SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

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

Registrar: Robin Vincent

Date: 4 August 2005

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

FOFANA MOTION FOR JUDGMENT OF ACQUITTAL

Office of the Prosecutor:
Mr Desmond De Silva, QC
Mr Luc Côté
Mr James Johnson
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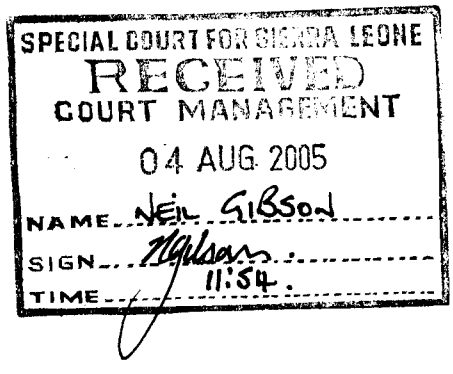

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INTRODUCTION

1. Counsel for Mr Moinina Fofana (the "Defence") hereby moves this Chamber pursuant to Rule 98 of the Rules of Procedure and Evidence (the "Rules") and the Order of the Trial Chamber dated 2 June 2005[1] for the entry of a judgment of acquittal as to each and every count charged in the Indictment of 5 February 2004 (the "Indictment")[2].

2. Mr Fofana was arrested on 23 May 2003 and charged with the following violations: (i) murder, a crime against humanity[3]; (ii) murder, a war crime[4]; (iii) inhumane acts, a crime against humanity[5]; (iv) cruel treatment, a war crime[6]; (v) pillage, a war crime[7]; (vi) acts of terrorism, a war crime[8]; (vii) collective punishments, a war crime[9]; and (viii) the "use of child soldiers", a serious violation of international humanitarian law[10]. Mr Fofana is said to have incurred liability for these alleged violations through both his own actions[11] and the actions of his alleged subordinates[12]. At his initial appearance on 1 July 2003, Mr Fofana pleaded not guilty to all counts. He was thereafter remanded into the custody of the Special Court.

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-419, Trial Chamber I, 'Scheduling Order on Filing of Submissions by the Parties Should a Motion for Judgment of Acquittal be Filed by Defence', 2 June 2005, as modified by this Chamber on 14 July 2005. *See Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript (hereinafter "Tr.") of 14 July 2005 at 11.

[2] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-003, 'Indictment', 5 February 2004.

[3] Count One of the Indictment, as provided by Article 2(a) of the Statute. "Crime Against Humanity" refers to an enumerated crime committed as part of a widespread or systematic attack against any civilian population. *See* Article 2 of the Statute.

[4] Count Two of the Indictment, as provided by Article 3(a) of the Statute. "War Crime" refers to an enumerated serious violation of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. *See* Statute, Article 3.

[5] Count Three of the Indictment, as provided by Article 2(i) of the Statute.

[6] Count Four of the Indictment, as provided by Article 3(a) of the Statute.

[7] Count Five of the Indictment, as provided by Article 3(f) of the Statute.

[8] Count Six of the Indictment, as provided by Article 3(d) of the Statute. This alleged offence has never before been charged by an international prosecutor nor tried by an international criminal tribunal. Indeed, for the reasons stated below, the Defence submits that Count Six does not articulate an offence under international criminal law.

[9] Count Seven of the Indictment, as provided by Article 3(b) of the Statute. This alleged offence has never before been charged by an international prosecutor nor tried by an international criminal tribunal. Again, for the reasons stated below, the Defence submits that Count Seven does not articulate an offence under international criminal law.

[10] Count Eight of the Indictment, as provided by Article 4 of the Statute. This so-called "Serious Violation of International Humanitarian Law" has never before been charged by an international prosecutor nor tried by an international criminal tribunal. However, over previous objection by the Defence, the Appeals Chamber held that Count Eight does not violate the principles of legality or specificity. *Prosecutor v. Norman et al.*, SCSL-2004-14-AR72(E)-131, Appeals Chamber, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)', 14 June 2004.

[11] *See* Indictment, ¶ 20 and Statute, Article 6.1.

[12] *See* Indictment, ¶ 21 and Statute, Article 6.3.

3. After several months of pre-trial motions and hearings, trial commenced before this Chamber on 3 June 2004. Over the course of thirteen months including five trial sessions, the Office of the Prosecutor (the "Prosecution") called seventy-five witnesses and introduced some one hundred and nineteen documentary exhibits[13]. On 14 July 2005, the Prosecution closed its case[14].

4. The Defence, by this Motion for Judgment of Acquittal (the "Motion"), now seeks entry of acquittal as to all counts of the Indictment on the following grounds: (i) The Chamber lacks personal jurisdiction over Mr Fofana under Article 1.1 of the Statute of the Special Court for Sierra Leone (the "Statute") as he is not, as a matter of law and evidence, a person who bears "the greatest responsibility for serious violations of international humanitarian law ... committed in the territory of Sierra Leone since 30 November 1996"[15]. Accordingly, his continued trial as to any of the counts alleged in the Indictment would amount to a miscarriage of justice. (ii) Furthermore, the Prosecution has failed to establish that Mr Fofana was, as a matter of law, the superior of the alleged perpetrators of the underlying criminal acts alleged in the Indictment such that he could incur liability under Article 6.3 of the Statute. (iii) Finally, the Prosecution has failed to show that Mr Fofana is criminally liable under Article 6.1 of the Statute through its failure to present evidence as to key elements of each count alleged in the Indictment.

5. Accordingly, and for the reasons set forth below, the Defence respectfully moves this Chamber for the entry of a judgment of full acquittal as to all counts and allegations contained in the Indictment.

SUBMISSIONS

Rule 98 Standards

Rule 98 Requires a Subjective Assessment of the Evidence

[13] One hundred and two exhibits were admitted at trial pursuant to Rule 89, and seventeen were admitted by motion pursuant to Rule 92*bis*. Additionally, seven "facts" were judicially noticed. *See Prosecution v. Norman et al.*, SCSL-2004-14-PT-50, 'Prosecution's Motion for Judicial Notice and Admission of Evidence', 1 April 2004 (the "Judicial Notice Motion") and SCSL-2004-14-AR73-398, Appeals Chamber, 'Decision on Appeal Against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 18 May 2005 (the "Judicial Notice Decision").
[14] Tr. of 14 July 2005 at 9.
[15] Statute, Article 1.1.

6. Rule 98, as recently amended, provides: "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"[16].

7. As the CDF case has been the first to reach the acquittal stage, there is as yet no jurisprudence from any Special Court chamber regarding the application of Rule 98. While this Chamber may naturally look to the general approach taken by the International Criminal Tribunals for the Former Yugoslavia and Rwanda (the "*Ad Hoc* Tribunals") in dealing with motions for judgment of acquittal, it is submitted that a more stringent set of standards should apply to our Rule 98 given the Special Court's limited jurisdictional[17] and temporal[18] mandates. Indeed, the Defence submits that faithful deference to the *sui generis* nature of this Tribunal as well as rigorous adherence to the general criminal law principle of individual culpability must inform this Chamber's Rule 98 analysis as paramount considerations.

8. It is the stated purpose of the Special Court to try those accused of bearing "the *greatest responsibility* for serious violations of international humanitarian law"[19]. To those of us now steeped in the intricacies of this protracted criminal trial, these words may have assumed a certain mundane aspect. However, their import and significance must not be lost sight of. Indeed, the mandate set forth in Article 1.1 is this Court's *raison d'être*, and must inform each and every action of this Chamber including its consideration of this important Motion.

9. With this in mind, the Defence notes that recent changes to Rule 98 indicate a preference for a more subjective standard as opposed to the well-known objective standard applied by the *Ad Hoc* Tribunals[20]. The language of Rule 98 has moved away from the hypothetical and objective—"the evidence is such that no reasonable tribunal

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[16] Rule 98 was amended on 14 May 2005. The previous Rule provided: "If, after the close of the case for the prosecution, the evidence is such that no reasonable tribunal of fact could be satisfied beyond a reasonable doubt of the accused's guilt on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts."

[17] *See* Statute, Article 1.1.

[18] *See, e.g., Prosecutor v Norman et al.*, SCSL-2004-14-T-170, Trial Chamber I, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', 2 August 2004, ¶ 32 (noting the "limited judicial lifespan of the Court" and its "commitment to expeditiousness").

[19] Statute, Article 1.1 (emphasis added).

[20] *See* Motion, ¶ 15 *infra*.

of fact *could be* satisfied"[21]—and toward the more factual and subjective—"there *is* no evidence capable of"[22]. More than mere semantic fine-tuning, it is submitted that this change amounts to a significant departure from Rule 98*bis* of the *Ad Hoc* Tribunals[23] and was designed to bring Rule 98 in line with the unique purpose of the Special Court[24].

10. As mandated by the Appeals Chamber, a "purposive interpretation" is to be given to the Special Court's constitutive documents, including the Rules: "The purpose of these rules is to enable trials to proceed fairly, expeditiously and effectively and they are to be interpreted according to that purpose"[25].

11. Like its *ad hoc* analogues, Rule 98 is premised on the presumption of innocence guaranteed by Article 17.3 of the Statute and on "the fundamental principle that the burden is on the Prosecutor to prove the guilt of the Accused beyond a reasonable doubt"[26]. However, unlike its sister tribunals at the Hague and Arusha, the Special Court has an exceedingly limited mandate in terms of both jurisdiction and lifespan. Because the Special Court is *sui generis*,[27] "procedures and practices that have grown up in [the other international tribunals] should not be slavishly followed" here[28].

12. Accordingly, it is appropriate to construe Rule 98—in light of Article 1.1, the jurisprudence of the Appeals Chamber, and the recent changes to the Rules—as placing a higher evidentiary burden on the Prosecution. In order to protect the Accused against baseless allegations and to avoid wasting precious resources litigating unsustainable claims, this Chamber should ask not whether the Prosecution's evidence *could* support

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[21] Former Rule 98 (emphasis added).
[22] Current Rule 98 (emphasis added).
[23] Former Rule 98 was a verbatim copy of ICTR Rule 98*bis*.
[24] While it may be said that all international criminal tribunals seek to achieve something akin to "the attribution and calibration of individual responsibility for mass atrocities", Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 Calif. L. Rev. 75, 79, January 2005, as far as the Special Court is concerned, its "purpose is to put on trial those credibly accused of bearing the *greatest responsibility* for war crimes and crimes against humanity committed in [Sierra Leone] in recent years". *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-34, Appeals Chamber, 'Separate Opinion of Justice Geoffrey Robinson to the Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)',15 March 2004, ¶ 24 (emphasis added).
[25] *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment', 18 May 2005, ¶ 45 (the "Amendment Decision").
[26] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Chamber, 'Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*', 13 March 2002, ¶ 4.
[27] "It must also be remembered, both when applying the Rules and when making procedural decisions on matters about which the Rules are silent (as they often are) that this court is unique—as the UN Secretary General in his Report, put it, *sui generis*". Amendment Decision, ¶ 46.
[28] Amendment Decision, ¶ 46.

a conviction, but instead whether the Prosecution's evidence has in fact been able to support its allegations. "Capability"[29] connotes the ability or power to do something, to affect a result. Therefore, to the extent that Prosecution has failed to achieve its intended results—under either a subjective or objective standard—the charges against Mr Fofana should be dismissed without further delay.

The Principle of Individual Culpability

13. The application of a more stringent standard will serve to reinforce the idea that an individual may be punished only for conduct for which he is personally responsible. This principle of individual culpability (*nulla poena sine culpa*) is derived from "foundational concepts of domestic criminal law systems"[30]. Indeed, the Appeals Chamber of the ICTY has recognised that one of the "basic assumption[s]" in international and national laws is that "the foundation of criminal responsibility is the principle of personal culpability"[31]. Strict adherence to this principle will protect the Accused from a finding of liability based simply on association with other wrongdoers[32].

14. In this regard, we must again look to the stated goals of the Special Court, one of which is clearly the promotion of peace and reconciliation[33]. To the extent that this international criminal tribunal—operating, as it does, above the municipal law of its host country—is seen to be engaged in the dispensation of collective or symbolic justice, it may inhibit rather than promote that goal. Accordingly, given this Court's lack of democratic accountability and the significant amount of prosecutorial discretion inherent in the

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[29] Under Rule 98, the evidence must be "capable of supporting a conviction".

[30] Danner and Martinez, n.24 *supra*, at 79. *See also* Mirjan Damaska, 'The Shadow Side of Command Responsibility', 49 Am. J. Comp. L. 455, 470 (2001) ("If one were to catalogue general principles of law so widely recognized by the community of nations that they constitute a subsidiary source of public international law, the culpability principle would be one of the most serious candidates for inclusion in the list".)

[31] *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber, 'Judgement', 15 July 1999, ¶186.

[32] Clearly, as the United States Supreme Court has observed, guilt by association is a "thoroughly discredited doctrine". *Uphaus v. Wyman,* 360 U.S. 72, 79 (1959); *see also* Marco Sassoli & Laura M. Olson, 'The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic Case', 82 Int'l Rev. Red Cross 733, 755 (2000) ("The very basis of international criminal law and its civilizing contribution to the enforcement of international law is that criminal responsibility is individual".)

[33] As then Presiding Judge Itoe remarked at the opening day of the CDF trial: "In fact, the mission of this Court and the process we are about to embark upon today is to contribute to the peace and reconciliation process within Sierra Leone". Tr. of 3 June 2004 at 3. *See also* UN Security Council Resolution 1315 of 14 August 2000, requesting the Secretary-General to negotiate an agreement with the government of Sierra Leone to create the Special Court, and stating that it "would contribute to the process of national reconciliation and to restoration and maintenance of peace". S/RES/1315 (2000) at 1.

international criminal system, this Chamber "should hew closely to the restraining influences of the culpability model when deciding how to construe" the Rules[34].

General Standards

15. The general standard for a motion for judgment of acquittal was settled in the ICTY Appeals Chamber, where the court adopted its now well-known objective approach:

> The Appeals Chamber considers that the reference in Rule *98bis* 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. ... [T]hus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could[35].

16. Yet, in consonance with the reasoning of our Appeals Chamber, the ICTY Appeals Chamber acknowledged the importance of considering a motion for acquittal within the context of each case based on the purpose of the particular statute and rules:

> Ultimately, the regime to be applied for Rule *98bis* proceedings is to be determined on the basis of the Statute and the Rules, having in mind, in particular, its construction in the light of the context in which the Statute operates and the purpose it is intended to serve[36].

This lends further support to the argument advanced above, regarding the application of a more subjective standard, one in-line with the principle of individual culpability and the unique nature of the Special Court.

17. Naturally, the burden falls on the moving party to demonstrate, in specific detail, that the criteria for acquittal are met[37]. In making the assessment, both the quality and quantity of the evidence must be considered:

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[34] Danner and Martinez, n.24 *supra*, at 96.

[35] *Prosecutor v. Jelisic*, IT-95-10-A, Appeals Chamber, 'Judgement', 5 July 2001, ¶ 37 (emphasis added). This objective standard has never been challenged by subsequent decisions. Indeed, the *Jelisic* test is regularly cited by decisions of both *Ad Hoc* Tribunals. *See, e.g., Prosecutor v. Semanza*, ICTR-97-20-T, Trial Chamber, 'Decision on Defence Motion for Judgement of Acquittal', 27 September 2001, ¶ 15.

[36] *Prosecutor v. Jelisic*, IT-95-10-A, Appeals Chamber, 'Judgement', 5 July 2001, ¶ 34, citing *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Trial Chamber, 'Decision on Defence Motions for Judgement of Acquittal', 6 April 2000, ¶ 9.

[37] *See Prosecutor v. Kvocka et al.*, IT-98-30/1-T, Trial Chamber, 'Decision on Defence Motions for Acquittal', 15 December 2000, ¶ 14 ("[T]he Chamber agrees with the Prosecutor that the burden lies upon parties for acquittal to provide the Chamber with a clear basis for their motions. This involves providing the Chamber with

> This inquiry into sufficiency of evidence has both a qualitative and a quantitative aspect. First the Chamber must be satisfied that there is sufficient quality of evidence, which, if believed, could lead a reasonable Trial Chamber to convict. As the Trial Chamber of the ICTY explained when facing a similar question, "that standard is not met by *any* evidence; there must be some evidence, which could properly lead to a conviction". Sufficiency cannot be determined in a vacuum. ... Second, the Chamber must be satisfied that there is sufficient quantity of appropriate evidence, which, if believed, could lead a reasonable Trial Chamber to convict[38].

18. Generally, on motions for acquittal, trial chambers have avoided assessment of the reliability or credibility of the Prosecution evidence. Such assessment is normally reserved for the end of the case in order to be made in light of all the evidence adduced by the parties[39]. However, an exception is admitted when the available evidence lacks so much credibility or reliability that it is considered that the Prosecution case has completely broken down[40]. It is submitted that this Chamber should not completely ignore issues of credibility given that so many of the Prosecution's witnesses have clearly testified in exchange for immunity. Several witnesses have been implicated in serious crimes under the Statute and, very likely, may have presented biased testimony in order to deflect responsibility for their own actions, thus securing their immunity.

19. The absence of evidence as to particular facts relied upon by the Prosecution is grounds for an acquittal as to those counts[41]. Further, the failure to adduce evidence of a particular element of a crime charged must lead to an acquittal as to that charge[42].

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detailed and specific allegations for its consideration: where only a general claim of insufficiency of evidence is made, the Chamber is not able to assess the strength of the case for acquittal".)

[38] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, 'Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*', 13 March 2002, ¶¶ 5, 7.

[39] *See, e.g., Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Trial Chamber, 'Decision on Defence Motions for Judgement of Acquittal', 6 April 2000, ¶ 28 ("The test that the Chamber has enunciated—evidence on which a reasonable Chamber could convict—proceeds on the basis that generally the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98*bis*, leaving those matters to the end of the case".)

[40] *Ibid.*

[41] *See Prosecutor v. Nyiramasuhuko et al.*, IT-98-42-T, Trial Chamber, 'Decision on Defence Motions for Acquittal Under Rule 98*bis*, 16 December 2004, ¶¶ 177-178; *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, Trial Chamber, 'Decision on Defence Motions for Acquittal', 15 December 2000, ¶¶ 30-31; *Prosecutor v. Milosevic*, IT-02-54-T, Trial Chamber, 'Decision on Motion for Judgement of Acquittal', 16 June 2004, ¶ 13; *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Trial Chamber, 'Decision on Motions for Acquittal Pursuant to Rule *98bis* of the Rules of Procedure and Evidence', 27 September 2004, ¶ 17.

[42] *See Prosecutor v. Nahimana et al.*, ICTR-96-11-T, Trial Chamber, 'Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal', 25 September 2002, ¶ 19 ([A] Rule 98*bis* motion will succeed if an essential ingredient for a crime was not made out in the Prosecution's case; for, if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction.); *see also Prosecutor v. Kunarac et al.*, IT-96-

Finally, motions for acquittal apply equally to allegations of liability pursuant to a theory of command responsibility[43].

Personal Jurisdiction under Article 1.1

20. As stated above, pursuant to Article 1.1 of its Statute, the Special Court may exercise personal jurisdiction only over those persons who can be credibly said to bear the greatest responsibility for serious violations of international humanitarian law that are within the Court's subject matter jurisdiction. The Defence submits that, as a matter of law and evidence, it is now clear that Mr Fofana does not belong to this category of persons[44]. Accordingly, the Special Court no longer has personal jurisdiction over him, and the Indictment should be dismissed in its entirety.

21. Issues of personal jurisdiction—which go to the very legitimacy of any criminal trial—can, *indeed must*, be raised at any stage of the proceedings once it becomes clear that a court ceases to possess the necessary *ratione personae*. This Chamber has already concluded that, "in the ultimate analysis, whether or not *in actuality* the Accused is one of the persons who bears the greatest responsibility for the alleged violations ... is an evidentiary matter *to be determined at the trial stage*"[45].

22. This ruling, coupled with the deliberate use by the Statute's drafters of the superlative term "greatest"[46], calls for a comparative analysis based on the evidence so far adduced. Given this Chamber's previous determination that personal jurisdiction is an evidentiary matter, the motion for judgment of acquittal is an appropriate vehicle for revisiting the issue. At

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23&23/1-T, Trial Chamber, 'Decision on Motion for Acquittal', 3 July 2000, ¶ 16; *Prosecutor v. Sikirica*, IT-95-8-T, Trial Chamber, 'Judgement on Defence Motions to Acquit', 3 September 2001, ¶ 9, 94-97. This naturally follows from the basic proposition that elements of crimes are conjunctive—the Prosecution must prove each and every one in order to sustain a conviction.

[43] *See Prosecutor v. Kvocka et al.*, IT-98-30/1-T, Trial Chamber, 'Decision on Defence Motions for Acquittal', 15 December 2000, ¶ 27 (Where allegations are made that crimes have been committed by way of command responsibility and the Defence posits that no reasonable trier of fact could find that the accused failed to prevent or punish these under his command from perpetrating the charged offences, such arguments must be considered under Rule 98*bis*.)

[44] This argument was first articulated by the Defence in a preliminary motion and subsequently reiterated in its pre-trial brief. *See Prosecutor v. Moinina Fofana*, SCSL-2003-11-PT-058, 'Preliminary Defence Motion on the Lack of Personal Jurisdiction', 14 November 2003 and *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-110, 'Moinina Fofana Defence Pre-Trial Brief', 28 May 2004.

[45] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-026, Trial Chamber I, 'Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana', 3 March 2004 (the "Personal Jurisdiction Decision"), ¶ 44 (emphasis added).

[46] While there was great debate regarding the formulation of Article 1.1, the drafters of the Statute ultimately settled on the use of the phrase "greatest responsibility", rather than "most responsible", so as to limit the Court's personal jurisdiction to persons of extraordinary culpability.

this point, this Chamber must comprehensively review the facts now in evidence in order to prevent the potential miscarriage of justice of requiring one, no longer subject to this Court's personal jurisdiction, to continue standing trial—a result that would be manifestly at odds with the purpose of the Special Court.

23. Further, it is precisely at this juncture that the Chamber must be acutely alert to the risks of guilt by association. The former Prosecutor has described his approach to the proceedings as "dancing with the devil"[47]. Of course, this was a reference to the prosecutorial strategy of using so-called insider witnesses to obtain convictions against higher-level defendants. However, at least one of these witnesses has testified to the commission of acts and the possession of *de facto* authority, which—if the evidence is to be believed—arguably place him in a position of much greater responsibility than Mr Fofana. Noting the significant divergence between the Prosecution's proposed case[48] and the actual state of the evidence against Mr Fofana, the Defence wonders why—given the explicit mandate of the Special Court and the apparent availability of evidence against more culpable figures—the Prosecutor chose to dance with the devil rather than to indict him[49].

24. Simply put, the Prosecution has not shown that Mr Fofana is one of the persons who bears the greatest responsibility for the violations alleged in the Indictment. A comparative analysis—as required by the phraseology of Article 1.1—reveals Mr Fofana to have been a relatively minor figure despite his rather impressive-sounding, though apparently not particularly illustrative, title. Indeed, the evidence so far adduced suggests that culpability lies with figures of much "greater" responsibility, namely, President Ahmed Tejan Kabbah, Vice-President Joe Demby, former members of the CDF National Coordinating Committee, former members of the War Council, the First Accused, and other CDF commanders, like Albert Nallo, who—by virtue of their cooperation with the Prosecution—have managed to vitiate their guilt and thus evade the rule of law.

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[47] *See* Michelle Staggs and Sara Kendall, 'Interim Report on the Special Court for Sierra Leone', UC Berkeley War Crimes Studies Centre, April 2005 at 6.

[48] As outlined in its pre-trial brief. *See Prosecutor v. Norman et al.*, SCSL-2004-14-PT-024, 'Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs of 13 February 2004', 2 March 2004.

[49] Indeed, the Prosecution's tactics put the Defence in mind of a passage from George Orwell's *Burmese Days*: "They won't go free, don't you fear. We'll get 'em. Get SOMEBODY, anyhow. Much better hang wrong fellow than no fellow".

The CDF Was a Legitimate Armed Opposition Group

25. In analysing Mr Fofana's alleged "greatest responsibility", it must be noted at the outset that he was a member of a legitimate armed opposition group engaged in the protection of its homeland from a bloodthirsty rebel force and the restoration of its democratically-elected government which had been overthrown by rogue government soldiers[50]. To the contrary, the illegitimacy of the RUF occupation and the AFRC coup was recognized by both the United Nations and ECOWAS[51].

26. International law does not prohibit the application of force, as such, within the borders of a state[52]. Indeed, the possibility of such internal violence has been left open in deference to a state's inherent right to maintain its peace and public order[53] as well as in recognition of the rights of "minority" groups to overthrow oppressive regimes. When reacting to disruptions to peace and public order, the state may chose to rely on the assistance of non-state actors. Therefore, this fundamental "right" to internal self-defence clearly applies to a civilian militia force, like the CDF, acting on behalf of the government in the face of a sustained domestic disturbance.

27. The democratically-elected administration of Ahmed Tejan Kabbah (the "Government") was recognized internationally as the legitimate constitutional government of Sierra Leone from March 1996 through the end of the conflict. The Defence submits that the Government comprised the ultimate leadership of the various factions that fought in the

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[50] The organized armed factions involved in the armed conflict in Sierra Leone included the Revolutionary United Front (the "RUF"), the Civil Defence Forces (the "CDF"), and the Armed Forces Revolutionary Council (the "AFRC"). The Defence does not dispute Mr Fofana's membership in the CDF.

[51] On 25 May 1997, the AFRC junta overthrew the democratically elected government of President Ahmed Tejan Kabbah. Two days later, the UN Security Council called for the immediate restoration of constitutional order. The first ECOWAS communiqué to the same effect was issued in June 1997. The Security Council unanimously imposed sanctions on Sierra Leone and in October 1997 expressly authorized, under Chapter VII, the use of force by ECOWAS. The junta was ousted on 12 February 1998. The Kabbah government returned to power, and the Conakry Peace Agreement was implemented. The Security Council thereafter commended ECOMOG for its important role in the ongoing restoration of peace, security, and democracy. Indeed, where the principal goals of the CDF were legitimate, those of the RUF and AFRC were clearly of a different order. Both the RUF and the AFRC defendants are accused of, *inter alia*, participating in a joint criminal enterprise to control the diamond mining areas of the country and to use the proceeds of such control to fund their alleged criminal activity. *See Prosecutor v. Sesay et al.*, SCSL-2004-15-PT-005, 'Indictment', 5 February 2004, ¶ 36 and *Prosecutor v. Brima et al.*, SCSL-2004-16-PT-147, 'Further Amended Consolidated Indictment', 18 February 2004, ¶ 33.

[52] Liesbeth Zegveld, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW, (Cambridge 2002), at 2 ("The mere fact of ... engaging in an internal armed conflict does not entail the responsibility of the armed groups concerned".) International law, however, does prohibit the use of violence between and among states, subject to the right of self-defence. *See, e.g.*, UN Charter, Articles 2(4) and 51.

[53] For example, both Article 4 of the International Covenant on Civil and Political Rights and Article 15 of European Convention on Human Rights permit the derogation from certain obligations in time of war or other public emergency threatening the life of the state.

name of its restoration and preservation, especially the CDF. As an arm of the state security apparatus, the CDF was subordinate to Mr Kabbah—the president and commander-in-chief of the Sierra Leone armed forces—at all times relevant to the Indictment including the period of the Government's exile in Guinea[54]. Upon his return to Sierra Leone in March of 1998, President Kabbah immediately reclaimed power, and ECOMOG essentially became the surrogate national army with the CDF fighting under its putative command. Indeed ECOMOG General Maxwell Khobe was named chief of staff of the Republic of Sierra Leone Armed Forces, and the evidence shows that ECOMOG planned jointly with, fought alongside, provided logistics to, and shared the same objectives as the CDF.

28. Several Prosecution witnesses, including the military expert, have testified that the CDF was acting with the support and approval of the Government and that one of its central goals was its restoration[55]. In fact, the stated CDF motto was: "We Fight for Democracy"[56]. CDF military operations, including the attacks on Tongo, Bo, Kenema, and Koribondo, were all legitimate armed attacks against the junta in furtherance of this goal[57]. Still other witnesses have testified that the CDF was organized to defend its homeland and protect civilians from the RUF and the AFRC[58]. Indeed, the Prosecution's military expert went so far as to describe this latter objective as "the central strategic idea of the CDF"[59]. However not a single witness testified that, in furtherance of its legitimate military goals, the CDF sought "the complete elimination of the RUF/AFRC, its supporters, sympathisers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone"[60].

29. Because the CDF acted on behalf of the Government pursuant to its right to maintain peace and public order within the state of Sierra Leone, as a general matter, military action taken in furtherance of this objective was not prohibited, let alone criminal. As

[54] The CDF, the Sierra Leone Army (the "SLA") and the Sierra Leone Police Forces were under the unified command of President Kabbah. Even during the coup, the CDF regarded President Kabbah as their commander in chief. *See* Appendix B (¶ 27, n.54). *N.B.* All "evidence"—witness testimony, documentary exhibits, and judicially noticed facts—is listed at the Appendices and referenced to the main text of the Motion by corresponding paragraph and footnote numbers.
[55] *See* Appendix B (¶ 28, n.55).
[56] *See* Appendix B (¶ 28, n.56).
[57] *See* Appendix B (¶ 28, n.57).
[58] *See* Appendix B (¶ 28, n.58).
[59] *See* Appendix B (¶ 28, n.59).
[60] *See* Appendix B (¶ 28, n.60).

explained in greater detail below, the CDF was manifestly not a criminal organisation as the Prosecution has attempted to categorise it. Yet by proceeding in this manner, the Prosecution sends an unambiguous and potentially threatening message to future militia leaders: stand down and wait for the so-called international community to intervene[61]. Such a message, however unintentional, clearly threatens to erode "Sierra Leone's future ability to defend itself if such predatory groups as the RUF [and the AFRC] were to emerge again"[62]. Indeed, given the example now being made of the CDF, who will come forward to lead the next opposition effort?

The Alleged CDF Violations Pale in Comparison to those of the RUF and the AFRC

30. In March 1991, RUF forces, under the leadership of Foday Sankoh, invaded Sierra Leone from Liberia[63]. Within the first year-and-a-half of the rebel occupation, over 400,000 civilians were internally displaced while hundreds of thousands more became refugees. The rebel war wiped out hundreds of hospitals and schools and tens of thousands of homes. Encouraged by the RUF leadership, widespread physical and mental brutality became rampant throughout the southern and eastern regions of the country, culminating in a state of "general terror" in both rural and urban centres. As the government found it increasingly difficult to pay its soldiers, the SLA began to mimic the atrocities of the rebels. Gross human rights violations including rape, forced prostitution, abductions, mutilations, looting, property destruction, and murder were the order of the day, and rebels and soldiers alike preyed on civilians for food, supplies, and forced labour. By January 1994, the government had declared a state of "total war" against the rebels[64].

31. It was from this bloody context that the Kamajors emerged, gaining prominence in the Eastern and Southern Provinces for their attempts to counter the rebels. During this time, the bulk of the atrocities in Sierra Leone were committed by RUF and SLA forces actively engaged in mining. In 1996, the Kamajors officially regrouped under the CDF, and power was centralized in Freetown under then Deputy Minster of Defence Samuel

[61] Given the examples set by the UN, the US, and the former African colonial powers in recent memory in terms of preventing the commission of atrocities on the continent, this is hardly a message worth broadcasting.
[62] Lansana Gberie, 'Sierra Leone: The Mysteries of a Special War Crimes Trial', ZNet Africa, 6 July 2004, available at http://www.zmag.org/content/print_article.cfm?itemID=5839&sectionID=2. Unfortunately, in this volatile and largely forgotten part of the world, one cannot optimistically rule out such a tragic possibility.
[63] The organized armed group that became known as the RUF was founded in about 1988 or 1989 in Libya. The RUF began organized armed operations in Sierra Leone in or about March 1991. *See* Appendix B (¶ 30, n.63).
[64] *See* Appendix B (¶ 30, n.64).

Hinga Norman. Alleged CDF violations during this period were far fewer than those carried out by the RUF and the AFRC. At this point, the rebels were "totally out of control", brutally killing, raping, mutilating, burning, and looting with impunity[65]. On 25 May 1997, the AFRC junta overthrew the Government. From the time of the coup until 2002, when the war officially ended[66], RUF and AFRC forces—and, to a much lesser extent, certain Kamajors—continued to inflict violence against the civilian population. ECOMOG ousted the junta on or about 14 February 1998, and the Government returned to power in March of the same year. It is undisputed that the CDF was instrumental in this laudable process[67].

32. While the Defence cannot credibly deny that some individual members of the CDF may have committed excesses in their struggle to oust the AFRC and defend their homeland against the RUF, it is a notorious fact that these were far fewer than those committed by the rebels and members of the junta[68]. Without condoning these actions, one wonders what—in the face of the RUF's particular brutality and lacking material support from the international community to effectively combat the AFRC—the CDF, a largely untrained, illiterate, and ill-equipped civil militia, should have done[69]. The Defence does not suggest that the doctrine of military necessity permits the commission of war crimes or crimes against humanity. However, given the harsh reality of the conflict and the *realpolitik* underlying the Prosecution's agenda[70], the Defence does submit that it stretches the limits of credibility to tar the CDF with the same brush as the RUF and the AFRC[71].

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[65] *See* Appendix B (¶ 31, n.65).
[66] The armed conflict in Sierra Leone occurred from March 1991 until January 2002. *See* Appendix B (¶ 31, n.66).
[67] *See* Appendix B (¶ 31, n.67).
[68] *See* n.65 and n.67 *supra*.
[69] "But then the demented nature of the RUF's total warfare ensured that in order to effectively challenge them one could hardly have avoided using brutal tactics. The ... argument—so vigorously enunciated, with ringing and seductive familiarity, by the Special Court's prosecutors—that those combating the depredations of the rebels should not have themselves been drawn into similar excesses flows from a well known pathology: the complacent 'humanitarianism' of people from more secure societies, people who in the end do little more than celebrate their own security. When the military theorist Martin van Creveld wrote that prolonged 'low-intensity' conflicts, like that which occurred in Sierra Leone, always ensure that combatants on both sides would look and act in the same way, he was stating an objective fact, not explaining away state or civil brutality". Gberie, n.62 *supra*.
[70] E.g., the exclusion of ECOMOG forces from the Court's jurisdiction. *See* Statute, Article 1.2 ("Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State".)
[71] It is worth noting here that, in its preliminary report circulated in October 2004, the Sierra Leone Truth and Reconciliation Commission (the "TRC") reported that the RUF committed over sixty percent of the atrocities, the Sierra Leone armed forces (including the SLA and the AFRC) nearly seventeen percent, and the CDF just six percent. Admittedly not evidence before this Tribunal, the TRC's estimates are telling.

33. Yet, in its seemingly overzealous quest for convictions[72] and apparent predilection for symbolic—not to say biblical—gestures, the Prosecution has chosen a "trinity"[73] of alleged civilian militia organisers to try alongside the leaders of one of the most brutal rebel forces of the Twentieth Century and a military junta of equal barbarity. The Defence submits that such juxtaposition renders the term "greatest responsibility" devoid of meaning. As the Appeals Chamber has noted: "For the English language to work, it must be comprehensible and considered"[74]. But, it is neither accurate nor fair to characterise the CDF efforts, however imperfect, as a criminal enterprise of the same magnitude as those alleged against the RUF and the AFRC[75]. Accordingly, allowing the case against the CDF to go forward will strip Article 1.1 of any comprehensible or considered value.

Mr Fofana Merely Played a Supporting Role to the CDF Leadership

34. Despite his formal title as Director of War, the evidence reveals that Mr Fofana was a figure of virtually no influence within the CDF leadership structure. Again, a comparative analysis of the evidence suggests that actual superior authority was vested in figures of consequentially much greater responsibility, including members of the SLPP leadership in exile and other CDF officials and commanders in Sierra Leone.

The SLPP Government

35. As noted above, the Defence submits that the CDF was subordinate to President Kabbah during all times relevant to the Indictment. The evidence reveals that the Government provided the CDF with funds and logistics necessary to perform its security role[76], and the president gave Mr Norman—his deputy Minister of Defence—his blessing with respect to CDF activity[77]. Through conversations via satellite telephone and visits to Guinea by members of the War Council, the SLPP leadership

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[72] As the former UK High Commissioner for Sierra Leone noted, "even before the trials commenced, [the former Prosecutor] injudiciously remarked that none of the indictees 'would ever see the light of day again'". Peter Penfold, 'Is This Justice?: Sierra Leone's Special Court Drags On', ZNet Africa, 20 January 2005, available at http://www.zmag.org/content/print_article.cfm?itemID=7066&sectionID=2.

[73] *See* Appendix B (¶ 33, n.73).

[74] Amendment Decision, ¶ 48.

[75] Indeed, as one commentator points out, the Prosecution's joint criminal enterprise theory borders on the absurd: "Bathos is too limited a word to describe this grandly demented exercise in how not to pursue international justice: even Joseph Conrad, with that cold eye for heroic absurdity and hypocrisy, would not have invented this". Gberie, n.62 *supra*.

[76] *See* Appendix B (¶ 35, n.76).

[77] Mr Norman, as the Deputy Minister of Defence, was subordinate to the President at all times relevant to the Indictment. *See* Appendix B (¶ 35, n.77).

was kept abreast of CDF activity[78]. Although in exile, these leaders formed part of the chain of command[79] and should bear responsibility for any excesses committed by the CDF. For example, former Vice-President Joe Demby was the chairman of the National Coordinating Committee, the highest placed body within the CDF, which catered "for the welfare of the CDF ... at the national level"[80]. As further evidenced by his ability to remove high-level CDF officials[81], Dr Demby was clearly part of the chain of command. As the evidence suggests, rather than acting to stop the alleged violations or speaking out against them, President Kabbah and other members of the Government lent their active support.

The First Accused

36. On the ground in Sierra Leone, Mr Norman—the CDF National Coordinator[82]—was the undisputed commander[83]. Seen and known as the overall Kamajor boss[84], there was a great deal of personal loyalty to him within the CDF fighting forces[85]. In terms of command, Mr Norman was the sole authority at Base Zero, where he wielded ultimate military power[86]. As the Prosecution's military expert stated, he was the only one with "responsibility to make decisions", the only one to exercise both "leadership" and "control"[87].

37. The evidence suggests that Mr Norman was aided in his role by a small staff of trusted advisors, which presumably included Mr Fofana[88]. However, as National Coordinator and the embodiment of the CDF, Mr Norman was solely and directly responsible for formulating policy and implementing strategy for prosecuting the war[89], including the appointment of key CDF directors[90] and commanders[91]. Various witnesses gave accounts

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[78] *See* Appendix B (¶ 35, n.78).
[79] The Prosecution's military expert believed that the SLPP government in exile had some role at the strategic level based on reports that Mr Norman communicated with President Kabbah by satellite telephone. *See* Appendix B (¶ 35, n.79).
[80] *See* Appendix B (¶ 35, n.82).
[81] Dr. Demby removed Albert Nallo from his position within the CDF. *See* Appendix B (¶ 35, n.81).
[82] *See* Appendix B (¶ 36, n.82).
[83] *See* Appendix B (¶ 36, n.83).
[84] *See* Appendix B (¶ 36, n.84).
[85] *See* Appendix B (¶ 36, n.85).
[86] *See* Appendix B (¶ 36, n.86).
[87] *See* Appendix B (¶ 36, n.87).
[88] *See* Appendix B (¶ 37, n.88).
[89] *See* Appendix B (¶ 37, n.89).
[90] *See* Appendix B (¶ 37, n.90).
[91] *See* Appendix B (¶ 37, n.91).

of having received detailed and specific instructions directly from Mr Norman[92], who personally ordered all tactical manoeuvres, including the attacks on Koribondo[93], Bo[94], Tongo[95], and the Black December Operation[96]. The evidence further suggests that orders were disseminated directly from Mr Norman to his regional coordinators[97] and reports from the field were returned to him[98]. Responsibility for the deployment of troops rested with Mr Norman[99], and commanders reported to him directly[100]. Additionally, "Special Forces" based at Talia, including the Death Squad, were answerable only to Mr Norman[101]. Not one for delegating authority, Mr Norman was even largely responsible for the procurement[102] and distribution[103] of logistics.

38. Indeed, by all accounts, the CDF operation in Sierra Leone was a "one-man show"[104] with Mr Norman exercising total strategic, operational, and tactical authority. Even the War Council—despite its intentions[105]—was subordinate to Mr Norman[106], who approved or denied its recommendations at his pleasure[107]. Once approved, the planning and implementing of these recommendations was also his domain[108]. In fact, all directives emanated from Mr Norman[109], and every important decision at Base Zero required his approval[110]. He even went so far as to publicly claim personal responsibility for Kamajor activity[111]. As one witness put it, the man simply "had no deputy"[112]. Clearly, Mr Norman's responsibility within the CDF was of a vastly greater magnitude than Mr Fofana's. The evidence on this point speaks for itself.

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[92] *See* Appendix B (¶ 37, n.92).
[93] *See* Appendix B (¶ 37, n.93).
[94] *See* Appendix B (¶ 37, n.94).
[95] *See* Appendix B (¶ 37, n.95).
[96] *See* Appendix B (¶ 37, n.96).
[97] *See* Appendix B (¶ 37, n.97).
[98] *See* Appendix B (¶ 37, n.98).
[99] *See* Appendix B (¶ 37, n.99).
[100] *See* Appendix B (¶ 37, n.100).
[101] *See* Appendix B (¶ 37, n.101).
[102] *See* Appendix B (¶ 37, n.102).
[103] *See* Appendix B (¶ 37, n.103).
[104] *See* Appendix B (¶ 38, n.104).
[105] *See* Appendix B (¶ 38, n.105).
[106] *See* Appendix B (¶ 38, n.106).
[107] *See* Appendix B (¶ 38, n.107).
[108] *See* Appendix B (¶ 38, n.108).
[109] *See* Appendix B (¶ 38, n.109).
[110] *See* Appendix B (¶ 38, n.110).
[111] *See* Appendix B (¶ 38, n.111).
[112] *See* Appendix B (¶ 38, n.112).

Albert Nallo

39. Although power was highly centralized among the SLPP leadership, including Mr Norman, the evidence reveals that another ambitious senior Kamajor managed to acquire a significant amount of authority within the CDF. This was Albert Nallo. An objective assessment of the evidence so far appears to demonstrate that he bears a substantial, indeed great, level of responsibility for alleged violations of humanitarian law.

40. As the Deputy Director of Operations as well as the Regional Director of Operations for the Southern Region[113], Mr Nallo had vast operational authority belied by his deputy status. Nominally subordinate to Director of Operations Joseph Koroma[114], Mr Nallo claims he did "all the work" and never received commands from Mr Koroma, "a dormant man"[115]. According to Mr Nallo, orders at Base Zero did not flow through the official chain of command[116], and Mr Koroma—elderly and illiterate—was given his post by Mr Norman only to "appease" him[117]. Mr Nallo admits that, to a certain extent, he, rather than Mr Koroma, was "in charge"[118]. This state of affairs is illustrative of the point made earlier that official designations within the CDF corresponded very little to actual power and duties.

41. Seen and known as a Kamajor "leader"[119], Mr Nallo was instrumental at all levels of the conflict. As a "director", he was intimately involved in deciding and planning strategies for war operations for the Southern Region[120] including the Black December operation[121]. As a "commander", he led the attack on Bo[122], apprised Mr Norman of developments from the war front[123], and relayed "general and specific instructions" from [Mr Norman] to other ground commanders[124]. He even delivered arms and ammunition to the fighting forces[125]. A veritable director of war, Mr Nallo claimed that—as the only literate director at Base

[113] *See* Appendix B (¶ 40, n.113).
[114] *See* Appendix B (¶ 40, n.114).
[115] *See* Appendix B (¶ 40, n.115).
[116] *See* Appendix B (¶ 40, n.116).
[117] *See* Appendix B (¶ 40, n.117).
[118] *See* Appendix B (¶ 40, n.118).
[119] *See* Appendix B (¶ 41, n.119).
[120] *See* Appendix B (¶ 41, n.120).
[121] *See* Appendix B (¶ 41, n.121).
[122] *See* Appendix B (¶ 41, n.122).
[123] *See* Appendix B (¶ 41, n.123).
[124] *See* Appendix B (¶ 41, n.124).
[125] *See* Appendix B (¶ 41, n.125).

Zero[126]—many of Mr Fofana's putative duties were delegated to him[127]. Indeed, the Prosecution's military expert characterized him as a key figure within the CDF hierarchy with apparently much greater responsibility than Mr Fofana[128]. As the evidence suggests, with much of his alleged authority either retained by Mr Norman or delegated to Mr Nallo, all that was left for Mr Fofana was to, quite literally, mind the store[129].

42. Yet Mr Nallo has managed to evade prosecution through his cooperation in these proceedings. While the normal practice in criminal trials is to utilise smaller "fish" to capture larger ones, the Prosecution appears to have reversed this strategy with respect to Messrs Nallo and Fofana. Smugly recounting such atrocities as throwing an elderly woman into a fire[130] and essentially depicting himself as the *de facto* Director of War[131], Mr Nallo has all but pleaded to the Fofana Indictment. Indeed, a close analysis of his testimony reveals that he in fact may have been one of the devilish personalities hogging all the space on the former Prosecutor's dance card[132]. Mr Nallo has testified that the Prosecution told him he would be indicted only if he bore the greatest responsibility[133]. While that remains to be seen, the Defence submits that he certainly bears more responsibility than Mr Fofana.

Mr Fofana

43. Notwithstanding the fact that several witnesses have testified that Mr Fofana was the "Director of War", the Prosecution has failed to demonstrate the legal significance of that moniker. Apparently convinced that if this Chamber hears these magic words enough times, it will be inclined to convict him, the Prosecution has neglected to define the actual contours of Mr Fofana's former position. The Defence submits, however, that the mere title has no talismanic significance—indeed, it is an objectively meaningless designation. It is quite telling that, while some witnesses have characterised Mr Fofana as a figure of some authority within the CDF, not one witness has described his position or duties with

[126] *See* Appendix B (¶ 41, n.126).
[127] *See* Appendix B (¶ 41, n.127).
[128] *See* Appendix B (¶ 41, n.128).
[129] *See* ¶¶ 43-44 *infra*.
[130] *See* Appendix B (¶ 42, n.130). Throughout his at times macabre testimony, Mr Nallo wore a strangely self-satisfied smile on his face, as if he was in someway proud of his actions.
[131] *See* ¶ 42 *supra*.
[132] *See* ¶ 23 *supra*.
[133] *See* Appendix B (¶ 42, n.133).

any particular detail. The Defence reminds the Chamber that it must look to the quality, as well as the quantity, of the evidence before it.

44. Notably, not one Prosecution witness testified with any degree of specificity that Mr Fofana had actual authority in terms of planning, overseeing, or implementing particular CDF directives[134]. In fact, the evidence reveals that Mr Fofana was nothing more than a glorified storekeeper[135] and occasional conduit for messages to Mr Norman[136]. At most an amateur aide-de-camp, he was, as one insider witness put it, a director of war in name only[137].

45. On the other hand, the evidence clearly shows the CDF to have been funded and supported by the Government at the logistics level, virtually dominated by Mr Norman at the planning and executive level, and managed by Mr Nallo and various ground commanders at the operational level. Where the evidence with respect to the Government, Mr Norman, and Mr Nallo is precise and consistent, the testimony regarding Mr Fofana is vague and often contradictory. And while his apparent closeness to Mr Norman may have given Mr Fofana a measure of influence among some of the thousands of Kamajors at Base Zero, this Chamber must not interpret this alleged intimacy as imparting to him any more authority than he actually obtained. As the evidence clearly suggests, to the extent Mr Fofana played any role within the CDF, it was a marginal one of *little*, rather than *great*, responsibility.

Superior Responsibility Under Article 6.3

46. Pursuant to Article 6.3 of the Statute[138], the Prosecution charges Mr Fofana with superior or command responsibility[139]. While allegedly holding a position of authority and exercising command and control over unidentified subordinates, Mr Fofana is said to be "individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of

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[134] Naturally, because Mr Fofana is now known throughout the country as the "Director of War" and the CDF "Second Accused", by virtue of the publicly-filed Indictment and the Prosecution's aggressive "outreach" activities, witnesses may tend to conform their testimony accordingly. This is human nature and an unavoidable aspect of any criminal justice system. However, it must be remembered that this Chamber is bound to evaluate the quality, and not merely the quantity, of the Prosecution's evidence. If a hundred witnesses say, "Mr Fofana was the Director of War" but not one elucidates his actual powers and duties, those witnesses have essentially said nothing.
[135] *See* Appendix B (¶ 44, n.135).
[136] *See* Appendix B (¶ 44, n.136).
[137] *See* Appendix B (¶ 44, n.137).
[138] The text of Article 6.3 is virtually identical to the relevant articles setting out the basis for command responsibility in the statutes of the *Ad Hoc* Tribunals. Accordingly, a review of the jurisprudence of these tribunals may be helpful in defining the specific nature of superior responsibility. However, the results of any such analysis must be tempered by an understanding of the significance and restrictive nature of Article 1.1 as discussed in greater detail above.
[139] The terms "superior responsibility" and "command responsibility" are used interchangeably here.

the Statute"[140]. Further, Mr Fofana is said to bear responsibility for the acts of his alleged subordinates "in that he knew or had reason to know that the subordinate[s were] about to commit such acts or had done so and [he] failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"[141].

47. The Defence submits that Mr Fofana does not bear superior responsibility for any of the allegations in the Indictment, as (i) no superior-subordinate relationship existed between him and the alleged perpetrators; (ii) to the extent that such relationship existed, Mr Fofana did not know or have reason to know that criminal acts were being committed; and (iii) to the extent that he had such knowledge, he took all reasonable and necessary measures within his limited authority to either stop them or punish the perpetrators thereof. The Prosecution's theory of command responsibility is premised upon vague assertions and propped-up by equally vague evidence, which fails to demonstrate that Mr Fofana is criminally responsible under Article 6.3. Accordingly, and for the specific reasons set forth below, the Defence moves this Chamber for the entry of a judgment of acquittal as to any and all alleged criminal liability on the basis of superior responsibility.

Generally

48. The jurisprudence of the *Ad Hoc* Tribunals establishes three elements which must be proved before an accused person may be held responsible as a superior for crimes committed by his subordinates: (i) the existence of a superior-subordinate relationship between the accused and the alleged perpetrators of the underlying offences; (ii) the knowledge of the superior that his subordinate was about to commit, or had committed, a crime; and (iii) the failure of the superior to take the necessary and reasonably measures to prevent the criminal act or to punish the perpetrator(s) thereof[142]. This is a conjunctive test; accordingly, the failure to satisfy one element must result in an acquittal.

49. Like the various forms of criminal liability articulated under Article 6.1, the doctrine of command responsibility is grounded in the principle of personal culpability. As noted above, this Chamber must be mindful not to assume a level of control based upon Mr

[140] Indictment, ¶ 21.
[141] *Ibid.*
[142] *See, e.g., Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶ 346; *Prosecutor v. Kvocka, et al.*, IT-98-30/1-T, Trial Chamber, 'Judgement', 2 November 2001, ¶ 314.

Fofana's title or to impute to him the liability of the other accused persons when assessing his potential liability as an alleged superior.

No Superior-Subordinate Relationship Existed Between Mr Fofana and the Alleged Perpetrators of the Underlying Offences

50. In order to prove its charge that Mr Fofana should incur liability as a superior under Article 6.3, the Prosecution must first establish the existence of a *de jure* or *de facto* superior-subordinate relationship between Mr Fofana and the alleged perpetrators of the underlying offences[143]. As the ICTY Appeals Chamber has established, "a commander or superior is ... one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed"[144]. This degree of authority, essential for a showing of superior responsibility, is described by the relevant jurisprudence as "effective control"[145]. In determining whether such a legally significant superior-subordinate relationship actually exists, a trial chamber "must at all times be alive to the realities of any given situation and ... [take] great care ... *lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote*"[146]. By force of logic, in order to be a superior, one needs a subordinate: "[T]he law does not know a universal superior without a corresponding subordinate"[147]. However, the Prosecution has failed to answer this essential legal question: who were these supposed "subordinate members of the CDF"[148] over whom Mr Fofana is alleged to have exercised command responsibility?[149] "The Accused

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[143] *See Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 39 ("A position of command is a necessary condition for the imposition of command responsibility".); *Prosecutor v. Semanza*, ICTR-97-20, Trial Chamber, 'Judgement', 15 May 2003, ¶ 401 ("A superior-subordinate relationship requires a formal or informal hierarchical relationship where a superior is senior to a subordinate".)

[144] *Prosecutor v. Delalic et al.*, IT-96-21-A, Appeals Chamber, 'Judgement', 20 February 2001, ¶ 192.

[145] It is well-established that, in order for the "principle of superior responsibility to be applicable, it is necessary that the [alleged] superior have *effective control* over the persons committing the underlying violations". *Prosecutor v. Delalic et al.*, IT-96-21-A, Appeals Chamber, 'Judgement', 20 February 2001, ¶ 197 (emphasis added); *see also Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber, 'Judgement', 29 July 2004, ¶ 69 ("The indicators of *effective control* ... are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate".) (emphasis added); *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 45 ("[T]he essential element is ... whether [the alleged superior] had *effective control* over the individuals who committed the crimes ...") (emphasis added); *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Trial Chamber, 'Judgement', 21 May 1999, ¶ 229 ("The principle of command responsibility must only apply to those superiors who exercise *effective control* over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3).") (emphasis added).

[146] *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber, 'Judgement', 20 July 2004, ¶ 197 (emphasis added).

[147] *Ibid.*

[148] Indictment, ¶ 18.

[149] *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 198.

cannot have had command responsibility over an unspecified assortment of attackers". As shown in greater detail below, the Prosecution's failure to establish this crucial "link of control"[150] is fatal to its command responsibility case.

Mr Fofana Did Not Possess De Jure Authority Over Any Subordinates

51. *De jure* authority is authority that is formally and legally established[151]. Yet the law is clear that a formal title alone does not suffice to reasonably establish *de jure* authority[152]. Consistent with the state of the law, the Prosecution's military expert has testified that "the issue of command is interesting because it is not a case of being titular command, it is effective command. The question is not whether [a particular individual] was placed in a *position of command* over the CDF, it was whether he was able to *exercise command* over the CDF"[153].

52. Several witnesses have testified that Mr Fofana was the National Director of War of the CDF[154]. Additionally, a document purporting to be Mr Fofana's letter of appointment to that position was admitted as an exhibit[155]. However, the Prosecution has offered no evidence with respect to any set of laws or rules—domestic or otherwise—outlining the specific powers or duties corresponding to any of the various positions within the CDF. Notably, no evidence exists to provide a formal, *de jure* definition of Mr Fofana's alleged position beyond the fact that he may have held it[156]. In fact, the Prosecution's military expert testified that formal rank and status were of little importance within the CDF structure and official job descriptions were not relied upon[157]. In short, the evidence offered by the Prosecution can only reasonably lead to the conclusion that formal titles within the CDF did not imply specific duties. Accordingly, there is no evidence upon which this Chamber, or any reasonable trier of fact, could conclude that Mr Fofana possessed *de jure* power, authority, or jurisdiction over any subordinates.

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[150] *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber, 'Judgement', 20 July 2004, ¶ 197.
[151] *Prosecutor v. Delalic et al.*, IT-96-21-A, Appeals Chamber, 'Judgement', 20 February 2001, ¶ 186.
[152] *Ibid.*, ¶ 197 ("In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles".)
[153] *See* Appendix C (¶ 50, n.153).
[154] *See* Appendix C (¶ 51, n.154).
[155] *See* Appendix C (¶ 51, n.155).
[156] The position of "Director of War" is unique to the CDF and has no objective significance.
[157] *See* Appendix C (¶ 51, n.157).

Mr Fofana Did Not Possess De Facto Authority Over Any Subordinates

53. A review of the evidence reveals that, while he may have exercised some influence at Base Zero, Mr Fofana was not the *de facto* commander of any subordinates. Several witnesses have testified that Mr Fofana was seen and known as a top leader of the CDF[158] and that he took directions from and was directly answerable to Mr Norman[159], a few going so far as to characterize him as the second in command[160]. Further, many witnesses have testified that Mr Fofana took part in policy, planning, and operational decisions of the CDF[161], and that, as National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war[162]. Others have testified that Mr Fofana liaised with field commanders and supervised and monitored operations[163]. However, in addition to the fact that none of this testimony describes criminal behaviour, it also fails to establish that Mr Fofana had *de facto* control over any specified subordinates, let alone those accused of committing the underlying acts alleged in the Indictment. Vague in the extreme, the evidence merely suggests that Mr Fofana was an individual of some influence within the CDF, which, as shown below, does not establish the crucial requirement of effective control.

54. At least three witnesses have testified that Mr Fofana had the authority to deploy troops[164]. However, while extensive evidence was offered that the First Accused and various battalion commanders had actual control over *specific* subordinate commanders of the CDF, the Prosecution has failed to provide sufficient evidence that Mr Fofana had such authority over *any* particular CDF members, let alone over those mostly unnamed Kamajors alleged to have perpetrated the acts at the various crime bases[165]. Rather, the evidence presented by the Prosecution amply demonstrates that Mr Fofana's position at Base Zero was outside the actual chain of command[166]. At most, it was a

[158] *See* Appendix C (¶ 52, n.158).
[159] *See* Appendix C (¶ 52, n.159).
[160] *See* Appendix C (¶ 52, n.160).
[161] *See* Appendix C (¶ 52, n.161).
[162] *See* Appendix C (¶ 52, n.162).
[163] *See* Appendix C (¶ 52, n.163).
[164] *See* Appendix C (¶ 53, n.164).
[165] *See Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 198 ("The Accused cannot have had command responsibility over an unspecified assortment of attackers".)
[166] Inclusion in the chain of command is crucial for a showing of superior liability. *See, e.g., Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶ 647 ("The Trial Chamber is unable to agree with the submission of the Prosecution that a chain of command is not a necessary requirement in the exercise of superior authority. ... Actual control of the subordinate is a necessary requirement of the superior-subordinate relationship".)

position akin to that of staff officer or military advisor[167]. In any event, it is clear that Mr Fofana did not directly control or order any CDF troops. Furthermore, there is absolutely no evidence that he commanded a battalion of Kamajors. In fact, the evidence suggests that Mr Fofana never set foot on the battlefield[168].

55. A few witnesses testified that Mr Fofana was responsible for supplying subordinate commanders with arms and ammunition when directed by Mr Norman[169], and that he did so on at least three specific operations[170]. Several other witnesses testified that his role was to provide food[171], morale boosters[172], and other "logistics"[173]. Again, the testimony of an insider is telling in this regard: Mr Fofana was "a man called the Director of War", but he "was more concerned with the receiving of logistics and distributing the logistics and I did not ever see a time when he came and really put in place, let's say, this is a deployment area, this is a number of manpower at that area. There was no proper nominal role"[174]. Indeed, this is the only area where the Prosecution's witnesses have been able to testify with any degree of specificity. Accordingly, it appears from this evidence that Mr Fofana's primary role at Base Zero was far more likely that of storekeeper and mess officer. However, it must be noted here that *supplying* the means to complete a task is in no way equivalent to *ordering* the task's completion. And despite the acknowledged importance of the provision of logistics to any armed force[175], the testimony describing Mr Fofana's responsibility in this regard simply does not indicate the exercise of any authority. To the contrary, it suggests that Mr Fofana only dispensed items pursuant to orders issued by Mr Norman.

Mr Fofana Did Not Exercise Effective Control Over Any Subordinates

56. Assuming, *arguendo,* that the evidence could reasonably establish a relevant group of *de jure* or *de facto* subordinates to Mr Fofana, their existence alone does not establish a superior-subordinate relationship of the type sufficient to prove command responsibility. Rather, the Prosecution must further prove that Mr Fofana exercised

[167] If anything, Mr Fofana was a staff officer, not a commander. *See* Appendix C (¶ 53, n.167).
[168] *See* Appendix C (¶ 53, n.168).
[169] *See* Appendix C (¶ 54, n.169).
[170] *See* Appendix C (¶ 54, n.170).
[171] *See* Appendix C (¶ 54, n.171).
[172] *See* Appendix C (¶ 54, n.172).
[173] *See* Appendix C (¶ 54, n.173).
[174] *See* Appendix C (¶ 54, n.174).
[175] *See* Appendix C (¶ 54, n.175).

effective control over this alleged group of CDF subordinates. Without such a nexus, there can be no effective control and consequently no superior responsibility[176].

57. The law is clear that the inquiry regarding effective control centres on the alleged superior's ability to issue binding orders to, punish, or otherwise compel the obedience of alleged subordinates[177]. Admittedly, there is some evidence that Mr Fofana—at times relevant to the Indictment—issued putative orders to certain members of the CDF, namely, TF2-082[178], TF2-223[179], TF2-201[180], TF2-017[181], Bob "Borbor" Tucker[182], and Albert Nallo[183]. However, the first element of a command responsibility case requires the existence of a superior-subordinate relationship between the accused and *the perpetrator of an underlying offence.* There is no evidence that TF2-082, TF2-223, or TF2-201 committed any offences[184]. And while there is some evidence that TF2-017, Bob Tucker, and Albert Nallo may have committed some of the underlying crimes alleged in the Indictment, the instructions they received from Mr Fofana were legitimate military orders unrelated to any alleged criminal activity. To the extent any violations were committed, the Defence submits they amounted to random acts of violence and therefore cannot be

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[176] This significant distinction is clearly illustrated in the *Delalic* Case. In that case, the accused Delalic was acquitted despite his status as a *de jure* superior at the Celebici prison camp. The Prosecution alleged that Delalic had played a key military role in the conflict, and the evidence revealed that he was in fact the commander of a tactical group who coordinated the logistics for the seizure of the Celebici prison camp and was further authorized to negotiate and conclude certain contracts and agreements on the behalf of the War Presidency. Notwithstanding these *de jure* responsibilities, the Trial Chamber concluded that he never acquired any status placing him within a "hierarchy of authority creating a superior and subordinate relationship" over the alleged perpetrators. Lacking was evidence of the essential link between Delalic, a *de jure* superior, and his alleged subordinates. *See Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶ 652-56.

[177] *Prosecutor v. Delalic et al.*, IT-96-21-A, Appeals Chamber, 'Judgement', 20 February 2001, ¶¶ 192, 254, quoting *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, at ¶ 354.

[178] Witness, the commander of the Koribondo operation, claims he received a letter from Mr Fofana instructing him to turn over captured vehicles and other items to CDF Headquarters for registration. *See* Appendix C (¶ 57, n.178).

[179] Witness, a member of Transport Two Unit, claims he received arms and ammunition from Mr Norman and distributed it according to instructions given to him by Mr Fofana. *See* Appendix C (¶ 57, n.179).

[180] Witness, Mr Fofana's deputy, testified that Mr Norman gave the orders to distribute arms and ammunition to Mr Fofana who would, in turn, pass them on to the witness who was in charge of the arms store at Talia. *See* Appendix C (¶ 57, n.180).

[181] Mr Fofana allegedly ordered witness, a commander, to deploy to Yele to carry out operations in January 1997. Further, Mr Norman ordered witness to take instructions from Mr Fofana regarding the Black December operation, which he did. *See* Appendix C (¶ 57, n.181).

[182] Mr Fofana allegedly told Kamajors at Base Zero including the witness, a commander, to launch an attack on the soldiers and to "destroy them finally from where they were settled". *See* Appendix C (¶ 57, n.182).

[183] For example, Mr Fofana allegedly ordered a team including witness, the Deputy Director of Operations, to go to Moyamba to investigate reports of Kamajor looting, burning, and killing. *See* Appendix C (¶ 57, n.183).

[184] Indeed, the evidence regarding TF2-082 indicates that he specifically instructed his men not to harm civilians and punished (or attempted to punish) those who did. Further, TF2-082 himself testified that Mr Fofana specifically instructed him not to harm civilians during the Koribondo operation. *See* Appendix C (¶ 57, n.184).

imputed to Mr Fofana[185]. With respect to Albert Nallo, the evidence suggests that his orders emanated from Mr Norman. Furthermore, and most importantly, it was Mr Norman rather than Mr Fofana, who had the sole authority to prevent these men from committing any alleged criminal acts or to punish them after the fact[186].

58. Furthermore, merely holding a high-level position or having "substantial influence" over alleged subordinates does not *ipso facto* amount to effective control over them[187]. This accounts for why "staff officers, who, irrespective of their rank, do not command troops, are only responsible when their participation in the delivery and execution of criminal orders is proven"[188]. In the definitive command responsibility case, although

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[185] Further, random acts or acts committed for personal reasons cannot be said to have been committed as part of a widespread or systematic attack. *See Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber, 'Judgement', 2 September 1998, ¶¶ 578-579; *see also Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Chamber, 'Judgement', 6 December 1999, ¶ 67, *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Trial Chamber, 'Judgement', 21 May 1999, ¶¶ 122-123, n.28.

[186] There is a troubling pattern of vagueness with respect to the Prosecution's evidence. Orders and instructions are not given in the abstract, yet the specifics are missing in almost every case. Where they are included, the object of the instructions is legitimate.

[187] *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶ 795 (Rather, "[t]he determining factor is the actual possession of power or control over the actions of subordinates".) In *Delalic*, the evidence revealed that the accused Delic served as an administrator and manager in the Celebici prison camp, organising documents and logistics and arranging daily activities in the camp as an assistant to the commander. Additional evidence indicated that the detainees generally regarded Delic as a person of influence. However, the Trial Chamber found that, although relevant to its consideration, this evidence was not dispositive of Delic's status. The live issue before the Chamber was whether the accused had the power to issue orders to subordinates and to prevent or punish their criminal acts, thus placing him within the chain of command. The Chamber ultimately found that although the evidence was indicative of a degree of influence, he could not be found to have been a "superior" for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute. *Ibid.*, ¶¶ 800, 809-810, *affirmed, Prosecutor v. Delalic et al.*, IT-96-21-T, Appeals Chamber, 'Judgement', 20 November 2001, ¶ 306 ("The Appeals Chamber accepts the Trial Chamber's view that this title or position is not dispositive of the issue and that it is necessary to look to whether there was evidence of *actual* authority or control exercised by Delic. For the same reason, the fact that the detainees regarded him as the deputy commander, and as a person with influence over the guards, is not conclusive evidence of his *actual* authority".). *See also Prosecutor v. Kvocka, et al.*, IT-98-30/1-T, Trial Chamber, 'Judgement', 2 November 2001. In that case, with respect to the accused Prcac, the Trial Chamber found that although he was an administrative aide to the commander of the Omarska camp and exercised some authority and influence there, the evidence did not prove that he (i) held a superior-subordinate relationship with those perpetrating crimes, (ii) exercised effective control over any individual who committed crimes, or (iii) had clear authority to prevent or punish crimes. Accordingly, the Chamber held that Prcac did not incur superior responsibility pursuant to Article 7(3) of the Statute. *Ibid.*, ¶¶ 466, 467. With respect to the accused Kos, the evidence showed that he was often present in the same administrative office as the commander and deputy commander of the camp, gave instructions to other guards, and was in a position to prevent abuses against detainees. The Trial Chamber found that Kos thus held a position of authority and influence over the guards on his shift. However, the Trial Chamber was not satisfied that sufficient proof had been provided demonstrating that Kos exercised the necessary degree of effective control over those guards who were shown to have committed specific crimes, or that he had clear authority to prevent or punish crimes committed by his subordinates in the camp. Accordingly, the Chamber held that Kos did not incur superior responsibility pursuant to Article 7(3) of the Statute. *Ibid.*, ¶¶ 480, 485, 502. In affirming the decision of the Trial Chamber, the Appeals Chamber noted: "Not every position of authority and influence necessarily leads to superior responsibility under Article 7(3) of the Statute." *Prosecutor v. Kvocka, et al.*, IT-98-30/1-T, Appeals Chamber, 'Judgement', 28 February 2005, ¶ 144.

[188] Ilias Bantekas, 'The Contemporary Law of Superior Responsibility', American Journal of International Law, v.93, no. 3, July 1999, available at http://www.torturers.net/analysis/bantekas.html.

the accused Delalic possessed significant influence, he was not found guilty as a superior because he lacked effective control over his alleged subordinates[189]. Moreover, as one trial chamber has held, "evidence of perceived authority may not be sufficient, as it may be indicative of mere powers of influence in the absence of a subordinating structure"[190].

59. At this stage of the proceedings, the evidence shows that—although apparently an individual of some influence and a possible advisor to the First Accused—Mr Fofana did not actually command troops. The testimony fails to establish the essential link between any given subordinate's act and Mr Fofana's order as a superior. Without a showing of this crucial nexus, the fact that Mr Fofana exhibited some influence among the Kamajors at Base Zero is largely immaterial. Evidence of such influence, by itself, is simply insufficient to establish the necessary element of a superior-subordinate relationship. What is critically lacking is any link within the "subordinating structure" of the CDF between Mr Fofana and the alleged perpetrators of the criminal acts.

60. Additionally, effective control of an alleged superior must be operative *at the time* the alleged subordinates committed the illicit acts[191]. Temporarily delegated authority is an insufficient basis from which to extrapolate command responsibility unless crimes occurred during the period of delegation[192]. This point is particularly well-illustrated in the *Kunarac* Case, where because the Prosecution failed "to show that soldiers who committed the offences charged in the Indictment were under the effective control of the accused *at the time they committed the offences*", the accused was not found liable under a theory of command responsibility[193]. In contrast to Mr Fofana's case, the accused Kunarac was a leader who controlled about fifteen soldiers. Yet the court did

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[189] *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶ 646 (His ability to negotiate contracts on the behalf of the War Presidency rendered Delalic, "influential, but it did not create a superior-subordinate relationship".); *see also Prosecutor v. Delalic et al.*, IT-96-21-T, Appeals Chamber, 'Judgement', 20 November 2001, ¶ 263 ("[P]owers of persuasion or influence alone" are an insufficient basis on which to found command responsibility.)

[190] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Trial Chamber, 'Judgement', 26 February 2001, ¶ 424 ("For instance, a government official who knows that civilians are used to perform forced labour or as human shields will be held liable only if it is demonstrated that he has effective control over the persons who are subjecting the civilians to such treatment. A showing that the official merely was generally an influential person will not be sufficient".)

[191] *Prosecutor v. Delalic et al.*, IT-96-21-A, Appeals Chamber, 'Judgement', 20 February 2001, ¶ 254.

[192] *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶¶ 695-96, 700.

[193] *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Chamber, 'Judgement', 22 February 2001, ¶¶ 628-29 ("The Prosecutor has failed however to show that the soldiers who committed the offences charged in the Indictment were under the effective control of Kunarac *at the time they committed the offences*. ... The Trial Chamber is therefore not satisfied that Kunarac is responsible as a superior under Article 7(3) of the Statute".)

not find him liable of command responsibility because the relevant group of subordinates was formed from various units on an *ad hoc* basis to perform specific tasks and was thus subject to change. The Prosecution failed to connect the acts of the perpetrators to Kunarac during his temporal period of effective control.

61. Some evidence has been presented that Mr Fofana was "in charge"[194] of Base Zero during one of Mr Norman's brief absences. However, the Prosecution has failed to establish that Mr Fofana had responsibility or effective control over any CDF troops during this period. Further, the particular witness failed to provide examples of any illegal orders that Mr Fofana might have made or illegal acts that might have occurred pursuant to this alleged temporary delegation of authority. The witness testified only that Mr Fofana agreed to transmit a report from the witness to the First Accused. No reasonable trier of fact could find that this testimony establishes that Mr Fofana had effective control over all, or even any, CDF troops[195].

62. Finally, the transmission of orders from a higher authority does not necessarily imply any measure of control, effective or otherwise, in the person who transmits them[196]. In Mr Fofana's case, merely informing certain CDF commanders that he would transmit their reports to Mr Norman, is not indicative of any measure of control. Likewise, to the extent that Mr Fofana delivered Mr Norman's orders to others who were clearly reacting to the latter's authority, this cannot reasonably impute control to Mr Fofana, especially if, as the evidence suggests, he lacked the power to compel a different result[197].

63. Because the Prosecution has failed to lead evidence from which one could reasonably conclude that Mr Fofana had direct authority, *de jure* or *de facto*, over any specific CDF subordinates alleged to have perpetrated crimes, it has failed to satisfy the first element of its command responsibility case.

Mr Fofana Had No Knowledge of Alleged Criminal Acts

64. Because the Prosecution has failed to establish the first element of its command responsibility case, we need not reach the question of Mr Fofana's alleged knowledge.

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[194] *See* Appendix C (¶ 61, n.194).
[195] *See* Appendix C (¶ 61, n.195).
[196] *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶ 696 (The Trial Chamber found that where orders were transmitted pursuant to a high command's authority, the accused, Delalic did not incur command authority for simply conveying the orders.)
[197] *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998, ¶¶ 662, 669.

However, assuming but not conceding that the requisite superior-subordinate relationship existed, Mr Fofana did not know or have reason to know that the alleged crimes were being committed[198].

65. With respect to the individuals named above as possible subordinates—TF2-082, TF2-223, or TF2-201—there is absolutely no evidence that they committed any crimes. In fact, while a few witnesses testified that Mr Fofana received reports about operations from his alleged subordinates, most of the crime-base witnesses admitted they did not report the reputed violations to any Kamajor authorities[199]. There is no additional evidence that such information ever came to the attention of Mr Fofana. The fact remains that the distance between Base Zero and the alleged crime bases was significant. Indeed, according to the Prosecution's own military expert, communication systems were primitive at best[200], and at least two insider witnesses testified that information often never reached Base Zero because of the lack of a formal communications system and the vast area of CDF operation[201]. Further, remedying these deficiencies in communication was simply not within the authority of Mr Fofana.

Mr Fofana Took Necessary and Reasonable Measures to Prevent the Alleged Violations and to Punish the Perpetrators Thereof

66. Again, assuming but not conceding that the Prosecution has satisfied the first two elements of its command responsibility case—which it has not—Mr Fofana took all reasonable and necessary measures within his very limited authority to either stop the alleged violations or to punish the perpetrators thereof. The evidence suggests that the ability to punish was vested in the discipline committee of the War Council[202]. As noted above, Mr Fofana did not actually command troops or exercise control over any identifiable CDF members. Accordingly, he had no *de jure* or *de facto* authority to administer punishment. In light of the organisational structure of the CDF, this was simply not his role.

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[198] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Trial Chamber, 'Judgement', 26 February 2001, ¶ 434 (A superior can only be held criminally responsible if some particular piece of information was in fact available to him that would have given him notice of the conditions.), and ¶ 435 (Knowledge of acts over which one lacks the power of control cannot be a basis for criminal responsibility, as to hold someone criminally responsible for acts he could not control would violate fundamental principles of criminal law.)
[199] *See* Appendix C (¶ 65, n.199).
[200] *See* Appendix C (¶ 65, n.200).
[201] *See* Appendix C (¶ 65, n.201).
[202] See Appendix C (¶ 66, n.202).

67. With respect to Albert Nallo's report to Mr Fofana that the Death Squad was killing civilians and looting their property, TF2-008 testified that Mr Fofana referred the matter to the War Council[203]. This, given the situation at Base Zero and his actual authority, was all he could reasonably have done. With respect to the alleged killing of Dauda Alpha Kanu, TF2-017 and Mr Fofana put the complaint to Mr Norman[204] who essentially claimed the death was a necessary consequence of the war[205]. Given Mr Norman's unquestioned authority, there was nothing more Mr Fofana could have done.

68. In sum, because the Prosecution has failed to establish that Mr Fofana was indeed a superior with effective control over his alleged subordinates as required by the law of command responsibility, the charges against him with respect to Article 6.3 must be dismissed. In the alternative, the Prosecution has failed to demonstrate that Mr Fofana knew or should have known of any alleged violations or that he failed to take the reasonable and necessary measures to prevent them.

Individual Criminal Responsibility Under Article 6.1

69. The Prosecution charges Mr Fofana with three related forms of individual criminal responsibility[206]: First, through his acts or omissions, Mr Fofana is said to have "planned, instigated, ordered, [or] committed" the crimes alleged in the Indictment[207]. Second, the Indictment states that in the "planning, preparation or execution" of the alleged crimes, Mr Fofana "otherwise aided and abetted" those responsible for the alleged crimes[208]. Finally, Mr Fofana is said to be individually criminally responsible for the alleged crimes that "were within a common purpose, plan or design" in which he participated, or were "a reasonably foreseeable consequence of the common purpose, plan or design"[209].

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[203] *See* Appendix C (¶ 67, n.203).
[204] *See* Appendix C (¶ 67, n.204).
[205] *See* Appendix C (¶ 67, n.205).
[206] These charges are brought pursuant to Article 6.1, the text of which is virtually identical to the corresponding articles in the statutes of the *Ad Hoc* Tribunals. Again, a review of the jurisprudence of these tribunals may be helpful in defining the specific nature of individual criminal responsibility under the Statute of the Special Court. However, as stated above, such analysis must be tempered by an understanding of the restrictive nature of Article 1.1.
[207] Indictment, ¶ 20. This form of individual criminal responsibility may be characterized as 'direct liability'.
[208] *Ibid.* This form of individual criminal responsibility may be characterized as 'indirect liability'.
[209] *Ibid.* This form of individual criminal responsibility may be characterized as 'group liability'.

70. The Defence submits that Mr Fofana does not bear individual criminal responsibility under Article 6.1, as the evidence reveals he never planned, instigated, ordered, or committed any of the alleged crimes, nor did he otherwise aid or abet the perpetration of any crime. Further, Mr Fofana did not share an illegal common plan, purpose, or design with either of the other accused persons or any other members of the CDF. He did not, therefore, participate in a joint criminal enterprise. To the extent that one of the goals of the CDF was "to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone", this quite simply is not a crime. Rather, it is an example of the natural and legitimate goal of any party to an armed conflict. Finally, it was manifestly not the CDF's intention to achieve "complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathisers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone"[210].

71. As discussed in greater detail below, the Prosecution has failed to present evidence capable of demonstrating that Mr Fofana is individually criminally responsible under Article 6.1. The Prosecution's evidence, if believed, is insufficient for any reasonable trier of fact, including this Chamber, to find that Mr Fofana's guilt has been proved beyond a reasonable doubt. Accordingly, a judgment of acquittal with respect to these charges should be entered.

Generally

72. As discussed above, a core principle of international criminal law is that no individual may be held liable for an act he has not performed, or in the commission of which he has not in some way participated, or for an omission that cannot be attributed to him[211]. With respect to individual criminal responsibility, this doctrine of personal culpability involves two elements: First, no individual may be held liable for crimes perpetrated by other persons; instead he must have physically participated in the crime. Second, no individual may be held liable for a crime unless he was culpable, that is he must also

[210] Indictment, ¶ 6.

[211] Antonio Cassese, INTERNATIONAL CRIMINAL LAW (Oxford 2003) at 136. As noted above, this principle was elucidated by the ICTY Appeals Chamber in *Tadic*, when it stated that "the foundation of criminal responsibility is the principle of *personal culpability*: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated". *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 186 (emphasis added).

have mentally participated in the crime[212]. Thus, perpetration of any criminal offence requires the physical carrying out of prohibited conduct, the *actus reus*, accompanied by the requisite psychological element, the *mens rea*[213].

73. The *actus reus* requires some form of participation in the alleged crime, or an omission where there is a legal duty to act, and varies substantially for each mode of individual criminal responsibility; but in all instances, it must be substantial[214]. With respect to the *mens rea*, while several categories seem to be recognized by developed national criminal legal systems—namely intent, recklessness, culpable negligence, and negligence[215]—the most important categories for individual criminal responsibility are intent and recklessness. Intent, or the will to bring about a certain criminal result, is the *mens rea* required for planning, instigating, ordering, and committing, as well as the basic form of participation in a common purpose, plan, or design[216]. Intent may also be defined as acting in the awareness of the *substantial* likelihood that a criminal act or omission would occur as a consequence of the conduct of the accused. Related to this is knowledge, which should not be considered an autonomous criminal state of mind, but rather a means of entertaining the requisite intent or recklessness, and is especially important for aiding and abetting[217]. Recklessness, or deliberately taking a risk when a certain result is possible although not desired, represents a degree of culpability less than intent[218]. As such, recklessness is more limited in its application[219]. In the instant case, recklessness suffices as the *mens rea* for the extended form of participation in a

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[212] Cassese, n.211 *supra*, at 136-137.

[213] An accused can only be found individually criminally liable for an alleged crime if *both* the *actus reus* and the *mens rea* are satisfied. *See Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeals Chamber, 'Judgement', 1 June 2001, ¶ 186 (reiterating the statement of the Trial Chamber that "there is a further two stage test which must be satisfied in order to establish individual criminal responsibility [which requires] the demonstration of (i) participation, that is the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime".)

[214] The *actus reus* is also defined by the underlying offenses alleged in the Indictment.

[215] Cassese, n.211 *supra*, at 161. Intent is the will to bring about a certain result; recklessness is the awareness that undertaking a course of conduct carries an unjustifiable risk of bringing about a certain result; culpable negligence is the failure to pay sufficient attention to generally accepted standards of conduct, thereby causing a certain result when the individual believes that the result will not occur; negligence is the failure to respect generally accepted standards of conduct without being aware that a certain result will occur.

[216] *Ibid.* at 162. Intent is also the *mens rea* for at least five of the eight underlying crimes alleged in the Indictment.

[217] *Ibid.* at 167. For example, knowledge is an important aspect of aiding and abetting, where individual criminal responsibility arises if the aider and abettor knows that his action will assist the commission of a crime by the principal. Also, knowledge of the factual circumstances that establish the existence of an armed conflict and knowledge that an act was committed as part of a widespread or systematic attack are necessary elements of war crimes and crimes against humanity respectively.

[218] *Ibid.* at 168.

[219] *Ibid.* at 169. Recklessness is also the *mens rea* for two of the eight underlying crimes alleged in the Indictment.

common purpose, plan, or design. Negligence is generally disfavoured as a form of *mens rea* in international criminal law.

Direct Liability – Planning, Instigating, Ordering, or Committing

Planning

74. As defined by the jurisprudence of the *Ad Hoc* Tribunals, planning consists of designing, endorsing, or arranging the commission of a crime. This implies that one or several persons contemplate the crime at both the preparatory and execution phases. The level of participation of the accused in planning a crime must be substantial. If planning is followed by the physical perpetration of the crime by the accused, planning is no longer punishable as a distinct crime, although it may be considered an aggravating factor at sentencing[220]. Any individual who takes part in the planning of a crime may be held liable for the resulting crime, with the *mens rea* being the intent to have the crime committed. It is necessary for the accused to have intended that the planned crime be committed, or else to have known of the substantial likelihood that the planned crime would be perpetrated[221].

75. The Prosecution has presented no evidence that Mr Fofana ever planned the commission of a crime. Although the evidence does suggest he was marginally involved in the planning of certain military operations[222], it must be stressed that such planning was conducted pursuant to a legitimate program of national defence on the part of the CDF. The evidence shows that Mr Fofana intended to further this endeavour by planning lawful military operations; it does not show that he intended to plan crimes[223]. Such a distinction should not be discounted, as planning as a form of individual criminal responsibility only criminalizes the design of *crimes*, not lawful military operations.

Instigating

76. Instigating involves the taking of psychological or physical measures, either positive acts or omissions, designed to prompt someone else to commit a crime. This occurs

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[220] *Ibid.* at 192; *see Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Appeals Chamber, 'Judgement', 17 December 2004, ¶ 26; *Prosecutor v. Bagilishema* , ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 30.
[221] Cassese, n.211 *supra*, at 192; *see Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Appeals Chamber, 'Judgement', 17 December 2004, ¶ 26; *see also Prosecutor v. Galic*, IT-98-29, Trial Chamber, 'Judgement', 5 December 2003, ¶ 172; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 31.
[222] *See* n.161 *supra*.
[223] *See* Appendix D (¶ 75, n.223).

through some form of inducement, encouragement, or persuasion, which may be expressed or implied. Instigation becomes a crime only when explicit, although it need not be direct and public, and when the commission of a crime follows due to a causal connection. While it does not need to be shown that the crime would not have been perpetrated without the participation of the accused, such participation must have been a factor substantially contributing to the commission of the crime[224]. The accused must have intended to instigate or provoke the commission of the crime by another individual, or was at least aware of the substantial likelihood that the commission of the crime would be a consequence of his action. The accused must also possess the *mens rea* concerning the crime that he is instigating[225].

77. The Prosecution has presented no evidence that Mr Fofana ever explicitly or implicitly induced, encouraged, or persuaded any member of the CDF to commit any crime. While there is some evidence that Mr Fofana may have encouraged certain individuals to fight against the junta[226], such encouragement related to the legitimate military goals of the CDF and was not aimed at instigating the commission of crimes. The Defence has found no evidence of a causal connection linking Mr Fofana—as an instigator—to any criminal act.

Ordering

78. Ordering requires that an individual in a position of authority, use his authority to compel an individual, subject to that authority, to commit a crime either through an act or an omission. This presupposes that whoever issues the order is the *de jure* or *de facto* superior to the one who executes it. Although no formal superior-subordinate relationship is required, it must be demonstrated that the accused possessed the authority

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[224] Cassese, n.211 *supra*, at 189; *see Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Appeals Chamber, 'Judgement', 17 December 2004, ¶ 27; *see also Prosecutor v. Naletilic*, IT-98-34, Trial Chamber, 'Judgement', 31 March 2003, ¶ 60; *Prosecutor v. Galic*, IT-98-29, Trial Chamber, 'Judgement', 5 December 2003, ¶ 168; *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, 'Judgement', 1 September 2004, ¶ 269; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 30; *Prosecutor v. Kamuhanda*, ICTR-99-54, Trial Chamber, 'Judgement', 22 January 2004, ¶ 593; *Prosecutor v. Gacumbitsi*, ICTR-2001-64, Trial Chamber, 'Judgement', 17 June 2004, ¶ 279.

[225] Cassese, n.211 *supra*, at 190; *see Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Appeals Chamber, 'Judgement', 17 December 2004, ¶ 32; *see also Prosecutor v. Naletilic*, IT-98-34, Trial Chamber, 'Judgement', 31 March 2003, ¶ 60; *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, 'Judgement', 1 September 2004, ¶ 269.

[226] For example, one Prosecution witness testified that Mr Fofana told him, with respect to the war: "Guys, you just try and if we succeed you will enjoy the future". Another witness indicated that Mr Fofana told some Kamajors at a planning meeting at Base Zero that it was time to implement the training they had received. *See* Appendix D (¶ 77, n.226).

to issue the order[227]. The individual issuing the order must have the requisite *mens rea* for the crime that is to be committed. Additionally, the person issuing the order must have intended for the crime to be committed, or have acted with knowledge of the substantial likelihood that a crime would be committed while implementing the order[228].

79. As outlined in greater detail above, the evidence demonstrates that Mr Fofana was neither a *de jure* nor a *de facto* superior, as he did not exercise authority over any identifiable CDF subordinates. Accordingly, he did not have the ability to order other members of the CDF to *do anything*, let alone perpetrate crimes. For example, there is some evidence that Mr Fofana may have been present when Mr Norman allegedly urged Albert Nallo to investigate reports of rebel infiltrators around Base Zero[229]. However, Mr Fofana cannot be held criminally responsible for Mr Nallo's independent decision to perpetrate crimes under the Statute. The evidence is clear that, to the extent any orders were given to execute suspected rebel infiltrators, such orders came from Mr Norman[230]. While Mr Fofana may have been present when these orders were given[231], the evidence notably fails to show that he had authority over Mr Nallo or that he possessed the requisite *mens rea* with respect to the crimes allegedly committed. Further, to the extent Mr Fofana may have issued putative orders to any other alleged CDF subordinates[232], they were legitimate military directives and not instructions to commit crimes.

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[227] Cassese, n.211 *supra*, at 193-194; *see Prosecutor v. Blaskic*, IT-95-14, Appeals Chamber, 'Judgement', 29 July 2004, ¶ 42; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T , Appeals Chamber, 'Judgement', 17 December 2004, ¶ 28; *Prosecutor v. Semanza*, ICTR-97-20, Appeals Chamber, 'Judgement', 20 May 2005, ¶ 361; *see also Prosecutor v. Naletilic*, IT-98-34, Trial Chamber, 'Judgement', 31 March 2003, ¶ 61; *Prosecutor v. Sakic*, IT-97-24, Trial Chamber, 'Judgement', 31 July 2003, ¶ 445; *Prosecutor v. Galic*, IT-98-29, Trial Chamber, 'Judgement', 5 December 2003, ¶ 168; *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, 'Judgement', 1 September 2004, ¶ 270; *Prosecutor v. Strugar*, IT-01-42, Trial Chamber, 'Judgement', 31 January 2005, ¶ 331; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 30; *Prosecutor v. Kamuhanda*, ICTR-99-54, Trial Chamber, 'Judgement', 22 January 2004, ¶ 594; *Prosecutor v. Gacumbitsi*, ICTR-2001-64, Trial Chamber, 'Judgement', 17 June 2004, ¶ 281-282.

[228] Cassese, n.211 *supra*, at 193-194; *see Prosecutor v. Blaskic*, IT-95-14, Appeals Chamber, 'Judgement', 29 July 2004, ¶ 42; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Appeals Chamber, 'Judgement', 17 December 2004, ¶ 30; *see also Prosecutor v. Strugar*, IT-01-42, Trial Chamber, 'Judgement', 31 January 2005, ¶ 333.

[229] Albert Nallo claims he went to Baoma Village in Bo District sometime in 1997 (while he was at Base Zero) on the orders of Mr Norman and Mr Fofana who said they had information that rebels had been infiltrating a market there. The witness claims he went with five other Kamajors, one of whom identified a Fullah man as a rebel. The witness further claims that he and his Kamajors took the man behind a school building and shot him dead. *See* Appendix D (¶ 79, n.229).

[230] *Ibid.*

[231] *Ibid.*

[232] *See* nn.178-183 *supra*.

Committing

80. Committing involves the physical and direct commission by the accused of the material elements of a crime through positive acts, either directly or indirectly, or engendering a culpable omission in violation of a rule of criminal law. Individual criminal responsibility for committing may occur individually or jointly with others, so long as each is responsible for participating in the crime, in which case all associated become co-perpetrators. While the accused need not have participated in all aspects of the criminal conduct, such participation that did occur must have made a substantial contribution. The specific *actus reus* elements that must be committed are derived from the substantive crimes[233]. The *mens rea* for committing is either intent for a crime to occur as a result of the acts omissions, or the knowledge of the substantial likelihood that criminal conduct would occur as a consequence of the acts or omissions[234].

81. The Prosecution has failed to present evidence sufficient to establish that Mr Fofana himself physically engaged in criminal behaviour. Although, admittedly, there is some indication that he may have been present at the alleged killing of two individuals (Mustapha Fallon and Alpha Dauda Kanu[235]), neither the quantity nor the quality of this evidence—limited to two statements by Mr Nallo, both vague in the extreme—is sufficient to prove that Mr Fofana, through his own unlawful act or omission brought about the death of either victim, much less that he was motivated by the intent to kill[236].

None of the Acts or Omissions of Mr Fofana had a Direct and Substantial Effect on the Perpetration of Any of the Alleged Crimes

82. All four previously discussed forms of direct liability—planning, instigating, ordering, and committing—require that the acts or omissions of the accused have a direct and substantial effect on the commission of the crime. Assuming, *arguendo*, the evidence establishes that Mr Fofana has, for example, been involved in the planning of a

[233] Cassese, n.211 *supra*, at 180-181; *see Prosecutor v. Naletilic*, IT-98-34, Trial Chamber, 'Judgement', 31 March 2003, ¶ 62; *Prosecutor v. Sakic*, IT-97-24, Trial Chamber, 'Judgement', 31 July 2003, ¶ 439; *Prosecutor v. Simic*, IT-95-9, Trial Chamber, 'Judgement', 17 October 2003, ¶ 137; *Prosecutor v. Galic*, IT-98-29, Trial Chamber, 'Judgement', 5 December 2003, ¶ 168; *Prosecutor v. Blagojevic*, IT-02-60, Trial Chamber, 'Judgement', 17 January 2005; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 29; *Prosecutor v. Kamuhanda*, ICTR-99-54, Trial Chamber, 'Judgement', 22 January 2004, ¶ 595.
[234] Cassese, n.211 *supra*, at 181; *see Prosecutor v. Sakic*, IT-97-24, Trial Chamber, 'Judgement', 31 July 2003, ¶ 442; *Prosecutor v. Simic*, IT-95-9, Trial Chamber, 'Judgement', 17 October 2003, ¶137.
[235] *See* Appendix D (¶ 81, n.235).
[236] In addition to proving the death of a victim as the result of the unlawful act or omission of the accused or his subordinate (*actus reus*), Murder, as both a Crime Against Humanity and a War Crime, requires a showing that the alleged perpetrator was motivated by the intent to kill or to inflict serious bodily harm (*mens rea*).

particular offence, because the Prosecution has failed to show that such participation was direct and substantial, it does not rise to the level required to incur individual criminal responsibility. Specifically, all the evidence which points to Mr Fofana's possible involvement in planning (albeit legitimate military planning)[237] shows him to be a minor figure within the CDF, merely standing in the shadow of Mr Norman. Moreover, the evidence does not establish that Mr Fofana ever acted with criminal intent or with the knowledge that criminal conduct would occur as a result of his acts or omissions. Accordingly, he cannot be held directly criminally responsible for any of the crimes alleged in the Indictment.

Indirect Liability – Aiding and Abetting

83. As expressed in the Statute and pleaded in the Indictment, an individual may also participate in a crime simply through acts or omissions directed to assist the perpetrator of the crime. Aiding and abetting consists of practical assistance, encouragement, or moral support by the accessory to the principal author of the main crime, with such support having a substantial effect on the perpetration of the crime. It is not necessary to prove that the assistance caused the crime, and such assistance may happen before, during, or after the crime, or at another location. The acts of the principal, which the accused is alleged to have aided and abetted, must be established. While the presence of a superior during the commission of a crime can be indicative of encouragement or support, such an inference must be supported by strong evidence[238].

84. The *mens rea* for aiding and abetting is not the criminal intent of the perpetrator; rather it involves the accessory having the knowledge that his actions assist the perpetrator in the commission of the crime. The accessory must also be aware of the essential elements of the crime, including the *mens rea* of the principal[239]. An individual that aids and abets a

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[237] *See* ¶¶ 25-29 *supra*.

[238] Cassese, n.211 *supra*, at 188; *see Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 229; *Prosecutor v. Blaskic*, IT-95-14, Appeals Chamber, 'Judgement', 29 July 2004, ¶ 48; *see also Prosecutor v. Naletilic*, IT-98-34, Trial Chamber, 'Judgement', 31 March 2003, ¶ 63; *Prosecutor v. Simic*, IT-95-9, Trial Chamber, 'Judgement', 17 October 2003, ¶¶ 161-162; *Prosecutor v. Galic*, IT-98-29, Trial Chamber, 'Judgement', 5 December 2003, ¶ 168; *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, 'Judgement', 1 September 2004, ¶ 271; *Prosecutor v. Blagojevic*, IT-02-60, Trial Chamber, 'Judgement', 17 January 2005, ¶ 726; *Prosecutor v. Strugar*, IT-01-42, Trial Chamber, 'Judgement', 31 January 2005, ¶ 349; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 33; *Prosecutor v. Kamuhanda*, ICTR-99-54, Trial Chamber, 'Judgement', 22 January 2004, ¶¶ 596-597; *Prosecutor v. Gacumbitsi*, ICTR-2001-64, Trial Chamber, 'Judgement', 17 June 2004, ¶ 286.

[239] Cassese, n.211 *supra*, at 188; *see Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 229; *Prosecutor v. Blaskic*, IT-95-14, Appeals Chamber, 'Judgement', 29 July 2004, ¶ 50; *see also*

crime must know that his support or assistance helps the perpetrator in the commission of the crime. It is inaccurate to refer to aiding and abetting a joint criminal enterprise, as it is merely a means of committing a crime, not a crime in itself[240].

85. Because the Prosecution's evidence fails to show that Mr Fofana provided practical assistance, encouragement, or moral support to any of the individual perpetrators of the alleged crimes, there must be an acquittal as to this form of individual criminal responsibility. To the extent that he did provide such assistance, encouragement, or support, the evidence shows that this did not have a substantial effect on the perpetration of the crime. Moreover, Mr Fofana was not aware of the essential elements of any of the crimes that were committed, especially the *mens rea* of the alleged perpetrators. While it may be unclear whether certain unidentified members of the CDF were conducting military operations with the intent to commit any of the crimes charged in the Indictment, Mr Fofana, as a potential aider and abetter, was certainly unaware of such hypothetical intentions. Accordingly, he cannot be held indirectly criminally responsible for any of the acts alleged in the Indictment.

Group Liability – Common Purpose, Plan, or Design

86. It must be reiterated here that, to the extent that one of the goals of the CDF was "to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone", this simply does not amount to criminal behaviour. On the contrary, it describes the legitimate goal of any party to an armed conflict. Yet the Prosecution has nonetheless attempted to criminalise the CDF as an organisation. As discussed in greater detail below, this is manifestly at odds with the state of the law.

87. The idea of individual criminal responsibility arising from participation in a common purpose, plan, or design—also referred to as membership in a joint criminal enterprise—is not provided for in the Statute of the Special Court. Rather, it is a concept that exists as

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Prosecutor v. Naletilic, IT-98-34, Trial Chamber, 'Judgement', 31 March 2003, ¶ 63; *Prosecutor v. Simic*, IT-95-9, Trial Chamber, 'Judgement', 17 October 2003, ¶ 163; *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, 'Judgement', 1 September 2004, ¶¶ 272-273; *Prosecutor v. Blagojevic*, IT-02-60, Trial Chamber, 'Judgement', 17 January 2005, ¶ 727; *Prosecutor v. Strugar*, IT-01-42, Trial Chamber, 'Judgement', 31 January 2005, ¶ 350; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001, ¶ 32; *Prosecutor v. Kamuhanda*, ICTR-99-54, Trial Chamber, 'Judgement', 22 January 2004, ¶¶ 599-600.

[240] Cassese, n.211 *supra*, at 188; *see Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 229; *Prosecutor v. Vasiljevic*, IT-98-32, Appeals Chamber, 'Judgement', 25 February 2004, ¶ 102; *Prosecutor v. Kvocka*, IT-98-30, Appeals Chamber, 'Judgement', 28 February 2005, ¶¶ 90-91.

customary international law, as defined by the jurisprudence of the *Ad Hoc* Tribunals[241]. As noted above, a core principle of international criminal law is that individuals may only be held liable for their own actions, not those of others. Thus, no individual may be held answerable for the acts or omissions of organizations to which he belongs, unless he bears personal responsibility for a particular act or omission.

88. Three forms of joint criminal enterprise were developed by the Appeals Chamber in *Tadic*, and have been recognized by subsequent decisions of the ICTY and ICTR[242]. In the instant case, the Prosecution has pleaded the first and third[243]. The first, or basic, form of joint criminal enterprise involves cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intent. The third, or extended, form of joint criminal enterprise involves cases where there is a common purpose to commit a crime, and where one of the co-perpetrators commits an act which, while outside the common purpose, was a natural and foreseeable consequence of carrying out the common purpose[244].

89. The *actus reus* for all three forms of joint criminal enterprise requires: (i) a plurality of persons; (ii) the existence of a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the participation of the accused in the common criminal plan[245]. The plurality of persons

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[241] In *Tadic*, the Appeals Chamber definitively held that "the notion of common design as a form of ... liability is firmly established in customary international law". *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 220. This decision was explicitly reaffirmed by the Appeals Chamber in *Milutinovic*, when in deciding a motion challenging jurisdiction based on joint criminal enterprise, it held that joint criminal enterprise existed under customary international law and was provided for in the ICTY statute. *Prosecutor v. Milutinovic et al.*, IT-99-37, Appeals Chamber, 'Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise', 21 May 2003, ¶ 30. In multiple decisions, the ICTY and ICTR have held that joint criminal enterprise is a form of "commission" under the statute, and should be considered as a form of co-perpetration. *See, e.g., Prosecutor v. Kvocka*, IT-98-30-A, Appeals Chamber, 'Judgement', 28 February 2005, ¶ 79.

[242] *See Prosecutor v. Tadic*, IT-94-A, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 220; *Prosecutor v. Vasiljevic*, IT-98-32-A, Appeals Chamber, 'Judgement', 25 February 2004, ¶¶ 97-99; *Prosecutor v. Kvocka*, IT-98-30-A, Appeals Chamber, 'Judgement', 28 February 2005, ¶¶ 81-83; *Prosecutor v. Ntakirutimana*, ICTR-96-10, Appeals Chamber, 'Judgement', 13 December 2004, ¶¶ 463-465.

[243] The second form of joint criminal enterprise is associated with "concentration camp" cases, and is a variant of the first form, characterized by the existence of an organized system of ill-treatment. *See Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 220.

[244] *See Prosecutor v. Vasiljevic*, IT-98-32-A, Appeals Chamber, 'Judgement', 25 February 2004, ¶¶ 97-99.

[245] *See Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 227; *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber, 'Judgement', 17 September 2003, ¶ 31; *Prosecutor v. Vasiljevic*, IT-98-32-A, Appeals Chamber, 'Judgement', 25 February 2004, ¶ 100; *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, Appeals Chamber, 'Judgement', 13 December 2004, ¶ 466; *see also Prosecutor v. Sakic*, IT-97-24-T, Trial Chamber, 'Judgement', 31 July 2003, ¶ 435; *Prosecutor v. Simic*, IT-95-T, Trial Chamber, 'Judgement', 17

need not be organized within any formal structure. Also, the common criminal plan or purpose need not be previously arranged or formally set out, but may arise extemporaneously and be inferred from the fact that a plurality of persons acted in unison to put into effect a joint criminal enterprise. An individual may participate in a joint criminal enterprise by contributing to, or assisting in, the execution of the common purpose, either directly or indirectly. Such participation must have been in furtherance of the common purpose, that is it must have had a causal connection, although it need not have been essential[246]. It may also be required that the accused enter into an agreement or understanding with the individual that commits the crime, not just their military superior[247].

90. The *mens rea* of joint criminal enterprise differs according to which of the three forms is alleged. The basic form requires that the accused had the intent to perpetrate a specific crime that was within the common purpose, an intent shared with the other co-perpetrators. The accused must have voluntarily participated in the joint criminal enterprise and intended the criminal result. The extended form requires that that the accused intended to participate in and further the common purpose of the joint criminal enterprise, and that the crime that was beyond the common purpose was a natural and foreseeable consequence, and the accused willingly took the risk that it would occur. In other words, being aware that such a crime was a natural and foreseeable consequence of the joint criminal enterprise, and with that awareness, the accused decided to participate in the enterprise[248]. A determination of what is natural and foreseeable requires an analysis of the position of the accused within the joint criminal enterprise, dependent on the information available to him[249].

October 2003, ¶ 156; *Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber, 'Judgement', 1 September 2004, ¶; *Prosecutor v. Blagojevic*, IT-02-60-T, Trial Chamber, 'Judgement', 17 January 2005, ¶ 698.

[246] *Ibid.*

[247] *See Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber, 'Judgement', 1 September 2004, ¶ 347. Although perhaps not much reliance should be placed on this decision, as it was issued by the trial chamber and is currently on appeal.

[248] *See Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber, 'Judgement', 15 July 1999, ¶ 227; *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber, 'Judgement', 17 September 2003, ¶ 31; *Prosecutor v. Vasiljevic*, IT-98-32-A, Appeals Chamber, 'Judgement', 25 February 2004, ¶ 100; *Prosecutor v. Kvocka*, IT-98-30-A, Appeals Chamber, 'Judgement', 28 February 2005, ¶¶ 81-83; *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, Appeals Chamber, 'Judgement', 13 December 2004, ¶ 466; *see also Prosecutor v. Sakic*, IT-97-24-T, Trial Chamber, 'Judgement', 31 July 2003, ¶ 435; *Prosecutor v. Simic*, IT-95-9-T, Trial Chamber, 'Judgement', 17 October 2003, ¶ 156; *Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber, 'Judgement', 1 September 2004, ¶ 260; *Prosecutor v. Blagojevic*, IT-02-60-T, Trial Chamber, 'Judgement', 17 January 2005, ¶ 698.

[249] *See Prosecutor v. Kvocka*, IT-98-30-A, Appeals Chamber, 'Judgement', 28 February 2005, ¶ 86.

91. In the Indictment, the Prosecution states that the "plan, purpose or design" of the accused and subordinate members of the CDF was to "use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone"[250]. Yet clearly lacking the requisite criminal purpose, this enterprise itself is simply not a crime as provided by the Statute[251]. By describing the legitimate goals of the CDF as criminal, the Prosecution has thereby attempted to criminalise the entire organisation.

92. As outlined in more detail above, the purpose of the CDF was to defend its homeland and liberate the country from the RUF and the AFRC at the direction of the Government. The evidence suggests that individual members of the CDF were generally apprised of and adhered to this official policy. The violations alleged in the Indictment—to the extent they occurred—were the fault of renegade commanders and individual Kamajors who did not adhere to the stated rules, which explicitly required the protection of civilians and forbade acts such as looting and harassing the population[252]. These isolated transgressions were not the result of a general criminal policy. Rather, the offenders acted outside their authority and their behaviour was neither condoned by, nor largely brought to the attention of, their superiors within the CDF.

93. Assuming *arguendo* a smaller joint criminal enterprise existed among the top leadership of the CDF, to commit any of the crimes listed in the Indictment, Mr Fofana did not share the intent of his fellow CDF members and cannot be held responsible for their actions. Further, assuming Mr Fofana's membership in such an enterprise, given his minor role within the CDF, it would not be natural and foreseeable from his perspective that other crimes would be committed in the course of carrying out the criminal purpose of the CDF.

94. Additionally, it must be noted here that, because joint criminal enterprise liability serves to expand the potential culpability of criminal defendants far beyond their physical perpetration of crimes, the doctrine, if not limited appropriately, has the potential to lapse into a form of guilt by association, "thereby undermining the legitimacy and the

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[250] The Prosecution elaborated on the alleged criminal purpose by stating that "[t]his included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone". Indictment, ¶ 19.
[251] A joint criminal enterprise requires the existence of a common plan, design, or purpose *which amounts to or involves the commission of a crime* provided for in the Statute. *See* ¶ 89 *supra*.
[252] See Appendix D (¶ 92, n.252).

ultimate effectiveness of international criminal law"[253]. Therefore, the scope of the enterprise and the Accused's relationship to it must be defined with precision; the Prosecution should not be permitted to employ joint criminal enterprise as a vehicle for organizational liability[254]. This is contrary to the principle of individual culpability[255] and "raises the spectre of guilt by association"[256].

95. Accordingly, there is no evidence capable of supporting a conviction on the common criminal purpose, plan, or design theory advanced by the Prosecution. The evidence, if believed, is insufficient for any reasonable trier of fact, let alone this Chamber, to find that Mr Fofana's guilt has been proved beyond a reasonable doubt.

Analysis of Individual Counts

Counts One through Five

96. For the reasons stated in greater detail above, Counts One through Five should be dismissed in their entirety. The Prosecution has failed to present sufficient evidence that Mr Fofana bears individual criminal responsibility for these allegations under either Article 6.1 or 6.3.

97. As the evidence clearly demonstrates, Mr Fofana did not plan, instigate, order, or commit murder[257], inhumane acts[258], cruel treatment[259], or pillage[260] in any of the locations alleged by the Prosecution in Counts One through Five. Nor did he aid and abet the planning, preparation, or execution of these alleged acts. Furthermore, Mr Fofana most certainly did not participate in any criminal enterprise. There is simply no evidence capable of supporting a conviction on Counts One through Five of the Indictment.

98. The Prosecution's evidence, if believed, is insufficient for any reasonable trier of fact, let alone this Chamber, to find that Mr Fofana's guilt has been proved beyond a

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[253] Danner and Martinez, n.24 *supra*, at 79.
[254] "What is the limit to intended or foreseeable wrongdoing in a country wracked by ethnic cleansing and armed conflict?" *Ibid.*, at 135.
[255] "Joint criminal enterprise provides an example of an international criminal doctrine where certain aspects of the human rights and transitional justice influences in international criminal law are in danger of overpowering the restraining force of the criminal law tradition". *Ibid.*, at 132.
[256] *Ibid.*, at 137.
[257] As alleged in Counts One and Two of the Indictment at ¶ 25.
[258] As alleged in Count Three of the Indictment at.¶ 26.
[259] As alleged in Count Four of the Indictment at ¶ 26.
[260] As alleged in Count Five of the Indictment at ¶ 27.

reasonable doubt. Accordingly, the Defence respectfully moves this Chamber to enter a judgment of full acquittal with respect to Counts One through Five.

Counts Six and Seven

99. In Count Six, the Prosecution alleges that, at all times relevant to the Indictment, the CDF, largely Kamajors, committed the crimes alleged in Counts One through Five as part of a campaign to terrorise the civilian population of the specified geographic locations[261]. The Prosecution further alleges that, Mr Fofana, by his acts or omissions in relation to the allegations contained in Counts One through Five, is individually criminally responsible for committing Acts of Terrorism, a War Crime[262].

100. Further, in Count Seven, the Prosecution alleges that, at all times relevant to the Indictment, the CDF, largely Kamajors, committed the crimes alleged in Counts One through Five to punish the civilian population of the specified geographic locations for its support of, or failure to actively resist, the combined RUF/AFRC forces[263]. The Prosecution further alleges that, Mr Fofana, by his acts or omissions in relation to the allegations contained in Counts One through Five, is individually criminally responsible for administering Collective Punishment, a War Crime[264].

101. As noted above, Counts Six and Seven have never before been charged by an international prosecutor or tried by an international criminal tribunal. "Acts of Terrorism" and "Collective Punishments" are nowhere discussed in the jurisprudence of the *Ad Hoc* Tribunals nor are their elements defined in the Addendum of the Rome Statute establishing the International Criminal Court, which purports to be a comprehensive digest of international crimes.

102. The Defence submits that this is because these "concepts" are not in themselves crimes *per se*. Rather, in theory, each represents a mere method, strategy, or vehicle for carrying out other crimes. As pleaded by the Prosecution, each appears as a sort of umbrella-crime, making reference to and putatively subsuming the preceding counts of the Indictment. While perhaps appropriately discussed in prosecutors' conference-rooms or reviewed in academic journals, these concepts have no place within the four corners of a

[261] Indictment, ¶ 28.
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.*

criminal indictment for the simple reason that they are not crimes. Indeed, as no discernable constituent elements exist with respect to these proposed offences, their inclusion in the Indictment violates the fundamental principle of *nullum crimen sine lege*[265]. Requiring Mr Fofana to answer these charges would amount to a miscarriage of justice. Accordingly, Counts Six and Seven must be dismissed in their entirety.

103. As the Appeals Chamber has noted, criminal rules must be specific in order to ensure "that all those who may fall under the prohibition of the law know in advance precisely which behaviour is allowed and which conduct is instead proscribed"[266]. The principle of legality requires "general agreement to a formulation of the offence which satisfies the basic standards for any serious crime, namely a clear statement of the conduct which is prohibited and a satisfactory requirement for the proof of *mens rea*"[267]. However, nowhere are the elements of Counts Six and Seven specified.

104. The temptation to criminalise seriously antisocial or immoral behaviour not yet recognised as sanctionable criminal conduct, "must be firmly resisted by international law judges, with no legislature to correct or improve upon them and with a subject—international criminal law—which came into effective operation as recently as the judgement at Nuremberg in 1946. … [I]t is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a household phrase, but it serves as some protection against the lynch mob"[268].

105. Justice Robertson argues that, in order for an international criminal tribunal to recognize a new criminal offence without violating the principle of legality, it must first be shown that the constituent elements of the proposed crime are "clear and in

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[265] "No crime without law", also known as the principle of legality: Conduct, however appalling, is not unlawful unless there is a criminal law against it in force at the time it was committed. This principle is enshrined in all democratic legal systems and in international law. *See, e.g.*, Article 15 of the International Covenant on Civil and Political Rights: "No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".

[266] *Prosecutor v. Norman, et al.*, SCSL-2004-14-AR72(E)-131, Appeals Chamber, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)', 14 June 2004, ¶ 40, citing Cassese, n.211 *supra*, at 145.

[267] *Prosecutor v. Norman, et al.*, SCSL-2004-14-AR72(E)-131, Appeals Chamber, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)', 14 June 2004, Dissenting Opinion of Justice Robertson, ¶ 34.

[268] *Ibid.*, ¶ 12. *Nullem crimen* "is the very basis of the rule of law … It is the reason why we are ruled by law and not by police". *Ibid.*, ¶ 14.

accordance with fundamental principles of criminal liability"[269]. This is necessary because the "[e]levation of an offence to the category of an international crime means that individuals credibly accused of that crime will lose the protection of their national law and it may as well lose them such protections as international law would normally afford"[270]. However, as mentioned above, the "crimes" alleged in Counts Six and Seven have no identifiable elements.

106. It is appropriate at this point to make a distinction between international humanitarian law and international criminal law, two intimately related though in no way identical systems. Humanitarian rules are fundamentally different from criminal offences in so far as only the latter implicate the principle of individual culpability. Where humanitarian rules are largely guidelines obliging states to avoid certain behaviour in the context of armed conflicts, international crimes are more severe, amounting as they do to criminal proscriptions the violation of which could lead to prosecution and eventual deprivation of liberty. "That is why not all, or even most, breaches of international humanitarian law, i.e. offences committed in the course of armed conflict, are offences at international criminal law"[271].

107. No doubt, with respect to the concepts articulated in Counts Six and Seven, it can be said there exist humanitarian rules obliging states to avoid this behaviour. However, it is clear that what has not evolved with respect to either of these ideas is "an offence cognisable by international criminal law which permit[s] the trial and punishment of individuals"[272]. In order to protect the fundamental rights of the accused[273], these counts must be dismissed. Accordingly, the Defence respectfully moves this Chamber to enter a judgment of full acquittal with respect to Counts Six and Seven.

Count Eight

108. The Prosecution alleges that, at all times relevant to the Indictment, throughout the Republic of Sierra Leone, the CDF initiated or enlisted children under the age of fifteen

[269] *Ibid.*, ¶ 17.
[270] *Ibid.*, ¶ 33.
[271] *Ibid.*, ¶ 33.
[272] *Ibid.*, ¶ 33.
[273] "If international criminal law adopts the common law principle that in cases of real doubt as to the existence or definition of a criminal offence, the benefit of that doubt must be given to the defendant". *Ibid.*, ¶ 6.

years into armed forces or groups and/or used them to participate actively in hostilities[274]. The Prosecution further alleges that, Mr Fofana, by his acts or omissions in relation to the above-alleged events, is individually criminally responsible for enlisting and using child soldiers, a Serious Violation of International Humanitarian Law[275]. As noted above, Count Eight has never before been charged by an international prosecutor or tried by an international criminal tribunal. Indeed, this charge was the subject of pre-trial litigation before this Chamber resulting in a decision of the Appeals Chamber[276].

109. No witness has testified that Mr Fofana planned, instigated, ordered, or committed the conscription or enlistment of anyone into the CDF, let alone persons under the age of fifteen years[277]. Nor is there any evidence that Mr Fofana similarly "used" any person under fifteen to participate actively in hostilities or that he did so as part of a common purpose, plan, or design. Additionally, there is no evidence that anyone shown to be legally subordinate to Mr Fofana engaged in the proscribed conduct.

110. A single witness did testify that Mr Fofana attended a meeting at Base Zero in January of 1998 and that present at this meeting were children who had gone into battle[278]. However, there is absolutely no evidence that these alleged, unidentified "children" were under the age of fifteen years or that Mr Fofana knew or should have known that these individuals were younger than fifteen[279]. Indeed, there is no evidence that Mr Fofana even observed their presence at the meeting. Consequently, there is no evidence capable of supporting a conviction on Count Eight of the Indictment.

111. Again, the Prosecution's evidence, if believed, is insufficient for any reasonable trier of fact, including this Chamber, to find that Mr Fofana's guilt has been proved beyond a

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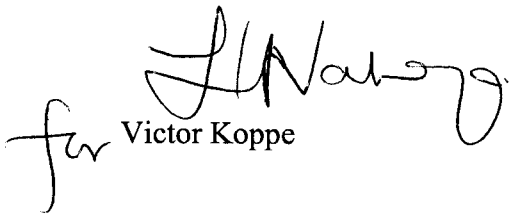
[274] Indictment, ¶ 29.
[275] *Ibid.* Article 4 of the Statute makes it an international crime to "[conscript or enlist] children under the age of 15 years into armed forces or groups or [to use] them to participate actively in hostilities". This language was taken, verbatim, from Article 8(2)(b)(xxvi) of the Rome Statute establishing the International Criminal Court.
[276] *Prosecutor v. Norman, et al.*, SCSL-2004-14-AR72(E)-131, Appeals Chamber, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)', 14 June 2004. It must be noted here that Count Eight does not specify the actual period at which the alleged enlistment offence or its more serious alternative—using children in combat—is alleged to have been committed, other than by making reference to "times relevant to this indictment."
[277] The first element of Count Eight requires a showing 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. The constituent elements of the offence charged in Count Eight are set forth only in the Addendum of the Rome Statute establishing the International Criminal Court. *See* UN Doc. PCNICC/2000/1/Add.2(2000).
[278] TF2-017, Tr. of 19 November 2004 at 87, 90 (Witness attended a meeting at Base Zero in January 1998. Mr Fofana was present along with children who had gone to battle.)
[279] *See* UN Doc. PCNICC/2000/1/Add.2(2000).

reasonable doubt. Accordingly, the Defence respectfully moves for the entry of a judgment of full acquittal with respect to Count Eight.

CONCLUSION

112. For the reasons set forth above, the Defence respectfully submits that Mr Fofana must be acquitted of any and all liability as to all counts in the Indictment.

COUNSEL FOR MOININA FOFANA



for Victor Koppe

APPENDIX A

Defence List of Authorities

Statue & Rules

1. Statute of the Special Court for Sierra Leone, Articles 1, 2, 3, and 6

2. SCSL Rules of Procedure and Evidence, Rule 98 (current and former)

3. ICTR Rules of Procedure and Evidence, Rule 98*bis*

Jurisprudence of the Special Court

4. *Prosecution v. Norman et al.*, SCSL-2004-14-AR73-398, Appeals Chamber, 'Decision on Appeal Against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 18 May 2005

5. *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment', 18 May 2005

6. *Prosecutor v. Norman et al.*, SCSL-2004-14-AR72(E)-131, Appeals Chamber, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' and 'Dissenting Opinion of Justice Robertson', 14 June 2004

7. *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-34, Appeals Chamber, 'Separate Opinion of Justice Geoffrey Robinson to the Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)', 15 March 2004

8. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-419, Trial Chamber I, 'Scheduling Order on Filing of Submissions by the Parties Should a Motion for Judgment of Acquittal be Filed by Defence', 2 June 2005

9. *Prosecutor v Norman et al.*, SCSL-2004-14-T-170, Trial Chamber I, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', 2 August 2004

10. *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-026, Trial Chamber I, 'Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana', 3 March 2004

Jurisprudence of the Ad Hoc Tribunals

11. *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber, 'Judgement', 2 September 1998

12. *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber, 'Judgement', 7 June 2001

13. *Prosecutor v. Blagojevic*, IT-02-60-T, Trial Chamber, 'Judgement', 17 January 2005

14. *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber, 'Judgement', 29 July 2004

15. *Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber, 'Judgement', 1 September 2004

16. *Prosecutor v. Delalic et al.*, IT-96-21-A, Appeals Chamber, 'Judgement', 20 February 2001

17. *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, 'Judgement', 16 November 1998

18. *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Trial Chamber, 'Judgement', 17 June 2004

19. *Prosecutor v. Galic*, IT-98-29-T, Trial Chamber, 'Judgement', 5 December 2003

20. *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Trial Chamber, 'Decision on Motions for Acquittal Pursuant to Rule *98bis* of the Rules of Procedure and Evidence', 27 September 2004

21. *Prosecutor v. Jelisic*, IT-95-10-A, Appeals Chamber, 'Judgement', 5 July 2001

22. *Prosecutor v. Kamuhanda*, ICTR-99-54-T, Trial Chamber, 'Judgement', 22 January 2004

23. *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeals Chamber, 'Judgement', 1 June 2001

24. *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Trial Chamber, 'Judgement', 21 May 1999

25. *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Appeals Chamber, 'Judgement', 17 December 2004

26. *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Trial Chamber, 'Judgement', 26 February 2001

27. *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Trial Chamber, 'Decision on Defence Motions for Judgement of Acquittal', 6 April 2000

28. *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber, 'Judgement', 17 September 2003

29. *Prosecutor v. Kunarac et al.*, IT-96-23-T & 23/1-T, Trial Chamber, 'Judgement', 22 February 2001

30. *Prosecutor v. Kunarac et al.*, IT-96-23-T & 23/1-T, Trial Chamber, 'Decision on Motion for Acquittal', 3 July 2000

31. *Prosecutor v. Kvocka, et al.*, IT-98-30/1-T, Appeals Chamber, 'Judgement', 28 February 2005

32. *Prosecutor v. Kvocka, et al.*, IT-98-30/1-T, Trial Chamber, 'Judgement', 2 November 2001

33. *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, Trial Chamber, 'Decision on Defence Motions for Acquittal', 15 December 2000

34. *Prosecutor v. Milosevic*, IT-02-54-T, Trial Chamber, 'Decision on Motion for Judgement of Acquittal', 16 June 2004

35. *Prosecutor v. Milutinovic et al.*, IT-99-37-A, Appeals Chamber, 'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise', 21 May 2003

36. *Prosecutor v. Nahimana et al.*, ICTR-96-11-T, Trial Chamber, 'Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal', 25 September 2002

37. *Prosecutor v. Naletilic*, IT-98-34-T, Trial Chamber, 'Judgement', 31 March 2003

38. *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Chamber, 'Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*', 13 March 2002

39. *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, Appeals Chamber, 'Judgement', 13 December 2004

40. *Prosecutor v. Nyiramasuhuko et al.*, IT-98-42-T, Trial Chamber, 'Decision on Defence Motions for Acquittal Under Rule 98*bis*, 16 December 2004

41. *Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Chamber, 'Judgement', 6 December 1999

42. *Prosecutor v. Sakic*, IT-97-24-T, Trial Chamber, 'Judgement', 31 July 2003

43. *Prosecutor v. Semanza*, ICTR-97-20-A, Appeals Chamber, 'Judgement', 20 May 2005

44. *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Chamber, 'Judgement', 15 May 2003

45. *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Chamber, 'Decision on Defence Motion for Judgement of Acquittal', 27 September 2001

46. *Prosecutor v. Sikirica*, IT-95-8-T, Trial Chamber, 'Judgement on Defence Motions to Acquit', 3 September 2001

47. *Prosecutor v. Simic*, IT-95-9-T, Trial Chamber, 'Judgement', 17 October 2003

48. *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, 'Judgement', 31 January 2005

49. *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber, 'Judgement', 15 July 1999

50. *Prosecutor v. Vasiljevic*, IT-98-32-A, Appeals Chamber, 'Judgement', 25 February 2004

Other Authorities

51. UN Security Council Resolution 1315 of 14 August 2000, S/RES/1315 (2000)

52. UN Charter, Articles 2(4) and 51

53. International Covenant on Civil and Political Rights, Article 4

54. European Convention on Human Rights, Article 15

55. United States Supreme Court, *Uphaus v. Wyman,* 360 U.S. 72, 79 (1959)

56. Antonio Cassese, INTERNATIONAL CRIMINAL LAW (Oxford 2003)

57. Liesbeth Zegveld, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW, (Cambridge 2002)

58. Ilias Bantekas, 'The Contemporary Law of Superior Responsibility', American Journal of International Law, v.93, no. 3, July 1999, available at http://www.torturers.net/analysis/bantekas.html

59. Lansana Gberie, 'Sierra Leone: The Mysteries of a Special War Crimes Trial', ZNet Africa, 6 July 2004, available at http://www.zmag.org/content/print_article.cfm?itemID=5839&sectionID=2

60. Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 Calif. L. Rev. 75, 79 (January 2005)

61. Peter Penfold, 'Is This Justice?: Sierra Leone's Special Court Drags On', ZNet Africa, 20 January 2005, available at http://www.zmag.org/content/print_article.cfm?itemID=7066&sectionID=2

62. Marco Sassoli & Laura M. Olson, 'The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic Case', 82 Int'l Rev. Red Cross 733, 755 (2000)

63. Michelle Staggs and Sara Kendall, 'Interim Report on the Special Court for Sierra Leone', UC Berkeley War Crimes Studies Centre (April 2005)

APPENDIX B

Evidence Regarding 'Personal Jurisdiction Under Article 1.1' (From Paragraphs 20-45 of the Motion)

The CDF Was a Legitimate Armed Opposition Group

¶ 27, n.54: TF2-005, Tr. of 17 February 2005 at 31, 34.

¶ 28, n.55: TF2-223, Tr. of 28 September 2004 at 20-21; TF2-201, Tr. of 5 November 2004 at 117; TF2-190, Tr. of 10 February 2005 at 60, 91; TF2-001, Tr. of 15 February 2005 at 17; TF2-005, Tr. of 15 February 2005 at 86, Tr. of 16 February 2005 at 67; TF2-014, Tr. of 14 March 2005 at 60-61, Tr. of 15 March 2005 at 26; TF2-079, Tr. of 26 May 2005 at 15; TF2-140, Tr. of 14 September 2004 at 92-94, 145; TF2-096, Tr. of 8 November 2004 at 17-18; TF2-147, Tr. of 10 November 2004 at 22; TF2-EW1, Tr. of 14 June 2005 at 50; Exhibit 117 at 1-2.

¶ 28, n.56: TF2-005, Tr. of 16 February 2005 at 67.

¶ 28, n.57: TF2-005, Tr. of 16 February 2005 at 67.

¶ 28, n.58: TF2-008, Tr. of 17 November 2004 at 13; TF2-079, Tr. of 26 May 2005 at 7 and Tr. of 27 May 2005 at 18; Exhibit 117 (The CDF was formed to provide local security.); *Prosecutor v. Norman et al.*, SCSL-2004-14-T-452, 'Prosecution Filing in Relation to Document 58 "Sierra Leone Conflict Mapping Program" (No Peace Without Justice) Pursuant to Order of 14 July 2005', 28 July 2005 (the "NPWJ Report"), at 477 (The CDF recruited members to protect the homeland against the RUF.)

¶ 28, n.59: TF2-EW1, Tr. of 14 June 2005 at 34 ("All CDF operations as far as I can see appear to have been driven by the central strategic idea of the CDF, which was to defend their homelands.")

¶ 28, n.60: The closest any of the witnesses came to supporting the Prosecution's theory were TF2-223, who testified that Mr Norman told the Kamajors that if they eliminated the AFRC, they would form part of the national army, Tr. of 28 September 2004 at 20-21, and TF2-079, who stated that Mr Norman told the Kamajors if they fought hard and liberated the country, they would rule it for three years before handing it back to the Kabbah administration. Tr. of 26 May 2005 at 22. This is hardly sufficient to establish the Prosecution's broad joint criminal enterprise theory.

The Alleged CDF Violations Pale in Comparison to those of the RUF and the AFRC

¶ 30, n.63: Judicial Notice Motion (Annex A, Fact P) and Judicial Notice Decision.

¶ 30, n.64: Exhibit 111 at 11; NPWJ Report at 299, 467.

¶ 31, n.65: Exhibit 111 at 11; NPWJ Report at 299, 323, 464, 478.

¶ 31, n.66: Judicial Notice Motion (Annex A, Fact A) and Judicial Notice Decision.

¶ 31, n.67: Judicial Notice Motion (Annex A, Fact W) and Judicial Notice Decision; NPWJ Report at 299.

¶ 33, n.73: TF2-014, Tr. of 11 March 2005 at 21 (Witness describes a "trinity" at Base Zero: Mr Norman was god, Mr Fofana the son, and Mr Kondewa the Holy Spirit.); TF2-011, Tr. of 8 June 2005 at 31 (The three Accused were like the father, the son, and the Holy Ghost.)

Mr Fofana Merely Played a Supporting Role to the CDF Leadership

The SLPP Government

¶ 35, n.76: TF2-140, Tr. of 14 September 2004 at 92-94; TF2-071, Tr. of 11 November 2004 at 113-114; TF2-014, Tr. of 15 March 2005 at 25, 53.

¶ 35, n.77: TF2-005, Tr. of 16 February 2005 at 2, 27.

¶ 35, n.78: TF2-140, Tr. of 14 September 2004 at 92-94; TF2-201, Tr. of 5 November 2004 at 96; TF2-147, Tr. of 11 November 2004 at 7-8; TF2-005, Tr. of 15 February 2005 at 96-97 and Tr. of 16 February 2005 at 10.

¶ 35, n.79: TF2-EW1, Tr. of 14 June 2005 at 70.

¶ 35, n.80: TF2-079, Tr. of 27 May 2005 at 24.

¶ 35, n.81: TF2-014, Tr. of 14 March 2005 at 60.

The First Accused

¶ 36, n.82: TF2-201, Tr. of 4 November 2004 at 74-75; TF2-008, Tr. of 16 November 2004 at 33; TF2-190, Tr. of 10 February 2005 at 28; TF2-005, Tr. of 15 February 2005 at 93; TF2-014, Tr. of 10 March 2005 at 13.

¶ 36, n.83: TF2-EW1, Tr. of 14 June 2005 at 30.

¶ 36, n.84: TF2-198, Tr. of 15 June 2004 at 17; TF2-162, Tr. of 8 September 2004 at 27; TF2-032, Tr. of 9 September 2004 at 55; TF2-140, Tr. of 14 September 2004 at 87; TF2-042, Tr. of 17 September 2004 at 98; TF2-033, Tr. of 20 September 2004 at 88; TF2-096, Tr. of 8 November 2004 at 18-19; TF2-088, Tr. of 25 November 2004 at 93; TF2-057, Tr. of 29 November 2004 at 110; TF2-088, Tr. of 26 November 2004 at 54; TF2-173, Tr. of 4 March 2005 at 67; TF2-165, Tr. of 7 March 2005 at 17; TF2-109, Tr. of 30 May 2005 at 36.

¶ 36, n.85: TF2-EW1, Tr. of 14 June 2005 at 36.

¶ 36, n.86: TF2-EW1, Tr. of 14 June 2005 at 40.

¶ 36, n.87: TF2-EW1, Tr. of 14 June 2005 at 50 ("To exercise effective command you need to have the responsibility to make decisions, you need to be able to exercise

leadership and you need to be able to exercise control. The person who exercised all three of these for the CDF was Hinga Norman".)

¶ 37, n.88: Exhibit 97, §C3.2 at C-4.

¶ 37, n.89: TF2-005, Tr. of 15 February 2005 at 102 (Mr Norman approved the War Council's recommendation for the Black December operation.); TF2-223, Tr. of 28 September 2004 at 25-36 (After the capture of Zimi, Mr Norman moved Kamajor headquarters there and announced certain strategic aims.); TF2-223, Tr. of 28 September 2004 at 110 (Mr Norman established SS Camp.); TF2-201, Tr. of 4 November 2004 at 84, 87 (Later, it was Mr Norman who decided that the Kamajors would base themselves at Talia, which would be their headquarters for the war effort.); TF2-201, Tr. of 4 November 2004 at 87 and TF2-008, Tr. of 17 November 2004 at 9 (Mr Norman ordered the formation of the War Council and a war wing with a national directorate.); TF2-201, Tr. of 4 November 2004 at 56 (Mr Norman called for the opening of offices in Bo and Kenema.); TF2-079, Tr. of 26 May 2005 at 10 (Mr Norman introduced the concept of initiations to the CDF.); TF2-011, Tr. of 8 June 2005 at 17 (Mr Norman made decisions regarding who could join the Kamajors.); TF2-011, Tr. of 8 June 2005 at 21-22 (Mr Norman formed the Death Squad, which was answerable to him).

¶ 37, n.90: TF2-005, Tr. of 15 February 2005 at 93 (Mr Norman appointed Mr Fofana and Mr Kondewa.); TF2-222, Tr. of 17 February 2005 at 96-97 (same); TF2-222, Tr. of 17 February 2005 at 96-97 (Mr Norman appointed the Director of Logistics.); TF2-014, Tr. of 10 March 2005 at 29-30 (Mr Norman appointed Albert Nallo as National Deputy Director of Operations and Regional Director of Operations for the Southern Region.); TF2-079, Tr. of 26 May 2005 at 40 (Mr Norman, not Mr Fofana, appointed Mr Fofana's literate deputy.)

¶ 37, n.91: TF2-068, Tr. of 17 November 2004 at 81 (Mr Norman was responsible for appointing commanders.); TF2-082, Tr. of 15 September 2004 at 51, 57 (Witness was appointed battalion commander by Mr Norman.); TF2-168, Tr. of 4 March 2005 at 41 (Obai was appointed battalion commander by Mr Norman.); TF2-223, Tr. of 28 September 2004 at 110 (Mr Norman placed C.O. Magona in charge of SS Camp.)

¶ 37, n.92: TF2-013, Tr. of 24 February 2005 at 10-13 (Mr Norman ordered witness to capture Zimi.); TF2-173, Tr. of 4 March 2005 at 55 (Mr Norman ordered C.O. Obai to remove soldiers from Mabang.); TF2-223, Tr. of 28 September 2004 at 57 (Mr Norman ordered witness's unit to take SS Camp.); TF2-017, Tr. of 19 November 2004 at 20 (Mr Norman ordered witness to move to Telu Bongor.); TF2-017, Tr. of 19 November 2004 at 50 (Mr Norman ordered witness to attack the Kono-Makeni Highway); TF2-190, Tr. of 10 February 2005 at 34-37 (Mr Norman ordered witness to give support to Kamajors in Moyamba.); TF2-190, Tr. of 10 February 2005 at 46 (Mr Norman ordered witness to hold the Bo-Koribondo Highway).

¶ 37, n.93: TF2-198, Tr. of 15 June 2004 at 38; TF2-157, Tr. of 16 June 2004 at 20-21; TF2-176, Tr. of 17 June 2004 at 85; TF2-012, Tr. of 21 June 2004 at 27; TF2-162, Tr. of 8 September 2004 at 29-31; TF2-159, Tr. of 9 September 2004 at 50-56; TF2-032, Tr. of 9 September 2004 at 53-63; TF2-082, Tr. of 15 September 2004 at 10, 49-50; TF2-201, Tr. of 4 November 2004 at 113; TF2-068, Tr. of 17 November 2004 at 93; TF2-190, Tr. of 10 February 2005 at 46; TF2-021, Tr. of 2 November 2004 at 62.

¶ 37, n.94: TF2-017, Tr. of 19 November 2004 at 93; TF2-068, Tr. of 17 November 2004 at 93.

¶ 37, n.95: TF2-201, Tr. of 4 November 2004 at 107; TF2-005, Tr. of 15 February 2005 at 106.

¶ 37, n.96: TF2-014, Tr. of 14 March 2005 at 49; TF2-079, Tr. of 26 May 2005 at 50; TF2-223, Tr. of 28 September 2004 at 41; TF2-068, Tr. of 17 November 2004 at 94.

¶ 37, n.97: TF2-005, Tr. of 16 February 2005 at 18 (As regional coordinator, witness received orders directly from Mr Norman and passed them on to the Director of Operations.); TF2-014, Tr. of 10 March 2005 at 32 (Witness received "general and specific instructions from [Mr Norman] and passed it on to the war front".)

¶ 37, n.98: TF2-201, Tr. of 4 November 2004 at 98 (Reports from the field were delivered directly to Mr Norman.); TF2-011, Tr. of 8 June 2005 at 27 (Military reports coming to Base Zero "were going straight to the co-ordinator".); TF2-027, Tr. of 18 February 2005 at 98 (When the Kamajors captured Tongo, they made the announcement by radio directly to Mr Norman.)

¶ 37, n.99: TF2-011, Tr. of 8 June 2005 at 47, 49 (Deployment from Base Zero rested "not even on the commanders. It rested on the coordinator.")

¶ 37, n.100: TF2-190, Tr. of 10 February 2005 at 40, 75 (Witness reported directly to Mr Norman and received instructions from "Pa Norman directly by himself".) and at 34-37 (At Base Zero, witness took orders from "Pa Norman and not any other person".)

¶ 37, n.101: TF2-014, Tr. of 11 March 2005 at 21, 25 and 10 March 2005 at 35 (The Death Squad was a special group answerable only to Mr Norman.)

¶ 37, n.102: Several witnesses saw Mr Norman arrive at Base Zero by helicopter bearing arms, ammunition, food, and other supplies. TF2-021, Tr. of 2 November 2004 at 61; TF2-096, Tr. of 8 November 2004 at 17.

¶ 37, n.103: TF2-223, Tr. of 28 September 2004 at 37 (Witness, a member of the Transport Two Unit, received his arms, ammunition, and other supplies from Mr Norman.); TF2-201, Tr. of 4 November 2004 at 96-97 (Mr Norman ordered the distribution of arms and ammunition.); TF2-079, Tr. of 26 May 2005 at 20 (Mr Norman supplied the Kamajors who went to Gendema with "a good quantity of arms and ammunition".); TF2-190, Tr. of 10 February 2005 at 34-37 (Mr Norman ordered the distribution of fuel, arms, ammunition to witness ordered to give support to Kamajors in Moyamba in 1997.)

¶ 38, n.104: TF2-011, Tr. of 8 June 2005 at 18-19.

¶ 38, n.105: TF2-222, Tr. of 17 February 2005 at 96; TF2-011, Tr. of 8 June 2005 at 41.

¶ 38, n.106: TF2-014, Tr. of 14 March 2005 at 6 (Mr Norman was the head of the War Council.)

¶ 38, n.107: TF2-008, Tr. of 16 November 2004 at 75-79; TF2-068, Tr. of 18 November 2004 at 91.

¶ 38, n.108: TF2-008, Tr. of 16 November 2004 at 82.

¶ 38, n.109: TF2-014, Tr. of 10 March 2005 at 32 (Sometimes Mr Norman would disseminate orders directly to Kamajors at the training ground, and sometimes he would pass them onto the Deputy Director of Operations, Albert Nallo, for onward transmission to the commanders.)

¶ 38, n.110: TF2-005, Tr. of 15 February 2005 at 90-91 (At Base Zero, Mr Mbogba provided military training and Mr Kondewa oversaw the initiations. Mr Norman was in charge of "all other matters". Every important decision required his approval. "He gave positions, he ordered food to be issued out. If ammunition was to be dished out to anybody, he had to order it".)

¶ 38, n.111: TF2-008, Tr. of 16 November 2004 at 117.

¶ 38, n.112: TF2-014, Tr. of 14 March 2005 at 6.

Albert Nallo

¶ 40, n.113: TF2-014, Tr. of 10 March 2005 at 29-30.

¶ 40, n.114: TF2-014, Tr. of 11 March 2005 at 4.

¶ 40, n.115: TF2-014, Tr. of 11 March 2005 at 54.

¶ 40, n.116: TF2-014, Tr. of 11 March 2005 at 54.

¶ 40, n.117: TF2-014, Tr. of 11 March 2005 at 53.

¶ 40, n.118: TF2-014, Tr. of 11 March 2005 at 87.

¶ 41, n.119: TF2-001, Tr. of 14 February 2005 at 75.

¶ 41, n.120: TF2-014, Tr. of 10 March 2005 at 30, 64; TF2-005, Tr. of 15 February 2005 at 94.

¶ 41, n.121: TF2-079, Tr. of 26 May 2005 at 52-53.

¶ 41, n.122: TF2-017, Tr. of 22 November 2004 at 2.

¶ 41, n.123: TF2-014, Tr. of 10 March 2005 at 30; TF2-082, Tr. of 15 September 2004 at 17.

¶ 41, n.124: TF2-014, Tr. of 10 March 2005 at 30.

¶ 41, n.125: TF2-014, Tr. of 10 March 2005 at 30; TF2-082, Tr. of 15 September 2004 at 18.

¶ 41, n.126: TF2-014, Tr. of 10 March 2005 at 32.

¶ 41, n.127: TF2-014, Tr. of 14 March 2005 at 45-46 (Many of the duties of the Director of War were assigned to the witness. These functions were "very cardinal", and the witness did them because Mr Fofana was not educated.)

¶ 41, n.128: Exhibit 97, Part C.

¶ 42, n.130: TF2-014, Tr. of 10 March 2005, at 42 (At Dodo Village, Nallo found the villagers in hiding. He assured them that Mr Norman had sent him to protect them and they should not be afraid. When they emerged from their hiding places, he summoned them to the court barrie where he killed over fifteen of them. He also burnt down some houses.); at 43-46 (At Sorgia Village, Nallo identified one Joseph Lansana as a rebel. Nallo bound Lansana then proceeded to torture him, cutting off his ear, dripping melted plastic on his body, and beating him. Nallo stripped Lansana's mother naked and "chopped" her then set her house ablaze and threw her into the fire.); at 47-48 (At Pipor Village, Nallo looted zinc from the roofs of civilian homes.); at 49 (At Baoma Village, Nallo shot dead a Fullah man.); at 70-71 (Nallo admitted burning houses and looting property in Bo as well as killing police.); Tr. of 11 March 2005, at 38 (Nallo admitted that he killed and ate the flesh of his victims.)

¶ 42, n.133: TF2-014, Tr. of 11 March 2005 at 41.

Mr Fofana

¶ 44, n.135: TF2-201, Tr. of 4 November 2004 at 96 (Mr Norman gave orders to distribute arms and ammunition to Mr Fofana who would pass them on to witness who was in charge of the arms store at Talia.); TF2-005, Tr. of 15 February 2005 at 106 (Mr Norman ordered Mr Fofana to dish out ammunition for the Tongo operation, which he did.); TF2-079, Tr. of 26 May 2005 at 66 (Mr Norman ordered Mr Fofana to hand over a goat and twenty thousand Leones and other "morale boosters" to the witness and others.)

¶ 44, n.136: TF2-223, Tr. of 28 September 2004 at 57 (Transport Two Unit was assigned to SS Camp. The orders came from Mr Norman but were "dished out" by Mr Fofana.); TF2-201, Tr. of 4 November 2004 at 96 (Mr Norman gave orders to distribute arms and ammunition to Mr Fofana who would pass them on to witness who was in charge of the arms store at Talia.) TF2-223, Tr. of 28 September 2004 at 41 (A letter given to CO Ngaoujia outlined the plans for Black December; the letter came from Mr Fofana but the contents/instructions were Mr Norman's.); TF2-014, Tr. of 10 March 2005 at 64 (Witness did all the planning for the Koribondo attack and submitted it to Mr Fofana who submitted it to Mr Norman.); TF2-079, Tr. of 26 May 2005 at 40 (As far as the witness could tell, the duties of the Director of War were to "received front-line report from commanders and pass it on to the national coordinator".); TF2-079, Tr. of 27 May 2005 at 59 (Mr Fofana accepted the report and "handled it for the onward transmission to" Mr Norman.); TF2-005, Tr. of 15 February 2005 at 122 (When fighters returned from the front, they reported to Mr Kondewa, who led them to Mr Fofana, who led them to Mr Norman); TF2-014, Tr. of 10 March 2005 at 30 (Witness, in his capacity as Deputy National Director of Operations for the Southern Region, collected reports from the war front and submitted them to Mr Norman via Mr Fofana.); TF2-222, Tr. of 17 February 2005 at 122 (When fighters returned from the front, they reported to Mr Kondewa, who led them to Mr Fofana, who led them to Mr Norman.)

¶ 44, n.137: TF2-222, Tr. of 17 February 2005 at 92 (Mr Fofana was "a man called the Director of War", but he "was more concerned with the receiving of logistics and distributing the logistics and I did not ever see a time when he came and really put in place, let's say, this is a deployment area, this is a number of manpower at that area. There was no proper nominal role".)

APPENDIX C

Evidence Regarding 'Superior Responsibility Under Article 6.3' (From Paragraphs 46-68 of the Motion)

No Superior-Subordinate Relationship Existed Between Mr Fofana and the Alleged Perpetrators of the Underlying Offences

Mr Fofana Did Not Possess De Jure Authority Over Any Subordinates

¶ 50, n.153: TF2-EW1, Tr. of 14 June 2005 at 50 (emphasis added).

¶ 51, n.154: TF2-159, Tr. of 9 September 2004 at 140; TF2-082, Tr. of 16 September 2004, at 121; TF2-201, Tr. of 4 November 2004 at 89; TF2-096, Tr. of 8 November 2004 at 19-20; TF2-008, Tr. of 16 November 2004 at 37; TF2-068, Tr. of 17 November 2004 at 88; TF2-190, Tr. of 10 February 2005 at 30; TF2-001, Tr. of 14 February 2005 at 99; TF2-005, Tr. of 15 February 2005 at 92-93; TF2-005, Tr. of 16 February 2005 at 54-55; TF2-222, Tr. of 17 February 2005 at 92; TF2-014, Tr. of 10 March 2005 at 16; TF2-014, Tr. of 11 March 2005 at 22.

¶ 51, n.155: Exhibit 59.

¶ 51, n.157: Colonel Iron testified that, although there was a hierarchy of seniority within the CDF, there was no established rank system and no written job descriptions. TF2-EW1, Tr. of 14 June 2005 at 69.

Mr Fofana Did Not Possess De Facto Authority Over Any Subordinates

¶ 52, n.158: TF2-159, Tr. of 9 September 2004 at 53; TF2-223, Tr. of 28 September 2004 at 18, 19-20; TF2-201, Tr. of 4 November 2004 at 81, 82; TF2-096, Tr. of 8 November 2004 at 20; TF2-071, Tr. of 11 November 2004 at 94; TF2-008, Tr. of 16 November 2004 at 47; TF2-008, Tr. of 16 November 2004 at 51, 70; TF2-017, Tr. of 22 November 2004 at 29-30; TF2-057, Tr. of 29 November 2004 at 120; TF2-190, Tr. of 10 February 2005 at 11-13, 25, 26; TF2-190, Tr. of 10 February 2005 at 28-29; TF2-001, Tr. of 14 February 2005 at 98; TF2-222, Tr. of 17 February 2005 at 102; TF2-014, Tr. of 10 March 2005 at 17, 29, 37-38, 11 March 2005 at 21, and 14 March 2005 at 3; TF2-079, Tr. of 26 May 2005 at 39, 42-43; TF2-134, Tr. of 3 June 2005 at 26.

¶ 52, n.159: TF2-223, Tr. of 28 September 2004 at 57; TF2-201, Tr. of 4 November 2004 at 96; TF2-008, Tr. of 16 November 2004 at 47; TF2-017, Tr. of 19 November 2004 at 18, 41-42; TF2-005, Tr. of 15 February 2005 at 93, 106 and Tr. of 16 February 2005 at 54-55; TF2-222, Tr. of 17 February 2005 at 96-97; TF2-079, Tr. of 26 May 2005 at 42, 66.

¶ 52, n.160: TF2-201, Tr. of 4 November 2004 at 98; TF2-008, Tr. of 16 November 2004 at 47; TF2-079, Tr. of 26 May 2005 at 24-25 and Tr. of 27 May 2005 at 59.

¶ 52, n.161: TF2-140, Tr. of 14 September 2004 at 86, 88; TF2-223, Tr. of 28 September 2004 at 41, 103, 104, 105-106; TF2-201, Tr. of 4 November 2004 at 92, 106,

113 and Tr. of 5 November 2004 at 42; TF2-008, Tr. of 16 November 2004 at 47, 58-59, 70, 79, 81, 82 and Tr. of 23 November 2004 at 11, 60; TF2-017, Tr. of 19 November 2004 at 87; TF2-190, Tr. of 10 February 2005 at 28, 44; TF2-005, Tr. of 15 February 2005 at 94, 101, 105, 106, 107 and Tr. of 16 February 2005 at 10, 17, 50; TF2-222, Tr. of 17 February 2005 at 92, 119; TF2-014, Tr. of 10 March 2005 at 30, 64-65; TF2-014, Tr. of 14 March 2005 at 6; TF2-079, Tr. of 26 May 2005 at 40, 53; TF2-011, Tr. of 8 June 2005 at 19, 20, 31.

¶ 52, n.162: TF2-223, Tr. of 28 September 2004 at 41, 57; TF2-223, Tr. of 28 September 2004 at 57, 104, 105-106; TF2-201, Tr. of 4 November 2004 at 92; TF2-008, Tr. of 16 November 2004 at 47, 58-59, 82; TF2-008, Tr. of 23 November 2004 at 11, 60; TF2-017, Tr. of 19 November 2004 at 82-83; TF2-005, Tr. of 16 February 2005 at 10, 17, 50; TF2-079, Tr. of 27 May 2005 at 56, 57.

¶ 52, n.163: TF2-082, Tr. of 15 September 2004 at 40; Exhibit 11; TF2-223, Tr. of 28 September 2004 at 41, 57, 104, 105-106; TF2-201, Tr. of 4 November 2004 at 98; TF2-005, Tr. of 15 February 2005 at 101, 122; TF2-014, Tr. of 10 March 2005 at 30, 31, 32, 64-65; TF2-079, Tr. of 26 May 2005 at 24-25, 59 and Tr. of 27 May 2005 at 56-57.

¶ 53, n.164: TF2-017, Tr. of 19 November 2004 at 41-42 (At a meeting in Masingbe, Mr Norman ordered Mr Fofana to deploy Kamajors and he did so.); TF2-008, Tr. of 16 November 2004 at 58-59 (All three Accused had the authority to dispatch Kamajors to war.); TF2-008, Tr. of 23 November 2004 at 11 (Mr Fofana and the battalion commanders were responsible for deployment of fighting forces.) and at 60 (Troop deployment was the domain of Mr Norman, Mr Fofana, and the commanders.); TF2-005, Tr. of 16 February 2005 at 10 (The decision as to how many Kamajors would participate in an attack belonged to Mr Fofana.)

¶ 53, n.167: TF2-EW1, Tr. of 14 June 2005 at 29 (Regarding the hierarchy of military structure at Base Zero, there was the "commander of the CDF and a small staff"—to support the commander.)

¶ 53, n.168: TF2-082, Tr. of 16 September 2004 at 117 (Mr Fofana never commanded troops.) and at 123 (Witness never saw Mr Fofana with a gun or on the battlefield.)

¶ 54, n.169: TF2-201, Tr. of 4 November 2004 at 96 (Mr Norman gave orders to distribute arms and ammunition to Mr Fofana who would pass them on to witness who was in charge of the arms store at Talia.); TF2-008, Tr. of 16 November 2004 at 47 (Mr Fofana's role was to supply arms and ammunition to the commanders.); TF2-005, Tr. of 15 February 2005 at 101 (Mr Fofana was responsible for the supply of ammunition when directed by Mr Norman.)

¶ 54, n.170: TF2-017, Tr. of 19 November 2004 at 84 (Witness received supplies for Black December operation from Mr Fofana.); TF2-017, Tr. of 19 November 2004 at 96 (Mr Fofana distributed arms and ammunition for the Bo attack.); TF2-005, Tr. of 15 February 2005 at 106 (Mr Norman ordered Mr Fofana to "dish out" ammunition for the Tongo operation.)

¶ 54, n.171: TF2-082, Tr. of 16 September 2004 at 121 (As far as witness knew, Mr Fofana's role in the war was to provide food.); TF2-079, Tr. of 27 May 2005 at 56

(Witness had many personal encounters with Mr Fofana at Base Zero, mostly to ask for food. Mr Fofana would direct the boys where to receive food and where to cook.) and at 57 (Mr Fofana used to bring dried fish and "serve us in the evening when we are together with the Pa".)

¶ 54, n.172: TF2-079, Tr. of 26 May 2005 at 66 (Mr Norman ordered Mr Fofana to hand over a goat, 20,000 Leones, and other "morale boosters" to the witness after he had delivered a situation report on Tongo.) and Tr. of 27 May 2005 at 57 (Mr Fofana once gave the witness and another Kamajor 100,000 Leones.)

¶ 54, n.173: TF2-079, Tr. of 26 May 2005 at 42 (The Director of War provided logistics.) and Tr. of 27 May 2005 at 71 (Witness saw Mr Fofana at the training ground, arranging seating for a passing-out parade and distributing footwear and green shorts and shirts to the Kamajors.)

¶ 54, n.174: TF2-222, Tr. of 17 February 2005 at 92.

¶ 54, n.175: Exhibit 97, § C4.2 at C-5.

Mr Fofana Did Not Exercise Effective Control Over Any Subordinates

¶ 57, n.178: TF2-082, Tr. of 15 September 2004 at 40; Exhibit 11.

¶ 57, n.179: TF2-223, Tr. of 28 September 2004 at 37.

¶ 57, n.180: TF2-201, Tr. of 4 November 2004 at 96.

¶ 57, n.181: TF2-017, Tr. of 19 November 2004 at 42; TF2-017, Tr. of 19 November 2004 at 82-83.

¶ 57, n.182: TF2-190, Tr. of 10 February 2005 at 83-84.

¶ 57, n.183: TF2-014, Tr. of 10 March 2005 at 57.

¶ 57, n.184: TF2-082, Tr. of 16 September 2004 at 141-142.

¶ 61, n.194: TF2-079, Tr. of 26 May 2005 at 25.

¶ 61, n.195: TF2-079, Tr. of 26 May 2005 at 24-25.

Mr Fofana Had No Knowledge of Alleged Criminal Acts

¶ 65, n.199: TF2-033, Tr. of 20 September 2004 at 122 (Witness did not report any incidents to the authorities.); TF2-021, Tr. of 4 November 2004 at 32 (Witness, a Kamajor, did not report the killing of the police officers at Kenema to his boss.); TF2-096, Tr. of 8 November 2004 at 74 (Witness did not report the killings to the Kamajor authorities.); TF2-086, Tr. of 8 November 2004 at 113 (Witness did not report the attack to the Kamajor authorities in Bonthe.); TF2-116, Tr. of 9 November 2004 at 49 (Witness did not make any report to Kamajor bosses.); TF2-119, Tr. of 23 November 2004 at 36 (Witness did not report any of the incidents.); TF2-030, Tr. of 25 November 2004 at 13

(Witness did not report the killing to any Kamajor authority.); TF2-156, Tr. of 25 November 2004 at 80 (Witness did not report the incident to the CDF office in Bo.); TF2-057, Tr. of 29 November 2004 at 80 (Witness did not report anything to the Kamajor hierarchy.); TF2-007, Tr. of 2 December 2004 at 102 (Witness did not report the incident to any authority.); TF2-058, Tr. of 3 December 2004 at 74 (Witness did not report killing to anyone.); TF2-056, Tr. of 7 December 2004 at 85 (Witness did not report the incident.); TF2-006, Tr. of 9 February 2005 at 18 (Witness did not report the incident to any superior Kamajors.); TF2-015, Tr. of 11 February 2005 at 19, 26-28 (Witness did not report this incident to any authority, not the police, nor to Kamajor bosses in Kenema.); TF2-022, Tr. of 11 February 2005 at 95 (Witness did not report killings to any CDF authority.); TF2-035, Tr. of 14 February 2005 at 44 (Witness did not report these incidents to any senior Kamajor commander.); TF2-001, Tr. of 14 February 2005 at 115 (Witness did not report the killings to the Kamajor leadership in Bo.); TF2-047, Tr. of 22 February 2005 at 106 (Witness made no report to the Kamajor authorities.); TF2-048, Tr. of 23 February 2005 at 34 (Witness did not make any report to the Kamajor authorities.); TF2-144, Tr. of 24 February 2005 at 94 (Witness did not report to the Kamajor authorities.); TF2-016, Tr. of 1 March 2005 at 66 (Witness did not report the killings, the incidents of forced labour, or the burning to BJK Sei.); TF2-053, Tr. of 1 March 2005 at 112-113 (Witness made no reports to BJK Sei); TF2-168, Tr. of 4 March 2005 at 39-40 (Witness did not report the killing, the theft of his wife's cash, or the theft of rice.); TF2-173, Tr. of 4 March 2005 at 70 (Witness never reported the killing.); TF2-165, Tr. of 7 March 2005 at 35-36 (Witness made no report to the Kamajor authorities at any time.); TF2-170, Tr. of 7 March 2005 at 65-67 (Witness made no report of the incident.); TF2-167, Tr. of 8 March 2005 at 45-46 (Witness did not report the looting of his property to any Kamajor authority, nor the killing of his grandson, nor the shooting of his son.); TF2-109, Tr. of 30 May 2005 at 36 (After she left Talia, Witness did not make any report.); TF2-133, Tr. of 6 June 2005 at 7 (Witness made no reports to Kamajor leadership.)

¶ 65, n.200: TF2-EW1, Tr. of 14 June 2005 at 33.

¶ 65, n.201: TF2-079, Tr. of 27 May 2005 at 35 (Witness agrees that some incidents did not come to the attention of those at Base Zero because of the lack of formal communications systems.); TF2-005, Tr. of 16 February 2005 at 70 (The area of CDF operation was so wide that in some cases, some fighters acted on their own, without the central command knowing.)

Mr Fofana Took Necessary and Reasonable Measures to Prevent the Alleged Violations and to Punish the Perpetrators Thereof

¶ 66, n.202: TF2-008, Tr. of 16 November 2004 at 75; TF2-190, Tr. of 10 February 2005 at 43; TF2-014, Tr. of 11 March 2005 at 15-20 and Tr. of 14 March 2005 at 4; TF2-011, Tr. of 8 June 2005 at 24; TF2-201, Tr. of 5 November 2004 at 134; TF2-005, Tr. of 16 February 2005 at 14.

¶ 67, n.203: TF2-008, Tr. of 16 November 2004 at 63.

¶ 67, n.204: TF2-017, Tr. of 19 November 2004 at 68.

¶ 67, n.205: TF2-017, Tr. of 19 November 2004 at 70.

APPENDIX D

Evidence Regarding 'Individual Criminal Responsibility Under Article 6.1' (From Paragraphs 69-95 of the Motion)

Direct Liability – Planning, Instigating, Ordering, or Committing

Planning

¶ 75, n.223: TF2-014, Tr. of 14 March 2005 at 51-52 (The killing of innocent civilians and looting of civilian property were not part of the planning the witness discussed with Mr Fofana.)

Instigating

¶ 77, n.226: TF2-079, Tr. of 27 May 2005 at 57; TF2-190, Tr. of 10 February 2005 at 44.

Ordering

¶ 79, n.229: TF2-014, Tr. of 10 March 2005 at 49.

Committing

¶ 81, n.235: TF2-014, Tr. of 10 March 2005 at 50, 55.

Group Liability – Common Purpose, Plan, or Design

¶ 92, n.252: TF2-012, Tr. of 21 June 2004 at 62 (Witness was told at his initiation not to kill innocent civilians, not to loot civilian property, not to rape, and to respect the dignity of civilians.); TF2-140, Tr. of 14 September 2004 at 161 (Witness told by his initiator that, as a Kamajor, he should not loot.); TF2-223, Tr. of 28 September 2004 at 35 (Kamajors were given ICRC booklets explaining how to treat war victims.), Tr. of 29 September 2004 at 50 (A general law was in place directing Kamajors not to take anything from pedestrians passing through checkpoints.) and at 164 (One of the Kamajor bylaws was to protect innocent civilians.); TF2-201, Tr. of 5 November 2004 at 107 (Kamajor laws forbid looting.); TF2-008, Tr. of 17 November 2004 at 13 (The objective of the Kamajors was to protect civilians. This was told to the witness during his training. He was also told not to loot or rape.); TF2-190, Tr. of 10 February 2005 at 91-93 (There were rules of engagement, a code of conduct, and laws in place. One such rule was to avoid harming civilians. The witness was never specifically ordered to kill captured soldiers.); TF2-222, Tr. of 18 February 2005 at 20 (At his initiation, witness was told not to loot and not to harm civilians.); TF2-048, Tr. of 23 February 2005 at 27 (Kamajors sent warnings to civilians to leave Tongo before they attacked.); TF2-013, Tr. of 24 February 2005 at 30-31 (As a Kamajor, the witness was instructed not to kill civilians or loot property.); TF2-073, Tr. of 3 March 2005 at 26 (Witness heard Allieu Kondewa address recruits, telling them that the Kamajor movement was not meant to harass, torment, loot, or disadvantage civilians. Rather, it was meant to protect them.); TF2-079, Tr. of 27 May 2005 at 17-18 (Witness was told at his initiation not to kill civilians nor to loot property.

Witness knew that the Kamajor movement was set up to protect the lives and properties of civilians.); TF2-027, Tr. of 22 February 2005 at 50 (B.J.K. Sei, the chief Kamajor, addressed the crowd and ordered the killing to stop. He announced: "please be careful about the civilians, be careful with civilians".), at 83 (Sei said that any captured civilian must be investigated properly, and nothing should be done to him.), at 87 (Sei also ordered captured rebels to be brought before him for investigation.), and at 115 (Witness agrees that the rationale behind sending letters asking civilians to leave Tongo was to minimize civilian casualties.)