650) SCSL-04-16-A (1168 — 1227) 1168

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

BEFORE: Hon. Justice George Gelaga King, Presiding
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice Geoffrey Robertson, QC
Hon. Justice A. Raja N. Fernando

Registrar: Mr. Herman von Hebel

Date Filed: 13 September 2007

THE PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

Case No. SCSL–2004–16-A

BRIMA APPEAL BRIEF

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INTRODUCTION

1. On 2 August 2007 the Brima Defence filed a Notice of Appeal pursuant to Article 20 (Appellate Proceedings) of the Statute[1] and Rule 108 of the Rules of Procedure and Evidence[2] against the Judgment[3] and Sentence[4] of Trial Chamber II pronounced on 20 June 2007 and rendered on 19 July 2007 respectively in the case of the Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara (hereafter referred to as "the Appellant") and Santigie Borbor Kanu case no. SCSL 04-16-T.

2. On 2 August 2007 both the Prosecution and all Defence teams filed a Public Urgent Joint Defence and Prosecution motion[5] for an extension of time to 13 September 2007 for the filing of Appeals Briefs.

3. On 10 August 2007 the Appeals Chamber rendered its Decision[6] on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Appeal Briefs ("Order of Extension") ordering the parties to file their Appeal Briefs no later than 13 September 2007.

APPELLATE PROCEEDINGS

4. Article 20 of the Statute of the Special Court for Sierra Leone states that;

> "1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
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> a. A procedural error;
> b. An error on a question of law invalidating the decision;

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[1] Statute of the Special Court for Sierra Leone (the 'Statute')
[2] Rules of Procedure and Evidence of the Special Court for Sierra Leone ('Rules')
[3] Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Bobor Kanu Case No. SCSL-04-16-T, Judgment, 20 June 2007 ("Judgment").
[4] Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Bobor Kanu Case No. SCSL-04-16-T, Sentencing Judgment 19 July 2007.
[5] SCSL Document No. - SCSL-2004-16-631-T
[6] SCSL Document No. - SCSL-2004-16-640-T

c. An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone."

5. The Brima Defence pursuant to Article 20 of the Statute, Rule 111[7] and the Order of Extension hereby files its Appeal Brief.

THE APPEAL

6. The Brima Appeal limit its arguments to matters that fall within the scope of its grounds of appeal, namely an error of law invalidating the judgment or an error of fact involving a miscarriage of justice. The Appeal is against both conviction and sentence.

7. As regards errors of law, the Appeals Chamber of the ICTR has averred that, in the event a party makes an allegation of an error of law the alleging party must advance arguments in support of the submission and explain how the error invalidates the decision in issue. However, if the appellant's arguments do not support the contention that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law[8].

8. As regards errors of fact, it is well established that the threshold for overturning

[7] Rules of Procedure and Evidence

[8] See Gacumbitsi Appeal Judgement, para. 7, quoting Ntakirutimana Appeal Judgement, para. 11 (internal citations omitted). See also Kajelijeli Appeal Judgment, para. 5; Staki} Appeal Judgment, para 8; Vasiljevic Appeal Judgment, para. 6

factual determinations made by a Trial Chamber is high and onerous and one not easily met by an Appellant.

9. Where the Defence alleges an erroneous finding of fact, the Appeal Chamber must give deference to the Trial Chamber that heard and observed the evidence at trial. The Appeals Chamber will only interfere in the findings of a Trial Chamber where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[9]

10. The Appeals Chamber should not disturb the Trial Chamber findings to substitute its own, unless the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact, or where its valuation has been "wholly erroneous"[10]

11. The Brima Defence submits that it will demonstrate that the evidence relied on by the Trial Chamber to arrive at the conviction and sentence of the Appellant "could not have been accepted by any reasonable tribunal of fact" and will show further that where its arguments where not successful at the trial the Trial Chamber's rejection of those arguments constitute an error warranting the intervention of the Appeals Chamber[11]

PROCEDURAL BACKGROUND

12. The initial Indictments against the Accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu each contained 17 counts of crimes against humanity, violations of Article 3 common to the Geneva Conventions and of

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[9] Gacumbitsi Appeal Judgement, para. 8, quoting Krsti} Appeal Judgement, para. 40 (internal citations omitted). See also Kajelijeli Appeal Judgment, para. 5.
[10] Tadic, Appeals Chamber Judgment, July 15, 1999 at para. 64; Aleksovski, Appeals Chamber Judgment, Mar. 24, 2000 at para. 63; Delalic et al., Appeals Chamber Judgment, Feb. 20, 2001 at para. 434, 491; Kupreškic et al., Appeal Judgment, Oct. 23, 2001 at para. 30.
[11] Ndindabahizi Appeal Judgement, para.11; Gacumbitsi Appeal Judgment, para. 9; Niyitegeka Appeal Judgment, para. 9. See also Staki} Appeal Judgment, para 11; Naletili} and Martinovi} Appeal Judgment, para. 13

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Additional Protocol II and other serious violations of international humanitarian law.[12]

13. On 27 January 2004, having ordered a joint trial of the Accused Brima, Kamara and Kanu, Trial Chamber I ordered the Prosecution to file two consolidated indictments and that new case numbers be assigned to the two joint cases.[13] On 5 February 2004, the Prosecution filed a new indictment ("Consolidated Indictment") in compliance with the Order of Trial Chamber I.[14]

14. On 9 February 2004, the Prosecution applied for leave to amend the Consolidated Indictment and add a count of "other inhumane acts" pursuant to Article 2(i) of the Statute for acts of "forced marriage". Moreover, the Prosecution moved for other modifications of the Consolidated Indictment.[15]

15. On 6 May 2004, Trial Chamber I granted the proposed amendments to the Consolidated Indictment, which included a new Count 8 of "other inhumane acts", along with other amendments ("Amended Consolidated Indictment").[16]

16. On 17 January 2005 the President of the Special Court assigned the trial of the Accused Brima, Kamara and Kanu to the newly created Trial Chamber II.[17]

17. On 7 February 2005, the Prosecution requested leave to withdraw Counts 15-18 from the Amended Consolidated Indictment. On 15 February 2005, the Trial Chamber granted the Prosecution's request.[18] The operative indictment in this

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

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

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

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

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

[17] Order Assigning a Case to the Trial Chamber, SCSL-2004-16-PT, 17 January 2005.

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

case, the Further Amended Consolidated Indictment, was filed on 18 February 2005.

18. The Prosecution case-in-chief commenced on 7 March 2005 and closed on 21 November 2005. The Prosecution called 59 witnesses. The Defence case-in-chief started on 5 June 2006 and finished on 26 October 2006. Final briefs were filed on 1 December 2006 and Closing Arguments were heard on 7 and 8 December 2006. The Trial Chamber sat 176 trial days.[19]

SUMMARY OF THE CONTEXT OF THE ALLEGED CRIMES

19. It is necessary for the Appeals Chamber to have a thorough understanding of the facts and sequence of events as and when they occurred within the time frame of the Indictment. The Kamara Defence will therefore attempt to summarize from the Judgment these facts and events without distracting detail. All legally significant facts must be included and precisely stated, whether or not they are helpful.[20]

POLITICAL PRECURSORS

20. The R.U.F. was established in the late 80's as an organized armed opposition group to overthrow the government of Sierra Leone. The Leader of RU.F. was Foday Saybena Sankoh, a former colonel in the army who served a 7 year sentence for alleged involvement in a failed coup in 1971.[21]

THE ARMED CONFLICT 1991-1997

21. R.U.F. initiated armed operations in Sierra Leone in 1991, consolidating positions in Kailhun district, and occupying a small part of Pujehun District.[22]

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and Corrigendum to Decision on the Prosecution Application to Further Amend the Amended Consolidated Indictment by Withdrawing Counts 15-18, 15 February 2005.

[19] Paragraphs 16 to 22 of the Kamara Appeal Brief have been adopted from paragraphs 4 to 10 of the Judgment.

[20] Chapter 15 Page 167, A Practical Guide to Legal Writing and Legal Method, John C. Dernbach & Richard V. Singleton II

[21] See paragraph 156 of Judgment

[22] See paragraph 157 of Judgment

22. In 1992 junior ranks of S.L.A. staged a coup by Captain Valentine Strasser and established the National Provisional Ruling Council (N.P.R.C.) Government.[23]

23. After 1992, R.U.F. took control over Bo and Bonthe Districts. The advance triggered the emergence of local military (C.D.F.) consisting primarily of traditional hunters who fought on behalf of the Government.[24]

24. By 1995, R.U.F. was in control of large parts of Sierra Leone with a strong hold in the North. In March the Government employed the services of a private South African security company, Executive Outcomes who trained the S.L.A. and dislodged the R.U.F. from most positions.[25]

25. In March 1996 elections were held and Almed Tejan Kabbah, emerged victorious. Tensions mounted between S.L.A. and C.D.F., and S.L.A. lost control of 2 Districts to the Kamajors, one of C.D.F. groups, this led to clashes. In September 1996, retired S.L.A. officer Johnny Paul Koroma staged an unsuccessful coup against President Kabbah and was jailed.[26]

26. Abidjan Peace Agreement was on 30th November 1996 between the Government and R.U.F. – It called for a Cessation of hostilities, amnesty for R.U.F. fighters for any crimes committed before the signing, Government was to terminate its relationship with Executives Outcomes, Disarmament, Demobilization, Reintegration of R.U.F.[27]

27. Early in 1997 the peace process broke down. Foday Sankoh was arrested in Nigeria on March 1997, allegedly for a weapons violation, and put under house arrest.[28]

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[23] See paragraph 158 of Judgment
[24] See paragraph 159 of Judgment
[25] See paragraph 160 of Judgment
[26] See paragraph 161 of Judgment
[27] See paragraph 162 of Judgment
[28] See paragraph 163 of Judgment

A.F.R.C./R.U.F. GOVERNMENT PERIOD (MAY 1997-FEB. 1998

28. On 25th May 1997, 17 junior rank soldiers of the S.L.A., disgruntled and discontented, seized power from the elected Government of Kabbah via a Coup d'etat. Johnny Paul Koroma was released from prison by the Coup plotters and appointed Chairman of the new A.F.R.C. Government. Koroma invited the R.U.F. to join the A.F.R.C. Government. Foday Sankoh accepted and R.U.F. fighters and commanders entered the capital.[29]

29. A.F.R.C. suspended the 1991 Constitution, dissolved the democratically elected Government and banned political parties. Sankoh was appointed Koroma's deputy but as he was absent, it remained defacto vacant. At a later stage, S.A.J. Musa, senior member of S.L.A., became de facto deputy to Koroma.[30]

30. When A.F.R.C. took power in May 1997, Bo and Kenama Districts were controlled by the C.D.F. The armed forces of A.F.R.C./R.U.F. undertook joint operations to gain control. Bo town was captured in June 1997. A.F.R.C. troops under Sam Bockarie (Mosquito) took control over Kenema District in May 1997 till Febuary 1998 but hostilities continued throughout the period.[31]

31. From June, 1997, A.F.R.C. Government controlled most parts of Freetown and Western Area, Bo, Kenema, Kono, Bombali, and Kailahun. However the Government remained under constant threat from C.D.F. and E.C.O.M.O.G.[32]

32. E.C.O.M.O.G. maintained control of the International Airport at Lungi (Part Loko District) on the north bank of Sierra Leone river, opposite Freetown. E.C.O.M.O.G. launched attacks against the A.F.R.C. Government in June, July and at the end of 1997.[33]

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[29] See paragraph 164 of Judgment
[30] See paragraph 165 of Judgment
[31] See paragraph 166 of Judgment
[32] See paragraph 167 of Judgment
[33] See paragraph 168 of Judgment

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RELATIONS BETWEEN A.F.R.C. AND R.U.F.

33. Coalition following the 1997 Coup was not based on long standing common interest. On 18th June 1997, R.U.F. issued an official apology to the Nation for its crimes and went on to praise Koroma's government.[34]

34. Commanders of both factions initially attended co-ordination meetings at which they planned operations, jointly obtained arms and ammunition.[35]

35. In October 1997 Koroma ordered the arrest of two R.U.F. leaders on charges that they were plotting with the C.D.F. to overthrow his government. Koroma ordered Issa Sesay another top Commander of R.U.F. arrested for his part in looting Iranian Embassy. In response R.U.F. stopped attending joint meeting. In June 1998 Sam Bockarie Vice Chair of A.F.R.C. in Sankoh's absence left Freetown for Kenema District because of discontent with A.F.R.C. commanders.[36]

36. Outside Freetown A.F.R.C./R.U.F. and engaged in joint operations in Bo and Kenema also with regards to diamond mining. As this relationship deteriorated each faction began hoarding its own share of profits. On one occasion Sam Bockarie refused instructions fro Koroma to attacked Nigeria soldiers arriving through Liberia.[37]

MILITARY PRESSURE OF A.F.R.C. GOVERNMENT

37. A.F.R.C. government was subjected to military pressure from E.C.O.M.O.G. International political pressure mounted as human rights violations escalated. On 8 October U.N imposed international sanctions on the A.F.R.C. Government.[38]

38. On 23rd October the A.F.R.C. Government was forced to accept the Conakry Accord, which called for a six-month Peace Plan, Cessation of hostilities and the restoration of the constitution by 22 May 1998.[39]

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[34] See paragraph 169 of Judgment
[35] See paragraph 170 of the Judgment
[36] See paragraph 171 of the Judgment
[37] See paragraph 172 of the Judgment
[38] See paragraph 173 of the Judgment
[39] See paragraph 174 of the Judgment

E.C.O.M.O.G ATTACK ON FREETOWN

39. Soon after the Conakry Accord, hostilities resumed. E.C.O.M.O.G attacked Freetown on 13th and 14th of February 1998. A.F.R.C. forces escaped through the Freetown Peninsula. The Government of Kabbah was reinstated in March 1998.[40]

40. Retreat from Freetown was uncoordinated. Troops fleeing passed through the villages of Lumley, Coderich, York and Tumbo. From Tumbo crossed Yawris Bay to Fo-gbo. Then proceeded to Port Loko District. Period took 3/4/ days and is referred to as "The Intervention".[41]

ARMED CONFLICT 1998-2001 - A-POST A.F.R.C./R.U.F. COURT PERIOD FEBRUARY TO MAY 1998

(a) Restruction of A.F.R.C./R.U.F. Troops

41. After chaotic retreat A.F.R.C. and R.U.F. gathered at Masiaka but organisation and control remained minimal. Initiative to recapture Freetown was abandoned due to indifferent Arms and Ammunition.[42]

42. At Masiaka, Koroma announced "Operation Pay Yourself' over B.B.C. immediately after the rebels began a widespread campaign of looting.

(b) Planning the Attack on Koidu Town (end of February 1998)[43]

43. In following days, troops moved without any obviously strategic aim except survival. Koroma retreated to his native village in Bombali District. At Kabaka senior commanders met to discuss strategic. S.A.J. Mussa called for an attack on Kono district believing it would lead to international recognition.[44]

44. After commanders agreed, Koroma arrived and held a muster parade at which he explained to his Soldiers that he could no longer pay them and henceforth they could be subordinate to R.U.F. Commander S.A.J. Mussa was furious, he insisted

[40] See paragraph 175 of Judgment
[41] See paragraph 176 of Judgment
[42] See paragraph 177 of Judgment
[43] See paragraph 178 of Judgment
[44] See paragraph 179 of Judgment

the purpose of his group was to reinstate the army and the R.U.F. could not lead such a mission.[45]

45. Before the operation to recapture Kono took place a dispute erupted over command and control issues resulting in hostilities and deaths of several fights. As result S.A.J. Mussa, and a significant No. of A.F.R.C. troops loyal to him opted not to support the operation.[46]

46. The remaining A.F.R.C./R.U.F. troops traveled towards Koidu Town. At Njema Sewafe the advancing troops were forced to retreat by C.D.F. Koroma and his fights returned to Makeni. Another group of A.F.R.C./R.U.F. rebels launched a second successful attempt to capture Koidu town on 1st March 1998 Koroma arrived in Koidu town shortly thereafter.[47]

KONO DISTRICT MARCH TO MAY/JUNE 1998

47. Koroma took overall command of the A.F.R.C./R.U.F. troops. At a meeting at R.U.F. commander Denis Mingo's house, chaired by him, Koroma agreed with Mingo that A.F.R.C. troops would be subordinate to the R.U.F., a decision unpopular with some of his own commanders.[48]

48. As larger parts of Kono fell to rebel control. Koroma announced that he would travel via Kailahun district, in order to organize logistics for the troops. Prior to his departure he announced that the civilians had betrayed the troops by calling for support of, C.D.F. and Kono should thus become a 'civilian no go area'. Rebels were ordered to execute weak civilians and force stronger ones to join the movement. Koroma also ordered that civilian housing in areas surrounding rebel headquarters was to be burned to prevent settling. Rebels immediately began implementing Koroma's orders.[49]

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[45] See paragraph 180 of Judgment
[46] See paragraph 181 of Judgment
[47] See paragraph 182 of Judgment
[48] See paragraph 183 of Judgment
[49] See paragraph 184 of Judgment

49. Within (3) days of his arrival in Koidu Town, on 4th March 1998 Koroma departed for Kailahum. Most of A.F.R.C. force remained in Kono District alongside the R.U.F troopos. Although A.F.R.C. was subordinate there was cooperation and joint operations.[50]

50. The villages targetted by rebels in Kono district during the indictment period included Koidu Geya, Koidu Buma, Paema, Penduma, Tombodu, Kaima (Kayima), Koidu Town, Foendor, Bomboafuido, Yardu Sandu, Penduma and Mortema.[51]

KOINADUGU AND KAIHUM DISTRICT (FEB-NOV. 1998)

51. A faction of A.F.R.C. Soldiers under command of S.A.J. Musa remained in Koinadugu District throughout this period. The main stronghold of the R.U.F. was Kailahum District, which was under the control of Sam Bockarie (Mosiquito).[52]

52. When Koroma departed for Kailahum district he was given to believe that he would be welcomed by the R.U.F. However he encountered a hostile R.U.F. leadership. He was arrested by Sam Bockarie, Issa Sesay and other R.U.F. fighters. He was then stripped and searched for diamonds and his wife was sexually assaulted. Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid 1999. No evidence was adduced suggesting Koroma had any form of contact whatsoever with any of his former associates during the remaining period covered by the Indictment.[53]

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[50] See paragraph 185 of Judgment
[51] See paragraph 186 of Judgment
[52] See paragraph 187 of Judgment
[53] See paragraph 188 of Judgment

KOINADUGU AND BOMBALI DISTRICT

53. A.F.R.C. troops maintained control over Kono District until April 1998 when E.C.O.M.O.G. advanced into Kono District. Tensions between A.F.R.C. and R.U.F. escalated. Majority of A.F.R.C. moved to Mansofinia in Koinadugu district. Some former soldiers remained, notably 'Savage' who remained in Tombodu as Commander.[54]

54. At a meeting in Koinadugu District, various A.F.R.C. commanders met with S.A.J. Musa to discuss future military strategy. Commanders agreed troops from Kono district should act as an advance party which would establish a base in north western Sierra Leone in preparation for an attack on Freetown. The purpose was to restore the S.L.A. No evidence the R.U.F. was involved in these deliberations.[55]

55. The split with the R.U.F. had considerable consequences for the A.F.R.C. troops. They no longer controlled diamond mining areas, thus no revenue. The only sources available to them was source available to them was stocks captured from E.C.O.M.O.G. or the C.D.F.[56]

A.F.R.C. TROOP MOVEMENT FROM EAST TO WEST (MAY-NOVEMBER 1998)

56. The advance team returned to Mansofinia and started a three month journey through Sierra Leone to Rosos, located in the Eastern Bombali district. They traveled south into Kono district and passed Kondea, Worodu and Yarya, hometown of the accused Brima. Then troops headed north east Yifin and then moved eastwards passing Kumala and Bendugu towards Tonkilili district. They then headed further north east into Bombali district, passing Kamagbegbeh, Bonoya, Karina, Pendembu and Maliboi before finally arriving at Rosos. The civilian population was targeted and villages attacked by troops included Yiffin, Yiraya, Kumalu in Kionadugu district and Mandaka, Rosos, Bonoya, Mateboi,

[54] See paragraph 189 of Judgment
[55] See paragraph 190 of Judgment
[56] See paragraph 191 of Judgment

Gbendembu, Madina Loko, Kamadogbo, Kamaybengbe and Bat Kanu in Bombali district.[57]

57. The journey was on foot and troops had their families and civilians ubducted from targeted villages. Troops settled in Rosos and stayed for three months (July-September). E.C.O.M.O.G. bombed the camp thus they traveled west to a village known as 'Colonel Eddie Town'. From here troops staged a number of attacks on E.C.O.M.O.G. positions in order to supplement their dwindling stocks of arms and ammunition.[58]

ADVANCE ON FREETOWN

58. As the different factions were unable to communicate with each other, S.A.J. Musa sent a second advance party to locate the first in or about September 1998. The troops appeared to take the same route as the first group.[59]

59. In October 1998, following clashes with Dennis Mingo, S.A,J. Musa left Koinadugu district to join the advance team and prepare for an assault on Freetown. S.A.J. Musa used a different route from those used by the advanced teams.[60]

60. Upon arrival at 'Colonel Eddie Town' in November 1998, S.A.J. Musa assumed command. He stressed his discontent with the R.U.F. and explained the importance of his troops arriving in Freetown before the R.U.F. S.A.J. Musa reorganized, and begun to move toward Freetown. Troops passed through the villages of Mange, Lunsar, Masiaka and Newton before arriving in Benguema in the western area in December 1998. During the move, troops withstood frequent

[57] See paragraph 192 of Judgment
[58] See paragraph 193 of Judgment
[59] See paragraph 196 of Judgment
[60] See paragraph 197 of Judgment

attacks by E.C.O.M.O.G. Little evidence was adduced that troops targeted civilians, they concentrated on purely military targets.[61]

61. While the A.F.R.C. troops advanced on Freetown, R.U.F. troops recaptured Koidu and planned an advance on Makeni in Bombali district. They reached Makini in the final days of 1998.[62]

62. During the advance S.A.J. Musa and A.F.R.C. troops heard a B.B.C interview with Sam Bockarie over the radio. Bockarie revealed the position of the A.F.R.C. fighting forces and explained that the R.U.F. were approaching Freetown. Soon after, E.C.O.M.O.G. bombarded the area. S.A.J. Musa immediately contacted Sam Bockarie and insulted him, saying he had no right to claim that the troops approaching Freetown were R.U.F.[63]

63. On 23rd December, shortly after the arrival in Benguema, S.A.J. Musa was killed in an explosion during an attack on an E.C.O.M.O.G. weapons depot.[64]

ATTACK ON FREETOWN.

64. After the death of S.A.J. Musa, troops reorganized. On the 6th of January 1999, they invaded Freetown. From Benguema, the troops passed through Waterloo, Hastings, Wellington and Kissy villages. The civilian population was targeted during the advance. A.F.R.C. were able to capture the seat of Government on the morning of 6th January. Sam Bockarie announced over Radio France International that troops had taken Freetown and would continue to defend it.[65]

65. One of the first acts of the invading troops on entering Freetown was to attack the central prison at Pademba road and release all the prisoners. This contributed to the general breakdown of order amongst the troops. However 3 days after the

[61] See paragraph 198 of Judgment
[62] See paragraph 199 of Judgment
[63] See paragraph 200 of Judgment
[64] See paragraph 201 of Judgment
[65] See paragraph 202 of Judgment

capture of State House, A.F.R.C fighting force were able to control large parts of Freetown.[66]

66. From State House A.F.R.C. officers contacted Sam Bockarie asking for reinforcements which did not come. Bockarie instructed them to burn down Freetown if they could not hold the city. Bockarie then announced over the B.B.C. that if E.C.O.M.O.G. did not stop attacking troop positions the whole of Freetown would be burnt down.[67]

67. A.F.R.C. troops remained in Freetown for around three weeks. Although they were unable to advance to the western part of the city. Period is referred to as the 'Freetown Invasion'.[68]

RETREAT FROM FREETOWN.

68 Following heavy assaults from E.C.O.M.O.G., the troops were forced to retreat from Freetown. This marked the end of the A.F.R.C. offensive as troops were running out of ammunition. A.F.R.C. managed a controlled retreat, engaging E.C.O.M.O.G. and Kamajor troops blocking their way. R.U.F. reinforcements arrived at Waterloo but were either unable or unwilling to provide the necessary support to A.F.R.C. troops.[69]

PORT LOKO DISTRICT (FEBUARY-APRIL 1999)

69. A.F.R.C. forces withdrew, reorganized and established bases in the western area including in Newton and Benguema. They remained until early April 1999 when the A.F.R.C. divided. One group traveled to Makeni in Bombali district to Port Loko district and settled in the region of the Okra hills near Rogberi. This group became known as the 'West Side Boys' who frequently targeted and attacked the civilian population. Towns and villages attacked included Masaika, Geribana,

[66] See paragraph 203 of Judgment
[67] See paragraph 204 of Judgment
[68] See paragraph 205 of Judgment
[69] See paragraph 206 of Judgment

Manaarma, Sumbaya, Nonkoba and Tendakum. These troops remained in Port Loko district until the negotiation of the Lomé Peace Accord.[70]

1999 LOMÉ PEACE ACCORD AND CESSATION OF HOSTILITIES IN 2001

70. Following atrocities committed in Freetown in January 1999, the Kabbah Government was under pressure to enter a peace agreement with the warring factions. The A.F.R.C. was not represented during the negotiations. On 7th July 1999 the Government of Tejan Kabbah and the R.U.F signed the Lome` Peace Accord. The Accord resulted in a power sharing arrangement between the Kabbah Government and the R.U.F. Foday Sankoh, who until this time remained under house arrest in Nigeria, returned to Sierra Leone and became Vice-President. Hostilities resumed shortly after. A final cessation of which only occurred in January of 2002.[71]

1. FIRST GROUND OF APPEAL

71. The Trial Chamber erred in law and or fact due to its failure to consider the fact that the inequality of arms between the Prosecution and Defence denied or substantially impaired the right of Brima to a fair trial resulting in a miscarriage of justice.

LEGAL SUBMISSIONS

72. Article 17(4)(b) provides that:

> "In the determination of any charges against the accused pursuant to the present statute, he or she shall be entitled to the following minimum guarantees, *in full equality*: to have adequate time and facilities for the preparation of his or her own defence and to communicate with counsel of his or her own choosing." [Emphasis added]

[70] See paragraph 208 of Judgment
[71] See paragraph 209 of Judgment

The Appellant submits that the guarantees set out in article 17 apply to all stages of the proceedings before the Trial Chamber.[72] The principle enunciated in Article 17(4)(b) has been interpreted to mean an "equality of arms" between the parties.[73] Both the ICTY and the European Commission on Human Rights have declared, "[W]hat is generally called 'equality of arms,' that is the procedural equality of the accused with the public prosecutor, is an inherent element of a fair trial."[74]

73. The Appellant submits that even though it is arguable that equality of arms does not guarantee an equality of resources, such a right does "obligate a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[75] Although the equality of arms caanot be reduced to an exact equation, there must, in the least, be an approximate equality in terms of resources. Any substantial inequality will call into question the fairnessof the trial. This is not a question of mathematics but, rather, of ensuring that the accused has adequate resources to defend the particular case.[76]

74. The Appellant further submits that fundamental procedural safeguards like Article 17, which are designed to ensure fairness and equality in criminal proceedings, are also guaranteed in international human rights treaties and most domestic legal systems.[77] Because of the extreme character of the crimes alleged before this Court and the challenges inherent in war crimes tribunals, the question of the

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[72] See, *Kröcher and Möller v. Switzerland*, 26 DR 24, EComm HR (1981)

[73] RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE, at p 266, para.8.15, (Transnational Publishers, 2002)

[74] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for the Production of Defense Witness Statements, 27 Nov. 1996; citing *Pataki v. Austria* No. 596/59; *Dunshirn v. Austria* No. 789/60; Reports of the Eur. Comm'n H.R.; vol. 6, 1963 Y.B. Eur. Conv. on H.R. 714 at 731-732.

[75] *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003; citing *Tadic* Appeals Chamber Judgement, 15 July 1999, para. 48.

[76] Id. Footnote 73 at p. 271, para. 8.25

[77] *See*, U.S.C.A. Const. Amend. XIV (Due Process Clause); *Ungar v. Sarafite*, 84 S.Ct. 841 at 849 (1964) ("a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality"); *Powell v. State of Alabama*, 53 S.Ct. 55 at 71 (1932) (taking into account the circumstance of public hostility when deciding the question of adequate time to prepare the case); ECHR Article 6(3)(b); ICCPR Article 14(3)(b); Statute of the ICTR 20(4)(b); Statute of the ICTY 21(4)(b).

rights of the accused should be considered even more strongly then in domestic courts.[78] The nature of the indictments requires international tribunals to aspire to the highest human rights standards set by international treaties, customary international law, and general principles of law.[79] The Defence further submits that policy considerations should reinforce this argument, as it would be difficult to imagine that an international tribunal charged with prosecuting the most serious of crimes could be held less stringently to human rights norms than national legal systems or other international bodies.

75. The Appellant submits that in determining what constitutes "adequate time" and "adequate facilities" as provided by article 17(4)(b), logical points of primary reference ought to be previous decisions interpreting identical provisions as contained in the International Covenant on Civil and Political Rights (1966) ("ICCPR"),[80] the European Convention on Human Rights (1950) ("ECHR"),[81] as well as the jurisprudence of the International Criminal Tribunals for Yugoslavia and Rwanda ("ICTY" and "ICTR").

76. The right of the Apellant to have adequate and time and facilities for the preparation of his defence has its origins in Article 14(3)(b) of the ICCPR. In its comments to Article 14, the UN Human Rights Committee (HRC) averred that the concept of adequate time depends on the circumstances of each case and the right to adequate facilities must include access to documents and other evidence which the accused requires to prepare his case. [82]

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[78] Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 Yale J. Int'l L. 111 at 114 (2002); *Prosecutor v. Tadic*, Appeals Chamber Judgment, July 15, 1999, para. 52.
[79] *Id.* at 117; citing Accord Decision on Preliminary Motions, *The Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Nov. 8, 2001, P 38.

[80] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976).
[81] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 [hereinafter ECHR].
[82] ICCPR General Comment 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14), Human Rights Committee, 21st Sess., U.N. Doc A/39/40 ¶ 9 (1984), available at www.unhchr.

77. In the HRC case of *Smith v. Jamaica*, the accused claimed that he had not been allowed adequate time to prepare his defence and that, as a result, a number of key witnesses for the defence were not traced or called to give evidence.[83] The HRC agreed and recalled its previous jurisprudence that "the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms".[84] Further, the HRC held that the determination of what constitutes 'adequate time' requires an assessment of the circumstances of each case.[85]

78. In *Kröcher and Möller v. Switzerland*, the European Commission on Human Rights interpreted Article 6(3)(b) of the ECHR, which echoes verbatim the language of the first leg of article 17(4)(b) of the Statute.[86] In *Kröcher* the Court held that the time element of the accused's rights was to act as a safeguard against a hasty trial.[87] Like other guarantees as to timeliness under the Convention, Article 17(4)(b) should apply from the moment the accused is arrested or is otherwise substantially affected [88] or when he is given notice of charges against him.[89]

79. Jurisprudence under the ECHR has maintained historical consistency in its determination of the right of an accused to have adequate time and facilities for the preparation of his or her defence. The European Court and Commission on Human Rights have held unequivocally that the adequacy of time allocation for preparation of a defence depends on the circumstances of the case.[90] In that

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[83] *Smith v Jamaica* (282/88) at para 10.4.
[84] *Id.*; see also, Communications Nos. 253/1987 (*Paul Kelly v. Jamaica*), Views adopted on 8 April 1991, paragraph 5.9; 283/19 *(Aston Little v Jamaica)*, Views adopted on 1 November 1991, paragraph 8.3.
[85] *Smith v Jamaica* (282/88) at para 10.4; See also *Sawyers, Mclean and Mclean v Jamaica* (226, 256/87) on HRC determination of what constitutes 'adequate time'; also Grant v Jamaica (353/8), para. 8.4. On 'adequate facilities' see *Yasseen and Thomas v Republic of Guyana* (676/96); also *Harward v Norway* (451/91)
[86] *Kröcher and Möller v. Switzerland*, 26 DR 24, EComm HR (1981).
[87] *Id.*
[88] *X and Y v. Austria*, 15 DR 160, Ecomm HR (1978).
[89] *Campbell and Fell v. United Kingdom*, 7 EHRR 165 at 203 (1984).
[90] Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, Oxford University Press, Volume 1 (2000).

regard, relevant factors that may impact the 'circumstances of the case' has been held to include, *inter alia*, the complexity of the case,[91] defence lawyer's workload,[92] and the stage of the proceedings.[93]

80. In interpreting similar provisions regarding minimum guarantees for fair trial under its respective enabling Statutes both the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have recognized the essence of the rights of accused persons to have adequate time and facilities for the preparation of their defence.[94] In its *Decision on the Application for Adjournment of the Trial Date, rendered in Delalic et al* on 3 February 1997, Trial Chamber II averred:

> "...[T]he operative phrase in the Article [Article 21], 'adequate time,' is flexible and begs of a fixed definition outside the particular situation of each case... [T]his is something which can be affected by a number of factors including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons." [95]

The frontiers of Article 17(4)(b) rights have been extended to include considerations of health of Lead Counsel, appropriate linguistic assistance,[96] and the unavailability of witnesses.[97]

81. The Appellant submits that it recognises that the right of an accused to have adequate time for preparation of his defence is not absolute but one that ought to be exercised in correlation with the right of the accused to be tried without undue delay. The Appellant also recognises the duty of the Trial Chamber to ensure

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[91] *Albert and LeCompte v Belgium*, 5 EHRR 533 at 546 (1983).
[92] *X and Y v Austria*, 15 DR 160, EComm HR (1978).
[93] *Huber v Austria*, 46 CD 99 (1974).
[94] Statute of the ICTR 20(4)(b), Statute of the ICTY 21(4)(b).
[95] *Prosecutor v. Delalic et al,* IT-96-21-T, Trial Chamber II, Decision on the Application for Adjournment of the Trial Date, 3 February, 1997; see also, *Prosecutor v. Kovacevic*, Case No: IT-97-24-AR73, Appeals Chamber Decision Stating Reasons for Appeals Chamber's Order of May 29, 1998, 2 July, 1998.
[96] *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-1, Decision on Postponement of Trial, 18 August, 2004.
[97] *Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, Trial Chamber I, Decision to Adjourn Proceedings Due to Unavailability of Witnesses, 19 June, 2002.

expeditious trials. Yet the Defence submits that a fair trial of the Appellant was substantially and seriously compromised and impaired without the adequate time and resources needed by the Defence to conduct investigations that were vital to the presentation of the Appellant's case before the Trial Chamber.

82. Furthermore, the Appellant submits that the urgent need for more time to prepare is a fundamental right guaranteed by the principle of equality of arms. Both the ICTY and the European Commission on Human Rights have declared, "[W]hat is generally called 'equality of arms,' that is the procedural equality of the accused with the public prosecutor, is an inherent element of a fair trial."[98] The Defence recognizes that equality of arms does not guarantee an equality of resources, but such a right does "obligate a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[99]

FOURTH GROUND OF APPEAL

84. The Trial Chamber erred in fact and/or in law by finding the Accused Brima was responsible under Article 6(3) for the crimes committed by his subordinates in Bombali District between 1, May 1998 and 30, November 1998 in which he did not directly participate resulting in a miscarriage of justice. (Paragraph 1744, page 480)

Factual Argument

85. The Appellant submits that the Trial Chamber erred in fact by finding that he was a superior who had authority over the 'AFRC forces' and that he was in a position to order them to commit crimes in Bombali District between 1 May 1998 and 30 November 1998, thereby incurring individual criminal responsibility pursuant to Article 6(3) of the Statute of the Specil Court. In arriving at the above

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[98] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for the Production of Defense Witness Statements, 27 Nov. 1996; citing *Pataki v. Austria* No. 596/59; *Dunshirn v. Austria* No. 789/60; Reports of the Eur. Comm'n H.R.; vol. 6, 1963 Y.B. Eur. Conv. on H.R. 714 at 731-732.

[99] *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003; citing *Tadic* Appeals Chamber Judgement, 15 July 1999, para. 48.

finding the Trial Chamber erroneously relied on Prosecution witnesses TF1-334, TF1-167 and TF1-033 in the light of inconsistencies and contradictions in their accounts as to the Killings in Karina, Mateboi, Gbendembu and Rosos in the Bombali District at the expense of the testimonies of the several crime base Defence witnesses[100]

86. Prosecution witnesses appeared to be contradictory as regards events which are said to have taken place in Bombali District. The identification of Appellant is open to question. Witness TF1-157 referred to a person called Gullit (referring to the Appellant), the name the Prosecution says the Appellant was known by. However this is only because he heard others say so. He provides no positive identification of this person.[101] Moreover, his evidence is punctuated by references to atrocities committed by persons who he referred to as 'they'. The names Gullit (referring to the Appellant) was what he heard others say and assumed he was one of the bosses 'the way they spoke to people that's how I knew they were bosses.'[102] That is insufficient evidence for the Trial Chamber to base a finding that Appellant "ordered his subordinates to perpetrate crimes against the civilian population in Karina and its environs with the specific intent of instilling terror in the civilian population" in Bombali District.

87. Evidence of Appellant ordering atrocities in Bombali are self serving and contradictory and perhaps explains why the Prosecution shifted its position in relation to parts of its own evidence. This was evidence given by TF1 – 167 and TF1-334, TF1-033 and what was allegedly told to TF1 -084.

88. The Appellant would also rely on the crime based defence witnesses called at the trial. For example, DBK 086 gave evidence that through out the events in his area of Bombali District he did not hear the name of the Appellant.[103] Further

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12. [100]*Trial Judgment, pages 167-194 at Paras. 1700- 1744*

[101] Page 90-92 of Transcript of 22nd July 2005
[102] See page 90 line 22 of the transcript of the 22nd July 2005
[103] See Page 86 of the Transcript of 18th July 2006

under cross examination he stated that he did not hear the name 'Gullit' (referring to the Appellant) [104]

89. DBK 090 also a Bombali resident gave evidence about Bombali District during the aforesaid period the Prosecution say the Appellant led an attack there.[105] He also did not hear the name of the Appellant.

90. The Defence also called DAB 100 who referred to a group led by Adama Cuthand as the perpetrators of the crimes in their area.[106] This person has been referred to before by Prosecution witness TF1 -157.[107] This opens up the possibility of another group separate and distinct that the group the Prosecution allege was led by the Appellant, whose viciousness is being passed on to the Appellant. Bearing in mind more than one Prosecution witness mentioned her, the Prosecution has never explored or explained who Adama Cuthand was and the role she played. These inconsistencies therefore created doubt as to who was responsible for the crimes in Bombali District. The Appellant submits that such doubt ought to have been exercised in favour of the Appellant.

91. Defence witness DBK 104 also stated that he never heard the name of the Appellant as being responsible for crimes in Bombali District.[108] Under cross examination, he also stated that he had not heard the name Gullit (referring to the Appellant).[109]

92. The Appellant submits that Trial Chamber erroneously assessed the prosecution evidence relating to the killings in a mosque at Karina. The evidence of TF1-334 was that Gullit (referring to the Appellant) killed the Imam and several other persons in the mosque.[110] Witness TF1 -033 said that about 300 civilians were

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[104] Id page 90
[105] See Transcript of 17th July 2005 in particular page 40 and page 58
[106] See Transcript of 17th July page 19
[107] See Transcript of 22nd July 2005
[108] See Transcript of 18th July 2006 page 64
[109] Id page 68
[110] See Transcript of proceedings of 23rd May 2005 at pages 68,69,and 70

killed and 200 amputated[111]. This witness did not specifically mention atrocities in a mosque and gave his figures for "both town" – that is to say Bonoya and Karina. Witness TF1- 167, gave an account of seeing dead bodies in the mosque and of orders coming from the (referring to the Appellant) that the town should be burnt down.

93. The account of witness TF1 -157 also differs in that he states that the rebels burnt two houses and that he saw two people mutilated[112] Witness TF1-055 also states that he saw two people killed at the mosque.[113] His version differs from all the others and is perhaps the most important as he is a native of Karina. What is important here is that we have five completely different versions of what transpired in Karina on that day. and

94. The Defence produced three witnesses from Karina – the Imam (DBK 095) who was supposedly killed according to Witness TF1-334, a local boy (DBK094) and the Assistant Section Speaker (DBK 089). Almost as soon as it was established that there was only one mosque in Karina, the Prosecution introduced the possibility that the atrocities could have taken place at a Wassi.[114]. The witness went on to describe what a wassi is[115] and to state that he did not hear of anything happening at a Wassi. The Imam who had been left in charge in the absence of DBK 095 had himself survived and has not been killed by the Appellant as witness TF1-334 had stated. It was also established through this witness that Karina town is different to Karina Section and that there was only one mosque in Karina Town. The Prosecution evidence had been only about Karina town. This is important to the Defence because, the evidence that was led by all the Prosecution witnesses was about Karina town only.

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[111] See Transcript of 11th July 2005 at pages 14 onwards
[112] See Transcript of 22nd July 2005 at page 101 lines 8-17
[113] See Transcript of 12th July 2005 at pages 125 to 128
[114] See Cross-examination of DBK 089 in the transcript of the proceedings of 14th July 2006. A wassi was described as a place where people pray - a praying spot
[115] See Transcript of 14th July 2006 at page 49 lines 6-29. Amongst other things the witness said a wassi is a praying spot, some people create it in their house. See also page 51 lines 9-10 "Wassi just apiece of pebbles and mud. Wassi is not a house"

95. The Appellant also submits that crime base Defence witnesses are all independent people of the Appellant who merely stated what they never knew, had ever heard of the Appellant committing atrocities in Karina. In so far as the Imam who was supposedly questioned and killed by the Appellant is concerned, the Defence submits that if any witness, Prosecution or Defence, should know about that then, it is the witness DBK 089 – the Imam of Karima. In the light of the above facts the Appellant submits that he did not commits the offences of unlawful killing and extermination in Karina as founded by the Trial Chamber.

96. The Appellant further submits that he was never in Bombali District and that he had no command and control over the perpetrators of the offences committed therein within the aforesaid period and that he was not in a position to order, prevent, or punish the perpetrators since the Armed Forces Revolutionary Council was no longer in existence between 1st May 1998 and 30th November 1998. Even if the AFRC was in existence during the aforesaid period the appellant submits that it was not a fighting force as referred to by the Trial Chamber "*AFRC forces*".

97. The Appellant in his oral testimony stated that he was in Kono on a native medical treatment in February, 1998 when the AFRC Junta Government was removed from power by the ECOMOG troops. He escaped from Kono towards the Guinea boundary where he was arrested by the RUF , taken to Kailahun detained at Buedu and remained there until July 1998 when he was assisted by RUF Morris Kallon to escape from the detention and returned to Koidu town and then to Yarya in Kono District in late July, 1998. The Appellant further testified that he was at with his relatives hiding in the bush at Yarya when a group of Ex-SLA troops led by O5 and Keforke arrested him and took him to Col. Eddie Town where he was detained in a Dungeon together with other members of the defunct AFRC junta a fact was corroborated by several defence and prosecution witnesses.

98. Witness TF1-334 also said that Appellant had mentioned being detained by Mosquito in Kailahun. This evidence is supported by prosecution witness TF1 - 045 who said that he was amongst those who effected the arrest of Gullit (referring to the Appellant)[116]. The evidence of Appellant's arrest in Kailahun is further supported by testimonies of Prosecutions witnesses TF1 -167 and TF1-334. The Appellant further relies on the alibi evidence adduced at trial. In relation to Kailahun the Defence witness DAB 142[117] gave evidence o f the arrest of the Appellant and that she saw him she was told he was in jail[118].

LEGAL ERRORS

99. International criminal doctrine must be responsive to notions of individual culpability if it is to maintain its legitimacy both in the realm of human rights and with regard to the aspirations of transitional justice. Both international criminal tribunals and domestic courts have rejected unequivocally the doctrine of guilt by association.[119] Culpability may not be derived from mere membership in an organization or from the simple title of rank, but rather guilt must be determined from individual actions (or omissions) with the requisite *mens rea.*

100. From the genesis of international law, the judgement of the International Military Tribunal at Nuremberg declared that the Tribunal's conclusions were made "in accordance with well-settled legal principles, one of the most important of which

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[116] see evidence of TF1-045 OF THE 19th july, 2005 pages 96-100
[117] See evidence given on the 19th September 2006
[118] Page 29 lines 20 -29 of the transcript of 19th September 2006
[119] Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 (2005); citing both the IMT at Nuremberg and the U.S. Supreme Court *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959) (stating that "guilt by association is a thoroughly discredited doctrine). See also, Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 22 Feb. 1993, U.N. Doc. S/25704, para. 56. (Also rejecting guilt by association, "The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.").

is that criminal guilt is personal, and that mass punishments should be avoided."[120] The ICTY Appeals Chamber further emphasized that the "basic assumption" in international and national laws is that "the foundation of criminal responsibility is the principle of personal culpability."[121]

101. Yet the evolving doctrine of command responsibility has the potential to lower the bar for individual culpability. Under the doctrine of command responsibility, the commander is punished for his failure to control those under his command and not for direct participation in the crimes which they commit. Yet, the commander is punished not for the distinct offence of failure to control, but rather as a principal actor for the actual offences committed by his subordinates. Under the most expansive interpretation of command responsibility, a commander can be held liable for the most serious of crimes under a mere negligence standard. Yet such an interpretation flies in the face of international community's commitment to avoid the spectre of arbitrary punishment. This memo will explore the recent jurisprudence regarding command responsibility in hopes of narrowing the doctrine and framing our factual case to show that the Appellant cannot be criminally liable for the acts of his subordinates.

Doctrinal Overview of Command Responsibility

102. Command responsibility doctrine under the case law of the ICTY and ICTR requires three elements: The existence of a superior-subordinate relationship of effective control; The existence of the requisite *mens rea*, namely that the commander knew or had reason to know of his subordinates' crimes; and That

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[120] International Military Tribunal, Judgement, in Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946, at 256 (1947).

[121] *Prosecutor v. Tadic*, Judgement, ICTY Appeals Chamber, at para. 186, Case No. IT-94-1-A (July 15, 1999) (The case continues: "[T]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nulla poena sine culpa).") available at http://www.un.org/icty/tadic/appeal/judgement/index.htm

the commander failed to take the necessary steps to prevent or punish the offenses.[122]

103. The failure to meet any single element implies the absence of liability. The statutes of the ICTY and ICTR provide further textual guidance, stating that an accused is liable where she "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[123] The statute for the Special Court echoes this language under Article 6(3):

104. "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[124]

105. Thus, the ICTY, ICTR, and the Special Court Statute apparently endorses liability for something less than actual knowledge of a subordinate's crimes. As these tribunals grapple with the evolving interpretation of the phrase "had reason to know," the question of *mens rea* looms large.

***Mens Rea* and Command Responsibility – A Closer Look**

106. The reference to "culpability" generally means that a crime must be committed with intent or knowledge, in other words, with *mens rea*. Such a commitment to limiting punishment has its roots in the British common law

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[122] See *Prosecutor v. Blaskic*, Judgement, ICTY Trial Chamber, at para. 294, Case No. IT-95-14-T (Mar. 3, 2000); *Prosecutor v. Delalic*, Judgement, ICTY Trial Chamber, supra note 30, at para. 346; *Prosecutor v. Kordic*, Judgement, ICTY Trial Chamber, supra note 102, at para. 401.
[123] ICTR Statute at art. 6(3); ICTY Statute at art. 7(3).
[124] Statute for the Special Court in Sierra Leone at art. 6(3); see also, U.N. Transitional Administration in East Timor at art. 16 (using similar language).

system yet its influence extends throughout to other contemporary jurisprudence. In an oft-cited case, Lord Goddard wrote that "the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[125] Yet doctrines of joint criminal enterprise and command responsible have the potential to negate this fundamental requirement.[126]

107. Allison Danner and Jenny Martinez thoroughly examined the recent jurisprudence in their 2005 article, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*.[127] Below we have excerpted some relevant sections of their article:

> "Throughout much of the ICTY and ICTR case law, there has been evident concern with avoiding the possibility of strict liability and discomfort with liability based on ordinary negligence. One early decision in which such concern appears is the ICTR Trial Chamber's judgement in Akayesu.[128] There, the Trial Chamber emphasized that command responsibility derives from the principle of individual criminal responsibility and noted that such responsibility should be based on malicious intent, or at least negligence "so serious as to be tantamount to acquiescence or even malicious intent."[129]

108. The ICTY's judgement in the Celebici camp case, rendered a few weeks after the Akayesu decision, likewise rejected a negligence standard.[130] The Celebici Trial Chamber held that the requisite knowledge could be shown by direct evidence or established by circumstantial evidence.[131] The Trial Chamber opined that "a superior is not permitted to remain wilfully blind to the acts of his subordinates," yet acknowledged that difficulties arise in situations where the superior lacks information of his subordinates' crimes because he failed to

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[125] *Brend v. Wood*, 175 L.T.R. 306, 307 (1946); see also *Harding v. Price*, 1 All E.R. 283, 284 (1948).
[126] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015 (2003).
[127] Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 at 127-129 (2005).
[128] *Prosecutor v. Akayesu*, Judgement, ICTR Trial Chamber, Case No. ICTR-96-4-T (Sept. 2, 1998).
[129] *Id.* at para. 489.
[130] *Prosecutor v. Delalic*, Judgement, ICTY Trial Chamber, supra note 30, at paras. 386-89.
[131] *Id.* at para. 386.

properly supervise them.[132]

109. While recognizing that some of the post-World War II case law suggested that a commander may be held liable where he wilfully failed to acquire knowledge of his subordinates' activities,[133] the Chamber found that, at the time the offenses occurred in the former Yugoslavia, customary international law allowed a superior to be held criminally responsible "only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates."[134] Such information need not provide conclusive proof of the crimes, but must be enough to demonstrate that additional investigation into the subordinates' actions was necessary.[135] Thus, Celebici embraces something akin to a recklessness requirement. The Appeals Chamber of the ICTY ultimately affirmed the Celebici Trial Chamber's rulings on command responsibility, rejecting the notion that command responsibility was a form of strict liability or vicarious liability and holding that a commander is liable only if "information was available to him which would have put him on notice of offences."[136]

110. The Blaskic Trial Chamber decision triggered sharp criticism, prompting one commentator to argue that command responsibility doctrine was so insensitive to a defendant's "own personal culpability" that it had "no support in principles accepted by systems of national criminal law."[137]

111. In a dramatic reversal, in July 2004, the ICTY Appeals Chamber overturned

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[132] *Id.* at para. 387.
[133] *Id.* at para. 388-89 (citations omitted).

[134] *Id.* at para. 393.
[135] *Id.* In addition, the Trial Chamber rejected the defense's argument that causation was a necessary element of liability: "Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a conditio sine qua non for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates." Id. at para. 398.
[136] *Prosecutor v. Delalic*, Judgement, ICTY Appeals Chamber, at paras. 400-413, Case No. IT-96-21-A (Feb. 20, 2001) (discussing approaches and ultimately adopting the test articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932))
[137] Mirjan Damaska, The *Shadow Side of Command Responsibility*, 49 Am. J. Comp. L. 455 at 456 (2001).

the Trial Chamber's conviction of Blaskic on most counts, reducing his sentence from forty-five years to nine years.[138] The sprawling 300-page opinion overturned many of the Trial Chamber's factual and legal holdings, but of greatest interest for present purposes was its forceful rejection of the Trial Chamber's negligence-based articulation of the command responsibility standard. The Appeals Chamber concluded that the Blaskic Trial Chamber's description of the doctrine was incorrect and that the "authoritative interpretation of the standard of 'had reason to know' shall remain the one given in the Celebici Appeals Judgement."[139] A few months earlier, the ICTR Appeals Chamber in Bagilishema had signaled similar discontent with the possibility of a negligence standard, noting that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought . . . ."[140]

112. Thus, following the Blaskic and Bagilishema appeals judgements, the current state of the doctrine seems well-settled in the ICTY and ICTR, at least to the extent that something greater than ordinary negligence is required to trigger liability.

113. In his 2003 article, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, William A. Schabas argues that there must be some element of actual knowledge (a standard higher then negligence would admit). Revisiting the Celebici case, he writes: [141]

> "The Appeals Chamber examined the *mens rea* of command responsibility in the Celebici case. The judges dismissed an argument by the Prosecutor aimed at expanding the concept, noting that:
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> "A superior will be criminally responsible through the principles of

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[138] *Prosecutor v. Blaskic*, Judgement, ICTY Appeals Chamber, at paras. 257-58, Case No. IT-95-14-A (July 29, 2004).
[139] Id. at paras. 62-64.
[140] *Prosecutor v. Bagilishema*, Judgement (Reasons), ICTR Appeals Chamber, at para. 35, Case No. ICTR-95-1A-A (July 3, 2002).
[141] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015 at 1028 (2003).

superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of mens rea as existing at the time of the offences charged in the Indictment".[142]

114. Thus, although a literal reading of article 7(3) suggests the possibility of a superior being convicted who had no knowledge of the crimes, the Appeals Chamber has required that there be evidence that the superior have some amount of actual knowledge. This knowledge cannot simply be presumed because of the commander's position. Obviously sensitive to the charges of abuse that could result from an overly large construction of article 7(3) of the Statute, the Appeals Chamber said it "would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability."[143]

115. Several of the judgements testify to this judicial discomfort with respect to the outer limits of superior responsibility, and reveal concerns among the judges that a liberal interpretation may offend the *nullum crimen sine lege* principle.[144]

116. Yet the Appeals Chamber in *Aleksovski* contempt hearing did confirm that wilful blindness is "equally culpable" as actual knowledge.[145] It seems at the moment the question of mens rea is evolving and unsettled.

The Particulars of the Appellant's Case

117. Judge Hunt of the ICTY recently opined in dissent from a procedural ruling on the admissibility of written witness statements, "[t]his Tribunal will not be judged by the number of convictions which it enters . . . but by the fairness of

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[142] *Prosecutor v. Delalic*, Case No.: IT-96-21-A), Judgement, 20 Feb. 2001, para. 241 (reference omitted); see also *Prosecutor v. Galic*, Case No.: IT-98-29-AR73.2, Appeals Judgement, 7 June 2002.
[143] *Prosecutor v. Delalic*, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 239.
[144] See, for example, the opinion of Judge Bennouna, in *Prosecutor v. Krajisnik*, Case No.: IT-00-39, Separate Opinion of Judge Bennouna, 22 Sept. 2000. For a recent discussion of this point: *Prosecutor v. Had•ihasanovic* et al., Case No.: IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 Nov. 2002.
[145] *Prosecutor v. Aleksovski* (Case No.: IT-95-14/1-AR77), Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001, para 43.

its trials."[146] Judge Hunt warned that decisions giving short shrift to the "rights of the accused will leave a spreading stain on this Tribunal's reputation."[147]

118. In the spirit of strong support for the aims of international criminal law, the Appellant must not be judged by the actions of those over whom he had no effective control. His guilt must not be presumed because of his title or rank in the defunck *AFRC junta* if he had no reason to know of criminal activities being committed in Bombali District. And finally, the Appellant could not have taken measures to prevent or punish those activities of which he was not aware and could not have controlled.

119. The Appellant submits that, because he was under arrest from Yaya in Kono to Col. Eddie Town in Bombali District, he was not in a position to prevent or punish crimes committed by "*the AFRC forces*" around Karina, in Bombali District and therefore ought not to have been convicted and sentenced for offences therein within the aforesaid period.

FIFTH GROUND OF APPEAL

120. Error in law and/or in fact due to the Trial Chamber's finding that the Accused Brima was individually responsible under Article 6(1) of the Statute for the crimes of murder and/or extermination of civilians in Bombali District resulting in a miscarriage of justice[148].

121. The Appellant submits that he was never in Bombali District and that he did not commit the offences of murder and extermination therein within the aforesaid period. The Appellant submits that between the period 1st May ,1998 and July 1998 he was under arrest at Kailahun by Sam Bockarie. This fact is corroborated by defence witness DAB-059 and DAB-142. In July 1998 he

[146] *Prosecutor v. Milosevic*, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ICTY Appeals Chamber, at para. 22, Case. No. IT-02-54-AR73.4 (Oct. 21, 2003).
[147] *Id.*
[148] (Trial Judgment Paragraphs 1708, 1709, 1714, 1715, 1716)

was assisted by RUF Morris Kallon to escape from the detention and returned to Koidu town and then to Yarya in Kono District in late July, 1998. The Appellant further testified that he was at Yarya with his relatives hiding in the bush at Yarya when a group of Ex-SLA troops led by O5 and Keforke arrested him and took him to Col. Eddie Town where he was detained in a Dungeon together with other members of the defunct AFRC junta a fact which was corroborated by several defence and prosecution witnesses.

122. The appellant submits that the Trial Chamber did not properly assess the evidence of the defence alibi witnesses who proffered sufficient evidence as to the accused's whereabouts during the period 1st May 1998 to 30th November 1998. Instead the Chamber relied on the evidence of prosecution witnesses TF1-334 and TF1-167 to convict the Appellant for the offences committed at Karina and its environs within the aforesaid period.

123. Prosecution Witness TFI-334 testified that "Gullit" (referring to the Appellant) was the brigade commander of the fighting forces that attacked Karina.[149] when asked in cross-examination stated that there were[150] Witness TFI-167 stated that as they were entering Karina, there was a house with a Benz vehicle parked outside. He was there with Bazzy and Eddie Williams aka Maf. When Eddie Williams went into the house, wrapped people in carpets of the house and set the house on fire. He drew fuel from the Mercedes Benz. [151] Prosecution Witness TFI-334 and TFI-167 both gave a contradictory story of the same incident they alleged to have participated in.

124. Prosecution Witness TFI-055 who was in Karina at the time of the attack, does not mention that anybody was burnt in a house in Karina. TFI-055 testified that he and the other villagers buried 5 people, including those killed at the mosque, in the same hole[152] and that some people told TFI-055 that

[149] Transcript 23 May 2005 page 59-61
[150] Transcript 21 June 2005 page 54 and 56 Cross-examination
[151] Transcript 15 September 2005 page 54-55
[152] Transcript, 12 July 2005 page 138

Jabbie was the ones that came in and fought.[153]

125. Witness TFI-033 testified that in Bonorya and Karina suffered the worst atrocities ever meted out on civilians. About 500 civilians were **kill**ed, 300 amputated, over 200 women raped. [154] Witness TFI-033 testified that he knew the Appellant[155] and he testified on the troop's movement in the Bombali district. Further there is a huge disparity between 5 people and 500 peopl being killed.

126. Witness TFI-167 testified in Karina town he saw a lot of dead bodies in a mosque. TFI-167 stated that he saw Cyborg, security to Bazzy dropped than four children aged between 5 and 10children from an up two-storey houses. [156]

127. Witness TFI-167 testified that at Rosos, Gullit (referring to the Appellant) sent teams to Mateboi, to get all civilians join them at Camp Rosos. The civilians did not come and a second team went, and Arthur returned with the head of the chief, Gullit, Bazzy, and other commanders were present. [157] Witness TFI-167 testified that Gullit was most senior commander at Major Eddie Town and Bazzy second in command. [158]

TF1-334

128. Witness TFI-334 testified that at Colonel Eddie Town, O-Five ordered arrest of Gullit(referring to the Appellant), Five-Five, Bazzy, Abdul Sesay, Coachy Borno, Operation Commander A. [159] O-Five arrested them because there was disunity among them. The matter was solved, and Commander A and Ibrahim Bioh Sesay were placed under mess arrest. [160] Witness TFI-334 only made mention of the arrest in cross-examination. On the arrest at Eddie Town

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[153] Transcript, 12 July 2005 page 142
[154] Transcript Monday, 11 July 2005 page 19, Transcript, 12 July 2005 page 80-81 Cross-examination
[155] Transcript , 11 July 2005 page 6
[156] Transcript 15 September 2005 page 56
[157] Transcript 15 September 2005 page 61and 63
[158] Transcript 15 September 2005 page 69
[159] Transcript 16 June 2005 page 42 Cross-examination
[160] Transcript 21 June 2005 page 66 Cross-examination

Witness TFI-167 testified that after O-Five arrived, all senior high commanders were arrested: Gullit(referring to the Appellant), Bazzy, Five-Five, Hassan Papah Bangura, Woyoh, Abdul Sesay, and Bio because they were not planning the operation properly. [161] TFI-167 arrested Ibrahim Bazzy together with Baski.[162] When SAJ arrived, he said that they should be under house arrest. They were under arrest till they got Newton where they were reinstated.[163]

129. The Trial Chamber erroneously relied on the evidence of prosecution witness TF1-334 and TF1-167 and erroneously assessed the evidence of the defence crime based witnesses. The Appellant submits that much of TF1-334's evidence was a fabrication based on fantasy and wishful thinking, with the hope of some reward attached to it. He further submits that this witness was incarcerated with the Appellant at the Pa Demba Road Prisons and whether by design or otherwise witness was released after he began cooperating with the Special Court. He further submits that such release is bound to play on the mind of the witness and may in fact feel under some pressure, implied or otherwise to give any information which he thinks might either ensure his release or when release ensure that his continued freedom is assured. The Appellant submits that TF1-334 not credible therefore the Chamber ought not to have relied upon his evidence as is unreliable and lacking in any truth .

TF1 -167 – George Johnson (Junior Lion)

130. The Appellant submits that this witness was far from being a truthful witness even down to the question of when he became known by the alias 'Junior Lion'. The Defence submits that contrary to the version given by the witness that it was after the war that Foday Sankoh gave him that name, he was in fact known as such during the period he spent in the jungle. Support for Appellant can be found in the evidence of witness TF1-334, who referred to this individual as Junior Lion throughout his evidence and in particular during the

[161] Transcript 15 September 2005 page 75
[162] Transcript 15 September 2005 page 75-76
[163] Transcript 15 September 2005 page 79

period in the jungle when TF1-167 was a commander.[164]. Subsequent witnesses have referred to TF1-167 as Junior Lion when talking of his involvement in events prior to this supposed crowning of him as Junior Lion by Foday Sankoh. The Appellant therefore submits that far from attaining the name in or around 2000, he had been using that name all along in the jungle and it is for that reason that the others knew him as such.

131. Further the Appellant stated in his evidence that Junior Lion had shot his brother in Kono. This was confirmed by the witness TF1 -334 in his evidence of 20th June 2005. However when this allegation was put to Junior Lion, he flatly denied this although he admitted knowing the brother. The ensuing dispute between this witness and the family of the Appellant as confirmed by TF1-334 is the reason enough for this witness to attempt to fabricate evidence against the Appellant.

132. It is perhaps also worth noting that in his pre-trial statement this witness had said that he was an informer for the Sierra Leone police. Yet when this was put to him in cross examination , he at first denied that he ever was, then accepted that he had said that to the investigators, but denied he was an informer, then later stated that he was with the police for his own protection, before eventually accepting that he was an informer. This is the evidence of a witness who is prepared to lie in order to attract the attention of anyone who would buy his story and rely on it. There was no reason for him to deny what he had in fact told the investigators, yet he moved around the issue in order to avoid telling the truth.

133. The First Appellant denied being in Bombali District at all. DAB-111 stated in evidence that he saw the Appellant in Yayah during the raining season.[165] The witness testified that the Appellant came to Yarya during the raining season after his brother Komba Brima had been shot. The witness told the

[164] See Transcript of 23rd May 2005 line 18 refers to Capt. Junior Lion - George Johnson alias Junior Lion
[165] See transcript of 27th September 2006 at page 20 line 7.

Appellant that Komba Brima had been taken to his father's plantation by his nephew.[166] Although this witness does not give a duration, this confirms the presence of the Appellant. The fact that a false duration was not given is proof itself that this is not a story that was made up. The witness stated that he was under arrest in Kailahun, a fact that was supported by the evidence of TF1 045. The defence witness DAB 059[167] also supported the fact that the Appellant was in Kailahun and was there for longer period. This witness stated inter alia that he left the Appellant in custody at Buedu in Kailahun District in around April to May 1998.[168] DAB 142 also gave evidence of the arrest of the Appellant in the Kailahun District.

134. In Kayishema para 109. the Appeals Chamber notes that Rule 67 (A) (ii) of the Rules of Procedure and Evidence which governs the reciprocal disclosure of evidence applies at the level of case-preparation only. It places no onus of proof on the Defence, in that it does not require the Defence to prove the existence of the facts, but rather provides for disclosure of evidence in support of the alibi. In the light of the above the appellant submits that erroneously disregarded the alibi proffered by the several defence witnesses and based the appellant's conviction for crimes committed at karina and it s environs on the evidence of the prosecution witnesses TF1-334 and TF1-167.

Legal arguments

135. The notion of individual criminal responsibility is derived form Article 6.1 of the Statute which reads as follows: *A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.*

136. The Prosecution's case is therefore that the Appellant must have either directly or indirectly committed any or all of the crimes under Article 2 to 4 of

[166] Id at page 27
[167] Evidence given on 27th September 2006
[168] Page 82-83 of the transcript of 27th September 2006

the Statute. The key elements are that he either planned, instigated, ordered, committed or aided and abetted in the planning, preparation or execution of any of the alleged crimes. The Appellant will look at each of these concepts separately borrowing from the definitions of the Trial Chamber in its Decision of Defence Motion for Acquittal pursuant to Rule 98.[169]

137. **Planning:** The Trial Chamber has defined planning as implying that "*:one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases. The actus reus requires that the accused, alone or together with others, designed the criminal conduct constituting the crimes charged. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The mens rea requires that the accused acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime*"[170].

138. In the ICTY case of Prosecutor v. Brdjanin[171], the Court held that responsibility for planning a crime shall only lie if it is demonstrated that the accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance'.

139. Based on these definitions and the above facts, the Appellant submits that the trial Chamber erred in law in finding the Appellant guilty of planning or designing the attack against Karina and its environs in the Bombali District between 1st May 1998 and 30th November, 1998. The inconsistent evidence led by prosecution TF1-334 and TF1-167 were discredited by those Defence witnesses who were in fact said by Prosecution witnesses to have either been killed or directly affected by the attack.

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[169] Decision on Defence Motion for Acquittal SCSL-04-16-PT
[170] Id pages 6529 to 6281 para. 284.
[171] ICTY Judgment, Trial Chamber, 1 September 2004, IT-99-36-T, para. 357.

140. **Instigating ;** The Trial Chamber in its Rule 98 decision[172] defined 'Instigating' as meaning: "*prompting another to commit an offence. Both acts and omissions may constitute instigating, which covers express as well as implied conduct. A nexus between the instigation and the perpetration must be proved, but it is not necessary to demonstrate that the crime would not have been perpetrated without the involvement of the accused. The actus reus requires that the accused prompted another person to commit the offence and that the instigation was a factor substantially contributing to the conduct of the other person(s) committing the crime. The mens rea requires that the accused acted with direct intent or with the awareness of the substantial likelihood that a crime would be committed in the execution of that instigation*".

141. The Appellant respectfully submits that the Trial Chamber erred in law in finding the Appellant guilty even though the Prosecution led no evidence on instigation either through its crime based witnesses or the insider witnesses.

142. **Ordering:** Similarly, in the rule 98 decision the Trial Chamber defined ordering as requiring *proof that a person in a position of authority uses that authority to instruct another to commit an offence. A formal superior/subordinate relationship between the accused and the perpetrator is not required. It is sufficient that the accused possessed the authority to order the commission of an offence and that such authority can reasonably be implied. There is no requirement that the order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence. It is not necessary for the order to be given by the superior directly to the person(s) who perform(s) the actus reus of the offence. What is important is the commander's mens rea, not that of the subordinate executing the order...The actus reus of "ordering" requires that the accused, as a person in a position of authority, instructed another person to commit an*

[172] Id., para. 293.

offence. The mens rea requires that the accused acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime would be committed in the execution of that order.[173]

143. It follows that for the offence of "Ordering" , the Appellant possessed the authority, expressly or implicitly, to order the commission of the offence[174], and secondly, that the he "acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime would be committed in the execution of that order"[175].

144. In this regard, it is important to categorize the evidence led by the Prosecution as follows: Crime based witnesses who had personal experiences to tell – none of whom who could identify the Appellant and either by identification or recognition in court; Crime Based witnesses who stated that they had heard the name of one of their commanders as Gullit(referring to the Appellant) – a name the Prosecution say the Appellant is known by and insider witnesses who claim to know the Appellant well and claim he was a leader and therefore ordered attacks.

145. The Appellant submits that given the quality and standard of evidence that emanated from the crime based and insider witnesses, the Court cannot be satisfied so that it is sure that the Appellant ordered the commission of the crimes in Karina and its environs in the Bombali District between 1st May 1998 and 30th November, 1998.. Much of the evidence is conflicting and contradictory and ought not to have been relied upon Trial Chamber.

146. **Committed** In its rule 98[176] decision, the Trial Chamber held that: "*[a]n individual can be said to have "committed" a crime when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in*

[173] Id para 295-296
[174] *Prosecution v. Kordic and Cerkez*, ICTY IT-95-14/2-T, Judgment, Trial Chamber 26 February 2001, para. 388; *Akayesu* Trial Chamber Judgment, *supra* note 33, para. 483.
[175] *Kordic and Cerkez*, ICTY Judgment, Appeals Chamber, *supra* note 31, paras. 29-30.
[176] See para. 277.

violation of a rule of criminal law.[177] *There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence"*

147. Following the Appeals Chamber Judgment in *Prosecutor v. Tadic*[178], the Chamber proceeded in the subsequent Judgment of *Prosecutor v. Krnojelac*[179] to define "committed" as "first and foremost the physical perpetration of a crime by the offender himself". The *actus reus* is paramount to the existence and proof of the offence of "committed

148. The Appellant submits that the evidence of actual commission of the aforesaid crimes in Karina and its environs in the Bombali District between 1st May 1998 and 30th November, 1998.. by the First Accused is at best unreliable and at worse fabrication.

149. **Aiding and Abetting :**This was also defined in the Rule 98[180] decision, wherein the Trial Chamber defined the ***actus reus*** of "aiding and abetting" as requiring: *"the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime...The mens rea requires that the accused knew that his acts would assist the commission of the crime by the perpetrator or he was aware of the substantial likelihood that his acts would assist the commission of the crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed.*

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[177] *Prosecutor v. Tadic*, ICTY IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 188.
[178] Ibid.
[179] ICTY Judgment, Appeals Chamber, 15 March 2002, para. 73.
[180] See paras. 301-2.

150. It was held in the case of *Prosecutor v. Kunarac*[181], that presence alone is not sufficient to prove "aiding and abetting", unless it can be shown that such presence gave legitimacy or encouragement to the acts of the principal. Thus, to aid and abet by omission, the failure to act should have a significant effect on the commission of the crime in issue[182]. The *actus reus* of the offence is therefore a crucial element.

151. The Appellant submits that there has been no reliable evidence adduced of the Appellant aiding and abetting anyone as was corroborated by witnesses called on behalf of the Appellant. Therefore the trial Chamber an erred in law by finding Appellant guilty under Article 6.1 for the crimes of murder and extermination of civilians in Bombali District based on the overall defense evidence.

152. In sum, the Apellant contends that the error invalidates the Judgment and sentence. The Appellant therefore, submits that the Appeals Chamber should quash the Judgment and sentence and return a verdict of not guilty.

SIXTH GROUND OF APPEAL

153. Error in law and/or in fact due to the Trial Chamber's finding that the Accused Brima is liable as a superior under Article 6(3) for crimes committed in Freetown and the Western Area during the relevant indictment period thereby occasioning a miscarriage of justice[183]. The Trial Chamber erroneously relied on the evidence of the prosecution witnesses TF1-334, TF1-167 ,TF1-184 and the prosecution Military expert witness at the expense of several Defence Alibi witnesses and the Defence military expert.

Legal Argument

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[181] ICTY Judgment, Trial Chamber, 7 May, 1997, para. 393.
[182] *Akayesu, supra*, note 32, para 705.
[183] (Trial Judgment Paragraph 1810, page 498).

154. Article 6 of the Statute of the Special Court for Sierra Leone (the "Special Court Statute") sets forth the theories of liability upon which the Special Court may impose individual criminal responsibility. Article 6(1) describes the bases for primary liability, and Article 6(3) codifies the customary law doctrine of command responsibility, whereby a person acting in a superior capacity is individually liable for crimes committed by subordinates if certain elements are proven. Specifically, Article 6(3) of the Statute provides:

> *"The fact that any of the [crimes over which the Court has jurisdiction] was committed by a subordinate does not relieve his or her superior of criminal responsibility if [the superior] knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.."*.[184]

155. For Appellant to be liable under the command responsibility principle, the prosecutor must prove three "essential elements": first, that there existed a superior-subordinate relationship between the Appellant and the perpetrator of the crime; second, that the Appellant had actual or constructive knowledge that the crime alleged would be, was being, or had been committed; and third, that the Appellant failed to take the necessary and reasonable measures either to prevent the crime or to punish the perpetrator-subordinate.[185]

156. The existence of a superior-subordinate relationship between the commander (herein allegedly the Appellant) and the perpetrator of the crime (his subordinate) is predicated upon the power of the said commander to

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[184] Notably, Article 6(3) of the Special Court's Statute is essentially identical to the corresponding provisions in the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Statute of the International Criminal Tribunal for Rwanda (ICTR). As a result, ICTY interpretations of Article 7(3) and ICTR interpretations of Article 6(3) will be highly persuasive in the Special Court.

[185] See Prosecutor v. Bagilishema, Judgement, ICTR-95-1A-T, para. 38 (Trial Chamber I 2001); see also Prosecutor v. Delalic et al. (hereinafter Celebici), Judgement, ICTY-96-21-A, para. 346 (Trial Chamber 1998).

"effectively" command and control the acts of his or her subordinate[186], assuming that the commander exercised any form of authority at all. Relying on Article 28 of the Statute of the International Criminal Court, any thing short of establishing and proving "effective command and control" by a superior over the conduct of his/her subordinate(s) ousts individual responsibility for the crimes perpetrated by such subordinate(s). "Effective control" is "a material ability to prevent or punish criminal conduct, however that control is exercised"[187].

157. In the case of *de facto* commanders, they must exercise such effective power and control over their subordinates that are substantially similar to the power and control exercised by *de jure* commanders, for individual criminal responsibility to lie.[188] Also, the superior should be able to exercise "substantial influence" over his or her subordinates in order to satisfy the requirement of effective control; failing which, liability cannot be grounded in superior command responsibility.[189]

158. In the *Prosecutor v. Kordic and Cerkez,*[190] the Trial Chamber, in its Judgment, set out the elements for a determination of "superior authority". It stated that the starting point is "the official position" held by the accused, noting however that the existence of a position of authority, whether *de jure* or *de facto*, will be based on an assessment of "the reality of the authority of the accused"[191]. The Court notes that "military positions will usually be strictly defined and the existence of a clear chain of command, based on strict hierarchy, easier to demonstrate.

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[186] See *Prosecutor v. Delalic et al*, IT-96-21 "Celebici", ICTY Judgment, Appeals Chamber, 20 February 2001, para 256 [hereinafter called "the Delalic Appeals Judgment"]; see also Article 28 of the Statute of the International Criminal Court (ICC).
[187] Id.; see also para. 197 of the Appeals Judgment endorsing the finding of the Trial Chamber on the issue.
[188] Id., para. 197.
[189] Id., para. 266
[190] IT-95-14/2, ICTY Judgment, Trial Chamber, 26 February 2001, paras. 418-24 [the "Lasva Valley"case]
[191] Id., para. 418.

159. Generally, a chain of command will comprise different hierarchical levels starting with the definition of policies at the highest level and going down the chain of command for implementation in the battlefield. At the top of the chain, political leaders may define the policy objectives. These objectives will then be translated into specific military plans by the strategic command in conjunction with senior government officials. At the next level the plan would be passed on to senior military officials in charge of operational zones. The last level in the chain of command would be that of the tactical commanders which exercise direct command over the troops."[192] Quoting further from the "ICRC Commentary" on Additional Protocol I of the Geneva Conventions, the Court noted that "there is no part of the army which is not subordinated to a military commander at whatever level. [Consequently], responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task"[193]. Significantly too, for criminal responsibility to lie, the Court held that it must be shown that the powers and duties exercised by the superior are "real"[194].

160. In view of the forgoing, the Appellant submit that he was never in a position of responsibility which conferred on him powers which he delegated or exercised over subordinates.

161. The Defence Military Expert, in reviewing the evidence adduced by the Prosecution to the Court including the Military Expert Report by the Prosecution's Military Expert, firstly, concluded that "the history of the SLA shows a total breakdown of military organization". He went on to say the "during the AFRC regime all forms of discipline and regimentation of the RSLAF were brought down to zero and ultimately finished the image of the RSLAF. This was also the starting point of the AFRC faction when ousted

[192] Id., para. 419.
[193] Id. para. 420.
[194] Id. para. 422.

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from power in February 1998"[195]. This view was also corroborated by TRC 001[196], a Common Defence Witness and also serving officer of the Republic of Sierra Leone Armed Forces. The fact that the Prosecution's Military Expert failed to properly review the military structure and operations of the Army before and during the AFRC regime, confining himself extensively to the AFRC faction[197], means that his report and conclusions are highly deficient. Thus, regarding the SLA under the AFRC regime, the Appellant submits that as a Corporal, he performed no military function and wielded no military authority over any one; his role was at best 'political' within the AFRC Government, and nothing more. Even if the Prosecution version is accepted, and he was a Staff Sergeant[198] that is a role that conferred on him the powers attributed to him by the Prosecution. The Appellant submits that in no way was he in a position of superior authority to command military or combat operations in any part of Sierra Leone or to order or supervise the commission of the crimes. As the Defence's Military Expert further concluded, "the AFRC", only had the semblance of a military structure and hierarchy. Specifically, the criteria of the *span of command* and the *span of control* were not fulfilled"[199].

162. Secondly, contrary to views expressed and conclusions reached by the Prosecution's Military Expert aforesaid on whose evidence the Trial Chambers erroneously based its findings, the Defence Military Expert concluded in his Report that "the AFRC faction did not exhibit the majority of the characteristics of a traditional military organization which therefore supports the view that the AFRC faction was an irregular military force"[200]. The Defence Military Expert also concluded that various groups within the AFRC faction were "not recognizable"[201]. The evidence led by the

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[195] *Supra,* Exhibit D36 note 112, para. 172. [SLA means Sierra Leone Army, and RSLAF means Republic of Sierra Leone Armed Forces].
[196] See Transcript of 16TH October 2006
[197] *Supra,* Exhibit D36 in its entirety, especially para. E6
[198] This is not accepted by the Defence: see evidence of First Accused
[199] *Supra,* Exhibit D36.p 176.
[200] Id., para. 177.
[201] Id., para. 175.

Prosecution, as well as the Defence maintained by the Appellant through Common and Individual Witnesses, altogether create a wry picture at odds with the purported existence of an "AFRC faction" with "a strong command capability", "functional characteristics of a military organization", "high levels of coherence between strategic, operational and tactical levels" as portrayed by the Prosecution's Military Expert[202].

163. Similarly, evidence of mutiny by junior soldiers at Colonel Eddie Town leading to the arrest and long detention of the three Accused[203], among others, weakens any responsible chain of command and the existence of superior authority by the Accused over their subordinates. Furthermore, even the Prosecution's Military Expert concluded in his Report that "the AFRC faction had a strong command capability which failed on 6th January"[204]. This conclusion admits the absence of an effective command and control, if any, over the fighters that attacked Freetown on 6th January, 1999.

164. Apart from the requirement for superior-subordinate relationship noted above, a second limb of Article 6.3 is the *mens rea* requirement, namely, proof by the Prosecution that the Appellant, among others, "knew or had reason to know that the crime was about to be or had been committed". Though "actual knowledge" may be proved through direct or circumstantial evidence, it must not be presumed[205]. Some of the indicia of superior knowledge may include: the number, type and scope of illegal acts; the number and nature of the troops involved; the geographical location of the acts; the widespread nature of the acts; and the *modus operandi* of similar illegal acts and location of the superior at the appropriate times[206].

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[202] *Supra,* Exhibit D36 .in its entirety, especially para. E6 thereof.
[203] (Transcript of cross examination of TF1- 334 by Counsel for the second Accused and evidence of TF1-167).
[204] *Supra,* Exhibit D36.para. E6.1.d.
[205] *Prosecution v. Blaskic*, ICTY Judgment, Trial Chamber, 3 May, 2000, p307.
[206] See *Archbold International Criminal Court: Practice, Procedure & Evidence*, 2003, edited by Dixon, Khan and May, para 10.35, p. 295.

165. Regarding indirect or circumstantial knowledge by the Appellant, superior criminal responsibility is not one of "strict liability"; each case has to be individually examined to ascertain the requisite *mens rea*, taking account of the superior's situation at the appropriate time[207]. Customary international law observes that superiors are not under a duty to know; they are only liable when they had "information which should have enabled them to conclude in the circumstances at the time, that [the perpetrator] was committing or was going to commit such a breach and if they did not take feasible measures within their power to prevent or repress the breach"[208].

166. The third limb of Article 6.3 of the Statute seeks to posit "culpable omission" as a crucial element of superior-subordinate individual criminal responsibility. In view of the foregoing analysis of this form of individual criminal responsibility, the Appellant submits that this third limb of Article 6.3 can only lie if the first two limbs are established. In order words, the Appellant has to be a commander over identified subordinates, he has to have effective command and control over them and their conduct, and more significantly, he has to possess the requisite *mens rea* of knowing or having reason to know that the subordinate has committed or is about to commit the crime outlined in the Indictment.

167. In view of the above the Appellant submits that the Trial Chamber erred in law by finding that the Prosecution has proved beyond reasonable doubt the Appellant is liable as a superior under Article 6(3) of the Statute for crimes committed in Freetown[209] .

NINTH GROUND OF APPEAL

[207] *Supra* Delalic Appeals Judgment, p. 239.
[208] See Article 86(2) of the 1997 Geneva Protocol I Additional to the Geneva Conventions of 1949.
[209] Trial Judgment page 498 at para 1810

168. The Trial Chamber erred in law and/or in fact by resolving any reasonable doubt in respect of the ability of the Accused Brima in favour of the Prosecution thereby occasioning a miscarriage of justice[210].

169. The Appellant submits that Trial Chamber erred in law and in fact for failing to address all his objections relating to discrepancies between witness TF1-184's prior statement provided to the prosecution as well as his trial testimony[211]. The Appellant submits that TF1-184 provided inconsistent account about him and the death of SAJ Musa. The Appellant submits that TF1-184's explanations concerning this discrepancy at trial were so confusing that a reasonable trier of fact would have rejected his testimony. That the Trial Chamber acted unreasonably in relying on the witnesses' trial testimony irrespective of the doubt raised therein without providing any reason for disregarding the earlier statement.

170. The appellant submits that the Prosecution has the burden of proving the case against him and must do so to the very high standard. The Accused is presumed innocent until proven guilty. Because of the extreme character of the crimes alleged before this Court and the challenges inherent in war crimes tribunals, the question of the rights of the accused should be considered even more strongly than in domestic courts.[212] The nature of the indictments requires international tribunals to aspire to the highest human rights standards set by international treaties, customary international law, and general principles of law.[213] There need not be any deviation from this.

171. Also even where evidence has been left unchallenged by the Defence or has not been recalled in the closing brief, the Prosecution still bears the burden of proving the evidence and the Trial Chamber must consider if it has been

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[210] (Paragraph 333 – 378

[211] Trial Judgmentpara361,362 & 363 at pages 122 & 123.

[212] Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 Yale J. Int'l L. 111 at 114 (2002); *Prosecutor v. Tadic*, Appeals Chamber Judgment, July 15, 1999, para. 52.

[213] *Id.* at 117; citing Accord Decision on Preliminary Motions, *The Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Nov. 8, 2001, P 38.

proved. Where the Chamber considers that there are doubts, then notwithstanding the foregoing, those doubts should be exercised in the Appellant's favour.

172. It is further submitted that any finding of the Trial chamber must be beyond reasonable doubt. "It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is reasonably open from that evidence, and which is consistent with the innocence of the Appellant, then he must be acquitted."[214] Where there is ambiguity same should be exercised in favour of the Accused.

173. The Appellant relies on the case of *Limaj*[215] where it was held that:

> *"Where.....more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that account".*[216]

174. The Appellant submit that much of the Prosecution's evidence is based on innuendos, surmising, guessing and drawing outrageous conclusions from a set of circumstances put together hopelessly and without any in depth investigation. For the most part, the Prosecution has relied on circumstantial evidence. Where it has sought to adduce direct evidence, this has come mainly from self- serving witnesses, hopelessly trying to shield speculation as to their role and hoping for some reward at the end. Such evidence is therefore extremely unreliable and lacking veracity.

175. Throughout the trial, the Prosecution built its case on the basis that the Appellant was one of those responsible for the overthrow of the Government

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[214] Prosecutor v Delalic et al., IT-96-21, Appeals Chamber' Judgment- 20tth February 2001
[215] Prsosecutor v Limaj et al., IT-03-66, Trial Chamber, Judgment, 30 November 2005
[216] Id at page 10

of President Kabbah in May 1997. This, which the Appellant denies, is said to be one of the reasons for the Appellant's senior position in the jungle, again denied responsible for the coup. The Appellant submits that this naivety permeates the Prosecution's case and raises more doubts which ought to have been resolved or determined in the Appellant's favour.

176. The Appellant further submits that the circumstantial evidence adduced by the Prosecution, upon which Trial Chamber erroneously relied on and eventually returned a verdict of guilty are based on rumour, embellishment and the fertile imaginations of their witnesses.

177. It is the submission of the Appellant that where the Prosecution sought to adduce as direct evidence, this ended up being utterances of an over active imagination of witnesses who suddenly had realised that they could recoup some benefit from the war after all. Witnesses TF1-334, TF1-167, TF1-184 were all out of work, former soldiers or vigilantes. Witness TF1-033 was an out of work member of the fugitive Johnny Paul Koroma's party. All of them had rather a lot more to gain than lose by coming to the Special Court to testify. This lends itself to the accusation that those pieces of evidence were embellished to suit a certain theory. TF1-334, TF1-167,gave conflicting, inconsistent and contradictory stories about the events in Karina and its environs between the period 1st May 1998 and 30th November, 1998[217]. The evidence of the aforesaid witnesses lacked credibility and reliability thus, created serious doubt which the Trial Chamber ought to have resolved in favour of the Appellant.

178. In the *Kayishema Appeal Judgment*, it was stated that "it is neither possible nor proper to draw up an exhaustive list of criteria for the assessment of evidence, given the specific circumstances of each case and the duty of the judge to rule on each case in an impartial and independent manner"[218]

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[217] Trial Judgment para,1703,1704 &1705 at pages 469 & 470
[218] ICTR-95-1, Appeals Chamber 1 June 2001

Evidence must be both reliable and reasonable. Thus, the appellant submits that the Trial Chamber erred in law and in fact by not resolving the several reasonable doubt in favour of the Appellant .

TENTH & ELEVENTH GROUNDS OF APPEAL

179. Pursuant to his tenth and eleventh grounds of Appeal the appellant associates mutatis mutandi with the submissions made under the eight ground of appeal as contained in the Kamara Appeal Brief

TWELFTH GROUND OF APPEAL

180. The Trial Chamber erred in law and/or in fact by imposing a global sentence of 50 years on the Accused which is excessively harsh and disproportionate and not in accordance with the sentencing practice and guidelines of the ICTY and the ICTR thereby resulting in a miscarriage of justice.

181. The Appellant submits that the sentence of 45 years is excessively harsh and exceedingly disproportionate if considered within the context of the totality of its factual and legal findings in comparison to other cases of even more serious nature that attracted lesser sentences in the ICTR and ICTY. The trial chamber stated as follows:

> *"The trial chamber will also consider the sentencing practice of the ICTY as its statutory provisions are analogous to those of the special court and the ICTR. The trial chamber is therefore guided by the sentencing practices at both the ICTR and ICTY"*[219].

182. The sentence of 50 years as imposed on the accused by the trial chamber compared to the ICTY and ICTR sentencing practice is unduly harsh and outrageous and tantamount for all practical purposes to a sentence to life imprisonment which committal powers the Trial Chamber does is not seised.

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[219] Prosecutor v. Brima, kamara, kanu p13 para 33, sentencing judgment

183. The appellant submits that the Trial Chamber erred in law by failing to give the mitigating circumstances adduced by the Appellant more weight that it should have in order to mitigate or reduce the high sentence given by the Trial Chamber.

184. Referring to Article 19 off the Statute, Rule 108 of the Rules of Procedure and Evidence of the Special Court and the jurisprudence of the ICTR and ICTY, the Appellant asserts that the Trial Chamber was obliged to consider mitigating and personal circumstances which includes the following factors; lack of prior criminal convictions, and his good reputation in the army without any court martial and his contribution towards the peace process in Sierra Leone.

185. Furthermore, even though the Appellant has six dependants including his two wives and children, the Trial Chamber averred that the Appellant has relations that can take care of his dependants. The Trial Chamber declared that the Appellant's dependants will be taken care of by other relations and further stated that the Appellant's wife depends on his pension which is totally untrue and false. It is a matter of record that the Appellant's pension from the Army is being collected by one, Lance Corporal Sullayman K (number SLA 18172061) without any authority or power of attorney whatsoever from the Appellant.

186. Despite the harsh conditions in Sierra Leone, the Appellant gallantly fought side by side with government forces in an attempt to repel the advancing RUF forces. The trial Chamber did in fact consider some factors as mitigating circumstances but did not give it sufficient weight to mitigate or bear on the harsh sentence imposed.

187. Paragraph 25 of the sentencing judgement titled mitigating circumstances reads as follows;

"Under Rule 101 (B) any substantial cooperation with the prosecutor by the convicted person before or after conviction must be considered as a mitigating circumstance. In addition, the Trial Chamber has the discretion to identify and weigh other mitigating factors according to the circumstances of each case, including but not limited to (i) expression of remorse or degree of acceptance of guilt; (ii) voluntary surrender (iii) good character with no prior criminal convictions; (iv)personal and family circumstances; (v) the behaviour or conduct of the accused subsequent to the conflict; (vi) duress and indirect participation; (vii) diminished mental responsibility; (viii) the age of the accused; (ix) assistance to detainees or victims and (x) in exceptional circumstances, poor health."[220]

188. In other cases all the above circumstances have been taken into account by both ICTR and ICTY as mitigating circumstances and have been given more weight in mitigating the sentences given..

189. It is submitted that the Trial Chamber erred at paragraph 64 and 65 of the sentencing judgment in deliberating as follows;

> *"The Trial Chamber does not consider Brima's service in the army without incident to be a mitigating factor as this was merely his duty...the Trial Chamber further finds that Brima's alleged acts of philanthropy and alleged involvement in the commission for the consolidation of peace are not mitigating factors"*

190. In the Muhimana case[221], it was held by the appeals chamber that, neither the statute nor the rules exhaustively define the factors that must be taken into account by a trial chamber in mitigation of a sentence. The only circumstance that is explicitly envisaged in Rule 101 is that of "substantial cooperation with the prosecutor before or after the conviction".

191. The Appellant submits that the Trial Chambers are endowed with a considerable degree of discretion in considering what other factors are to be considered in mitigation and the concomitant weight to attach to such considerations.

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[220] Brima Et al sentencing judgment para 25
[221] Muhimana appeal judgment para 231 see also Babic appeal judgment para 43

192. It is the submission of the Appellant that the Trial chamber did not exercising the discretion vested in it fairly and reasonably thereby abusing the discretionary power and authority vested in it. The appellant generally submits that the trial chamber did not give appropriate weight to his mitigating circumstances such as his personal and family circumstances, lack of prior conviction, poor health of the accused, showing remorse and help given to others in community.

193. The Appellant submits further that the Trial chamber paid more attention to the aggravating circumstances than any of the adduced mitigating circumstances. The Appeals Chamber held in the Muhimana case that the appellant did not submit any mitigating circumstances and therefore, the Trial Chamber had to use its discretion in determining what circumstances to take into account. In the present case however, the appellant submitted mitigating circumstances which were given very minimal or no weight at all[222].

194. The Trial Chamber further failed to properly assess the aggravating circumstances which led to the imposition of such a heavy sentence of 50 years. Article 19 of the Statute provides that the Trial Chamber shall, where appropriate have recourse to the practice regarding prison sentences in the ICTR in determining the terms of imprisonment. The Trial Chamber explicitly states in paragraph 33 on page 13 of the sentencing judgment that it will consider the sentencing practice of ICTY as it is analogous to those of the Special Court and ICTR.

195. Further, the Trial Chamber notes in paragraph 23 and footnote 46 that

> *"...regardless of the approach, where a factor has already been taken into account in determining the gravity of the offence, it cannot be considered additionally as an aggravating factor and*

[222] sentencing judgment p 20 para 64-66.

vice versa. Similarly if the factor is an element of the underlying offence, then it cannot be considered as an aggravating factor".

196. However, the trial chamber erred in its judgment by considering the following factors in determining the gravity of the offence as well as aggravating factors in paragraphs 45, 53, 55-57 on pages 18 and 19 of the sentencing judgment respectively;

i. The crimes were brutal and heinous in nature
ii. the dragging of child soldiers
iii. brutal gang rapes
iv. vulnerability of victims
v. prolonged time of enslavement
vi. burning of civilians alive
vii. amputation of limbs as submitted by prosecution

197. Further, the Trial Chamber failed to properly analyse the purpose and objectives of sentencing by focusing mainly on retribution and deterrence and giving very little weight to rehabilitation and reconciliation. It is the Appellant's contention that "Truth and Justice" should also foster a sense of reconciliation between different ethnic groups[223]. Mitigating factors do not take the crime away but simply used as a means to reduce the criminal responsibility of the accused for violation of rights.[224]

198. Deterrence is mainly used in international tribunals to dissuade other people who might want to commit the same crime from doing so and this is achieved by giving an appropriate sentence which includes long term imprisonment but 50 years is an excessive sentence.

199. In ICTR a long term imprisonment is equated to 30 years and not 50 years. Credit shall be given to the convicted person for the period if any, during

[223] Nikolic Trial judgement at para 120
[224] Semanza judgment, ICTR-97-20

which the convicted person was detained in custody pending his surrender to the tribunal or pending trial or appeal.[225]

200. In addition to the above, the court should address the principal aims of sentencing namely; retribution, deterrence, rehabilitation and justice. However, judges should not limit themselves to the above factors but have the discretion to consider any other factors that they deem fit to meet justice.

201. If the Trial Chamber had taken all these relevant factors into account and analysed them sufficiently, the sentence would not have been as outrageous as it is therefore, the Appeals Chamber should revise the purposes of sentencing to reduce the sentence imposed by the Trial Chamber.

202. In the case of Akayesu[226] the following sentences were imposed: 15 years imprisonment for murder as a crime against humanity, 10 years for torture as a crime against humanity, Rape 15 year's imprisonment, 10 years for crimes against humanity and other inhuman acts. These sentences were to be served concurrently and were imposed despite the Prosecutions submission for longer sentences.

203. Also in the case of Momcilo Krajisnik[227], he was convicted of the crimes of persecution as a crime against humanity, extermination as a crime against humanity and Murder as a crime against humanity, for which he received a sentenced 27 years imprisonment.

204. Similarly, his co accused Vinko Martinovic has been found guilty of inter alia persecutions on political, racial and religious grounds as a crime against humanity, inhumane acts as a crime against humanity, inhuman treatment as a

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[225] Ruggiu judgment, ICTR-97-32-1 at para27 D, see also Rule 101 D of Special Court rules of procedure and evidence
[226] Ibid (ICTR-96-4-T)
[227] IT-00-39 & 40http://www.un.org/icty/krajisnik/trialc/judgement/kra-jud060927e.pdf

grave breach of the Geneva Conventions of 1949, unlawful labour as a violation of the laws or customs of war, murder as a crime against humanity, wilful killing as a grave breach of the Geneva Conventions of 1949 and wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949. The Chamber sentenced Martinovic to a single sentence of eighteen years of imprisonment.

205. Further, in support of the twelfth ground of appeal the Appellant associates mutatis mutandi with the submissions of the Kamara Appeal Brief made in respect of its ninth, tenth, eleventh, twelfth, and thirteenth grounds of appeal relating to sentencing.

Respectfully submitted

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