evidence is punctuated by references to atrocities committed by persons who he referred to as 'they'. The name Gullit was what he heard others say and assumed he was one of the bosses 'the way they spoke to people that's how I knew they were bosses.'⁴⁴ That is insufficient evidence on which to base a finding that Mr Brima has a case to answer as regards unlawful killings in Bombali District. The Defence further submits that evidence of Mr Brima ordering atrocities in Bombali given by the so-called insider witnesses are self serving and contradictory. This characterizes the evidence given by witnesses TF1 – 167 and TF1-334.

Freetown and Western Area

58. As far as that 'soldiers' who attacked the mosque in Freetown, TF1-021 affirms the statement 'They were rebels of the RUF. I know this because when they were addressing us, they told us that they were RUF rebels and that they were People's Army.' (this in contradiction to what he said before)

59. By reason of the foregoing it is the submission of the Defence that the prosecution has failed to provide critical and necessary evidence on essential elements of the crimes capable of supporting a conviction on any of the charges contained in Counts 3, 4, and 5, and that since these elements are required as a matter of law to sustain any convictions resulting from the Indictment, Mr Brima ought to be acquitted of the charges contained therein. .

⁴³ Page 90-92 of Transcript of 22nd July 2005

⁴⁴ See page 90 line 22 of the transcript of the 22nd July 2005

Counts 6 – 9: Sexual Violence

60. Counts 6, 7, and 8 of the Indictment charges Mr Brima with the sexual violence related offences of rape, sexual slavery and any other form of sexual violence, and other inhumane acts respectively, all crimes against humanity. Count 9 charges Mr Brima with the offence of outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.
61. The prosecution alleges that, at all times relevant to the indictment, Mr Brima committed widespread sexual violence against civilian women and girls including brutal rapes, often by multiple rapists, and forced “marriages in the Districts of Kono, Koinadugu, Bombali, Kailahun, Freetown and the Western Area, and Port Loko during the period from February 1997 to April 1999.⁴⁵ The Prosecution further alleges that Mr Brima, by his acts or omissions in relation to the allegations averred in Counts six to nine, is individually criminally responsible for these acts of Sexual Violence.⁴⁶
61. The Prosecution has failed to adduce evidence that Mr Brima raped or ordered the rape of any person or that he knew or should have known that rape was being committed by members of the AFRC. The Prosecution called Witness 081 (an independent witness) who gave evidence of girls treated for medical conditions which derived from sexual abuse during the war by the Organization FAWE.⁴⁷ The witness could not however tell the court of the identity of the perpetrators of the crimes against the girls they were treating.⁴⁸

Kono District

62. Tombodu: Witness TF1 – 076 gave evidence on the 27th June 2004 of her capture and rape in Tombodu. Witness’ evidence was that they were dressed in TUPAC T- Shirts and spoke in Liberian dialect. Witness does not identify her attackers as either AFRC or RUF and it is submitted that any attempt to label her attackers as being members of the AFRC is uncorroborated by any evidence led by the Prosecution. There has been no evidence of Liberians being members of the

⁴⁵ pages 12-15 of Indictment

⁴⁶ para. 57 of Indictment

⁴⁷ Evidence given on the 4th July 2005

⁴⁸ Page 10 of Transcript lines 23 to the end.

fighting faction AFRC although there has been evidence of them being either part of or fighting along side the RUF.

63. Witness TF1 -206 was also abducted in Kono and had his hand amputated by rebels. He gave evidence on the 28th June 2005 and talked about sexual assaults on girls in which he was forced to participate.⁴⁹ However the witness could not say which rebel faction these men belonged to even though he had heard of the AFRC and of the RUF⁵⁰. This evidence does not lend its support to the Prosecution's theory and cannot therefore form a basis for attesting individual criminal responsibility to Mr Brima.
64. Further, the evidence has failed to demonstrate that such sexual abuse was widespread in Kono District. Whereas there has been oral evidence of some sexual violence in the Kono there was no evidence adduce of it being widespread. The Prosecution failed to establish the evidence about the Cyborg Mining Pit⁵¹. The evidence of TF1-062 was that the Cyborg Pit was in Tongo but whilst he gave evidence of deaths and work conditions he gave no evidence of sexual violence.⁵²

Koinadugu District

65. The Prosecution failed to adduce evidence of acts or omissions of Mr Brima in relation to sexual violence in the Koinadugu District. Witness TF1-209 gave evidence of rapes including of herself by some men who had captured her. She did however say that of her two captors one belonged to the group of S.A.J. Musa and the other belonged to the group of Superman who has been established as belonging to the RUF. S.A.J. Musa was according to the Prosecution case at all times superior in rank and position to Mr Brima and also from the Prosecution evidence it is clear that Mr Brima took orders from Musa.⁵³ The witness makes no mention of Mr Brima having been present or that she heard his name being

⁴⁹ Page 95-97 of the Transcript.

⁵⁰ See evidence given on the 28th June 2005

⁵¹ Page 32, paragraph 85 of the Prosecution Supplemental Pre-Trial Brief of 1st April 2004

⁵² TF1-062 evidence of 27th June 2005.

⁵³ Evidence given by witnesses TF1-334, TF1-167, TF1-188

mentioned.⁵⁴ Indeed the evidence of Mr Brima in Koinadugu District is that he went to S.A.J. Musa from whom he received orders to find a base in the north.⁵⁵ The Prosecution has therefore failed to adduce sufficient evidence to establish a case that Mr Brima could have acted or that he omitted to act to prevent sexual violence in the Koinadugu District.

67. The Prosecution also led evidence from witness TF1-133 who gave evidence of abduction and sexual assault. This witness' evidence is about being abducted by soldiers belonging to Brigadier Mani's group in Koinadugu District where she eventually became 'Mami Queen' residing in Brigadier Mani's house.⁵⁶ Earlier, the Chamber had heard evidence from Witness TF1-334, who said that on going to SAJ Musa for instructions at Mongo Bendugu, Mr Brima was advised by S.A.J. Musa to go to the North and join Brigadier Mani.⁵⁷ No evidence was adduced from which a conclusion can be drawn that Mr Brima and Brigadier Mani ever met during the entire period after retreat from Freetown in February 1998. This further reinforces the Defence position that there is no evidence however slight that Mr Brima could have acted to prevent sexual violence in the Koinadugu District.

Bombali District

68. Witness TF1-334 said he saw soldiers raping women, but there is very little detail to what he claimed to have seen. Apart from saying that the fighters objected to seeing naked women, he failed to tell the court of the presence of any commander, whether they ordered it or whether they saw and failed to stop it.⁵⁸

Counts 10-11: Physical Violence

Kono District

69. The evidence given by TF1 – 072 also confirms the superiority of Savage in Tombody area. This witness whose hand was amputated by Savage was captured along with a friend and taken to Savage who accused him of killing soldiers and

⁵⁴ See evidence of 7th July 2005.

⁵⁵ Evidence of TF1 -167 on the 15th September 2005

⁵⁶ Evidence of 7th July 2005

⁵⁷ Page 96-87 of the Transcript of 20th May 2005

⁵⁸ See evidence of the 23rd May 2005

of not being there when they came to save them. This supports evidence of other witnesses that Savage was in charge of Tombodu and did not take orders from anyone.

70. Furthermore, the evidence of TF1 – 074 (witness on whom the letters RUF, AFRC were inscribed) appears to be a confusion as to which organisations people belonged to.⁵⁹ At page 13 of the transcript the witness said that on their third day in Wordu, one of the rebels was told to take a letter from Komba Gbundema (RUF man) “to the boss man with whom we were, and they said that they were report to Kayima”.
71. Also, the witness at pages 29 and 30 of the transcript said that himself and others were taken to the front as cartridge and bomb carriers. He remained 3 years with his captors (1998 – 2002) during that period the 1st Battalion commander was Komba Gbundema and he was with the operation and company commander Captain Barry (RUF). In his four years of capture, he was only taken to Yiffin (front). In that period, the battalion commander was Major Komba Gbundema (RUF). Captain Ibrahim Ticker was also from RUF. The witness also came across Captain SK, the operation commander of the 4th Battalion (RUF). This clearly indicates that what happened to the witness was clearly the work of the RUF, who were in charge and carried out these mutilations. Under cross-examination it was put to the witness that in a previous statement to the Investigators from the Special Court he had said that a man named Katta had marked him.⁶⁰ The witness refused to accept that he had said that, but this only goes to reinforce the point that this witness’ evidence is confusing and cannot be relied upon. Also, although this witness had said he was captured by one Bangalie of the AFRC who was in full combat uniform in his statement given to investigators from the Office of the Prosecutor he had said that he was captured by rebels mainly RUF.⁶¹ It is submitted that Mr Brima could not be held individual responsible for the actions and conduct of person or persons over whom he exercised no control. There is in any event no evidence upon which the Prosecution can rely that Mr Brima by his

⁵⁹ Evidence of 5th July

⁶⁰ Page 8209 of prosecution statements

⁶¹ Page 8208 of statement

acts or omissions was individually responsible for the actions of these perpetrators.

72. The Defence submits that the evidence of TF1-198 cannot be used as proof of physical violence in the Kono District. That witness who gave evidence on the 28th June 2005, gave a description of physical violence the type of which is not alleged in the indictment at paragraph 59. Moreover, the witness says she was asked if she did not want Foday Sankoh⁶² which by itself indicates that the persons who abducted her were members of the RUF.
73. Further, evidence given by TF1-206 also confirms that amputations did take place in Kono. However as pointed out in the preceding paragraph this witness could not tell which faction the rebels belonged to and therefore cannot support any assertion that Mr Brima was part of or was responsible for these act or omissions.

Kenema District

74. As stated above, the evidence adduced is that Sam Bockarie alias Mosquito was in total control of Kenema District and the Eastern Province. Indeed, although Sam Bockarie was part of the Supreme Council at the inception of the AFRC government, the Prosecution evidence is that he soon left the government to return to Kenema where he exercised control to the exclusion of all others.
75. The Defence position is that the Prosecution evidence adduced is insufficient to uphold any assertion that Mr Brima has a case to answer for any offences committed in Kenema town, Kenema District, Kailahun District and the Eastern province as a whole.

Count 12: Use of Child Soldiers

76. The Defence submits that there is no evidence adduced by the prosecution to the effect that Mr Brima individually or in concert with others ordered the abduction of children or the use of abducted children as soldiers.

⁶² Page 20 of the Transcript

77. The Defence submits that TF1-199 a child at the period under review gave evidence that he was abducted by Lieutenant-Colonel Savage and Lieutenant Marah who belonged to Brigadier Mani's group.⁶³ Evidence before the Trial Chamber has never suggested that Brigadier Mani's group came in contact with Mr Brima or any group of which he is part. Futhermore Brigadier Mani has been said to be senior in rank and position to Mr Brima.
78. The description given by witness TF1-157, another child soldier, of the person he referred to as Gullit, and the person whom the Prosecution say is Mr Brima, is according to the said witness a person of fair complexion, not very tall, has a stammer when he speaks and also that he is bulky. These features undisputably and clearly does not fit the person who answers to the name of Mr Brima, the First Accused. TF1-158 also vaguely attempts to describe Mr Brima, describing him as wearing sun glasses, helmet, jacket uniform and a pair of short, a description which would fit any of the men amongst whom he was being held.⁶⁴
79. Moreover there was no evidence put forward that Mr Brima was aware of the presence of these child soldiers or was involved in their abduction, training and the decision for them to be used as combatants. The Prosecution would like the Trial Chamber to accept that Mr Brima did know or if he didn't then he ought to have known. However none of the witnesses either TF1-157 or TF1-158 described any contact with Mr Brima save to say that TF1-157 said that he became aware of the names of some of the rebels and soldiers and he mentioned the name Gullit amongst others.⁶⁵ TF1-157 could only say that he knew 'they' were bosses by the way they spoke to people. His evidence is littered with what 'they' did but we are not clear who they are, under whose command, who exercised command and control or who carried out the crimes against TF1-157 and other child soldiers.⁶⁶ Other witnesses also failed to show any connection with the child soldiers by Mr Brima or any command by Mr Brima over them

⁶³ Evidence of the 6th October 2005.

⁶⁴ Evidence of 26th July 2005

⁶⁵ Evidence given on the 22nd July as pages 90-91 of the transcript

⁶⁶ Evidence of 22nd and 25th July 2005

80. Witness TF1-334 gave evidence of an order from the Accused that the abducted children should be distributed.⁶⁷ He failed to expand on how it was to be effected, when and to whom this distribution was to be made. Indeed witness TF1 -334 had said that Gullit on ordering the attack on Karina said that strong men should be captured⁶⁸. He does not say that he ordered the capture of children. Similarly witness TF1-167 makes no mention of an order given by Mr Brima for the abduction of and use of child soldiers.
81. Further, the evidence of witness TF1-167 differs, in that he said that Accused ordered that Karina must be burnt down ‘and anyone who sets hands on must be killed.’⁶⁹ This piece of evidence is unsupported by any other witness of fact who claims to have been present and been part of the assault on Karina town. The Trial Chamber is expected to assume that the distribution was made in order that the children are trained to fight. Furthermore we do not know how the witness came by this information. Without any foundation, the Prosecution cannot rely on this evidence to support its assertion.
82. Furthermore, the witness TF1-334 said that he trained children abducted from Karina and trained at Rosos. At no point during his extensive evidence on this point does he say that he was ordered to do so by Mr Brima.⁷⁰ Also the witness appeared to be painting a picture of a well organised training course where details of ages and place of residence were taken by him and records of all the children were kept. Yet, he failed to elucidate on these records, produce them or provide any evidence upon which the Chamber can safely conclude that a record of these children’s ages were kept in order to conclude that those trained by this witness and who are the subject of count 12 were under the age of 15 years. This piece of evidence does not support any assertion that Mr Brima conscripted or enlisted children under the age of 15 years into armed forces or groupings.

Count 13: Abductions and Forced Labour

Kenema District

⁶⁷ Evidence 23rd May 2005

⁶⁸ See evidence of 23rd May 2005 – page 58 line 27 of transcript.

⁶⁹ Evidence of 15th September 2005, page 54, line 1 of the transcript

⁷⁰ Evidence of 24th May 2005 pages 24 to 30 of the Transcript.

83. The Prosecution have failed to adduce sufficient evidence of abductions and forced mining in the Kenema District. Witness TF1-045 a former RUF combatant, who gave evidence of mining in Tongo Field in the Kenema District gave no reliable evidence upon which the Prosecution can rely.⁷¹ The witness' evidence goes as follows:

Q: Thank You. In your presence did you witness anything happen to civilians who were mining?

A: Well yes. I saw. That was done the forced mining. When they were doing the morning, some of them were forced to mining you see. So I saw that.

Q: Again if you know or if you saw what would happen to a civilian who refused to mine.

A: Well if you refused to mine and you are captured you will be beaten, you will undergo serious torture, if... And if you are not lucky you will die. They will shoot you with a gun.

Q: Mr Witness did you see this happen to civilians in Tongo?

A: I saw it on many occasions when it took place. I saw it⁷²

84. It is noteworthy that the witness does not give a description of what he claims to have seen for him to form or arrive at the conclusion that this was forced labour in the mining fields. There is nothing about who said what, when, how and to whom. This evidence does not support any assertion that Mr Brima was acted or omitted to act in relation to abductions and forced labour in the Kenema District. This witness gave the names of those present in Tongo at the time and indeed those persons who were in charge of the mining and other operations in that particular area. The witness' identification of the Defendant was on two occasions neither of which was at Tongo.

85. Further, Witness TF1-122 also stated that AFRC and RUF formed a very strong team and left for Tongo Field, Lower Bambara Chiefdom, Kenema District, between May 1997 and March 1998. He stated they were heavily armed and that Issa Sesay and Akim were among them.⁷³ The Prosecution's case is that Issa Sesay was a high ranking RUF official and indeed one of those who bear the greatest responsibility. The witness went on to say that two days later, a lot of displaced people came from Tongo and reported to him that they were attacked by

⁷¹ Evidence of the 19th July 2005

⁷² Page 55 of transcript, lines 9-20

⁷³ Page 71 of Transcript of 24th June 2005

RUF/AFRC at Tongo Field and that they killed and captured a lot of men, to do diamond mining for them. This evidence is unreliable. Though the witness was a police officer at the time, he demonstrated no knowledge of what transpired in Tongo except for what he had been told and nor did he make any effort to verify if what he had heard was indeed a fact. It is at best a general statement without foundation and as such cannot be relied upon as evidence of forced labour for which Mr Brima can be held responsible.

Count 14: Looting and Burning

86. There is insufficient evidence that Mr Brima ordered looting and burning as alleged. Witness TF1-122 gave evidence of looting and burning by the rebels as they retreated from Kenema. TF1-045 who was a member of the RUF also gave evidence about this same episode. This witness who had earlier stated that Mosquito controlled the Eastern Province of Sierra Leone told the court under cross examination that ‘Operation Pay Yourself’ was launched by Mosquito and that he was in command and control of this operation.⁷⁴

Legal Submissions

87. The Defence submits that Mr Brima bears no individual criminal responsibility under Article 6(1) of the Statute as no evidence has been adduced by the Prosecution to establish or prove that he planned, instigated, ordered, or committed any of the alleged crimes contained in the Indictment. There is also no evidence to prove that he on the other hand aided or abetted the perpetration of any of the crimes.

88. It is submitted that the prosecution has failed to provide evidence to establish the key statutory elements of Article 6(1) required in order to punish Mr Brima for his individual responsibility for the alleged crimes. Moreover, no evidence has been adduced by the prosecution to establish that the acts or omissions of the accused had a direct and substantial effect on the commission of the alleged crimes. Accordingly, a judgment of acquittal ought to be entered for the crimes for which he is allegedly individually responsible.

⁷⁴ Evidence of 21st July page 37 of the Transcript.

1. The Defence further submits that based on the Prosecution evidence at the close of its case, the Defence contends that Mr Brima does not bear superior responsibility for the allegations as provided in article 6(3) of the Statute. The Prosecution has failed to establish the three elements necessary to prove that Mr Brima is responsible as a superior for crimes committed by his subordinates, namely, first, the existence of a superior-subordinate relationship between the accused and the alleged perpetrators of the alleged offences; second, the knowledge of the superior that his subordinate was about to commit, or had committed, a crime; and third, the failure of the superior to take the necessary measures to prevent the criminal act or to punish the perpetrator(s) thereof.⁷⁵ The prosecution's theory of superior responsibility is hiked on the status of Mr Brima as a senior member of the erstwhile AFRC military regime.
90. The Defence contends that Mr Brima's mere status as a senior member of the AFRC does not automatically attach to him command responsibility for alleged criminal actions of all AFRC combatants unless it is established that he exercised effective command and control over his subordinates.⁷⁶ This the Prosecution has failed to do. Whilst the Prosecution has sought to establish that Mr Brima had effective control over the AFRC troops, they have been unsuccessful in doing so. The evidence was that Mr Brima as PLO II of the AFRC government and was subordinate to people like Johnny Paul Koroma and S.A.J. Musa and he acted in accordance to duties devised and controlled by them.⁷⁷ The title PLO II conferred no formal authority on Mr Brima. Witnesses have testified that the movement from the Northern Province to Benguema up to the death of S.A.J. Musa, Mr Brima was under S.A.J. Musa's command and took orders from him. Furthermore, as has been indicated above, Mr Brima had to go to S.A.J. Musa in the Koinadugu District and it was there that Musa ordered Mr Brima to find a base in the North and link up with Brigadier Mani. Witness TF1-167 went further to state that whilst they were based in Colonel Eddie Town Mr Brima and other

⁷⁵ See, e.g., *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgment', November 16, 1998, para. 346; *Prosecutor v. Kvočka, et al.*, IT-98-30/1-T, Trial Chamber, 'Judgment', 2 November 2001, para. 314.

⁷⁶ See *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgment', November 16 1198, para. 652-56.

⁷⁷ See Evidence of TF1-334 evidence of 17th May at page 52, lines 27-29. Also see page 11 at lines 10 -16

Commanders were arrested and detained by other AFRC fighters until the arrival of S.A.J. Musa. This itself does indicate that Mr Brima had no control over the AFRC. Therefore relying on the Prosecution's own evidence the Defence submits that:

- (i) The Prosecution has failed to establish that Mr Brima had the power or authority to prevent his subordinates crimes and to punish the perpetrators of these crimes.
- (ii) The Prosecution has failed to establish that Mr Brima had effective command over AFRC troops
- (iii) The Prosecution has not shown any link of control over troops in the Eastern, Northern and Southern provinces of Sierra Leone.

The Defence therefore submits that Prosecution has failed to establish the sufficient elements for command responsibility.

91. The Prosecution based their case and indeed conducted it on the platform of a joint criminal enterprise between the AFRC and the RUF. This joint criminal enterprise has not been established throughout their case. The Prosecution have not established that there was a joint common plan between the AFRC and the RUF or that they acted with a common purpose or that they possessed the same criminal intent. Whilst there was evidence that the AFRC invited the RUF to join them in government, this was only to govern the country in peace and put an end to the war. Prosecution witnesses have stated that Mosquito soon left the government to return to Kenema, where he was the *de facto* leader.⁷⁸ These same Prosecution witnesses gave evidence of the plan of the AFRC being to reinstate the Army as directed by S.A.J. Musa. Furthermore the Prosecution led evidence that Mr Brima asked Mosquito for reinforcement when they arrived in Freetown on the 6th January, 1999. Despite assurances given by Mosquito, no such reinforcement was sent⁷⁹. Indeed witness TF1-046 gave evidence that when he asked Mosquito for reinforcement on behalf of Brima, Mosquito told him to keep his mouth shut and that he knew nothing.⁸⁰ The political affiliation in 1997 never transcended to the troops and events detailed above of Mosquitos' treatment of

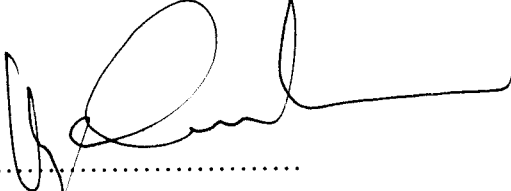
⁷⁸ See evidence of TF1-167, TF1-334, TF1-184

⁷⁹ See evidence of TF1-184.

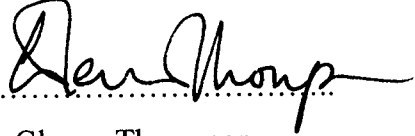
⁸⁰ See Pages 8-9 of the Transcript of 10th October 2005

J.P. Koroma and Mr Brima and the evidence of S.A.J. Musa's intolerance of RUF⁸¹ do not support the Prosecution's theory of a joint criminal enterprise.

92. In view of the forgoing the Defence submit that the case against Tamba Brima be dismissed in its entirety.



.....
Kojo Graham



.....
Glenna Thompson

⁸¹ See the evidence of TF1-033