SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER I

Case No. SCSL-04-14-T

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

Registrar: Robin Vincent

Date: 3 August, 2005

PROSECUTOR Against SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

MOTION FOR JUDGEMENT OF ACQUITTAL OF THE FIRST ACCUSED SAMUEL HINGA NORMAN

Office of the Prosecutor:
Luc Cote
James Johnson
Kevin Tavener

Court Appointed Counsel for Hinga Norman
John Wesley-Hall Jr.
Dr. Bu-Buakei Jabbi
Ibrahim Yillah
Clare da Silva

Court Appointed Counsel for Moinana Fofana
Victor Koppe
Arrow Bockarie
Andrew Ianuzzi
Michiel Pestman

Court Appinted Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana
Martin Michael

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I. Introduction

1. On 14 July 2005, the Prosecution closed its case and the Trial Chamber ordered that any motion under Rule 98 for Motion for Judgement of Acquittal under the Rules of Procedure and Evidence (the "Rules") of this Court shall be filed by the Defence by 4 August 2005. The Defence submits this Motion pursuant to that order.

2. The standard to be applied in ruling on a Rule 98 motion is whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of First Accused[1] Samuel Hinga Norman. The Accused submits that the Prosecutor has failed, in law and in fact, to prove a number of allegations contained in the Indictment and moves for an entry of judgment of acquittal for a number of individual counts.

3. The Defence further submits that, with respect to a number of factual incidents included in the Indictment, the Prosecution has presented no evidence whatsoever and that those particular incidents should also be acquitted.

4. With respect to two basis of criminal liability of the First Accused in the Indictment put forward by the Prosecution–joint criminal enterprise and command responsibility–the First Accused submits that the Prosecution has failed to provide proof of the required elements. The First Accused submits that there is no evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that a joint criminal enterprise existed or that the First Accused had command responsibility, and he requests that the Trial Chamber enter a judgement of acquittal for these forms of criminal liability.

II. Rule 98—Motion for Judgment of Acquittal

5. Rule 98 states as follows:

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[1] Samuel Hinga Norman is referred to as "First Accused" or "Accused" in this pleading.

If, after the close of the case for the Prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts.

A. Standard to be Met

6. The general standards of Rule 98 were articulated by the ICTY Appeals Chamber in *Jelisic*[2], and have been regularly cited by subsequent decisions of both the ICTY and ICTR:

[T]he reference in Rule 98*bis* to a situation in which the "evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the Prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond a reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalic* appeal judgment, where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond a reasonable doubt of the guilt of the accused on the particular charge in question." The capacity of the Prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier of fact would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence (if accepted) but whether it could. At the close of the case for the Prosecution, the Chamber may find that the Prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the Prosecution has not in fact proved guilt beyond reasonable doubt.[3]

7. Therefore, the standard to be applied is whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a find-

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[2] Prosecutor v. Jelisic, Case no. IT-95-10-A, Appeals Chamber, Judgment (Jelisic Appeal Judgment), 5 July 2001, ¶ 37.

[3] Ibid., Since the Jelisic Appeal Judgment, numerous Trial Chambers have applied this standard: see, for example, Prosecutor v. Galic, Case No. IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002; Prosecutor v. Sikirica et al. Case No. IT-95-8-T, Judgment on Defence Motion to Acquit, 3 September 2001.

ing of guilt of the First Accused.

8. The Defence submits that there are a number of guidelines to assist the Trial Chamber in making its determination as to whether this standard has been met.

9. First, where no evidence has been adduced by the Prosecution in relation to a count or a charge, acquittal shall be granted.

10. Second, a Rule 98 motion will succeed if an essential ingredient for a crime was not made out in the Prosecution's case; for, if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction[4].

11. The First Accused notes that, in accord with practice of the sister tribunals, this Trial Chamber may enter a judgement of acquittal with regard to a factual incident or event cited in the Indictment in support of the offence, if the Prosecutor's evidence on that particular incident does not rise to the level of the standard set forth in Rule 98.[5]

12. Where there is some evidence, but it is such that, taken at its highest weight, a Trial Chamber could not convict on it, the Motion for Judgement of Acquittal should be granted.[6] Therefore, while an assessment on the credibility and reliability of the evidence is neither necessary nor generally permitted at this stage, where the evidence as to an element is so manifestly unreliable or incredible that no reasonable tribunal of fact could

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[4] *Supra*, note 1, Jelisic Appeal Judgment, ¶s 59-61.

[5] The Prosecutor v. Kvocka & al., Decision on Defence Motions for Acquittal, Case No.: IT-98-30/1-T, 15 December 2000, ¶ 9.

[6] See R. Watson, Criminal Law (New South Wales) (1996), at p. 5740 (expressing this exception with great clarity: "On a submission of no case the judge is concerned with the question whether there is evidence which is legally capable of leading to a conviction and not with the question whether the evidence is so lacking in weight that a conviction based upon it would be unsafe or unsatisfactory, except where the evidence is so inherently incredible that no reasonable person would accept its truth.".

credit it, the evidence should be dismissed,[7] and the Chamber shall order the entry of judgement of acquittal.

B. Greatest Responsibility Standard

13. Article 1 of the Statute of the Special Court limits the power of the Special Court to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law... including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[8] This statement of personal jurisdiction is considerably less inclusive than that of the ICTR, which has the power to prosecute "persons responsible for serious violations of international humanitarian law"[9] and that of the ICTY, which has "the power to prosecute persons responsible for serious violations of international humanitarian law."[10]

14. The "greatest responsibility" standard, along with the added clause including specifically those leaders who have "threatened the establishment of and implementation of the peace process in Sierra Leone" was adopted at the recommendation of the UN Security Council[11] in spite of proposed language which would have expanded jurisdiction to "those most responsible" in an effort to capture *all* those bearing some degree of responsibility.[12]

15. While the test to be applied on a Rule 98 motion is that articulated in the *Jalisec Appeal Judgment* (whether there is "evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question")[13], the unique jurisdictional limitations of the SCSL requires that the Trial Chamber must also consider whether the Prosecution's evidence (if accepted) could suffice to prove beyond reasonable doubt not only the guilt of the accused, but also

[7] The Prosecutor v. Kordic and Cerkez, Case No.: IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, ¶28 and Prosecutor v. Kvocka & al, Case No.: IT-98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, ¶17.
[8] Article 1(1) of the Statue of the Special Court For Sierra Leone ("the Statute")
[9] ICTR Statute of the Tribunal, Article 1
[10] ICTY Statute of the Tribunal, Article 1.
[11] UN Security Council Resolution 1315 of 14 August 2000.
[12] Press Briefing by UN Assistant Secretary-General Office of Legal Affairs, Ralph Zacklin, in advance of the publication of the UN report on the Special Court for Sierra Leone, 25 September 2000.
[13] *Supra*, Note 1.

that the accused is indeed one of those bearing the *greatest responsibility* for the counts in question. The Accused submits that Prosecution's evidence is inadequate to prove that the First Accused bears "greatest responsibility" as required by the Statute and the Indictment.

16. It is further submitted that although the Statute provides jurisdiction over "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone," Article 1's choice of "including" rather than "as well as" or "in addition to" those who bear the greatest responsibility, does *not* suggest that the "greatest responsibility" standard may be diluted where issues of command responsibility are concerned.

III. The Indictment

17. The First Accused faces eight counts on the Indictment.[14] He is charged with crimes against humanity, violations of Article 3 common to the Geneva Conventions and of additional Protocol II, and other serious violations of international humanitarian law in violation of Articles 2, 3 and 4 of the Special Court of Sierra Leone Statute. These charges are enumerated in Counts: 1 and 2 (unlawful killings),[15] 3 and 4 (physical violence and mental suffering),[16] 5 (looting and burning),[17] 6-7 (terrorizing the civilian population and collective punishments),[18] and 8 (conscripting and enlisting of child soldiers).[19]

18. The Prosecution cumulatively charges the First Accused for the crimes alleged in Counts 1 through 8 under different modes of liability. These are:

    a. Responsibility for criminal acts that were perpetrated as part of a joint criminal enterprise ("JCE") in which he participated or which were a reasonably foreseeable conse-

[14] Consolidated Indictment, 4 February 2005.
[15] Articles 2(a) and 3(a) of the Statute.
[16] Articles 2(i) and 3(a) of the Statute.
[17] Article 3(f) of the Statute.
[18] Articles 3(d) and 3(b) of the Statute.
[19] Article 4(c) of the Statute.

quence of the joint criminal enterprise in which he participated, entailing the Accused's individual criminal responsibility under Article 6(1) of the Statute of the Tribunal[20];

b. Responsibility under Article 6(1) of the Statute for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation, or execution of the crimes charged in the Indictment[21];

c. Responsibility under Article 6(1) of the State for the crimes committed by the suborindates of the First Accused while he was holding an position or superior authority.[22]

19. It is the Defence's submission that the Prosecution's evidence for alleged criminal liability of the First Accused under the first (JCE) and third (command responsibility) modes of liability does not meet the Rule 98 standard, that is whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused. The Defence moves for a judgement of acquittal to be entered for these two forms of criminal liability.

A. Joint Criminal Enterprise ("JCE")

(1) The Law

18. The First Accused submits that the Prosecution has failed to provide proof of the elements required to establish criminal culpability for a joint criminal enterprise ("JCE") under Article 6(1). The definition of a JCE has been set out by the Appeals Chamber in the *Tadic Appeals Judgement*, and there are three elements of a JCE identified therein.[23]

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[20] Indictment ¶ 20, Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004, 22 April 2004 ("Pre-Trial Brief"), ¶ 270.
[21] Indictment, ¶ 20, Pre-Trial Brief, ¶ 270.
[22] Indictment, ¶s 20-21, Pre-Trial Brief, ¶ 270.
[23] Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgement, 15 July 1999 ("Tadic Appeals Judgement"), ¶s 185-229: The first category of JCE consists of "[c]ases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) The accused

19. The *Tadic* Appeals Tribunal provided that the following *actus reus* elements that must be proved beyond a reasonable doubt in a JCE charge: (a) a plurality of persons, (b) the existence of a common plan or design to commit a crime under the Statute, and (c) participation of the defendant in the common plan.[24]

20. The *mens rea* requirement varies with the JCE category. The first category requires shared intent to commit the crime; the second category requires knowledge of the systemic ill treatment and an intention to further the system; and the third category requires intention to further the common plan and awareness that crimes committed by participants of the JCE outside the common plan are foreseeable consequences of the common plan.[25]

21. If the crime fell within the common plan, as in the first-category JCE, the Prosecutor must prove that the defendant "shared with the person who personally perpetrated the crime the state of mind required for that crime."[26]

22. If the crime went beyond the common plan, as in third-category JCE, the Prosecutor must

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must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitate the activities of his co-perpetrators), and (ii) The accused, even if not personally effecting the killing, must nevertheless intend the result." (Tadic Appeals Judgement, ¶ 196).

The second category of JCE is the "systemic" variant of the basic category, exemplified by organized repression in detention camps and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan." (Tadic Appeals Judgement, ¶ 202).

The third category of JCE "concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk." (Tadic Appeals Judgement, ¶ 204).

[24] Tadic Appeals Judgment, ¶s 227-28.

[25] Prosecutor v. Vasiljevic Case no. IT-98-32-A, Appeals Judgment, 25 February 2004, ¶ 101 (citing Tadic Appeals Judgment).

[26] Prosecutor v Krstic, Case No. IT-98-33, Trial Judgment, 2 August 2001(Krstic Trial Judgment), ¶ 613.

prove that the defendant was aware that the further crime was a possible consequence and that, with that awareness, he participated in that enterprise, as in *Tadic*.[27]

23. It is also necessary for the Prosecution to prove that, between the member of the JCE responsible for committing the material crime charged and the person held responsible under the JCE for that crime, there was an agreement to commit at least that particular crime.[28]

24. Also, the Defence submits that the Prosecution's evidence must demonstrate that the First Accused's involvement in the criminal act formed a link in the chain of causation.[29]

(ii) Defence Submissions

25. The Defence submits that the Prosecution has failed to adduce any evidence to show the existence of a common plan to commit any of the crimes as enumerated in Articles 2, 3 and 4 of the Statute. In the absence of such a plan, there can be no JCE.

26. The Prosecution itself presented evidence the negates the possibility of a JCE, having witnesses whose testimony demonstrated that the central strategic idea, indeed, the entire purpose, of the CDF was to defend its homelands from the RUF and junta forces[30] rather than to commit any crimes under Articles 2, 3, and 4 of the Statute.

27. The Prosecution has also not presented any evidence to show that there was plurality of persons involved in the alleged JCE. Other than evidence that describes meetings where the three Accused were in attendance, along with other members of the CDF, the Prosecution has presented no evidence at all to satisfy the first element of a JCE, a plurality of persons. There is no evidence whatsoever to demonstrate that a plurality of persons ever

[27] Krstic Trial Judgment, ¶ 613; see also Tadic Appeals Judgment, ¶ 228.
[28] Prosecutor v. Brdjanin and Talic, Case No. IT-99-36-P, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, ¶ 44.
[29] Tadic Appeals Judgment, ¶ 199, referring to the to Ponzano case (Trial of Feurstein and others, Proceedings of a War Crimes Trials held at Hamburg, Germany, Judgement of 24 August 1948)
[30] See for example, testimony of Prosecution witness EW#1.

developed a common plan to commit crimes. The only common plan was to defend their country, and that is not a joint criminal enterprise.

28. The Defence further submits that the Prosecution has presented no evidence to meet the *mens rea* requirements for a JCE. The Prosecution has no evidence that demonstrates the existence of a shared intent to commit crimes. Further there is no evidence showing that the perpetrators of alleged crimes and the First Accused shared the state of mind required for those individual crimes.

29. On this basis the Defence submits that there is no evidence from which a reasonable trier of fact could conclude beyond reasonable doubt that a joint criminal enterprise has been proven, and requests that the Trial Chamber enter a judgement of acquittal for this form of criminal liability.

B. Command Responsibility

30. The Accused has been charged with individual criminal responsibility for the charges of the Indictment under SCSL Statute Articles 6(1) and 6(3). This section deals specifically with the elements required to establish criminal culpability under 6(3), which, the Defence submits, is the primary theory under which the Prosecution has tried to link the Accused to the unlawful acts described in the Indictment.

(i) The Law

31. In order to invoke criminal responsibility under Article 6(3) of the Statute, three elements must be satisfied.[31] First, the existence of a *de jure* or *de facto* superior-subordinate relationship must be established.[32] Such relationship presupposes that the superior has effective control over the offenders, otherwise described as the material ability to prevent or

[31] Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgement, 16 November 1998 ("Celebici Trial Judgement"), ¶ 346.
[32] Prosecutor v. Delalic et al., Case No. IT-96-21-A*bis*, Judgement, 3 April 2003 (Celebici Appeals Judgement), ¶ 195, referring to Celebici Trial Judgement, ¶s 370 -371.

punish the alleged offences.[33] Secondly, the superior must have known or had reason to know that the criminal act was about to be or had been committed. This may be established through proof that the superior had actual knowledge that his subordinates were about to or had committed the alleged offences or that he had in his possession information of such a nature as to put him on notice of such risk.[34] Thirdly, it must be established that the superior failed to take the necessary and reasonable measures within his capacity to prevent the criminal act or punish the perpetrator thereof.[35]

(a) Superior-subordinate relationship

32. A superior-subordinate can be established in two independent ways: *de jure* if the source of authority is the state and *de facto* if the source of authority is a paramilitary structure. *De jure* authority implicates official recognition of rank or superiority and the ability to exercise "legal and financial control" over another.[36] *De facto* command requires the accused to have effective control over subordinates.

33. The ICTY in *Mucic* described effective control as "having the material ability to prevent and punish the commission of [offenses committed by subordinates]."[37] The mere fact that an individual gave orders that were carried out does not itself establish a superior-subordinate relationship unless there is some showing that the superior could have punished the subordinate for not following out those orders. Case law indicates that a superior must have some actual, special and particular ability to sanction an individual who disobeys a command.

34. Command responsibility applies only to individuals with greater status than the offenders and not to persons of "completely equal" or lesser status even though that individual may influence the offender's actions.[38] Significantly, powers of persuasion or influence alone

[33] Celebici Appeals Judgement, ¶ 256
[34] Celebici Trial Judgement, ¶. 383, as endorsed by the Appeals Chamber in Celebici Appeals Judgement, ¶ 241.
[35] Celebici Trial Judgement, ¶ 395.
[36] Prosecutor v. Musema, ICTR-96-13-A, Judgement and Sentence, 27 January 2000, ¶ 880.
[37] Ibid.
[38] Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, 20 February 2001, ¶ 303.

are insufficient to establish criminal liability under the doctrine of command responsibility.[39]

(b) Mens rea

35. A superior possesses or will be imputed the *mens rea* required to incur criminal liability where he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed, a crime, or, when he had information which put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain the commission of such offences by subordinates.[40]

36. Where the illegal acts are committed in a location "physically distant," the presumption of knowledge becomes far weaker in the "absence of other indicia,"[41] which may include access to telephones and other communications equipment.

37. Knowledge of the nature of the "general situation that prevailed" does not amount to knowledge that one's subordinates are likely to commit crimes.[42]

38. It is well established that the standard that the doctrine of command responsibility establishes for superiors who fail to prevent or punish crimes committed by their subordinates is not one of strict liability.[43] While an individual's position in a command hierarchy may be an indicator that the superior knew or had reason to know about the actions of his subordinates, "knowledge will not be presumed from the status alone."[44]

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[39] Ibid. ¶ 236.
[40] Bagilishema Trial Chamber, June 7, 2001, ¶ 46
[41] Prosecutor v. Aleksovski, IT-95-14/1-T (1999), ¶ 80.
[42] Prosecutor v. Bagilishema, Judgement (Reasons), ICTR-95-1A-A (2002), ¶ 42-45 (knowledge that roadblocks were often a means by which victims were identified and the staffing of those roadblocks with a subordinate with a criminal record was not sufficient, in itself, as a matter of law, to demonstrate the knowledge of the commander).
[43] Bagilishema, June 7, 2001 ¶ 44; see also Prosecutor v. Semanza, Judgement and Sentence, ICTR-97-20-T, May 15, 2003, ¶ 404.
[44] Semanza, May 15, 2003, ¶ 404; see also Bagilishema, June 7, 2001, ¶ 45.

38. The *Kayishema and Ruzindana* Trial Chamber made it clear that there is no "*prima facie* duty upon a non-military commander to be seized of every activity of or knowledgeable of the acts of all persons under his or her control"[45] because it just is not possible.

(c) Failure to Prevent or Punish

39. A superior is not liable unless he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

40. The preventative and punitive measures must have been "within [the superior's] powers" and within "material possibility."[46] Material possibility refers to the ability to "prevent or punish in the circumstances prevailing at the time"[47] rather than to any conceivable or hypothetical possibility. It is not sufficient for the Prosecution to prove that means were available and that certain steps were abstractly possible.[48] Rather, the Prosecution must prove that the superior's "effective control, his material ability" presented viable options that he knowingly refused to take.[49]

(ii). Defence submissions

41. The First Accused submits that the Prosecution has brought forth no evidence demonstrating that the Accused was anything more than a civilian administrator, albeit a popular and well-known one with a military background, involved with the administrative leadership of the CDF and Kamajor organizations. As such, to the extent there was any relationship approximating a *de jure* or *de facto* superior-subordinate relationship between the Accused and other members of the organisation, this relationship did not involve essential control of those individuals perpetrating unlawful acts in the field. Evidence of the level of influence that the First Accused possessed is not sufficient to establish crimi-

[45] Prosecutor v. Kayishema & Ruzindana, ICTR-95-1-T , Judgement, 21 May 1999, ¶ 228.
[46] Prosecutor v. Delalic, IT-96-21-T ¶ 394-95 (1998); Prosecutor v. Kayishema & Ruzindana, ICTR-95-1-T, ¶228 (1999).
[47] Prosecutor v. Bagileshima, ICTR-95-1A-T ¶ 47 (2001).
[48] Prosecutor v. Aleksovski, IT-95-14/1-T ¶ 81 (1999).
[49] Prosecutor v. Semanza, ICTR-97-20-T ¶ 407 (2003).

nal liability under the doctrine of command responsibility.

42. The First Accused submits that the Prosecution has failed to meet its burden with regard to the first prong of this test, having failed to prove the existence of a superior-subordinate relationship between the Accused and any of the offenders who committed any of the specific acts alleged in any of the substantive counts charged in the Indictment.

43. The First Accused additionally submits that the Prosecution has brought forth no evidence demonstrating that he had actual or constructive knowledge of the specific unlawful acts alleged in these Counts. The evidence presented by the Prosecution recounts a number of alleged crimes committed by Kamajors but none of that evidence is linked back to the First Accused to indicate that he had specific knowledge of any specific alleged crimes.

44. Further, given that the majority of alleged illegal acts were committed in locations "physically distant," the presumption of knowledge becomes far weaker in the "absence of other indicia," which may include access to telephones,[50] radios, and other elementary communications equipment. The evidence as presented by the Prosecution only reinforces that the possibility of knowledge throughout the organization was low an ineffective, given the rudimentary communication structures in place. It is undisputed testimony from Prosecution witnesses that messages were often delivered by foot. Indeed, EW #1, the military expert, discussed at length the ability of the CDF and Kamajors to only communicate by runners or a man on a motorcycle carrying messages between groups, and even those messages were not accurately delivered, as the botched attack on Bo demonstrates where two of the three groups to attack failed to do so because they did not accurately get the word of when to attack. He summed it up that they were largely an ineffective military organization as a result ("Not a very good one" were his words).

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[50] The only reference to a telephone was a satellite telephone that the First Accused used to keep in touch with President Kabbah.

45. Any evidence that the Prosecution presented which gave an indication of a general situation that existed or general activities of Kamajors cannot be imputed to amount to knowledge in the First Accused that subordinates are or were likely to commit crimes.

46. In addition, it is submitted that the Prosecution has not provided evidence to establish that the First Accused had specific enough notice of the unlawful acts alleged in the Counts to warrant a "should have known" *mens rea* standard.

47. The First Accused furthermore submits that the Prosecution has brought forth no evidence demonstrating that, to the extent the Accused held a degree of *de jure* or *de facto* control, he failed to do that which was within material possibility to do to prevent the occurrence of unlawful acts and, where within material possibility, to punish those committing them.

48. On this basis the First Accused submits that there is no evidence from which a reasonable trier of fact could conclude beyond reasonable doubt he exercised command responsibility has been proven, and he requests that the Trial Chamber hold the Prosecution failed to prove this form of liability is involved in this case.

C. Analysis of the Indictment

(1) Counts 1 and 2 -- Unlawful Killings

49. Count 1 of the Indictment charges the First Accused with the offence of murder, a crime against humanity, punishable under Article 2(a) of the Statute of the Court. In addition, or in the alternative, Count 2 charges the First Accused with the offence of violence to life, health, and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute of the Court.

50. The Indictment at ¶ 25 alleges this offence. This allegation concerns seven sets of oc-

currences at various locations in Sierra Leone during the period November 1997 to December 1999 in which Kamajors (occurrences a-f, referred to as ¶s 25(a-f)) or the CDF (occurrence g (¶ 25(g)) unlawfully killed an unknown number of civilians and captured enemy combatants.

51. The case against the First Accused on these counts is that, by acts or omissions in relation to these events, he is individually criminally responsible for their occurrence, pursuant to Article 6(1), and, or alternatively, Article 6(3) of the Statute.

52. The offence of murder requires the killing of a person by the First Accused or a subordinate, by an unlawful act or omission, with the intention to cause death or inflict grievous bodily harm, knowing that such bodily harm is likely to cause death and being reckless as to that fact. In relation to Count 1 as a crime against humanity, the Prosecution must prove that the offence to have was committed as part of a widespread or systematic attack against the civilian population. In addition, the Accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population. In relation to Count 2 as a violation of Article 3 Common to the Geneva Conventions, the Prosecution must show that a state of armed conflict of a non-international character existed in Sierra Leone at the time of the acts alleged in the indictment, the crimes must be committed *ratione loci* and *ratione personae*, and that there was a nexus between the armed conflict and Count 2.

53. To establish command responsibility for the offences asserted in Counts 1 and 2, the Prosecution must prove both the elements of murder and the elements of command responsibility as already described above.

¶ 25(a): Between 1 November 1997 and 30 April 1998, at Tongo Field and at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma, and Sembehun: Kamajors unlawfully killed civilians and captured combatants

54. The unlawful killings alleged to have occurred in the Indictment at ¶ 25(a) were addressed by Prosecution witnesses TF2-022, TF2-035, TF2-027, TF2-047, TF2-048.

TF2-013, TF2-144, TF2-016, TF2-053, TF2-073, and TF2-079.

55. Of the witnesses identified as relevant to the unlawful killings alleged in Indictment at ¶ 25(a), witnesses TF2-035, TF2-027, TF2-047, TF2-048, TF2-144, TF2-016, TF2-053, and TF2-073 make no mention whatsoever of the First Accused. Neither is there any direct or indirect evidence to show that the First Accused had the requisite level of intent to kill civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused.

56. Witnesses TF2-013, TF2-022, and TF2-079 mentioned the First Accused in their testimony, but they referred to the Accused's actions as occurring in an administrative context, completely distinct from their testimony about unlawful killings they witnessed. They thus provided no direct evidence of the Accused's planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation, or execution of the unlawful killings, as charged under Statute Article 6(1).

57. Witnesses TF2-013 and TF2-022 addressed the issue of the Accused's command responsibility for the unlawful killings they witnessed.

58. Witness TF2-013 testified that the Accused made a speech in which he proclaimed his desire to capture Zimmi first. This alleged speech does not provide any evidence of complicity in the commission of unlawful killings; it merely demonstrates a desire to take back a town under the control of rebel forces, and that is a legitimate military objective. No testimony as to the First Accused relates to the unlawful killings.

59. Witness TF2-013 also said that ammunition was distributed to himself and others after

the First Accused had left the meeting. Providing ammunition or other logistical support to CDF or Kamajor forces does not establish that the First Accused was involved in the commission of unlawful killings nor establish the *mens rea* requirement that the First Accused had the intent to kill or seriously harm a civilian population; it merely demonstrates his administrative position within the organization.

60. Witness TF2-022 testified that the Kamajors told him that the First Accused had supplied them with guns and food, somewhat similar to the situation described by Witness TF2-013, above. The argument already articulated there applies here as well: providing logistical support to a civilian force does not equate to or imply support of unlawful killings, only support of a legitimate military objective.

61. The First Accused submits that the Trial Chamber may enter a judgement of acquittal with regard to a factual incident or event cited in the Indictment in support of the offence if the Prosecutor's evidence on that particular incident does not rise to the level of the standard discussed above. The Prosecution has not presented any evidence of alleged unlawful killings in Konia and the Defence requests that a judgement of acquittal be entered with respect to this alleged incident.

¶ 25(b): On or about 15 February 1998, at Kenema and nearby SS Camp and Blama, Kamajors killed civilians and captured combatants

62. The unlawful killings alleged in Indictment ¶ 25(b) were addressed by Prosecution witnesses TF2-154, TF2-152, TF2-223, TF2-021, and TF2-188.

63. Of the witnesses to the alleged unlawful killings alleged in Indictment ¶ 25(b) witnesses TF2-152, TF2-154 and TF2-188 make no substantive mention of the First Accused. Neither is there any direct or indirect evidence to show that the First Accused had the requisite level of intent to kill civilians. Therefore, their testimony cannot constitute evidence that he planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability

through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection having been made to the First Accused whatsoever.

64. Therefore, their testimony cannot constitute evidence that the First Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings alleged in the Indictment.

65. Witnesses TF2-021 and TF2-223 mentioned the First Accused in their testimony, but referred to his actions as occurring in an administrative context, completely distinct and separate from their testimony about the unlawful killings they witnessed. They thus provided no direct evidence of the First Accused's planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation, or execution of the unlawful killings, as charged in the Indictment under Statute Article 6(1).

66. Witnesses TF2-021 and TF2-223 addressed, albeit generally and indirectly, the issue of the Accused's command responsibility for the unlawful killings they witnessed.

67. Witness TF2-021 testified that the Accused brought arms and ammunition to Base Zero to supply commanders. Just as with witnesses TF2-013 and TF2-022, above, providing logistical and supply support only implies an administrative relationship with the Kamajors and support of their legitimate military objectives; it does not expressly or implicitly indicate support for unlawful killings. This evidence also does not meet the necessary *mens rea* requirement the Prosecution must meet.

68. Witness TF2-223 testified that the First Accused introduced Magona as the new head of intelligence, investigation, and Prosecution in Kenema, which led to numerous changes. The Witness claimed that the Accused claimed that this was due to the checkpoint at SS Camp, which was for the execution of people coming and returning to Sokoihun. The introduction of a new leader indicates nothing more than the Accused's administrative

involvement with the CDF and/or the Kamajors. The alleged statement regarding the check point's status as a place for execution, without more, does not demonstrate that the Accused instructed, ordered, or otherwise aided and abetted in the planning, preparation, or execution of unlawful killings. The term "execution of people" could simply refer to the killing of enemy combatants inherent in any armed conflict, and does not necessarily refer to the unlawful killings specified in Counts 1 and 2 of the Indictment. It is too vague and nebulous and refers to no one in particular, so it cannot form the basis for a charge.

69. Witness TF2-223 also stated that the First Accused received a message regarding the deaths of women and children in the cross-fire and responded that there were "no civilians in rebel-held territory" as the civilians had taken to the bush, as directed before the attack. Although this conceivably could be construed as wilful ignorance (i.e., constructive knowledge) of unlawful killings of civilians, such an interpretation is by no means automatic. Any such statement by the Accused, however, could just as easily be interpreted as simply a mistake and a good-faith belief that the civilians in rebel-held towns would generally heed the CDF/Kamajor warnings to flee to the bush which generally preceded every attack, which nearly all did. Thus, those that remained could only be combatants.

¶ 25(c): On or about 15 February 1998, at or near Kenema, Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers

70. The unlawful killings alleged in Indictment ¶ 25(c) are addressed by Prosecution witnesses TF2-033, TF2-039, TF2-040, TF2-041, TF2-042, TF2-151, TF2-190, and TF2-223.

71. Of the witnesses identified as relevant to the unlawful killings alleged in Indictment ¶ 25(c) witnesses TF2-033, TF2-039, TF2-040, and TF2-151 make no mention of the Accused. Neither is there any direct or indirect evidence to show that the First Accused had the requisite level of intent to kill civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise

aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused.

72. Witnesses TF2-041, TF2-042, TF2-190, and TF2-223 mentioned the First Accused in their testimony, but referred to the Accused's actions as occurring in an administrative context, completely distinct from their testimony about unlawful killings they witnessed. They thus provided no direct evidence of the Accused's planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation, or execution of the unlawful killings, as charged under Statute Article 6(1).

73. Witnesses TF2-041, TF2-042, and TF2-223 addressed the issue of the First Accused's command responsibility for the unlawful killings they witnessed.

74. Witness TF2-041 testified that when he was caught, the Kamajors said that the Accused said that police and their families should be killed. Such evidence shows nothing more than Kamajor subordinates self-servingly attempting to shift blame for their actions to others; it conspicuously fails to show *any* of the elements necessary to establish command responsibility.

75. Witness TF2-042 testified that he was called to a meeting where the Accused was introduced as leader of the Kamajors. Merely being called a leader, however, shows nothing more than social deference and a degree of administrative importance. It is not evidence of a superior-subordinate relationship characterized by effective control of those in the field.

76. The most telling testimony of all, however, came from the Battalion Commander of that attack. When the Kamajors came into town, there was no resistance, but, unexpectedly,

gunfire came from the direction of the police barracks, and they returned fire, ultimately entering the building to insure the threat was over. On cross-examination, he admitted that, as far as he was concerned, the police barracks was a legitimate military target when Kamajors were fired upon from it without warning.

77. Thus, the proof as to this occurrence fails as a matter of law because these could not be unlawful killings if the police barracks was a legitimate military target.

25(d): In or about January and February 1998, in location in Bo District including the District Headquaters town of Bo, Kebi Town, Koribundo, Kpeyama, Fengehun and Mongere, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants

78. The unlawful killings alleged in Indictment ¶ 25(d) are addressed by Prosecution witnesses TF2-001, TF2-006, TF2-012, TF2-015, TF2-030, TF2-156, TF2-040, TF2-140, TF2-157, TF2-159, TF2-162, TF2-198, TF2-057, TF2-067, TF2-058, and TF2-056.

79. Of the witnesses identified as relevant to the unlawful killings alleged in Indictment ¶ 25(d) witnesses TF2-001, TF2-006, TF2-015, TF2-030, TF2-156, TF2-040, TF2-057, TF2-058, TF2-056, and TF2-067 make no substantive mention of the First Accused. Neither is there any direct or indirect evidence to show that he had the requisite level of intent to unlawfully kill civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused.

80. Witnesses TF2-157, TF2-159, TF2-162, and TF2-198 mentioned the First Accused in their testimony, but referred to the Accused's actions as occurring in an administrative

context, completely distinct from their testimony about unlawful killings they witnessed. Thus, they provided no direct evidence of the Accused's planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation, or execution of the unlawful killings, as charged under Statute Article 6(1).

81. Witnesses TF2-012, TF2-157, TF2-162, and TF2-198 addressed, albeit generally and indirectly, the issue of the Accused's command responsibility for the unlawful killings they witnessed. Their testimonies will be addressed in turn, and in common, where their testimonies address similar issues.

82. These four witnesses testified that the First Accused addressed a meeting where he said he told one Joe Tamidey to destroy the town except for three buildings, but that they are lucky he did not do it. The fact that the First Accused's desires or instructions were not followed shows that he did not have a superior-subordinate relationship or effective control over the Kamajors.

83. These witnesses also testified that the First Accused said that no one should blame the Kamajors but him because he sent them. Merely saying that he should be blamed, far from showing control, demonstrates nothing more than the Accused's concern for the well-being of civilians, and perhaps his intent to be seen as a leader with a greater deal of control than he actually had. Such a statement in itself, however, does not demonstrate a superior-subordinate relationship involving effective control of the Kamajors. Finally, it does not state what it is he says he should be blamed for. It amounts to an alleged admission founded on speculation of something that happened outside his presence, and there was no showing that he knew exactly what had happened there at the time.

84. Witness TF2-157 testified that the Accused brought the Kamajors to Koribondo, and made reference to two meetings allegedly addressed and/or organized by the Accused, including one at which he supposedly said they should not blame the Kamajors for the destruction of property and killings, and should blame only him. Evidence of a meeting

and even evidence of an individual's organization of a meeting show nothing more than modicum of administrative involvement with the CDF and/or Kamajors. Such evidence does not automatically indicate a superior-subordinate relationship involving effective control over the unlawful acts allegedly committed by associates of other individuals present at the meeting. Although his comments may be construed as actual or constructive knowledge of the general destruction of war, the witness' recollections do not constitute evidence that the Accused had knowledge of any specific act listed in the Indictment. Nor should his willingness to take the blame be construed as an admission of culpability in a legal sense. If anything, such a statement displays his compassion for civilians and his good faith intention to prevent atrocities, even if his actual ability to prevent such atrocities was considerably limited by his lack of direct control over Kamajors in the field. Furthermore, the fact that the Accused's instructions were not heeded, and property continued to be destroyed, shows that the Accused did not, in fact, have effective control over the Kamajors in the field.

85. Witness TF2-198 testified that the Accused held a meeting in March or April 1998 in Koribondo. Evidence of a meeting and even evidence of an individual's organization of a meeting show nothing more than modicum of administrative involvement with the CDF and/or Kamajors. Such evidence does not, in itself, indicate a superior-subordinate relationship involving effective control over the unlawful acts allegedly committed by associates of other individuals present at the meeting. Nor does evidence of a meeting alone demonstrate actual knowledge, constructive knowledge, or "reason to know" of these acts.

86. Furthermore, the Prosecution has presented no evidence of any alleged unlawful killings in Kebi Town, Kpeyama, Fengehun, and Mongere. Therefore, a judgement of acquittal must be entered with respect to these alleged incidents.

¶ 25(e): Between October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians

87. The unlawful killings alleged in Indictment ¶ 25(e) to have occurred between about October 1997 and December 1999 in locations in Moyamba District are addressed by Prosecution witnesses F2-168, TF2-073, TF2-173, TF2-165, TF2-170, TF2-167, TF2-166, and TF2-014.

88. These witnesses make no substantive mention of the First Accused. Neither is there any direct or indirect evidence to show that the First Accused had the requisite level of intent to kill civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides is evidence of Kamajors alleged involvement in killings without any connection whatsoever being made to the First Accused.

89. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue.

90. Witness TF2-014 gave testimony with respect to the incident whereby the First Accused allegedly said that he had passed a standing order concerning collaborators a long time ago. There is no date given as to when this statement was given so it is not even clear whether this falls with the temporal jurisdiction of the court. For this reason alone, a judgement of acquittal should be entered in this occurrence.

91. Further, other testimony that this witness gave concerned disagreements over war strategy with the First Accused and not about "unlawful killings." Other evidence concerned the First Accused releasing a number of civilians, and again there is no evidence of unlawful killings.

92. With respect to ¶ 25(e) the Prosecution has not presented sufficient evidence whereby a

reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused. There is no direct evidence of the Accused's planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation, or execution of the unlawful killings, as charged under Statute Article 6(1) and the First Accused submits that a judgement of acquittal be entered with respect to ¶ 25(e).

93. The Prosecution has not presented any evidence of alleged unlawful killings in Bylago, so a judgement of acquittal must be entered with respect to this alleged incident.

¶ 25(f): Between October 1997 and December 1999, in Bonthe including Talia (Base Zero), Mobayeh, Makose, Bonthe Town, Kamajors killed civilians

94. The unlawful killings alleged in Indictment ¶ 25(f) to have occurred between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town are addressed by Prosecution witness TF2-096, TF2-147, TF2-071, TF2-014, TF2-108, TF2-109, and TF2-189.

95. Of the witnesses identified as relevant to the unlawful killings alleged in Indictment ¶ 25(d) witnesses TF2-096, TF2-147, TF2-071, TF2-108, make no substantive mention of the First Accused. Neither has there been any direct or indirect evidence to show that the Accused had the requisite level of intent to kill civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused.

96. Witness TF2-109 evidence was limited to testifying that while at Talia she was told that the First and Second Accused, along with another commander were the "bosses." Wit-

ness TF2-189 testimony was that she had merely heard the name of the First Accused. Clearly this evidence is not sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused. Merely being a "boss" is not a war crime; more is required to connect the First Accused to the actions of subordinates.

97. The Prosecution has not presented any evidence in relation to alleged unlawful killings in Mobayeh and Makose, and the Defence requests that a judgement of acquittal be entered with respect to these alleged incidents.

¶ 25(g): Between 1 November 1997 and 1 February 1998 (Black December) in the southern and eastern provinces, the CDF killed civilians and captured combatants in road ambushes at Gumahun, Gerihun, Jembeh, and Bo-Matotoka Highway

98. The unlawful killings alleged in Indictment ¶ 25(g) was addressed by Prosecution witnesses TF2-223 and TF2-014.

100. Neither witness TF2-223 nor TF2-014 made substantive mention of the First Accused. Neither is there any direct or indirect evidence to show that the First Accused had the requisite level of intent to kill civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused. Clearly this evidence is not sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused.

101. Further, the Prosecution has not presented any evidence of alleged unlawful killings in Gumahun and Jembeh, and a judgement of acquittal must be entered with respect to

these alleged incidents.

102. The Defence also submits that ¶ 25(g) states that it was the CDF, not individual Kamajors, that perpetrated the alleged crimes. None of the evidence presented suggests that these alleged crimes were committed by an entity known as the CDF, nor is there any evidence to suggest how CDF could kill civilians. Besides being an impossibility that CDF could kill civilians (as well as being contrary to the undisputed evidence of its code to protect civilians), the Prosecution has presented no evidence to clarify this allegation or to show how the CDF killed civilians as distinct from Kamajors, as set out in ¶s 25(a-f). On this basis, the First Accused submits that the evidence as presented is insufficient and submits that a judgement of acquittal for ¶ 25(g) be entered.

103. As a general submission, the First Accused submits that none of the evidence presented as Count 1 in ¶s 25(a-g) suffices to reach the level of a crime against humanity, as there is no evidence to demonstrate that rather than being sporadic alleged crimes, the offences were committed as part of a widespread[51] or systematic[52] attack against the civilian population. An essential ingredient for Count 1 as a crime against humanity was not made out in the Prosecution's case; therefore an ingredient required as a matter of law to constitute the crime is missing, this evidence is insufficient to sustain a conviction and a judgement of acquittal should be entered.

¶ 26: Counts 3 and 4 – Physical Violence and Mental Suffering

104. Count 3 of the Indictment charges the Accused with the offence of inhumane acts, a crime against humanity, punishable under Article 2(i) of the Statute of the Court. In addition, or in the alternative, Count 4 charges the Accused with the offence of violence to life, health, and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II,

[51] Akayesu, (Trial Chamber), September 2, 1998, ¶ 580: "The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."

[52] Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, ¶ 123: "A systematic attack means an attack carried out pursuant to a preconceived policy or plan."

punishable under Article 3(a) of the Statute of the Court.

105. The Indictment alleges the offence within ¶ 26. The allegation concerns two sets of occurrences at various locations in Sierra Leone during the period November 1997 to December 1999 in which the CDF, largely Kamajors, committed acts of physical violence and inflicted mental harm or suffering upon an unknown number of civilians suspected of being "collaborators."

106. The case against the Accused on these counts is that, by acts or omissions in relation to these events, the Accused is individually criminally responsible for their occurrence, pursuant to Article 6(1), and, or alternatively, Article 6(3) of the Statute.

The Law

107. The offence of other inhumane acts requires crimes that are not otherwise specified in Article 3 "but are of comparable seriousness" and "comparable gravity" to the other enumerated acts. The Accused must act with knowledge that the act is perpetrated within the overall context of the attack.[53] The acts or omissions must deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.[54] The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim.[55] In relation to Count 3 as a crime against humanity, the Prosecution must prove that the offence was committed as part of a widespread or systematic attack against the civilian population. Additionally, the Accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population.

108. In relation to Count 4 as a violation of Article 3 Common to the Geneva Conventions, the Prosecution must show that a state of armed conflict of a non-international character existed in Sierra Leone at the time of the acts alleged in the indictment, the crimes must be

[53] Kayishema and Ruzindana, (Trial Chamber), May 21, 1999,¶s 154, 583,
[54] Kayishema and Ruzndana (Trial Chamber), May 21, 1999, ¶s 148-151.
[55] Ibid.

committed *ratione loci* and *ratione personae*, and that there was a nexus between the armed conflict and Count 4.

109. In order to establish command responsibility for the offences asserted in Counts 3 and 4, the Prosecution must prove both the elements of other inhumane acts and the elements of command responsibility.

The Evidence

¶ 26(a): Between 1 November 1997 and 30 April 1998, in Tongo Field, Kenema Town, Blama, Kamboma and surrounding areas, CDF (largely Kamajors) inflicted serious bodily harm and physical suffering on civilians

110. The acts of physical violence and infliction of mental harm or suffering alleged in Indictment ¶ 26(a) to have occurred between about 1 November 1997 and 30 April 1998, at various locations including Tongo Field, Kenema Town, Blama, Kamboma and the surrounding areas are addressed by Prosecution witnesses TF2-021, TF2-041, TF2-151, and TF2-152.

111. Of the witnesses identified as relevant to the acts of physical violence and infliction of mental harm or suffering alleged in Indictment ¶ 26(a), witnesses TF2-151, TF2-152 and TF2-021 make no substantive mention of the Accused. Neither is there any direct or indirect evidence to show that the First Accused had the requisite level of intent to inflict serious bodily harm and physical suffering on civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused. Clearly this evidence is not sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused.

112. Witness TF2-041's testimony addressed the issue of the First Accused's command responsibility for the acts of physical violence and infliction of mental harm or suffering. Such evidence shows nothing more than Kamajor subordinates attempting to shift blame for their actions to others; it conspicuously fails to show any of the elements necessary to establish command responsibility.

113. The Prosecution has not presented any evidence of physical violence and mental suffering in Kamboma, and a judgement of acquittal must be entered with respect to these alleged incidents.

¶ 26(b): Between November 1997 and December 1999 in Tongo Field, Kenema, Bo, Koribundo and surrounding areas, and Districts of Moyamba and Bonthe CDF (largely Kamajors) inflicted mental harm and suffering:
-- screening for collaborators
-- killing of collaborators in plain view of friends and relatives
-- illegal arrest and unlawful imprisonment of "collaborators"
-- destruction of homes, looting and threats to unlawful kill, destroy, loot

114. The acts of physical violence and infliction of mental harm or suffering alleged in Indictment ¶ 26(b) to have occurred between about November 1997 and December 1999, in the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas, and the Districts of Moyamba and Bonthe, are addressed by Prosecution witnesses TF2-198, TF2-157, TF2-140, TF2-042, TF2-056, TF2-006, TF2-015, TF2-001, TF2-086, TF2-147, TF2-017, TF2-173, TF2-110, TF2-166, TF2-170, TF2-079, and TF2-134.

115. Of the witnesses identified as relevant to the acts of physical violence and infliction of mental harm or suffering alleged in Indictment ¶ 26(b) TF2-198, TF2-157, TF2-140, TF2-042, TF2-056, TF2-006, TF2-015, TF2-001, TF2-086, TF2-147, TF2-110, TF2-166, TF2-170, TF2-079, and TF2-134 make no substantive mention of the First Accused. Neither is there any direct or indirect evidence to show that he had the requisite level of intent to inflict mental harm and suffering. Therefore, their testimony cannot constitute evidence that the First Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at is-

sue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused. Clearly this evidence is not sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused on this count.

116. Witness TF2-173 mentioned the Accused in their testimony, but referred to the First Accused's actions as occurring in an administrative context, completely distinct from their testimony about the acts of physical violence and infliction of mental harm or suffering they witnessed. They thus provided no direct evidence of the Accused's planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation, or execution of the acts of physical violence and infliction of mental harm or suffering, as charged under Statute Article 6(1).

117. Witness TF2-017 attempted to address the issue of the Accused's command responsibility for the acts of physical violence and infliction of mental harm or suffering he testified to because of alleged orders the First Accused gave to commanders. However, this evidence does not establish command responsibility because there is no evidence to should that the First Accused had effective control over the offenders.

118. As a general submission, the Defence submits that none of the evidence presented as Count 3 in ¶s 26(a-b) of the Indictment suffices to reach the level of a crime against humanity, as there is no evidence to demonstrate, other rather than being sporadic alleged crimes, that the offences were committed as part of a "widespread or systematic" attack against the civilian population. An essential element for Count 3 as a crime against humanity was not made out in the Prosecution's case. When an element is missing, this evidence is insufficient to sustain a conviction, and a judgement of acquittal for Count 3 should be entered.

Count 5 -- Looting and Burning

119. Count 5 of the Indictment charges the Accused with the offence of pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute of the Court.

120. Indictment ¶ 27 alleges the offence, and the allegation concerns occurrences at various locations in Sierra Leone during the period 1 November 1997 to 1 April 1998 in which civilian property was taken unlawfully and/or destroyed by burning.

121. The case against the First Accused on this count is that, by acts or omissions in relation to these events, he is individually criminally responsible for their occurrence, pursuant to Article 6(1), and, or alternatively, Article 6(3) of the Statute.

The Law

122. The offence of Pillage (destroying, taking, or stealing property) requires that the conduct took place in the context of war, that the perpetrator was aware of the war and intended to appropriate certain property, intending to deprive the owner of the property and to appropriate it for private or personal use. This appropriation must be without consent of the owner. There is no requirement that the owner/victim be of any particular status.

123. To establish command responsibility for Pillage in Count 5, the Prosecution must prove the elements of the offence of Pillage as well as the elements of command responsibility.

The Evidence

124. **¶ 27: Between 1 November 1997 and 1 April 1998, Kenema, Tongo Field, and surrounding areas, Bo, Koribundo, Moyamba district, Sembehun, Gbangbatoke, Bonthe District, Talia, Bonthe Town, Mobayeh: the unlawful taking and destruction by burning of civilian property.**

125. The looting and burning alleged in Indictment ¶ 27 to have occurred between about 1 November 1997 and 1 April 1998, at various locations including Kenema District, the

towns of Kenema, Tongo Field and surrounding areas, in Bo District, the towns of Bo, Koribondo, and the surrounding areas, in Moyamba district, the towns of Sembehun, Gbangbatoke and surrounding areas, and in Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas are addressed by Prosecution witnesses TF2-001, TF2-012, TF2-021, TF2-032, TF2-082, TF2-140, TF2-144, TF2-152, TF2-154, TF2-157, TF2-159, TF2-162, TF2-176, TF2-190, TF2-198, and TF2-223.

126. Of the witnesses identified as relevant to the acts of looting and burning alleged in Indictment ¶ 27 witnesses TF2-001, TF2-032, TF2-140, TF2-144, TF2-152, and TF2-154 make no substantive mention of the Accused. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the looting and burning at issue.

127. Witnesses TF2-012, TF2-157, TF2-159, TF-162, TF-176, TF2-190, and TF2-198 mentioned the Accused in their testimony, but they only referred to the First Accused's actions as occurring in an administrative context, completely distinct from their testimony about the acts of looting and burning they witnessed. They thus provided no direct evidence of the Accused's planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation, or execution of the acts of looting and burning as charged under Statute Article 6(1).

128. Witnesses TF2-012, TF2-021, TF2-082 and TF2-223 addressed the issue of the Accused's command responsibility for the looting and burning they witnessed.

129. Witness TF2-012 testified that the First Accused addressed a meeting where he said he told Tamidey to destroy the town except for three buildings. The fact that such orders were not followed suggests the absence of the superior-subordinate relationship involving effective control required to establish command responsibility under Statute Article 6(3).

130. Witness TF2-082 testified that the First Accused had ordered the burning of houses and

that the witness had established a rule that whoever burns or takes property will be captured and dealt with. This testimony, if anything, demonstrates that the Accused frequently had little to no effective control of the actions of subordinates. Moreover, the witness was in fact the one controlling those under his command.

131. Witness TF2-223 testified that there was a meeting where the First Accused provided the Kamajors with instructions to capture Zimmi. In the meeting, witness alleges that the Accused promised the Kamajors to provide them with training instructors, agreed to shoulder the responsibility for their welfare, and urged them to defeat the SLA in order to become the national army. Witness further alleges that the Accused said "what kind of valuable property or money, we loot that and come with it so it would all belong to us." Evidence of the First Accused's promises of logistical support and descriptions of the potential benefits of victory show nothing more than the Accused's administrative involvement with the CDF and/or the Kamajors. In addition, evidence of the Accused's instructions to take Zimmi merely shows his relaying of military commands. Such evidence does not automatically indicate a superior-subordinate relationship involving effective control over the Kamajors and/or CDF members. Even if the command is construed as a legitimate military order, evidence of this instruction does not indicate that the First Accused planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation or execution of any of the acts listed in the Indictment.

132. The statement made by Witness TF2-223 about looting does not suggest that he desired the actions to take place against civilians. Nor does it signify that the Accused instructed, ordered, or otherwise aided and abetted in the planning, preparation, or execution of looting of civilian property. A statement that does not support the looting of civilian property cannot be used to show that the Accused and the perpetrators had a common criminal purpose to loot civilian property. Thus, the alleged statement does not provide the required connection between the Accused and future acts of looting that took place by Kamajor and/or CDF members.

133. Although the First Accused's speech may be construed as actual or constructive knowl-

edge of the general destruction of war, it does not constitute evidence that the Accused had knowledge of any specific act listed in the Indictment. His statement about general looting does signify that he knew or should have known about future civilian looting. Additionally, his willingness to shoulder all responsibilities and take care of the Kamajors' welfare cannot and should not be construed as an admission of culpability in a legal sense. Such a promise displays the compassion of the Accused and his desire to keep the spirits of the civilian forces high, rather than any indication of encouragement to commit any acts specified in the Indictment.

134. None of this evidence fulfils the *mens reas* requirement that the perpetrators were intending to appropriate certain property, and intending to deprive the owner of the property and to appropriate it for private or personal use. As a result, an essential ingredient for a crime of Pillage was not made out in the Prosecution's case and therefore this evidence would also be insufficient to sustain a conviction. On this basis, the First Accused submits that judgement for acquittal for Count 5 should be entered.

¶ 28: Counts 6 and 7: Terrorizing the Civilian Population and Collective Punishments

135. Count 6 of the Indictment charges the Accused with the offence of acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute of the Court. In addition, Count 7 charges the Accused with the offence of collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(b) of the Statute of the Court.

136. Indictment ¶ 28 alleges the offence. The allegation concerns occurrences at various locations in Sierra Leone during the period November 1997 to December 1999 in which the CDF, largely Kamajors, committed the acts set forth in ¶s 22-27 and charged in counts 1-5, including threats to kill, destroy, and loot, as part of a campaign to terrorize civilian populations and punish them for their support to, or failure to actively resist, the combined RUF/AFRC forces.

137. The case against the Accused on these counts is that, by acts or omissions in relation to these events, the Accused is individually criminally responsible for their occurrence, pursuant to Article 6(1), and, or alternatively, Article 6(3) of the Statute.

The Law

138. In relation to Count 6, the Prosecutor to establish acts of Terrorism, the Prosecution must establish that the perpetrator engaged in violent conduct of a dimension involving intense fear or anxiety and extreme danger to human light and that that conduct was both politically motivated and premeditated.

139. In relation to Counts 6 and 7 as violations of Article 3 Common to the Geneva Conventions, the Prosecution must show that a state of armed conflict of a non-international character existed in Sierra Leone at the time of the acts alleged in the indictment, the crimes must be committed *ratione loci* and *ratione personae*, and that there was a nexus between the armed conflict and Counts 6 and 7.

140. In order to establish command responsibility for the offences asserted in Counts 6 and 7, the Prosecution must prove both the elements of acts of terrorism and collective punishment, as well as the elements of command responsibility.

The Evidence

141. The incidents of terrorizing the civilian population and collective punishments alleged in Indictment ¶ 28 to have occurred "at all times relevant to this Indictment" are addressed by Prosecution witnesses TF2-022, TF2-027, TF2-047, and TF2-162.

142. Of the witnesses identified as relevant to the acts of terrorizing the civilian population and collective punishments alleged in Indictment ¶ 28 witnesses TF2-027 and TF2-047 and make no substantive mention of the Accused. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the acts of terrorizing the

civilian population and collective punishments at issue.

143. None of the evidence with respect to Count 6 shows that the actions of the perpetrators were premeditated or that they were politically motivated. As a result, two essential ingredients for the crime of terrorism were not made out in the Prosecution's case and therefore this evidence would also be insufficient to sustain a conviction. On this basis, the Defence submits that judgement for acquittal for Count 6 should be entered

¶ 29: Use of Child Soldiers

144. Count 8 of the Indictment charges the Accused with the offence of conscripting and enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, a serious violation of international humanitarian law, punishable under Article 4(c) of the Statute of the Court.

145. Indictment ¶ 29 alleges the offence. The allegation concerns the conscription or enlistment of children under the age of 15 years into armed forces or groups, and in addition, or in the alternative, using them to participate actively in hostilities.

146. The case against the Accused on this count is that, by acts or omissions in relation to these events, the Accused is individually criminally responsible for their occurrence, pursuant to Article 6.1, and, or alternatively, Article 6(3) of the Statute.

The Law

147. The offence of using, conscripting, and enlisting children in war requires that the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities, that such person or persons were under the age of 15 years, and that the perpetrator knew or should have known that such person or persons were under the age of 15 years. In addition, the conduct must have taken place in the context of and associated with an armed conflict not of an international character, and the perpetrator must have been aware of factual circumstances that estab-

lished the existence of an armed conflict. To show conscription there must be some element of compulsory recruitment.

148. First, the First Accused submits that the offence of using child soldiers must meet a standard of using child soldiers to participate actively in hostilities. Active participation must extend beyond merely having a weapon or acting as a guide or courier. It must also extend beyond guarding checkpoints. Rather, First Accused submits that active participation in hostilities must mean participation in combative missions and using a firearm. Their mere presence proves nothing, and the proof shows only mere presence, except alleged "manning" of checkpoints.

149. Second, the First Accused also submits that Count 8 requires that the Prosecution prove that the First Accused both knew and approved of the conscripting, enlisting and use of child soldiers. Therefore, there must be some evidence to demonstrate active approval by the First Accused to meet the *mens rea* requirement of the Court, and that approval cannot be inferred through indirect evidence.

150. In order to establish command responsibility for the offence asserted in Counts 8, the Prosecution must prove both the elements of conscription, enlistment, or use of child soldiers as well as the elements of command responsibility.

The Evidence

151. The incidents of using child soldiers alleged in Indictment ¶ 29 to have occurred "at all times relevant to this Indictment" are addressed by Prosecution witnesses TF2-005, TF2-021, TF2-032, TF2-033, TF2-042, TF2-061, TF2-082, TF2-201, TF2-017, TF2-079, TF2-140, and EW#2.

152. The witnesses identified as relevant to the use of child soldiers alleged in Indictment ¶ 27 witness TF2-033 makes no substantive mention of the First Accused. Therefore, his testimony cannot constitute evidence that the Accused planned, instigated, ordered, commit-

ted, or otherwise aided and abetted in the planning, preparation, or execution of the use of child soldiers at issue.

153. None of the evidence presented by the Prosecution shows that child soldiers were conscripted through some form of compulsory recruitment. Evidence of EW#2 demonstrated that conscription was not used by the CDF. Rather, the Chiefdoms sent young men to assist the Kamajors as a fundamental tenet of Kamajor Society. As a result, the Defence submits that the Count for the conscription of child soldiers in Count 8 should be acquitted.

154. Further, the Prosecution has presented no evidence whatsoever to demonstrate that the First Accused actively approved of the use of child soldiers. Neither can it be inferred that by knowing of the existence of child soldiers that the First Accused approved of their use.

155. TF2-140 and TF2-021 testified to their participation in combat situations did not provide evidence to suggest that the First Accused knew, let alone approved of the use of children in hostilities.

156. Further, a number of witnesses provided evidence saying that they had seen what they alleged to be children carrying weapons. The defence submits that such evidence is not sufficient because the carrying of weapons does not meet the standard of actively participating in hostilities. Further, seeing a child with a weapon provides no indication as to whether that child might have been enlisted or conscripted.

157. Witness TF2-021 described his experience as a child soldier and recalled visits by the First Accused to Base Zero. He did not, however, put forth any direct evidence that the First Accused had any sort of contact with him or with other child soldiers, and certainly no evidence that the First Accused knew of his age, or actively approved of their participation.

158. Witness TF2-082 testified that he never saw Kamajors use child soldiers, and thus fails to provide any evidence that would substantiate Count 8.

159. Witness TF2-140 testified that he was a former child soldier, that he had fought in Kenema, and that he had seen other child soldiers at various points during his time with the CDF. He also testified that he stayed at the Freetown residence of the Accused. Given that there was no evidence presented that the Accused knew of the Witness's age or his presence in his dwelling at the same time, this coincidence cannot, in itself, be reasonably construed as evidence of the Accused's *mens rea* for this charge.

160. Witness TF2-140 testified that when children were with child protection agencies, the Accused came to visit them and see that they were properly cared for. This suggests or shows only compassion and not complicity in the use of child soldiers. While this fact may constitute evidence that the Accused had been put on notice about the existence of child soldiers, it likewise demonstrates that he took actions within his power to alleviate the situation, and this is evidence of innocence.

161. The First Accused therefore submits that within Count 8, there is no evidence whatsoever to prove the allegation of conscription of child soldiers. There is also no evidence to demonstrate that the First Accused both knew and actively approved of the use of child soldiers. On this basis, the Defence submits that a judgement of acquittal for Count 8 be entered.

Conclusions

162. In summary, the Defence for the First Accused submits that the prosecution has failed to meet the required standard, that is, whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused. In particular, the Prosecution has failed to adduce evidence on factual allegations, and particular elements of the Counts included in the indictment.

163. The Defence submits that the Trial Chamber must also consider whether the Prosecu-

tion's evidence (if accepted) could suffice to prove beyond reasonable doubt not only the guilt of the accused, but also that the accused is indeed one of those bearing the *greatest responsibility* for the counts in question. The Accused submits that Prosecution's evidence is inadequate to prove that the First Accused bears "greatest responsibility" as required by the Statute and the Indictment.

164. It is further submitted that the Prosecution has failed to provide proof of the elements required to establish criminal culpability for a joint criminal enterprise ("JCE") under Article 6(1).

165. The Defence submits that there is no evidence from which a reasonable trier of fact could conclude beyond reasonable doubt that a joint criminal enterprise has been proven, and requests that the Trial Chamber enter a judgement of acquittal for this form of criminal liability.

166. The Prosecution has brought forth no evidence demonstrating that, to the extent the Accused held a degree of *de jure* or *de facto* control, he failed to do that which was within material possibility to do to prevent the occurrence of unlawful acts and, where within material possibility, to punish those committing them. On this basis the First Accused submits that there is no evidence from which a reasonable trier of fact could conclude beyond reasonable doubt he exercised command responsibility has been proven, and he requests that the Trial Chamber hold the Prosecution failed to prove this form of liability is involved in this case.

167. With respect to Count 1 the Prosecution's evidence does not demonstrate a widespread or systematic attack on a civilian population as required by the count to be a crime against humanity. The evidence is also not sufficient under both Counts 1 and 2 to demonstrate that the First Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-

subordinate relationship. All this testimony provides evidence of Kamajors alleged involvement in killings without any connection being made whatsoever to the First Accused.

168. The Defence submits that the Trial Chamber may enter a judgement of acquittal with regard to a factual incident or event cited in the Indictment in support of the offence if the Prosecutor's evidence on that particular incident does not rise to the level of the standard discussed above. The Prosecution has not presented any evidence of alleged unlawful killings in Konia and the Defence requests that a judgement of acquittal be entered with respect to this alleged incident in ¶ 25(a) of the Indictment.

169. The Prosecution has presented no evidence of any alleged unlawful killings in Kebi Town, Kpeyama, Fengehun, and Mongere. Therefore, a judgement of acquittal must be entered with respect to these alleged incidents in ¶ 25(d) of the Indictment.

170. The Prosecution has not presented any evidence of alleged unlawful killings in Bylago, so a judgement of acquittal must be entered with respect to this alleged incident in ¶ 25(e) of the Indictment.

171. The Prosecution has not presented any evidence in relation to alleged unlawful killings in Mobayeh and Makose, and the Defence requests that a judgement of acquittal be entered with respect to these alleged incidents in ¶ 25(f) of the Indictment.

172. The Prosecution has not presented any evidence of alleged unlawful killings in Gumahun and Jembeh, and a judgement of acquittal must be entered with respect to these alleged incidents in ¶ 25 (g).

173. None of the evidence presented suggests that these alleged crimes were committed by an entity known as the CDF, nor is there any evidence to suggest how CDF could kill civilians. The Prosecution has presented no evidence to clarify this allegation or to show how the CDF killed civilians as distinct from Kamajors, as set out in ¶s 25(a-f). On this basis,

the First Accused submits that the evidence as presented is insufficient and submits that a judgement of acquittal for ¶ 25(g) be entered.

174. The First Accused submits that none of the evidence presented as Count 1 in ¶s 25(a-g) suffices to reach the level of a crime against humanity, as there is no evidence to demonstrate that rather than being sporadic alleged crimes, the offences were committed as part of a widespread or systematic attack against the civilian population. An essential ingredient for Count 1 as a crime against humanity was not made out in the Prosecution's case; therefore an ingredient required as a matter of law to constitute the crime is missing, this evidence is insufficient to sustain a conviction and a judgement of acquittal should be entered.

175. With respect to Counts 3 and 4 there is no direct or indirect evidence to show that the First Accused had the requisite level of intent to inflict serious bodily harm and physical suffering on civilians. Therefore, their testimony cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings at issue. The evidence also does not substantiate the Prosecution's allegations of criminal liability through command responsibility because none of this evidence demonstrates a superior-subordinate relationship.

176. The Prosecution has not presented any evidence of physical violence and mental suffering in Kamboma, and a judgement of acquittal must be entered with respect to these alleged incidents in ¶ 26(a) of the Indictment.

177. The Defence submits that none of the evidence presented as Count 3 in ¶s 26(a-b) of the Indictment suffices to reach the level of a crime against humanity, as there is no evidence to demonstrate, other rather than being sporadic alleged crimes, that the offences were committed as part of a "widespread or systematic" attack against the civilian population. An essential element for Count 3 as a crime against humanity was not made out in the Prosecution's case. When an element is missing, this evidence is insufficient to sustain a

conviction, and a judgement of acquittal for Count 3 should be entered.

178. None of the evidence presented under Count 5 fulfils the *mens reas* requirement that the perpetrators were intending to appropriate certain property, and intending to deprive the owner of the property and to appropriate it for private or personal use. As a result, an essential ingredient for a crime of Pillage was not made out in the Prosecution's case and therefore this evidence would also be insufficient to sustain a conviction. On this basis, the First Accused submits that judgement for acquittal for Count 5 should be entered.

179. The testimony given for Counts 6 and 7 cannot constitute evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the acts of terrorizing the civilian population and collective punishments at issue.

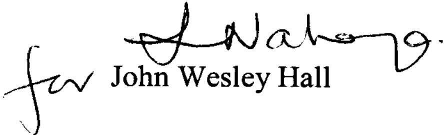
180. None of the evidence with respect to Count 6 shows that the actions of the perpetrators were premeditated or that they were politically motivated. As a result, two essential ingredients for the crime of terrorism were not made out in the Prosecution's case and therefore this evidence would also be insufficient to sustain a conviction. On this basis, the Defence submits that judgement for acquittal for Count 6 should be entered.

181. None of the evidence presented by the Prosecution for Count 8 shows that child soldiers were conscripted through some form of compulsory recruitment.

182. There is no testimony that constitutes evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the use of child soldiers at issue. The Defence submits that judgement for acquittal for Count 8 should be entered.

Submitted, 4 August 2005

Court Appointed Counsel for the First Accused



John Wesley Hall

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