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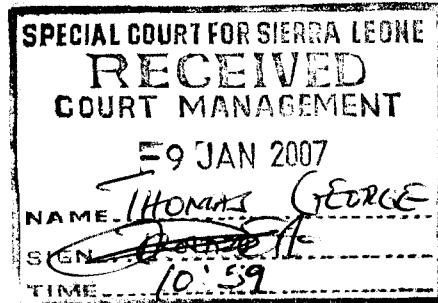
**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-T

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

Registrar: Lovemore G. Munlo, SC

Date filed: 8 December 2006



THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

PUBLIC VERSION

KANU - DEFENCE TRIAL BRIEF

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1 DEFENCE THEORY ON CRIMES AND CRIME BASE EVIDENCE

1. The Defence herewith presents its theory on the elements of crime of several of the crimes alleged in the Indictment against the Third Accused.

1.1 Count 1 – Terrorism

2. Para. 41 of the Indictment, insofar relevant, reads that “[m]embers of the AFRC/RUF subordinate to and/or acting in concert with Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, committed the crimes [in the Indictment] as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population.”
3. Acts of terrorism are charged as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute.

Definition of Terrorism

4. The ICTY Trial Chamber in *Prosecutor v. Galic* gave the following definition of the crime of terror: “1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body and health within the civilian population. 2. The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence. 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.”¹ Trial Chamber I of the Special Court ruled that this definition might be of assistance in the interpretation of Article 3(d) of the Statute.²
5. Trial Chamber I in the aforementioned decision in *Prosecutor v. Norman et al.* also held, in the interpretation of the concept of terrorism, that “the proscriptive ambit of

¹ *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003, para.133.

² *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motion for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 110.

Protocol II in respect of 'acts of terrorism' does extend beyond acts of threats of violence committed against protected persons to 'acts directed against installations which would cause victims terror as a side-effect.'³

6. The Trial Chamber in para. 49 of the Rule 98 Decision, adopted the *Norman* Trial Chamber definition of 'acts of terrorism,' namely: "[t]he crime of Acts of Terrorism is comprised of the elements constitutive of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II as well as the following specific elements:
 - i. Acts or threats of violence directed against protected persons or their property.
 - ii. The offender willfully made protected persons or their property the object of those acts and threats of violence.
 - iii. The acts of violence were committed with the primary purpose of spreading terror among protected persons.'⁴

7. This definition includes the element of 'property.' The Trial Chamber assumed that this definition was accepted by the Defence,⁵ which is not the case. The Defence in its Rule 98 Motion mentioned both the abovementioned *Galic* case and the *Norman* definitions of terrorism. These definitions are not similar to each other, and are different on one essential part.

No 'Property' Element

8. Neither Trial Chamber I, nor Trial Chamber II indicate in their respective Rule 98 Motions the reasons as to why such definition was broadened to include the aspect of 'property.'

³ *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 23 October 2005, para. 111, referring to the ICRC Commentary on the Additional Protocols, at 1375.

⁴ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 49.

⁵ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 49.

9. Trial Chamber I mentions the *Galic* definition, and consequently indicates that it bases its definition on the ICRC Commentaries while concluding that “acts of terrorism” does extend beyond acts of threats of violence committed against protected persons to ‘acts directed against installations which would cause victims terror as a side-effect.’⁶ However, in its definition, this aspect of ‘installations’ is without any explanation or substantiation transformed into ‘property.’
10. It seems from the wording that Trial Chamber I extensively interprets ‘installations’ as ‘property,’ although this is not explained by Trial Chamber I. ‘Installation,’ as indicated in the Cobuild dictionary, can be defined as a place that has been specially built by the army, navy, or air force to contain people or equipment; a place that contains equipment and machinery which are being used for a particular purpose (for instance, North Sea oil and gas installations). Property, on the other hand, can be defined as all the things that belong to them or something that belongs to them.
11. Therefore, it is the Defence submission that the Trial Chamber I definition cannot be used by Trial Chamber II as there is no legal basis for assuming the element of ‘property’ in its definition. The Defence thus contends that Trial Chamber II should re-examine this definition in order to insure that the correct scope of this crime is exercised.

Reasons Why ‘Property’ Element Should Not Be Included

12. The Defence contends that the element of ‘property’ added by Trial Chamber I, and duplicated by Trial Chamber II, to the ICTY definition of terror, is an element which should not be incorporated in this definition for the following reasons.
13. In the first place, serious care should be taken in adding elements to the definition of terrorism, and thus widening the scope of the provision. In international politics, several heads of state have attempted to widen the scope of the international war on terror to include organizations including their national opponents and other

⁶ *Prosecutor 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. 111.

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competitors disagreeing with the government's policies. For instance, mention is made of China's attempt to widen the scope of terrorism.

14. China's Foreign Minister Zhu stated the following: "We think terrorism should be opposed no matter where it manifests itself, where it comes from-and no matter who the perpetrators and their targets are." Or, as Chinese President Jiang Zemin pointed out while meeting with Russian President Putin: "China is determined to counter all forms of terrorism, no matter where and when it takes place and no matter who it is targeting." Beijing's all-embracing approach was reflected in the APEC antiterrorist manifesto. It said APEC (Asia-Pacific Economic Cooperation) leaders condemned "murderous deeds as well as other terrorist acts in all forms and manifestations, committed wherever, whenever and by whomsoever."⁷

15. This is merely an example indicating the caution which should be taken in defining terrorism, and more specifically, in widening the definition thereof. The definition provided to such a crime by an international tribunal will have its effect on the interpretation thereof in international politics; especially of such sensitive international issue.

16. In the second place, another reason why the definition should exclude the 'property' element is that terrorism should be directed at sowing terror. The question raised here is whether an attack on someone's property can actually be categorized as terrorizing people.

17. In paras. 262 and 263 of the Rule 98 Decision, the honorable Trial Chamber holds that the evidence on "destruction of civilian property by burning" may be charged more appropriately under, *inter alia*, the count of terrorism.⁸ The Defence respectfully holds that the burning of property does not fulfill the strict requirements of the crime of terrorism.

⁷ See, The Jamestown Foundation China, China Brief, Volume 1, Issue 8, October 25, 2001, see: No Peace Without Justice, <http://www.npwj.org/?q=node/43> (last visited on 25 November 2006).
⁸ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 262-263.

18. For the above reasons, the Defence respectfully submits that the definition of terrorism should exclude the 'property' element.

1.2 Count 2 – Collective Punishment

19. Collective punishment is a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute.

20. This provision of 'collective punishments' should be interpreted "in its widest sense" according to the ICRC commentaries.⁹ Yet, several requirements must be met for this charge. The Trial Chamber in its Rule 98 Decision, accepts the following definition:¹⁰

- (i) The general elements of Article 3 common to the Geneva Conventions and Additional Protocol II;
- (ii) A punishment imposed upon protected persons for acts that they have not committed; and
- (iii) The intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishments.¹¹

21. The Trial Chamber again assumes that the Defence accepts this definition; however, the Defence respectfully contends that it did not indicate so in its Rule 98 Motion. Nonetheless, the Trial Chamber states that it adopts said definition.¹²

22. The second element of said definition requires "[a] punishment imposed upon protected persons for acts that they have not committed." The Defence submits that the Prosecution has not led evidence to the fact that the punishment as required by the second element, was for acts that they have not committed.

⁹ ICRC, Commentary on the Additional Protocols, at 1374.

¹⁰ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.

¹¹ *Prosecutor 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. 118; *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.

¹² *Prosecutor 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. 118; *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.

23. Evidence has been led, indicating that civilians were killed or had their limbs amputated, and that because they had voted for President Kabbah, they would be killed or have their limbs amputated.¹³ However, there is no single piece of evidence showing that these civilians had not committed the alleged act, i.e. voted for President Kabbah, required by the second element of this Chamber's definition.

24. This necessarily leads to the conclusion that the evidence led during the trial in this regard, does not fulfill the elements of the crime of collective punishments as set forth by the Trial Chamber in the Rule 98 Decision.¹⁴

1.3 Counts 3, 4 and 5 – Extermination and Murder

25. The Trial Chamber enumerated four elements for the crime of extermination, besides the elements of crimes against humanity:

- (i) The perpetrator intentionally caused the death or destruction of one or more persons by any means including the infliction of conditions of life calculated to bring about the destruction of a numerically significant part of a population;
- (ii) The killing or destruction constituted part of a mass killing of members of a civilian population;
- (iii) The mass killing or destruction was part of a widespread or systematic attack directed against a civilian population; and
- (iv) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.¹⁵

26. International humanitarian law defined murder as a crime against humanity as “the intentional killing of a person as part of a widespread or systematic attack upon a

¹³ TF1-004, Transcript 23 June 2005, p. 5-6; TF1-021, 15 April 2005, p. 28, p. 29; TF1-033, Transcript 11 July 2005, p. 18-19, 12 July 2005, p. 58; TF1-083, 8 April 2005, p. 66-68; TF1-098, Transcript 5 April 2005, p. 42; TF1-153, Transcript 22 September 2005, p. 98, 23 September 2005, p. 50-51; TF1-157, Transcript 25 July 2005, p. 5; TF1-179, Transcript 27 July 2005, p. 41; TF1-184, Transcript 27 September 2005, p. 36-37; TF1-198, Transcript 28 June 2005, p. 15; TF1-206, Transcript 28 June 2005, p. 104; TF1-216, Transcript 27 June 2005, p. 79, 93; TF1-217, Transcript 17 October 2005, p. 26; p. TF1-227, Transcript 8 April 2005, p. 102-103, 11 April 2005, p. 35; [REDACTED] TF1-278, Transcript 6 April 2005, p. 7.

¹⁴ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.

¹⁵ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 75.

civilian population.”¹⁶ The Trial Chamber in its Rule 98 Decision set out the following elements for the crime of murder as a crime against humanity:

- (i) The perpetrator by his acts or omission caused the death of a person or persons;
- (ii) The perpetrator had the intention to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death;
- (iii) The murder was committed as part of a widespread or systematic attack directed against a civilian population; and
- (iv) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.¹⁷

27. Trial Chamber II indicated that the international humanitarian legal definition of this crime is “the wilful killing of a person or persons protected under the Geneva Conventions of 1949 and Additional Protocol II during an armed conflict.”¹⁸

28. The following elements are enumerated:

- (i) The perpetrator inflicted grievous bodily harm upon the victim in the reasonable knowledge that such bodily harm would likely result in death;
- (ii) The perpetrator’s acts or omission resulted in the death of the victim;
- (iii) The victim was a person protected under one or more of the Geneva Conventions of 1949 or was not taking an active part in the hostilities at the time of the alleged violation;
- (iv) The violation took place in the context of and was associated with an armed conflict; and
- (v) The perpetrator was aware of the factual circumstances that established the protected status of the victim.

¹⁶ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 74.

¹⁷ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 74.

¹⁸ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 75.

29. The Defence contends that Prosecution evidence does not link the Third Accused with any acts of extermination, as indicted by count 3 of the Indictment, either through the form of individual criminal responsibility or superior responsibility.
30. Extermination and counts 4 and 5 are alleged in Kono District between about 14 February 1998 and 30 June 1998. It is the Defence submission that the Third Accused was not present in this District during most of the time relevant to the Indictment. He did not have any position of operational command, and could not practically exert such influence either, because of his absence most of the time. Although witnesses do at times testify of his presence, this presence was very rare.
31. The Prosecution led evidence that in Koidu Buma, RUF Rambo killed fifteen people.¹⁹ Witness TF1-216 indicates that three people were killed in Pacma in "Operation No Living Thing."²⁰ Witness TF1-033 claims that 40 people were killed in Sama Bendugu.²¹ This same witness testifies of hundreds of civilians being killed by Savage under Gullit's command in Tombodu.²² However, this witness tones down this number, by stating the following:
- Q. The figures you have given, Mr Witness, did you count them?
 A. Well, I saw a large number of -- [Overlapping speakers].
 Q. Please, just answer my question.
 A. No."²³
32. Witness TF1-113 mentions one incident in Kailahun, where some 67 persons from Ngeima, Bandajuma and Boworbu were collected, and killed.²⁴
33. Prosecution and Defence evidence suggest that an attack took place on Karina around May 1998. The Defence evidence presented states that seven people were killed.²⁵ Two OTP witnesses supports this Defence evidence.²⁶ Another OTP witness, TF1-033, speaks of "500 civilians were killed." In addition to that, "about 300 were also

¹⁹ TF1-334, Transcript 20 May 2005, p. 23.

²⁰ TF1-216, Transcript 27 June 2005, p. 80-81.

²¹ TF1-033, Transcript 11 July 2005, p. 17.

²² TF1-033, Transcript 11 July 2005, p. 11.

²³ TF1-033, Transcript 11 July 2005, p. 79.

²⁴ TF1-133, Transcript 18 July 2005, p.84-85, 87-90.

²⁵ DBK-089, Transcript 14 July 2006, p. 7-8; DBK-094, Transcript 11 July 2006, p. 38-39;

²⁶ TF1-058, Transcript 14 July 2005, p. 78-80. At a later stage this witness mentions six corpses, see TF1-058, Transcript 14 July 2005, p. 104. Witness TF1-055 testifies that he and the other villagers buried five people, including those people killed at the mosque; see TF1-055, Transcript 12 July 2005, p. 138.

amputated in both towns [Karina and Bonoya]. Many rapes, over 200 -- over hundreds of women were raped in that town.²⁷ The Defence submits that this latter evidence is, compared to the other evidence available, not reliable, and should not be taken into account. Especially given the size of the town of Karina (and Bonoya), the estimates given by Witness TF1-033 seems to be inconsistent with the other available evidence. This same witness testifies of 200 people being killed in Rosos,²⁸ whilst indicating: "This is an approximation. It could be more than or less than."²⁹ The Defence contends that also this part of Witness TF1-033's evidence is unreliable, and should have any weight in the assessment of this alleged crime.

34. In Bonoya, Prosecution witness TF1-158 states that he did not see any corpses.³⁰ However, another Prosecution witness testifies that three people were killed in Bonoya. Again, another witness states that six people were killed in Bonoya.³¹ Evidence has been led by the Prosecution that one person was killed in Mandaha.³² Another Prosecution witness states that two persons were killed.³³ In Colonel Eddie Town, one Prosecution witness testifies of an incident where three people were killed.³⁴ One Prosecution witness mentions Mabaka, that two people were killed.³⁵ In Fadugu, according to Prosecution evidence, some civilians were killed.³⁶ In Gbendembu, two policemen were killed,³⁷ and in Kamalo, Prosecution evidence indicates that fifteen people were set aside and killed by O-Five.³⁸

35. Witness TF1-083 mentions 70 corpses in a mosque in Western Area in January 1999.³⁹ No clear indication is given as to the person or group responsible for such killings. In Kissy Town, according to witness TF1-021, some 71 persons were shot down. The witness lays no foundation for such statement, he did not count the

²⁷ TF1-033, Transcript 11 July 2005, p. 19.

²⁸ TF1-033, Transcript 11 July 2005, p. 28-29.

²⁹ TF1-033, Transcript 11 July 2005, p. 20.

³⁰ TF1-158, Transcript 14 July 2005, p. 105.

³¹ TF1-157, Transcript 22 July 2005, p. 57-58.

³² TF1-157, Transcript 22 July 2005, p. 81.

³³ TF1-334, Transcript 23 May 2005, p. 78-79.

³⁴ TF1-167, Transcript 15 September 2005, p. 72-74.

³⁵ TF1-157, Transcript 22 July 2005, p. 79.

³⁶ TF1-199, Transcript 6 October 2005, p.78.

³⁷ TF1-334, Transcript 23 May 2005, p.86.

³⁸ TF1-334, TF1-Transcript 25 May 2005, p.4.

³⁹ Transcript 8 April 2005, p. 70.

bodies.⁴⁰ The amounts he mentions seem quite random, especially given the fact that the amounts he mentioned are quite large and unspecified. In order to recognize an amount of 71 bodies, one needs to actually count them before coming to such conclusion. The evidence presented does not indicate that this witness actually counted the bodies, and thus this part of witness TF1-021's evidence is deemed unreliable by the Defence and should have no weight in the determination of the Third Accused's alleged guilt on this count. The civilians in this mosque harboured ECOMOG soldiers, and thus the Defence contends that these people were not protected persons as defined by the Geneva Conventions nor were they to be considered as civilians, given their active interference in the conflict.

36. The Defence contends that civilians who voluntarily decide to remain inside the mosque, where one of the warring parties are hidden, do not enjoy full protection of international humanitarian law.

37. The Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities indicates that the suggestion "that voluntary shields are similarly not directly participating in hostilities because 'their actions do not pose a direct risk to opposing forces' and they are not 'directly engaged in hostilities'" constitutes an "excessively narrow" interpretation of international humanitarian law.⁴¹

It continues:

Most importantly, the standard is participation in hostilities, not engagement therein. In this particular case, the human shields are deliberately attempting to preserve a valid military objective for use by the enemy.

(...)

Indeed, to suggest otherwise would actually run counter to the underlying purposes of humanitarian law in that it would encourage voluntary shields by minimizing the risk they assumed by their actions. This would heighten, in turn, the risk to the civilian population generally by disrupting humanitarian law's delicate balance between military necessity and protection of civilians.⁴²

38. Evidence has been brought forward by Prosecution witnesses relating to killings in Freetown and Western Area during beginning of 1999, but no amounts of actual

⁴⁰ TF1-021, Transcript 15 April 2005, p. 30.

⁴¹ Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23-25 October 2005, Summary Report (URL address: [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205:\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205:$File/Direct_participation_in_hostilities_2005_eng.pdf)), p. 521.

⁴² Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23-25 October 2005, Summary Report (URL address: [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205:\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205:$File/Direct_participation_in_hostilities_2005_eng.pdf)), p. 521-522.

deaths are reported, no responsible persons or groups mentioned,⁴³ and in several cases it is unclear whether such acts even fall within the Indictment period, which only runs from 6th January 1999.⁴⁴

39. Concerning Bo District, Witness TF1-004 mentions that in Tikonko five civilians were shot.⁴⁵ This same witness mentions a burial of "up to 200 or more."⁴⁶ This witness at the same time indicates the following: "At that time, when the soldiers are in Tikonko, it wasn't an SLA time. We were calling them rebels, RUF. Those are names we heard."⁴⁷ The Defence respectfully submits that these incidents in Bo District in the period indicated were committed by RUF rebels. This happened during the AFRC government period; however, the AFRC did not have any control over these incidents in Bo District, nor has the Prosecution led any evidence to that effect. In Kenema District, several allegations were made about killings, including in Tongo Field where the AFRC and RUF allegedly killed a lot of people.⁴⁸ Another witness holds that three people were killed in Tongo.⁴⁹ And again another witness testifies of Mosquito ordering boys to be killed.⁵⁰ The above evidence supports the following conclusions.

40. One of the elements of extermination is that 'mass killings' took place. The Statute provides no definition of mass killings, and neither does the Rule 98 Decision. By way of reference, the Defence makes reference to some incidents of which the ICTY Prosecution indicated that it was 'mass killing'; mentioned are incidents where 160 Bosnian Muslims were killed, another incident where 47 Bosnian Muslim men were killed.⁵¹ The ICTY Trial Chamber spoke of a 'mass killing' in an incident where "thousands of able-bodied Muslim men" had been killed.⁵²

41. The Defence submits that the evidence presented above, is first of all not conclusive and above all indistinguishable to be able to determine whether 'mass killings' took

⁴³ For instance: TF1-098, Transcript 5 April 2005, p.36.

⁴⁴ For instance: TF1-157, Transcript 25 July 2005, p. 17-18.

⁴⁵ TF1-004, Transcript 23 June 2005, p. 13.

⁴⁶ TF1-004, Transcript 23 June 2005, p. 82.

⁴⁷ TF1-004, Transcript 23 June 2005, p. 99.

⁴⁸ TF1-122, Transcript 24 June 2005, p. 72.

⁴⁹ TF1-062, Transcript 27 June 2005, p. 12.

⁵⁰ TF1-122, Transcript 24 June 2005, p. 22.

⁵¹ *Prosecutor v Karadzic*, Amended Indictment, 31 May 2000, Case No. IT-95-5/18, para. 22.

⁵² *Prosecutor v. Tolimir, Miletic, and Gvero*, Decision on Interlocutory Appeal against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, Case No.: IT-04-80-AR65.1, para. 23.

place. The witnesses are generally very unclear about numbers, as is evidenced by witness TF1-033, who makes mention of 500 civilians being killed in Karina.⁵³ Moreover, for some of the presented evidence, no link is established with the Indictment period, most amounts seem quite randomly guessed by illiterate witnesses, and most of the evidence is rather linked to the RUF, or to Savage, who did not form part of any structure.

42. It can thus be concluded that these killings were quite random, and did not take place in a widespread and systematic attack. Accordingly, no conviction can be entered. In any case, no link can be made to the Third Accused either personally or as his alleged role as a commander, and thus, the Defence holds that the Third Accused cannot be found guilty of the crime of extermination.

1.4 Count 6 – Rape

43. The Defence herewith refers to the following definition of rape, a crime against humanity, punishable under Article 2.g. of the Statute:

- (i) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
- (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
- (iii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (iv) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁵⁴

⁵³ TF1-033, Transcript 11 July 2005, p. 19.

⁵⁴ John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587 p. 294 (ICC Elements of Crimes).

1.5 Count 7 – Sexual slavery and Count 8 – Other Inhumane Act (Forced Marriage)

44. The Prosecution has charged the Third Accused with the crime of “forced marriages”, claiming that an “an unknown number of women and girls were abducted and (...) forced into ‘marriages’ (...). The ‘wives’ were forced to perform a number of conjugal duties under coercion by their ‘husbands’.”⁵⁵ According to the Prosecution, forced marriages can be categorized as an “other inhumane act”, a crime against humanity punishable under article 2.i of the Statute.⁵⁶ It expressed the view, as given by a Prosecution investigator, that “the crimes of sexual violence are not simply sexual slavery but are most appropriately characterized as forced marriage”.⁵⁷
45. It can thus be derived that the Prosecution has already indicated in the pre-trial stage of the proceedings that it holds the view that the crimes of sexual violence that allegedly occurred in Sierra Leone can be better characterized as forced marriage, an “Other Inhumane Act”, and not, or to a lesser extent, as sexual slavery. The Defence will therefore mainly focus its discussion on (the concept of) forced marriage as the most appropriate characterization of the evidence the Prosecution has led on the crimes of sexual violence, according to this same Prosecution.
46. The honourable Trial Chamber has decided that the crime against humanity of “other inhumane acts” constitutes of the following elements:
- (a) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
 - (b) The act was of a gravity similar to any other act referred to in Article 2 a. to h. of the Statute;
 - (c) The perpetrator was aware of the factual circumstances that established the character or gravity of the act;

⁵⁵ Indictment, paragraphs 51-57, wherein the Prosecution charges the Third Accused with this crime of “forced marriage” in the following Districts: Kono District, Koinadugu District, Bombali District, Kailahun District and Freetown and the Western Area.

⁵⁶ *Prosecutor v. Brima et al.*, Request for Leave to Amend the indictment, SCSL-2004-16-PJ-11, 9 February 2004, par. 4.

⁵⁷ *Prosecutor v. Brima et al.*, Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-2004-16-PT-70, 6 May 2004, par.10.

- (d) The act was committed as part of a widespread or systematic attack directed against a civilian population; and
- (e) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.⁵⁸

47. The Defence holds that the last element of an other inhumane act as a crime against humanity should entail the actual knowledge of the perpetrator and not the lesser requirement, as stated by the honourable Trial Chamber in their Rule 98 Decision, that the perpetrator had reason to know. This was also acknowledged in the ICC Elements of Crimes, mentioning as an element of an other inhumane act that "the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population"⁵⁹ The Defence asserts that the honourable Trial Chamber in many of its definitions of the crimes charged in the Indictment in its Rule 98 Decision⁶⁰ does not deviate from the definitions given by the ICC Elements of Crimes, and sees no reasons why this should be the case when it concerns other inhumane acts as a crime against humanity.

48. The Prosecution submitted, at the Status Conference of 8 March 2004, that "forced marriage entails a conduct over time whereby a man forces a woman into relationship with all the trapping of marriage, and in which, in the Prosecution's submission, there are obligations in relation to the division of chores and sexual relations as in a marriage,"⁶¹ The Defence is however of the view that, if this conduct cannot be categorized as sexual slavery, this conduct will not constitute a crime against humanity. The exercising of force on a woman to enter into a relationship similar to marriage, is not of "a gravity similar to any other act referred to in Article 2 a. to h. of the Statute" (see element b of the definition of an other inhumane act), especially in view of the more nuanced and complicated relation between the "husband" and "wife"

⁵⁸ *Prosecution v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, par. 174.

⁵⁹ International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 7 (1) (k). John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587 p. 298.

⁶⁰ *Prosecution v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006.

⁶¹ *Prosecutor v. Brima et al.*, Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-2004-16-PT-70, 6 May 2004, par.16.

as discussed in the expert report of Dr. Thorsen.⁶² In the following paragraphs the Defence will elaborate on the complexities of the concept of forced marriages, and explain why this concept cannot be categorized as a crime against humanity. In addition, the Defence will at the same time deal with the major flaws of the report of the Prosecution expert witness on forced marriages, who does not provide any nuance with regard to the position of women during the war, and has filled her report with sweeping statements without any proper foundation.

Expert Reports on Forced Marriages

49. The Defence expert on Forced Marriages, Dr. Thorsen, has a wide experience in the field of gender relations and women's position in rural societies in West Africa,⁶³ including a excellent theoretical expertise on these subjects. The report drafted by Dr. Thorsen forms a strong, theoretical analysis of the concept of forced marriage, and is also based on her practical experience as a field worker in Western Africa.
50. This is in sharp contract with the expertise of Prosecution expert witness on forced marriages Mrs. Bangura, who has a background as an insurer, and is a women's rights activist.⁶⁴ As this Prosecution expert lacks any real expertise on the field of conjugal relationship, Mrs. Bangura gives her own activist view on women as victims and persons who are in need for help⁶⁵, and even tries to influence the policy of the international community concerning women's problem in Sierra Leone.⁶⁶ The Defence holds the view that the fact that this Prosecution expert is furthering a political goal, seriously influence her status as an independent and impartial expert, and undermines the objectivity of her expert report.⁶⁷

⁶² Expert Report Dr. Thorsen, Exhibit D38.

⁶³ See the biography of Dr. Thorsen, included in Exhibit D38, and also Transcript 24 October 2005, p.116-120.

⁶⁴ Expert Report Mrs. Bangura, Exhibit P32, p.3-4.

⁶⁵ See for example p.6-7 of her report (Exhibit P32), wherein she without any foundation states that "the most devastating effect on women of the war was the phenomenon called 'bush wife', 'rebel's wife' or 'jungle wife'. In addition, on p.10 Mrs. Bangura defines the absence of a legal minimum age stipulation in Sierra Leone as one of the critical issues in the current women's rights debates. Many other examples can easily be drawn from her report.

⁶⁶ For example, p.4, wherein she discussed UN and donor community programs, which according to Mrs. Bangura are in need of prolongation. Also 'bush wives' should get more access to specific services and facilities, such as medical care, according to Mrs. Bangura.

⁶⁷ See also the testimony of Dr. Thorsen in court (Transcript 25 October 2006, p.18) expressing similar concerns:

51. According to Dr. Thorsen the concept of forced marriage contains "implicit assumptions about the degree of force involved"⁶⁸, and although the use of this terminology among anthropologists is not common anymore, "the notion of 'forced marriage' is commonly used in studies from a rights-based perspective which rarely describe the particularities of such marriages or the actual experiences of the women entering them."⁶⁹
52. Dr. Thorsen holds the opinion that a more nuanced view on the "contemporary social practices related to marriage in rural West Africa" should prevail.⁷⁰ It is this nuanced view that is absent in the Prosecution theory on the concept of forced marriage. The Prosecution evidence is lacking the detail required to really understand the relationship that existed between members of the SLA and their allegedly abducted wives.⁷¹ In this regard, Dr. Thorsen presents an adequate analyses of the deficiencies in the evidence the Prosecution has led with regard to the alleged crime of forced marriages⁷²:

"The level of detail required to get a deeper understanding of the extent to which girls and young women are coerced into marriage by their seniors and how the degree of coercion has been shaped by institutional and economic changes requires long-term fieldwork that allows for building up personal relationships with women and men with whom such sensitive issues can be discussed. Mbilinyi's study of court cases in colonial Tanganyika quoted above suggested that women strategically moulded their account to the values that would make possible their goal. There is no reason to think that people being interviewed by researchers or activists should be less subjective or less strategic in portraying themselves in ways that guard their secrets, aim to shape the outcome of their accounts and suit their aspirations to particular identities, life-styles or representations of their culture (Caplan 1997, Lather 2000)."

Q. In relation to your observations about the flaws in the methodology adopted by Mrs Bangura, apart from the lack of contextualisation, did you observe, in your opinion, are there any other flaws, that you observed with her report?

A. There is another flaw pertaining to the way she's speaking about arranged marriages, although she's making a very clear distinction after, arranged marriages during peace time are very different from the coerced bush wife situation. She's talking about arranged marriages with a rhetoric of thought all the way through and I think it becomes very contradictory, and that is one of my worries about this whole link between traditionally arranged marriages and the use of, the notion of bush wives in Sierra Leone is that you're making this link, rhetorically, even if you don't make it explicitly.

⁶⁸ Expert Report Dr. Thorsen, Exhibit D38, p.3.

⁶⁹ Expert Report Dr. Thorsen, Exhibit D38, p.4. See also her testimony in court, Transcript 24 October 2005, p.124-125.

⁷⁰ Expert Report Dr. Thorsen, Exhibit D38, p.4.

⁷¹ See for example witness TF1-282, Transcript 13 April 2005, p.18, describing her alleged relationship with her new rebel husband as "Both of us stayed together, we slept together. He took me as his wife and every day we slept together." and "I never thought about it that I leave him, because I was afraid that if I say I should leave him, he was going to do any other thing to me." See also TF1-023, Transcript 9 March 2005, p.44-49.

⁷² Expert Report Dr. Thorsen, Exhibit D38, p.5.

53. It can be imagined that the concept of forced marriage as applied by Prosecution in the underlying case against the Third Accused, can be a useful tool for women interviewed by Prosecution to fit their experiences in, without revealing the real or more nuanced views on their actual relationship with their 'husband'. Yet, such an artificial application of this concept should be avoided. In addition, this could equally apply on alleged victims of abductions.
54. The methodology used by Prosecution expert Mrs. Bangura is therefore seriously flawed, in that the interviewing of alleged 'bush wives' by women's rights activists, in view of the strategically moulding of the accounts by these interviewees, has major consequences for the outcomes of these interviews.⁷³ For example, the claim of this Prosecution expert that "[a]ll respondents claimed that domestic violence, and physical and psychological abuse are not accepted"⁷⁴, is a clear indication of the facts that these women gave socially acceptable answers, and were (unintentional) influenced by the question these interviewers posed them.
55. Dr. Thorsen's description of the social practices of marriage in Sierra Leone in her expert report forms a vivid account of the actual relationships that can exist between men and women in rural Western African societies, including the dynamic of the mutual expectations, responsibilities and obligations, and stresses the importance to see conjugal relationships in a longer term.⁷⁵ Dr. Thorsen therefore refutes the theory the Prosecution is trying to prove that the alleged phenomenon of 'bush wives' is a replication of customary marriage; this theory qualifies as a stereotyped perception of women.⁷⁶
56. Conclusively, the Defence submits that on the basis of the theory as provided by Dr. Thorsen in her expert report on forced marriages, forced marriages can not be

⁷³ Expert report Mrs. Bangura, Exhibit P32, p.7-8. See also further in this chapter on the possible strategies of these 'bush wives' (paragraph 58 and further).

⁷⁴ Expert report Mrs. Bangura, Exhibit P32, p.13.

⁷⁵ Expert Report Dr. Thorsen, Exhibit D38, p.5-15. See also Dr. Thorsen's testimony in court, Transcript 24 October 2005, p.125-128. This is in contrast with Prosecution expert witness Mrs. Bangura, who provides in her report an overly generalized account of the practice of early or arranged marriages in Sierra Leone (Exhibit P32, p.9-10), leaving no room for difference within the country, and without even clarifying where she actually has gained this knowledge.

⁷⁶ Expert Report Dr. Thorsen, Exhibit D38, p.16. See also Transcript 24 October 2005, p.132.

qualified as an international crime (against humanity), as it is not of "a gravity similar to any other act referred to in Article 2 a. to h. of the Statute". In addition, also in view of the expert opinion given by Dr. Thorsen, the Prosecution evidence on the occurrence of the phenomenon of 'bush wives' if believed can not be qualified as forced marriage.

57. Furthermore, in the following paragraphs the Defence will explain why the Prosecution evidence on the phenomenon of 'bush wives', if the honourable Trial Chamber would accept that this phenomenon can not qualify as the crime of forced marriage (or that forced marriages do not constitute a crime against humanity), do not fulfil the requirement as been set out by the honourable Trial Chamber with regard to the crime of sexual slavery. These elements are:

- (a) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
- (b) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
- (c) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (d) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁷⁷

⁷⁷ *Prosecution v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, par. 109. In addition, count 7 includes as well any other form of sexual violence, with the following elements (see par. 110):

- (i) The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
- (ii) Such conduct was of a gravity comparable to the acts referred to in art 2g. of the Statute.
- (iii) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
- (iv) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (v) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

58. According to the Defence, the Prosecution evidence did not prove that the phenomenon of 'bush wives' can be categorized as the crime of sexual slavery, as the "powers attaching to the right of ownership" are absent. To this extent, Dr. Thorsen provides in her report a nuanced use of the terms 'bush wife' and 'bush husband', terms that⁷⁸:

[R]elate to the bundles of obligations and rights inherent in implicit conjugal contract. Consequently, when a Sierra Leonean man told (an abducted) girl that she would be his wife, he forced her into the relationship but also indicated that he was willing to taken on (some of) the responsibilities ascribed to a young husband. Whether he then fulfilled these responsibilities and whether he succeeded in overcoming the girl's contempt due to his initial use of force is a different question but may give an indication of why some women have remained with their 'bush husbands' and other have not. Along this line of inquiry we also need to raise questions about adolescent girls' and young women's ability to strategise during the civil war.

59. Dr. Thorsen further continues about the strategies of girls and young women⁷⁹:

Utas (2005: 9), for example, drew attention to moral and economic issues underpinning youngsters' representations of themselves as victims in a study of child and youth soldiers in Liberia and in another study of Sierra Leonean refugee women in northern Liberia. Firstly, it was difficult for the young soldiers to explain and justify their actions if they had participated in the war voluntarily and thus avoid to be stigmatised locally and internationally because of the atrocities committed in the course of the civil war. Secondly, the social position as victim enabled child soldiers and women refugees to make claims on humanitarian aid both during and after the war and they hoped, it could help them to re-integrate and be accepted in their communities. Statistics of abductions and rapes are therefore insufficient to depict the complexities of adolescent girls' and young women's location in the war.

Through the life story of one Liberian girl, Utas (ibid) sketched the way in which many girls became involved with soldiers and commanders as a choice, albeit a choice on a continuum from a free choice because they aspired to the middle-class liberated life style that these men offered their girlfriends, or simply liked the man, to a strategic but constrained choice to safeguard themselves or their families. Some of these girls also became fighters in whatever army their boyfriend was involved. Mazurana & Carlson (2004) made a similar observation and pointed out that not all the young women were captives; some joined because their husband asked them to, others because the Paramount Chief of their area made it mandatory that each family contributed with a member, others agreed to join or to become 'wives' to survive. The degree of freedom in such choices is impossible to estimate since they depend both on the situation in which girls find themselves and on the alternatives available to them (McKay 2004).

60. Thereafter Dr. Thorsen further explains the base of power the position as a 'bush wife' could be⁸⁰:

⁷⁸ Expert Report Dr. Thorsen, Exhibit D38, p.16. See also Transcript 24 October 2005, p.128-129; Transcript 25 October 2005, p.10-11.

⁷⁹ Expert Report Dr. Thorsen, Exhibit D38, p.16-17.

⁸⁰ Expert Report Dr. Thorsen, Exhibit D38, p.17.

Given that 'bush marriages' are embedded in cultural understandings of implicit conjugal contracts and the bundles of obligations and rights they outline for husbands and wives respectively, the position as a 'bush wife' was not only drudgery and sexual abuse but also the base of power.

Captive 'wives' of commanders exerted substantial power within the RUF compounds. (...) When the commander was away, they were in charge of the compound. They kept in communication with the commander and would select and send troops, spies, and support when needed. (...) In the absence of the commander, when food and loot were delivered to the camps, it was brought to his captive 'wife'. She would then decide how these goods were to be apportioned among those in the compound.

Commander's 'wives' thus took the position of the first wife of a powerful man, something that few junior women would ever be in times of peace. Moreover, the loot gave some of the 'wives' and 'girlfriends' access to commodities on which they would otherwise never have laid their hands. As Utas (2005: 415) reasoned, being in a relationship with a high-ranking commander offered an attractive base for marginalised young girls of up-ward social mobility. However, the studies focusing on the multi-faceted roles of girls and young women during the war also point to their vulnerability and the ease with which they were discarded as girlfriends and pushed into insecurity if their partner was killed.

61. In the opinion of Dr. Thorsen, an expert on conjugal relationships in Western Africa, even "bush wives" and "bush husbands" had mutual rights and obligations. In addition, she explains the various reasons that woman could have to represent themselves as victims, and the fact that becoming a "bush wife" could have a strategic reason, and the fact that this position was also the base of power.

62. The Defence asserts that the Prosecution evidence does not refute the theory of Dr. Thorsen, and that often Prosecution witnesses present themselves as victims, without being able to clarify what the actual relationship between the 'bush wife' and the 'bush husband' was. For example, witness TF1-282, testifying about the alleged marriage she was forced into, only give the following details concerning her relationship with her new 'husband':

Q. After this first day when the rebel raped you, did you see him again?

A. I saw him again; both of us stayed together.

Q. When you say both of you stayed together, can you explain to us what you mean by that?

A. Yes.

Q. Please tell us what you mean that both of you stayed together?

A. Both of us stayed together, we slept together. He took me as his wife and every day we slept together.

Q. In the house where you stayed together with this rebel man, apart from the two of you, was there anyone else living with you?

A. Yes, other rebels were there.

Q. Were these rebels armed?

A. Yes.

Q. With what?

A. Guns.

Q. During the time that you stayed in Sumbuya, did you ever feel that you could leave the rebel with whom you were staying with?

A. I never thought about it that I leave him, because I was afraid that if I say I should leave him, he was going to do any other thing to me.⁸¹

63. According to the Defence, this testimony does not clarify if the man, who took TF1-282 as his wife, accepted any responsibilities in the newly created conjugal relationship. Furthermore, this evidence is lacking the detail required to really understand the relationship that existed, and neglects the potential strategies of the woman who entered into this relationship. In addition, the evidence given by TF1-282 does not prove the element of ownership as a requirement for the crime of sexual slavery.

64. In addition, the evidence of TF1-023 actually points to some of the responsibilities a husband did accept:

Now, Madam witness, when this rebel handed you over to the rebel commander, did he tell you anything?

A. Yes.

Q. What did he tell you?

A. He told me that he wouldn't be able to take care of two women at the same time, so he decided to hand me over to the person's name that I've written down.⁸²

Q. Now, you spent about a month at Four Mile. Correct?

A. Yes.

Q. And during this time, Madam Witness, who did you live with?

A. I was with the commander.

Q. Did you continue to be his wife?

A. No.

Q. You were staying with him, but you were not his wife?

A. No. He left us and went to Makeni, so he left me with somebody to take care of me.⁸³

⁸¹ Transcript 13 April 2005, p.18.

⁸² Transcript 9 March 2005, p.44.

⁸³ Transcript 9 March 2005, p.49. See also witness TF1-227 on the women in the SLA group the Third Accused allegedly was part of at Benguema:

Q. Were there other female civilians at Benguema?

A. Yes, there are many female civilians at Benguema.

Q. Did anything happen to those female civilians?

A. No.

Q. Can you describe the behaviour of the rebels towards female civilians at Benguema?

A. Well, the female civilians at Benguema were protected because they – some of them who have been captured have been with them and there is cordiality among them.

Q. What do you mean by "cordiality between them"?

A. Since there is a good relationship (Transcript 11 April 2005, p.15)

65. The Defence contends that the report by Mrs. Bangura neglects differences in conjugal relationships and the strategies of especially the women, and gives a very one-sided view on women being victims of the cruel behaviour of men, without looking into the possible responsibilities these men accepted, and the potential strategic reasons for a woman to enter into a certain type of marriage.⁸⁴ Dr. Thorsen points to this one-sidedness of the Prosecution expert report⁸⁵:

Q. Were there other female civilians at Benguema?

A. Yes, there are many female civilians at Benguema.

Q. Did anything happen to those female civilians?

A. No.

Q. Can you describe the behaviour of the rebels towards female civilians at Benguema?

A. Well, the female civilians at Benguema were protected because they -- some of them who have been captured have been with them and there is cordiality among them.

Q. What do you mean by "cordiality between them"?

A. Since there is a good relationship.

Q. And you would agree with me that there is no such form of consent as it relates to a forced marriage during armed conflict such as that which took place in Sierra Leone; is that correct?

A. I cannot say anything about that because we have not -- Mrs Bangura does not interview any of the men. She doesn't interview the husband (...).

66. Accordingly, the Defence holds that the Prosecution evidence does not exclude this more nuanced view on "bush wives" and "bush husband", and therefore the Prosecution has not proven beyond reasonable doubt that their evidence on this phenomenon fulfils the elements of sexual slavery, especially the element of ownership. "Bush wives" strategies and husbands acceptance of their responsibilities are clear indication of the absence of the elements of ownership in the relationship between "bush wives" and "bush husband".

67. With regard to the Prosecution expert report, the Defence contemplates the following. Mrs. Bangura has based her research on a limited amount of interviews, mainly of alleged (ex) "bush wives" in Kailahun District, a RUF stronghold during the whole

⁸⁴ See for example Expert report Mrs. Bangura, Exhibit P32, p.13, stating that "Forced marriage during the conflict had no security", "The 'husband' could abandon his 'wife' whenever he wanted to and get a new one whenever he felt like it". See further on p.15-16 where Mrs. Bangura claims that the use of the word 'wife' was a strategic act of the men (without even talking to any of these alleged 'bush husbands' or mentioning any source for these overall conclusions), to show that the woman belonged to the man. Dr. Thorsen, on the other hand, is of the view that this type of marriage involved as well responsibilities for the men (see p.10-11 of Exhibit D38).

⁸⁵ Transcript 25 October 2006, p.9.

war.⁸⁶ On the basis of this limited research, it is impossible to draw the general conclusions Mrs. Bangura did, who made general statements with regard to all "bush wives", for example "Being a 'bush wife' meant that the girl 'belonged' to one person and was not required to have sex with different rebels", " 'Forced marriage' became a means of survival for most girls in the bush" "when the 'husband' decided to take a second 'bush wife', the first one was thrown out and she no longer enjoyed protection' and "A 'bush wife' carried her 'husband's' possessions as they moved from place to place."⁸⁷ It remains unknown if, and to which extent, these conclusions apply to the conjugal relations that existed within the SLA. The Defence therefore respectfully submits that in view of the methodology of the Prosecution expert report and the lack of expertise of Mrs. Bangura, her expert report should not have any weight in the assessment of the evidence by the honourable Trial Chamber.⁸⁸

68. In conclusion, no conviction can be entered for the charge as to counts 7 and 8.

69. In the alternative, no conviction can be entered on the basis of the defence of mistake of law, which will be addressed below.

1.6 Count 9 – Outrages upon Personal Dignity

⁸⁶ Expert report Mrs. Bangura (Exhibit P32), p.7-8.

⁸⁷ Expert report Mrs. Bangura (Exhibit P32), p.14. See also p.16 where Mrs. Bangura provides an overview of the alleged tasks of 'bush wives' and non 'bush wives'. Furthermore, the expert report contains overviews on the consequences for the victims of forced marriage and the stigmas associated with having been a bush wife, again providing conclusions that according to the Prosecution expert apply to all 'bush wives'.

⁸⁸ See also testimony of Dr. Thorsen on the methodological problems in the report of Mrs. Bangura:

Q. Now, as it relates to this particular issue, did you consult the report of Mrs Bangura?

A. I read the report. I found it very flawed on the methodological issues and I found that the quotes she gives in her report, it talks a lot about the circumstances of these -- well not even circumstances -- it tells a lot about -- that women were abducted and that they were being coerced into being bush wives and that they left or stayed with the husband after the war. But inasmuch as she didn't analyse her data, inasmuch as she didn't discuss it but left it to speak on its own, it is actually very difficult to know what she wanted to say with this material. And also, she does not contextualise the whole situation of these women and she collected the data from a large amount of regions. How can we know that everything is the same in those regions? There is a lack of contextualisation (Transcript 25 October 2005, p.7).

Q. Now, if I understand correctly, the basis of your report is that there are questions that still must be answered as it relates to the issue of forced marriage and bush wives; is that correct?

A. I think they must be asked in any case where you are talking about arranged marriages and where you want to make any conclusions about the degree of force. You need to ask a lot of questions. And I even doubt you would be able to say anything about the degree of force, because you would get a very diverse picture (Transcript 25 October 2005, p.12).

70. Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.e. of the Statute comprise the following elements of crimes:

- (iv) The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
- (v) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
- (vi) The conduct took place in the context of and was associated with an international armed conflict.
- (vii) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁸⁹

71. The Defence respectfully contends that the arguments set out above, relating to counts 6 to 8, are also applicable to the crime alleged under count 9. The Defence will thus not separately go into this.

1.7 Counts 10 and 11 – Mutilation

72. The Trial Chamber adopted the following elements for the crime of mutilation:

Mutilation as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II occurs where the perpetrator intentionally cause death or seriously endangers the physical or mental health of a person by permanently disabling or disfiguring or removing an organ or appendage of that person, during an international or internal armed conflict. The Trial Chamber adopts the following elements of the crime of Mutilation as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II, as charged under Count 10, namely that:

- (a) The perpetrator subjected the victim to mutilation, in particular by permanently disfiguring the victim, or by permanently disabling or removing an organ or appendage of the victim;
- (b) The perpetrator's conduct caused death or seriously endangered the physical or mental health of the victim;
- (c) The perpetrator's conduct was neither justified by the medical, dental or hospital treatment of the victim, nor carried out in the victim's interest;
- (d) The victim was a person protected under one or more of the Geneva Conventions of 1949 or was not taking an active part in the hostilities at the time of the alleged violation;
- (e) The violation took place in the context of and was associated with an armed conflict; and

⁸⁹ John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587 p. 311.

(f) The perpetrator was aware of the factual circumstances that established the protected status of the victim.⁹⁰

73. The Trial Chamber describes the elements for count 11 as follows:

- (a) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
- (b) The act was of a gravity similar to the acts referred to in Article 2.a to h. of the Statute;
- (c) The perpetrator was aware of the factual circumstances that established the character or gravity of the act;
- (d) The act was committed as part of a widespread and systematic attack directed against a civilian population; and
- (e) The perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.⁹¹

1.8 Count 12 – Use of Child Soldiers

74. The honourable Trial Chamber has decided that conscripting or enlisting children under the age of 15 years into the armed forces or groups, or using them to participate actively in the hostilities, an other serious violation of international humanitarian law punishable under Article 4.c. of the Statute, requires proof of the following elements of crimes:

- (i) The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
- (ii) Such person or persons were under the age of 15 years.
- (iii) The perpetrator knew or should have known that such person or persons were under the age of 15 years.
- (iv) The conduct took place in the context of and was associated with an international armed conflict.
- (v) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁹²

⁹⁰ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 172.

⁹¹ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 174.

75. The Defence respectfully submits that within the African context the age of 15 years, under which age the conscription or enlisting of persons is a war crime according to the honourable Trial Chamber, is arbitrarily in that “the traditional African setting offers a different conception of childhood as chronological age as an indicator for the termination of childhood is an arbitrary concept. In this sense, the ending of childhood has little to do with achieving a particular age and more to do with physical capacity to perform acts reserved for adults.”⁹³

76. In addition, under Sierra Leonean law the recruitment of a child below the age of seventeen and a half is allowed if “the person’s parents or guardians or other competent authority gives consent.”⁹⁴ The age limit for recruitment into the military in Sierra Leone is thus not fixed, and the government practice of recruiting children into the army, even under the government of president Kabbah from 1996 until the AFRC coup⁹⁵, further reinforce the vagueness within the Republic of Sierra Leone on the legality of the recruitment of persons under the age of 15 into the military. It is evident that the group of ex-AFRCs and SLAs that fled into the bush after the ECOMOG intervention in February 1998, must have included persons under the age of 15 that were recruited by previous governments. Furthermore, this government practice to recruit children in the army must have had an influence on the possible involvement of children within the groups of SLAs within the bush.⁹⁶

77. Within this context the Defence would like to draw special attention to the practice under the NPRC military regime of “enlisting vigilantes including the Sierra Leone Border Guards (SLBGA) into the military. Most of these members were under 15 years.”⁹⁷ This led to “the infiltration of a number of children into the military through a variety of ways including backdoor enlistment.”⁹⁸

⁹² *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 194. John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587, p. 314.

⁹³ Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 9-11. See also par. 39 of this Report.

⁹⁴ Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 30.

⁹⁵ Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 33-39. See also par. 48-51 of this report, in which it is further explained under which circumstances persons under the age of fifteen voluntarily joined government forces and/or the SLAs in the bush.

⁹⁶ Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 38.

⁹⁷ Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 36.

⁹⁸ Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 37.

78. Although the Defence is aware of the fact that these circumstances do not go into the Special Court's jurisdiction to try the alleged use of child soldiers by the AFRC faction⁹⁹, the Defence holds the opinion that the abovementioned circumstances should have a major influence on the alleged level of responsibility of the Third Accused's alleged involvement in the crime of conscripting or using child soldiers.
79. In paragraph 65 of the Indictment the Prosecution charges the Accused with the training of (abducted) children in AFRC/RUF camps. According to the Defence, no evidence has been led that these combined AFRC/RUF camps existed.
80. Most of the Prosecution witnesses were not able to properly estimate the age of the soldiers they regarded as child soldiers. For example, TF1-023, when asked how old the boys of the Small Boys Unit were, answered with "They were about 14 -- 13, 14, 15"¹⁰⁰, thus excluding a substantial, or possibly even all, members of this unit from the definition of child soldiers. TF1-167 does the same when giving evidence that the "children" trained by the SLAs were roughly between the age of 10 and 15 years.¹⁰¹ In addition, witnesses TF1-153¹⁰² and TF1-157¹⁰³ both do not give any evidence about the age of the members of the Small Boys Unit or even do not know the age of the boys that were trained. Conclusively, the Prosecution did not prove beyond reasonable doubt that the "small boys" allegedly fighting along with the former SLAs were under the age of fifteen.
81. In conclusion, in the absence of proof beyond a reasonable doubt, the Third Accused should be acquitted for count 12. In addition, the Defence concludes that the elements of this particular crime are incorrect, and should be altered. Moreover, the practical circumstances of the country at that time should be taken into account in assessing the Accused's alleged responsibility in this regard.

⁹⁹ See also, *Prosecutor v. Norman et al.*, Appeals Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, SCSL-04-14-AR72(E).

¹⁰⁰ Transcript 9 March 2005, p.35.

¹⁰¹ Transcript 15 September 2005, p. 67.

¹⁰² Transcript 22 September 2005, p.83; Transcript 23 September 2005, p. 64-65.

¹⁰³ Transcript 25 July 2005, p.3-4. Even the own age of the witness could slightly differ from the evidence he gave (20 years in July 2005 - see Transcript 22 July 2005, p.56-57, - thus possibly 13 or 14 when the witness allegedly was kidnapped), as TF1-157 derives his age from the knowledge of his sister, a person that very likely can not even remember herself the birth of this witness.

1.9 Count 13 – Enslavement

82. Enslavement, a crime against humanity, punishable under Article 2.c. of the Statute requires proof of the following elements of crimes:

- (i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;¹⁰⁴
- (ii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- (iii) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.¹⁰⁵

83. In order to meet the requirements of the crime of enslavement as charged under count 13 of the Indictment, the Prosecution evidence first of all needs to prove that the exercise of any or all of the powers attaching to the right of ownership over a person were exercised; this includes as well the intentional exercise of such powers.¹⁰⁶ The ICTY Appeals Chamber adopted a set of indicia of enslavement, as developed by the ICTY Trial Chamber in the same case, including “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”¹⁰⁷

84. As sexual slavery has been separately indicted by the Prosecution (see count 7 of the Indictment), the following paragraphs will be focusing on forced labour as a form of enslavement. In the case of *Prosecutor v. Krnojelac*, referring to the definition of enslavement as set out in the *Kunarac* case¹⁰⁸, it was established that “it is clear from

¹⁰⁴ See also *Prosecutor v. Kunarac et al.*, Trial Chamber Judgement, 22 February 2001, IT-96-23-T, par. 539.

¹⁰⁵ *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-16-T, par. 214; John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587, p. 293.

¹⁰⁶ *Prosecutor v. Kunarac et al.*, Trial Chamber Judgement, 22 February 2001, IT-96-23-T, par. 540.

¹⁰⁷ *Prosecutor v. Kunarac*, Appeals Chamber Judgement, 12 June 2002, IT-96-23-A, par. 119.

¹⁰⁸ *Prosecutor v. Kunarac et al.*, Trial Chamber Judgement, 22 February 2001, IT-96-23-T, par. 542-543.

the Tribunal's jurisprudence that "the exaction of forced or compulsory labour or service" is an "indication of enslavement", and a "factor to be taken into consideration in determining whether enslavement was committed".¹⁰⁹ Evidence on forced labour by itself is thus not enough to establish that the crime of enslavement has been committed by the Accused or any other person for whom the Accused can be held criminal responsible.¹¹⁰ In addition, "the detainees' personal conviction that they were forced to work must be proved with objective and not just subjective evidence."¹¹¹

85. It is evident that some of the Prosecution evidence on enslavement for the purpose of forced labour, falls short of meeting the abovementioned requirements. First of all, the evidence given by witness TF1-184 proves that not all civilians that joined, or were forced to join, the various groups of SLA soldiers that operated within the territory of Sierra Leone after the ECOMOG intervention of February 1999, were forced to stay with this group. According to TF1-184, the civilians within the group of [REDACTED] Commander C [REDACTED] in Koinadugu were free to leave, as is evidenced by the following evidence given by this witness in Court:

Q. Those young boys who were with you, were they free to go if they wanted to?

A. Yes.

Q. The women who were with you, were they free to go if they wanted to?

A. Yes.

Q. Those who you asked to carry your loads, were they free to go if they wanted to?

A. Yes.

Q. They could put the load down and say, "Sorry, I've had enough, I'm going"; is that what you're saying?

A. No. Commander C -- to assist you further, Commander C asked them that whosoever wants to go, he should go. He gave that order when we were -- I don't know the place, when we were by Kabala. That was the time he gave that order. When most of them left, unless those that had contact with the soldiers that were willing to go.

Q. Okay, so they were given one opportunity to go. If they didn't go when they were in Kabala, were they given any other opportunity to leave before you got to Rosos?

A. Yes. Before we left he gave order that no soldiers should beat a civilian and they too would prove me right if they can say the truth. (...)¹¹²

86. It becomes clear from this part of the evidence of TF1-184 that these civilians were free to leave if they wanted to, and thus certainly were not subject to the crime of

¹⁰⁹ *Prosecutor v. Krnojelac*, Trial Chamber Judgement, 15 March 2002, IT-97-25-T, par. 359.

¹¹⁰ See also article 5 of the Slavery Convention, which entered into force on 9 March 1927, wherein it is agreed that the contracting parties to this Convention "to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery", thus making a clear distinction between forced labour and the crime of enslavement.

¹¹¹ *Prosecutor v. Krnojelac*, Appeals Chamber Judgement, 17 September 2003, IT-97-25-A, par. 159.

¹¹² Transcript 29 September 2005, p.36-37.

enslavement. The indicators of enslavement “control of someone’s movement, measures taken to prevent or deter escape, force, threat of force or coercion” as established by the ICTY Appeals Chamber, are therefore in this instance absent.¹¹³

This evidence is also important in view of the fact that [REDACTED]

[REDACTED] a group wherein, according to the abovementioned evidence, civilians were not forced to stay.

87. Secondly, a lot of the evidence the Prosecution has introduced with regard to the crime of enslavement is insufficient to prove this crime, as it merely deals with the abduction or kidnapping of civilians, without any details about what happened to these civilians thereafter. For example, Prosecution witnesses TF1-055¹¹⁴ and TF1-058¹¹⁵ provide no further information on the subjection of civilians who were taken away by rebels or soldiers to the crime of enslavement.

88. Although this evidence, according to the honourable Trial Chamber, should be “considered together with the other evidence available to prove the count”¹¹⁶, the Defence is of the opinion that the fact that in another instance an abducted civilian was subject to the crime of enslavement, it is speculative to assume that this happened to other abducted civilians as well. The faith of the civilians who were taken away by soldiers or rebels in the abovementioned Prosecution evidence is unknown, and can not be inferred from crimes occurring against other civilians. The Defence submits that evidence on alleged victims of the crime of enslavement in which not all elements of the crime of enslavement with regard to that specific victim are proved, should not be taken into account when considering the occurrence of the crime of enslavement.

89. In the third place, the Prosecution evidence far from conclusive to establish the occurrence of the crime of enslavement. For example, Prosecution witness TF1-320 made the following statement in court:

Q. Mr Witness, you mentioned that you were with your elder son when you were captured by the rebels. What happened to your son?

¹¹³ *Prosecutor v. Kunarac*, Appeals Chamber Judgement, 12 June 2002, IT-96-23-A, par. 119.

¹¹⁴ Transcript 12 July 2005, p.137.

¹¹⁵ Transcript 14 July 2005, p.64-66.

¹¹⁶ *Prosecutor v. Brima et al.* Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-16-T, par. 233.

A. They held my son. They held him for two years, five months. Except when the [inaudible] attacked Rogberi, they were the only people who freed him. They took him to Raka. I sent a message to Raka when we heard the news. I sent to Mohammed. I said, "Mohammed, please go to stadium and find my son. If you see him, please bring him." He went there and saw him and brought him. They held him for two years, five months.

Q. Mr Witness, who kept your son for two years?

A. The one who held my son for two years, five months, is the commando. Who was -- he was at his house. He was staying with him.

Q. Which group did this commando belong to?

A. Well, at Gberibana he called themselves outside -- West Side.¹¹⁷

90. According to the Defence, this evidence is insufficient to prove the crime of enslavement.

91. Fourthly, a substantive portion of the civilians that moved along with a group of SLAs, had joined these SLAs voluntarily, as this was the safest option at that time. This was the case after the ECOMOG intervention in February 1998 and the retreat of the AFRC and SLA soldiers into the jungle, but does apply to other situations as well, for example the retreat of the soldiers from Freetown in January 1999.¹¹⁸ In addition, civilians, including women and children, joined their relatives and close associates within the SLA during the retreat from Freetown both in February 1998 and January 1999.¹¹⁹

92. For the above reasons, the Defence is of the humble opinion that the evidence presented during the trial does not substantiate a conviction on this count.

1.10 Count 14 – Pillage

93. In Count 14 of the Indictment the Accused is charged with pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute. It is alleged that during the whole period covered by the Indictment "AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property.", thus assuming that both burning and looting are crimes covered by the crime of pillage.

¹¹⁷ Transcript 8 April, p.18.

¹¹⁸ See for example witness TF1-334, Transcript 15 June 2005, p.10:

Q. So the civilians that you met in Bengucma, what happened to them?

A. Whilst the troops were retreating most of them joined the troops because they said that their lives were not safe. So they joined the troops in retreating.

¹¹⁹ See for example Exhibit D37 (Expert report on child soldier by Mr. Gbla), par. 51, wherein Mr. Gbla describes this phenomenon with regard to children.

Constitutive Elements of the Crime of Pillage

94. According to both Trial Chamber I and the ICC's elements of crime, the crime of pillage enhances the following constitutive elements:

- (i) The perpetrator appropriated certain property.
- (ii) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
- (iii) The appropriation was without the consent of the owner.
- (iv) The conduct took place in the context of and was associated with an international armed conflict.
- (v) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹²⁰

95. According to the Defence this definition should apply to count 14 of the Indictment, thus explicitly including the element of appropriation for private or personal use. The Defence therefore disagrees with the definition given by the honourable Trial Chamber in its Rule 98 Motion, and the Trial Chamber's argument that it follows from the *Celibici* Trial Judgement¹²¹ that "the requirement of 'private or personal use' is unduly restrictive and ought not to be an element of the crime of pillage".¹²²

96. In the *Celibici* case the ICTY Trial Chamber, setting an important standard for the interpretation of the crime of pillage, noted that the "prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic

¹²⁰ *Prosecutor v. Norman et al.*, Decisions on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-14-T-473, par. 102; John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587, p. 309.

The Prosecution in its Pre-Trial Brief made use of a totally different set of elements; it is not clear what the Prosecution's basis for this specific set of elements is, but they do not concur with the ICC elements of crime nor with definitions given by both Trial Chamber I and Trial Chamber II (see *Prosecutor v. Brima et al.*, Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73bis) of 13 February 2004, 5 March 2004, SCSL-2004-16-PT-29, par. 175).

¹²¹ *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, IT-96-21-T.

¹²² *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 241-243.

economic exploitation of occupied territory".¹²³ This general scope of the crime of pillage seems to imply an extensive interpretation of the element "private or personal use", including as well private or personal use within the broader context of a systematic exploitation of certain property.

97. However, the conclusion of the honourable Trial Chamber in its Rule 98 Decision that the words "and to appropriate it for private or personal use" should not be included in the constitutive elements of the crime of pillage, is not warranted by the judgement rendered by the ICTY in the *Celibici* case. This follows from the fact that the element "use", including both personal use and organized exploitation according to the *Celibici* Judgement¹²⁴, forms an essential component of the pillage offence. The Defence is therefore of the humble opinion that the interpretation of the crime of pillage as set forth by the ICTY in the *Celibici* case, can only lead to the conclusion that the constitutive elements of the crime of pillage should include the "appropriation for private or personal use". According to the Defence, the deletion of this element alters and expands the character of the crime of pillage in a significant and unjustified way. This view is also in accordance with the opinion delivered by Trial Chamber I in its Rule 98 Motion.¹²⁵

Crime of Pillage Does Not Include Burning

98. Furthermore and directly related to the previous arguments regarding the constitutive elements of the crime of pillage, the Defence submits that the evidence of burning as such does not fulfil these elements. The constitutive elements of the crime of pillage require the occurrence of appropriation, a component that forms no part of the act of burning of civilian buildings and houses, as laid down under Count 14 in the Indictment.

99. In *Prosecutor v. Delalic et al.*, the ICTY Trial Chamber observed that "the offence of unlawful appropriation of public and private property in armed conflict has varyingly

¹²³ *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, IT-96-21-T, par. 590.

¹²⁴ *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, IT-96-21-T, par. 590.

¹²⁵ *Prosecutor v. Norman et al.*, Decisions on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-14-T- 473, par. 102. It should be noted that Trial Chamber I explicitly included the Judgement of the ICTY in the *Celibici* case in its reasoning on the constitutive elements of the crime of pillage.

been termed 'pillaging', 'plunder' and 'spoliation'.¹²⁶ Therefore, pillage requires appropriation, while the burning of property is something different: no property is appropriated, and there is certainly no intent of appropriation.

100. This difference results from the fact that the *mens rea* for burning is different from the *mens rea* for appropriation of property. The Prosecution argument in its response to the Defence Motions for Judgement of Acquittal that "before third party property can be burnt it must be appropriated in the sense that the owner is no longer in control of his property,"¹²⁷ is artificial and thus negates the fact that burning is legally different from the crime of pillage, both as to the *mens rea* as well as the *actus reus*. The objective of appropriation is future possession and/or use of the object, whilst the objective of burning is destruction thereof.
101. This is also the case if the definition of the honourable Trial Chamber in its Rule 98 Decision would apply, in that the crime of pillage does not include the requirement of "private or personal use".¹²⁸ This element of use requires the possibility that the property can still be used after the appropriation; this is clearly not the case after the burning of a building, nor is the object of the act of burning to use the property afterwards. Even after the removal of this element, the crime of pillage still encompasses the appropriation of property, as can be derived from the phrasing of element 1 and 2 in the definition of the honourable Trial Chamber.¹²⁹
102. This argument becomes even stronger now that the Special Court Statute specifically provides in Article 5(b)(i), (ii) and (iii) for wanton destruction of property, more specifically "[s]etting fire to dwelling – houses, any person being therein (...)," "[s]etting fire to public buildings (...)," and "[s]etting fire to other buildings (...)." The Prosecution thus deliberately chose to categorize burning, as charged in the Indictment, not under this category but as the international crime of pillage. The fact that ICTY has the separate and distinct crime of "wanton destruction of cities, towns

¹²⁶ *Prosecutor v. Delalic et al.*, Judgment, 16 November 1998, IT-96-21-F, par. 591.

¹²⁷ *Prosecutor v. Brima et al.*, Public Version of Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, SCSL-2004-16-T-459, par. 109.

¹²⁸ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 242.

¹²⁹ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 243.

or villages or devastation not justified by military necessity” and clearly distinguishes in its case law between pillage and destruction, further reinforces the Defence position.¹³⁰

103. Additionally, the Defence is of the humble opinion that the suggestion made by the honourable Trial Chamber in its Rule 98 Decision that burning can be brought under other articles of the Statute, including the articles covering collective punishment and terrorism¹³¹, is at variance with the Indictment and violates the rights of the Accused, especially the right “to be informed promptly and in detail (...) of the nature and cause of the charge against him or her” (article 17(4)(a) of the Statute of the Special Court). The classification of the act of burning under a different charge in the Indictment leads to the introduction of a new *mens rea* and *actus reus*. This means that even if the honourable Trial Chamber would accept jurisdiction under international law to prosecute persons who have committed offences relating to the destruction of property by burning, this right of the Accused to know the content of the accusations against him excludes the possibility of an alteration of the Indictment at this stage of the proceedings, with both the Prosecution and the Defence case closed.

104. Conclusively, it is the Defence view that burning does not fall within the definition of pillage, and therefore that the acts relating to the destruction of property by burning are not covered by the Indictment.

¹³⁰ See for example *Prosecutor v. Blaskic*, Judgement, 3 March 2000, IT-95-14-T, par. 367, 558.

¹³¹ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 263.

II GREATEST RESPONSIBILITY

2.1 Standard of Greatest Responsibility

105. Article 1(1) of the Statute of the Special Court for Sierra Leone “shall (...) have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”
106. Article 15(1) of the Statute prescribes the role and function of the Prosecutor, where it states that, insofar relevant, the Prosecutor “shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”
107. Trial Chamber I in the case of *Prosecutor v. Norman* held that the issue of personal jurisdiction is a jurisdictional requirement.¹³² This was affirmed by Trial Chamber II in the Rule 98 Decision. Trial Chamber II moreover held that the Rule 98 stage was not the right moment to consider this issue.¹³³
108. Trial Chamber II in its Rule 98 Decision considers the formulation of “persons who bear the greatest responsibility” by referring to the discussion between the UN Secretary General and the UN Security Council.¹³⁴ The Security Council interprets the wording “most responsible” as denoting the political or military leadership or authority of the accused.¹³⁵ Trial Chamber II held that the standard thus, at a

¹³² *Prosecutor v. Norman et al.*, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004, para. 27.

¹³³ *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 31.

¹³⁴ *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 32-33.

¹³⁵ Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 30.

minimum, includes “at a minimum, political and military leaders and implies an even broader range of individuals.”¹³⁶

109. This threshold also affects the evidentiary burden to be met by the Prosecutor.¹³⁷ The Defence respectfully contends that the Prosecution has not met such evidentiary standard in the presentation of its case, and that as a result, the Trial Chamber does not have the jurisdiction to try the Third Accused. As an alternative argument, the Defence submits that the evidentiary threshold of greatest responsibility has not been met, resulting in an acquittal for the Third Accused on all counts of the Indictment.

2.2 Greatest Responsibility: Other Persons’ Responsibility

110. It is the Defence contention that one of the evidences of the fact that the Third Accused does not belong to “those who bear the greatest responsibility,” as is evidenced by the following observations.

111. On 3 March 2003, the following persons were indicted:

- a. Charles Taylor – SCSL-2003-01-PT¹³⁸
- b. Foday Sankoh – SCSL-2003-02-PT¹³⁹
- c. Johnny Paul Koroma – SCSL-2003-03-PT¹⁴⁰
- d. Sam Bockarie – SCSL-2003-04-PT¹⁴¹
- e. Issa Hassan Sesay – SCSL-2003-05-PT¹⁴²
- f. Alex Tamba Brima – SCSL-2003-06-PT¹⁴³
- g. Morris Kallon – SCSL-2003-07-PT¹⁴⁴
- h. Sam Hinga Norman – SCSL-2003-08-PT¹⁴⁵

¹³⁶ *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 34.

¹³⁷ See Luc Côté, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, 1 *Journal of International Criminal Justice* 184-185 (2005).

¹³⁸ *Prosecutor v. Taylor*, Indictment, 3 March 2003, Case No. SCSL-2003-01-PT.

¹³⁹ *Prosecutor v. Sankoh*, Indictment, 3 March 2003, Case No. SCSL-2003-02-PT.

¹⁴⁰ *Prosecutor v. Koroma*, Indictment, 3 March 2003, Case No. SCSL-2003-03-PT.

¹⁴¹ *Prosecutor v. Bockarie*, Indictment, 3 March 2003, Case No. SCSL-2003-04-PT.

¹⁴² *Prosecutor v. Sesay*, Indictment, 3 March 2003, Case No. SCSL-2003-05-PT.

¹⁴³ *Prosecutor v. Brima*, Indictment, 3 March 2003, Case No. SCSL-2003-06-PT.

¹⁴⁴ *Prosecutor v. Kallon*, Indictment, 3 March 2003, Case No. SCSL-2003-07-PT.

¹⁴⁵ *Prosecutor v. Norman*, Indictment, 3 March 2003, Case No. SCSL-2003-08-PT.

112. On 16 April 2003, the following person was indicted:

- i. Augustine Gbao - SCSL-2003-09-PT¹⁴⁶

113. On 26 May 2003, the following person was indicted:

- j. Brima Bazzy Kamara - SCSL-2003-10-PT¹⁴⁷

114. On 24 June 2003, the following persons were indicted:

- k. Moinina Fofana - SCSL-2003-11-PT¹⁴⁸
- l. Allieu Kondewa - SCSL-2003-12-PT¹⁴⁹

115. And on 15 September 2003, again almost three months later, the last person was indicted:

- m. Santigie Borbor Kanu - SCSL-2003-13-PT, the Third Accused.¹⁵⁰

116. The Defence respectfully submits that the above overview provides a clear indication of the Prosecution's view on greatest responsibility. It started with Charles Taylor who was the first to be indicted for this Court, Foday Sankoh the second, Johnny Paul Koroma the third, and Sam Bockarie the fourth. Kanu was the thirteenth, the very last one to be indicted, more than six months after the first list of eight accused had been indicted. It is the Defence submission that the Prosecution made its list of persons they considered to be the most responsible. However, after it turned out that Sam Bockarie died on 5 May 2003, and Foday Sankoh died on 23 July 2003, also after realizing that it would be difficult if not impossible to arrest Charles Taylor and Johnny Paul Koroma, the Prosecution must have realized that they needed to expand the category of "greatest responsible" so as to include a wider selection of persons who played a role during the conflict.

117. The Defence holds that it was this circumstance of several persons who bore the greatest responsibility whom the Prosecution, for one reason or another, could not

¹⁴⁶ *Prosecutor v. Gbao*, Indictment, 16 April 2003, Case No. SCSL-2003-09-PT.

¹⁴⁷ *Prosecutor v. Kamara*, Indictment, 26 May 2003, Case No. SCSL-2003-10-PT.

¹⁴⁸ *Prosecutor v. Fofana*, Indictment, 24 June 2003, Case No. SCSL-2003-11-PT.

¹⁴⁹ *Prosecutor v. Kondewa*, Indictment, 24 June 2003, Case No. SCSL-2003-12-PT.

¹⁵⁰ *Prosecutor v. Kanu*, Indictment, 15 September 2003, Case No. SCSL-2003-13-PT.

arrest, which made the Prosecution decide to indict the thirteenth person before this Court.

118. Interestingly, and in corroboration of the foregoing, the following witness, when interviewed in January 2003, did not mention the name of the Third Accused. What was his reason? Because, when he was confronted with this fact in cross-examination, he stated: "Yes, sir. But during that time [January 2003], when I say I knew most of them, I was not concerned about. The major people who were commanders, during that time, on top, superior to these people, those were the only people I stated during that time."¹⁵¹ This Prosecution witness therefore indicates that Five-Five, whom he had not mentioned in his interview in January, did not belong to this group of "major people who were commanders (...) on top, superior to these people."

119. It is of course remarkable to see how in January 2003, when the Third Accused was obviously not yet in the Prosecution's picture, this witness does not yet mention Kanu's name. Only after Kanu was indicted did this witness come up with the name of the Third Accused, whilst indicating that he was not one of the top people.

120. It is the Defence submission that the Third Accused cannot be held to bear the greatest responsibility for the conflict, for the crimes committed during the relevant period of the Indictment. The evidence brought forward by the Prosecution cannot sustain such assertion beyond reasonable doubt seen from the perspective of a reasonable trier of fact. To the contrary, that evidence introduces the existence of genuine prominent individuals bearing greatest responsibility, other than the Accused.¹⁵²

121. Persons who do bear the greatest responsibility within the AFRC, although the Defence holds that of the warring parties, the AFRC as such is not the group which bears the greatest responsibility for the conflict, but rather the RUF. Within the AFRC/SLA it was Johnny Paul Koroma, SAJ Musa who bore the greatest responsibility, and of the three Accused, the Third Accused was undoubtedly the lowest in rank and factual position. Even persons such as Junior Lion, Savage and

¹⁵¹ TFI-045, Transcript 21 July 2005, p. 24.

¹⁵² See for instance testimonies of OTP witnesses TFI-046 (Gibril Massaquoi) and TFI-296.

Colonel Mani, Staff Alhaji bore a substantial greater responsibility than the Third Accused did.

122. The Prosecution case has even adduced evidence to the contrary, i.e. exculpatory for the Third Accused when it concerns the threshold of 'greatest responsibility.' The Defence holds that at no time did the Third Accused have a position of command; rather was his role during the conflict to take care of the women and children.

Q. Did you ever meet with this person called Santigie Kanu, alias Five-Five?

A. During the AFRC I met with him.

Q. And can you tell this Court where you met with him?

A. Well, during the AFRC, when things were going on normal, he summoned a meeting in the community centre which was for youths. He spoke about progress, cleaning and other caretaking of the town, and that was the time I knew that this was the man. That was the time I met with him.¹⁵³

2.3 Conclusion

123. For these reasons, the Defence respectfully holds that for the reasons elaborated on above, the threshold of the 'greatest responsibility' requirement has not been met, that the jurisdictional requirement has not been fulfilled, and that consequently the Trial Chamber has no jurisdiction to try the Third Accused. In the alternative, the Defence submits that the evidence presented at trial does not substantiate the Prosecution allegation that the Third Accused formed part of the group of persons who bear the greatest responsibility for the conflict.

¹⁵³ DAB-042 Transcript 15 September 2006, p. 89.

III DEFENCE OF MISTAKE OF LAW

3.1 Mistake of Law Regarding Count 12 – Impact on *Mens Rea*

124. As to count 12 (child soldiers) the Defence specifically holds that an acquittal is warranted on the basis of the following. On the basis of the reports and testimony of both the Prosecution and Defence expert on child soldiers, evidence has been adduced as to the existence of a governmental practice, even within the SLA on conscripting and enlisting children below the age of 16 within the army, up to 1997.

[REDACTED]

126. In particular, the Defence expert Mr. Osman Gbla, in his report of 11 October 2006, which report was not contested by the Prosecution and the contents thereof thus accepted by the Prosecution, provides strong support for this conclusion. Reference can be made to the following passages in this report:

Despite its track record of having ratified a number of international legal instruments bordering on the prevention of underage recruitment into the military, the Sierra Leone Government has not done much to prevent the recruitment of children into the Sierra Leone military. This is the case because the Sierra Leone military at various periods has a record of child recruitment. This is not necessarily out of a clearly thought out policy but one dictated by various circumstances at certain period of the country's history. One senior Sierra Leone military officers interviewed confirmed this point in noting that: the recruitment of children into the Sierra Leone military is not a deliberate government or military policy. The war circumstances created a fertile ground for the practice of involving children in the military. This latter view is not implying that the war started the practice of recruiting children into the Sierra Leone military.¹⁵⁶

As far back as to the days of one party rule especially under the reign of the late President Siaka Stevens (1978-1985) voluntary enlistment into the military slowly gave way to enlistment through political connections. Politicians and well-connected persons were given a number of cards, which they gave out to young men of their choice to join the

[REDACTED]

¹⁵⁶ Report Mr. Gbla, Exhibit D37, page. 15, para. 33

Army. This system produced a serious diminishing of military standards as characters of all shades were recruited into the force irrespective of prevailing military requirements.¹⁵⁷

Recruitment of children into the military however assumed an unprecedented character during the war first under the reign of Joseph Saidu Momoh. President Momoh did not only inherit a military that was underpaid, indisciplined, demoralised and poorly trained but one that was also confronted with a rebel war. The Army at the time was about 3000 in strength and 364 of these were in Liberia as part of the ECOWAS Ceasefire Monitoring Group (ECOMOG). This precarious situation among other things compelled Momoh to embark on a crash military recruitment drive advocating for vigilantes to join the force thus sidelining military recruitment standards and procedures.¹⁵⁸

The military regime of the National Provisional Ruling Council (NPRC) under the leadership of Captain V.E.M. Strasser inherited the legacy of sidestepping military recruitment procedures in his bid to swell up the military force to face the rebels. He continued the practice of enlisting vigilantes including the Sierra Leone Border Guards (SLBGS) into the military. Most of these members were under 15 years.(...)¹⁵⁹

This background saw the infiltration of a number of children into the military through a variety of ways including backdoor enlistment. This was an enlistment practice that encouraged the replacement of deceased soldiers with child recruits that were given official status in the payroll. What was even more disturbing was the fact that these recruits were given crash training for three months instead of the nine months minimum period for such normal trainings. In most cases, they were trained only in the four rules of war-planning, advance, attack and retreat.¹⁶⁰

The practice of recruiting children into the military continued even during the period of the democratically elected government of Alhaji Ahmad Tejan Kabbah of the Sierra Leone People's Party that came to power in 1996.¹⁶¹

127. It is therefore fair to conclude that this established practice of recruiting children into the military up to 1997 clearly impacts on the awareness within the military and specifically within the minds of individual military servicemen as to the alleged unlawfulness of recruiting children under the age of 18 or 16 within the military. Additionally, the absence of a proper training as to the (international) laws prohibiting the conscription and enlistment of children under 15 years into the army as an alleged war crime, also affects this awareness.

128. The report of Mr. Gbla lends support for the latter observation. Noticeably, this expert [REDACTED] relied upon primary sources, namely military and civilian official currently serving within the Administration of Sierra Leonean. The footnotes 17, 18, 23-27 of his report reveal that this expert conducted interviews with

¹⁵⁷ Report Mr. Gbla, Exhibit D37, page 16, para. 34.

¹⁵⁸ Report Mr. Gbla, Exhibit D37, page 16, para. 35.

¹⁵⁹ Report Mr. Gbla, Exhibit D37, page 16, para. 36.

¹⁶⁰ Report Mr. Gbla, Exhibit D37, page 16, para. 37.

¹⁶¹ Report Mr. Gbla, Exhibit D37, page 16, para. 38.

inter alia, the senior military officer attached in the Ministry of Defence, lieutenant-colonel working for the Sierra Leonean Ministry of Defence and other senior officials of the Government of Sierra Leone. Therefore the foundation of the report of Mr. Osman Gbla is highly relevant. It is therefore that also his conclusions on this issue have a considerable probative value, including his observation on p.18 in para. 39:

It is however noteworthy that the Government of Sierra Leone during the pre-conflict period did not seriously monitor the practice of recruiting children below the minimum age of seventeen and the half years into the military and that laws pertaining to this issue were hardly enforced. Furthermore, the laws pertaining to the definition of a child are confusing and contradictory with no uniform age and most are outdated and not in tune with modern international legal standards.¹⁶²

129. Moreover, one of his major conclusions and findings in his report, which is, as noticed not contested the Prosecution, can be read in paragraphs 54 and 55:

The study also confirms that the role of the Sierra Leone government in recruiting child soldiers especially during the war in an attempt to bolster government forces to face the rebels sidestepped recruitment procedures and undermined efficient training and this in a way influenced the composition of the SLA faction that withdrew into the jungle. The study also reveals that prior to the on-going British-led military training programme, there was very little serious and consistent efforts to infuse child rights issues in the training of the security forces in the country especially the military.¹⁶³

130. Aside from adducing evidence that the inclusion of children that followed the AFRC members after being ousted from power in February 1998 was mainly caused by the fact that they were family members and other associates "that were afraid of reprisal" (see also para. 51 of his report), this expert report supports the conclusion that the requisite *mens rea* element for count 12 can not be proven beyond a reasonable doubt.

131. The defence of mistake of law is, under certain circumstances, accepted under contemporary international criminal law, evidenced by Article 32 (2) of the Rome Statute on the ICC. Dinstein, discussing this defence, observes that in certain conditions "there may be no choice but to admit that, as a result of mistake of law, *mens rea* is negated."¹⁶⁴ This author furthermore states that "*mens rea* can not be negated if the illegality of the war crime is obvious to any reasonable man."¹⁶⁵

¹⁶² Report Mr. Gbla, Exhibit D37, page 18, para. 39.

¹⁶³ Report Mr. Gbla, Exhibit D37, page 23, paras. 54-55.

¹⁶⁴ Joram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2005), 245.

¹⁶⁵ Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2005), 245.

132. Based upon the foregoing submissions by Mr. Gbla, it can be said that the alleged illegality of conscripting children below the age of 15 in order to participate in active hostilities was *not* "obvious to any reasonable man." The combination of a continued governmental practice in this regard with absence of an adequate and effective training on this issue within the military up to 1997 clearly vests the basis to accept that in all reasonableness the third accused can not be held accountable for this charge in terms of *mens rea*. It can be observed that on the basis of these facts and the evidence adduced by both the Prosecution and Defence expert, the alleged unlawfulness of the activities described in count 12 were not on its face "manifestly illegal" for the Third Accused.¹⁶⁶ Accordingly, no conviction can be entered for count 12.

3.2 Mistake of Law Regarding Count 8 – Other Inhumane Act as a Crime against Humanity

133. If the Trial Chamber would not accept the primary Defence argument that forced marriages cannot be categorized as a crime against humanity, the Defence respectfully contends that as an alternative argument, the Accused was not aware of the existence of such crime.

134. The Prosecution failed to prove beyond reasonable doubt the element of forced marriages. In specific the testimony of Dr. Thorson at the trial on 24 and 25 October 2006, has adduced evidence that:

- only with detailed information about *inter alia* the decision making process about marriage and the underlying negotiations between women and men, it can be assessed the degree of force involved in these marriages. The Prosecution failed to provide particulars in this regard and as a result no conviction can be entered for this specific count.
- Various reasons may underlie a marriage which could be qualified on its face as "forced," including strategic reasons for the particular women in order to be protected.¹⁶⁷ Accordingly, the element of free will, which is fundamental for proof of "forced marriage" should be established beyond a reasonable doubt. The element of "coercion" is far more complex and nuanced as the prosecution case tends to believe. Dr. Thorson's report on the pages 16 and 17 mentions several

¹⁶⁶ Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2005), 245.

¹⁶⁷ See also report dr. Thorson, 21 August 2006, p. 16.

sources indicating that, given that bush marriages are embedded in cultural understandings, the position as a bush wife was not only drudgery and sexual abuse but also the base of power. Furthermore, it can not be excluded that commanders' "wives" took the position of the first wife of a powerful man which gave them access to commodities on which they would otherwise never laid their hands.

The Prosecution case failed to adduce evidence of this nature which justifies a conviction for the alleged participation of the third accused on the aspect of "forced marriages" within the regions and within the timeframe as mentioned in the indictment. The degree of freedom in such choices is impossible to estimate "...since they depend both on the situation in which girls find themselves and on the alternatives available to them (Mackay, 2004)."¹⁶⁸ Also this observation justifies an acquittal since the prosecution case did not eliminate any evidence which enables the Trial Chamber to make such estimation.

135. In this regard, the submissions of the prosecution expert Mrs. Bangura can not serve as a proper counterargument since her research can not be qualified as a conclusive and persuasive study.¹⁶⁹

136. Alternatively, also with respect to this count the requisite *mens rea* element on part of the third accused can not be established beyond reasonable doubt. Similar to the defense of mistake of law invoked with respect to count 12 (child soldiers) the arguments developed in the latter situation can be applied to the charge of forced marriage. As a result, the accused should be acquitted on the basis of mistake of law, in particular the absence of *mens rea*, reinforced by the observation that "forced marriage" can not be qualified as an international crime on the basis of customary international law. Reference can also be made to the observation by Dr. Thorson in her report on page 1 observing that she does not support the view that "forced marriage" in West-Africa endorses a general view on rural populations as backwards and on their divers social practices as the primary source of malevolence, sexual abuse and war atrocities.

¹⁶⁸ See report Dr. Thorson, 21 August 2006, p. 17.

¹⁶⁹ See Testimony Dr. Thorson, Transcript 25 October 2006.

IV INADEQUATE OR INSUFFICIENT EVIDENCE PRESENTED BY OTP

4.1 Lack of Prosecution Evidence on Certain Location in the Indictment

137. The Prosecution has led no evidence on certain specific villages and locations pleaded in the Indictment. In the following paragraph an overview will be given of the villages and locations for which, according to the Defence, with regard to certain counts in the Indictment, and in view of the relevant time period mentioned in this Indictment, no evidence has been led by the Prosecution. If the Prosecution already agreed with this lack of evidence on certain locations (see Annex A to its response to the Defence Rule 98 Motion),¹⁷⁰ this will be indicated.

138. In the table concerning count 14 (pillage) a distinction will be made between evidence on looting and evidence on burning, as the Defence is of the opinion that the evidence on burning can not be classified as pillage as charged in the Indictment. Therefore, if the Prosecution has only led evidence on acts related to the burning of property with regard to a certain location mentioned in the Indictment, and thus no evidence on the occurrence of any acts of looting at this same location, it is the Defence view that the Prosecution has led no evidence regarding count 14 at this location.

139. According to the Defence it is undisputed that with regard to the following counts and locations the Prosecution has not led any evidence in its case¹⁷¹:

Count(s)	District	Location	Named in OTP Annex A ¹⁷²
3-5	Bo	Telu Sembchun Mamboma	Yes

¹⁷⁰ *Prosecutor v. Brima et al.*, Public Versions of Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, SCSL-2004-16-T-459, Annex A; Villages and Locations pleaded in the Indictment in respect of which the Prosecution has no Evidence.

¹⁷¹ Prosecution evidence that has been led with regard to certain locations and counts, but does not fulfil one of the elements of the crime according to the Defence, will be discussed separately in this Trial Brief.

¹⁷² See *Prosecutor v. Brima et al.*, Public Versions of Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, SCSL-2004-16-T-459, Annex A; Villages and Locations pleaded in the Indictment in respect of which the Prosecution has no Evidence.

Count(s)	District	Location	Named in OTP Annex A ¹⁷²
3-5	Kono	Foindu Willifeh Biaya	Yes
3-5	Koinadugu	Heremakono Kumalu Katombo Kamadugu	Yes
3-5	Bombali	Mafabu	Yes
3-5	Port Loko	Tendakum	Yes
6-9	Kono	Tomendeh Fokoiya Superman Camp Kissi Town Camp	Yes
6-9	Koinadugu	Heremakono	Yes
8-9	Kono	Tombodu	No
8-9	Bombali	Mandaha	No
10-11	Koinadugu	Konkoba	Yes
10-11	Bombali	Lohondi Malama Mamaka	Yes
13	Kono	Tomendeh	Yes
13	Koinadugu	Kamadugu Heremakono	Yes
13	Freetown	Peacock Farm	Yes
13	Port Loko	Tendakum	Yes
14: looting and burning	Bo	Telu Sembchun Mambonma	Yes
14: looting	Bo	Tikonko	No
14: looting and burning	Koinadugu	Heremakono Kamadugu	Yes
14: looting	Koinadugu	Padugu	No
14: looting and burning	Kono	Foindu	Yes

Count(s)	District	Location	Named in OTP Annex A ¹⁷²
14: looting	Freetown and the Western Area	Calaba Town Fourah Bay Uppun area Pademba Road	No

4.2 Reliability of Prosecution Evidence in General: Witnesses and Their Evidence

Prosecution Witness TF1-033

140. The Defence submits that the evidence of Prosecution witness TF1-033 is unreliable, and as such should be excluded from the evidence which will be used in the assessment of the Third Accused's alleged responsibility. The following examples are indicative of the unreliability of this particular witness.

A. Well, eventually I was in bondage, I was in their hands. But in Tombodu there was a subordinate commander to Gullit by the name of Savage, alias Mr Die.

(...)

A. Well, through the orders given to Savage by Gullit to kill, burn the town, Savage really adhered to that order he received from Gullit.

Q. Witness, how do you know that Gullit gave those orders to Savage?

A. It was given in my presence.

Q. Did you hear him give the orders?

A. I heard them in my presence.

Q. Witness, what happened after the orders were given?

A. The orders were carried out. There was chaos in the township. Civilians were killed, houses were burnt, hundreds of them, amputations were carried out by the AFRC fighters. Many civilians were locked up in houses and fire set on the houses by Savage and the AFRC fighters.

Q. Witness, how do you know this?

A. I was present when all those atrocities were carried out.¹⁷³

Q. Witness, were any of the AFRC commanders present in Tombodu during that time?

A. Yes.

Q. Can you tell the Court who was present?

A. Hassan Papa Bangura was there. Five-Five was also there.

Q. Witness, when you say Five-Five, who do you mean? Can you tell the Court his full name?

A. Santigie Borbor Kanu.

Q. Proceed, Witness, who else?

A. Franklyn Woyo Conteh, Franklyn Conteh, alias Woyo, was also there. Savage, I said was there. he was the subordinates' commander implementing the orders given to him by

¹⁷³ TF1-033, Transcript 11 July 2006, p. 11.

Gullit. Bazzy, Ibrahim Bazzy Kamara was also again. Ibrahim Sesay, alias Biyoh, was also there. And Abdul Sesay also.¹⁷⁴

141. Whilst Prosecution and Defence witnesses testified that an attack took place on Karina, Bombali District, around May 1998 and that six to seven people were killed,¹⁷⁵ TF1-033 speaks of "500 civilians were killed." In addition to that this witness asserts that, "about 300 were also amputated in both towns [Karina and Bonoya]. Many rapes, over 200 -- over hundreds of women were raped in that town."¹⁷⁶ The evidence of TF1-033 is unreliable in this regard, especially when compared to the other evidence available. Particularly given the size of the town of Karina (and Bonoya) the estimates given by Witness TF1-033 seem to be inconsistent with the other available evidence. This same witness testifies of 200 people being killed in Rosos,¹⁷⁷ whilst indicating: "This is an approximation. It could be more than or less than."¹⁷⁸

142. TF1-033 at some point admits that he had not counted the corpses he mentioned, and states:

Q. The figures you have given, Mr Witness, did you count them?
Well, I saw a large number of -- [Overlapping speakers].
Q. Please, just answer my question.
No.¹⁷⁹

Prosecution Witness TF1-277

143. Also with regard to this Prosecution witness, the Defence holds that his testimony is entirely unreliable, and should thus not be used in the weighing of the evidence available against the Third Accused. The following evidence supports this assertion.

144. During his testimony in court, witness TF1-277 testified the following:

Q. Do you know how she died?
A. Well, she died by gunshot.
Q. And who shot her?
A. It was one Brigadier Five-five.
Q. How do you know Brigadier Five-five shot her?
A. Well, SAJ Alieu came, and he came and told us that -- he told our father that there he fired at a woman and my father came and collected the lady and brought her to our house

¹⁷⁴ TF1-033, Transcript 11 July 2006, p. 12.

¹⁷⁵ DBK-089, Transcript 14 July 2006, p. 7-8; DBK-094, Transcript 11 July 2006, p. 38-39; TF1-058, Transcript 14 July 2005, p. 78-80. At a later stage this witness mentions six corpses, see TF1-058, Transcript 14 July 2005, p. 104.

¹⁷⁶ TF1-033, Transcript 11 July 2005, p. 19.

¹⁷⁷ TF1-033, Transcript 11 July 2005, p. 28-29.

¹⁷⁸ TF1-033, Transcript 11 July 2005, p. 20.

¹⁷⁹ TF1-033, Transcript 11 July 2005, p. 79.

and said, "who shot this lady?" And he said it was our boss. And he said it was because of this woman that we did not go to fight.¹⁸⁰

145. Defence counsel confronted this witness with his earlier statement to the Prosecution:

Q. (...) If I'm correct, Mr Witness, you indeed stated that you heard that a person referred to as Five-five shot Mrs Zainab. Is that correct? That is today your testimony?

A. Yes.

Q. Again, I ask your patience for the following sentence I draw from your statement from September 2003. It's a statement which can be found on page 6300, last paragraph. I will first quote the full portion, and then come back to you with the relevant question.

To the Prosecution in September 2003, you stated, I quote: "At Waterloo, I saw Brigadier Five-five killed a 20-year-old girl Zainab. He killed her because he met the lady seated by one rebel who had refused to fight against ECOMOG. He said he killed the girl because their fighting men are reluctant to go to the front because of women. After the incident at Waterloo, Five-five went to Lumpa where I was told he killed eight people, including my aunt's husband, Mr Victor."

Q. (...) Now, today, Mr Witness, you testified that you confirmed your change of statement which is to be found in the notes of the 17th February 2005, and you testified that you heard that a person referred to as Five-five killed your -- killed Mrs Zainab. What made you change your statement on this particular point?

A. That question, I give my final statement today.

Q. Was there a specific reason why you gave a different statement on this topic in September --

A. I have no reason. I have no reason. I didn't mention in the statement, but I say that he killed. I said it this morning. I was at the house when SAJ Alieu came and said they've shot my woman. And that's when the Pa went and collected her and brought her to the house and interviewed her, and I've sworn.¹⁸¹

146. Witness TF1-277 asserted at trial under oath, *inter alia*, that he was present when Mr. SAJ Alieu made a report to his uncle (the witness's uncle) which report contained the allegation that a person referred to as Five-Five shot a woman named Zainab.

147. Witness TF1-277 states that he was present during the making of such report from SAJ Alieu to witness's uncle. Whilst it is not established that those persons, SAJ Alieu and witness's uncle, are not available as witnesses within these proceedings, the witness as such was therefore not the addressee of the alleged report. The Defence holds therefore that this particular form of hearsay evidence factually amounts to a form of indirect hearsay. Hearsay evidence, especially such a form, the admissibility of which may seriously affect the administration of justice pursuant to Rule 95 of the Rules.

¹⁸⁰ Witness TF1-277, Transcript 8 March 2005, p. 50.

¹⁸¹ Witness TF1-277, Transcript 8 March 2005, p. 116-117.

148. It is the opinion of the Defence that this testimony in its entirety should not be taken into account in determining the reasonable doubt threshold, considering both the context and the character of this evidence in question. Two foundations are laid for such requested exclusion: one is the prior inconsistencies relating to the evidence, and the second relates to the indirect hearsay evidence presented by this witness.

The element of hearsay

149. In the Blaskic Appeals Chamber's Decision, the Chamber defined a witness statement as "an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime."¹⁸² The ICTY Appeals Chamber established the admissibility of hearsay, but held nonetheless that the Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate.¹⁸³ Decisive parameters for this admissibility are both the content of the hearsay statement and the circumstances under which the evidence arose.

150. In *Prosecution v. Marques et al.*, the Special Panel for Serious Crimes of the East Timor Court of 11 December 2001, it was held that hearsay evidence from witnesses who had heard from other witnesses that the accused was involved in the crime, should be given little weight and did not result in any certainty about the conduct of the accused.¹⁸⁴ The Defence respectfully submits that this same reasoning should apply to the underlying witness TF1-277.

The argument of Prior Inconsistencies

151. In the ICTR case of *Ruzindana*, the Court ruled that when a contradiction is preserved between the written and oral statement of a witness, this should be raised by putting to the witness the exact portion in issue and counsel should formally exhibit it, so as to form part of the record of the Tribunal.¹⁸⁵ In *Prosecutor v. Kayishema et al.*,¹⁸⁶ the

¹⁸² See *Prosecutor v. Blaskic*, Appeals Chamber Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, Case No. 11-95-14, paras. 15-16.

¹⁸³ *Prosecutor v. Aleksovski*, Appeals Chamber Decision on Admissibility of Evidence, Case No. 11-95-14, February 16, 1999.

¹⁸⁴ See for further jurisprudence on this issue: Archbold International Criminal Courts, Practice, Procedure and Evidence 2003, p. 263.

¹⁸⁵ See *Prosecutor v. Ruzindana*, order on the Probative Value of Alleged Contradiction Between the oral and Written Statement of a Witness During Examination, Case No. 95-1-T, 17 April 1997.

ICTR ruled upon the admissibility of inconsistent statements, saying that “inconsistencies may raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses’ evidence as a whole.”

152. In the instant case, it is clear that the inconsistencies regarding the statement of witness TF1-277 compared to his evidence given in Court, are to be found material. Whilst the witness stated in his written statement that he saw the particular shooting, at trial he alleges this to have heard, while listening to a conversation between two other individuals.

153. In this respect, the ICTR in the aforementioned *Kayishema* case held in para. 78 that the doubt in relation to the particular piece of evidence in question based on an inconsistency, may be removed by “an explanation of substance rather than mere procedure” and that an explanation to the extent that the witness alleges that the interviewing investigator did not accurately reflect in the written statement what the witness said, “(...) is generally not enough to remove doubt.” As the Trial Chamber noted, it is not for the Trial Chamber “to search for reasons to excuse inadequacies in the Prosecution’s investigative process.” Only if the witness is able to “provide a convincing explanation of substance (...) then this may be sufficient to remove the doubt raised.”¹⁸⁷

154. The Defence observes that any reasonable “explanation of substance” for the aforementioned inconsistencies, were not given by witness TF1-277 during cross-examination, despite repetitious questions of the Defence counsel to obtain an answer of the witness which could explain this material discrepancy. In the absence of such explanation, the statement of witness TF1-277 both given to the Prosecution on 4 September 2003, as well as given at trial, should be excluded.

¹⁸⁶ *Prosecutor v. Ruzindana*, Case No. ICTR-95-1-I, Trial Chamber Judgment of 21 May 1999, paras. 77 – 80.

¹⁸⁷ *Prosecutor v. Ruzindana*, Case No. ICTR-95-1-I, Trial Chamber Judgment of 21 May 1999, par. 79.

[REDACTED]

156. In light of these specific circumstances, it cannot even be said that the evidence given by the particular witness qualifies under the standard of "any relevant evidence" as meant by Rule 89(C). In fact, the two mentioned will-say statements referred to in para. 11(b) of this Motion, cannot be considered as "clarification" now that any specification of this clarification is absent, particularly with respect to the notes found on p. 6302.

157. In its decision on admissibility of proposed testimony of witness DBY, the ICTR in *Prosecutor v. Rutaganda*, ruled as to the arguments of the Defence raised with respect to the exclusion of hearsay evidence: "[h]is discretion [in admitting hearsay evidence] is not unlimited, considering that the test to be met before ruling evidence inadmissible is rigorous. It was thus ruled that 'a piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and is therefore inadmissible. The Appeals Chamber is of the opinion that this principle should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible. At the stage of admissibility, the beginning of proof that evidence is reliable, in other words, that sufficient indicia of reliability have been established, is quite admissible."¹⁸⁸

158. The Defence holds the view that the evidence given by witness TF1-277, seen in the perspective of his previous inconsistent statement, given to the Prosecution on September 4, 2003, at least as far as hearsay evidence concerning the alleged incident in the house of Mr. SAJ Alieu and the events surrounding this incident, are so lacking in terms of the indicia of reliability that it is not deemed probative and should therefore be excluded. Even the "beginning of proof" that the evidence of TF1-277 is reliable is absent.

¹⁸⁸ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Appeals Chamber Judgment, 26 May 2003, para. 33 (footnotes omitted from citation).

159. Moreover, in the landmark decision on hearsay evidence given by the ICTY Trial Chamber in *Prosecutor v. Tadic* of August 5, 1996,¹⁸⁹ hearsay evidence was in principle admitted within international criminal proceedings, yet, the ICTY ruled that “relevant evidence tending to prove an issue must have some component of reliability.” In the instant case, it can be observed that both the uncle to whom witness TF1-277 refers as well as the person referred to as SAJ Alieu, were never interviewed by the Prosecution (although it is never established that these persons are not available as witnesses),¹⁹⁰ so that therefore any form of verification of the reliability of the hearsay statement of said witness is absent. In addition, witness TF1-277 testified that he could not indicate the address of the house where the alleged shooting took place. All these conditions result in the presence of a lack of reliability of his hearsay statement. After all, the ICTY in the mentioned Tadic ruling upheld the condition that “both the circumstances under which the evidence arose as well as the content of the statement” must be taken into account in order to admit hearsay evidence. It is these surrounding circumstances and content which should disqualify the evidence given by witness TF1-277.

160. The Defence submits that the evidence of this witness should have no weight in the assessment of the Third Accused’s alleged criminal responsibility.

Prosecution Witness TF1-227

161. In the third place, the Defence contends that the evidence of Prosecution witness TF1-227 is to be considered unreliable, on the basis of the following arguments.

162. This witness states the following about the Third Accused, in the period from January 1999 onwards:

Q. You mentioned about one Brigadier Five-Five at Benguema?

A. Yes.

Q. When was the first time that you met this person you refer to as Brigadier Five-Five?

A. It was at Benguema the first time. I saw him in person then. It was a long time now.

Q. Did you say he wore civilian clothes?

A. Yes, I saw him with civilian clothes.

Q. How many times did you see him during your captivity?

¹⁸⁹ See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Decision on Defense Motion on Hearsay, para. 9.

¹⁹⁰ The witness indicated at trial that his uncle is still living, but has been traveling, and that no details of this uncle were given to the OTP. Furthermore, the witness indicated that he does not know where SAJ Alieu is.

- A. Three times. It was a far distance, I just saw him passing.
 Q. It was a far distance, you just say him passing. Okay. Was he always dressed in civilian clothes on those three occasions?
 A. Yes.
 Q. You have referred to him as Brigadier Five-Five. Did you hear people calling him that?
 A. Yes.
 Q. Did you hear at any time people call him just Five-Five?
 A. No, they called the title Brigadier Five-Five.
 Q. They always called him Brigadier Five-Five?
 A. Yes.¹⁹¹

163. Contrary to the evidence of witness TF1-277, witness TF1-227 testifies to the following evidence, in the same period of time and the same area:

- Q. When did you leave your hiding area?
 A. On the 6th of January 1999.
 Q. And where did you go to when you left your hiding area?
 A. I went to Lumpa.
 Q. And did you remain in Lumpa throughout the month of January?
 A. No.
 Q. Where did you go after you left Lumpa?
 A. I went to Waterloo.
 Q. Mr Witness, do you know the accused Santigie Kanu?
 A. Yes, I used to see him in the Benguema barracks during the AFRC government.¹⁹²
- Q. Do you recall how he was dressed that day?
 A. Yes. I could remember.
 Q. How was he dressed?
 A. He was dressed in combat, military uniform, green combat.¹⁹³
- Q. In what capacity was he there? Can you describe what you saw.
 A. I saw him dressed in full military uniform, combat.¹⁹⁴

164. Also insider witness TF1-046 testifies that in Freetown/Western Area, "I saw Brigadier Five-Five wearing his ranks, pips and a crown on his shoulder here as a brigadier."¹⁹⁵

165. The Defence respectfully holds that the evidence presented by these Prosecution witnesses is contradictory. Whilst the one witness states Kanu was always dressed in civilian clothes, the other witnesses indicate he was dressed in full military combat.

166. Again another inconsistency presents itself within this witness's testimony. He states:

¹⁹¹ TF1-227, Transcript 11 April 2005, p. 53-54.

¹⁹² TF1-277, Transcript 8 March 2005, p. 45.

¹⁹³ TF1-277, Transcript 8 March 2005, p. 57.

¹⁹⁴ TF1-277, Transcript 8 March 2005, p. 110.

¹⁹⁵ TF1-046, Transcript 7 October 2005, p. 125.

A. About 200 people I met at Magbeni.

Q. Now, out of those 200 people you met at Magbeni, approximately how many of them were soldiers?

A. Well, hundreds --¹⁹⁶

167. Later on during his testimony he states the following:

Q. Out of the 200 people you met at Magbeni, how many were soldiers?

A. Seventy-five were soldiers.

Q. And who were the others?

A. They were civilians.¹⁹⁷

168. Again, this is an example where the Prosecution cross-examines its own witness, resulting in an inconsistency within this witness's own testimony, affecting the reliability of this witness's testimony as a whole.

169. Furthermore, witness TF1-227 testified that Brigadier Five-Five was the overall commander at Benguema¹⁹⁸, in clear contradiction with the evidence given by TF1-167 on the identity of the overall commander at that time¹⁹⁹, and the evidence given by TF1-334 that Five-Five was never an overall commander.²⁰⁰

170. Witness 227 indicates that Five-Five was the commander at Benguema.²⁰¹ However, when they moved to Blama from end of January 1999 onwards, the witness states he did not see Five-Five giving any command.

Q. (...) Did you see him give any command at Blama?

A. I did not see him giving any command.²⁰²

171. This witness has not indicated how it was possible that whilst in Benguema Five-Five was the overall commander, while traveling to the next village, he was not in a position to give command anymore, which is, to say the least, remarkable and sheds doubt on the reliability of this witness's evidence.

TF1-085

¹⁹⁶ TF1-227, Transcript 11 April 2005, p. 38.

¹⁹⁷ TF1-227, Transcript 11 April 2005, p. 39.

¹⁹⁸ Transcript 11 April 2005, p.19.

¹⁹⁹ Transcript 16 September 2005, p.12, where TF1-167 gives evidence that Alex Tamba Brima took over the overall command after the death of SAJ Musa.

²⁰⁰ Transcript 16 June 2005, p.4.

²⁰¹ TF1-227, Transcript 11 April 2005, p. 19.

²⁰² TF1-227, Transcript 11 April 2005, p. 77.

172. The Defence asserts that the evidence given by witness TF1-085 can not be deemed reliable. TF1-085 describes many atrocities, including killings, rape, cannibalism and the alive burying of a child²⁰³, and ascribes most of these crimes to a big boss named Five-Five. However, TF1-085 gives the following description of Five-Five, which most certainly does not correspond to the Third Accused²⁰⁴:

A. Yes, the day that I saw him he was huge, he was tall, he was fat and he carried a walking stick that he was walking with.

Q. What was his complexion?

A. It was fair and he was black, he was huge.

Q. What was he wearing when you saw him?

A. I wore ronko clothes.

You've spoken about a walking stick. What was this walking stick like?

A. The walking stick that he carried had bombs inside. If you see it you wouldn't know. You wouldn't know there were bombs inside when he opened it there were bombs inside.

Q. Did you ever see it being used?

A. Yes.

Q. Try and describe what it did?

A. He used it to kill people. He would just use it and point it and anywhere he points it at bombs would come out to kill civilians and --

173. In addition, the evidence given by TF1-085 on these cruelties and the composition of the group of rebels she joined is not corroborated by any other Prosecution witness.²⁰⁵

174. The Defence therefore contends that evidence of Prosecution witness TF1-085 should not have any weight in the assessment by the honourable Trial Chamber if the Prosecution has proved beyond reasonable doubt the counts as charged in the Indictment.

²⁰³ Transcript 7 April 2005, p.30-36.

²⁰⁴ Transcript 7 April 2005, p.16-17.

²⁰⁵ See for example Transcript 7 April 2005, p.38, 46-47.

V ORGANIZATIONAL STRUCTURES OF THE AFRC AND SLA

5.1 AFRC Was a Political Body, Not a Military Organization

175. The AFRC was in power from May 1997 until February 1998, when they were ousted from power by ECOMOG, and chased out of Freetown into the provinces. It is the Defence theory that the honourables who were in charge of the AFRC government did not have a leading role during the conflict after February 1998. A very clear example hercof can be seen in the complete disappearance of Johnny Paul Koroma after the end of the AFRC regime. Although the political leader of the AFRC movement, his role had practically ended when pushed out of Freetown. He went with one SLA group to Kono, but immediately left the district and headed back to his home province Kailahun, where his active participation came to a complete standstill.

176. It was SAJ Musa who took over the role of Johnny Paul Koroma, and became the military leader of the SLA group. His overall goal was to reinstate the army in Freetown, and not a political goal to gain power, as alleged by the Prosecution.

177. This theory is also applicable to the Third Accused, and is supported by the example of several of the honourables being arrested in Major Eddie Town by the end of 1998. Witness DBK-113 indicates that the Third Accused did not have any military or operational position whilst in Colonel Eddie Town.²⁰⁶

178. Witness DBK-113 was in Major Eddie Town with an SLA group in 1998, when another SLA group, led by SAJ Musa, joined them there. A little later, in October or November 1998, the group honourables was arrested.²⁰⁷ This witness indicates that SAJ Musa had them arrested because "they were an obstacle to the movement. They did not want them to achieve the goals of the movement, they were afraid that they wanted to run away, so they were being punished."²⁰⁸

²⁰⁶ DBK-113, Transcript 13 October 2006, p. 29. Witness TF1-334 testifies that before the arrest of the Third Accused and his co-Accused in Major Eddie Town, witness TF1-334 alleges that Gullit was the commander, Bazyzy his second-in-command and Five-Five the third-in-command. See TF1-334, Transcript 24 May 2005, p. 87. On another occasion, this same witness provides a different picture of the command structure, indicating that Bazyzy, and not Kanu, was the third-in-command. See, TF1-334, Transcript 13 June 2005, p. 26.

²⁰⁷ DBK-113, Transcript 13 October 2006, p. 27. TF1-167, Transcript 15 September 2005, p. 79.

²⁰⁸ DBK-113, Transcript 13 October 2006, p. 32.

179. Even the fact that the Prosecution has led evidence that the Third Accused addressed civilians in Koidu Town on behalf of the AFRC government, and that the Third Accused sometimes stayed in Koidu Town during the AFRC regime,²⁰⁹ does not prove that the Third Accused held any responsibility within the AFRC government for the Kono District. Moreover, this certainly does not prove that Third Accused held at any time a command position in Kono District, nor that he was present in Kono District in 1998.

5.2 AFRC / SLAs on the run and subject to reprisals

180. It is the Defence theory, that in February 1998, the AFRC was ousted from Freetown, and that they were subjected to reprisals, forcing them to flee from the area. The picture the Prosecution has drawn, not only in its opening statement, but throughout the whole trial, is that the AFRC, when pushed out of Freetown, was fighting its way back into the provinces, whilst killing, mutilating, raping, etc. the civilian population. The Defence theory is that this is an oversimplified picture of the situation, and is not a correct reflection of the true story. Whilst fleeing out of the capital, the AFRC allies and SLA soldiers were severely attacked throughout the region, and they suffered harsh and brutal behaviour by the civilians, ECOMOG and Kamajors.²¹⁰

181. The AFRC in this rush to get out of Freetown, split up into various SLA factions, which operated independently from each other, without any overall structure.²¹¹

182. This situation also nuances the intent with which certain acts were committed. The intent required for several of the alleged crimes cannot be substantiated with facts of

²⁰⁹ Witness TF1-019, Transcript 30 June 2005, p. 85-88; see also DAB-042, Transcript 15 September 2006, p. 89.

²¹⁰ See for instance DBK-113, Transcript 13 October 2006, p. 11. See also testimony 11:1-114, 18 July 2005, p. 50-51, who states that:

Q. What was the reason for this mass exodus that you are referring to. Why were all the soldiers fleeing Freetown? Why? You were with them. Why. What was the reason? Please, tell us.

A. Thank you, very much, sir. One, there was poor communication in the army. The army was not recognised. Even you come attest story here, say story, somebody believe you. So the army was not much all to that extent at that time. As compared to --

²¹¹ See for instance DBK-113, Transcript 13 October 2006, p. 14. Junior Johnson testifies that "we diverted into the jungle," see TF1-167, Transcript 20 September 2005, p. 60-61.

this specific period of time, because no sufficient evidence has been adduced indicating the goals of the AFRC and SLA groups at this time.

183. Witness DBK-113 provides a very clear picture of such development. In his home village, people started pointing fingers at him, and telling him they knew him and his father who was a soldier.²¹² Witness testifies that at Wellington “[s]ome Kamajors and some ECOMOG soldiers went to the house [of witness’s stepfather]. So they removed us and burned the house and seized his car.”²¹³ He also testifies of Kambia where Guineans had started capturing people in Kambia, referring to soldiers.²¹⁴ Moreover, he states about the ECOMOG attack on Makeni in March/April 1998.

184. Witness DAB-079 indicates the following in his testimony:

Q. I want you to take it step by step. After the lynching or the shooting and burning of these two officers, what happened?

A. We held a meeting at the barri where the civilians were told not to repeat the action. It was during that time that those people in the interior, some SLAs officers, were told that their brothers are being killed in Kabala, they are being burnt alive, so some of them attacked the town.²¹⁵

185. The Defence submits that the evidence presented during the trial, by both Prosecution and Defence nuances the Prosecution theory concerning the incidents after February 1998.

²¹² DBK-113, Transcript 13 October 2006, p. 7 and p. 92.

²¹³ DBK-113, Transcript 13 October 2006, p. 5.

²¹⁴ DBK-113, Transcript 13 October 2006, p. 8.

²¹⁵ DAB-079, Transcript 28 July 2006, p. 24-25, 31.

VI NO COMMAND RESPONSIBILITY THIRD ACCUSED

6.1 Introduction

186. Several reasons emerge for an acquittal as to superior responsibility on part of the Third Accused. When it concerns the assessment of alleged superior responsibility in the case of the Third Accused two principal issues arise:

187. In the first place, the question whether this form of responsibility can be based on the mere alleged participation or membership of the AFRC. This subject relates to the question raised in the opening statement of the Defence as to non-validity of the notion of collective responsibility within international criminal law.

188. In the second place, the observation that, based on the evidence presented by the Prosecution and Defence at trial, it is not established that the Third Accused ever functioned, throughout the period charged, as an operational commander, i.e., as a military leader in command and control of a fighting unit.

189. In the following paragraphs the Defence will further elaborate on these two crucial issues regarding the alleged superior responsibility of the Third Accused.

6.2 Collective Responsibility

190. "Collective responsibility" is what the Prosecution is *de facto* advocating in its case. In paragraph 31 of the Amended Indictment, it is said that the three Accused individually or in concert with others (among which Mosquito, and the RUF defendants Issa Sesay, Morris Kallon and Augustine Gbao) "exercised authority, command and control over all subordinate members of the AFRC, Junta and AFRC/ RUF Forces." The Defence submits that such evidence, supporting the allegation that the Third Accused, in cooperation with the mentioned persons, exercised command and control over all AFRC, Junta and AFRC/RUF forces, has not been presented by the evidence at trial. In the absence of proof for this, a conviction of the Third Accused would be tantamount to strict liability on the basis of organizational responsibility.

191. Article 6 of the ICTY Statute (in analogy with Article 6(1) of the SCSL Statute) provides that the international tribunal shall have jurisdiction over natural persons, with the exclusion of legal persons, organizations and States. The possibility of extending the personal jurisdiction of the tribunal to organizations for the purpose of establishing membership thereof as an offence – in analogy with the Nuremberg precedent – was discarded, mainly because the notion of guilt by association, implicit in the crime of membership, does not comport with the underlying principle of the Statute that criminal liability is personal.²¹⁶

192. Additionally, within international criminal law, *objective and strict* criminal liability is ruled out.²¹⁷ It follows from the first notion that among other things no one may be held answerable for acts or omissions of *organizations* to which he belongs, unless he bears personal responsibility for a particular act, conduct, or omission. This means that mere membership of the AFRC does not justify criminal liability of the accused as set forth in the indictment.

193. Recently, the ICTY Trial Chamber in *Prosecutor v. Oric*, reinforced the notion that “[n]evertheless, superior criminal responsibility by no means involves the imposition of ‘strict liability,’ for even if it may be described as the ‘imputed responsibility or criminal negligence,’ a mental element is required at least in so far as an accused must have been aware of his position as a superior and of the reason that should have alerted him to relevant crimes of his subordinates.”²¹⁸

6.3 No Operational Command

194. Exemplary for the Third Accused's lack of operational command and control, or absence of him having functioned as a commander operationally in charge of individuals, forms the evidence of one of the Prosecution's key witnesses, TF1-334, who declares:

²¹⁶ See for these arguments, Daphna Shraga and Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, EJIL Vol. 5 1994, no. 3, at 370; for these reasons both New Zealand and Belgium in their submissions to the Secretary-General of the U.N. expressed opposition to including membership in criminal organization as an offence under the Statute.

²¹⁷ Cassese, *International Criminal Law*, 2003, at 209.

²¹⁸ See *Prosecutor v. Oric*, ICTY Judgment, 30 June 2006, IT-03-68, para. 318.

Q. Mr Witness, it is a simple question. Was he ever in overall command? I did not ask you for his position.

A. He was not the overall commander.²¹⁹

Moreover, witness TF1-045 indicates that Five-Five was not one of the group of "[t]he major people who were commanders (...)."²²⁰

195. Essential for command responsibility is proof of "command authority," meaning the authority to command forces. In *Prosecutor v. Halilovic*, the ICTY acquitted the accused Sefer Halilovic, a former general and supreme commander of the army of Bosnia and Herzegovina (ABiH) which accused was charged with command responsibility for murder (Articles 3 and 7(3) ICTY -- Statute). This case concerned murders allegedly committed during military operations conducted by the ABiH. The following two conclusions of this ICTY judgment draw attention:

- (i) Notwithstanding the finding that it was established that many of the murders alleged in the indictment had been committed by soldiers of the ABiH, the court held that the prosecution had failed to prove that the accused had effective control over these troops.²²¹
- (ii) The Trial Chamber held that the accused Halilovic was the team leader of an inspection team and was (therefore) not entrusted with command authority.²²² The ICTY established that, instead, the duties of Halilovic were limited to coordinating and monitoring functions in the areas of responsibility of the ABiH 4th and 6th Corps, the corps that carried out military operations in the specific areas.²²³

196. Projected on the case against the Third Accused, the Prosecution evidence suggests that the Third Accused would have acted as a G-5 or Chief of Staff, both clearly functions and positions without command authority. As will be argued below, no conclusive evidence has been presented that the Third Accused was commanding units or forces during the combat operations which are alleged to have had happened in the period of the indictment. Yet, effective command and control encompasses operational command. Command must entail the exercise of real "powers of command," reflected

²¹⁹ Transcript 16 June 2005, p.4.

²²⁰ TF1-045, Transcript 21 July 2005, p. 24.

²²¹ *Prosecutor v. Halilovic*, ICTY Judgment, 16 November 2005, IT-01-48-T, paras. 747, 751.

²²² *Prosecutor v. Halilovic*, ICTY Judgment, 16 November 2005, IT-01-48-T, paras. 752.

²²³ *Prosecutor v. Halilovic*, ICTY Judgment, 16 November 2005, IT-01-48-T, paras. 735-742.

by the “actual possession (...) of powers of control”²²⁴ over the acts of others. Thus, effective control “is the material ability to prevent and punish the commission of offences.”²²⁵ In *Prosecutor v. Bagalishema*,²²⁶ the Trial Chamber stated that “the decisive criterion in determining who is a superior is his or her ability, as demonstrated by duties and competence, to effectively control his or her subordinates.”²²⁷ Accordingly, *de facto* control refers to the right of superiors to exert control over subordinates.²²⁸

6.4 Absence of Superior Responsibility Third Accused

197. The Prosecution case failed to prove beyond reasonable doubt superior responsibility on part of the Third Accused. The following evidence supports this conclusion.
198. Witness TRC-01 states that he knew that SAJ Musa was a senior commander, and that the First Accused was a commander in the jungle. He does not have knowledge about command positions of the Second and Third Accused.²²⁹
199. The exact position of the Third Accused remains unclear throughout the evidence, mainly because of a lack of clear command structure. Whilst at times, as set out in, some witnesses indicate that Kanu’s position had been that of a G5, whilst other witnesses do not support this contention. Those other witnesses, mainly TF1-334, indicated that his position was that of a chief of staff.
200. A G5 is a staff position (not an operational function), responsible for communication between the military and civilians. This position is incompatible with the position of chief of staff, described by Colonel Iron as “the chief of the staff officers who support the commander. He is responsible for the management of their output of all their work, he is (...) another close advisor to the commander in chief, and is really responsible for running and implementing the commander in chief’s decisions. This is typical

²²⁴ *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, February 20, 2001, IT-96-21, para. 370.

²²⁵ *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, February 20, 2001, IT-96-21, para. 378.

²²⁶ *Prosecutor v. Ignace Bagalishema*, ICTR Judgment, 7 June 2001, ICTR-95-1A-T.

²²⁷ *Prosecutor v. Ignace Bagalishema*, ICTR Judgment 7 June 2001, ICTR-95-1A-T, para. 39.

²²⁸ See I. Bantekas, *The Contemporary Law of Superior Responsibility*, AJIL Vol.93:573, 1999, at 577.

²²⁹ TRC-01, Transcript 16 October 2006, p.105-106.

across all armies (...).²³⁰ In any case, whichever role Kanu allegedly played, he did not act in a position of command, and thus was not in a position to exert superior responsibility.

201. A G-5 is thus not a function in the command line. Also, in the diagrams of Colonel Iron on page C-12 of his report, the third accused is not positioned within the command line (see also page D3, definition of Chief of Staff). Accordingly, no superior responsibility can be vested.²³¹ Also the testimony of the defence military expert major-general Prins is supportive of this view. At the trial this expert concluded that:

Q. General, you have also -- did you encounter in the transcripts you've read the term "G5"?

A. Yes, I certainly did.

Q. And can you please tell the Court whether the terminology, G5, has any bearing, in your professional opinion, as to the five criteria you mentioned?

A. Only the criteria that G5, or J5, it's a matter of wording, is a function that is established in a staff. Now G5 or J5 is established in a joint headquarters but when I was commandant of the marine corps I had a J5 because I had a general staff but again, that is wording, so yes, indeed, if you then look at the criteria I described, and you ask me point blank the question:

Did you see J5 somewhere in the transcripts, or in the study by Colonel Iron? The answer is yes.

Q. Suppose that you have a G5 in an organisation irrespective whether it's regular or irregular, leave apart that discussion, you have a G5, is that, in your opinion, sufficient to speak about staff structure or joint staff structure?

A. Absolutely not. Of course, for -- if -- for a staff structure, or a joint staff structure, you need more than a G5. You need a G1, a 2, a 3, a 4, a 5 and after that, as I indicated relating to NATO, you know, you have -- you may have a G8 and not a G7. For example, you may not have a G9 which relates to civil military co-operation. If you operate in Iraq and you want to rebuild the country you need a G9 who does civil military co-operation with the local population, but if that is not one of your missions you may not have a G9, so back to your question. If you just say there is a G5 it doesn't tell me much.

Q. General, the conclusions you've just put before the Court, do they change, in your view, when we speak about the situation when the AFRC was on the advance to Freetown?

A. It should not have a relation with your operations, as such. You are still relating to staff structure. You do have a staff structure or you don't.²³¹

202. In conclusion, in the absence of the position of a G-5 within the operational command billet, no superior responsibility can be vested.

²³⁰ Colonel Iron, Transcript 12 October 2005, p. 59.

²³¹ See Transcript Major-General Prins, 19 October 2006, page 22-23.

203. Some of the Prosecution witnesses testify to the fact that Kanu was a 'leader' or a 'big man.' The Defence holds that such vague and unsubstantiated assertions can not serve in support of the allegation that the Third Accused filled a position of superior responsibility. Some examples of such evidence are presented below.
204. Witness TF1-282 indicates that a rebel told her that "Five-Five was a big man." When asked whether she could tell the circumstances under which the rebel told her that Five-Five was a big man, she said "At one time he told me that Five-Five said they were to go and jah-jah." This is the only reason she provides for her knowledge that Five-Five was allegedly "a big man."²³²
205. Witness TF1-227 indicates that Five-Five was the commander at Benguema.²³³ However, when they moved to Blama from end of January 1999 onwards, the witness states he did not see Five-Five giving any command.
- Q. (...) Did you see him give any command at Blama?
A. I did not see him giving any command.²³⁴
206. This witness has not indicated how it was possible that whilst in Benguema Five-Five was the overall commander, while traveling to the next village, he was not in a position to give command anymore.
207. Witness TF1-158 testifies that in Karina SAJ Musa, Gullit, Five-Five and O-Five were "the leaders." The basis for his knowledge is that "one boy" who made an introduction, told witness so.²³⁵ The Defence respectfully submits that such testimony of hearsay that the Third Accused was one of the 'leaders,' cannot lead to the conclusion that the Third Accused was in a position of superior responsibility.
208. Witness TF1-094 testifies that the Third Accused "used to command everybody."²³⁶ And when asked: "Let me put it another way. Was he always close to where you were walking?" this witness answers "Well, he used to command everybody." And when asked more specifically: "And do you mean the captured men and women?" she

²³² TF1-282, Transcript 13 April 2005, p. 21.

²³³ TF1-227, Transcript 11 April 2005, p. 19.

²³⁴ TF1-227, Transcript 11 April 2005, p. 77.

²³⁵ TF1-158, Transcript 26 July 2005, p. 31-32.

²³⁶ TF1-094, Transcript 14 July 2005, p. 3.

answers: "Both sides because he was a big man."²³⁷ The Defence submits that such evidence referring to "a big man" cannot support the allegation that the Third Accused was in a position of superior responsibility.

209. Assessing the evidence of these witnesses, TF1-282, TF1-227, TF1-158 and TF1-094, it cannot be said that their interpretation of the situation could lead to a determination of alleged superior responsibility of the part of the Third Accused.

210. Witness TF1-167's story about the last part of the march to Freetown in 1999 is indicative of the role the Third Accused played in the alleged so-called command structure. At Orugu village, Western Area, a meeting was called and chaired by Alex Tamba Brima, "to put in place on our move to Freetown."²³⁸

Q. Why did Santigie Kanu remind the battalion commanders of the orders?

A. Because he was very close to the commander of the whole troops which was Alex Tamba Brima.²³⁹

211. This quote is indicative of the Third Accused's position, he was able to communicate to the army personnel "[b]ecause he was very close to" Alex Tamba Brima.²⁴⁰ The Defence contends that he did not have any command position of his own within the any of the SLA structures.

212. Insider Prosecution witness Gibril Massaquoi provides evidence for the fact that the objective of the Third Accused was mere political, and that any issues relating to other objectives than political, were not relevant to him. He provides the following evidence:

Q. You said that Five-Five was in the house?

A. Yes.

Q. Did you see him?

A. Yeah, we saw him later. He came to the parlour, we all sat and discussed.

Q. Who sat and discussed?

A. Myself, Steve Bio, Five-Five.

Q. What was discussed?

²³⁷ TF1-094, Transcript 14 July 2005, p. 3.

²³⁸ TF1-167, Transcript 16 September 2005, p. 17.

²³⁹ TF1-167, Transcript 16 September 2005, p. 17.

²⁴⁰ TF1-167, Transcript 16 September 2005, p. 17. This same witness states:

Q. Was there anyone amongst the commanders to whom he was particularly close?

A. Yes, Santigie Kanu, aka Five-Five, was very close to Alex Tamba Brima.

A. The discussion was basically on to release these nuns and the bishop as they were religious people, they have nothing in the politics of Sierra Leone.²⁴¹

213. When confronted with his earlier statements, witness TF1-045 declares the following in his testimony:

Q. Now, why is it then that your interview in January 2003 did not mention the names Five-Five and Bazy as belonging to those individuals you had an opportunity to know?

A. Yes, sir. But during that time, when I say I knew most of them, I was not concerned about. The major people who were commanders, during that time, on top, superior to these people, those were the only people I stated during that time. But you know as questions were going on, that was -- I included their names as how I knew them because we just met, but this latter part, I came back and what I saw and what I remembered I place it -- I place it on the paper. So if I say so, I say that is what I saw.²⁴²

214. This Prosecution witness therefore indicates that Five-Five, whom he had not mentioned in his interview in January, did not belong to this group of "major people who were commanders (...) on top, superior to these people."²⁴³

215. Furthermore, witness DBK-113 gave the following evidence in court:

Q. Thank you, Mr Witness. Mr Witness, do you know whether, at that time, at Colonel Eddie Town, the third accused, Santigie Kanu, had any military position, or operational position in Colonel Eddie Town?

A. No.

Q. Thank you. Why do you say that?

A. Because I have never seen him. Like, anybody who had a position, they were active. So the group would have known that this individual had a position.²⁴⁴

216. Witness 227 indicates that Five-Five was the commander at Benguema.²⁴⁵ However, when they moved to Blama from end of January 1999 onwards, the witness states he did not see Five-Five giving any command.

Q. (...) Did you see him give any command at Blama?

A. I did not see him giving any command.²⁴⁶

217. This witness has not indicated how it would be possible that whilst in Benguema Five-Five was the commander, while traveling to the next village, he was not in a position to give command anymore. The Defence respectfully submits that, if Kanu had been

²⁴¹ TF1-046, Transcript 10 October 2005, p. 19.
²⁴² TF1-045, Transcript 21 July 2005, p. 24.
²⁴³ TF1-045, Transcript 21 July 2005, p. 24.
²⁴⁴ Transcript 13 October 2005, p.29.
²⁴⁵ TF1-227, Transcript 11 April 2005, p. 19.
²⁴⁶ TF1-227, Transcript 11 April 2005, p. 77.

in a position of command at Benguema, his position would not have suddenly changed in Blama, and that the perception of this witness is not objective, and should thus not be taken into account in assessing alleged superior responsibility of the Third Accused.

218. In conclusion, the Defence submits that for this reason no conviction can be entered on the basis of superior responsibility for the Third Accused as set forth in the Indictment.

6.5 Absence of Effective Command and Control

Absence of 'Material Ability'

219. The indictment asserts, as mentioned, that the Third Accused exercised (effective) authority, command and control over "all subordinate members of the AFRC, Junta and AFRC/RUF forces."²⁴⁷

220. In the first place, no evidence has been presented that Mr. Kanu was in command and control of "all subordinate members of the AFRC."²⁴⁸ Notably, the SLA split into several factions after their pulling out from Freetown in February 1998, with different groups under command of different commanders. Therefore, only for this reason the assertion in paragraph 31 of the Indictment cannot be upheld.

221. In the second place, on the basis of recent case law of the ICTY, the requisite element of 'effective command and control' cannot be proven on part of the Third Accused. The findings of the Appeals Chamber in the *Celebici* case confirm this assertion: "Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts."

²⁴⁹ To this effect, Prosecution witness Junior Johnson testified that the position of the

²⁴⁷ See paragraph 31 of the Indictment.

²⁴⁸ See paragraph 31 of the Indictment (emphasis added).

²⁴⁹ *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, 20 February 2001, IT-96-21 para. 197.

Third Accused was mainly characterized by the fact that he was close to Alex Tamba Brima,²⁵⁰ i.e. a factual position rather than any rank or military appointment.

222. In the third place, one should observe that the mere alleged position of the Third Accused as an 'honourable' or his alleged involvement in the AFRC coup in May 1997, does not constitute an element for vesting superior responsibility for events which took place in the period thereafter. As to superior responsibility, what counts is the "material ability" of the particular accused to endorse the obligations as a commander, such as the ability to prevent and punish the commission of crimes by subordinates.²⁵¹ In the *Celebici* case, the Appeals Chamber of the ICTY did not accept the notion that the element of "effective control" can be met on the basis of proof of the Accused having "substantial influence" alone.²⁵²
223. In specific, the ICTY Appeals Chamber in the *Celebici* case held in paragraph 266 thereto: "It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed."²⁵³
224. Projected on the case of the Third Accused it can be observed that any potential inference from the Prosecution evidence that the Third Accused may have had a form of 'substantial influence' on the AFRC and SLA factions which fled Freetown in February 1998, is not sufficient for a conviction in this regard, i.e., proof of exercising

²⁵⁰ TF1-167, Transcript 16 September 2005, p. 17. This same witness states:

Q. Was there anyone amongst the commanders to whom he was particularly close?

A. Yes, Santigie Kanu, aka Five-Five, was very close to Alex Tamba Brima.

²⁵¹ *Prosecutor v. Delalic et al.*, ICTY Judgment, 16 November 1998, IT-96-21-T, para. 378, paras. 364-377; see also *Prosecutor v. Blaskic*, ICTY Judgment 3 March 2000, IT-95-14-T, para. 302.

²⁵² *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, 20 February 2001, Case No. IT-96-21-A, par. 266.

²⁵³ See also Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in: *International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas & William A. Schabas, eds., 2003) p. 251, footnote 66.

command responsibility. Especially in this period of time, witnesses testify to an overall lack of command. Junior Johnson's testimony reads as follows:

Q. In other words, what I am trying to put to you is that the army was still operating as an established institution, as a unit.

A. When we pulled out, it was not established as an institution, because they were chasing us out from Freetown. So, there was no military orders going on, or no military operations, until we reach Masiaka, we reach Kabala.²⁵⁴

225. And witness TF1-033 states the following, also affirming that there was no control after the 1998 pullout, and under those circumstances, it would have been impossible for the Third Accused to exert 'substantial influence' on the AFRC and S.I.A factions fleeing from Freetown:

Q. That is not what I am asking you about. I said was there any control? I am only confirming what you said this morning, that there was no control so you were able to go your own way.

A. Yes. That is the tail end of the occupation of Freetown so.

Q. There was no control?

A. Yes, by then everybody was running for his life.²⁵⁵

226. TF1-033 moreover states that in February 1998, there was "mob justice" in Freetown, where the AFRC was violently pushed out of Freetown.

Q. Okay, thank you. Mr Witness, in February 1998, you said you escaped from Freetown because there was mob justice in Freetown; is that so?

A. Yes.

Q. What do you describe as mob justice?

A. Lynching.

Q. By whom?

A. By opponents' group.

Q. Who are you referring to as opponent group?

A. In this context, I am referring to pro-SLPP supporters by that time. They branded us, who were involved in rallies denouncing a military intervention to the AFRC issue.²⁵⁶

No Proper Disciplinary and Command Structure

227. Requisite for exercising effective command and control is the existence of:

- a. A proper disciplinary system within a force,²⁵⁷ and

²⁵⁴ TF1-167, Transcript 20 September 2005, p. 111.

²⁵⁵ TF1-033, Transcript 11 July 2005, p. 125.

²⁵⁶ TF1-033, Transcript 11 July 2005, p. 68, and see also on p. 69, where it reads as follows:

Q. No, I am talking about what you saw. You said people were lynched.

A. Yes.

Q. Did you see any other thing being done to people who were branded supporters of the --

A. They were killed, they were killed.

Q. In what manner?

A. They were hacked to death, they were burnt with tyres -- tied and burned with tyres alive.

b. The existence of a proper command structure.

The evidence adduced by the Prosecution and Defence shows that these two elements were not in place in the period February 1998 – June 1999. Accordingly, effective command and control in this sense can not be proven beyond reasonable doubt.

Absence of a Disciplinary System

228. *De facto* control requires the existence of a goal-directed hierarchy, coupled with a general awareness of a chain of command. Also, there must be a widely accepted exercise of issuing and receiving orders, as well as an expectation that insubordination will trigger disciplinary reaction. This entails a mutual expectation that orders will be obeyed. Moreover, the superior must possess effective means enabling him to suppress an illegal act and punish the perpetrators.²⁵⁸ Within guerrilla warfare a disciplinary system and command and control do not automatically follow from the nature of this kind of combat. The problematic nature of these requirements within irregular forces is reinforced now that “effective control” demands a certain degree and quality of control. Thus, a purely *de facto* position, without the specific traits of *de jure* command, will remain at the level of a powerful influence over an unstructured, intimidating and oppressive force. Hence, in order to distinguish superiors in the meaning of Article 6(3) from a mere bully or agitator, *de facto* authority must present the traits of *de jure* control.²⁵⁹ The findings of the Appeals Chamber in *Celibici* confirm this assertion.

229. In the case against the Third Accused, the Prosecution case failed to prove beyond reasonable doubt that a “strict military disciplinary system, based on the Provost Marshall who would investigate wrongdoing and be responsible for punishment of malefactors”²⁶⁰ would have existed within the S.I.A factions from February 1998 onwards.

230. Notably, Prosecution witness TFI-167 testified on 20 September 2005:

²⁵⁷ See also the third requirement for superior responsibility.

²⁵⁸ See Alexander Zahar, Command Responsibility of Civilian Superiors for Genocide, in 14 *Leiden Journal of International Law* 591-616 (2001), at 598.

²⁵⁹ See Alexander Zahar, Command Responsibility of Civilian Superiors for Genocide, in 14 *Leiden Journal of International Law* 591-616 (2001), at 612.

²⁶⁰ This is assumed by Colonel Iron in his expert report of 5 August 2005, page E-3.

On arrival at Gberibana there were not laws that were placed. No laws were given by the senior commander. There were no laws that were given to fighters at Gberibana like us, Mansofina to Camp Rosos.²⁶¹

231. Witness TF1-167 testified that when the SLA faction left Kono and moved to Mansofina, he was "promoted" to captain and assumed a position as "provost marshal."²⁶² However, this individual did not have any form of (military) training to seriously fulfil such a position.²⁶³ In the absence of conclusive evidence for the presence of a provost marshal system within the AFRC faction or an equivalent thereof, no effective command and control could reasonably be exercised.

232. As clarified in the report of Major-General Prins, the absence of a disciplinary system also emerged from lack of any structural military training both within the other ranks and officer ranks. Discipline has to be instilled in military training from the outset and soldiers need to be trained and lectured on all aspects regarding discipline and rules of combat. Moreover, officers and non-commissioned officers need to lead by example and set the example to act themselves in a disciplined manner. Lastly, the organization as such needs to be set up in a way that discipline can be maintained and enforced.²⁶⁴ The Prosecution case failed to prove all these aspects beyond a reasonable doubt. As to the element of discipline within the other ranks, [REDACTED] witness TF1-167 testified about the use of drugs while in the jungle.²⁶⁵ These circumstances clearly are indicative for the lack of a proper discipline within the specific timeframe.

233. Furthermore, the expert report of Mr. Gbla provides an overview of the lack of proper training and discipline within the Sierra Leonean army until the AFRC coup in May 1997. For example, Dr Gbla describes the inheritance of "a military that was underpaid, indisciplined, demoralised and poorly trained"²⁶⁶, where after the President Momoh embarked on "a crash military recruitment drive advocating for vigilantes to join the force thus sidelining military recruitment standards and procedures."²⁶⁷ As the

²⁶¹ Statement witness TF1-167, Transcript 20 September 2005, p. 59.

²⁶² Witness TF1-167, Transcript 15 September 2005, p. 6.

²⁶³ Witness TF1-167, Transcript 15 September 2005, p. 6.

²⁶⁴ See report major-general Prins p. 57, para. 114, and his testimony on 17 and 19 October 2006.

²⁶⁵ Transcripts 19 September 2005, p. 36 [REDACTED]

²⁶⁶ Expert Report Mr. Gbla, Exhibit D37, par.35.

²⁶⁷ Expert Report Mr. Gbla, Exhibit D37, par.35.

Prosecution did not contest the contents of the report of Mr. Osman Gbla, the lack of a disciplinary system can assumed to be an agreed fact.

Absence of a Proper Command Structure and Its Impact on Superior Responsibility

234. Both the Prosecution and Defence military expert concluded that the AFRC faction qualified as an irregular force or guerrilla force. In specific, colonel Iron admitted this during his testimony at the trial on 13 October 2005, saying that the AFRC faction is to be characterized as a non-regular army which does not have government authority.²⁶⁸ One of the features of a paramilitary and irregular militia force is that it most often lack formal military chains of command.

235. No conclusive proof has been adduced by the Prosecution for the existence of a formal military chain of command requisite for the functioning of an army. In particular, it has not been refuted that within the SLA faction(s) at the utmost only one or two level(s) of span of command have existed. Reference can be made to, *inter alia*:

- i. The report of major-general Prins on pages 38-42²⁶⁹ and his corresponding testimony at trial.²⁷⁰ In specific major-general Prins concludes on page 38 of his report that: "In every military organization it is therefore essential that sub-units are established within the battalions. A battalion is further broken down into companies and platoons with subordinate (junior) commanders at every level in order to limit the *span of command*. For example, a battalion consisting of 700 men may have 4 companies of 140 men each and a Headquarters and Logistics element. The companies are further broken down into 3 manoeuvre troops (platoon) of 35 men each, 1 manoeuvre support troop of 20 men and a company staff. The manoeuvre troop is then further broken down into manoeuvre sections of 8 men. All western armies know similar breakdowns of their organization. Witness TF1-334 stated that the battalions were different in size. "Well, some battalions had 80, some had 90, some even had hundred." In a later statement witness TF1-334 was questioned on the size of a battalion and stated: "well, a

²⁶⁸ Transcripts 13 October 2005, p. 35.

²⁶⁹ Exhibit D36.

²⁷⁰ Transcripts of 17, 19, 20 and 24 October 2006.

battalion could have 100 men. 150 could make a battalion. 150 could make a battalion."²⁷¹

- ii. The expert report by colonel Iron, pages C-12 (Figure 8, which only refers to battalions) and D-3 (likewise merely speaking about battalions).
- iii. The fact that the evidence produced by the Prosecution did not establish a further breakdown of these battalions into the requisite levels, such as companies, platoons and squad size units. Neither witness TF1-334 nor witness TF1-167 referred to such a breakdown of military levels, requisite for a proper and an effective chain of command and span of command. In the absence of a three or four level span of command within the SLA(s) faction, no proper chain of command existed.²⁷²
- iv. In addition to the absence of a three or four level span of command within the AFRC faction, the alleged battalion commanders did not receive any (staff) training necessary to fulfil the function of an officer. Although some of the SLAs who testified indicated that they received a form of basic military training, none of them testified that they received specific training to fulfil the rank of an officer. Yet, the AFRC faction was allegedly led by "battalion commanders." Major-general Prins in his report concludes on page 61 (para 125) inter alia that "promotions were handed out at random and were not based on a proper selection, training or qualification."
- v. The absence of a proper command structure also arises from the following. Essential for a military hierarchy and command structure is the existence of a staff structure.²⁷³ No evidence has been adduced for proof of such a structure, let alone proof that the SLA-faction(s) was composed of qualified staff officers to fulfil fundamental staff functions.²⁷⁴

²⁷¹ See military expert report of major-general W.A.J. Prins, Exhibit D36, p.38.

²⁷² See military expert report major-general W.A.J. Prins, Exhibit D36, p.40, para. 69.

²⁷³ See military expert report major-general W.A.J. Prins, Exhibit D36, p.41, para. 71.

²⁷⁴ See military expert report major-general W.A.J. Prins, Exhibit D36, p.49, para. 89.

- vi. Even the Prosecution expert colonel Iron conceded during his testimony on the 13th October 2005 that "I don't know the precise number, but I know it was a small handful compared to the majority and that the AFRC coup essentially was a junior ranks coup and most of the senior ranks were excluded from it."²⁷⁵ His evidence shows that²⁷⁶:

The trained officers that were available were of a very junior rank (Lieutenant). As concluded before, SAJ Musa as the overall commander made a very simple structure of "battalion commanders" as his subordinates. These battalions were under command of former non-commissioned officers, or other ranks, now being "promoted" to lieutenant-colonel or colonel. For example witness TF1-167, who only had one month of military training, had apparently a startling "career." "Promoted" to sergeant in 1997, to Lieutenant, Captain, Major and Lieutenant-Colonel in 1998 and further promoted to Colonel after the attack on Freetown.

- vii. Additionally, major-general Prins' report clearly shows the lack of substantive and sufficient military knowledge and education to properly fulfil staff functions which are prerequisite for exercising effective command and control.²⁷⁷

- viii. Defence witness TRC-01, after being cross-examined by the Prosecution on the AFRC period, adduced evidence in re-examination which clearly undermines the assumption of effective command and control, when testifying to the following elements:

Your Honour, the AFRC was unable to operate as a traditional military organisation by virtue of the fact they married up with the RUF and referred to themselves as a people's army. There was no hierarchal structure respected or put in place. There were issues where those who came and married up with them wore wigs and military uniforms, and were parading in the streets of the capital.

That was no proper for regimentation and discipline. Furthermore, *there was nothing like command and control wherein proper command was managed from top to bottom.*²⁷⁸ Instead, it was other ranks giving commands to officers, which is not allowed anywhere in the world, or for any army in the world, so that was not a military organization. It was disorder.²⁷⁹

This testimony clearly supports the Defence case as to absence of effective command and control. Moreover, on another subject (albeit attached to this lack of command and control), TRC-01 testifies:

²⁷⁵ See Transcript 13 October 2005, p. 83.

²⁷⁶ See military expert report major-general W.A.J. Prins, Exhibit D36, p.42, para. 74.

²⁷⁷ See the examples derived from the evidence given in the report of General Prins, Exhibit D36, p.42-44, paras 74-78.

²⁷⁸ Emphasis added.

²⁷⁹ See Transcripts 16 October, p. 115-117.

Your honour, nothing strategical occurred during that period, unfortunately. I think things were happening more on the tactical level, not even on the operational level. As a tactical it was a small bunch and body of personnel, not in a formed and cohesive unit, operating on their own. So the issue of organising plans for operations, battle plans was not clear cut and did not manifest even in the way they operated and carried themselves along.

Who was to dish out orders, who was to take orders, those things did not exist, thereby limiting the issue of strategy, because when you say grand strategic plan, you are looking at the national interest and the core values. Now what are the core values. Their own values were survival. It was merely survival that they were working on, because they had to survive, by all means. So there was nothing like saying the values, the territorial integrity or the sovereignty of Sierra Leone are to be protected and defended at all costs or that we will have to stay here and make sure we protect here.

It was running from point A to B, you know, to stay alive. So I don't think there was anything strategic about the movement from Freetown of the AFRC.²⁸⁰

236. In conclusion, an organization merely focussing on survival on order to stay alive maybe effective in surviving and staying alive. Yet, this does not say anything about the existence of effective command and control.

237. Additionally, TRC-01 testified that in August 1997 when he was in Freetown, he observed 'resentment' within the army "due to the fact that the extra militia group was abusing and misusing their privileges, which caused destruction and carnage."²⁸¹

Importantly, in this context TRC-01 states that at that time:

there was weak command and control at the level of the leadership then. And also the lack of the terms and conditions of service document which was not updated, it brought about resentment in the minds of the personnel who were then serving in the Sierra Leone army. Those facts I was able to gather when I returned back. It created some problems.²⁸²

238. These observations reinforce the conclusion that no proper command and control existed.

239. In conclusion, no superior responsibility on part of the Third Accused can be entertained. This conclusion is supported by the reasoning of the ICTY in the *Oric* case. In its judgment, the ICTY applied a higher evidentiary threshold for superior responsibility in favour of the Accused when it concerns informed command

²⁸⁰ See Transcripts 16 October, p. 115-117.

²⁸¹ Transcripts 16 October 2006, p. 91; [REDACTED]

²⁸² Transcript 16 October 2006, p. 91-92.

structures, in holding that “Although the required knowledge is in principle the same, both for military and civil superiors, the various indications must be assessed in light of the accused’s position of command. This may, in particular, imply that the threshold required to prove knowledge of a superior exercising more informal types of authority is higher than for those operating within a highly disciplined and formalised chain of command with established reporting and monitoring systems.”²⁸³

240. The evidence adduced by both the Prosecution and Defence at the least suggests that in the instant case the AFRC faction, in the period February 1998 – January 1999, did not operate “within a highly disciplined and formalized chain of command with established reporting and monitoring systems.” As a result, no superior responsibility on part of the Third Accused can be accepted.

241. Also, the *Galic* Trial Chamber Judgment of the ICTY (of 5 December 2003) may shed light on this issue. In this case the Chamber concluded that when an accused exercises *informal* authority over the perpetrator(s), the standard of proof is higher than that applicable to an accused holding an official position of command, serving within a formal and structured system of organization.²⁸⁴ But even informal authority should meet the standard of “effective control and authority over the alleged perpetrators of the crimes” before holding an individual responsible on the basis of superior responsibility.

242. In conclusion, the Third Accused should be acquitted for criminal responsibility for the alleged crimes on the basis of superior responsibility.

6.6 Downfall SLA and Impact on Superior Responsibility

243. An analysis of the question whether effective command and control existed within the AFRC faction within the timeframe mentioned in the indictment, can not be seen without looking into the history of the SLA in terms of (mis)management in political and military aspects.

²⁸³ *Prosecutor v. Oric*, ICTY Judgment 30 June 2007, IT-03-68-T, para. 320.

²⁸⁴ *Prosecutor v. Galic*, ICTY Trial Chamber Judgment, 5 December 2003, IT-98-29, para. 174, as cited in *Prosecutor v. Brima et al.*, Kanu – Defense Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b) – filed on March 22, 2004, Case No. SCSL-2004-16-PT-39, para. 60.

244. Contrary to the Prosecution expert Colonel Iron, the Defence expert Major-General Prins conducted a detailed historical analysis of this issue on the pages 8 to 23 of his report. During his testimony before the court on 17 October 2006, he provided a further overview of his research in this regard.
245. His conclusion was unequivocally clear, namely that the history of the SLA and the People's Army from May 1997 onwards shows a disintegration of a military organization due to unprecedented political and military mismanagement. This expert also came to the conclusion, which was not refuted by any expert evidence adduced by the Prosecution, that this form of mismanagement resulted in a total neglect by the political and military leaders of the junior and other ranks.²⁸⁵
246. Furthermore, the analysis of the Defence expert shows that at the time of the coup in May 1997, there was low moral, no discipline, no training, no leadership, no hierarchy, no equipment, no organization, no welfare system for rank and file, no prospect, no military command and control, and no hope for improvement.²⁸⁶
247. In light of this organizational background, it is not comprehensible that at the time of May 1997, the AFRC was equipped with the ingredients necessary to have a proper and effective command and control in place. Accordingly, considering the fact that the AFRC while in the jungle had no training system and structured system of discipline (at the least after February 1998), these fundamental military deficiencies have considerable ramifications on the question whether an effective command and control existed within the AFRC after May 1997 till January 1999. In view of the Defence, this forms a *prima facie* basis for the absence of effective command and control which basis and presumption could be rebutted by the prosecution when conclusive evidence would have been adduced for the opposite. However, the Prosecution case failed to rebut this presumption and therefore it is fair to say that the Defence has made probable the absence of effective command and control.

6.7 Reliability Prosecution Insider Witnesses on Command Structure

²⁸⁵ See also Report General Prins, Exhibit D36, p. 22, para. 42-43.

²⁸⁶ Expert Report major-general Prins, Exhibit D36, para. 44.

248. Additionally and exemplary for the lack of proof of a command structure within the S.I.A forms the element of unreliability of the Prosecution insider witnesses testifying on this issue. The Defence submits that the evidence presented by the Prosecution insider witnesses is on crucial parts contradictory. Below some examples hereof are provided.

249. Witness TF1-167 explains in his testimony an alleged command structure in Kono:

- Q. I'm going to ask you just a little about the command structure that you have described being set up in this meeting that you attended. Firstly, was there anyone in overall command?
- A. Yes, Denis Mingo was the overall commander.
- Q. Was there anyone who was second to him?
- A. Second to him was Ibrahim Bazy Kamara. Then you have --
- Q. Pause a moment. Was he, to your knowledge, always in the position of being second to Denis Mingo whilst you were in Kono?
- A. Yes, but the last days on our pull-out from Kono, Alex Tamba Brima came from Kailahun with some reinforcement and on their arrival to Kono, when going to Mansofinia, Alex Tamba Brima was in command and Bazy was two to him.
- Q. When you say on his arrival he was in command, who was he in command of, Alex Tamba Brima, on his arrival in Kono?
- A. On his arrival at Kono, you have Denis Mingo who was the overall commander. Then next to him is Alex Tamba Brima, because he was senior than Ibrahim Bazy.
- Q. As far as you know, did Ibrahim Bazy Kamara have any other position, apart from the --
- A. Yes, he was in charge of the G4.
- Q. What do you mean by the G4?
- A. Keeping arms and ammunitions.
- Q. Now, you have said that Denis Mingo was in overall command in Kono. Do you know if there was anyone to whom he reported?
- A. Yes, Denis Mingo at that time reports straight to Sam Bockarie, aka Mosquito, at Kailahun.
- Q. How did you know that?
- A. Because there was a VHS communication set at his house and we used that VHS communication set to send messages to Kailahun.
- Q. How do you know that messages were sent to Kailahun on the VHS communication set?
- A. Because at that time I was chief security to Ibrahim Bazy. At all time when he goes to the radio communication, I go with him. So I'm always there when some messages are sent.
- Q. Do you know any other positions that were held by any others as a result of the command structure?
- A. Yes, you have the G5.
- Q. Who was that?
- A. It was Santigie Kanu, aka Five-Five, he was in charge of the civilians and abductees. Then you have the medical.
- Q. Who was that?
- A. It was Biorbo Sesay. And you have the battalion at Tombodu being commanded by Savage. You also have another battalion at Mamudo.
- Q. Pause a moment. Just repeat the name you have just mentioned. Repeat the name.

- A. You have Tombodu.
 Q. Okay, and you said there was another battalion somewhere else that you recall.
 A. The one at Tombodu was Savage commanding it.
 Q. Pause a moment. I'm just going to ask you a little about Savage. Who was he?
 A. He was an SLA soldier.
 Q. Was Savage his full name?
 A. No. I only knew that name for him.
 Q. Apart from the appointments that you have told us about, do you recall any others specifically from the command structure as a result of that meeting?
 A. You have Morris Kallon who was in charge of creating obstacles -- obstacles, to create obstacles on the road leading to Koidu Town.
 Q. Witness, you have mentioned another battalion at Mamudo.
 A. Yes, which was commanded by Salifu Mansaray, aka Tito.
 Q. Perhaps if you just spell Salifu Mansaray, aka Tito.
 A. S-A-L-I-F-U M-A-N-S-A-R-A-Y.
 Q. Can you spell Mamudo, please, for the Court?
 A. M-A-M-U-D-O.
 Q. Witness, you have mentioned a G4 and a G5. Were there other appointments in this category, the G category that you've described, that you're able to recall?
 A. You have Hassan Papa Bangura who was in charge of operations too.
 Q. Apart from a G4 and a G5, was there a G1, 2 and 3?
 A. You have FAT Sesay who was in charge of G1, administration.
 Q. It's not a name that we've had before from you. Who was FAT Sesay?
 A. FAT Sesay was an SLA officer.
 Q. Had you come across him before Kono?
 A. Yes.
 Q. Where had you come across him before?
 A. I know him even before the AFRC junta.
 Q. Was there a G2 or a G3, or didn't those positions exist?
 A. No.²⁸⁷

250. The Defence respectfully submits that the above evidence of witness TF1-167 is seemingly characterized by this witness's apparent strong desire to categorize persons into certain ranks and positions. In the first place, this witness testifies to a clear command structure, in which Savage had a clear place, and was in charge of 'the battalion' assigned to Tombodu (in the time period February until April 1998). Other available evidence suggests, however, the contrary. There was no clear evidence what exactly Savage's role was, and in no way was he linked to any SLA group. If he was linked at all, it was to Superman's RUF group who was in command in Kono District.

Q. Okay. And, Mr Witness, during the time that you were in Tombodu did, and I'm referring to the period when you were captured and taken to Tombodu by the guards who were under the command of Savage, did you know -- did you hear during this period whether Savage was taking instructions from anyone else?

A. No. They were all calling him boss. He was the boss.

(...)

Q. Thank you. Mr Witness, finally, during the period that you were in Tombodu, that you saw Savage, did you observe him using any form of communication equipment?

²⁸⁷ Witness TF1-167, Transcript 15 September 2005, p.38-43.

A. I did not see him with any communication equipment. That was my first time when they captured us, and he sentenced us.²⁸⁸

251. This latter evidence clearly indicates Savage's independence from any form of command structure. This is again evidenced by the following witness:

Q. Do you, in furtherance to that, do you also know if Savage was answerable to anyone?

A. If he used to answer? What do you mean?

Q. Was there anyone to whom Savage was reporting or to whom he was taking command or orders; do you know?

A. No. I only heard about Savage. I only heard his name. I don't know any answer.²⁸⁹

252. The following evidence indicates that Savage was somehow connected to Superman's RUF, but does, in support of the previous evidence, not indicate of him forming part of any command structure, other than that he worked under the RUF:

Q. Thank you, Mr Witness. Mr Witness, you mentioned that -- earlier, that Superman went to visit Savage?

A. Yes.

Q. Do you know who Superman was?

A. He was even -- he was even superior to Savage. Savage's boss was him.²⁹⁰

Q. Tombodu Savage was in charge of Tombodu; not so?

A. Yes.

Q. Did he take any orders from anyone?

A. He took orders from Superman.²⁹¹

Q. Did you ever find out the name of this big man that you are talking about?

A. Yes, I know his name. Later on, they showed his name.

Q. What is his name?

A. His name is Semi Saffi [as interpreted].

Q. Please say it again.

A. Savage. Savage.

(...)

Q. Yes. Apart from Wounded, did you get to know any other name?

A. Yes, I knew the name of another person.

Q. Please tell the Court that name.

A. His name is Superman. One of their big men that come from Koidu.

Q. Thank you. Apart from Superman, did you get to know any other name?

A. I knew another person's name. He was in Bendu II.²⁹²

(...)

Q. Do you know where Savage was based, during that time?

A. Yes. It was in Tombodu. He was in Tombodu.

Q. Do you know if Savage was also working under anyone?

A. Yes.

Q. Who was Savage working under?

A. Well, Savage said he was working under General Issa. That was what he said.

²⁸⁸ DAB-107, Transcript 8 September 2006, p. 69-74.

²⁸⁹ DAB-115, Transcript 4 September 2006, p. 73.

²⁹⁰ DAB-098, Transcript 4 September 2006, p. 37.

²⁹¹ TFI-167, Transcript 19 September 2005, p. 41.

²⁹² DAB-098, Transcript 4 September 2006, p. 22-23.

Q. Do you know if General Issa belonged to any group of fighters?
 A. Yes, he's in one of the groups.
 Q. What group was it?
 A. RUF.²⁹³

253. This Prosecution witness, TF1-167, examined about an alleged command structure, asserted that Savage would fall within this command structure, and that he was in charge of 'the battalion' assigned to Tombodu. This is in clear contradiction to all other evidence regarding Savage's role in this District and that this is indicative of TF1-167's overall attempt to draw a clearer picture of the structure of the groups, organizations, and individuals than reality depicted.

254. This Defence submission is again substantiated by the following. TF1-167 indicates the following:

Q. Do you know any other positions that were held by any others as a result of the command structure?
 A. Yes, you have the G5.
 Q. Who was that?
 A. It was Santigie Kanu, aka Five-Five, he was in charge of the civilians and abductees.²⁹⁴

255. During his testimony, witness TF1-167 was confronted with prior inconsistent evidence. This further strengthens the Defence submission that this witness bent his evidence in such a way that it matched the Prosecution theory. This is illustrated by his following testimony:

Q. At Mansofinia you told this Honourable Court that the G5 commander was Santigie Kanu. That was your evidence-in-chief to this Court.
 A. Yes.
 Q. Mr Witness, do you recall giving statements to the investigators on 6th May?
 (...)
 Q. I put to it you that in fact on 6 May 2003 - that was two years ago - you told the investigators that in fact at Mansofinia the G5 commander was Pikin and not Santigie Kanu. Was one Pikin.
 A. No.
 Q. That was what you told them.
 MR KOROMA: Your Honour, with your leave I will refer the witness to statement made to investigators. On 6 May 2003 at page 23, page 22 and 23.
 MS PACK: That is 10434, Your Honour.
 MR KOROMA: Very grateful.
 PRESIDING JUDGE: Thank you.
 MR KOROMA: Your Honour, I will start to read from lines 32 page 22 on the said statement.
 Q.

²⁹³ Witness DAB-113, Transcript 7 September 2006, p. 118.

²⁹⁴ Witness TF1-167, Transcript 15 September 2005, p. 39-40.

"Q. Did you have a G5?

"A. G5? Yes, he had to take care of the families, responsibilities, civilian families, those who are going to carry loads and everything. Yes, we had a G5.

"Q. Who was he?

"A. It was this guy -- I don't know his real name. I don't know his real name but they call him Pikin. Pikin. And his deputy was a guy they called Six Fingers. He had six fingers. He is at Pademba Road. He was his deputy."

Is that not what you told the investigators in that statement?

A. I said so in one of my statements, but they were on two different places. I guess where you are reading from, if you continue reading you will find out that that is when all the honourables have been arrested at Gberibana and their positions were given to people like Terminator Pikin. At Mansofinia, G5 commander was Five-Five.

Q. Right. I will put it to you, Mr Witness, that in fact this was at Mansofinia and not those places Gberibana you are referring to. This was specifically at Mansofinia.²⁹⁵

256. Contrary to witness TF1-167's evidence, witness TF1-334 describes that in Mansofinia, Koinadugu, Santigie Kanu was Chief of Staff,²⁹⁶ speaking of "[t]he chief of staff, Five-Five."²⁹⁷ Witness TF1-334 is the only witness who uses this terminology "chief of staff." The conclusion is justified that the alleged structure of command was made up by witness TF1-334, who, similarly to witness TF1-167 but with contrary evidence, probably tried to make his evidence match the Prosecution's theory on command structure. Besides Kanu's alleged role as so-called 'chief of staff', witness TF1-334 said the Third Accused was also in charge of the women.²⁹⁸

²⁹⁵ TF1-167, Transcript 20 September 2005, p. 6-8.

²⁹⁶ TF1-334 indicates the following about the term 'chief of staff':

Q. Mr Witness, you have told us of chief of staff. Have you ever heard the words chief of army staff?

A. Yes, My Lord.

Q. Have you also ever heard the words chief of defence staff?

A. Yes, My Lord.

Q. As a member of the Sierra Leone Army what is the head of the army called?

A. The chief of defence staff.

Q. And what position does the chief of army staff hold?

A. Well, he is the commander of the army.

Q. So he is the boss, the chief of army staff?

A. The chief of defence staff.

Q. Is the boss?

A. Yes, My Lord. Apart from the President who is the commander in chief.

Q. Is there a chief of staff in the Sierra Leone Army?

A. Yes, My Lord.

Q. And what is his position?

A. He is the -- he is operate directly with the military.

Q. I am putting it to you that there is no such position as chief of staff?

(...)

Q. I am asking you about just chief of staff. Not defence staff or army staff, just chief of staff.

A. Chief of army staff; we cut it short. It's called chief of staff but it should chief of -- COAS, chief of army staff. (See Transcript 16 June 2005, p. 20-21).

²⁹⁷ TF1-334, Transcript 23 May 2005, p. 7; Transcript 20 May 2005, p. 92; and Transcript 23 May 2005, p. 27.

²⁹⁸ TF1-334, Transcript 16 June 2005, p. 59-60, where this witness states:

Q. Mr Witness, coming back to Santigie Horbor Kanu, apart from being chief of staff, being supervisor and you said third in command, was he ever given any other role to play whilst you were all together?

A. Yes, My Lord.

257. These discrepancies in the evidence in this regard, is also reinforced by another witness testimony, describing the G5 (albeit within an RUF structure) as follows:

Q. Witness, what is the G5 office in Kailahun?

A. G5 office was responsible for investigating civilians wherever they were. That was the place they called the G5 office.²⁹⁹

A. Yes, sir. He was the G5 responsible for the civilian population there.³⁰⁰

258. It is to be concluded that this aspect of TF1-167's testimony is unreliable, and influenced by his strong wish to categorize people's positions and command structures in a clearer way than was actually the case.

259. Colonel Iron also describes the G5 position, but presents it in a completely different way. He states about the G5 position that "he is not personally in command."³⁰¹ This same witness indicates that the SLA groups (referred to by this witness as AFRC) were divided in separate groups and "some of them are individual commanders in their own right."³⁰²

260. Again, witness Colonel Iron explains that "within the AFRC, if I can continue the question, I found no single individual who was responsible and termed the G5."³⁰³ However, this witness indicates, in corroboration with witness TF1-334's evidence, that there was a chief of staff in the army. [REDACTED]

Q. What was that role?

A. He was in charge of the women.

Q. Was that role called by any name?

A. Well, at that time all I knew was that he was in charge of the women. I did not know the name that was given to that, but he was in charge of the women. If there was any complaint, he was the one who would take action.

Q. Mr Witness, you are saying now that this man, this Santigie Borbor Kanu, was at one and the same time the person responsible for the entire troops as chief of staff, and at the same time responsible for the women?

A. Yes, My Lord, as chief of staff.

²⁹⁹ TF1-113, Transcript 18 July 2005, p. 84-85.

³⁰⁰ TF1-113, Transcript 14 July 2005, p.130.

³⁰¹ Colonel Iron, Transcript 13 October 2005, p. 104-105.

³⁰² Colonel Iron, Transcript 13 October 2005, p. 104.

³⁰³ [REDACTED]

263. The testimony of witness TF1-227 is surrounded by miscommunication between the Prosecution and its own witness, and consequently between the Defence and the Prosecution witness. The evidence relates to Braima/Blama, where Kanu, according to witness TF1-227 was allegedly in charge of the particular SLA group.³⁰⁸ The evidence of this witness is unclear, evidenced by the fact that throughout the testimony the actual place remains unclear. The next quote is illustrative for this kind of testimony:

Q. Did anything happen to the civilians in Blama?
A. Yes, one incident happened at Braima.³⁰⁹

264. Additionally, later on in the transcript after the testimony-in-chief was finalized, that the miscommunication finally became clear in cross-examination:

Q. Do you know that Blama was a Kamajor controlled area?
A. The town -- the name of that particular is Braima, it is not Blama at Kenema. I want to be very specific, it is Braima, B- R-A-I-M-A. So I mean you can correct it.
Q. So we are not talking about Blama at all?
A. At Kenema, it's not the Blama at Kenema.
Q. You are talking about Braima.
A. Braima. Do you know what district of Braima is? Well, from Newton the district that is in the -- put around Kuya Wula area.
Q. Did you have to cross a bridge to get there?
A. Yes, you have to cross a bridge to get at that place.
Q. Was it an old metal bridge, iron bridge?
A. It is the main road, now it's been modernised by the Roads Authority. You use the main Masiaka Old Road, the new road you can go to Braima. It is just at the main Masiaka highway.
Q. I am asking about the bridge. Is it an old metal bridge?
A. No, it is modern bridge. It is not the old metal bridge.
Q. You have not crossed the old metal bridge?
A. Mmm.
Q. But you do know the old metal bridge?
A. Yes, I know from the old road.³¹⁰

265. The Defence respectfully contends that such testimony cannot be admitted into evidence of which the Prosecution did not even know the district where its own witness came from. The evidence-in-chief, and large part of the cross-examination assumed, based on the line of questioning by the Prosecution, that this witness came from Blama, which is in another district than Braima, where the witness actually came from and testified about. This testimony is full of miscommunications and vagueness, and should thus not be admitted as evidence.

³⁰⁸ TF1-227, Transcript 11 April 2005, p. 25.

³⁰⁹ TF1-227, Transcript 11 April 2005, p. 26.

³¹⁰ TF1-227, Transcript 11 April 2005, p. 73-74.

266. The Defence holds that the evidence of these Prosecution insider witnesses should have no weight in the assessment of the Third Accused's alleged criminal responsibility. In the alternative, the Defence contends that the evidentiary sections set out above should be excluded from the weighing process in determining the Third Accused's criminal responsibility.

6.8 Kanu's Protective Role Concerning Women and Children: No Superior Responsibility

267. During a certain part of his stay in the jungle (since his arrival in Koinadugu District in the beginning of 1998)³¹¹, the evidence suggests that the Third Accused was responsible for protecting and taking care of the civilians, more specifically the women, who joined the soldiers for all sort of reasons, being a family member or looking for a safe haven in the jungle. These women were well protected³¹² and could consult the Third Accused on certain problems and welfare issues.³¹³ This alleged role of the Third Accused did not in any way involve a (operational) command position over any operation by the SLA soldiers, including no command over the abduction and enslavement of civilians.³¹⁴

268. DSK-113 described the assignment by SAJ Musa as to the alleged role of the Third Accused³¹⁵:

A. We were in a village. Well, I do not know the name of the village. Then we had known that SAJ Musa ordered some troops to attack Masiaka. But when the troops had gone, SAJ Musa came to the headquarters where we were. He came there. I was there some time when SAJ Musa came to the headquarter and told Five-Five that, "You, when I'm sending your colleagues, you are just after women. When women are quarrelling, you are there to settle that. That's your duties. You should settle their problems. You and the women should be together."

³¹¹ TF1-334 gives a good indication when describing the time frame of the protective role of the Third Accused (Transcript 16 June 2005, p.62-63):

Q. Mr Witness, do you know when Santigie Borbor Kanu was appointed to look after the women?
A. Yes, sir, My Lord.

Q. When was it?

A. Well, it was during the time when we were at Mansofinia up to the time that we came to Freetown and he was still in charge of them.

Q. Was he still in charge of the women whilst you were retreating from Freetown?

A. Yes, My Lord.

³¹² See for example TF1-334, Transcript 14 June 2005, p.116 ("These civilians were well protected").

³¹³ Witness TF1-334, Transcript 15 June 2005, p.15-17.

³¹⁴ See for example TF1-334, Transcript 14 June 2005, p.119, where it was Gullit who gave the order for the abduction of civilians after the retreat of the soldiers from Freetown in January 1999.

³¹⁵ Transcript 13 October 2005, p.35.

269. On the contrary, according to this evidence the Third Accused was continuously with the group of families to protect them³¹⁶, and therefore not in position to join or command any operation. The testimony of TF1-334 that the Third Accused went with the first group of soldiers, the so-called advance group, from Koinadugu District to create a base at Colonel Eddie Town (Camp Rosos)³¹⁷ is therefore implausible, as the Third Accused, as protector of especially the women, joined the later movement of another group of soldiers and especially family members to join the group that already created Camp Rosos.³¹⁸

270. The allegation made by witness TF-334 that the abducted civilians were called "family",³¹⁹ thus implying that all the families that moved along with the SLAs were abducted, ignores the fact that the soldiers indeed took their families with them in the jungle.³²⁰ The fact that TF1-167 speaks of both abductees and civilians in his testimony is another proof of the fact that the civilians were not abducted, but joined the SLAs voluntarily or were family members.³²¹ Moreover, the soldiers had to take their families to protect them from reprisals after the fall of the AFRC regime in February 1998. Defence witness DBK-113, himself a civilian that voluntarily joined the SLAs to save his life, stated in this regard:³²²

When I said that some were soldiers' affiliates because from the initial stage, when soldiers had been pulling out from Freetown most, because of the harassment which they had been receiving, and they had been burning soldiers, some were afraid to leave their children or their nephews, and nieces, so they went with them. So those kinds of people were in that group.

271. Even the evidence given by TF1-334, although overly inadequate in blaming the three Accused for almost all crimes that happened within the group of soldiers TF1-334 moved along with, and unjustly ascribing the Third Accused a senior military command position, contains indications of this specific role the Third Accused played

³¹⁶ See for example the testimony of witness TF1-094, Transcript 13 July 2005, p.56-57.

³¹⁷ Transcript 23 May 2005.

³¹⁸ Witness DBK-113, Transcript 13 October 2006, p.22-25.

³¹⁹ Transcript 14 June 2005, p.115-116.

³²⁰ See for example DAB-142, Transcript 19 September 2006, p.28-29; DBK-113, Transcript 13 October 2006, p.19-20.

³²¹ Transcript 15 September 2005, p.40

³²² Transcript 25 October 2006, p.19. See also p.20 of this transcript wherein DBK-113 explains that the civilians moved together during a certain time period, and that soldiers often came to check upon their wives and children.

within SAJ Musa's group. For example, when describing the role of the Third Accused at Camp Rosos, TF1-334 gives the following explanation³²³:

A. As I said earlier, these women, Five-Five was in total control of them.

Q. Pause. How do you know that Five-Five was in total control of them?

A. After the Karina operation, Five-Five called the commanders and that everyone should sign for these women.

Q. Pause. How do you know that Five-Five was in total control of these women at Rosos?

A. Well, in my presence, anyone that had a problem with her husband or the husband a problem with the wife, he goes direct to Five-Five to report. From there, Five-Five would send to call the woman to call the mammy queen because we had a mammy queen in the camp.

Q. Pause. Explain what you mean by "mammy queen"? A. Well, in the jungle, this mammy queen, she deals with the affairs of women in case a woman becomes pregnant, wants to give birth, or if a woman has any bad sick like stomach ache and other things, this woman had vast knowledge on these women affairs.

272. This portion of the evidence given by TF1-334 explains to some extent the role of the Third Accused with regard to the protection of women³²⁴, although the Third Accused's tasks would better be described as protecting than controlling the women. The evidence given by TF1-334 on the warning made by the Third Accused to the soldiers that they should take good care of the women³²⁵ is a good characterization of the role of the Third Accused.

273. The fact that the Third Accused, even with regard to the women, did not hold a position of command and control becomes clear when witness TF1-334 is asked the following question³²⁶:

Q. Pause. I'm not asking you about the jungle generally. But in particular, was there a mammy queen in particular with your troop?

A. Yes. This was appointed by Gullit.

274. Furthermore, concerning the women in the SJA group the Third Accused operated within, TF1-227 provided the following evidence³²⁷:

Q. Were there other female civilians at Benguema?

A. Yes, there are many female civilians at Benguema.

Q. Did anything happen to those female civilians?

A. No.

³²³ Transcript 24 May 2005, p.62.

³²⁴ See also Transcript 15 June 2005, p.15-16 on Kanu's alleged role on protecting the women.

³²⁵ Transcript 23 May 2005, p.76:

A. In fact, the soldiers came, they signed and Five-Five warned them that if there is any problem they should immediately report to him or he himself will monitor. If these soldiers disturb these women, he was going to retrieve them, to take them back from them. So he released these women to the various soldiers who had asked for them.

³²⁶ Transcript 24 May 2005, p.62.

³²⁷ Transcript 11 April 2005, p.15.

Q. Can you describe the behaviour of the rebels towards female civilians at Benguema?

A. Well, the female civilians at Benguema were protected because they -- some of them who have been captured have been with them and there is cordiality among them.

Q. What do you mean by "cordiality between them"?

A. Since there is a good relationship.

275. This evidence proves that most of the women in the group of soldiers wherein the Third Accused participated were not abducted but belonged to the original families of these soldiers, and that the female civilians were protected by these soldiers. Moreover, the relationship between "captured women" and their "husbands" was more complicated than the alleged enslavement of these women.
276. Furthermore, as TF1-227 claims to be an abducted civilian, and was addressed by the Third Accused in a so-called muster parade³²⁸, this witness developed the incorrect perception that the Third Accused was the overall commander of troops and "the boss"³²⁹, instead of the person dealing only with civilians and families. This seems to be an overall problem with the Prosecution evidence given by civilians that joined the group of SLA soldiers the Third Accused was part of: these civilians, especially the women, had to deal with the Third Accused when problems occurred, and therefore grossly overestimated the role and position of the Third Accused within the troops.
277. Another important aspect in the proof of the fact that the Third Accused was responsible for the women and children, is his role in the release of the children after the ceasefire agreement in 1999. TF1-334 gave evidence in court that the Third Accused came to West Side to collect children which would be released in Freetown.³³⁰
278. In addition, DBK-113, a civilian moving along with the SLAs testified the following about this release:³³¹

Q. Mr Witness, I want you to -- if you can remember the month of May 1999, May 1999?

A. No.

³²⁸ See Transcript 11 April 2005, p.9, wherein TF1-227 talks about a muster parade, an activity that is strictly reserved for soldiers, and thus can not involve any civilians.

³²⁹ Transcript 11 April 2005, p.8, wherein TF1-227 inadequately describes the Third Accused as a member of the AFRC government, a body that was dismantled for almost a year.

³³⁰ Transcript 16 June 2005, p.91-92.

³³¹ Transcript 13 October 2006, p.43.

Q. Mr Witness, did you ever hear that a cease-fire was signed between the honourable president, Ahmad Tejan Kabbah, and Foday Sankoh of the RUF?

A. Yes.

Q. Do you recall where you were at that time?

A. Yes.

Q. Where were you?

A. I was at Four Mile.

Q. And whilst you were at Four Mile, did anything happen to you?

A. Yes.

Q. What was it that happened to you?

A. When I was at Four Mile, when the government and the soldiers and the RUFs came into an agreement to cease-fire, most of us, the civilians, because they went with some religious group, and the group went and pleaded that most of the civilians, they had -- they wanted the soldiers to allow them to bring the civilians in town. They would be able to take care of them and sort their problems out and reintegrate them into the society again. I was rather fortunate, me and one of my friend. We came with the group and we came to Freetown.

279. In conclusion, the Defence holds that during a certain part of his stay in the jungle (since his arrival in Koinadugu District in the beginning of 1998)³³², the evidence suggests that Third Accused was responsible for protecting and taking care of the civilians, more specifically the women, who joined the soldiers for all sort of reasons, being a family member or looking for a safe haven in the jungle. Moreover, the evidence only suggests that he did not fulfil any position of command, but his task was strictly confined to the care of women and children, which is not tantamount to exercising superior responsibility with respect to the operations conducted by the SI.As

³³² TF1-334 gives a good indication when describing the time frame of the alleged protective role of the Third Accused (Transcript 16 June 2005, p.62-63):

Q. Mr Witness, do you know when Santigie Borbor Kanu was appointed to look after the women?

A. Yes, sir, My Lord.

Q. When was it?

A. Well, it was during the time when we were at Mansofinia up to the time that we came to Freetown and he was still in charge of them.

Q. Was he still in charge of the women whilst you were retreating from Freetown?

A. Yes, My Lord.

VII LACK OF PROOF FOR JOINT CRIMINAL ENTERPRISE³³³

7.1 Introduction

280. This Brief now turns to the question whether the Third Accused can be convicted on the basis of responsibility through the alleged Joint Criminal Enterprise (JCE). In the following paragraphs a number of arguments will be discussed to refute this allegation.

281. Para. 33 of the Indictment states that “the AFRC, including Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, and the RUF, including Issa Hassan Sesay, Morris Kallon and Augustine Gbao, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.”

7.2 Theory on JCE

282. The ICTY Trial Chamber in *Prosecutor v. Galic* concludes the following:

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 arrangement with each other to commit a crime.³³⁴

283. In *Prosecutor v. Krnojelac*, the ICTY Trial Chamber held that a JCE:

exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or

³³³ The Defence in its Trial Brief refers to the SLA (faction(s)). It is the Defence theory that the political organization AFRC ceased to exist in February 1998, and from then onwards the different groups formerly associated with the AFRC are now defined as SLA (groups). However, in this part of the Brief on alleged JCE with the RUF, the Defence will use the terminology as used by the Prosecution in its Indictment.

³³⁴ *Prosecutor v. Galic*, Judgment, 5 December 2003, IT-98-29-T, para. 174, as cited in the Defence Pre-Trial Brief in *Prosecutor v. Brima et al., Kanu* – Defense Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b) – filed on March 22, 2004, Case No. SCSL-2004-16-PT-39, para 60.

arrangement amounting to an agreement formed between them then and there to commit that crime.³³⁵

7.3 Alleged JCE between Organizations AFRC and RUF

284. In the first place, the Defence wishes to remark that the Indictment with respect to JCE relies upon an agreement between the AFRC on the one hand, of which the three Accused were allegedly members, and the RUF on the other.

285. It should be said that the inclusion within the Indictment of the AFRC and RUF as organizations as such is tantamount to a form of organizational (criminal responsibility). If it were to be accepted that the Third Accused, through the concept of JCE, was to be convicted for “any actions” of the AFRC/RUF as such, this would result in strict liability which is clearly outside the requisite criteria of JCE as set forth by the ICTY (see below). It should be observed that the Prosecution’s case has failed to prove the existence of a common plan as set forth in paragraphs 31–35 of the Indictment, let alone that the Third Accused formed part of such a plan (see below).

7.4 Alleged Case against Third Accused Outside Scope JCE

286. The Defence holds that the doctrine of JCE can not be applied without more when the case concerns irregular forces. Moreover, in the absence of a highly disciplined military organization, the evidentiary requirements to establish JCE should be more strict in that the Prosecution should prove why, in the absence of such structure, nonetheless a common plan would exist.

287. Although extensively developed by the ICTY, criticism has arisen in this respect, and not without foundation. Since the *Tadic* case, the doctrine was expanded ever since, including a more and more broad range of activities, persons and situations. This doctrine, if not limited appropriately, has the potential to lapse into a form of guilt by association.³³⁶

³³⁵ *Prosecutor v. Krnojelac*, Judgment, 15 March 2002, IT-97-25-T, para. 80.

³³⁶ See Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 2004 (URL address: www.berkeley.edu/students/curricularprograms/ils/workshop/fall04_Martinez.pdf).

288. The ICTY Trial Chamber in the *Brdjanin* case held 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. (...) [I]t 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. An examination of the cases tried before this Tribunal where JCE has been applied confirms this view.³³⁷

289. The Defence respectfully submits that the criterion developed by the *Brdjanin* Trial Chamber is also applicable in the underlying case, where the extraordinarily broad nature of the case far exceeds the broadness of the facts in the *Brdjanin* case.

290. Moreover, as opposed to the *Brdjanin* case,³³⁸ in the case against the Third Accused, all three forms of JCE have been alleged.³³⁹ The Defence thus submits that the extraordinarily broad case brought against the Third Accused, in combination with the actual position the Third Accused had, warrants a dismissal of the JCE count against the Third Accused. This especially counts in view of the nature of the AFRC as being irregular.

7.5 Three Distinct Categories in *Mens Rea* of JCE

291. In the Prosecution Rule 98 Response, the Prosecution indicated that it alleges all three forms of JCE.³⁴⁰ The Defence respectfully submits that the Prosecution should have indicated its position on this at an earlier stage, and by only indicating this at the Rule 98 stage of the proceedings, the Prosecution was out of time. As a result thereof, the Defence submits that only the third category of JCE should be taken into account. The Defence indicated already at an early stage in the proceedings that it understood the Indictment to mean that only the third category was applicable. Only at the Rule 98 stage did the Prosecution finally make a choice in this respect, which, in the humble opinion of the Defence, was out of time.

³³⁷ *Prosecutor v. Brdjanin*, Judgment, 1 September 2004, Case No. IT-99-36-T, para. 355 (footnotes omitted).

³³⁸ *Prosecutor v. Brdjanin*, Judgment, 1 September 2004, Case No. IT-99-36-T, para. 259.

³³⁹ See *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 313.

³⁴⁰ *Prosecutor v. Brima et al.*, Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, Case No. SCSL-2004-16-T-458, para. 27.

292. The Appeals Chamber in the *Tadić* case formulated the requisite *mens rea* for the three JCE categories as follows:

With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which (...) is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.³⁴¹

First JCE Category

293. The first category requires shared intent on the part of all co-perpetrators to perpetrate a certain crime.³⁴² The Defence will argue below that this basic category of JCE cannot be applied on the basis of the evidence brought forward in this case.

294. The Defence respectfully submits that no evidence has been brought forward during the trial against the Third Accused alleging that he shared any intention whatsoever with "all co-perpetrators to perpetrate a certain crime."

295. The Defence contends that the first category of JCE should be dismissed on the basis that there is no supporting evidence for the Prosecution remark that Kanu formed part of a JCE first category liability form for any of the crimes indicted.

Second JCE Category

296. The second form, a variant of the first category, and actually a sub-category thereof, requires (i) personal knowledge of the system of ill-treatment and (ii) the intent to

³⁴¹ See *Prosecutor v. Tadić*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see Daryl A. Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute*, in *International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas & William A. Schabas, eds., 2003) page 269.

³⁴² See *Prosecutor v. Tadić*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see Daryl A. Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute*, in *International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas & William A. Schabas, eds., 2003) page 269.

further this common concerted system of ill-treatment.³⁴³ The Defence submits that no evidence has been brought forward during the trial that there was a 'system of ill-treatment' such as envisaged by this specific form of JCE, intended for so-called concentration camp cases. The Defence first of all contends that, despite the fact that ill-treatment did occur during the conflict, there was no envisagement to "further this concerted system of ill-treatment," even if – *quod non* – such ill-treatment had been widespread and systematic. For this reason alone, the Defence submits that the second category is simply not applicable to the underlying case and not supported by the facts presented at trial, and should thus be dismissed.

Third JCE Category and requisite element of mens rea

297. The third category requires (i) the *intention* to participate in and further the criminal activity or the criminal purpose of a group and (ii) to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. If a crime falls outside of the agreement of the common plan, this only falls within the JCE if it (i) was foreseeable, and (ii) the accused willingly took that risk.³⁴⁴ This third, extended, form of JCE is neither applicable, in the opinion of the Defence, as will be further substantiated below.

298. With respect to these *mens rea* requirements of the third category, it can be observed that no conclusive proof has been adduced for this on part of the Third Accused. In specific, the Prosecution case failed to prove that:

1. It was foreseeable for the Third Accused that the alleged crimes in the Indictment were to be committed by one or other members of the AFRC and/or RUF; and
2. The Third Accused willingly took that risk.

³⁴³ See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-I-A, para. 228; see Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in *International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas & William A. Schabas, eds., 2003) page 269.

³⁴⁴ See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-I-A, para. 228; see Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in *International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas & William A. Schabas, eds., 2003) page 269.

299. The Defence submits that the third condition for *actus reus* (participation of the accused in the common design) cannot be proven beyond reasonable doubt. Here the evidence adduced by the defence is decisive as to the absence of coherence between military-strategic level; operational level; and tactical level.³⁴⁵ The inference of this conclusion is that in the absence of such coherence, individual members of the AFRC faction could realistically not have participated in a common plan, if any.
300. As noted, substantial proof has been adduced that the AFRC in the period February 1998 until June 1999 was merely a survival organization, conducting mainly defensive operations against, *inter alia*, ECOMOG.³⁴⁶ As stated before, only on the advance to Freetown at the end of 1998, SAJ Musa allegedly stipulated a (tactical) plan to attack Freetown and reinstate the army (excluding the RUF). This situation reinforces the conclusion that no common plan or purpose existed, requisite for JCE. Here, reference can be made to the ruling of the ICTY in the *Brdjanin* case. The mere espousal of a strategic or political plan by the Accused on the one hand and many of the relevant physical perpetrators on the other is not equivalent to an arrangement between them to commit a concrete crime.³⁴⁷
301. The Defence respectfully holds that the *mens rea* element of JCE cannot be proven on the part of the Third Accused. As such, the JCE form of liability should be dismissed.

7.6 Required *Actus Reus* of JCE

302. JCE liability also presupposes several objective elements (*actus reus*). The ICTY Appeals Chamber in the *Tadic* case delineated these objective elements as follows:
- (ii) A plurality of persons; these persons need not be organized in a military, political or administrative structure;
 - (iii) The existence of a common plan, a design or purpose, amounting to or involving the commission of a crime provided for in the Statute. There is

³⁴⁵ See for this Defence evidence, report major-general W.A.J. Prins, Exhibit D36, p.65-71, in particular para. 151, saying that at the utmost one may conclude that there may have been some coherence between operational and tactical level.

³⁴⁶ See also Colonel Iron's testimony thereto on 19 October 2005.

³⁴⁷ *Prosecutor v Brdjanin*, ICTY Judgment, 1 September 2004, IT-99-36-T, paras. 351-352.

no necessity for this plan, design or purpose to have been previously arranged or formulated and it may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a JCE; and

- (iv) Participation of the Accused in the common design is required, involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.) but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.³⁴⁸

303. It has not been established beyond reasonable doubt that the element under (ii) is proven. After the AFRC had been ousted from Freetown in February 1998, the movement split up in various factions; their goal was purely survival.³⁴⁹

304. The notion of "common purpose" as a basis for criminal liability under international law was set forth by the Appeals Chamber in the *Tadic* case.³⁵⁰ In particular, the third category of JCE merits attention. Within this category:

[T]he notion of 'common purpose' only [applies] where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.³⁵¹

305. Also here the *Brdjanin* judgment lends support for this conclusion. In paragraph 347 of this judgment, the ICTY, addressing the third category of JCE, held that "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 para-military unit

³⁴⁸ See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in *International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas & William A. Schabas, eds., 2003) p. 270.

³⁴⁹ See testimony major-general W.A.J. Prins, 17 and 19 October 2006. See also testimony TRC-01 discussed above.

³⁵⁰ See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, IT-94-1-A, paras. 185-229.

³⁵¹ See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, IT-94-1-A, para. 220; see Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in *International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas & William A. Schabas, eds., 2003), p. 269.

committing a crime.”³⁵² Moreover, the ICTY held “that the accused could only be held criminally responsible if the Prosecution established 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 was a natural and foreseeable consequence of the crime agreed upon by the accused and those perpetrators.”³⁵³

306. It was only in November 1998, that SAJ Musa apparently formulated his intention to reinstate the army.³⁵⁴ This mere intention of SAJ Musa cannot be equated with a common plan, design or purpose as mentioned by the ICTY Appeals Chamber. It is the Defence submission that from that time onwards, the goal of SAJ Musa’s group was to further this purpose.
307. The reinstatement of the army and the decision to attack Freetown can at the utmost be seen as a decision at military-operational level, not in support of a high strategic military goal which in turn was part of a grand strategy.³⁵⁵
308. Additionally, no proof has been adduced that political oversight existed within the AFRC faction, a precondition for the proper functioning of a military force.³⁵⁶ Although not a required element for establishing JCF’s requirement of common purpose, in the underlying case, absence of such oversight is indicative of the absence of any common purpose. Support for this condition may be lend also from Colonel Iron’s testimony, saying that: “You can formulate a commander’s intent without a political oversight, but we teach our people that in order to be coherent within the strategic and operational and tactical levels, you have got to plan your military operations within your political mandate in a regular army. That is one of the ways we achieve that cohesion between strategic, operational and tactical levels.”³⁵⁷

³⁵² *Prosecutor v Brdanin*, ICTY Judgment, 1 September 2004, IT-99-36-T, para 347.

³⁵³ *Prosecutor v. Brdanin*, ICTY Judgment, 1 September 2004, IT-99-36-T, para. 347.

³⁵⁴ See *inter alia*, testimony TF1-184, Transcript 27 September 2005, p. 40, 46, 47; DMRK-113, Transcript 13 October 2006, p. 30-31.

³⁵⁵ See report major-general W.A.J. Prins, Exhibit D36, p.70, para 150.

³⁵⁶ See report major-general W.A.J. Prins, Exhibit D36, p. 67, par. 143.

³⁵⁷ Transcript 13 October 2005, p. 104.

309. In the absence of proof of the existence of political oversight within the AFRC faction, a common purpose, plan or design, required for JCF, cannot be proven beyond a reasonable doubt. This means that the second criterion for the JCF *actus reus* is not met and acquittal should follow for the Third Accused with regard to the alleged JCF liability. Notwithstanding that a 'common purpose' may materialize during a certain course of action, the evidence does not indicate that this happened within the SLA factions. This is reinforced by the prosecution's military expert, testifying that:

I am, although I – there is a difficulty with the AFRC in that the strategic aims were never articulated, certainly not on paper. Therefore, if one wants to look at the coherence from strategic operation to tactical level, one has to make certain inferences of what those strategic aims were, which I have done, essentially using the evidence and sources being made available to me, understanding the situation which the AFRC found itself in over time. (...) Now, strategic aims, I think, of the AFRC did change, did evolve.³⁵⁸

310. The evidentiary impact of this observation is that members of the AFRC were unfamiliar with any alleged strategic aims, if those existed at all, and thus no common purpose both as to *mens rea* and *actus reus* can be established.

311. Evidence has been presented at trial, indicating the differences between the AFRC and RUF, supporting the conclusion that the RUF had a different plan. Prosecution witness Gibril Massaquoi testified that "[t]he SLA were using infantry organizations while RUF were using guerrilla structures."³⁵⁹ Later on in his testimony, he adds about the AFRC coming to Freetown in 1999: "Before I was arrested the structures I knew for RUF were quite different from the structures I saw when they came in January 1999."³⁶⁰

312. Prosecution witness TF1-045 stated that the overall plan of the RUF was to gain political power over the country. In court he stated:

Q. Mr Witness, is it correct to say that this plan you talk about of the RUF, or the ideological goal of the RUF existed long before the AFRC came into play; is that correct?

A. Yes, sir.

Q. Is it fair to say that it was the ultimate goal of the RUF to be in power, to be in control of the whole country; is that correct?

A. Yes, sir.³⁶¹

³⁵⁸ Testimony Colonel Iron, October 2005, p. 48-49.

³⁵⁹ G. Massaquoi, Transcript 7 October 2005, p. 105.

³⁶⁰ G. Massaquoi, Transcript 10 October 2005, p. 98

³⁶¹ TF1-045, Transcript 20 July 2005, p. 11.

313. This is in clear contradiction to SAJ Musa's indication that his overall goal was to reinstate the army, as evidenced by all main Prosecution witnesses.³⁶²

314. The Defence respectfully holds that also the *actus reus* element of JCE cannot be proven on the part of the Third Accused. As such, the JCE form of liability should be dismissed.

7.7 No Evidence for Alleged Purpose of JCE: Control of Diamond Mining Areas

315. Paras. 33 and 34 of the Indictment assert that the AFRC, including the three Accused, "shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside of Sierra Leone in return for assistance in carrying out the joint criminal enterprise" and that this JCE "included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographical control, and to use members of the population to provide support to the members of the joint criminal enterprise."

316. The JCE, in the Prosecution theory, thus mainly aims at gaining and exercising political power and control over in particular the diamond areas.

317. The Defence case supports that after the AFRC was ousted of Freetown, it did not have the plan, purpose or design to gain and exercise political power and control. As evidenced by several of the Prosecution witnesses, the goal of SAJ Musa's SLA was to reinstate the army in Freetown. There was no intention whatsoever, and neither is there evidence to support such allegation, that the SLA wanted to take over power after February 1998.³⁶³ Also Junior Johnson states that he went to see Johnny Paul Koroma to give our demands about re-instating the Sierra Leonean Army.³⁶⁴

³⁶² TF1-167, Transcript 20 September 2005, p.12; TF1-184, Transcript 27 September 2005, p. 9, p. 15, p. 41, p. 46; TF1-334, Transcript 13 June 2005, p. 49.

³⁶³ TF1-167, Transcript 20 September 2005, p.12; TF1-184, Transcript 27 September 2005, p. 9, p. 15, p. 41, p. 46; TF1-334, Transcript 13 June 2005, p. 49.

³⁶⁴ TF1-167, Transcript 16 September 2005, p. 82.

318. Besides absence of this political purpose to gain control over the country, the Prosecution asserts that in particular such purpose was directed at gaining control over the diamond mining areas. The Defence respectfully submits that the diamond mining areas, which are predominantly in the eastern part of the country, were not under control of the SLA, but rather under RUF control.

319. Witness TRC-01's testimony supports this Defence theory. He states:

Q. So the SLAs were better trained than the RUF?

A. They were not comparable. Those were two different groupings altogether. That was a military force against a group of -- I wouldn't call them rebels because they had no ideologies. Maybe a group of people who were power thirsty and had a lust for diamonds, that was all. Probably bandits.³⁶⁵

320. Witness DBK-117 testifies as follows:

Q. Mr Witness, do you know who were actually mining the soil? Who actually did the mining?

A. Yes.

Q. Who were they?

A. Well, the civilians, with whom the RUF commanders had, during that time, those civilians were the ones that -- that were digging.³⁶⁶

321. Witness TF1-045 declared that Johnny Paul Koroma had suggested to use some diamonds to go to Charles Taylor in order to obtain weapons. This upset Sam Bockarie.³⁶⁷ The Defence submits that, first of all, at that time, in Kono District, Johnny Paul Koroma was not in charge of the AFRC anymore,³⁶⁸ and in the second place, was Koroma's suggestion never taken over by any of the SLA groups, because once he arrived in Kono, Koroma immediately left for Kailahun, and SAJ Musa took over his position in one of the SLA factions.

322. The Defence submits that the evidence presented at trial does not prove beyond reasonable doubt that the AFRC had a common purpose as delineated in paras. 33 and 34 of the Indictment.

³⁶⁵ TRC-01, Transcript 16 October 2006, p. 114.

³⁶⁶ DBK-117, Transcript 16 October 2006, p. 24-25.

³⁶⁷ TF1-045, Transcript 19 July 2005, p. 95.

³⁶⁸ TF1-334's testimony of 18 May 2005, p. 2-3, supports the Defence assertion that Johnny Paul Koroma went to Kailahun (through Kono), and did not stay in Kono District. Witness TF1-334 indicates that Johnny Paul Koroma "called all the other commanders and he was addressing them. He said now that he was about to go to Kailahun and he was telling us that Kono should be the defensive ground for the junta forces," see TF1-334, Transcript 18 May 2005, p. 2-4.

323. In case the Trial Chamber would find that, in spite of the above arguments on the absence of a common plan, purpose or design as presented in the Indictment, a joint criminal enterprise did exist between the AFRC and the RUF, the Defence submits that no evidence has been put forward during the trial that the Third Accused himself had such intention or shared the alleged common purpose.

7.8 No JCE Due to Absence of a Joint Military Structure between RUF/AFRC

324. As mentioned before, paragraph 33 of the Indictment primarily connects the existence of an alleged JCE to the AFRC/RUF as such and the assumption that these organizations shared a common plan. This connection is evidenced by the words in the Indictment in paragraph 33: "The AFRC, *including* Alex Tamba Brima (...) and Santigie Borbor Kanu (...)." ³⁶⁹ An additional argument arises for the lack of proof of the existence of a JCE.

325. The Defence submits that absence of a workable joint military structure is indicative of absence of a JCE between the organizations which are qualified as fighting factions. As observed by Professor Dinstein:

The hallmarks of a military alliance are the integration of the military high command, the amalgamation of staff planning, the unification of ordnance, the establishment of bases on foreign soil, the organization of joint manoeuvres and the exchange of intelligence data. ³⁷⁰

326. The Prosecution case failed to prove beyond a reasonable doubt that such a "military alliance," fulfilling these requirements, was established.

327. Unlike the Prosecution expert Colonel Iron, the Defence military expert Major-General Prins addressed this subject, which is of perennial importance in order to prove an alleged JCE between the AFRC and RUF. Several arguments exist why such a structure was not vested, contrary to the unmotivated statement of Colonel Iron that "on or around 20 February (1998) they entered into an existing RUF/AFRC command structure that worked well." ³⁷¹

³⁶⁹ Emphasis added.

³⁷⁰ See Yoram Dinstein, *War, Aggression and Self-Defence* (2005), p. 260.

³⁷¹ See Report Col. Iron, Exhibit P36, sections C-3, C-4, C2.6.

328. The first argument is provided by the conclusions of Major-General Prins in his report³⁷² and corresponding testimony at trial³⁷³ concluding in paragraph 171 of his report: "In order to establish a joint structure or joint force in military operational sense a few requirements (not limitative) have to be fulfilled: Trust and confidence, co-operation and mutual understanding, interoperability, joint operational procedures and a joint head quarters. The RUF and the AFRC did not meet any of the described requirements of a joint military operational structure or joint force during the period between May 1997 and February 1998 and following that period until the attack on Freetown in January 1999."³⁷⁴

329. Secondly, Prosecution witness Gibril Massaquoi refutes the assumption that the AFRC and RUF entertained a joint military structure. This witness, questioned about the interrelation between the structures of the AFRC/RUF, clearly said the following: "The SLA were using infantry organizations while RUF were using guerrilla structures."³⁷⁵ Additionally, this witness confirmed the distinction between these two forces, stating:³⁷⁶

[Y]es, you were referring to an incident the Prosecution asked me about Freetown when they came to Freetown in January 6. My response there is the same; I have not denied that. Before I was arrested the structures I knew for RUF were quite different from the structures I saw when they came in January 1999."

330. Gibril Massaquoi also testified that no form of (leadership) cooperation existed between the AFRC and the RUF from February 1998 onwards. At the trial session of 7 October 2005, he testifies as follows:³⁷⁷

That was a time [after February 1998] when they left Freetown with the AFRC, and the RUF left Freetown and they were pushed by ECOMOG and they were now in the bush. So the new command structure was created by Sam Bockarie.

At that time, the new command structure created didn't speak of Foday Sankoh being leader. It only talked about Sam Bockarie being CDS, Chief of Defense Staff. (...) And Sam Bockarie, who was (...) Issa Sesay, who was the battlegroup commander, now eventually became the battlefield commander.

³⁷² See report of major-general W.A.J. Prins, Exhibit D36, p.71-82.

³⁷³ Transcript 17 October 2006.

³⁷⁴ See report of major-general W.A.J. Prins, Exhibit D36, p.71-82.

³⁷⁵ G. Massaquoi, Transcript 7 October 2005, p. 105.

³⁷⁶ G. Massaquoi, Transcript 10 October 2005, p. 98

³⁷⁷ G. Massaquoi, Transcript 7 October 2005, p. 70.

331. The absence of a joint leadership or command structure between the AFRC and the RUF is reinforced by his observations regarding the period after February 1998.³⁷⁸

Q. Is it correct that RUF, when reading this passage from your draft book, was not tolerating the AFRC.

A. That is what I presumed because I was not there. That was what I learned from the fighters. The period I was referring to I was in prison. I was quoting what fighters told me what happened between them.

332. **Thirdly**, also Prosecution witness TF1-167 supports these conclusions, confirming that the SLA considered themselves superior to the RUF:³⁷⁹

Well, the SLA, I thinking on it that they were well trained to be a soldier and in going to the bush. The RUF were civilians just trained a little tactics, so they should not be under the RUF.

333. **Fourthly**, TRC-01, who testified on 16 October 2006, confirmed this evidence, saying the following:³⁸⁰

Q. So the SLAs were better trained than the RUF?

A. They were not comparable. Those were two different groupings altogether. That was a military force against a group of -- I wouldn't call them rebels because they had no ideologies. Maybe a group of people who were power thirsty and had a lust for diamonds that was all probably bandits.

Q. so it was essentially a well trained military organisation against a bunch of rebel forces who were coming to steal diamonds?

A. Well I would call them bandits, Your Honour. Indeed, they were something like that. And so they never knew of the Geneva Convention and laws of war. So there were occasions they were using, probably, rocket-propelled grenades against human target. That's an anti-tank weapon. An Anti-tank weapon is meant to be used against equipment, not against human beings, but they were using such weaponry against human targets. And so it created the mayhem in the war.

334. Notwithstanding that these observations relate to the period 1992-1994, this certainly reflects on the viability of an alleged joint structure in military operational sense between AFRC and RUF in 1997-1999.

335. In conclusion, the Defence case has established that no joint military structure between RUF and AFRC could have existed and also for this reason the Prosecution case failed to prove the existence of a JCE between AFRC and RUF. Therefore the Third Accused should be acquitted for this form of reliability.

³⁷⁸ G. Massaquoi, Transcript 11 October 2005, p. 25-27.

³⁷⁹ Statement witness TF1-167, transcript date 19 September 2005, p. 63.

³⁸⁰ Transcript 16 October 2006, page 114.

7.9 No JCE – Deteriorated Relationship between RUF and AFRC in Provinces

336. Apart from these more theoretical arguments as to why no JCE existed between the AFRC (and the Third Accused within this organization) and the RUF, the Defence will sum up some of the available evidence supporting the allegation that also from a practical point of view, one could not speak of a JCE, requiring a common plan, purpose or design.

337. The Defence challenges the Prosecution assertion that a JCE existed, and holds that after February 1998, after the pullout from Freetown, one could no longer speak of 'one AFRC' group, but rather did former soldiers and persons allied to the AFRC split up in small groups throughout the country, with the sole purpose of getting out of Freetown, and out of the hands of their enemies and survive.

Freetown and Western Area

338. Already in Freetown, immediately after the 1997 takeover from power, the relationship between the RUF and the AFRC was affected. Junior Johnson in his testimony states:

Q. Yes. I will come back to the issue of BS Massaquoi later. It is fair to say that the relationship between RUF and the AFRC was a strained relationship; not so?

A. At the early stages the relationship was good. But as time goes on the relationship break between the two.

Q. When you say the "early stages", would I be right in saying that that was when the AFRC invited the RUF to join them?

A. Yes, because if the relationship was not too good, I believe when they invited them they should not have come.³⁸¹

339. The following testimony also evidences the row between the two organizations, already in Freetown after the AFRC regime:

Q. But it wasn't long before Gibril Massaquoi was arrested; not so?

A. He was arrested -- I couldn't call the actual date he was arrested, but it was not too long after the AFRC regime, and they arrested him. I could remember it was during -- it was in the mid of the regime.

Q. Were the RUF happy about this?

A. I cannot tell, because after his arrest -- I would say they were not happy because Issa Sesay and some others were very angry about that.

Q. Did they attend meetings with the AFRC after that?

A. No.

³⁸¹ TF1-167, Transcript 19 September 2005, p. 57.

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Q. They stopped going to meetings?

A. They stopped some time going to meeting after the looting of the Iranian Embassy. They stopped going to meetings.

Q. You mentioned the looting of the Iranian Embassy. After that looting Johnny Paul had ordered the arrest of Issa Sesay; not so?

A. Yes, after the looting Issa Sesay was ordered to be arrested.³⁸²

340. Witness TF1-045 also testifies that already in September 1997, the deteriorating relationship between the AFRC and RUF were discussed in a meeting in Freetown.

The transcript reads:

Q. You testified earlier in your testimony that with respect to this first meeting there was no respect between the AFRC and the RUF commanders. That was one of the issues pertaining to one of the topics; is that correct?

A. Yes, it was within the topic of discussion.

Q. Can you please explain what you meant by the words "there was no respect for each other"?

A. Yes, sir. The respect that was not -- after the RUF and the AFRC have come together, the soldiers said they were trained soldiers. They were in charge of some ammunition and they had international recommendation, so RUF were just like civilians, so you see soldiers who is a sergeant, who is a lieutenant, he considers an RUF -- he belittle him, even if he is a captain or a major, there was no respect. So when the RUF and AFRC man made, the RUF man want to show that he's senior to the soldier and the AFRC soldier again says recognise I am a government soldier, whether you are major or captain, and I am a sergeant, so I am a above you, so that problem existed. It existed so much. That was one of the points that was discussed in order for respect to be mutual, no matter your position might be. As long as we had formed one government, so let us respect one another. That was the main problem. That was the problem between the AFRC and the RUF that was discussed.

Q. Thank you, Mr Witness. Do you recall whether this issue of mutual respect returned during the other meetings you talked about? The second meeting in - I believe it was October/November you refer to 1997 and the third meeting by the end of 1997. Was this issue of the problem of respect for each other, was that raised during the other two meetings as well?

A. Yes. Yes, sir.

Q. According to your own recollection, was that problem ever solved during these meetings?

A. Well, they talked about it. They reached a conclusion, but to stop the problem, I did not see where it stopped, by the way.³⁸³

Q. Witness, aside from the meetings we just talked about, did you encounter a similar power struggle between members of the AFRC and members of the RUF in the field as individuals?

A. Individually, yes, I saw that.³⁸⁴

Q. Coming back to my initial question, Mr Witness, is it fair to say that from the first meeting at the Wilberforce officers' mess in September 1997 till March 1998, the AFRC and the RUF tried to work together; is that correct?

A. Yes.

³⁸² TF1-167, Transcript 19 September 2005, p. 54.

³⁸³ TF1-045, Transcript 21 July 2005, p. 27-28.

³⁸⁴ TF1-045, Transcript 21 July 2005, p. 31.

(...)

Q. Do you agree that after this period of five to six months there was no cooperation between the RUF and the AFRC whatsoever?

A. After the ECOMOG intervention here in Freetown till 1998 until Johnny Paul was disarmed by Mosquito, the whole thing was fragile. There was no unity between the AFRC and the RUF.

Q. After this fragile period, I mean, after the disarmament of Johnny Paul Koroma, what happened then between the AFRC and the RUF? They were willing to share meetings?

A. Well, there was no unity. There was a final split. The AFRC soldiers were only loyal to AFRC commanders; RUF commanders were only loyal to RUF commanders at that time.

Kono

341. The Defence contends that in Kono District, the RUF was in control during the relevant indictment period. There were some SLAs present in the region, but those either worked under RUF command, or were completely independent from all other structures. A Third Accused's alleged role in this cannot be substantiated by the evidence presented at trial which, as will be shown, was at crucial points contradictory concerning Mr. Kanu.

342. Witness TF1-167 holds that in Kono District, it was the RUF who was in command.

Q. Would you say Mosquito was in control of the eastern province of Sierra Leone at that time?

A. Yes, when he went to the east he was in control.

Q. And that would include Kenema, Kono, Kailahun, Tongo Field?

A. Tongo, yes.

Q. And these were all mining areas?

A. Yes.³⁸⁵

(...)

Q. Yes. So I ask you the question again: Was Sam Bockarie taking orders from anyone?

A. They early stage of the revolution he was taking orders, and later he went up country. He was not taking orders from anybody.³⁸⁶

343. This evidence is corroborated by the evidence of Defence witness DBK-113, who states that:

While I was in Kono, the relationship between the soldiers, and the RUF, it -- it wasn't good with them because the RUFs were always saying that the soldiers, because when they were in Freetown, they were saying that they had AFRC but when they were in the bush, now, they were not in Freetown again. They were in the bush. It was the jungle. So their movements had started for a while. So all the soldiers believed that, all the soldiers should be under their command. No soldier should be under AFRC again. It was the RUF movement. The revolution to pursue. That was what the RUF were saying.³⁸⁷

³⁸⁵ TF1-167, Transcript 19 September 2005, p. 55.

³⁸⁶ TF1-167, Transcript 19 September 2005, p. 57.

³⁸⁷ DBK-113, Transcript 13 October 2006, p. 14.

(...)

The nature of the relationship existing between the RUFs and the SLAs in Kono wasn't cordial (...). Superman gave order from Hill Station, said, gather some soldiers, and told them to go down where the soldiers were to go and burn -- burn all the vehicles belonging to the soldiers, and that wasn't any AFRC business. (...) [D]id you see any SLA soldiers being harassed and humiliated by RUF fighting forces? Yes. (...).³⁸⁸

344. Defence witness DAB-140 testifies about a certain pit in Buedu, Kono District, where people were thrown into and "each time they put somebody there, that person would never be seen again."³⁸⁹ This same witness states the following:

What I'm telling you about this pit, Johnny Paul was not there when this pit was dug. Johnny Paul came there, but he did had no knowledge about this pit, because Sam Bockarie had the command. He had power to do everything. Everything was in his care.³⁹⁰

345. It is the Defence submission that in the Kono District, Savage was completely separate from the other SLA's present in the area, and did not in any way cooperate with other SLA groups. He had his own group, which functioned partly under RUF, Superman's, supervision. It is furthermore the Defence contention that Staff Alhaji worked together with Savage in this district.³⁹¹

346. Witness DBK-117 testifies that "the SLAs that were there, we fall in command of the RUFs. Those who were in the villages, that I knew about as SLAs, were Savage, Staff."³⁹² He also testifies:

Q. And you said that Savage was in Tombodu; is that right?

A. Yes. Savage was at Tombodu. Staff Alhaji was the commander and Savage was the deputy. But they were afraid of him more than the commander that was there.

Q. And I put it to you that both of them, Savage and Staff Alhaji, were both SLAs; what do you say?

A. We were all People's Army then because we were subject under the command of the RUFs.³⁹³

347. Savage was responsible for the most heinous crimes committed in that area during the relevant Indictment period, as is exemplified by the following incident:

A. Yes. On arrival at Tombodu we met the battalion commander that was there by the name of Savage. And when we met he had already killed a lot of people, thrown in a pit.

³⁸⁸ DBK-113, Transcript 13 October 2006, p. 68-69.

³⁸⁹ DAB-140, Transcript 19 September 2006, p. 80.

³⁹⁰ DAB-140, Transcript 19 September 2006, p. 93.

³⁹¹ DSK-103, Transcript 13 September 2006, p. 30-31. See also: DBK-117, Transcript 16 October 2006, p. 24-25.

³⁹² DBK-117, Transcript 16 October 2005, p. 37. Whilst this witness states there were no battalions in the Kono structure, Junior Johnson's evidence indicates that there were in fact battalions operating in Kono. See TF1-167, Transcript 15 September 2006, p. 38.

³⁹³ DBK-117, Transcript 16 October 2005, p. 38.

(...)

Q. And the people thrown in the pit, were they –

A. They were all civilians.

Q. Were they alive or were they dead?

A. They were dead.

Q. Did you see what had happened to them?

A. I met them dead, but I could see that they were killed by machetes.

Q. Could you estimate how many you saw in the pit?

A. I cannot give a right number, but there were plenty, more than 150 people in the pit.³⁹⁴

348. Another witness states: “we all knew that whosoever, whosoever meets with Savage you will not live afterwards, so we were all afraid not to ever see with that man.”³⁹⁵

There are many other examples of Savage’s grievous behavior in Kono District.³⁹⁶

Witness DAB-084 clearly indicates that Savage was in charge of the “juntas” in his village, Fadugu.³⁹⁷ Later he refers to people in soldiers uniforms, Savage and Komba

Gbundema and their groups attacking Fadugu village.³⁹⁸ Savage had his own group in

Kono District: “I understood that he was not alone. There were some other people, a group, his group.”³⁹⁹

Q. This time you said that Savage was the commander of the battalion at Tombodu. Do you know what his rank was at this time?

A. He was a lieutenant.

Q. Do you know who appointed him to that rank?

A. Denis Mingo, aka Superman.⁴⁰⁰

Q. Okay. And, Mr Witness, during the time that you were in Tombodu did, and I’m referring to the period when you were captured and taken to Tombodu by the guards who were under the command of Savage, did you know -- did you hear during this period whether Savage was taking instructions from anyone else?

A. No. They were all calling him boss. He was the boss.

(...)

Q. Thank you. Mr Witness, finally, during the period that you were in Tombodu, that you saw Savage, did you observe him using any form of communication equipment?

A. I did not see him with any communication equipment. That was my first time when they captured us, and he sentenced us.⁴⁰¹

Q. Do you, in furtherance to that, do you also know if Savage was answerable to anyone?

A. If he used to answer? What do you mean?

³⁹⁴ TF1-167, Transcript 15 September 2005, p.44-45.

³⁹⁵ DAB-107, Transcript 8 September 2006, p. 60.

³⁹⁶ TF1-334, Transcript 20 May 2005, p. 13; DAB-078, Transcript 6 September 2006, p. 40-41; DAB-084, Transcript 8 September 2006, p. 14; DAB-108, Transcript 5 September 2006, p. 121; DAB-114, Transcript 4 September 2006, p. 92; DAB-115, Transcript 4 September 2006, p. 67-68; DHK-100, Transcript 17 July 2006, p. 70-71.

³⁹⁷ DAB-084, Transcript 8 September 2006, p. 6-7; see also DAB-084, Transcript 8 September 2006, p. 14.

³⁹⁸ DAB-084, Transcript 8 September 2006, p. 18-19.

³⁹⁹ DAB-084, Transcript 8 September 2006, p. 19.

⁴⁰⁰ TF1-167, Transcript 15 September 2005, p.47.

⁴⁰¹ DAB-107, Transcript 8 September 2006, p. 69-74.

Q. Was there anyone to whom Savage was reporting or to whom he was taking command or orders; do you know?

A. No. I only heard about Savage. I only heard his name. I don't know any answer.⁴⁰²

349. Clearly, given the foregoing evidence, Savage was in charge of his own group of people. The following evidence suggests a form of cooperation or communication between Savage and the RUF.

Q. Thank you, Mr Witness. Mr Witness, you mentioned that -- earlier, that Superman went to visit Savage?

A. Yes.

Q. Do you know who Superman was?

A. He was even -- he was even superior to Savage. Savage's boss was him.⁴⁰³

Q. Tombodu Savage was in charge of Tombodu; not so?

A. Yes.

Q. Did he take any orders from anyone?

A. He took orders from Superman.⁴⁰⁴

Q. Did you ever find out the name of this big man that you are talking about?

A. Yes, I know his name. Later on, they showed his name.

Q. What is his name?

A. His name is Semi Saffi [as interpreted].

Q. Please say it again.

A. Savage. Savage.

(...)

Q. Thank you. Did you get to know the name of any other of the rebels?

A. I know -- you know that all of them can't be in one place. They were scattered everywhere. You just wouldn't know all their names. Those that you live with, you would know their names.

Q. Yes. Apart from Wounded, did you get to know any other name?

A. Yes, I knew the name of another person.

Q. Please tell the Court that name.

A. His name is Superman. One of their big men that come from Koidu.

Q. Thank you. Apart from Superman, did you get to know any other name?

A. I knew another person's name. He was in Bendu IL.⁴⁰⁵

(...)

Q. Do you know where Savage was based, during that time?

A. Yes. It was in Tombodu. He was in Tombodu.

Q. Do you know if Savage was also working under anyone?

A. Yes.

Q. Who was Savage working under?

A. Well, Savage said he was working under General Issa. That was what he said.

Q. Do you know if General Issa belonged to any group of fighters?

A. Yes, he's in one of the groups.

Q. What group was it?

A. RUF.⁴⁰⁶

⁴⁰² DAB-115, Transcript 4 September 2006, p. 73.

⁴⁰³ DAB-098, Transcript 4 September 2006, p. 37.

⁴⁰⁴ T11-167, Transcript 19 September 2005, p. 41.

⁴⁰⁵ DAB-098, Transcript 4 September 2006, p. 22-23.

⁴⁰⁶ DAB-113, Transcript 7 September 2006, p. 118.

Q. There is no need to go into any further detail about that. Who was the commander on the operation to capture Koidu Geiya? Who was the commander in charge of you all?

A. Superman.

Q. And you have identified the operational commander for the RUF being on that operation. Was that Superman?

A. Yes.

Q. Who was in command of the -- What groups were in that operation, men from what groups?

A. It was the RUF group.

Q. Were there men -- also you identified that you were on the operation together with the operational commander for the SLAs. Were there other SLAs also on that operation?

A. Yes.

Q. Who was in command of the SLAs?

A. Operations commander A.

Q. Can you name any other SLAs who were involved in this operation?

A. Mohamed Savage was there.⁴⁰⁷

350. This is contrasted by the testimony of witness TF1-334, contradicting the foregoing, by testifying the following in court:

Q. While Johnny Paul Koroma was in Kono who was in command of the district of Kono?

A. Immediately Johnny Paul was the supreme head, who was the chairman of the AFRC, and he was the immediate commander in Kono.⁴⁰⁸

Q. In the hierarchy in Kono at this time when Johnny Paul was there still who was subordinate to him?

A. He had Issa Sesay. He was the other immediate commander under Johnny Paul.

Q. And what position did Issa Sesay hold in the RUF? You've described him as an RUF member earlier?

A. Well, he was second in command.

Q. Did you identify just then under who he was second in command?

A. Well, he was under Mosquito, General Mosquito's command and he was second in command to General Mosquito.

Q. Now, you've described -- you've talked about the presence of Superman in Kono. Where did he fit in in the hierarchy in relation to Issa Sesay and Johnny Paul Koroma when those two were still in Kono?

A. Well, as Issa arrived he immediately -- he was the overall commander of the whole RUF whilst they were in Kono at that moment.⁴⁰⁹

⁴⁰⁷ TF1-334, Transcript 20 May 2005, p. 24.

⁴⁰⁸ Here this witness contradicts himself, as he declares later on in his testimony:

Q. Mr Witness, you said that when you were in Kono there were two operational commanders; is that so?

A. Yes, My Lord.

Q. Who were the operational commanders?

A. You had an Operational Commander A for the SLA and you had operation commander for the RUF who was Superman, Denis Mingo alias Superman.

Q. You also said there was a joint command too; is that so?

A. A joint operation. That was what I said. We had a joint operation.

Q. Well, between Mr A and Superman who was superior?

A. Well, at that time Superman was the boss because it was from him that Operation A took command or ammunition that was sent.

See TF1-334 Transcript 16 June 2005, p.36-37. See also, DBK-117, Transcript 16 October 2006, p. 14-15, 16-17-19, who, in line with the evidence of TF1-167 states that in Kono the RUF in control, and not joined with the AFRC, as TF1-334 claims.

⁴⁰⁹ TF1-334 Transcript 17 May 2005, p.115.

351. The above again leads to a sharp inconsistency with another Prosecution insider witness, TF1-167, who testifies the following concerning the command structure in Kono District, and Superman's position therein:

Q. How do you know that there was a meeting at the house of Denis Mingo?

A. Because I went at the meeting.

Q. Do you recall who else was there?

A. Yes.

Q. Who else?

A. You have Morris Kallon, Johnny Paul Koroma, Rambo his CSO, Ibrahim Bazy Kamara, Hassan Papa Bangura. Those I could remember.

Q. Who chaired the meeting, do you remember?

A. The meeting was chaired by Denis Mingo.

Q. What happened at the meeting?

A. In the meeting it was discussed that we should be under the RUF in Kono.

Q. By "we", who are you talking about?

A. The SLAs should be under the RUF.

Q. Do you recall any response to that?

A. Yes. When Johnny Paul told us at the meeting that we should be under the RUF, there was an argument that some other commanders refused, but at the end, they were all convinced to be under the RUF.

Q. Did anything else happen at this meeting that you're able to recall?

A. Yes.

Q. What else happened?

A. It was agreed upon so Johnny Paul could be at Kailahun.⁴¹⁰

352. The Defence concludes that the testimony of witness TF1-334 is unreliable, as shown above, and that his testimony was bent in order to fit the Prosecution theory. As a consequence, the Defence submits his evidence should be excluded.

Kenema

353. There is ample evidence supporting the argument that the relationship between the RUF and the AFRC was not one in which they can be supposed to share a common purpose, also in Kenema District. For instance, TF1-045 testified about Kenema:

A. Like I myself, I can make an example. I saw at one time when I heard – I mean, I was in Kenema with Mosquito when I heard that Gibril Massaquoi, who was an RUF; Steve Bioh, who was a representative of the RUF made a plan to overthrow Johnny Paul Koroma and remove him from power. So I saw that. Then later I saw when Johnny Paul himself was flushed from Freetown and he went. I saw Mosquito, who I saw an RUF molested him. So I saw that. I heard about it again.⁴¹¹

A. Okay. After Johnny Paul had spoken, he himself, Mosquito, stood. He thanked Johnny Paul with regards all what he has said and what he had done. He said the only problem now - he said Johnny Paul should forget about being a commander again. What ever

⁴¹⁰ TF1-167, Transcript 15 September 2005, p. 32-35.

⁴¹¹ TF1-045, Transcript 21 July 2005, p. 32.

suggestions he was trying to put out with regards what he had discussed, he said it is now that he will take Johnny Paul Koroma, that, as of now, he was the commander.

(...)

A. Issa Sesay; Mosquito, Sam Bockarie, they used force on Johnny Paul. They ensured that where he was seated he stood up and ordered him to hand over whatever he had. They had arms, there were all armed men around. They had their pistols and they were talking to him. So they used force on him and took all that he had. They stripped the shirt off him. They took the diamond. Issa Sesay held his wife and said he was shouting for diamonds. He went and raped Johnny Paul's wife.⁴¹²

Bombali

354. It is the Defence conclusion that in Bombali District, Savage cooperated with Brigadier Mani, and formed a separate SLA group, not allied to any of the other factions.

Q. Please tell the Court the names that you remember?

A. The heads I am going to name, those we knew to be head. They don't go anywhere but they were stationed there. One of them was called Savage.

Q. So do you know any other of them?

A. The second one or the third one, he was called Mani. The head, but they didn't go anywhere. They were stationed there.⁴¹³

Q. Yes. And Mosquito, it is fair to say, was the de facto leader of the RUF; not so? In the absence of Foday Sankoh he was leader of the RUF?

(...)

Q. And he had men that he controlled, lots of men that he controlled?

A. Yes, anyone who is an RUF is under his supervision.

Q. And lots of ammunitions and arms?

A. Yes, he had arms and ammunition.

Q. The AFRC subsequently did not trust the RUF, did they? Nor the RUF the AFRC.

A. Yes, there was a trust on trust. The RUF don't trust the AFRC, the AFRC don't trust the RUF, when they had started being some fracas between them.

Q. Was there a fracas in Kabala in February 1998?

A. Yes, when we pull out, there was a lot of individual fighting with mid-level fighters.

Q. This mid-level fighters, you had the SLAs on the one side and the RUF on the other; not so?

A. Yes.

Q. Can you tell the Court how serious that fracas got? How serious was it?

A. Yes, that was why even SAJ did not join the troops to go to Kono. He decided to go on his own to Koinadugu.

Q. How serious did it get?

A. It was serious because there are killings that were going on secretly.

Q. Killing of whom by who?

A. RUF would kill SLA soldiers, SLA soldiers would kill RUF.

Q. Was there one particular fighting that lasted for one day?

A. Yes.

Q. A particular event, where fighting took place and lasted for one day?

A. Yes.

Q. That event, there was loss of life; not so?

A. Not plenty, a few.

⁴¹² TF1-045, Transcript 21 July 2005, p. 95-96.

⁴¹³ DBK-101, Transcript 14 July 2006, p. 81-82.

Q. How many?

A. Both RUF and S.L.A. I cannot give a specific number.

Q. Now, can you recall what was this all about?

A. Well, the fighting between RUF and S.L.A. was more on looted properties, vehicles.⁴¹⁴

Q. Now, if I can just point out your statement of 6 May 2003, page 6.

MS PACK: It's 10418, Your Honour.

PRESIDING JUDGE: Thank you, Ms Pack.

MS THOMPSON:

Q. I will start from line 22.

"A. Makeni. From Makeni, we took him to his village and then went to Kabala straight.

"Q. Okay.

"A. Yes, it was at night we took him there" - we are referring to Johnny Paul Koroma at these stages - "so when that message came, so there was some fracas between us, the RUF arresting some S.L.A. guys, taking their guns from them, controlling the guns that -- they said we should be under them. So the split had to come, so some commanders came together like Ibrahim Bazy, Papa, Kallay from the S.L.A. side that we should go to Kono, that we should go to Kono. All that time Kamajor were at Kono, Kamajors."

Do you recall saying that?

A. Yes.

Q. And that was at Kabala?

A. Yes.

Q. It's fair to say the fight was about command and control between the RUF and S.L.A.; not so?

A. Yes, I have already said that initially.

Q. It was at Kabala that you said earlier that Musa refused to join the RUF?

A. Yes.⁴¹⁵

Koinadugu

355. The following evidence is an example of the deteriorated relationship between the AFRC and the RUF in Koinadugu District:

Q. You have spoken earlier about SAJ Musa going to Kubola with commanders Mani and Bropleh. Do you know where they were at this time that SAJ Musa arrived at Major Eddie Town?

A. SAJ Musa left them at Kubola.

Q. How do you know that?

A. Because when SAJ Musa came he told us that he was chased out from Kubola by Superman and he only came with a few fighters and all the remaining stayed at Kubola.⁴¹⁶

Port Loko

356. It is the Defence submission that no evidence has been adduced supporting the allegation that a JCE existed between the AFRC and RUF in Port Loko District. Moreover, the Defence specifically argues that the Third Accused was not involved in the alleged activities taking place in this District, but rather that other people from

⁴¹⁴ TF1-167, Transcript 19 September 2005, p. 58-59.

⁴¹⁵ TF1-167, Transcript 19 September 2005, p. 59-61.

⁴¹⁶ TF1-167, Transcript 15 September 2005, p. 85.

within the SLA allegedly bore responsible for that, in spite of the fact that, during a limited period of time, the Third Accused was present in this district, and did not function in any command position.

357. Witness TF1-167 testifies that all honourables, except for Alex Tamba Brima, were present in Masiaka, Port Loko District, after the pullout from Freetown in 1999. He testifies:

Q. Apart from these commanders that you have spoken about, apart from commanders in Masiaka, who else were there?

A. You have all honourables that pulled out, with the exception of Alex Tamba Brima, who was at Kono.⁴¹⁷

358. This same witness testifies to a meeting held in Masiaka led by SAJ Musa to go and attack Bo. Five-Five was absent from this meeting, which can be seen as an indication of the Third Accused's position, or rather, lack thereof, during that time. The testimony reads:

Q. Did anything happen when you were in Masiaka?

A. Yes, in Masiaka there was an operation planned by SAJ Musa to go and attack Bo.

Q. How do you know there was an operation planned?

A. There was a meeting called. I was in the meeting with Ibrahim Bazy Kamara and others.

Q. Can you remember the names of anyone else at the meeting?

A. Yes. Issa Sesay, AF Kamara, Hassan Papa Bangura, Foday Kallay. Those I can remember.⁴¹⁸

359. Brima Bazy Kamara, together with witness TF1-167, Hassan Papa Bangura and some securities went to visit Charles Taylor in Liberia after the signing of the peace process.⁴¹⁹ From Port Loko they traveled to Liberia to see Charles Taylor. This part of this witness's testimony provides further evidence for the fact that the Third Accused was not in any position of command in the West Side. This part of the testimony reads as follows:

Q. Whilst in the West Side after the signing of the peace process, did you remain there?

A. No.

Q. Where did you go?

A. We are called upon to go to Liberia.

Q. Who was called upon? You say "we", who do you mean?

A. I, Ibrahim Bazy Kamara, Hassan Papa Bangura and a few other securities.

Q. Who were you called upon by?

A. By the -- we were to go and see Charles Taylor.

⁴¹⁷ TF1-167, Transcript 15 September 2005, p. 27.

⁴¹⁸ TF1-167, Transcript 15 September 2005, p. 27.

⁴¹⁹ Notably, this falls outside the Indictment period.

Q. Did you go to Liberia?

A. Yes.

(...)

Q. On your return to Sierra Leone where did you go?

A. We came to Freetown. From there we went back to the West Side jungle.⁴²⁰

Bo

360. The Defence contends that SLAs were present in Bo District, but that this was a separate SLA group, of which the Third Accused at no time formed a part, neither was he in any way allied thereto.⁴²¹

361. Moreover, the Defence submits that there was no form of cooperation between the RUF and the SLA group in Bo District, excluding a possibility for proving JCE applicable to the incidents in this district.

362. The evidence concerning this district is indicative of how fractured the AFRC was, and that, even during the time the AFRC was in power, there was not one single organization, which was in control of what happened throughout the country.

Kailahun

363. Also in Kailahun District, the Defence asserts that the relationship between the RUF and SLA was deteriorated.

7.10 Conclusion

364. For the reasons set out above, the Defence submits that the Prosecution has not met the evidentiary threshold of reasonable doubt in presenting evidence for its theory that there existed a JCE between the RUF and AFRC, including the Third Accused, to the extent that they shared a common plan, purpose or design "which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside of Sierra

⁴²⁰ TF1-167, Transcript 16 September 2005, p. 81-83.

⁴²¹ See TF1-054, Transcript 19 April 2005, p. 77-79, 86-90, 92-94; Transcript 20 April 2005, p.32; Transcript 22 April, p.18-19; TF1-053, Transcript 19 April 2005, p.19-20, 22-25, 49.

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Leone in return for assistance in carrying out the joint criminal enterprise” and that this JCE “included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographical control, and to use members of the population to provide support to the members of the joint criminal enterprise.”⁴²²

⁴²² See Indictment paras. 33 and 34.

VIII INDIVIDUAL CRIMINAL RESPONSIBILITY THIRD ACCUSED, OTHER THAN JCE

8.1 Alibi Defence: Time Spent in Prison

365. The Defence herewith refers to the evidence filed on 21 January 2005, concerning the detention of the Third Accused at Cockerill Barracks. Exhibit 1 attached to the "Kanu – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case"⁴²³, a letter from Brigadier General M.K. Dumbuya of the Sierra Leonean Ministry of Defence, including certified copies of entries in the Cockerill Barracks detention register pertaining to SLA/18164955 Sgt. Kanu S.B., proves that the Third Accused was in custody during the period 12 June 2000 and 1 December 2000. Therefore, during this specific time frame, the Third Accused cannot be held responsible for any of the crimes as charged in the Indictment. Furthermore, the Prosecution has not led any evidence to prove that the Third Accused, although being incarcerated, was in position to exercise command and control over any SLA troops or (the intend) to participate in the alleged Joint Criminal Enterprise.

8.2 Third Accused's Presence

366. It is the humble opinion of the Defence that the Prosecution has indicted the Third Accused with crimes throughout the *whole territory* of Sierra Leone, whilst it has not been able to establish that the Third Accused was in command and control of the perpetrators of these alleged crimes throughout the whole country, nor that the Third Accused can be held responsible for these crimes through the assumed JCE. The Third Accused has never been in almost half of the Districts mentioned in the Indictment during the relevant time period, and the Prosecution has not even come close to proof that the Third Accused, whilst not being present, held a position that made him responsible for the alleged crimes committed in these Districts.

Absence of Evidence on Kanu's Presence and Independent SLA Command

⁴²³ *Prosecutor v. Brima et al.*, Kanu – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case, SCSL-2004-16-T-119, 21 January 2005, Exhibit 1.

367. The Prosecution failed to present any evidence that the Third Accused was ever present in Bo District, Kenema District or Kailahun District during the whole indictment period. In the following paragraphs, the Defence will further elaborate on the position of the Third Accused vis-à-vis each of these two Districts.
368. The evidence provided by the Prosecution on the alleged crimes committed in Bo District all falls within the time span from 25 May 1997 until end of June 1997, the period just after the AFRC coup in Freetown. Witness TF1-004 has given evidence on pillage and killing by soldiers on 25th June 2005 in and around Tikonko⁴²⁴, witness TF1-053 testified on pillage in Bo town just after the coup on 25 May 1997⁴²⁵, and killing in Gerihun⁴²⁶, and witness TF1-054 who gave a testimony in court about pillage in Bo town about June 1997⁴²⁷ and killings in Gerihun.⁴²⁸
369. If these witnesses were to be believed about the events in Bo District they testified on during the abovementioned time period, the Defence respectfully submits that most of these alleged crimes were committed by soldiers already stationed within the Bo District⁴²⁹, even before the AFRC coup in May 1997. This is also corroborated by the evidence of witness TF1-054⁴³⁰ and by the fact that witness TF1-053 already knew some of the soldiers.⁴³¹ These soldiers in the Bo District were operating under the command of the brigade commander of the Bo District, Boysie Palmer, who was participating in the crimes described by witness TF1-053 in Gerihun and TF1-054 in Bo town⁴³² and Gerihun.⁴³³ Also participating in the crimes according to the evidence

⁴²⁴ Transcript 23 June 2005, p.7, 10, 12-13, 17-22, 25-27. This evidence however identifies the RUF as the perpetrators of the crimes, see Transcript 23 June 2005, p. 99, and the arguments on extermination in Bo District in paragraphs.

⁴²⁵ Transcript 18 April 2005, p.97-99.

⁴²⁶ Transcript 18 April 2005, p.107-111.

⁴²⁷ Transcript 19 April 2005, p.80-85

⁴²⁸ Transcript 19 April 2005, p.92-94.

⁴²⁹ Excluding the evidence given by TF1-004 on the killings in Tikonko (see further footnote 424).

⁴³⁰ Transcript 19 April 2005, p.78-79:

Q. Starting with Boysie Palmer, when was the first time you saw him?

A. Boysie Palmer is an old boy of Prince of Wales, my old school. And I knew him as the brigade commander in Bo Town.

Q. Do you recall the very first time you saw him in Bo Town?

A. Yes, he was just a brigade commander for a very long time before the AFRC.

⁴³¹ Transcript 18 April 2005, p.103-104, and Transcript 19 April 2005, p.19-20, where TF1-053 identifies three of the perpetrators: AF Kamara, AB Kamara and brigade commander Boysie Palmer.

⁴³² Transcript 19 April 2005, p.19-20, 22-25, and Transcript 19 April 2005, p.85.

⁴³³ Transcript 19 April 2005, p.93

given by TF1-053 and TF1-054⁴³⁴ was major AF Kamara, the number two in rank within the AFRC in Bo District.⁴³⁵ Boysie Palmer and AF Kamara were both found guilty of treason and executed under the government of President Kabbah in October 1998.⁴³⁶

370. The evidence the Prosecution submitted with regard to Kenema District covers killings in Tongo town by soldiers in August, which were according to witness TF1-062 committed by soldiers who he “knew that they were government soldiers and that they were SLAs. They were the ones that protected Tongo from 1995 to 1996”.⁴³⁷ This proves as well that the alleged crimes committed by soldiers in Kenema were executed by soldiers who had been stationed in the District even before the AFRC coup in May 1997.

371. The evidence given by TF1-122 on alleged crimes committed in Kenema District during the AFRC regime fall clearly within the responsibility of the RUF, as both the crimes were committed by RUF members⁴³⁸, and leaders of the RUF had the command over these crimes.⁴³⁹ Although TF1-122 is sometimes speaking of both AFRC and RUF members that were committing the crimes, it becomes clear from his description of the perpetrators that these were RUF members led by amongst other, Sam Bockarie and Issa Sesay.⁴⁴⁰ Furthermore, the witness is not able to mention a single SLA soldier that participated in these crimes, and is only able to mention that the “RUF and AFRC juntas” in general were responsible, without giving any foundation on his knowledge that both the RUF and SLA soldiers were involved in these crimes.⁴⁴¹ The Defence therefore concludes that the evidence given by TF1-122

⁴³⁴ Transcript 19 April 2005, p.19-20, and Transcript 19 April 2005, p.85.

⁴³⁵ Transcript 19 April 2005, p.92-94. See evidence given by witness TF1-054, Transcript 19 April 2005, p.77-78 and p.107.

⁴³⁶ Transcript 19 April 2005, p.109, and as referred to by Counsel in Transcript 19 April 2005, p.49.

⁴³⁷ Transcript 27 June 2005, p. 12-13, 44.

⁴³⁸ Transcript 24 June 2005, p.16-17, 25-26, 32-35, 71-76, 92.

⁴³⁹ Transcript 24 June 2005, p.2-22, 25-26, 92, 7-9.

⁴⁴⁰ Transcript 24 June 2005, p.2-22, 25-26, 92, 7-9. See also witness TF1-062, Transcript 27 June 2005, p.46 and witness TF1-045, Transcript 21 July 2005, p.37 for corroborating evidence that Kenema was in control of the RUF to at least a large extent. See also Defence witness DAB-142, Transcript 19 September 2006, p.13, testifying that Mosquito was based in Kenema.

⁴⁴¹ For example Transcript 24 June 2005, p.32-33, testifying about “Operation No Living Thing” and frequently ascribing the crimes to the “The AFRC juntas and the RUF rebels”. Witness TF1-045 confirms the Defence view that this operation was led by Sam Bockarie, alias Mosquito (Transcript 21 July 2005, p.37). See also Transcript 24 June 2005, p.27.

is incredible when it concerns the identification of the perpetrators of the crimes in Kenema District as members of the AFRC junta.⁴⁴²

372. It is the Defence view that the SLA brigades in Bo and Kenema District operated independently from the AFRC government that was very recently established in the capital city. The following extracts from the statement of witness TF1-054 on a meeting with a delegation from the new AFRC government who had come from Freetown, supports this arguments:

Q. And what were you doing in this classroom with these four men who said they had come from Freetown?

A. They said they had come to speak to us, the people of Gerihun, for us to talk to the Kamajors in Gerihun so that they would be united with the soldiers in Gerihun, AFRC in Gerihun.

Q. Were any of you in this classroom armed?

A. No.

Q. And was the meeting that you were having with these four gentlemen successful?

A. No.

Q. Why was the meeting not successful?

A. During the meeting, we heard the sound of a gun from the junction of the town, the entrance of the -- the entrance to the town of Gerihun.⁴⁴³

Q. What I am putting to you, when A F Kamara came, according to you, they did exactly the opposite of what the delegation went to the chief for; is that not so?

A. It was against because what they did was bad.⁴⁴⁴

373. These extracts from the evidence of TF1-054 show a clear contradiction between the activities of the new AFRC government in Freetown, who had sent a delegation to hold peace talks with the people in Gerihun, and the acts of the members of the SLA brigade in Bo District, who allegedly committed serious crimes by killing members of communities in Bo District and looting Bo town. It can therefore be concluded that the SLA brigades in Bo District, committed these crimes independently from the AFRC government in Freetown. Furthermore, the alleged crimes that were committed in Kenema District by soldiers, although almost all crimes were committed by the RUF,

⁴⁴² This argument is further reinforced by the fact that the witness does not seem to refer to AFRC junta members but to SLA soldiers already stationed in the Kenema District. Furthermore, the position, knowledge and foundation given by TF1-227 does not in any way justify the conclusion he often makes in his testimony, for example "From the circumstances, all I can tell this Court is that the killing of BS Massaquoi and others was well planned and coordinated by the organisation of AFRC juntas and the RUF rebels."

⁴⁴³ Transcript 19 April 2005, p.87-88; See also witness TF1-053, 19 April 2005, p.13-14 giving corroborating evidence on this meeting between Kamajors and the AFRC delegation from Freetown.

⁴⁴⁴ Transcript 22 April 2005, p.19

were occurring as well under control of the brigade command in Kenema District, and thus independently from the AFRC government in Freetown.

374. Moreover, even if the honourable Trial Chamber would accept that the alleged crimes committed by the SLA soldiers in Bo District and Kenema District were under the direct control of the AFRC government, the Defence submits that the Prosecution did not present any evidence that the Third Accused was in command of the incidents happening in the different towns in Bo District and Kenema District, nor that the Third Accused held such a position within the AFRC government that he can be held responsible for the crimes allegedly committed in the Bo District in May and June 1997.

375. According to Prosecution evidence, the Third Accused was an honourable in the AFRC government and did not hold any ministerial position or responsibility with regard to the southern Districts. The Prosecution has led evidence that the AFRC junta had their Secretary of State for the East by the name of Eddic Kanneh⁴⁴⁵, and their Secretary of State for the Southern Region AB Kamara.⁴⁴⁶ Therefore, the Prosecution did not introduce any evidence that the Third Accused can be held responsible for, or was in any way involved in, the alleged crimes in Bo or Kenema District.

Kailahun District: In Control of RUF

376. The Prosecution has not led any evidence that the Third Accused was at any time during the relevant Indictment period, present in Kailahun District, nor that the Third Accused can be held responsible for the crimes that according to Prosecution witnesses have been committed in the Kailahun District. Furthermore, the Prosecution evidence does not provide any proof of the responsibility of any SLA commander for crimes committed in the Kailahun District,

377. Although witness TF1-045 provides evidence on the presence of Johnny Paul Koroma, the political leader of the late AFRC regime, in the Kailahun District after the fall of the AFRC regime in May 1997, this evidence proves that nor the AFRC nor the SLA

⁴⁴⁵ Transcript 24 June 2005, p.7-8. See also TF1-114, 14 July 2005, p.127.

⁴⁴⁶ Transcript 19 April 2005, p.78.

that fled from Freetown, were in control of (part of) Kailahun District, or were even allowed to operate within this District.⁴⁴⁷ Defence witnesses DAB-142 and DAB-140 testify as well about that arrest by the RUF of the SLAs that came to Kailahun⁴⁴⁸, followed by the disarming and pillaging of the SLA soldiers⁴⁴⁹ and the tying up of Johnny Paul Koroma by the RUF.⁴⁵⁰ Furthermore, witness DAB-140 provided evidence that Johnny Paul Koroma addresses an assembly in Buedu town, wherein Johnny Paul Koroma stated that he was leaving Kailahun District with his own group.⁴⁵¹

378. Therefore, both Prosecution and Defence evidence proves that there existed no SLA command structure or organization of SLAs in Kailahun District. The soldiers that crossed the borders of Kailahun District had only one choice, and that is to join the RUF command and drop their SLA status, thus becoming a RUF fighter. The way the RUF and its leader treated the SLAs and their leader in Kailahun District, arresting and disarming them, forms important proof that no JCE could exist between the SLA and the RUF, especially after the fall of the AFRC government in February 1998. The leadership of RUF would not tolerate the command of the SLAs in the Districts under RUF control. DAB-140 gives the following lively account of this fact⁴⁵²:

He [Sam Bockarie] disarmed all of them [the group of SLA that arrived in Kailahun District, including Johnny Paul Koroma], that – because they've come to my own area and, whatever power I have, I will inflict it on you. I am your custodian, so all the guns you have should be with me.

379. Prosecution witness TF1-114, a member of the SLA that fled from Freetown to Kailahun after the ECOMOG intervention in February 1998⁴⁵³, and then became a member of the RUF, unambiguously testified about the position he took when he arrived in Kailahun:

Who appointed you an adjutant whilst you were in Kailahun?

A. Ex-general Mosquito.

Q. What faction did General Mosquito belong to?

A. At that time he was a leader of the RUF.

⁴⁴⁷ TF1-045, Transcript 19 July 2005, p. 95-96. In this testimony Mosquito makes it very clear to Johnny Paul Koroma that there is no room for him in the command structure in Kailahun District. See also witness TF1-113 Transcript 18 July 2005, p. 86-87 on the arrival of Johnny Paul Koroma in Kailahun District.

⁴⁴⁸ Transcript 19 September 2006, p. 18, 28; Transcript 19 September 2006, p. 71-72.

⁴⁴⁹ Transcript 19 September 2006, p. 77-78, 92.

⁴⁵⁰ Transcript 19 September 2006, p. 71-72.

⁴⁵¹ Transcript 19 September 2006, p. 75-76.

⁴⁵² Transcript 19 September 2006, p. 92.

⁴⁵³ Transcript 14 July 2005, p. 7-8.

- Q. Am I therefore right to say that you were appointed as an RUF official?
 A. Yes, sir.
 Q. Am I also right to say that you were then a member of the RUF?
 A. At that time now in Kailahun, yes. For all Kailahun District is RUF.
 Q. Mr Witness --
 A. Yes, sir.
 Q. -- how long did you stay with the RUF?
 A. Three years.⁴⁵⁴

380. The Defence holds that this witness, as member of the SLA that joined the RUF and thus became an insider within the RUF, should be in an especially good position to testify about the position members of the SLA that arrived in Kailahun.⁴⁵⁵

381. Additionally, Prosecution witness TF1-113 is very clear about the command structure in Kailahun District:

- Q. When you said they were all under the one command, did you mean they were all under the command of Sam Bockarie, General Sam Bockarie, alias Mosquito?
 A. When all of them came from here and went to Kailahun, they were all under Mosquito's order, as I saw it, because he was the General over all of them.⁴⁵⁶

382. This evidence is further corroborated by the evidence given by TF1-114⁴⁵⁷ and DAB-143⁴⁵⁸ who testified about the RUF command structure that existed throughout the whole indictment period in the Kailahun District.

383. Therefore, the evidence given by witness TF1-114 on rape and forced labour by RUF in Kailahun⁴⁵⁹, and witness TF1-113 on mass killing in Kailahun District, by RUF under command of Mosquito⁴⁶⁰, if believed, only can prove that these crimes fall under the criminal responsibility of certain members of the RUF. Furthermore,

⁴⁵⁴ Transcript 18 July 2005, p.12.

⁴⁵⁵ Although TF1-114 is fairly consistent throughout his whole evidence about the position of SLAs that arrived in Kailahun District (they had to become RUF), at one point he contradicts himself, when identifying the perpetrators of rapes (see Transcript 14 July 2005, p.130):

Q. When you say that people tried to rape or people tried to marry, who do you mean by "people"?

A. Members of this organisation, members of this group, RUF and AFRC men.

However, when asked again about the position of the SLAs who arrived in Kailahun District, TF1-114 consistently

⁴⁵⁶ Transcript 18 July 2005, 120-121. In addition, TF1-113 was not consistent in identifying both SLAs and RUF as the perpetrators of the crimes the witness testified on (see Transcript 18 July 2005, p.115-116, where Defence counsel confront the witness with her previous statement in which she only identified the RUF as the perpetrator of the crimes she testified about).

⁴⁵⁷ Transcript 18 July 2005, p.59-60, where TF1-114 testified about the command structure in the Kailahun District, naming Sam Bockarie as the overall commander, and Issa Susay as the second in command.

⁴⁵⁸ Transcript 19 September 2006, p.56, testifying about the RUF leaders who came to Buedu Town.

⁴⁵⁹ Transcript 14 July 2005, p.128-131.

⁴⁶⁰ Transcript 18 July 2005, p.84-85, 87-90.

although TF1-113 is testifying about the Military Police being a combination of the two groups, SLAs and RUFs⁴⁶¹, Prosecution witness TF-114 further clarified that he, as a member of the SLA joined the Military Police in Kailahun District, and therefore had to join the RUF.⁴⁶²

384. Conclusively, both Prosecution and Defence witnesses have unambiguously testified that Kailahun District was under total control of the RUF, and that any member of the SLA that went to Kailahun had no other choice than to join the RUF, and operate under the command of the RUF. The Prosecution has not to any extent proved that the Third Accused was criminal responsible for these alleged crimes which took place in the Kailahun District.

8.3 Prosecution Evidence on the Third Accused's Route after the Fall of the AFRC Regime in February 1998

385. The Defence observes that, in addition to the fact that the role of the Third Accused within the group of SLAs he moved along was grossly exaggerated by Prosecution key insider witnesses such as TF1-334 and TF1-167, some of the Prosecution witnesses falsely claimed the presence of the Third Accused when certain villages were attacked or even the participation of the Third Accused in these attacks. In the following paragraphs the Defence will therefore refute some of the Prosecution evidence with regard to the presence and the route of the Third Accused after the fall of the AFRC regime, and thus, according to Prosecution evidence, the ending of the Third Accused's purported role as an honourable within this regime.

Kanu's Presence and Role in Kono

⁴⁶¹ Transcript 18 July 2005, p.90.

⁴⁶² See paragraph 379 of this Defence Trial Brief, combined with Transcript 14 July 2005, p.128, where TF1-114 states that:

Q. Okay, Mr Witness, the question to you is this: When you got to Buedu, what were you doing there?

A. I was a military police adjutant, defence headquarter Buedu.

Q. Who did you report to in Buedu?

A. I report to at that time, to Mr Alex Alie, Captain Alex Alie.

Q. Was Captain Alex Alie from the Sierra Leone Army?

A. No, sir, he was in the RUF.

386. The Prosecution evidence fails to prove that the Third Accused stayed more than a few days in the Kono District after the fall of the AFRC regime in February 1998, or that the Third Accused had any command position within this District.

387. Defence witness DBK-117, who arrived in April 1998 with a group of SLAs, including Kallay, Hassan Papa Bangura (aka Bomblast), Junior Johnson (aka Junior Lion), Alimamy Bobson Sesay (Bobby), Staff Alhaji and Savage, in Kono District met a lot of RUF members in Kono District.⁴⁶³ When asked about the presence and role of the Third Accused concerning Kono District, DBK-117, who stated with the only SLA group in Kono District based at Masingbi Road,⁴⁶⁴ states the following⁴⁶⁵:

Mr Witness, when you were there at that time, did you see the third accused there?

A. No, I did not meet him there.

Q. Thank you. Mr Witness, where in Kono did you stay?

A. Well, I was there together with my SLA brothers at Masingbi Road. Whilst the RUF, they were all over in Koidu Town. Beware at Masingbi Road. That's what they called the place. That was where we deployed.

Q. Now, do you know whether the third accused, Santigie Borbor Kanu, was involved in the capture of Kono, before you went there?

A. No. They did not tell me and I did not see him. I did not see him and they did not tell me that they captured Kono. I never met them there and they did not go there.

This evidence is further corroborated by the testimony of other Defence witnesses.⁴⁶⁶

388. Furthermore, the evidence given by Prosecution witness TF1-167 that the SLAs and RUF that arrived in Kono District jointly took over the control of the town⁴⁶⁷, is in clear contradiction with the evidence of DBK-117, who arrived together with this Prosecution witness. And Prosecution witness TF1-334 claims that the Third Accused

⁴⁶³ Transcript 16 October 2006, p.14-15.

⁴⁶⁴ See DBK-117. Transcript 16 October 2006, p.15:

A. Well, I was there together with my SLA brothers at Masingbi Road. Whilst the RUF, they were all over in Koidu Town. Beware at Masingbi Road. That's what they called the place. That was where we deployed.

See also Prosecution witness TF1-334, Transcript 17 May 2005, p.103: "We and the SLA took out Masingbi Road, and Supcrman, the RUF took care of the road from Opera to Ciandorhun route. They also took care of the Guinea Highway to go to us Jaghwema I'lama."

⁴⁶⁵ Transcript 16 October 2006, subsequently p.15 and p.41-42.

⁴⁶⁶ See for example Defence witness DAB-042, who had seen the Third Accused before. (Transcript 15 September 2006, p.89):

Q. After the overthrow of the AFRC, did you hear that Santigie Kanu was commanding AFRC troops in Koidu, Yengema or in the Kono District?

A. No.

See also DBK-113 (Transcript 13 October 2006, p.16), who confirms that the Third Accused was not in Koidu town.

⁴⁶⁷ Transcript 15 September 2005, p.32-33.

took part in the operation to capture Kono⁴⁶⁸, but both TF1-167⁴⁶⁹ and DBK-117⁴⁷⁰ gave evidence that the Third Accused took no part in this operation.

389. Prosecution witness TF1-033 testified about the presence of the Third Accused⁴⁷¹ in Tombodu town, when Savage and his troops, under the command of Gullit, attacked this town⁴⁷² in March 1998.⁴⁷³ However, the reliability of TF1-033 is seriously hampered by the fact that the evidence of this witness showed that, instead of being an abducted civilian, this Prosecution witness played his own active role within the SLA group he joined, and thus was an active supporter of the AFRC⁴⁷⁴ and a participant in the SLA.⁴⁷⁵ In addition, witness TF1-334 does not mention the presence of the Third Accused during this alleged attack on Tombodu town.⁴⁷⁶ Furthermore, TF1-334 only testifies about the SLAs moving through Tombodu town, when they left Kono District⁴⁷⁷, and puts the attack on Tombodu town in a totally different time frame, as an alleged joint SLA and RUF attack taking place before the SLAs decided to leave Kono District, as well as the independent work of the troops under Savage.⁴⁷⁸ Witness TF1-167 his evidence proves as well that the mass killings were done by Savage and his troops, and that the SLAs just moved through Tombodu town.⁴⁷⁹

390. Although the Defence refutes the evidence given by witness TF1-167 on the presence of the Third Accused at an alleged meeting in Koidu Town (but not during the alleged capture of Koidu town⁴⁸⁰) in the beginning of 1998 at Denis Mingo where members of

⁴⁶⁸ Transcript 16 June 2005, p.59.

⁴⁶⁹ Transcript 15 September 2005, p.32-33.

⁴⁷⁰ See paragraph 387 of this Trial Brief.

⁴⁷¹ This witness seems to identify the Third Accused as a commander (Transcript 11 July 2005, p.11-12) but no foundation has been laid how this witness could have known this. On the contrary, this evidence has been suggested by the Prosecution in examination-in-chief (Transcript 11 July 2005, p.11-12):

Q. Witness, were any of the AFRC commanders present in Tombodu during that time?

A. Yes.

Q. Can you tell the Court who was present?

A. Hassan Papa Bangura was there. Five-Five was also there.

⁴⁷² Transcript 11 July 2005, p.9-13.

⁴⁷³ Transcript 11 July 2005, p.78-79.

⁴⁷⁴ TF1-033 fled Freetown to escape from the mob justice, as he was an active supporter of the AFRC (Transcript 11 July 2005, p.68-69).

⁴⁷⁵ The witness held the job of news reporter for Gullit (Transcript 11 July 2005, p.80).

⁴⁷⁶ TF1-334, Transcript 20 May 2005, p.65-67.

⁴⁷⁷ Transcript 20 May 2005, p.57-58, 65-67.

⁴⁷⁸ Transcript 20 May 2005, p.11, 13-17.

⁴⁷⁹ Transcript 15 September 2005, p.44-47.

⁴⁸⁰ Transcript 17 May 2005, p.99-101.

the RUF and SLA set up a command structure to defence Kono District,⁴⁸¹ and that the Third Accused as a G5 supervised the civilians in Kono District⁴⁸², this Prosecution witness still does not proof that the Third Accused had any position of command within this District.

391. In addition, TF1-334 testifies that the Third Accused only came for a short visit to Kono District, in order to give SAJ Musa an update on what happened in this District⁴⁸³:

- Do you know how long Five-Five remained at Masingbi Road?
- A. Five-Five only spent a day and the other day he returned.
- Q. Do you know where he returned to?
- A. Well, as Five-Five came, he addressed myself in the presence of my operation commander and the other soldiers that were under the operation commander, that he came to see the security situation in Kono and that he would go back to SAJ Musa and reported to him about our strength in Kono.
- Q. You said SAJ Musa; you have said that before.
- S-A-J M-U-S-A. Now, you said that Five-Five would go back to report to SAJ Musa about what was going on in Kono. Do you know where SAJ Musa was based at this time?
- A. Well, SAJ was based in Mongor Bendugu.
- Q. How do you know SAJ Musa was based in Mongor Bendugu at this time?
- A. Well, Five-Five clearly explained this to me, that SAJ had withdrawn from Kono and now he is based at Mongor Bendugu.

Therefore, Prosecution evidence fails to prove that the Third Accused operated in the Kono District, or held a command position in this District.

Kanu's Movement from Koinadugu District to Camp Rosos

392. Defence witness DBK-113 has given convincing evidence in court that the Third Accused did not move together with Prosecution witness Junior Johnson from Koinadugu District through Karina and Mandaha to establish a new base, Camp Rosos.⁴⁸⁴ This Defence witness formed part of a group of civilians that moved in the back rear of the SLA advance group with Junior Lion, Hassan Papa Bangura, Tito and FAT Sesay, amongst others.⁴⁸⁵ The Third Accused did not join this group of soldiers

⁴⁸¹ TF1-167, Transcript 15 September 2005, p.35-37.
⁴⁸² Transcript 19 September 2005, p.39-41, Transcript 15 September 2005, p.39-40.
⁴⁸³ Transcript 18 May 2005, p.19-20
⁴⁸⁴ Transcript 13 October 2006, p.21-25.
⁴⁸⁵ Transcript 13 October 2006, p.18-19.

and civilians at any stage during their movement from Mansofinia to Karina to Mandaha and eventually to Camp Rosos.⁴⁸⁶

- 393. As the Third Accused, according to Prosecution and Defence evidence, arrived before SAJ Musa in Colonel Eddie Town – more specifically, there is evidence that the Third Accused was already under arrest when the troop of SAJ arrived in Colonel Eddie Town⁴⁸⁷ – there must have been more groups that moved separately from the base in Koinadugu District to the newly established Camp Rosos in Bombali District. This fact also fits in the Defence view on the SLAs after the ECOMOG intervention in February 1998, as a group of soldiers on the run for opposing fighting forces, and moving in different SLA groups.
- 394. The evidence given by both Junior Johnson and TF1-334, that the Third Accused moved as a commander with them from Koinadugu District to Colonel Eddie town, and that the Third Accused participated in the attack on Karina and surrounding villages, including Mandaha, in mid 1998⁴⁸⁸ is clearly challenged by the evidence given by DSK-113 on this subject, as DSK-113 moved along with both Prosecution witnesses.⁴⁸⁹
- 395. Therefore this Prosecution evidence has not proved beyond reasonable doubt that the Third Accused was involved in, or in command of, any of the crimes committed by the troops that moved from Koinadugu District, to Colonel Eddie town.

8.4 OTP Evidence on Individual Crimes Allegedly Committed by Kanu

Count 1 - Terrorism

396. In all discussed definitions of terrorism, the ICTY *Galic* definition and the definition provided by Trial Chambers I and II, one of the constitutive elements is that the acts of violence were committed with the primary purpose of spreading terror amongst civilians.

⁴⁸⁶ Transcript 13 October 2006, p.21-25
⁴⁸⁷ See DSK-113, Transcript 13 October 2006, p.27; TF1-167, Transcript 15 September 2005, p. 78-79.
⁴⁸⁸ Transcript 23 May 2005, p.78-90.
⁴⁸⁹ [REDACTED]

397. In *Prosecutor v. Galic*, the ICTY Trial Chamber held that the 'primary purpose' element entails the *mens rea* of the crime of terror. "It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime."⁴⁹⁰
398. No evidence has been adduced at trial, supporting the Prosecution allegation that the Third Accused had a special intent to commit the crime of terror, nor that he actually did so.
399. There is no evidence that the Third Accused, in any form of liability, committed acts of violence with the primary purpose of spreading terror.
400. The Prosecution case suggests that SAJ Musa was the overall AFRC commander from the time the AFRC was ousted from Freetown by ECOMOG in February 1998. As evidenced by several Prosecution witnesses, SAJ Musa time and again indicated that the overall goal of the AFRC was to reinstate the army in Freetown.⁴⁹¹ The route to Freetown was made with this goal in mind. Thus, not only did the Prosecution not lead any evidence that the AFRC's or Kanu's primary goal was to spread terror during this period of time, but to the contrary, Prosecution witnesses testified that there was another overall goal: to reinstate the army, and that all crimes allegedly committed were in furtherance of this primary goal.
401. Kanu was part of this group of SAJ Musa, and no evidence has been led to the effect that the Third Accused would have had the primary purpose of spreading terror amongst the civilian population.

⁴⁹⁰ *Prosecutor v. Galic*, Judgment & Opinion, 5 December 2003, Case No. IT-98-29-T, para. 136 (footnotes omitted).

⁴⁹¹ TF1-167, Transcript 20 September 2005, p.12; TF1-184, Transcript 27 September 2005, p. 9, p. 15, p. 41, p. 46; TF1-334, Transcript 13 June 2005, p. 49; DBK-113, Transcript 13 October 2006, p. 30-31.

402. The Defence furthermore contends that outside of the abovementioned time period (from February 1998 until the end of 1999), the Prosecution did not lead any evidence supporting the required element that the primary goal should have been to spread terror amongst the civilian population.
403. For the above reasons, the Defence respectfully submits that the required elements of terrorism have not been met, and no evidence has been led to this end.

Count 2 - Collective Punishments

404. Furthermore, the Prosecution failed to adduce any evidence in this regard against Kanu individually.
405. As regards the liability form of superior responsibility, the Defence submits the following.
406. Witness TF1-033 states that in 1998, Kanu was one of the commanders present in Tombodu. This witness also testifies as follows:⁴⁹²

Q. Witness, were any of the AFRC commanders present in Tombodu during that time?

A. Yes.

Q. Can you tell the Court who was present?

A. Ilassan Papa Bangura was there. Five-Five was also there.

Q. Witness, when you say Five-Five, who do you mean? Can you tell the Court his full name?

A. Santigie Borbor Kanu.

Q. Proceed, Witness, who else?

A. Franklyn Woyo Conteh, Franklyn Conteh, alias Woyo, was also there. Savage, I said was there, he was the subordinates' commander implementing the orders given to him by Gullit. Bazy, Ibrahim Bazy Kamara was also again. Ibrahim Sesay, alias Biyoh, was also there. And Abdul Sesay also.

Q. Witness, do you know the reason why Tombodu Town was attacked by the AFRC?

A. Well, precisely, according to the AFRC guys under the command of Gullit, Gullit said to them that they all know what befell on their sympathisers, loved ones and colleague soldiers, when ECOMOG militarily removed them from power. Civilian also were involved in the killing -- in the killings of their colleague soldiers, sympathisers and relatives. So, the same fate they are going to return to civilians.

⁴⁹² Transcript 11 July 2005, p. 11-12.

407. Again, TF1-334 testifies that Five-Five was present in Western Area while an order was given to burn and kill. No evidence is brought forward by this witness that this order was followed up by either the Third Accused or the others present.⁴⁹³

408. The Defence respectfully contends that this evidence is insufficient in holding the Third Accused responsible for superior responsibility of the crime of collective punishments, as his mere presence as a commander, one of many, is mentioned.

Count 3, 4 and 5 – Extermination and Murder

409. The evidence presented on no occasion links the Third Accused to any act of extermination.

410. One witness testifies that Brigadier Five-Five shot a woman in Waterloo, who died consequently. He states the following:

- Q. Do you know how she died?
- A. Well, she died by gunshot.
- Q. And who shot her?
- A. It was one Brigadier Five-five.
- Q. How do you know Brigadier Five-five shot her?
- A. Well, SAJ Alicu came, and he came and told us that -- he told our father that there he fired at a woman and my father came and collected the lady and brought her to our house and said, "who shot this lady?" And he said it was our boss. And he said it was because of this woman that we did not go to fight.⁴⁹⁴

411. This evidence is to be qualified as absolutely unreliable. The witness, on the question who killed this woman, asserts that it was the Third Accused. Yet, when questioned about the foundation of his alleged knowledge, this witness failed to provide any plausible answer. Based upon this unreliable (hearsay) testimony, which was not supported by any other evidence, no conviction can be entered here.

412. At another occasion, Prosecution evidence has been submitted to the shooting of a mosque in Kissy. Gullit allegedly ordered the Third Accused to shoot and kill people inside a mosque, of whom he had received information "that the civilians were harbouring ECOMOG forces in the mosques. That was information he had got on that

⁴⁹³ Transcript 14 June 2005, p. 83-84.
⁴⁹⁴ TF1-277, Transcript 8 March 2005, p. 50.

area and that the troops, as they go down, should not see a mosque and think that they were housing civilians." Gullit moreover said that "if a troop reaches the mosque which houses people, they should be shot and killed," and "it was housing collaborators". He has found that they were harbouring Nigerian soldiers in the mosque." Witness then testifies that Five-Five ordered the shooting of this mosque, "[w]e shot at the mosque and people died and I saw it myself."⁴⁹⁵ Also witness TF1-046 testifies of ECOMOG soldiers being shot by, *inter alia*, the Third Accused.⁴⁹⁶

413. The Defence respectfully submits that such shooting of ECOMOG soldiers, if it were to be proved (*quod non*) cannot be qualified as extermination, because the second requirement, the killing or destruction constituted part of a mass killing of members of a civilian population, is not fulfilled. This same argument goes for the crime against humanity of murder, and murder as a violation of Common Article 3 (counts 4 and 5 respectively).

414. For the above reasons, the Defence respectfully submits that the required elements of extermination and murder have not been met, and no evidence has been led to this end.

Count 6 – Rape

415. The Defence submits that the only Prosecution witness that has actually testified about the involvement of the Third Accused in the crime of rape is highly unreliable. Witness TF1-282, who testified about being raped by a person named Five-Five⁴⁹⁷, was in cross-examination confronted with her previous inconsistent statement, and could not even describe the way the Third Accused looks, whilst according to her statement she described him before:⁴⁹⁸

Witness was in Sumbuya for two weeks before Sumbuya was attacked. Witness was raped during these two weeks. Witness was vaginated by Five-Five when she arrived in Sumbuya. Witness was about 14 years old at the time and had not yet been initiated. Witness was raped in a house by Five-Five who threatened to kill her if she cried. Witness said that Five-Five had a pistol on him, and she did not see it clearly." I'm sorry, "although she did not see it clearly. Five-Five made her take off all her clothes. Witness said that

⁴⁹⁵ TF1-334, Transcript 14 June 2005, p.87-88.

⁴⁹⁶ TF1-046, Transcript 7 October 2005, p. 115-116.

⁴⁹⁷ Transcript 13 April 2005, p.6-14.

⁴⁹⁸ Transcript 14 April 2005, p.3-5.

Five-Five penetrated her vagina and made her bleed vaginally. Witness pleaded with Five-Five for him to stop, but he said that she should wait until he was finished. After he had finished, he dismissed witness, who returned to the house where the other group of rebels who captured her were staying. Witness described Five-Five as tall, slim, and fair in complexion, which means not too black. She heard him speak Krio. Witness knew he was a big commander, as he passed orders to his men. Witness heard him order his men to jah-jah or loot. They would go looting, and then come back with the loot which they brought to him."

Q. Witness, I want to ask you first of all, did you tell the Prosecution that you were raped by the person called Five-Five at Sumbuya?

A. I did not say that he raped me at Sumbuya. I said he raped me in the bush.

Q. Is it the case that what I've just read to you, that part of what I've just read to you is not true?

[...]

THE WITNESS: It was not in Sumbuya.

MR MANLEY-SPAINÉ:

Q. Witness, did you describe the person called Five-Five as tall, slim, and fair in complexion?

A. I was not able to describe him because I only saw him once. That was the time that he raped me. So I wasn't able to describe him, how he was and how he wasn't.

Q. Are you saying that you did not tell the Prosecution that he was tall, slim, and fair in complexion?

A. Not at all.

Q. Witness, how long -- how many times did you see this person that you were told was Five-Five -- was called Five-Five?

A. I saw him only once.

Q. Where was that?

A. That was the time that -- that was the time that we were in the bush. The very day I was captured.

416. Accordingly, the Defence concludes that the evidence of witness TFI-282 should have no weight in the determination of the guilt of the Third Accused. In addition, according to the Defence the Prosecution has not proven beyond reasonable doubt the criminal responsibility of the Third Accused for the crime of rape, charges as count 6 in the Indictment.

Count 10-11 mutilation

Defence Theory

417. Regarding count 10, the Defence respectfully holds that no conclusive evidence has been adduced regarding the specific incidents the Prosecution witnesses testified upon, that the following element has been fulfilled: the perpetrator's conduct caused death or seriously endangered the physical or mental health of the victim (element b).

418. With regard to count 11, the Defence submits that no evidence has been introduced at trial, supporting the Prosecution allegation that mutilations and other inhumane acts as described in count 11 were committed as part of a widespread and systematic attack. This requirement of crime against humanity has not been met by the Prosecution evidence, and accordingly, count 11 should be dismissed.

Crime Base

419. Prosecution witnesses have made some assertions relating the Third Accused's behaviour to the tenth and eleventh counts. The Defence submits that this evidence needs to be refuted, on the basis of the following.

420. Witness Junior Johnson describes that at Kissy mental home, when he got there, Santigie Kanu gave an order to go to the eastern part of Freetown, "to amputate up to 200 civilians." The Defence first of all contests the fact that the Third Accused made such a statement. Junior Johnson was not in the direct presence of the Accused at that time, and even if the Third Accused would have made such an order, he was not present and could not have known. This witness is asked where he was when the order was given. He states he was with Ibrahim Bazy Kamara, "at the *environment* of the Kissy mental home."⁴⁹⁹ In the second place, without proper basis, it is not possible to understand the meaning of the Third Accused's words, if he uttered them at all – *quod non* –, and assuming that this simple sentence led to the crimes indicated in counts 10 and/or 11 is an oversimplification of the facts. In the words of honourable Judge Lussick during the examination-in-chief of witness TF1-334: "Amputation could mean just cutting a lock of their hair off."⁵⁰⁰

421. When confronted with this incident several days later, Junior Johnson, when confronted with the allegation that it was not the First Accused who made this order, he did not deny this, but rather states that more people came and ordered the amputation of 200 civilians.⁵⁰¹

⁴⁹⁹ TF1-167, Transcript 16 September 2005, p.53-55 (emphasis added).

⁵⁰⁰ Transcript 14 June 2005, p. 69.

⁵⁰¹ TF1-167, Transcript 19 September 2005, p.87.

422. Prosecution insider witness TF1-184 indicates that Five-Five showed how amputations were to be carried out.⁵⁰² The Defence respectfully submits that this provides no conclusive evidence of the elements of counts 10 and 11, even not in combination with the other allegations made by these insider witnesses, whose reliability the Defence in this Brief has seriously contested.
423. Witness TF1-334 also provides evidence for Mr. Kanu's alleged participation in the amputation of people's hands.⁵⁰³ The Defence submits that this witness's testimony as a whole is unreliable, and that also this part of the evidence should not be taken into account.
424. Remarkably, it is these two witnesses, TF1-184, TF1-334, who testify to the alleged participation of Kanu in these crimes. The Defence holds that this evidence is not reliable, because of the fact that these two witnesses were in prison together, also with Defence witness DBK-113. In prison, they were approached by Special Court investigators, and had all the time in the world to discuss and adjust each others evidence. DBK-113 indicates of inappropriate promises made to them, and "They told us that we were to testify against Bazzy, Santigie Kanu and Tamba Brima."⁵⁰⁴ This witness moreover states that the Special Court's investigators told him: "You boy, you are senseless. You just come and say this, the bosses that had been held were the one who gave the order to commit crimes.' That was what they said."⁵⁰⁵
425. As shown above, the only evidence that has been alleged against the Third Accused, was in the Freetown District. The time period for this count is restricted to "[b]etween 6 January 1999 and 28 February 1999."⁵⁰⁶ The Defence contends that no evidence has been put forward substantiating the allegation that such facts happened on or after 6 January 1999. As such, this evidence relating to the Freetown area should also be dismissed. For all other districts, the Defence contends that no evidence has been adduced relating the Third Accused, either individually or through his alleged position as a superior, to the crimes embedded in counts 10 and 11 of the Indictment.

⁵⁰² TF1-184, Transcript 27 September 2005, p. 74.

⁵⁰³ TF1-334, Transcript 14 June 2005, p.69-71.

⁵⁰⁴ DBK-113, Transcript 13 October 2006, p. 58-59 and p. 64-65.

⁵⁰⁵ DBK-113, Transcript 13 October 2006, p. 126.

⁵⁰⁶ See para. 63 of the Indictment.

426. For the above reasons, the Defence respectfully submits that the required elements of mutilation have not been met, and no evidence has been led to this end.

Count 12 – Child Soldiers

427. The Defence holds that the Prosecution has not led any evidence on the involvement of the Third Accused in the actual recruitment of child soldiers. Furthermore, the Prosecution evidence about the involvement of the Third Accused in the training of child soldiers is often vague, and does not specify the alleged role of the Third Accused. For example, witness TF1-158 gives the following evidence⁵⁰⁷:

Q. When you told us about the training in Rosos, you indicated that Gullit and Five-Five they go there and stand by during the training. Can you recall?

A. Yes. Yes.

Q. Did you recall whether Five-Five did anything while standing by during this training?

A. He did not do anything.

428. In addition, Prosecution witness TF1-167 describes the role of the Third Accused in the training of men and boys as follows:

A. The men were used – some were used to carry arms and ammunition and food, and some were choosed [sic] to be trained as fighters.

Q. Were the women used for anything?

A. The women always are there to help cook. To cook.

Q. When you were at Rosos did you have any particular role?

A. Yes, at Rosos there was a training organised at Rosos, which Santigie Kanu was overseeing the training and PAT Sesay, the G1 in charge of admin, was also in charge of the training.⁵⁰⁸

429. The hearsay evidence of TF1-180, if believed, does also not prove that the Third Accused held any position, or was in charge of, the recruitment, training or use of alleged child soldiers⁵⁰⁹:

A. So unfortunately, at that moment, we took some weeks – two weeks. That was the time our commander said -- he said, "Those small boys are supposed to go and fight in Kabala." That was the time that Brigadier Issa and some other bras Brigadier Five-Five, Gullit, O-Five - they said they had given an order that all of us should be captured, the smaller boys in the street, that we should go and fight.

430. The Defence holds that the evidence of witness TF1-227's testimony should not be followed. In the testimony of this witness, a clear inconsistency can be detected with

⁵⁰⁷ TF1-158, Transcript 26 July 2005, p. 72.

⁵⁰⁸ TF1-167, Transcript 15 September 2005, p.64.

⁵⁰⁹ TF1-180, Transcript 8 July 2005, p.14.

respect to the assertions of this witness on the issue of so-called 'child combatants.' At the outset of his testimony this witness asserts: "Brigadier Five-Five he has a child combatant."⁵¹⁰ Yet, later on, this same witness purports something totally different, namely:

Q. How many child combatants did you say Brigadier Five-Five had?

A. Ten.⁵¹¹

431. The Defence holds that this is an indicative inconsistency within the witness's testimony, not between a prior statement and the testimony, but within the testimony itself. From the wording used by Prosecution counsel, "How many child combatants did you say Brigadier Five-Five had?", it seems that the Prosecution counsel had to remind witness of something he should say in court, and which he had failed to mention earlier on when this topic had already been discussed.
432. With reference to the previous discussion of the reliability of TF1-227, the Defence contends that the evidence of witness TF1-227 should consequently not be taken into account, as it has been shown that this witness' testimony is on crucial parts unreliable.
433. Furthermore, as previous mentioned, the age of these "children" remains often unclear.
434. Conclusively, in the absence of other conclusive witness testimony, the Prosecution has not led sufficient evidence to prove beyond reasonable doubt that the Third Accused can be held criminal responsible for the crime of recruitment and use of child soldiers, charged in count 12 of the Indictment.

⁵¹⁰ TF1-227, Transcript 11 April 2005, p. 21.

⁵¹¹ TF1-227, Transcript 11 April 2005, p. 75.

IX CONCLUSIONS

435. This trial brief arrives at the following overall conclusions.

History of the SLA

436. The defence has first of all shown that there was such failure of state responsibility on part of the Republic of Sierra Leone from the 1970s onwards up to 1997 as to the endorsement of all forms of discipline, education and training within the army. It also showed that this was not without substantive effects on the state of the army. It is established that Defence that the marginalization and deterioration of the army in all its aspects undermined the three liability modes as embedded in the indictment. The defence case has specifically set forth:

- (a) The history of the SLA shows a total breakdown in terms of military organization. Before and during the AFRC regime all forms of discipline and regimentation of the RSLAF were brought down to zero and ultimately finished the image and military nature of the RSLAF, affecting command and control.
- (b) Junior ranks in the SLA were totally neglected by the politicians and (senior) officers. It was this neglect that was one of the major factors that led to the AFRC coup. The defence case has also shown that this led to the disintegration of the army as a coherent unit, deteriorating command and control.

437. Furthermore, the Defence has established that at that time the AFRC came into power, no integrated / coherent army force existed which reasonable could have been functioning as one unified fighting force in military sense.

438. Additionally the Defence case has provided evidence that:

- (a) The precondition, assumed by the OTP, that recognizable groups need to exist to establish a military organization, was not fulfilled during the conflict in which the AFRC faction participated. Evidence has been adduced the various groups were not recognizable.

- (b) The AFRC at the maximum may have had the semblance of a military structure and hierarchy. However, since the essential criteria of the span of command and the span of control were not fulfilled, it was far from a regular force, if any.
- (c) The AFRC faction did not inhibit the majority of the characteristics of a traditional military organization.
- (d) Within the AFRC faction any form of strategic military level and the grand strategy level was absent.
- (e) Fifth, it has been shown that the AFRC faction can not be qualified as a military organization in military-doctrinal sense.
- (f) The Defence case also adduced evidence that the AFRC, during the war, was never one single unit, but comprised of various groups with constantly changing compositions, not related to each other with different commanders; a chameleonic movement. All these different commanders had different supporters operating in different parts of the country, pledging alliance not to the larger coalition, but to specific commanders.
- (g) Finally, a joint force or joint structure in military operational terms between the RUF and the AFRC was never established. The Defence case has provided prove that this conclusion undermines the liability theory of JCE.
- (h) As a result it is the Defence case that Common Article 3 of the Geneva Conventions is not applicable in the instant case. It has been argued that some of the individual prohibitions of this provision demand an administration and organization of discernable proportions on part of both parties to the conflict.⁵¹² Within international law, the view has also been transpired that an "armed conflict," even if it is "not of an international character," requires some degree of military organization and political control on both sides.⁵¹³ It is exactly this

⁵¹² See Draper, "The Status of Combatants and the question of Guerilla Warfare, o.c., at 234

⁵¹³ Draper, o.c. at 335

organization and political control which is absent in this case as shown by the evidence.

The Defence case has provided evidence as to the total downfall of the Sierra Leone Army from 1961 to 1997 and the total negligence of the junior ranks in the Army by politicians and senior officers. It has also shown the disintegration of a military organization at the time of the Coup of 1997 as a result of this negligence. It is established that as a result hereof the following consequences emerged: low morale, no discipline, no training, no leadership, no hierarchy, no equipment, no organization, no welfare system for rank and file, no prospect, no military command and control, and last but not least, no hope for improvement. And: no political oversight as required for the applicability of common article 3.

As a result, this history has had important implications as to the assessment of the existence of "effective command and control" and the presence of joint enterprise in military and legal criminal sense.

Absence of JCE

439. The Defence case has led evidence as to the following five conclusions on the issue of JCE:

- (a) It has been shown by the Defence that the three accused may and can not be held accountable for alleged crimes committed by other persons, such as alleged conduct of any member of the AFRC or RUF, not even based upon the concept of JCE.
- (b) Secondly, the Defence case has furthermore shown that the three accused can not be held criminally liable for acts or omissions which are attributed to the AFRC and RUF as such, i.e. the organizations to which they allegedly belong. "Organizational crime" does not warrant the current indictment.
- (c) Thirdly, the Defence case has shown that the three accused, to be part of the purported JCE, lacked the requisite "frame of mind."

- (d) Fourthly and in specific, the Defence case has established that no reasonable trier of fact can arrive at the conclusion that the three accused had an understanding or entered into an agreement with the relevant physical perpetrators to commit acts which were a natural and foreseeable consequence of the crime agreed upon by the accused and those perpetrators.⁵¹⁴
- (e) Fifthly, the Defence case has provided proof that, as is set forth by the ICTY judgments in the Blagojevic and Jokic cases, in the event that the objective of an alleged JCE changes such that the objective is fundamentally different in nature and scope from the common plan or design to which the participants originally agreed, then a new and distinct JCE (within the third category) can be established.⁵¹⁵ However, any "escalation" of the original objective must either be agreed to if a person is to incur criminal liability for the first category of JCE, or that "escalation" must be a natural and foreseeable consequence of the original enterprise.⁵¹⁶ The Defence case has shown that the latter was not the case. In specific, the Defence case has provided proof for the following:

- (c) Firstly, the conflict in general and fighting factions in particular were of chameleon nature. Military conduct, if any, shifted from offensive and defensive operations to "survival of the fittest" actions. Evidence is adduced, that those that joint SAJ Musa's group only did so to protect themselves and their families from the variety of threats from ECOMOG and Kamajors.
- (d) Secondly, the composition of the factions, due to internal rivalry and escalation within and between AFRC and RUF, constantly changed and fragmented; there was a considerable degree of "factional fluidity", all processes which were unforeseeable for the accused. We will prove that by end 1997 / early 1998 there was a complete breakdown of relations between SLA soldiers and RUF directly after looting of the Iranian Embassy.

⁵¹⁴ See ICTY Judgment Prosecutor v. Brdanin, 1 September 2004 case no. IT-99036-T para. 347

⁵¹⁵ ICTY, *Prosecutor v. Blagojevic and Jokic*, Judgment, 17 January 2005, Case No. IT-02-60-T, paras. 700, 2155-2156.

⁵¹⁶ *Ibid.*

- (e) In-fights between AFRC, RUF and even amongst SLA soldiers occurred on many occasions during the timeframe of the Indictment.

440. Therefore no conviction can be entered on the bases of JCE.

Absence of Superior Responsibility

441. The Prosecution case failed to proof that the third accused from the time of the retreat from Freetown to the time of the advance on Freetown, had any command authority. Furthermore it failed to proof that a leadership structure existed, even in Mansofinia. It has been shown that the nature of the retreat from Freetown was so disjointed and disorganized such that there was no central authority. It has been proven that at that time a breakdown of command and control occurred.
442. The Prosecution case failed to proof that even at Col. Eddie Town under SAJ Musa no operational structure existed nor was such a structure established, bearing in mind that only SAJ Musa and FAT Sesay were educated staff officers. No one else. Additionally, it has been shown that the accused even were ostracized after being accused by AFRC / SLAs of trying to subvert the movement.
443. The evidence has shown that third accused was detained or put under house arrest by Commander "O-Five" throughout the period they were in "Colonel Eddie Town" in 1998. It has been shown that this house-arrest was imposed due to internal strife and because the third accused were trying to subvert the movement. After the house arrest, the position of the third accused was considerably marginalized on the advance to Freetown. Accordingly, it has been established that the third accused reasonably could not have exercised any form of effective command and control.
444. Additionally, it has been established that "control" must be effective to bear superior responsibility. Mere appearance of an official's name on a list, i.e. the presented list with honourables, as such does not qualify superior responsibility of this nature.⁵¹⁷ The Prosecution failed to proof that the movement at all material times was such that there was no effective control.

⁵¹⁷ Ibid.

445. Furthermore, it has been established that as a result of these events the third accused could not have been endowed with any military authority. In this regard, it should be noted that his alleged qualification as "honourable" can not serve as proof for de facto or de jure military authority.

446. Finally, the evidence led by the Defence as to the element of superior responsibility has indicated that unlike the third accused, other individuals were exercising command and control during the relevant times in the relevant districts, if any. Witnesses have appeared before your Court indicating that other individuals than the third accused were exercising command and control, if any. In specific, witnesses have testified before the honourable Trial Chamber speaking about the control by the RUF of (the diamond areas in) Kono almost throughout all 1998, thus excluding the asserted control by the AFRC, let alone the third accused.

Absence of Individual Criminal Responsibility

447. The Defence case, addressing the alleged individual criminal responsibility has provided evidence for the following conclusions:

- a.) common Article 3 applies only "if the hostile action, directed against a legal government, is of a collective character and consists of a minimum amount of organization".⁵¹⁸
- b.) The third accused was not present in all of the districts at the relevant times.
- c.) It is not proven in the instant case that alleged unlawful attacks on civilian or civilian objects actually *resulted* in serious damage in all the districts and with its magnitude as asserted in the Indictment.

448. With respect to the latter evidence reference can be made to the ICTY Appeals Chamber judgment in the *Kordic and Cerkez* case of 17 December 2004.⁵¹⁹

449. The Appeals Chamber concluded that a serious *result* of the attack must be shown for liability to attach under Article 3 ICTY Statute:

⁵¹⁸ See the 1962 ICRC Commission of Experts and various scholars; see Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law* 97 (2001).

⁵¹⁹ Case No. IT-95-14/2-A.

[T]he Appeals Chamber is not satisfied that at the relevant time, a violation of Articles 51 and 52 of Additional protocol I incurred individual criminal responsibility under Article 3 of the Statute without causing death, serious injury to body or health, or results listed in Article 3 of the Statute, or being of the same gravity. Therefore the Appeals Chamber will consider in the Judgement that criminal responsibility for unlawful attack on civilians or civilian objects does require the proof of such a result emanating from an unlawful attack.

450. In this respect the Prosecution case failed to proof that such result emerged from all the alleged attacks. The Prosecution case failed to provide forensic evidence whatsoever which determines the existence, nature and scope of the purported injury and damage inflicting upon civilians and civilian objects relative the various districts / villages. The defence is mindful that the ICTR in its judgment of 27 January 2000 in *Prosecutor v Musema* held that the absence of forensic evidence of killings may not be decisive in case where there is convincing eyewitness testimony of crimes; yet, in the AFRC case, all the alleged killing and destructions in terms of quantity and occurrence are not supported by conclusive eyewitness testimony. Hence, this renders the element of "widespread or systematic" attack moot and also the qualification "widespread looting and burning of civilians homes" (count 14 of the Indictment).

451. Addressing the particular position of the third accused in the conflict, the evidence led by the defence has shown that he did not fulfil a role as a commanding officer in military-operational sense, neither de jure nor de facto. Further, the Prosecution case failed to proof that Mr. Kanu did actively participate in the crime neither as a civilian nor as a combatant.

452. The Prosecution case failed to proof that the third accused functioned as a commander responsible for military operations. Therefore no conviction can be entered.

Defences of Mistake of Law

453. The Defence case also has established the defence of mistake of law. It has shown that concurrence of moral and legal culpability does *not* count for at the least these alleged crimes of recruiting child soldiers, forced marriages and the alleged violation of Common Article 3 of the Geneva Conventions seen in connection with the established chaos, in military-operational and military legal terms, within the SLA just before the *coup d'etat*. Recruiting of child soldiers, as is shown by the defence, which was part of an official governmental policy in Sierra Leone at the relevant times and subsequently

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can not justify criminal liability of the serviceman or citizens involved therein. Additionally, recruitment of child soldiers was only internationally accepted as an international crime in July 1998 by 122 states, at the moment of acceptance of the Rome Treaty.

454. The Defence case has provided the foundation for the defence of mistake of law relying upon the notion that there is a limit to the knowledge and attribution of criminal liability to the military. The tribunal in the *High Command* (Von Leeb and other, US military tribunal sitting at Nuremberg, judgment 28 October 1948) admitted this when it determined that a military commander:

[c]annot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgement as to disputable legal questions.⁵²⁰

455. The words expresses in the *Peleus* trial in 1945 by the Judge Advocate are supportive in this regard:

It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject.⁵²¹

456. As a result the Defence case has proven that, contextualized in the chaotic movements and breakdown of military structures, *mens rea* could reasonably not have been established on part of the third accused with respect to, at the least, the mentioned charges of forced marriages and child soldiers.

Conclusion

457. This Trial Brief finally wishes to conclude with the following words of Justice Murphy of the U.S Supreme Court saying in his dissent in *Yamashita*:

An uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit.⁵²²

⁵²⁰ *High Command* case in Freidman (1972), Vol. II, p.1433.

⁵²¹ *Peleus* Case by a British Military court, Hamburg 1945, 13 II.R 248, p. 249.

⁵²² In re *Yamashita*, 327 U.S. 1, per J. Murphy, at 41 (1946). Yamashita, a Japanese General, had been tied by an American Military Commission for crimes committed in the Philippines and appealed to the U.S. Supreme Court.

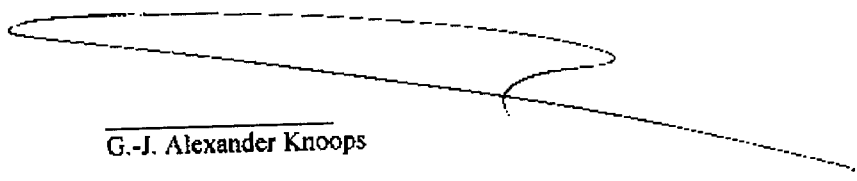
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458. Additionally the reasoning of Justice Murphy in *Yamashita*, while referring to the "brutal atrocities inflicted upon the helpless Filipino people", held that:

The immutable rights of the individual (...) belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, colour, or beliefs (...). No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights (...).⁵²³

459. The defence for the third accused wishes that these notions will be reflected in the judgement in this case.

Respectfully submitted,
On 1 December 2006



G.-J. Alexander Knoops

⁵²³ *ibid*, at 26

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