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SCSL-04-14-T  
(20151-20304)

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**SPECIAL COURT FOR SIERRA LEONE**

**In Trial Chamber I**

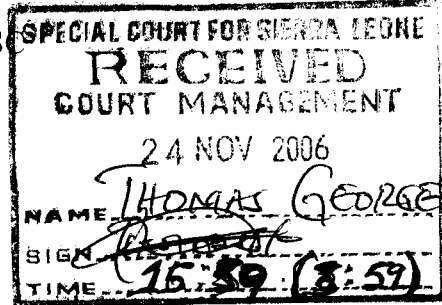
Before: Justice Bankole Thompson, Presiding  
Justice Benjamin Mutanga Itoe  
Justice Pierre Boutet

Registrar: Mr Lovemore Munlo, S

Date: 24 November 2006

**THE PROSECUTOR**

-against-



**SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA**

SCSL-2004-14-T

PUBLIC

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**FOFANA FINAL TRIAL BRIEF**

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## I. Introduction

1. Counsel for Moinina Fofana (the “Defence”) hereby submits its final trial brief (the “Brief”) pursuant to Rule 86(B) of the Rules of Procedure and Evidence (the “Rules”) and the order of this Trial Chamber (the “Chamber”).<sup>1</sup>
2. The Office of the Prosecutor (the “Prosecution”) filed its eight-count consolidated indictment (the “Indictment”) on 5 February 2004,<sup>2</sup> charging Fofana with violations of Articles 2, 3, and 4 of the Statute of the Special Court for Sierra Leone (the “Statute”).<sup>3</sup> Pursuant to orders of the Chamber, the Prosecution subsequently filed a pre-trial brief (the “Pre-Trial Brief”) and supplemental pre-trial brief (the “Supplemental Pre-Trial Brief”).<sup>4</sup> The Prosecution delivered its opening statement (the “Opening Statement”) on 3 June 2004.<sup>5</sup> Throughout this Brief, the Indictment, Pre-Trial Brief, Supplemental Pre-Trial Brief, and Opening Statement are referred to collectively as the “Pleadings”.
3. For the reasons outlined below, the Defence submits that the Prosecution has failed to substantiate a single charge contained in the Pleadings beyond a reasonable doubt. Accordingly, the Chamber should enter a verdict of ‘Not Guilty’ on Counts 1 through 8 as to all modes of liability. Simply put, Moinina Fofana does not bear any—let alone the greatest—responsibility for serious violations of international humanitarian law committed in Sierra Leone. Quite to the contrary, he supported the legitimate aims and objectives of the Civil Defence Forces (the “CDF”): the defence of the territory and civilian population of Sierra Leone and the restoration of its democratically elected government.

<sup>1</sup> *Prosecutor v. Norman et al.*, SCSL-2004-14-T-722, Trial Chamber I, ‘Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments’, 18 October 2006.

<sup>2</sup> *Norman*, SCSL-2004-14-PT-003, ‘Indictment’.

<sup>3</sup> In particular, Fofana is charged under Article 2 with “murder” (Count 1) and “inhumane acts” (Count 3) as crimes against humanity; under Article 3 with “murder” (Count 2), “cruel treatment” (Count 4), “pillage” (Count 5), “acts of terrorism” (Count 6), and “collective punishments” (Count 7) as violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II; and under Article 4 with “enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” (Count 8) as a serious violation of international humanitarian law.

<sup>4</sup> *Norman*, SCSL-2004-14-PT-024, ‘Prosecution’s Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73bis) of 13 February 2004’, 2 March 2004; *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-024, ‘Prosecution’s Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004’, 22 April 2004, including attached annexes outlining proposed testimonial evidence and documentary evidence.

<sup>5</sup> Trial Transcript, 3 June 2004.

## II. Principles of Evidence

4. As a preliminary observation, it should be noted that, in cases where more than one accused stands trial, the evaluation of the guilt of each of the accused should be considered in light of all the evidence presented by the Prosecution and each of the defendants, “not just the evidence of the Prosecution and the Defendant under consideration.”<sup>6</sup> Where one of the accused has put forth evidence discrediting a Prosecution witness, the other accused are permitted to take advantage of that evidence.
5. The Prosecution has the burden to establish beyond a reasonable doubt the guilt of each accused for each distinct element of the charges in the Indictment. This is so, regardless of whether the evidence has been challenged. Where the Chamber is aware that the Defence inadvertently failed to recall certain evidence in its final brief or closing argument that would show that the Prosecution failed to meet its burden, the Chamber must, on its own initiative, consider that evidence.
6. The Defence invites the Chamber to consider all submissions the Defence made during the trial, as well as the oral submissions due to be made on 28–29 November 2006, in addition to the arguments raised in the Brief.

### A. Burden of Proof

7. Pursuant to Article 17(3) of the Statute an accused is presumed to be innocent of all the charges levied against him. This presumption places on the Prosecution the burden of establishing the guilt of the accused, i.e., the burden of proving beyond a reasonable doubt that all the facts and circumstances which are material and necessary to constitute the crimes charged and the criminal responsibility of the accused. The burden of proof remains with the Prosecution for each individual fact alleged; in no circumstances does it shift to the Defence.<sup>7</sup> This is also in accordance with Rule 87(A), which states that a “finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.”

<sup>6</sup> Prosecutor v. *Simic*, IT-95-9, Trial Chamber, ‘Judgment’, 17 October 2003 (the “*Simic* Trial Judgment”), ¶ 18.

<sup>7</sup> Prosecutor v. *Brdjanin*, IT-99-36, Trial Chamber, ‘Judgment’, 1 September 2004 (the “*Brdjanin* Trial Judgment”), ¶ 22; Prosecutor v. *Kunarac*, IT-96-23, Appeals Chamber, ‘Judgment’, 12 June 2002 (the “*Kunarac* Appeal Judgment”), ¶¶ 63, 65.

8. In order to enter a verdict of ‘Guilty’, the Chamber must find beyond a reasonable doubt “first, that the crimes charged have been committed and, second, that the accused is responsible for those crimes”.<sup>8</sup> This is of notable importance to the instant case where the Defence does not necessarily dispute that certain crimes may have been committed, but vigorously denies that any culpability for such crimes attaches to Fofana. The Chamber determines “whether the ultimate result of the whole evidence is weighty and convincing enough to establish beyond reasonable doubt the facts alleged and, ultimately, the guilt of the Accused, as charged in the Indictment”.<sup>9</sup>
9. Any finding of the Chamber must be established beyond a reasonable doubt. “It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably opened from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.”<sup>10</sup> Any ambiguity must be resolved to the benefit of the accused.<sup>11</sup> In relation to facts from which more than inference may be drawn, the Trial Chamber in *Limaj* held:

Where ... more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count.<sup>12</sup>

10. Consistent with the presumption of innocence, an accused need not give evidence. It has been acknowledged without limitation that “silence by the Accused may not be used as evidence to prove guilt and may not be interpreted as an admission”.<sup>13</sup> Fofana’s choice to remain silent has no bearing on the Prosecution’s burden of proof. In *Limaj*, the Trial Chamber explicitly stated that “no probative relevance” should be attached to an accused’s decision not to give evidence.<sup>14</sup>

<sup>8</sup> *Brdjanin* Trial Judgement, ¶ 21.

<sup>9</sup> *Brdjanin* Trial Judgement, ¶ 22.

<sup>10</sup> *Prosecutor v. Delalic et al.*, IT-96-21, Appeals Chamber ‘Judgement’, 20 February 2001 (the “*Delalic* Appeal Judgement”), ¶ 458 (emphasis in original).

<sup>11</sup> *Brdjanin* Trial Judgement, ¶ 20.

<sup>12</sup> *Prosecutor v Limaj et al.*, IT-03-66, Trial Chamber, ‘Judgement’, 30 November 2005 (the “*Limaj* Trial Judgement”), ¶ 10.

<sup>13</sup> *Brdjanin* Trial Judgement, ¶ 24.

<sup>14</sup> *Limaj* Trial Judgement, ¶ 22.

## B. Evaluation of the Weight of the Evidence

11. The Chamber may admit evidence that is deemed to be relevant, probative, and reliable pursuant to Rule 89(C). The broad discretion under rule 89(C) is limited by the requirement of Rule 89(B) “that the rules of evidence applied by a Chamber must be those which best favour a fair determination of the matter before the Chamber and which are consonant with the of the Tribunal’s Statute and the general principles of law; the exercise of discretion under Rule 89(C) ought therefore to be in harmony with the Statute and the other Rules to the greatest extent possible”.<sup>15</sup> By virtue of Rule 89(B), the accused is entitled to be tried in accordance with the principle of *in dubio pro reo*, according to which, doubt must be resolved in favour of the accused.<sup>16</sup>
12. The threshold of admissibility is low, and the Chamber’s approach is a flexible one. The assessment of the reliability, credibility, and ultimate weight of the evidence is another matter. The fact that the Chamber made a determination favouring admissibility does not suggest that it should necessarily, at this stage, attach any weight to the proposed evidence. The Chamber may decide to disregard admitted evidence.
13. At a minimum, the evidence must be relevant to the charges and credible in order to have any weight. The Appeals Chamber of the International Tribunals<sup>17</sup> pointed out that “it is neither possible nor proper to draw up an exhaustive list of criteria for the assessment of evidence, given the specific circumstances of each case and the duty of the judge to rule on each case in an impartial and independent manner.”<sup>18</sup> In essence, evidence must be both “reasonable” and “reliable”.<sup>19</sup>
14. Reliability must be assessed in the context of the facts of each particular case, and requires a consideration of the circumstances under which the evidence arose, the

<sup>15</sup> *Prosecutor v. Milosevic*, Trial Chamber, ‘Decision on Admissibility of Prosecution Investigator’s Evidence’, 30 September 2002, ¶ 18.

<sup>16</sup> *Brdjanin* Trial Judgement, ¶ 21; *see also* Rule 89(B).

<sup>17</sup> In this Brief, the ICTY and ICTR are referred to collectively as the “International Tribunals”.

<sup>18</sup> *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1, Appeals Chamber, ‘Judgement’, 1 June 2001 (the “*Kayishema* Appeal Judgement”, ¶ 319).

<sup>19</sup> *Kayishema* Appeal Judgement. ¶¶ 320, 322.

content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntariness, and trustworthiness of the evidence.<sup>20</sup>

### C. Credibility of Witnesses and Corroborative Evidence

15. In order to determine the credibility of witnesses, the Chamber must consider “their demeanor, conduct and character”, as well as “the probability, consistency and other features of their evidence, including the corroboration which may be forthcoming from other evidence and circumstances of the case”, as well as “the knowledge of the facts upon which they give evidence, their disinterestedness, their integrity, their veracity.”<sup>21</sup> The Appeals Chamber of the International Tribunals has endorsed the practice of considering “inconsistencies in the light of its evaluation of the overall credibility of each particular witness”.<sup>22</sup>
16. Although the Chamber should excuse reasonable memory gaps regarding exact dates and sequences of events,<sup>23</sup> discrepancies in relation to matters peripheral to the charges may be said to undermine the credibility of the witnesses in question.<sup>24</sup> The fact that a witness gave evidence honestly is not in and of itself sufficient to establish the reliability of that evidence, since the ultimate basis for accepting the evidence rests on whether the evidence is objectively reliable.<sup>25</sup>
17. Where a witness is found by the Trial Chamber to have lied on one issue, the Chamber should be sceptical about the remainder of that witness’ evidence. In *Limaj* the Trial Chamber was “left with the distinct impression that [a witness] did indeed give false testimony on [an] issue.”<sup>26</sup> This led the Chamber to treat the evidence of that witness with caution:

<sup>20</sup> *Prosecutor v. Tadic*, IT-94-1, Trial Chamber, ‘Decision on Defence Motion on Hearsay’, 5 August 1996, ¶ 19; *Prosecutor v. Kajelijeli*, ICTR-98-44, Trial Chamber, ‘Decision on Motion to Limit the Admissibility of Evidence’, 2 June 2001.

<sup>21</sup> *Brdjanin* Trial Judgment, ¶ 25. See also *Prosecutor v. Akayesu*, ICTR-96-04, Appeals Chamber, ‘Judgement’, 1 June 2001 (the “*Akayesu* Appeal Judgment”), ¶ 128.

<sup>22</sup> *Akayesu* Appeal Judgment, ¶ 136.

<sup>23</sup> *Kunarac* Appeal Judgment, ¶ 267; see also *Delalic* Appeal Judgment, ¶ 497, *Kunarac* Appeal Judgment, ¶ 254.

<sup>24</sup> *Simic* Trial Judgment, ¶ 22.

<sup>25</sup> *Delalic* Appeal Judgment, ¶¶ 491, 506.

<sup>26</sup> *Limaj* Trial Judgment, ¶ 26.

the individual components of his evidence [were] rigorously scrutinised and used with caution. The Chamber [was] not prepared to accept and act on the evidence of [that particular witness] alone regarding any material issue and ... only [gave] weight to those parts of his evidence what are confirmed in some material particular by other evidence which the Chamber [accepted].<sup>27</sup>

18. The Trial Chamber in *Limaj* considered how to treat the evidence of an “insider” who himself had “committed” crimes and was offered “inducements” in return for his testimony.<sup>28</sup> In *Limaj* the Trial Chamber formed a “negative view of the credibility” of one such witness. Accordingly, the Trial Chamber stated in relation to the witness that:

The Chamber has not been prepared to act on the evidence of [the witness] alone regarding any material issue and has only given weight to those parts of his evidence which are confirmed in some material particular by other evidence which the Chamber accepts.<sup>29</sup>

19. Where evidence is not corroborated, the Chamber should scrutinise the evidence against the accused “with great care before accepting it as sufficient to make a finding of guilt”.<sup>30</sup> The Chamber may in such situations, as it has done in some instances, decide not to rely on the evidence at all.<sup>31</sup> Just as a witness’ evidence will be strengthened by corroboration, “the converse also holds true”.<sup>32</sup> Corroboration, however, is not a guarantee of credibility.

#### D. Documentary Evidence

20. The threshold for admission of documents is low, but before any weight is attached to a document there must be some proof of authenticity, source, and/or author.<sup>33</sup> The absence of a signature or stamp does not necessarily deprive the document of authenticity.<sup>34</sup> In order to determine the authenticity of a document, the form, contents and purported use of the document, as well as the position of the parties on the matter,

<sup>27</sup> *Limaj* Trial Judgment, ¶ 26.

<sup>28</sup> *Limaj* Trial Judgment, ¶ 28.

<sup>29</sup> *Limaj* Trial Judgment, ¶ 28.

<sup>30</sup> *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber, ‘Judgement’, 15 March 2002 (the “*Krnojelac* Trial Judgement”, ¶ 8).

<sup>31</sup> *Krnojelac* Trial Judgement, ¶ 71; *Brdjanin* Trial Judgment, ¶ 27.

<sup>32</sup> *Prosecutor v. Tadic*, IT-94-1, Trial Chamber, ‘Judgment on Allegation on Contempt Against Prior Counsel Milan Vujin’, 31 January 2000, ¶ 92.

<sup>33</sup> *Prosecutor v. Brdjanin & Talic*, IT-99-36, Trial Chamber, ‘Order on the Standards governing the admission of evidence’, 15 February 2002, ¶¶ 18, 19.

<sup>34</sup> *Ibid.*, ¶ 20.



are important factors for consideration.<sup>35</sup> Before affording weight to any documents admitted in evidence, the Trial Chamber must consider the reliability of these documents and the probative value in the overall context of the evidence. The Trial Chamber should always rely on the best evidence available under the circumstances.

#### **E. Circumstantial Evidence**

21. Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred. While circumstantial evidence may be of no less substance than direct evidence, the Chamber should be cautious not to draw inferences based on assumptions. While “a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused depends because they would usually exist in combination only because a particular fact did exist,” such a conclusion must be the only reasonable conclusion available on the evidence.<sup>36</sup>

#### **F. Hearsay Evidence**

22. Though hearsay evidence is admissible, the Defence cautions the Chamber to rely on such evidence only where its reliability is not in question, i.e., where there is sufficient independent evidence to support it. “Where hearsay is sought to be admitted to prove the truth of its content, a Chamber must be satisfied that the evidence is reliable for that purpose, and in doing so, may consider both the content of the evidence and the circumstances under which it arose”.<sup>37</sup> Notwithstanding the variable circumstances of the case, “the weight or probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined.”<sup>38</sup> Double or triple hearsay will, on this basis, should be given even less weight.<sup>39</sup> In assessing the weight of hearsay evidence the

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<sup>35</sup> *Prosecutor v. Musema*, ICTR-96-13, Trial Chamber, ‘Judgment’, 27 January 2000 (the “*Musema* Trial Judgment”). ¶ 66.

<sup>36</sup> *Krnjelac* Trial Judgment, ¶ 67.

<sup>37</sup> *Prosecutor v. Aleksovski*, IT-95-14/1, Appeals Chamber, ‘Decision on the Prosecutor’s Appeal on Admissibility of Evidence’, 16 February 1999, ¶ 15.

<sup>38</sup> *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, ‘Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin’, 31 January 2000, ¶ 93.

<sup>39</sup> *Ibid.*

Trial Chamber considers that “the source has not been the subject of a solemn declaration and that its reliability may be affected by a potential compounding of errors of perception and memory”.<sup>40</sup> The probative value of hearsay evidence depends on context and character of the evidence concerned.<sup>41</sup>

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<sup>40</sup> *Simic* Trial Judgment, ¶ 23 and *Krnjelac* Trial Judgment, ¶ 70.

<sup>41</sup> *Prosecutor v. Tadic*, IT-94-1, ‘Separate of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses’, 10 August 1995, at 3.

### III. Principles of Pleading

#### A. Introduction

23. The Defence submits that the Indictment, standing alone, suffers from a number of material defects. With regard to Fofana's alleged criminal conduct, the Indictment is vague in the extreme, and fails to set forth with the necessary degree of particularity the material facts describing his personal role in the alleged crimes. The Defence concedes that certain of these material defects have been cured by further Pleadings.<sup>42</sup> Nevertheless, the Defence submits that by the time the Prosecution called its first witness on 15 June 2004, the overly ambitious and highly ambiguous case articulated in the Indictment had been substantially limited to only a discrete number of specific charges supported by material facts contained in the Pleadings. The aim of the Defence in this section is not so much to expose a fatally defective charging instrument, but rather to define, to the extent possible, the actual scope of the charges levied against Fofana so that the Chamber may come to a fair and proper decision in the case.

#### B. Relevant Law

24. According to a recent decision of this Chamber, challenges to the form of an indictment are properly raised by an accused in his final submissions.<sup>43</sup> This decision accords with the jurisprudence of the International Tribunals, which requires, where possible, issues of this nature to be raised at the trial stage and not deferred until the appeals process.<sup>44</sup>
25. Article 17(4)(a) of the Statute explicitly affords each accused person the right "to be informed promptly and in detail in a language which he [...] understands of the nature and cause of the charge against him". In the jurisprudence of the International

<sup>42</sup> As noted previously, the Pleadings include the Indictment, the Pre-Trial Brief, the Supplemental Pre-Trial Brief (and its annexes), and the Opening Statement.

<sup>43</sup> See *Prosecutor v. Sesay et al.*, SCSL-2004-15, Trial Chamber I, 'Oral Decision on Motions for Judgment of Acquittal', Trial Transcript of 25 October 2006, at 8:5-11 ("In the Chamber's considered opinion, this submission clearly goes to the root of the form of the indictment. It cannot, therefore, be examined at this stage as to its merits by reason of the provisions of Rule 72(B)(ii) [...] This is, of course, without prejudice to the right of the Defence to raise such issues in their final closing arguments".)

<sup>44</sup> See, e.g., *Prosecutor v. Naletilic and Martinovic*, IT-98-34, Appeals Chamber, 'Judgement', 3 May 2006 (the "Naletilic Appeal Judgement"), ¶ 21.

Tribunals, this right “translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment”.<sup>45</sup>

26. As noted by this Chamber:

It is trite law that an indictment as the fundamental accusatory instrument which sets in motion the criminal adjudicatory process, must be framed in such a manner as not to offend the rule against multiplicity, duplicity, uncertainty or vagueness, and that where specific factual allegations are intended to be relied upon or proven in support of specific counts in the indictment they ought to be pleaded with reasonable particularity.<sup>46</sup>

27. It is equally trite that “a failure to plead in the Indictment, material facts and elements of the offences which the Prosecution intends to rely on to prove it, renders it vague, unspecific, and defective”.<sup>47</sup>

28. By the time of proceeding to trial, the Prosecution is expected to know its case such that the accused is able to prepare his defence<sup>48</sup> and the Chamber is in a position to properly evaluate the charges.<sup>49</sup> The Prosecution’s failure to proceed on anything less than “well-pleaded” allegations “would gravely undermine the procedural due process rights of accused persons and thereby bring the administration of justice into disrepute”.<sup>50</sup> It would be manifestly unfair to confront an accused person “at every stage during the conduct of their trial [...] with new pieces of evidence designed to prove factual allegations not specifically pleaded in the Indictment, under the guise of a prosecutorial

<sup>45</sup> *Prosecutor v. Kupreskic et al.*, IT-95-16, Appeals Chamber, ‘Judgement’, 23 October 2001 (the “*Kupreskic Appeals Judgement*”), ¶ 88.

<sup>46</sup> *Norman*, SCSL-2004-14-T-434, Trial Chamber I, ‘Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence’, 24 May 2005 (the “*Admissibility Decision*”), ¶ 18 (citing *Lansana and Eleven Others v. Reginam*, ALR SL 186 (1970–71) where the Sierra Leone Court of Appeal condemned the idea of an indictment framed in such a way as to create uncertainty in a count or counts both as to the offences and supporting factual allegations).

<sup>47</sup> *Norman*, SCSL-2004-14-T-434, ‘Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence’, 24 May 2005, ¶ 18.

<sup>48</sup> *Prosecutor v. Blaskic*, IT-95-14, Appeals Chamber, ‘Judgement’, 29 July 2004 (the “*Blaskic Appeal Judgement*”), ¶ 212 (Precision is “required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused”).

<sup>49</sup> See *Naltilic Appeal Judgement*, ¶ 26 (In reaching its judgement, “a Trial Chamber can only convict the accused of crimes which are charged in the indictment”).

<sup>50</sup> *Admissibility Decision*, ¶ 19(iv).

latitude to broaden the definitional scope of the statutory categories of offences chargeable”.<sup>51</sup>

29. Whether particular facts are “material” depends on the nature and scope of the Prosecution case.<sup>52</sup> However, regardless of such variables, it is patently unacceptable for the Prosecution to omit relevant facts known to it at the time of confirmation with a view to shaping its charges over the course of the trial to match the evidence as it unfolds.<sup>53</sup>
30. In addition to providing the obvious material facts—such as the time, place, and identity of the victim of the alleged crime—pleading the manner and extent of the accused’s alleged participation is equally important.<sup>54</sup> This requirement is borne of the fact that liability for international crimes may be incurred in a variety of ways. Therefore, the mere reference to Articles 6(1) or 6(3) of the Statute—which together provide for seven discrete modes of liability—or the simple verbatim quotation of their provisions is insufficient.<sup>55</sup> Because, in addition to the numerous crimes which form the *ratione materiae* of international criminal law, each mode of liability has its own unique *actus reus* and *mens rea* requirements, a well-pleaded allegation should include references to the physical deeds of the accused, his temporal and physical proximity to the crime scene, and the identity of any co-perpetrators and/or subordinates involved in the alleged crime. Such factors are clearly material and, to the extent possible, should be set forth unambiguously in an indictment.<sup>56</sup>

<sup>51</sup> Admissibility Decision, ¶ 19(iv).

<sup>52</sup> See *Naletilic* Appeal Judgement, ¶ 24; see also *Blaskic* Appeal Judgement, ¶ 210 (“A decisive factor in determining the degree of specificity with which the Prosecution is required to particularize the facts of its case in an indictment is the nature of the alleged criminal conduct charged”).

<sup>53</sup> See *Blaskic* Appeal Judgement, ¶ 220 (The Prosecution “may not rely on the weakness of its own investigation in order to mould the case against the accused as the trial progresses”).

<sup>54</sup> *Prosecutor v. Ntagerura et al.*, ICTR-99-46, Trial Chamber, ‘Judgement’, 25 February 2004 (the “*Ntagerura* Trial Judgement”), ¶ 36 (emphasis added).

<sup>55</sup> *Ntagerura* Trial Judgement, ¶ 37; *Blaskic* Appeal Judgement, ¶ 226.

<sup>56</sup> See *Prosecutor v. Krnojelac*, IT-97-25, Appeals Chamber, ‘Judgement’, 17 September 2003 (the “*Krnojelac* Appeal Judgement”), ¶ 138 (“Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial.”). See also *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Appeals Chamber, ‘Judgement’, 17 December 2004 (the “*Kordic* Appeals Judgement”), ¶ 129; *Ntagerura* Trial Judgement, ¶¶ 31, 37; *Prosecutor v. Semanza*, ICTR-97-20, Trial Chamber, ‘Judgement’, 15 May 2003 (the “*Semanza* Trial Judgement”), ¶ 59; *Delalic* Appeal Judgement, ¶ 350; *Blaskic* Appeal Judgement, ¶ 210.

31. More specifically, where it is alleged that an accused personally committed the criminal acts in question, the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed must be pleaded “with the greatest precision”.<sup>57</sup> Only somewhat less precision is required for allegations of planning, instigating, ordering, and aiding and abetting, and the Prosecution is still required to identify the “particular acts” or the “particular course of conduct” allegedly attributable to the accused.<sup>58</sup> For example, the Appeals Chamber of the International Tribunals has held that, in pleading instigation as a distinct form of participation, the Prosecution must precisely describe “the instigating acts and the instigated persons or groups of persons”.<sup>59</sup> By analogy, planning, ordering, and aiding and abetting must be pleaded with similar precision.<sup>60</sup>
32. In its ‘Response to Fofana Motion for Judgement of Acquittal’<sup>61</sup> with regard to planning, instigating, and ordering, the Prosecution submitted that Fofana planned, instigated, and ordered “all of the crimes alleged in the Indictment”<sup>62</sup> and that it was unnecessary—as to these modes of liability—“to show that the accused planned, instigated or ordered the specific crime, or each of the specific crimes, alleged in the indictment”.<sup>63</sup> Not surprisingly, there are no citations of support for the latter proposition. This is because the assertion is in direct contravention to the principles of pleading articulated by the relevant jurisprudence highlighted in the previous paragraph.
33. Where an accused is said to have incurred liability as a co-perpetrator through his participation in a joint criminal enterprise (“JCE”), the jurisprudence is clear: the pleadings must unambiguously specify (i) the form or forms of JCE upon which the Prosecution intends to rely; (ii) the alleged criminal purpose of the enterprise; (iii) the identity of the co-participants; and (iv) the nature of the accused’s participation in the enterprise.<sup>64</sup>

<sup>57</sup> *Naletilic* Appeal Judgement, ¶ 24 (emphasis added).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Blaskic* Appeal Judgement, ¶ 226.

<sup>60</sup> See, e.g., *Ntagerura* Trial Judgement, ¶ 33 (“Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime”).

<sup>61</sup> *Norman*, SCSL-2004-14-T-469, 27 September 2005 (the “Rule 98 Response”).

<sup>62</sup> *Ibid.*, ¶ 80.

<sup>63</sup> *Ibid.*, ¶ 79.

<sup>64</sup> See, e.g., *Ntagerura* Trial Judgement, ¶ 34.

34. With regard to allegations of command responsibility, the accused must be apprised not only of his own putative conduct giving rise to liability as a superior, but also of the conduct of his supposed subordinates for whom he is said to bear responsibility.<sup>65</sup> This Chamber has cited with approval the reasoning of the *Brdjanin* Trial Chamber, which held that, when pleading a case of superior responsibility,

what is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.<sup>66</sup>

35. Recognizing the need to balance the difficulty of prosecuting international crimes with the paramount concern of affording the accused a fair trial, the jurisprudence acknowledges that certain deficiencies contained in an indictment may, in some instances, be cured through further pleading.<sup>67</sup> Essentially, a simple two-pronged approach to issues of defective charging has emerged from the relevant caselaw: (i) Is there a material defect in the indictment? (ii) If so, has it been otherwise cured?<sup>68</sup> While the evaluation of both questions obviously turns on the specific facts of the particular case, it is submitted that certain rules have crystallized in the jurisprudence.

36. Chambers have consistently found that the failure to plead the following categories of information renders an indictment materially defective with regard to the particular allegation: the location, date, and/or victim of the alleged crime,<sup>69</sup> the location, date,

<sup>65</sup> See, e.g., *Blaskic* Appeal Judgement, ¶¶ 216–219.

<sup>66</sup> *Norman*, SCSL-2004-14-T-434, ‘Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence’, 24 May 2005, ¶ 18 (emphasis added).

<sup>67</sup> See, e.g., *Naletilic* Appeal Judgement, ¶ 26 (A defective indictment or portion thereof may be cured in some instances where the accused nevertheless “has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him”.)

<sup>68</sup> *Ibid.* See also *Prosecutor v. Kvočka et al.*, IT-98-30/1, Appeals Chamber, ‘Judgement’, 28 February 2005 (the “*Kvočka* Appeal Judgement”), ¶ 33.

<sup>69</sup> See *Naletilic* Appeal Judgement, ¶¶ 30–34, 40–43 (material defects not cured by further pleading); *Prosecutor v. Ntakirutimana*, ICTR-96-10, Appeals Chamber, ‘Judgement’, 13 December 2004 (the “*Ntakirutimana* Appeal Judgement”), ¶¶ 33, 41 (material defect not cured by further pleading); *Limaj Trial Judgement*, ¶ 242 (material defect not cured by further pleading); *Prosecutor v. Muhimana*, ICTR-95-01, Trial Chamber, “Judgement”, 28 April 2005 (the “*Muhimana* Trial Judgement”), ¶ 196 (material defect cured by further pleading), ¶ 404 (material defect cured by further pleading), and ¶ 422 (material defect not cured by further pleading); *Prosecutor v. Muvunyi*, ICTR-00-55, Trial Chamber, ‘Judgement’, 12 September 2006 (the “*Muvunyi* Trial Judgement”), ¶ 25 (material defect cured by further pleading).

and specific nature of the accused's participation in the alleged crime;<sup>70</sup> the identity and activity of individuals and/or units allegedly subordinate to the accused;<sup>71</sup> the accused's particular acts of encouragement;<sup>72</sup> the details regarding the nature of the accused's alleged orders;<sup>73</sup> the names of principle perpetrators;<sup>74</sup> and the existence of an international armed conflict.<sup>75</sup>

37. As a general rule, the Prosecution is required to plead the material facts in its possession at the time of confirmation,<sup>76</sup> and material defects are not likely to be cured by information outside of an indictment.<sup>77</sup> However, it is possible "in a few cases that the Prosecution might cure the defect by giving timely, clear, and consistent information concerning the factual basis of the charge in relatively uncomplicated cases".<sup>78</sup> Such curative information can be provided through the Prosecution's pre-trial brief, opening statement, timely disclosed witness statements, or a combination thereof.<sup>79</sup> But, further pleadings which simply amount to "verbatim incorporation" of an indictment or provide no additional clarity will not cure a material defect,<sup>80</sup> nor will the exercise of the accused's right to cross-examine witnesses as to the unpleaded facts.<sup>81</sup>

<sup>70</sup> See *Prosecutor v. Kamuhanda*, ICTR-99-54, Appeals Chamber, 'Judgement', 19 September 2005 (the "Kamuhanda Appeal Judgement"), ¶¶ 18–20, 28 (material defect cured by further pleading); *Ntakirutimana* Appeal Judgement, ¶¶ 45, 47 (material defect cured by further pleading) and ¶¶ 51, 59 (material defect not cured by further pleading).

<sup>71</sup> See *Blaskic* Appeal Judgment, ¶¶ 228, 245 (material defect not cured by further pleading).

<sup>72</sup> See *Ntagerura* Trial Judgement, ¶¶ 40–64, 69.

<sup>73</sup> *Ibid.*, ¶¶ 40–64, 69.

<sup>74</sup> *Ibid.*, ¶¶ 40–64, 69.

<sup>75</sup> See *Simic* Trial Judgment, ¶¶ 115, 117 (material defect not cured by further pleading).

<sup>76</sup> See *Muhimana* Trial Judgement, ¶ 454 ("In this case, the material facts not pleaded relate to allegations that the Accused personally committed a series of individual acts and, with the exception of one allegation that arose after the filing of the Indictment in its final form, pleading the material facts in the Indictment was entirely practical, and the Prosecution's failure to do so remains largely unexplained. In its Pre-Trial Brief, the Prosecution had attempted to excuse itself from providing precise details of some attacks because of the lapse of time, the trauma of witnesses, and the scale of the alleged crimes. However, in respect of all but the one exception referred to above, the Prosecution had the requisite information and was aware of the material facts at the time that the Revised Amended Indictment was filed".)

<sup>77</sup> *Ibid.* ("The Trial Chamber is of the view that, where the material defect is the absence of a pleading of material facts underpinning a charge, it is less likely to be curable by information provided outside the Indictment.")

<sup>78</sup> *Ibid.*, ¶ 452 (emphasis added).

<sup>79</sup> See *Naletilic* Appeal Judgement, ¶ 27 ("In assessing whether a defective indictment was cured ... the Appeals Chamber has in some cases looked at information provided through the Prosecution's pre-trial brief or its opening statement" as well as "the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment".); *Prosecutor v. Ndindabahizi*, ICTR-01-71, Trial Chamber, 'Judgement', 15 July 2004 (the "Ndindabahizi Trial Judgement"), ¶ 29.

<sup>80</sup> See *Naletilic* Appeal Judgment, ¶ 34 (A pre-trial brief or opening statement which suffer from the "same insufficiencies as did the Indictment itself" by failing to specify the place, time, and military purpose of a particular allegation do not cure a defective indictment.) and ¶¶ 42–43 (A chart of witnesses which fails to



38. Notably, the Prosecution can never discharge its pleading obligations by simply referring the Defence to material facts alleged only in witness statements and/or potential documentary evidence.<sup>82</sup> Where an indictment is materially defective, a timely disclosed witness statement may, in conjunction with a sufficiently informative pre-trial brief or opening statement, assist in the curative process.<sup>83</sup> However, the Defence knows of no case in which material facts have been pleaded through disclosure alone.
39. The rationale behind this rule of pleading is simple: In cases of such size and complexity as those typically before International Tribunals, it is unfair to require the Defence “to sift through voluminous” disclosure material searching for allegations which should have been clearly set out in the indictment or included in a pre-trial brief

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sufficiently identify the victim of an alleged beating and an opening statement which makes no reference to the beating do not cure a defective indictment.); *Simic* Trial Judgment, ¶¶ 117, 119 (A pre-trial brief which fails to identify the “particular time and place” of the alleged international conflict does not cure a defective indictment despite the fact that the Trial Chamber heard evidence from both parties on the issue and where the Prosecution’s case had clearly shifted. In such instance, the Prosecution should have sought to amend its indictment.)

<sup>81</sup> See *Muhimana* Trial Judgment, ¶ 457, n. 420 (“The Trial Chamber notes that the exercise by the Accused of his right to cross-examine witnesses on the unpleaded facts does not cure the material defects in the Indictment”).

<sup>82</sup> See *Naletilic* Appeal Judgement, ¶ 27; *Muhimana* Trial Judgement ¶ 452 (“Disclosure of witness statements by the Prosecution does not, by itself, suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.”)

<sup>83</sup> See *Kamuhanda* Appeal Judgment, ¶¶ 25, 28 (A pre-trial brief containing a witness summary including the necessary details—the dates and locations of a defendant’s alleged distribution of weapons—and a timely disclosed witness statement also including the necessary details were sufficient to “provided the Appellant with timely, clear, and consistent information about this distribution of weapons” and thus to cure the defective indictment.); *Muhimana* Trial Judgement, ¶ 196 (A pre-trial brief containing “accurate details” with regard to the time, place, and identity of victims of an alleged rape, where such information had been omitted from the indictment, was sufficient to cure the defect.); *Muhimana* Trial Judgement, ¶ 404 (A pre-trial brief and a timely disclosed witness statement, which “provided the identity of the victim and general area of the crime”, were sufficient to cure a defective indictment.); *Muvunyi* Trial Judgement, ¶ 25 (A timely disclosed unredacted witness statement as well as a summary of that witness’s testimony in the pre-trial brief containing information about a particular killing cured a defective indictment.); *Ntakirutimana* Appeal Judgement, ¶ 41 (A timely disclosed witness statement containing the necessary information in addition to a pre-trial brief which “made it unequivocal” that the Prosecution intended to prove that the accused personally killed the named victim as well as an annex to the brief which “further indicated” the particular witnesses the Prosecution would rely on in that regard were sufficient to cure the defective indictment); *Ntakirutimana* Appeal Judgement, ¶¶ 46–47 (A pre-trial brief containing the specific allegations and an annex thereto specifying the particular witness upon whom the Prosecution intended to rely as well as a timely disclosed witness statement including the necessary information cured the defect—“based on these three documents” (indictment, pre-trial brief, and witness statement) that the accused were clearly informed of the charges.) Cf. *Muhimana* Trial Judgement, ¶¶ 468–470 (A timely disclosed witness statement referring to an alleged rape, clearly not pleaded in the indictment, did not “constitute sufficient, clear, and timely notice of the intention to prove the allegation of rape against the Accused” where the references in the appendix to the pre-trial brief were “insufficient and confusing”. Accordingly, the Chamber made no finding in respect of this allegation.)

or opening statement.<sup>84</sup> As one Chamber succinctly put it: “Clear notice must be given and, until that time, the Defence is entitled to assume that the material facts enumerated in the Indictment are exhaustive and represent the case it has to meet”.<sup>85</sup>

40. Therefore, to the extent that the evolving jurisprudence of the International Tribunals articulates a rule on the issue, it is this: Material facts which appear only in witness statements do not form part of the allegations.<sup>86</sup> In order to protect the rights of the accused and the integrity of the proceedings, the only fair and proper course of action in such cases is for the Trial Chamber to consider any evidence aimed at substantiating such unpleaded facts as falling outside the scope of the allegations and to disregard it.<sup>87</sup>

### C. Analysis

41. Turning to the facts of Fofana’s case, it is submitted that the Indictment suffers from several material defects only some of which have been cured through the further Pleadings.

<sup>84</sup> See *Ntagerura* Trial Judgement, ¶ 66 (“The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused’s alleged crimes, in particular, because some of this material is not made available until the eve of trial”).

<sup>85</sup> *Muhimana* Trial Judgement, ¶ 452. See also *Ntakirutimana* Appeal Judgement, ¶¶ 53, 54, 57, 59 (A pre-trial brief from which the material fact that the accused personally conveyed attackers to the attack was “conspicuously absent” and which contained “only one sentence” to that effect in its annex, when “viewed together”, failed to state the allegation and cure the defective indictment. The Appeals Chamber concluded that the accused were “entitled to conclude that the allegations [contained in Annex B to the Pre-Trial Brief] were the allegations it would have to meet at trial”).

<sup>86</sup> The *Niyitegeka* case is particularly exemplary in this regard. There, the ICTR Appeals Chamber held that, as a general matter, mere service of witness statements by the Prosecution pursuant to the disclosure requirements of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial, and that “regardless of whether the witness statement referred to the [particular] attack or not, the Appellant could well have concluded from the failure to mention [such attack] in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe”. Accordingly, the Chamber held that the defect was not cured through disclosure only, and the Trial Chamber had committed an error of law by convicting the appellant in reliance on such evidence. *Prosecutor v. Niyitegeka*, ICTR-96-14, Appeals Chamber, ‘Judgement’, 9 July 2004 (the “*Niyitegeka* Appeal Judgement”), ¶¶ 221, 223.

<sup>87</sup> See *Ntagerura* Trial Judgement, ¶ 67 (“When the Chamber is confronted with defective paragraphs in an indictment at the post-trial phase, it may address an accused’s lack of notice by disregarding the defective paragraphs in making its factual and legal findings. [...] The Chamber further notes that disregarding a portion of the indictment is most appropriate where an allegation is grossly deficient [...]”); *Krnjelac* Appeal Judgement, ¶ 144 (“the Appeals Chamber holds that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good grounds for refusing, in all fairness, to consider an extended form of liability with respect to *Krnjelac*.”); *Kupreskic* Appeal Judgement, ¶ 92 (“It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.”(emphasis added); *Semanza* Trial Judgement, ¶ 61; *Krnjelac* Trial Judgement, ¶ 86; *Kupreskic* Appeal Judgement, ¶ 114.

42. The Indictment claims that Fofana should be held responsible pursuant to Articles 6(1) and 6(3) of the Statute for those crimes listed at Counts 1–8 and described as having taken place at several geographic locations over a stated period of time throughout southern and eastern Sierra Leone. He is said to have incurred liability for all of these acts—described in the Indictment as having been committed only by unidentified “Kamajors”—by either committing them himself, planning them, instigating them, ordering them, aiding and abetting their commission, participating in an enterprise whose common aim it was to commit them, or, finally, by virtue of his position of authority over the actual perpetrators. However, nowhere in the Indictment is it explained how, where, when or with whom Fofana is said to have accomplished the alleged acts.
43. Because his name is not once mentioned in the factual descriptions preceding each count,<sup>88</sup> the Indictment creates the impression that Fofana has only been charged as a superior. This, of course, is belied by the repeated references to the verbatim language of Article 6(1). However, as noted above, all forms of Article 6(1) liability (including each category of JCE<sup>89</sup>) require the Prosecution to move beyond the mere quotation of the Statute and specifically plead the nature of the accused’s alleged participation.
44. Yet the Indictment does not describe any particular course of conduct on the part of Fofana which could be understood as either committing, planning, instigating, ordering, aiding and abetting, or participating in—through a common plan—any criminal activity. Oddly, the Indictment does not contain the name of a single victim. Nor does it list any principle or co-perpetrators apart from Norman and Kondewa. As clearly articulated by the relevant jurisprudence, these are the kinds of “particular acts” which are required to be pleaded with some degree of specificity in any well-pleaded indictment and the absence of which will render the charging instrument materially defective.
45. Further, the Defence submits that—despite the references to Fofana’s alleged leadership position within the CDF—the Article 6(3) charges were not fully pleaded with the requisite degree of specificity. By failing to precisely alleged the conduct of Fofana “by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by [his alleged subordinates], and to have failed to take the

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<sup>88</sup> See Indictment, ¶¶ 25–29.

<sup>89</sup> The particular pleading requirements for JCE are taken up again in greater detail below.

necessary and reasonable measures to prevent such acts or to punish the persons who did them”,<sup>90</sup> the Prosecution has run afoul of the rule of *Brdjanin* endorsed by this Chamber.

46. Simply put, consistent with the above-stated principles, the Defence is unable to discern a single charge in the Indictment against Fofana which is supported by appreciable material facts. The Pre-Trial Brief is equally defective, simply restating, as it does, the vague allegations contained in the Indictment.<sup>91</sup> Accordingly, the Defence submits that the material defects which existed as of 5 February 2004<sup>92</sup> were in no way cured by 2 March 2004.<sup>93</sup>
47. It was only with the filing of the Supplemental Pre-Trial Brief and its accompanying evidentiary annexes, as ordered by the Chamber, that certain material facts regarding the allegations were finally provided to the Defence. That document purported to lay bare “The Specific Case Against Each Individual Accused”, and the Defence concedes that some of the factual information contained therein reached the level of “particular acts” as described in the relevant jurisprudence. Additionally, the Opening Statement contained some allegations of sufficient particularity. Nevertheless, despite these minor curative effects, the Defence submits that a great deal of the evidence adduced at trial is irrelevant to the charges as they stood on 15 June 2004.<sup>94</sup>

#### D. Conclusion

48. It is not for the accused to strain to appreciate the charges laid out against him, but rather for the Prosecution to articulate them clearly and with specificity. Consistent with the Admissibility Decision, there is a surplus of evidence on the record in this case which goes to no particular allegation. If, as the Chamber has clearly held, the Prosecution’s case against the three accused contains no allegations of sexual offences then, by parity of reasoning, any other “charge” unsupported by material facts in the Pleadings is similarly invalid.<sup>95</sup> Accordingly, for purposes of this Brief, the Defence

<sup>90</sup> Admissibility Decision, ‘Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence’, ¶ 18 (citing *Brdjanin*).

<sup>91</sup> The Pre-Trial Brief is essentially a legal submission with no relevant factual allegations.

<sup>92</sup> The date of filing of the Indictment.

<sup>93</sup> The date of filing of the Pre-Trial Brief.

<sup>94</sup> The date the Prosecution called its first witness.

<sup>95</sup> E.g., acts of cannibalism or human sacrifice. *N.B.* The Prosecution has conceded this point. See *Norman*, SCSL-2004-14-T-728, ‘Confidential Prosecution Response to Confidential Defence Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure’, 30 October 2006, ¶ 16.

shall consider only those allegations supported by material facts in the Pleadings. Pursuant to the above-cited jurisprudence, the Defence does not deem it necessary to address allegations raised solely in witness statements, regardless of the testimony of certain witnesses or the exercise of Fofana's right to cross-examine them. Such matters simply do not form part of the Prosecution's case.

## IV. Crimes Against Humanity

### A. Introduction

49. The Prosecution has charged the three accused with crimes against humanity in Counts 1 and 3 of the Indictment.
50. The Indictment asserts that: “All acts and omissions charged herein as crimes against humanity were committed as part of a widespread and systematic attack directed against the civilian population of Sierra Leone.”<sup>96</sup> The Indictment further alleges that “The words civilian or civilian population used in this indictment refer to persons who took no active part in hostilities, or were no longer taking an active part in the hostilities.”<sup>97</sup> The Prosecution allege in the Indictment that “civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed ‘collaborators’ and specifically targeted by the CDF.”<sup>98</sup>
51. The Pre-Trial Brief acknowledges the systematic and prolonged repression and human rights abuse meted out by the combined RUF and AFRC forces against the innocent people of Sierra Leone.<sup>99</sup> It is instructive to note that the vast majority of the ‘General Factual Background’ presented in the Prosecution CDF Pre-Trial Brief highlights the atrocities and misconduct of the RUF and AFRC.
52. As noted in the Prosecution Pre-Trial Brief the Kamajor and CDF movement gained momentum as a direct response to RUF/AFRC attacks in an attempt to defend the civilian population and “local communities”<sup>100</sup> from abuse and ultimately restore the legitimate and democratic government.<sup>101</sup>

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<sup>96</sup> Indictment, ¶ 10.

<sup>97</sup> Indictment, ¶ 11.

<sup>98</sup> Indictment, ¶ 23. Paragraph 24 further elaborates on how the CDF allegedly committed crimes against ‘collaborators’.

<sup>99</sup> Pre-Trial Brief, ¶¶ 2-39.

<sup>100</sup> Pre-Trial Brief, ¶ 13.

<sup>101</sup> Pre-Trial Brief, ¶ 18.

53. In the Opening Statement, the Prosecution stressed that: “The joint indictment is not an indictment of what could have been an important force for good, the organization called the CDF, the organization that these indictees perverted. Nor did we indict the cultural traditions or the concept of the centuries old hunting societies such as the Kamajors.”<sup>102</sup> In other words, the trial is not a trial of the Kamajors and/or CDF.
54. Nowhere in the Indictment, the Pre-Trial Brief, or the Supplemental Pre-Trial Brief did the Prosecution set out explicitly or exactly how they intended to prove or demonstrate the widespread or systematic nature of the attack.
55. It fell to Prosecution counsel in the Opening Statement, for the first time, to give notice and indicate how the Prosecution intended to prove the widespread and systematic nature of the attack. After setting out a series of alleged incidents and crimes, counsel stated:

These scenarios, Your Honours, clearly show the systematic and widespread pattern of physical violence, murder and looting, perpetrated by the Kamajors on the civilian population of Sierra Leone, Your Honours, all on the instructions, direction and command of Hinga Norman, National Coordinator, Moinina Fofana, National Director of War, and Allieu Kondewa, High Priest.<sup>103</sup>

56. It is submitted on behalf of Moinina Fofana that the Prosecution has failed to prove that any attack upon the civilian population of Sierra Leone (other than those committed by RUF and AFRC forces upon civilians) was either “widespread” or “systematic” so as to amount to a crime against humanity.

### **B. Relevant Law**

57. The Pre-Trial Brief sets out much of the relevant law in relation to crimes against humanity.<sup>104</sup> This section will set out the other relevant jurisprudence and law in relation to crimes against humanity not covered in sufficient detail in the Pre-Trial Brief.

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<sup>102</sup> Trial Transcript, 3 June 2004, at 13:7-9.

<sup>103</sup> Trial Transcript, 3 June 2004, at 27:21-24.

<sup>104</sup> Pre-Trial Brief, ¶¶ 89-105.

58. Crimes against humanity are crimes which: “Either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied ... endangered the international community or shocked the conscience of mankind.”<sup>105</sup>

59. In *Tadic* the Trial Chamber held that there were six conditions for crimes against humanity to apply:

- (i) the existence of an armed conflict;
- (ii) a nexus between the acts in question and the armed conflict;
- (iii) the acts were part of a widespread or systematic occurrence of crimes directed against a civilian population;
- (iv) there was a discriminatory intent behind the crimes;
- (v) there was a policy behind the discrimination (although this may not always be strictly necessary);
- (vi) the accused acted with the requisite intent.<sup>106</sup>

60. In *Akayesu* the Trial Chamber explained the terms “widespread” and “systematic” as follows:

The concept of “widespread” may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of “systematic” may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.<sup>107</sup>

61. In *Blaskic* the Trial Chamber held that the term “systematic” referred to the following four elements:

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<sup>105</sup> *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1943 p. 179 (emphasis added).

<sup>106</sup> *Prosecutor v. Tadic*, IT-94-1, Trial Chamber, ‘Judgement’, 7 May 1997 (the “*Tadic* Trial Judgement”), ¶¶ 616-660.

<sup>107</sup> *Prosecutor v. Akayesu*, ICTR-96-04, Trial Chamber, ‘Judgement’, 2 September 1998 (the “*Akayesu* Trial Judgement”), ¶ 580.



- (i) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- (ii) The perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- (iii) The preparation and use of significant public or private resources, whether military or other;
- (iv) The implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.<sup>108</sup>

62. The Appeals Chamber, however, held that the existence of a plan or policy may be evidentially relevant, but that it is not a legal element of the crime.<sup>109</sup>

63. In *Tadic* the Trial Chamber held that the concept of crimes against humanity necessarily implies a policy element,<sup>110</sup> but did not strictly stipulate this aspect as a requirement for crimes against humanity. The Trial Chamber also held that such a policy need not be explicitly formulated or be a policy of a State:

... the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. As explained by the Netherlands Hoge Raad in *Public Prosecutor v Menten*:

The concept of ‘crimes against humanity’ also requires – although this is not expressed in so many words in the above definition [Article 6(c) of the Nurnberg Charter] – that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.

Importantly, however, such a policy need not be formulised and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those

<sup>108</sup> *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, ‘Judgement’, 3 March 2000 (the “*Blaskic* Trial Judgement”), ¶ 203.

<sup>109</sup> *Blaskic* Appeals Judgement, ¶¶ 100, 117–120.

<sup>110</sup> *Tadic* Trial Judgment, ¶¶ 653–655.

acts, whether formalised or not. Although some doubt the necessity of such a policy the evidence in this case clearly establishes the existence of a policy.

An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy “because their commission requires the use of the state’s institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nurnberg Charter].” While this may have been the case during the Second World War, and thus the jurisprudence followed by the courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case ... . Therefore, although a policy must exist to commit these acts, it need not be the policy of a State.<sup>111</sup>

64. This was confirmed by the Trial Chamber in *Kayishema and Ruzindana* in which it was held that a policy formulated by an organisation or group was sufficient:

For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. Additionally, the requirement that the attack must be committed against a “civilian population” inevitably demands some kind of plan and, the discriminatory element of attack is, by its very nature, only possible as a consequence of a policy.

Who or what must instigate the policy? Arguably, customary international law requires a showing that crimes against humanity are committed pursuant to an action or policy of a State. However, it is clear that the ICTR Statute does not demand the involvement of a State [...]

To have jurisdiction over either of the accused, the Chamber must be satisfied that their actions were instigated or directed by a Government or by any organisation or group.<sup>112</sup>

65. In *Kordic and Cerkez* the Trial Chamber held that “although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a requirement, as such, for crimes against humanity.”<sup>113</sup> Instead it

<sup>111</sup> *Tadic* Trial Judgment, ¶¶ 653, 654.

<sup>112</sup> *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-01, Trial Chamber, ‘Judgement’, 21 May 1999 (the “*Kayishema* Trial Judgement”), ¶¶ 124–126.

<sup>113</sup> *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Chamber, ‘Judgement’, 26 February 2002 (the “*Kordic* Trial Judgement”), ¶ 182.

was held that “the existence of a plan or policy should better be regarded as indicative of the systematic character of the offences charged as crimes against humanity.”<sup>114</sup>

66. In *Jelisić* the Trial Chamber held:

The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale of the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of the attack.<sup>115</sup>

67. In essence, the policy requirement requires that the acts of individuals alone, which are isolated, un-coordinated, and haphazard be excluded. The International Law Commission has stated:

This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan [...]. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity.<sup>116</sup>

68. The policy need not be one of a State. It can also be an organizational policy. Non-state actors, or private individuals, who exercise *de facto* power can constitute the entity behind the policy.<sup>117</sup>

69. Article 7(1) of the Rome Statute of the International Criminal Court provides that “crimes against humanity” means any of the stipulated acts when committed as part of a “widespread or systematic attack directed against any civilian population”. Article 7(2) of the Rome Statute provides that for the purpose of Article 7(1), “attack directed against any civilian population” means:

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Prosecutor v. Jelisić*, IT-95-10, Trial Chamber, ‘Judgement’, 14 December 1999 (the “*Jelisić* Trial Judgement”), ¶ 53.

<sup>116</sup> *Report of the International Law Commission on the Work of its Forty-eighth Session* 6 May-26 July 1996, GAOR, 51<sup>st</sup> Sess., Supp. No. 10, 30, UN Doc. A/51/10, p. 94. See also *Prosecutor v. Nikolic*, IT-02-60/1, ‘Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence’, 20 October 1995, ¶ 26.

<sup>117</sup> *Report of the International Law Commission on the Work of its Forty-eighth Session* 6 May-26 July 1996, GAOR, 51<sup>st</sup> Sess., Supp. No. 10, 30, UN Doc. A/51/10, p. 266.

A course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

70. The elements of the crimes within the jurisdiction of the International Criminal Court are set out in the Elements of Crimes as drafted by the Preparatory Commission for the International Criminal Court. The introduction to the elements of the crimes under Article 7 of the Rome Statute (crimes against humanity) provides the following:

Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires the State or organisation actively promote or encourage such an attack against a civilian population.<sup>118</sup>

71. The footnote to the above provides that:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.<sup>119</sup>

72. Thus, at the ICC, for an accused to be guilty of crimes against humanity pursuant to Article 7, it must be shown that the attack on the civilian population was widespread or systematic and that the attack was in furtherance of a State or organizational policy.
73. Although the *tu quoque* principle has no application in international law, the Trial Chamber in *Limaj* acknowledged and was “conscious” of the background and context in which the crimes of one side to a conflict are alleged to have taken place.<sup>120</sup> In Kosovo, as in Sierra Leone, it was common knowledge that one side, namely the Serb forces, were responsible for far greater human suffering and human rights abuse than the side of the accused on trial, i.e., the KLA.

<sup>118</sup> ICC Elements of Crimes, Introduction to elements of crimes against humanity (article 7), ¶ 3 (emphasis added).

<sup>119</sup> ICC Elements of Crimes, Introduction to elements of crimes against humanity (article 7), ¶ 3, n. 6.

<sup>120</sup> *Limaj* Trial Judgement.

74. In *Limaj* the Trial Chamber held that:

History confirms, regrettably, that wartime conduct will often adversely affect civilians. Nevertheless, the Chamber finds that, even if it be accepted that those civilians of whatever ethnicity believed to have been abducted by the KLA in and around the relevant period were in truth so abducted, then, nevertheless, in the context of the population of Kosovo as a whole the abductions were relatively few in number and could not be said to amount to a “widespread” occurrence for the purposes of Article 5 of the Statute.<sup>121</sup>

It is therefore appropriate, when considering the widespread or systematic nature of an attack to take account of the scale of the alleged abuse in the context of the population as a whole.

75. The Trial Chamber in *Limaj* found that “the KLA evinced no policy to target civilians per se.”<sup>122</sup> The Trial Chamber did hold, however, that “there was evidence of a KLA policy to target perceived Kosovo Albanian collaborators who were believed to be or suspected of associating with Serbian authorities and interests.”<sup>123</sup> The Chamber went on that “whether these perceived or suspected collaborators were correctly identified or not, they were targeted as individuals rather than as members of a larger targeted population.”<sup>124</sup>

76. In finding that there had been no widespread or systematic attack on the civilian population, the Trial Chamber in *Limaj* concluded:

Upon consideration of the evidence before it, the Chamber finds that at the time relevant to the Indictment there was no attack by the KLA directed against a “civilian population”, whether Kosovo Albanian or Serbian in ethnicity, and no attack that could be said to indicate a “widespread” scale; however, as indicated earlier there is evidence of a level of systematic or coordinated organization to the abduction and detention of certain individuals. While the KLA evinced a policy to target those Kosovo Albanians suspected of collaboration with the Serbian authorities, the Chamber finds that there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity.”<sup>125</sup>

<sup>121</sup> *Ibid.*, ¶ 210 (emphasis added).

<sup>122</sup> *Ibid.*, ¶ 215.

<sup>123</sup> *Ibid.*, ¶ 216.

<sup>124</sup> *Ibid.*, ¶ 217.

<sup>125</sup> *Ibid.*, ¶ 228.

The Prosecution did not appeal against this finding or the acquittal of all three accused of all the Crimes against humanity counts in the Indictment.

### C. Analysis

77. It would be an affront to history to suggest that the Kamajors/CDF had as their primary aim anything other than the protection of the civilian population from human rights abuse and the restoration of the legitimate and democratic government of Sierra Leone.

78. The position was succinctly and clearly stated by Prosecution witness Colonel Iron:

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 ... I can't recall the exact words, but seemed to accord to the central idea of the CDF, which was to defend their homelands against the RUF and subsequently junta forces. But specifically in the south and west there were clear strategic ideas as the campaign developed, as the war developed. So we see the CDF starting from a defensive posture after the junta. Moving to an offensive posture to correspond – coincide with the ECOMOG intervention.<sup>126</sup>

The defence of their homelands, their people and democracy were the guiding principles of the CDF. It was not an organization dedicated to destruction and gratuitous violence.

79. Other Prosecution witnesses confirm that the primary goal of the CDF was the defence of their homelands and the protection of civilians: Witness TF2-008 said that the objective of the Kamajors was to protect civilians and that this was told to Kamajors during training.<sup>127</sup> Witness TF2-079 testified that he joined the Kamajors to “defend myself from RUF brutality and to prevent my community from being attacked by the RUF rebels.”<sup>128</sup> He went on to confirm that the Kamajor movement was set up to protect the lives and properties of civilians.<sup>129</sup>

80. Moreover, Prosecution witnesses confirm one of the primary aims of the CDF as being the restoration of the democratically elected government: Bob Tucker stated that the

<sup>126</sup> Trial Transcript, 14 June 2005, at 34:5-18.

<sup>127</sup> Trial Transcript, 17 November 2004, at 13.

<sup>128</sup> Trial Transcript, 26 May 2005, at 7.

<sup>129</sup> Trial Transcript, 27 May 2005, at 18.

Kamajors fought to restore the legitimate government and not to enrich themselves.<sup>130</sup> Witness TF2-005 confirmed that the CDF motto was “we fight for democracy”.<sup>131</sup>

81. Other witnesses confirmed that the CDF fought alongside ECOMOG with the aim of restoring the legitimate government: Colonel Iron stated that the CDF and ECOMOG had similar operational aims and objectives—to recover the country from the junta forces.<sup>132</sup> Witness TF2-201 stated that to his knowledge ECOMOG was fighting on behalf of the government in exile and that ECOMOG had the same objectives as the Kamajors.<sup>133</sup>
82. Expert witness Dr Daniel Hoffman confirms this analysis. His testimony relevant to this issue is summarised below:
83. Traditionally and historically, the Kamajor was the protector of the community “from threatening forces of the forest.”<sup>134</sup> In the early stages of the war, it was the Kamajors who were “mobilized to defend communities to assist the armed forces as scouts and as guides.”<sup>135</sup>
84. As the war progressed, the numbers of people adopting or being labelled Kamajor increased.<sup>136</sup> The need to protect rural villages and IDP camps from the threat of the “Sobel” led “community elders, town chiefs, paramount chiefs, and the elderly” to come together and respond by putting men forward as Kamajors.<sup>137</sup> The number of people self-identifying themselves as Kamajors significantly increased during the Junta period.<sup>138</sup>
85. Notwithstanding the massive growth of the Kamajor/CDF movement between 1995 and 2000, its principle aims and objective of “defending the community from threat” did not significantly change. As stated by Dr Hoffman:

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<sup>130</sup> Trial Transcript, 10 February 2005, at 91.

<sup>131</sup> Trial Transcript, 16 February 2005, at 67. This motto also appears on Exhibit 26.

<sup>132</sup> Trial Transcript, 14 June 2005, at 50.

<sup>133</sup> Trial Transcript, 5 November 2004, at 117.

<sup>134</sup> Trial Transcript, 9 October 2006, at 60:1-2 and 61:29.

<sup>135</sup> Trial Transcript, 9 October 2006, at 62:13.

<sup>136</sup> Trial Transcript, 9 October 2006, at 62:16.

<sup>137</sup> Trial Transcript, 9 October 2006, at 64:22–65:7.

<sup>138</sup> Trial Transcript, 9 October 2006, at 62:26 and 67:6-16.

It is obviously a very broad claim and at different moments in the trajectory of this organization, what was perceived to be the threat to the community changed. I would argue, though, and have argued that this is a fairly consistent sense throughout that the function, if you will, of a Kamajor, was to be this community defender. In the Junta period, the threat was of the AFRC, and this was—and the RUF had combined forces at that time. This is a fairly significant threat. I mean, the policy, if you will, of the Junta was fairly clear, that it was the Kamajors were not going to be allowed to continue, and this was perceived as being a threat, not only to the Kamajors themselves, but, really, to Mende areas, in general, and so I would suggest that at that level, the aims and objectives are fairly consistent throughout.<sup>139</sup>

86. In response to a question from the Presiding Judge, Dr Hoffman elaborated on the subtle change in emphasis of the CDF in response to the Junta threat:

It fell on the Kamajors to maintain their position as those who were defenders of communities. Their specific objectives, their specific aims when the Junta takes control is to restore the SLPP government. So, in that sense, you have a new set of aims based on a new set of circumstances; the SLPP government has gone into exile. And so I guess what I'm arguing is it sort of depends on which level you're talking. If you are talking at a greater level of extraction, the sort of purpose of the Kamajor remains consistent. The specific aims have obviously changed, based on the fact that you now have the Junta in Freetown.<sup>140</sup>

87. Notwithstanding the Kamajor/CDF principle objective of defending the community, there can be little doubt that some civilians were killed by such forces. Such killings, however, did not form part of CDF policy. When cross-examined, Dr Hoffman stated:

If you are asking me whether civilians were killed by members of the CDF and Kamajors, I have no doubt that it happened at various points. If you're asking me as a matter of policy, I would disagree with that statement.<sup>141</sup>

88. As Dr Hoffman earlier confirmed in his testimony:

Q: Rape, extra-judicial killings, cannibalism, et cetera, how do such things relate to the aim of defending the community, which was an aim of the Kamajor society which you identified? How do those matters relate to the aim of the Kamajor/CDF?

A: They would certainly be countered to those aims.<sup>142</sup>

<sup>139</sup> Trial Transcript, 9 October 2006, at 81:20–82:4.

<sup>140</sup> Trial Transcript, 9 October 2006, at 83:13-23.

<sup>141</sup> Trial Transcript, 10 October 2006, at 65:17-20.



89. Part of the reason for this was the process of initiation into the Kamajor society. As part of many such initiations the initiated undertook to observe a certain set of responsibilities to the community. These included things like: “not committing rape, not attacking unarmed civilians, defending the community.”<sup>143</sup>
90. Dr Hoffman exemplified this further by explaining a powerful phrase associated with initiation: “Kamajor *baa woteh*”. This means:

Kamajor do not turn, right. It has a number of meanings, one way is simple: Do not retreat. When you go into battle, don't run away. Even more importantly, it means don't turn on your community. The specific reference is to the Sobels, the figures of the AFRC, RUF, you know that ambiguous line between people meant to be protecting the community and people who in fact threaten the community. The Kamajor *bawote* is that this is what you are about now you have entered this society.<sup>144</sup>

Thus, fundamental to being a Kamajor is the notion of not committing crimes against the community. Accordingly, the commission of crimes runs counter to the very core of what Kamajors undertook to do.<sup>145</sup>

91. That the targeting of civilians was not an objective of the CDF was reinforced during the cross-examination of Dr Hoffman. Dr Hoffman agreed with the proposition that the CDF engaged in guerrilla-type warfare.<sup>146</sup> He did not agree with the proposition that “targeting innocent civilians is one of the main tools in guerrilla warfare”.<sup>147</sup> He stated: “the ideal military models of guerrilla warfare specifically states that it's only successful when civilians are not attacked.”<sup>148</sup>
92. The targeting of so-called “collaborators” cannot be described as an aim and objective of the CDF.<sup>149</sup> Dr Hoffman explained the reason for this in the following terms:

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<sup>142</sup> Trial Transcript, 9 October 2006, at 89:25–90:1.

<sup>143</sup> Trial Transcript, 9 October 2006, at 90:18.

<sup>144</sup> Trial Transcript, 9 October 2006, at 90:22-29.

<sup>145</sup> Trial Transcript, 9 October 2006, at 91:1-5.

<sup>146</sup> Trial Transcript, 10 October 2006, at 62:7-13.

<sup>147</sup> Trial Transcript, 10 October 2006, at 62:14-17.

<sup>148</sup> Trial Transcript, 10 October 2006, at 62:18-20.

<sup>149</sup> Trial Transcript, 9 October 2006, at 98:11-16.

For one thing the—I would probably point to the ambiguity of the term “collaborator” for one thing, and what it meant for individuals on the ground. The fact that this is, as I pointed out, one of the things we need to take into account is the extent to which what was happening here was a conglomeration of local dynamics. The term “collaborator” was used fairly – well, to cover a lot of different kind of dynamics. We are talking about in some cases, this became a rubric under which individual scores would be settled. The easiest thing in the world was, in the wake of an attack on a village, or an intervention which a new territory was held, the easiest thing in the world to do was to use that particular term “collaborator” as a way to settle old scores, you know, promote oneself individually [...].<sup>150</sup>

Thus to the extent that individuals were targeted as “collaborators”—this was more as a way of settling personal scores than as part of CDF policy.

93. Moreover, due to the communication problems within the terrain over which the Kamajors/CDF operated and the different voices that purported to speak on behalf of the CDF—it was impossible for one person to articulate any kind of common CDF position. As Dr Hoffman stated: “There simply was nobody in a position to make declarations that would be considered the word for the movement as a whole. The communication capacity wasn’t there.”<sup>151</sup> In response to a question from Justice Itoe, Dr Hoffman stated:

To make the kinds of declarations that would be considered to be CDF policy, in that sense. It simply wasn’t—it wasn’t practical, and it wasn’t the way the organization was operating at the time. I mean, logistically, it wasn’t possible. The only mode of communication that had any chance of reaching a broad audience was the BBC’s Focus on Africa programme. It’s the only outlet to which everybody—and I put “everybody” in quotes, clearly it wasn’t everybody, but a large number of the Kamajors had simultaneous access to, and that’s not where these kinds of declarations were necessarily being made.<sup>152</sup>

In response to a further question, Dr Hoffman confirmed:

Presiding Judge: Does it amount to saying that there was no center from which pronouncements came?

<sup>150</sup> Trial Transcript, 9 October 2006, at 98:18–99:4.

<sup>151</sup> Trial Transcript, 9 October 2006, at 99:12-15.

<sup>152</sup> Trial Transcript, 9 October 2006, at 99:20-29.

A: Yes, My Lord, that's what I would maintain. And logistically, there was nobody who could occupy that position and there was nothing logistically that could have facilitated it.<sup>153</sup>

94. For example, Dr Hoffman confirmed the very "tenuous" relationship between Base One and Base Zero with "tensions between the personalities at these various locations".<sup>154</sup> He concluded by saying:

There is not a lot of—in fact, probably very, very little co-ordination of efforts, partly because of these personality tensions, but also because of the difficulty of moving from one to another. It is not possible to do it over land. It's dangerous, it takes a very long time. And it meant coordinating any kinds of activities between the two was certainly not easy.<sup>155</sup>

95. Although the Kamajors/CDF had a common aim to protect the civilian population and not commit crimes against them, this did not preclude individuals amongst them having less than noble aims and objectives of their own, such aims, however, cannot be said to give rise to CDF policy. Dr Hoffman confirmed that although everyone, on the whole, adhered to the common aims of the Kamajors:

that does not preclude other people having individual agendas or individual aims as well. These are not mutually exclusive. My sense is that—and certainly in my experience, you talk to members of the organization, and they—they are pretty consistent, that this is what the organization is about. Now again, they may have individual aspirations as well, hopes for what their participation might bring them personally, but, in terms of a—a kind of collective sense of what they are about, I think that's fair to say.<sup>156</sup>

96. In terms of examples of individual aims, Dr Hoffman highlighted the following:

I think there are a lot of individuals that—and, again, we're talking especially about young people who saw, at various points, that participation with the militia was a way to gain a certain amount of prestige. Some cases, it may even have been a route to material success, material acquisition. It may have been an opportunity to settle old scores with community members for whom they may not have been able to do that in the past, for reasons of economic imbalance or social norms. The war presented many people with an opportunity to enact alternate routes to achieving their individual objectives.

<sup>153</sup> Trial Transcript, 9 October 2006, at 100:1-6.

<sup>154</sup> Trial Transcript, 9 October 2006, at 72:2-4.

<sup>155</sup> Trial Transcript, 9 October 2006, at 72:4-10.

<sup>156</sup> Trial Transcript, 9 October 2006, at 85:14-24.

Again, they might be political, they might be economic, they might be social. And I think for various individuals they fell in all three of those categories.<sup>157</sup>

Dr Hoffman stated that the activities of such individuals were not a common aim of the Kamajor movement: “not in a sense of being a kind of policy or even a *raison d’etre*.”<sup>158</sup> He went on: “what I’m suggesting is that there are local aims and local concerns shot through and everyone—and this is not uncommon”.<sup>159</sup>

97. To conclude, it is clear that there was no Kamajor/CDF policy to attack civilians. The over-riding Kamajor/CDF policy was the defence of civilians from the very constant and ever-present RUF/AFRC attack. There was no one person or entity that could articulate and circulate any CDF policy to attack civilians. Exhortations to attack collaborators, if done at all, was done by individuals rather than on behalf of the CDF. In any event, encouragement to attack collaborators does not necessarily give rise to policy to commit crimes against humanity. As held in *Limaj* it must be shown that regardless of whether collaborators are correctly identified or not, it must be shown that they were targeted as “members of a larger targeted population” rather than as individuals.<sup>160</sup>
98. The Prosecution stated in their Opening Statement that the widespread or systematic nature of the attacks would be demonstrated by the various incidents alleged against the three accused. It is necessary therefore to look at such evidence as has been adduced by the Prosecution and consider, for each crime base, whether the facts alleged, if proved, cross the requisite threshold of seriousness to rise from violations of Common Article 3 (war crimes under Article 3 of the Statute) to crimes against humanity under Article 2.
99. The Prosecution case, taken at its highest, is set out at Annex A. It is submitted that close scrutiny of the alleged crimes, as outlined in Annex A, demonstrates that the requisite threshold has not been crossed.

<sup>157</sup> Trial Transcript, 9 October 2006, at 85:27–86:10.

<sup>158</sup> Trial Transcript, 9 October 2006, at 86:23-25.

<sup>159</sup> Trial Transcript, 9 October 2006, at 87:6-8.

<sup>160</sup> *Limaj* Trial Judgment, ¶¶ 216-217.

100. Firstly, even if proved, the attacks cannot be said to have, for the reasons set out above, been carried out pursuant to any Kamajor/CDF policy. Secondly, the incidents themselves are not, in the context of the conflict in Sierra Leone, of a sufficient seriousness and gravity to amount to widespread or systematic attacks for the purposes of Article 2 of the Special Court Statute.

#### **D. Conclusions**

101. It is submitted that from the above the following conclusions can be made:

- (i) The overwhelming majority of human rights abuses in Sierra Leone between 1996–1999 were committed by the combined forces of the RUF/AFRC against the Sierra Leone civilian population.
- (ii) The Kamajor/CDF policy (such that there was one) was to protect the civilian population from such attacks and reinstated the SLPP government in exile.
- (iii) The CDF did not have a policy to target and attack civilians. Indeed to attack civilian targets was contrary to CDF philosophy and training.
- (iv) The targeting of collaborators was not a CDF aim. Some members of the CDF may have had concerns about collaborators and articulated them. However, they did not and could not speak for the CDF as a whole. Moreover, there is nothing to suggest their exhortation to deal with collaborators was aimed at anyone who was not actively engaged with the RUF/AFRC forces.
- (v) It is common practice and certainly not a violation of international law for a State or armed group to take lawful measures against those suspected of spying or being engaged in treason.
- (vi) To the extent that perceived collaborators were targeted, they were, as in *Limaj*, targeted as individuals rather than as members of a larger targeted population.

(vii) If innocent civilians were attacked by persons purporting to be members of the CDF, these attacks were not carried out as part of any CDF policy and were carried out by individual Kamajors/CDF members independent of any overall plan or policy.

(viii) Any such isolated attacks carried out do not demonstrate a widespread or systematic attack on the civilian population for the purpose of the current proceedings.

102. For the reasons set out above, all three accused should be found 'Not Guilty' of counts 1 and 3 of the Indictment.

## V. War Crimes

103. In order for this Chamber to have jurisdiction over the crimes alleged pursuant to Article 3 of the Statute, it must be shown, conjunctively, that such crimes were committed in the context of an armed conflict and that a sufficient nexus existed between each crime and the conflict.<sup>161</sup>
104. The Prosecution has alleged that at all times relevant to its case, “a state of armed conflict existed in Sierra Leone”<sup>162</sup> and that a “nexus existed between the armed conflict and all acts or omissions charged”<sup>163</sup> as violations of Article 3 of the Statute.<sup>164</sup>
105. While the Appeals Chamber has already confirmed this Chamber’s finding that an armed conflict existed in the territory of Sierra Leone from March 1991 until January 2002,<sup>165</sup> it remains for the Prosecution to prove beyond a reasonable doubt that Fofana’s alleged acts were “closely related” to the hostilities occurring in the parts of the country controlled by the parties to the conflict.<sup>166</sup>
106. The Defence submits that the Prosecution has failed to discharge its burden in this regard and urges the Chamber to hold the Prosecution to strict proof of its case with respect to Counts 2, 4, 5, 6, and 7.

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<sup>161</sup> See, e.g., *Kunarac* Appeal Judgement.

<sup>162</sup> Indictment, ¶ 4.

<sup>163</sup> Indictment, ¶ 5.

<sup>164</sup> These include Counts 2, 4, 5–7.

<sup>165</sup> See *Norman*, SCSL-2004-T-398, Appeals Chamber, ‘Decision on Appeal Against Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’, 18 May 2005, ¶ 40.

<sup>166</sup> See, e.g., *Brdjanin* Trial Judgement, ¶ 128.

## VI. Article 6(1) Liability

107. Consistent with the previous submissions, for each mode of liability contained in Article 6(1), the Defence will set out the relevant law and then apply it to the evidence which corresponds to the allegations contained in the Pleadings, discussing the elements of the relevant crimes only where necessary.

### A. Fofana did not commit any crimes

108. “Committing” a crime “covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law”.<sup>167</sup> Article 6(1) “covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law”.<sup>168</sup> The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime provided for in the Statute, through positive acts or omissions,<sup>169</sup> whether individually or jointly with others. The requisite *mens rea* is that the accused acted with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.<sup>170</sup>

109. Nowhere in the Indictment, the Pre-Trial Brief, or the main body of the Supplemental Pre-Trial Brief is Fofana specifically alleged to have physically perpetrated any crime provided for in the Statute, either through positive acts or omissions. Annex A of the Supplemental Pre-Trial Brief, listing the Prosecution’s proposed testimonial evidence, does refer to a single incident of Fofana’s alleged commission, specifically that a group of Kamajors, including Fofana, broke into the proposed witness’s house, fired shots, and beat the proposed witness’s uncle.<sup>171</sup> However, the proposed witness was never

<sup>167</sup> *Prosecutor v. Krstic*, IT-98-33, Trial Chamber, ‘Judgement’, 2 August 2001 (the “*Krstic* Trial Judgment”), ¶ 601. See also *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, ‘Judgement’ (the “*Tadic* Appeal Judgment”), ¶ 188; *Ntakirutimana* Appeals Judgment, ¶ 462.

<sup>168</sup> *Tadic* Appeals Judgment, ¶ 188.

<sup>169</sup> *Kordic* Trial Judgment, ¶ 376.

<sup>170</sup> *Ibid.*

<sup>171</sup> Supplemental Pre-Trial Brief, Annex A, p.9 (proposed testimony of TF2-063).



called<sup>172</sup>, and no other evidence was presented by the Prosecution as to this alleged incident.

110. Accordingly, Fofana should be found ‘Not Guilty’ of committing any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

### **B. Fofana did not plan any crimes**

111. “Planning” implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases.<sup>173</sup> The *actus reus* of “planning” requires that one or more persons plan or design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated.<sup>174</sup> It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.<sup>175</sup> A person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 6(1) of the Statute for planning.<sup>176</sup>

112. Nowhere in the Indictment or the Pre-Trial Brief is Fofana specifically alleged to have planned or designed the commission of any particular crime which was later perpetrated. Although he is said to have been physically present at several so-called “planning meetings”<sup>177</sup>, the Supplemental Pre-Trial Brief alleges only a single instance of Fofana’s actual participation and/or involvement in the planning of crimes,<sup>178</sup> namely, that he was “physically present and participated in a meeting addressed by Samuel Hinga Norman at Dassamu village”, wherein it was agreed that “all civilians living in Kebe were collaborators and should be killed and their houses burnt”.<sup>179</sup> Arguably, the Prosecution has alleged that Fofana planned Counts 1 and 2 at Dassamu

<sup>172</sup> Proposed witness TF2-063 did not testify at trial.

<sup>173</sup> *Brdjanin* Trial Judgement, ¶ 268; *Krstic* Trial Judgement, ¶ 601; *Stakic* Trial Judgement, ¶ 443.

<sup>174</sup> *Kordic* Appeals Judgement, ¶ 26.

<sup>175</sup> *Kordic* Appeals Judgement, ¶ 26.

<sup>176</sup> *Kordic* Appeals Judgement, ¶ 31.

<sup>177</sup> Not one of these references, however, refers to any alleged criminal activity. See ¶¶ 16(e), 25(e), 33(e), 41(d), 47(b), 49(g), 65(e), 72(e), 79(e), 88(e), 91(d), 93(e), 101(e), 108(h), 113(c), 115(e), 122(e), and 135(e).

<sup>178</sup> *N.B.* Annex A of the Supplemental Pre-Trial Brief, listing the Prosecution’s proposed testimonial evidence, does not provide any factual details that could reasonably and fairly be construed as Fofana’s alleged planning of crimes.

<sup>179</sup> Supplemental Pre-Trial Brief, ¶¶ 33(h), 78(e), and 108(c).

village through his participation in the above-mentioned meeting. Yet, the Prosecution presented no evidence with respect to this alleged incident and the Chamber, in its Rule 98 Decision, held that all references to “Kebi Town” in Bo District were accordingly stricken from the Indictment.<sup>180</sup> If by “Kebe”, the Prosecution had in mind a location other than Kebi Town, the Defence has been unable to discover that particular location on any map of Sierra Leone, let alone evidence that any crimes were committed there.

113. Accordingly, Fofana should be found ‘Not Guilty’ of planning any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

### C. Fofana did not instigate any crimes

114. “Instigating” means “prompting another to commit an offence.”<sup>181</sup> Both acts and omissions may constitute instigating, which covers express and implied conduct.<sup>182</sup> A nexus between the instigation and the perpetration must be demonstrated;<sup>183</sup> but it need not be shown that the crime would not have occurred without the accused’s involvement.<sup>184</sup> The *actus reus* is satisfied if it is shown that the conduct of the accused was a factor substantially contributing to the perpetrator’s conduct.<sup>185</sup> The requisite *mens rea* for “instigating” is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.<sup>186</sup>

115. Nowhere in the Pleadings is Fofana specifically alleged to have prompted any others to commit any particular offence provided for in the Statute which was later perpetrated. Accordingly, the Defence submits that the Prosecution’s case against Fofana did not include charges of instigating any criminal activity. In any event, no evidence of such instigation was presented.

<sup>180</sup> *Norman*, SCSL-2004-14-T-473, Trial Chamber I, ‘Decision on Motions for Judgement of Acquittal Pursuant to Rule 98’, 21 October 2005.

<sup>181</sup> *Krstic* Trial Judgement, ¶ 601; *Akayesu* Trial Judgement, ¶ 482; *Blaskic* Trial Judgement, ¶ 280; *Kordic* Appeals Judgement, ¶ 27; *Kordic* Trial Judgement, ¶ 387.

<sup>182</sup> *Brdjanin* Trial Judgement, ¶ 269; *Blaskic* Trial Judgement, ¶ 280.

<sup>183</sup> *Brdjanin* Trial Judgement, ¶ 269; *Blaskic* Trial Judgement ¶ 280.

<sup>184</sup> *Kordic* Appeals Judgement, ¶ 27.

<sup>185</sup> *Kordic* Appeals Judgement, ¶ 27.

<sup>186</sup> *Kordic* Appeals Judgement, ¶ 32.

116. Accordingly, Fofana should be found ‘Not Guilty’ of instigating any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

#### **D. Fofana did not order any crimes**

117. The *actus reus* of “ordering” requires that a person in a position of authority instructs another person to commit an offence.<sup>187</sup> It is not necessary to demonstrate the existence of a formal superior-subordinate command structure or relationship between the orderer and the perpetrator; it is sufficient that the orderer possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.<sup>188</sup> There is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.<sup>189</sup> With regard to the *mens rea*, the accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.<sup>190</sup>

118. Nowhere in the Indictment or the Pre-Trial Brief is Fofana specifically alleged to have instructed others to commit any particular offence provided for in the Statute, which was later perpetrated. However, the Supplemental Pre-Trial Brief does make certain specific factual claims which support the following allegations of ordering. These are dealt with in turn.

##### *1. Fofana did not order “Born Naked” Kamajors to attack Kenema*

119. The Prosecution has alleged that Fofana ordered a CDF group known as Born Naked “to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses”.<sup>191</sup> However, no evidence was presented that Fofana ordered the Born Naked group to do anything, let alone attack Kenema Town. The Prosecution’s

<sup>187</sup> *Kordic Appeals Judgement*, ¶ 28.

<sup>188</sup> *Brdjanin Trial Judgement*, ¶ 270.

<sup>189</sup> *Kamuhanda Appeal Judgement*, ¶ 76.

<sup>190</sup> *Blaskic Appeals Judgement*, ¶ 42; *Kordic Appeals Judgement*, ¶ 30; *Brdjanin Trial Judgement*, ¶ 270.

<sup>191</sup> Supplemental Pre-Trial Brief, ¶ 25(g), 72(f), and 101(f); Annex A, p.20 (proposed testimony of TF2-148).

proposed witness on this issue never testified,<sup>192</sup> and no other evidence was presented that Fofana ordered any commander to attack Kenema, kill captured combatants or collaborators, burn their houses, or seize their property.

*2. Fofana did not order the erection of a checkpoint at Jebma Town*

120. The Prosecution has alleged that Fofana “gave instructions for a checkpoint to be erected at Jebma Town, where civilians were separated by tribes” and “the Temnes were taken to the forest” to be killed, maimed, and/or physically harmed”.<sup>193</sup> However, no evidence was presented that Fofana ordered a checkpoint to be erected at any location, let alone at Jebma Town. The Prosecution’s proposed witness on this issue never testified<sup>194</sup>, and no other evidence was presented that Fofana ordered any commander to separate captured rebels and civilians by tribe and kill, maim, or otherwise physically harm Temnes.

*3. Fofana did not order the Taiama Operation*

121. The Prosecution has alleged that Fofana, along with Norman, “gave direct instructions to the Death Squad for the Taiama Operation in 1997” resulting in “a heavy toll of civilian casualties”.<sup>195</sup> However, no evidence was presented that Fofana ordered the Death Squad to do anything, let alone engage in the so-called “Taiama Operation” in 1997. Indeed, no evidence was presented as to the existence of any such operation.

*4. Fofana did not order the execution of death sentences at Base Zero*

122. The Prosecution has alleged that Fofana, “at Base Zero and together with Allieu Kondewa, pronounced the death sentences on captured combatants or gave orders to inflict other forms of physical violence”.<sup>196</sup> However, no evidence was presented that Fofana pronounced death sentences or gave orders to inflict other forms of physical violence on anyone, let alone captured combatants at Base Zero.

<sup>192</sup> Proposed witness TF2-148 did not testify.

<sup>193</sup> Supplemental Pre-Trial Brief, ¶¶ 33(i) and 78(d); Annex A, p. 17 (proposed testimony of TF2-124).

<sup>194</sup> Proposed witness TF2-124 did not testify.

<sup>195</sup> Supplemental Pre-Trial Brief, ¶¶ 33(j) and 78(c).

<sup>196</sup> Supplemental Pre-Trial Brief, ¶ 93(i).

*5. Fofana did not order the burning of civilian property*

123. The Prosecution has alleged that Fofana ordered, “as a general measure of retribution”, “the burning of civilian property performed as part of the attacks on many villages throughout the various Districts of Sierra Leone”.<sup>197</sup> However, no evidence was presented that Fofana ordered the burning of civilian property as part of attacks on villages for any reason, let alone as a general measure of retribution.

*6. Fofana did not order any other attack on Kenema*

124. The Prosecution has alleged that “the CDF launched an attack on Kenema Town on or about February 15, 1998, which occasioned severe physical violence, and the intentional infliction of mental harm or suffering on the civilian population, upon the directives and instructions of the CDF high command, of which Moinina Fofana was the National Director of War”.<sup>198</sup> It is further alleged that Fofana “was responsible for sending ammunition to the CDF in the field”.<sup>199</sup>

125. Although witness TF2-201 claims that Fofana was present at a meeting at Base Zero sometime in February 1998 where Norman is said to have instructed commanders with regard to potential attacks on Kenema and Bo,<sup>200</sup> there is no evidence that Fofana ever issued a single directive or instruction with regard to the alleged 15 February 1998 attack, or any other attack, on Kenema.

*7. Fofana did not order the illegal detention of witness TF2-057 and his brother*

126. In Annex A of its Supplemental Pre-Trial Brief, the Prosecution has alleged that Fofana ordered witness and his brother to be imprisoned and kept on a water-only diet for twenty-five days, and that witness’s brother and two other detainees were taken away and never seen again.<sup>201</sup> In its Opening Statement, the Prosecution further alleged that

<sup>197</sup> Supplemental Pre-Trial Brief, ¶ 131(c).

<sup>198</sup> Supplemental Pre-Trial Brief, ¶ 70(a).

<sup>199</sup> Supplemental Pre-Trial Brief, ¶¶ 25(d) and 72(d).

<sup>200</sup> Trial Transcript, TF2-201, 5 November 2004 (41–54).

<sup>201</sup> Annex A, p. 8 (proposed testimony of TF2-057).

it would substantiate the killings, by machete, of four civilians along Mahei Boima Road in Bo, “right at the same street where Moinina Fofana had his headquarters”.<sup>202</sup> Arguably, on these material facts, the Prosecution has alleged that Fofana ordered Counts 1–4.

127. The Prosecution did present evidence regarding this alleged incident by way of a single witness, TF2-057.<sup>203</sup> According to his testimony, sometime in March 1998<sup>204</sup> shortly after the arrival of ECOMOG forces in Bo, a group of unidentified Kamajors came to his house and informed him that he was wanted at Kamajor headquarters at 88 Mahei Boima Road, and that he and his brother were then taken there by force. Once there, Fofana allegedly entered the room from the veranda and stood near the witness and his brother.
128. The witness claims to have recognized Fofana from previous meetings held at Coronation Field in Bo in 1993 and 1994 where Fofana was introduced as the Director of War. According to the witness, Fofana then asked: “What type of people are this?” When told that the witness and his brother were Temnes, Fofana allegedly responded that he “did not have any business with the Temne people, because ... they’re [sic] brother, Foday Sankoh, brought a war in this country”.<sup>205</sup> The witness claims that he understood this comment to mean that he and his brother would be killed.<sup>206</sup>
129. Fofana then went into his office, and an unidentified Kamajor locked the witness and his brother in a cell with four others, where the witness remained for twenty-five days. Approximately fifteen days into his detention, the witness claims to have heard Fofana’s voice calling for “one person among the two people in the cell”. Unidentified Kamajors then opened the door and asked witness’s brother to come out. The witness never saw his brother again.

<sup>202</sup> Opening Statement, 3 June 2004, 26:21–24. *N.B.* The forensic evidence presented by the Prosecution had to do with an incident described by witness TF2-156, who testified that four of his companions were pursued and chopped to death by unidentified Kamajors outside his aunt’s house in Bo. See Exhibit 101, Haglund Report, § IV(A)(4) at p. 22 (7654). The Prosecution presented no forensic evidence with respect to the incident described by TF2-057.

<sup>203</sup> Trial Transcript, TF2-057, 29 November 2004 (117–123); Trial Transcript, 30 November 2004 (1–12). The evidence of TF2-057 is uncorroborated.

<sup>204</sup> Trial Transcript, TF2-057, 30 November 2004 (70:26–71:9).

<sup>205</sup> Trial Transcript, TF2-057, 29 November 2004 (122).

<sup>206</sup> Trial Transcript, TF2-057, 30 November 2004 (20:24–21:12).

130. Sometime later, the witness again claims to have heard the voice of Fofana calling for two others from the cell to be removed. The witness then “peeped” through a hole in the door and saw a group of unidentified Kamajors armed with cutlasses and sticks surround the two detainees and hack them to death. The witness further claims that he saw another fellow detainee, Aruna Massaquoi, killed in a similar manner by unidentified Kamajors. The witness claims he was eventually released by ECOMOG officers.
131. The Defence submits that the evidence of TF2-057 is neither reliable nor consistent with the other evidence in the case. Furthermore, that Fofana ordered the alleged detention and killings is not the only reasonable inference to be drawn from the evidence.

*a. The witness’s identification of Fofana is unreliable*

132. Although the witness indicated that he personally recognized Fofana based on having seen him at certain meetings in 1993 and 1994,<sup>207</sup> the evidence suggests that the witness spent very little time in the presence of Fofana on the day he was detained—only long enough for Fofana to emerge from the veranda, ask a single short question, receive an even shorter answer, briefly reply, and immediately leave the scene.<sup>208</sup> No doubt this is a sufficient amount of time in which to recognize a familiar face. But the witness—by his own admission—hadn’t seen Fofana in at least four years and only then at public meetings at Bo’s Coronation Field, a large meeting ground the size of a standard football pitch. Following this initial brief encounter, the witness does not claim that he saw Fofana again. However, after an interval of not less than fifteen days, according to the evidence,<sup>209</sup> the witness claims to have recognized Fofana’s voice through the closed door of his cell.<sup>210</sup> Ten days later, he claims to have heard the same voice a second time.<sup>211</sup> This evidence is all that links Fofana to the disappearance of the witness’s brother and the killings of the three others. For a number of reasons, the Defence submits the Chamber should treat it with extreme circumspection.

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<sup>207</sup> Trial Transcript, TF2-057, 29 November 2004 (120:20–121:9).

<sup>208</sup> Trial Transcript, TF2-057, 29 November 2004 (121:14), (121:28), (122:10-11), (122:29).

<sup>209</sup> Trial Transcript, TF2-057, 30 November 2004 (2:8–9, 3:2).

<sup>210</sup> Trial Transcript, TF2-057, 30 November 2004 (2:16-17).

<sup>211</sup> Trial Transcript, TF2-057, 30 November 2004 (3:29).

133. As to the physical identification of Fofana, the witness's assertion that he would have been introduced by the title Director of War in 1993 or 1994 is dubious. According to the Prosecution's own evidence, the earliest mention of Fofana's title is mid- to late-1997.
134. Further, with regard to the alleged voice identification, there is no evidence that the witness had ever heard Fofana's voice prior to the alleged incident at the office.<sup>212</sup> Additionally, as stated above, the amount of time the witness was allegedly exposed to Fofana's voice was rather short, and it is highly unlikely that the witness—no doubt under a great deal of stress, having been forcibly detained for reasons unexplained to him—was making a deliberate effort to commit Fofana's voice to memory. The witness indicated in his examination-in-chief that he only spoke three languages: Temne, Krio, and Susu.<sup>213</sup> Assuming, *ex arguendo*, that Fofana in fact engaged in the above-mentioned dialog with the "junior Kamajor",<sup>214</sup> it is almost certain that such a discussion would have taken place in Mende, a foreign language to the witness. Moreover, as the witness describes the original exchange between Fofana and the junior Kamajor, there is no reason to suppose that it was conducted in anything but normal conversational tones. However, if the witness was indeed able to comprehend an unfamiliar voice speaking a foreign language through the door of his cell, it most certainly must have been projected quite forcefully, if not shouted. One needn't be an expert in forensic voice recognition to know that the sound of someone's voice can change dramatically depending on the speaker's tone and emotional state as well as the acoustic conditions of the environment.
135. Finally, the Defence emphasizes that the witness did not identify Fofana or his voice in court. Accordingly, it is equally likely that the voice the witness claims to have heard calling for the removal of the men from the cell belonged to a person other than Fofana.

*b. There is confusion as to the timing, location, and perpetrator of the alleged incident*

136. With regard to the creation and staffing of CDF offices in Bo, the evidence is as follows: (i) At some point, Kosseh Hindowa occupied an office at 88 Mahei Boima

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<sup>212</sup> *N.B.* It was the witness's testimony only that he *saw* Fofana in 1993 or 1994, not that he *heard* him speak at that time. TF2-057, 29 November 2004 (120:20–121:9).

<sup>213</sup> Trial Transcript, TF2-057, 29 November 2004 (110:3-6).

<sup>214</sup> Trial Transcript, TF2-057, 29 November 2004 (121:13).



Road.<sup>215</sup> (ii) Sometime in 1999/2000, an office of the “war directorate” (which was later referred to as the “Peace Office”) was opened at an unspecified number on Mahei Boima Road and that Fofana headed this office.<sup>216</sup> (iii) There were two CDF offices in Bo, both along Mahei Boima Road: one at number 88 and the other at number 42.<sup>217</sup> (iv) Hindowa and Fofana had offices at different locations.<sup>218</sup> Apart from the testimony of witness TF2-057, there is no evidence that Fofana was present in Bo in March 1998.

137. According to the evidence, it appears fairly clear that Fofana’s “office” was at 42 Mahei Boima Road and was not opened until March 1999 at the earliest. Therefore, the witness’s testimony—that he saw Fofana at 88 Mahei Boima Road in March 1998—is suspect. While it is possible that Fofana was present on that particular occasion at number 88 or that the witness was simply mistaken in his testimony as to both the address and the time of the incident, it is equally possible that the witness mistook Kosseh Hindowa or another Kamajor for Fofana.

*c. Fofana’s ordering is not the only reasonable inference under the circumstances*

138. While the existence of an order may be proved through circumstantial evidence, it must be the only reasonable inference under the circumstances. The witness did not testify that Fofana ordered him to be brought to the office or placed in the cell or that he heard Fofana order the alleged killings. Assuming, *ex arguendo*, that it was indeed Fofana who the witness saw, the evidence is simply that he emerged from the veranda *after* the witness had been detained, made an equivocal remark about Temne people, and left the room. Indeed, Fofana’s question (“What type of people are this?”) indicates that he may have been surprised to see the witness and his brother in the office. That Fofana is said to have spent so little time with the two men reasonably indicates that, as he is alleged to have said, he literally “did not have any business with the Temne people” and not, as the witness understood it, that he thought they should be killed. At its highest, the evidence suggests that Fofana may be a racist, not a murderer.

<sup>215</sup> Exhibit 168, Statement of Foday Seisay, 29 August 2006, at p. 2 (“Mr Hindowa occupied a large, staffed office at 88 Mahei Boima Road”.)

<sup>216</sup> Trial Transcript, TF2-014, 14 March 2005 (57:7-12), (57:24-26) and 15 March 2005 (40:17–41:25), (42:16-22); *see also* Exhibit 168, Statement of Foday Seisay, 29 August 2006, at p. 2.

<sup>217</sup> Trial Transcript, 20 February 2006 (90:17-20).

<sup>218</sup> Trial Transcript, Kenneth Koker, 20 February 2006 (84:17–19).

139. Of course, it is the burden of the Prosecution to prove Fofana's alleged acts and state of mind beyond a reasonable doubt. For the above-stated reasons, the Defence submits that it has not done so. The evidence of witness TF2-057 cannot and should not be relied upon by the Chamber to impute any liability to Fofana for ordering Counts 1–4.
140. Accordingly, Fofana should be found 'Not Guilty' of ordering any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

#### **E. Fofana did not aid and abet any crimes**

141. "Aiding and abetting" is the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.<sup>219</sup> Strictly speaking, "aiding" and "abetting" are not synonymous.<sup>220</sup> "Aiding" involves the provision of assistance, while "abetting" need involve no more than encouraging, or being sympathetic to, the commission of a particular act.<sup>221</sup> However, the two concepts have been consistently considered together as a single mode of liability.
142. The *actus reus* of aiding and abetting is the practical assistance, encouragement, or support of the aider and abettor which has a substantial effect upon the perpetration of the crime.<sup>222</sup> The test is two-pronged: (i) Initially, it must be shown that the accused in fact provided assistance, encouragement, or support to the principle offender. (ii) Such assistance, encouragement, or support must then be shown to have had a substantial impact on the commission of the alleged crime.
143. While there is no requirement of a strict causal relationship between the conduct of the aider or abettor and the crime in the sense that such conduct was the *sine qua non* of the commission of the crime,<sup>223</sup> liability will not arise where the activities of the accused are merely "indicative of some degree of involvement" in alleged criminal activity.<sup>224</sup>

<sup>219</sup> *Krstic* Trial Judgement, ¶ 601; *Aleksovski* Appeal Judgement, ¶ 162.

<sup>220</sup> *Kvočka* Trial Judgement, ¶ 254, citing *Akayesu* Trial Judgement, ¶ 484.

<sup>221</sup> *Kvočka* Trial Judgement, ¶ 254, citing *Akayesu* Trial Judgement, ¶ 484.

<sup>222</sup> *Blaskic* Appeals Judgement, ¶ 48; *Furundzija* Trial Judgement, ¶ 249; *Kunarac* Trial Judgement, ¶ 391.

<sup>223</sup> *Blaskic* Appeals Judgement, ¶ 48.

<sup>224</sup> See, e.g., *Delalic* Appeal Judgement, ¶¶ 356–359 (No liability for unlawful confinement where the accused publicly justified and defended the purpose and legality of the camp and participated in the classification and release of prisoners (despite having no "independent authority" to do so); while such activities were "indicative of some degree of involvement in the continuing detention or release of detainees", both were insufficient to

Regardless of the type of support, encouragement, or assistance, it must always be shown to have a substantial effect on the commission of the underlying crime. In practice, Chambers of the International Tribunals have refused to impose liability where the nexus between the accused's alleged acts and the underlying crime has been considered too remote, particularly where the accused's own involvement is both temporally and physically distant from the crime base.<sup>225</sup>

144. Mere presence at the scene of a crime will rarely, if ever, constitute aiding or abetting.<sup>226</sup> However, in those few cases where it can be shown that the presence bestows legitimacy on, or provides encouragement to, the actual perpetrator, such presence may be culpable.<sup>227</sup> The presence of a superior may operate as an encouragement or support, in the relevant sense,<sup>228</sup> but only where he is physically present at the crime base along with his subordinate.<sup>229</sup> An omission may, in the particular circumstances of a case, constitute the *actus reus* of aiding and abetting, but only where there is a legal duty to act.<sup>230</sup>

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establish the “degree of participation that would be sufficient to constitute a substantial effect on the continuing detention”).

<sup>225</sup> See, e.g., *Brdjanin* Trial Judgment, ¶ 527 (No liability for torture where the accused's public utterances were not deemed “specific enough to constitute instructions [...] to the physical perpetrators to commit any of the underlying” crimes; the Prosecution had failed to establish a nexus between the statements and the commissions of the killings in question.); *Kunarac* Trial Judgment, ¶ 741 (No liability where it was not established that the accused was present while the principle perpetrator committed the rapes, despite the fact that the accused continued to visit the house where the rapes were being committed; the connection between the events at the house and the accused's sporadic presence there, was “so loose” that it would stretch the concept of aiding and abetting beyond its limits.); *Oric* Trial Judgment, ¶¶ 682–688 (No liability where, despite his preparation and execution of attacks wherein crimes were clearly committed but where there was evidence that the accused could have done nothing to prevent it as he did not have the means to control the perpetrators and where there was no evidence that his group—one of several involved in the attack—had any involvement in the crimes, the accused could not be said to be the kind of “approving spectator” who could be held responsible.)

<sup>226</sup> *Kupreskic* Appeal Judgment, ¶¶ 256, 304.

<sup>227</sup> *Simic* Trial Judgment, ¶ 165; *Delalic* Appeal Judgment, ¶¶ 357–359; *Naletilic* Trial Judgment, ¶ 63; *Kvočka* Trial Judgment, ¶ 257; *Krnjelac* Trial Judgment, ¶ 89; *Kunarac* Trial Judgment, ¶ 393; *Aleksovski* Trial Judgment, ¶¶ 64, 65, 87; *Delalic* Trial Judgment, ¶ 327; *Limaj* Trial Judgment, ¶ 517; *Brdjanin* Trial Judgment, ¶ 271; *Tadic* Trial Judgment ¶ 689.

<sup>228</sup> *Brdjanin* Trial Judgment, ¶ 271.

<sup>229</sup> See, e.g., *Akayesu* Appeal Judgment, ¶ 684; *Akayesu* Trial Judgment, ¶¶ 452, 693–694, 704–705 and AC ¶ 694; *Bisengimana* Trial Judgment, ¶ 39; *Furundzija* Trial Judgment, ¶¶ 270–275; *Niyitegeka* Trial Judgment, ¶ 462; *Ntagerura* Trial Judgment, ¶ 762.

<sup>230</sup> See *Blaskic* Appeal Judgment, ¶ 47; *Krnjelac* Trial Judgment, ¶ 88; *Kunarac* Trial Judgment, ¶ 391. *N.B.* Omissions have been found to constitute the *actus reus* of aiding and abetting the crimes of subordinate principles only where the accused's position of authority imposed a duty to act and his proximity to the crime scene and awareness of what was happening there established his knowledge. See, e.g., *Aleksovski* Trial Judgment, ¶ 87; *Krnjelac* Trial Judgment, ¶¶ 171, 316; *Rutaganira* Trial Judgment, ¶¶ 29–35.

145. The *mens rea* required is the knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence.<sup>231</sup> This awareness need not have been explicitly expressed; it may be inferred from all relevant circumstances.<sup>232</sup> The aider and abettor need not share the *mens rea* of the perpetrator, but he or she must be aware of the essential elements of the crime ultimately committed by the perpetrator,<sup>233</sup> and must be aware of the perpetrator's state of mind.<sup>234</sup>
146. Of particular relevance when attempting to determine an accused's state of mind, is the physical and temporal proximity of the accused to the underlying criminal act in question. In making the determination, the Chambers of the International Tribunals have invariably found that the accused became cognizant of the state of mind of the principle perpetrator either (i) due to his physical presence at the crime base along with the principle or (ii) through effectively functioning military or institutional lines of communication.<sup>235</sup> No liability will attach where it has not been shown that the accused knew that his acts of support, encouragement, or assistance would lead to the commission of crimes.<sup>236</sup> Of course, in order for a Chamber to make the determination, the identity of the principle perpetrator must be pleaded and proven.
147. Nowhere in the Indictment or the Pre-Trial Brief is Fofana specifically alleged to have aided and abetted the commission of any particular offence provided for in the Statute which was later perpetrated. However, the Supplemental Pre-Trial Brief does make

<sup>231</sup> *Furundzija* Trial Judgement, ¶ 249; *Tadic* Appeals Judgement, ¶ 229; *Blaskic* Appeals Judgement, ¶ 49; *Vasiljevic* Appeals Judgement, ¶ 102.

<sup>232</sup> *Delalic* Trial Judgement, ¶ 328; *Tadic* Trial Judgement, ¶ 676.

<sup>233</sup> *Aleksovski* Appeals Judgement, ¶ 162; *Krnjelac* Trial Judgement, ¶ 90 ("The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's *mens rea*. However, the aider and abettor need not share the *mens rea* of the principal offender.")

<sup>234</sup> *Brdjanin* Trial Judgement, ¶ 273; *Aleksovski* Appeals Judgement, ¶ 162.

<sup>235</sup> *Blagojevic* Trial Judgment; *Brdjanin* Trial Judgment; *Gacumbitsi* Trial Judgment; *Kajelijeli* Trial Judgment; *Krstic* Appeal Judgment; *Kunarac* Trial Judgment; *Kvočka* Appeal Judgment; *Limaj* Trial Judgment; *Naletilic* Trial Judgment; *Ndindabahizi* Trial Judgment; *Ntakirutimana* Trial Judgment; *Rutaganda* Trial Judgment; *Semanza* Trial Judgment; *Vasiljevic* Appeals Judgement..

<sup>236</sup> *Blagojevic* Trial Judgment, ¶¶ 733–745 (No liability for mass executions where the accused and his brigade provided practical assistance to the operation that resulted in the death of thousands of Muslim men and boys by separating the men from the rest of the population and transporting, detaining, and guarding them at the detention sites (necessary steps in the overall murder operation). However, there was insufficient evidence of *mens rea*, and therefore no liability.); *Brdjanin* Trial Judgment, ¶¶ 477–479 (No liability for extermination where it was not demonstrated that the accused was aware that the crimes would necessarily reach the level of extermination.); *Kordic* Appeal Judgment, ¶ 765 (No liability for persecution where the accused had no knowledge that crimes were about to be committed.); *Krnjelac* Trial Judgment, ¶ 347 (No liability for unlawful killings where the accused, a prison warden, failed to use his authority to prevent the perpetrators from entering the prison which had a substantial effect on the commission of the killings, because the Prosecution had failed to establish that the accused was "aware of the crimes which were being committed as a result of his failure".)

certain specific factual claims which, the Defence concedes, arguably allege the following charges of aiding and abetting. These are dealt with in turn.

*1. Fofana did not aid and abet the commission of any crimes which might have resulted from any attack on Bonthe Town*

148. The Prosecution has alleged that Fofana “addressed a meeting of the CDF at Base Zero” in February 1998 where he “supported directives for the attack on Bonthe Town” which included the killing of collaborators and the destruction of their property.<sup>237</sup> However, absolutely no evidence was led with regard to this alleged meeting, or with regard to any other meeting concerning any attacks on Bonthe Town at which Fofana was alleged to have been present.

*2. Fofana did not aid and abet the execution of a captured soldier at Dassamu*

149. The Prosecution has alleged that Fofana was “responsible for turning over to Allieu Kondewa a soldier captured at Dassamu for the purpose of having that soldier executed”.<sup>238</sup> However, absolutely no evidence was led with regard to this alleged incident.

*3. Fofana did not aid and abet the looting of a World Vision vehicle in Bo*

150. The Prosecution has alleged that Fofana “took possession of a vehicle looted from World Vision by the CDF and put it into private use”.<sup>239</sup> However, no evidence was presented that Fofana took possession of any vehicle belonging to World Vision or to any other party or organization.

*4. Fofana did not aid and abet the looting of generators and stereos in Bo*

151. The Prosecution has alleged that “during the attack on Bo Town, the CDF looted generators and stereos from the house of one civilian accused of being a collaborator

<sup>237</sup> Supplemental Pre-Trial Brief, ¶¶ 49(h), 93(h), 115(f).

<sup>238</sup> Supplemental Pre-Trial Brief, ¶ 64(b).

<sup>239</sup> Supplemental Pre-Trial Brief, ¶ 106(c).

and handed the looted items to Moinina Fofana”.<sup>240</sup> However, no evidence was presented that any looted items, let alone generators and stereos, were handed over to Fofana.

*5. Fofana did not aid and abet the looting of a Mercedes vehicle at Base Zero*

152. The Prosecution has alleged that “a looted Mercedes vehicle was delivered to Samuel Hinga Norman at Base Zero but was in the custody and use of Moinina Fofana”.<sup>241</sup> However, no evidence was presented as to this alleged incident.

*6. Fofana did not aid and abet the beating of a civilian by the CDF of the 19th Battalion*

153. The Prosecution has alleged that Fofana was “physically present at a scene when one civilian was severely beaten by the CDF of the 19th Battalion”.<sup>242</sup> While no evidence was led that Fofana was involved in any such incident, a single prosecution witness gave evidence regarding a seemingly similar episode involving Kosseh Hindowa. According to witness TF2-057, sometime after the arrival of ECOMOG in Bo, a Limba man was arrested by unidentified Kamajors and taken to 88 Mahei Boima Road—the Kamajor “head office”. The man was placed in the custody of Kosseh Hindowa and beaten by unidentified Kamajors in Hindowa’s presence. Hindowa then demanded 100,000 Leones for the man’s release, and the witness paid the money. The man died one month later.<sup>243</sup> However, the witness never mentioned Fofana as being present or in any way involved in the alleged incident, nor did any other witness. Accordingly, he cannot be said to bear responsibility for the alleged beating.

*7. Fofana did not aid and abet the infliction of physical violence and mental harm in Bo*

154. The Prosecution has alleged that Fofana “maintained his offices and spent a significant amount of time in Bo and was thus in proximity to the events which resulted in the

<sup>240</sup> Supplemental Pre-Trial Brief, ¶ 106(d).

<sup>241</sup> Supplemental Pre-Trial Brief, ¶ 114(e).

<sup>242</sup> Supplemental Pre-Trial Brief, ¶ 33(g).

<sup>243</sup> Trial Transcript, TF2-056, 6 December 2004 (74:14–76:14), (76:18–77:7), (77:17-19).

infliction of physical violence and mental harm or suffering”.<sup>244</sup> It is unclear to the Defence what the Prosecution intended to allege by this statement.

155. However, whether and when Fofana maintained offices in Bo, let alone whether he spent any time there, has been left unclear on the record.<sup>245</sup> At its highest, the Prosecution’s evidence suggests that Fofana was in some way associated with offices somewhere on Mahei Boima Road as early as March 1999. With the exception of the evidence of witness TF2-057 (dealt with above under “ordering”), there is no evidence, specific or otherwise, suggesting that Fofana was in proximity to the events which resulted in the infliction of physical violence and mental harm or suffering in Bo. In any event, merely being “in proximity” to unspecified criminal events does not incur criminal liability for aiding and abetting (or any other mode of liability) under the relevant jurisprudence. Accordingly, the Prosecution has failed to substantiate its charges in this regard.

*8. Fofana did not aid and abet the looting of coffee and cocoa at Base Zero*

156. The Prosecution has alleged that “a looted truck loaded with coffee and cocoa was taken to Base Zero and handed over to Moinina Fofana”.<sup>246</sup> Yet this vague allegation—arguably an attempt to charge Fofana with aiding and abetting the looting of the goods—is not made any clearer by the Prosecution’s evidence.

157. According to the only witness who testified as to this alleged event, when asked whether he had ever seen any evidence of looting at Base Zero, he replied that a truckload of “looted cocoa and coffee” was brought there from the highway by unidentified individuals. He then stated that the cocoa and coffee were unloaded and given to the “Director of War and the Chief Priest”.<sup>247</sup> No further evidence regarding the incident was presented, and there is nothing in the witness’s testimony to suggest that Fofana knew the items had been looted, or if he did, that he had anything to do with their improper procurement. The witness did not identify the individuals who arrived

<sup>244</sup> Supplemental Pre-Trial Brief, ¶ 77(d).

<sup>245</sup> Trial Transcript, TF2-014, 14 March 2005 (57:7-12), (57:24-26) and 15 March 2005 (40:17-41:25), (42:16-22); Trial Transcript, TF2-140, 14 September 2004 (91:3-20); Trial Transcript, TF2-008, 16 November 2004 (18:1-5), (19:23-20:3); Trial Transcript, Kenneth Koker, 20 February 2006 (90:17-20); and Exhibit 168, at 2.

<sup>246</sup> Supplemental Pre-Trial Brief, ¶ 114(d).

<sup>247</sup> Trial Transcript, TF2-068, 17 November 2004 (92:1-12).

with the goods, nor did he indicate what, if anything, Fofana did with the items once they were given to him.

158. The Prosecution has clearly failed to demonstrate how, by simply taking possession of items without the knowledge that they had been illegally obtained, Fofana lent substantial assistance to the crime of looting.

*9. Fofana did not aid and abet the order to kill Sheku Gbao*

159. The Prosecution has alleged that Fofana, “in the presence of Samuel Hinga Norman and Allieu Kondewa, accosted a CDF commander of inferior rank, and rebuked him for failing to kill, as ordered, one Sheku Gbao, a captured enemy combatant”.<sup>248</sup> Again—as per its pleading style—the Prosecution has failed to coherently articulate its allegation, and no evidence was presented that Fofana himself did anything that could be said to have had a substantial effect on the order to kill Gbao.

160. The little evidence presented on this issue suggests that Norman gave the order to Albert Nallo without any assistance, encouragement, or support from Fofana.<sup>249</sup> As to whether Fofana had any appreciable effect on the actual commission of the crime itself is impossible to determine for Nallo admitted that he was unable to carry out the killing.<sup>250</sup> The testimony of witness TF2-082—indicating that sometime after the successful attack on Koribondo Fofana asked him why he hadn’t killed Sheku Gbao<sup>251</sup>—is irrelevant. As already stated, Gbao was not killed, and there are no inchoate offences in international criminal law (apart from genocide). Accordingly, Fofana cannot be said to have incurred liability in this case.

*10. Fofana did not aid and abet the use of children in attacks*

161. The Prosecution has alleged that Fofana was “present where children were being used in attacks”;<sup>252</sup> that he “was directly responsible for the Death Squad, which allowed

<sup>248</sup> Supplemental Pre-Trial Brief, ¶ 32(c).

<sup>249</sup> Trial Transcript, TF2-014, 10 March 2005 (71:7–72:25).

<sup>250</sup> Trial Transcript, TF2-014, 10 March 2005 (71:7–72:25).

<sup>251</sup> Trial Transcript, TF2-082, 15 September 2004 (41:3–42:27).

<sup>252</sup> Supplemental Pre-Trial Brief, ¶ 135(c), under “Count 8: Use of Child Soldiers”.



young boys to fight alongside them on the battlefield”;<sup>253</sup> and that he “visited the village of Gambia twice where he expressed support and endorsed the use of child soldiers”.<sup>254</sup> Although quite vague,<sup>255</sup> these claims arguably articulate *prima facie* charges of aiding and abetting Count 8.

162. However, no evidence was presented that Fofana himself was ever present during any attack, let alone one in which children were “being used”. Although a few Prosecution witnesses mentioned that the Death Squad was answerable to the three accused collectively, the leader of that unit, Bob Tucker, testified that he received his orders from “Pa Norman and not any other person else”.<sup>256</sup> Furthermore, there is no evidence in this case that the Death Squad ever engaged in any particular operation “on the battlefield”, with or without young boys. Finally, there is no evidence that Fofana ever “expressed support and endorsed the use of child soldiers” in the village of Gambia or anywhere else in Sierra Leone.

163. According to one Prosecution witness, Fofana was present along with “children” at a meeting at Base Zero sometime in January 1998 where Norman is alleged to have said that the children were performing better than the adult fighters.<sup>257</sup> Yet no evidence was presented as to the age of the alleged individuals, and no other witness testified to the same incident. Even assuming, *ex arguendo*, that the unidentified individuals were under the age of fifteen years, there is no evidence that Fofana was or should have been aware of that information, that he had anything to do with their conscription or enlistment, or that he used them in any way.<sup>258</sup> Accordingly, the Prosecution has failed to substantiate its allegation that Fofana aided and abetted Count 8.

<sup>253</sup> Supplemental Pre-Trial Brief, ¶ 135(f), under “Count 8: Use of Child Soldiers”.

<sup>254</sup> Supplemental Pre-Trial Brief, ¶ 135(g), under “Count 8: Use of Child Soldiers”.

<sup>255</sup> Unlike its approach with respect to Counts 1–5, the Prosecution did not articulate its Count 8 allegations according to the specific crime bases.

<sup>256</sup> Trial Transcript, TF2-190, 10 February 2005 (34:15-26).

<sup>257</sup> Trial Transcript, TF2-017, 19 November 2004 (87:3–88:16), (89:21–90:29), (91:13–92:2).

<sup>258</sup> According to this Chamber, the elements of Count 8 are as follows: (i) 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; (ii) such person or persons were under the age of 15 years; (iii) the perpetrator knew or had reason to know that such person or persons were under the age of 15 years; (iv) the conduct took place in the context of and was associated with an armed conflict; and (v) the perpetrator was aware of factual circumstances that established the existence of an armed conflict. Rule 98 Decision, ¶ 124.

*11. Fofana did not aid and abet any crimes which might have resulted from any attack on Tongo*

164. The Prosecution has alleged that Fofana was present at a meeting at Base Zero “in December 1997”, along with “members of the CDF command structure”<sup>259</sup> including “all Commanders in the Tongo axis”, where Norman announced “that the civilians found in Tongo at the time of the battle were to be regarded as the enemy and should be treated as such”,<sup>260</sup> and “the civilians living in Tongo were enemies of the CDF because they were mining diamonds which were used by the rebels to buy weapons and therefore these individuals should be killed”.<sup>261</sup> It is further alleged that Fofana “was responsible for sending ammunition to the CDF in the field”.<sup>262</sup> Arguably, the Prosecution has alleged that Fofana aided and abetted Counts 1–4<sup>263</sup> in Tongo through his presence at the above-mentioned meeting and his further distribution of ammunition. The evidence with regard to this allegation is as follows:
165. According to witness TF2-201, the meeting took place at Base Zero and was convened by Norman. Present were Fofana and Kondewa, along with members of the war council and certain commanders including Musa Junisa and Lamin Ngobeh. Norman announced that the hydroelectric facility at Dodo should be destroyed and that the Kamajors should capture Tongo from the rebels and junta. He further announced that he would supply the commanders with ammunition and food, and the commanders gave their assurances that they would mobilize Kamajors from their individual chiefdoms for the attack.<sup>264</sup>
166. According to witness TF2-005, Tongo was discussed at a planning meeting for the Black December Operation. Present were Norman, Fofana, Kondewa, war council members, and commanders from Tongo including Musa Junisa. Norman announced that Tongo should be taken “at all costs” and anybody found “walking with the juntas

<sup>259</sup> Supplemental Pre-Trial Brief, ¶ 15(c), under “Counts 1–2: Unlawful Killing” for “Tongo Field”.

<sup>260</sup> *Ibid.*

<sup>261</sup> Supplemental Pre-Trial Brief, ¶ 64(b), under “Counts 3–4: Physical Violence and Mental Suffering” for “Tongo Field”.

<sup>262</sup> Supplemental Pre-Trial Brief, ¶ 16(d), under “Counts 1–2: Unlawful Killing” for “Tongo Field” and ¶ 65(d), under “Counts 3–4: Physical Violence and Mental Suffering” for “Tongo Field”.

<sup>263</sup> The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Counts 5 or 8 for Tongo. Because Counts 6 and 7 are pleaded as “umbrella” offences, they are dealt with separately in this Brief.

<sup>264</sup> Trial Transcript, TF2-201, 4 November 2004 (106:4-29).

there or mining for them should not be spared". Norman ordered Fofana to "dish out the ammunitions". Fofana did so, and "they went with it".<sup>265</sup>

167. According to witness TF2-222, Norman gave specific instructions for the Tongo operation. He told the fighters present that Tongo would determine the outcome of the war and that they should bear in mind that there was no place to keep any prisoners of war, junta forces or collaborators. At the same meeting, Norman instructed the fighters present to "take care of the human left", that is to chop off the left hand of captured junta forces as "an indelible mark". Fofana then addressed the fighters and told them—"Now you've heard the National Coordinator"—any commander failing in his mission should kill himself and not return. Kondewa said that the time for the rebels to surrender had passed and gave his blessing to the operation.<sup>266</sup>

168. According to witnesses TF2-201 and TF2-079, a situation report was delivered to Norman, in the presence of Fofana and Kondewa and members of the war council indicating that Tongo had fallen to the Kamajors after four days of fighting and that approximately five to six thousand Kamajors had come from several chiefdoms. This was sometime in December 1997.<sup>267</sup> According to witness TF2-079, Norman then ordered Fofana to make arrangements for witness and his men to receive money and other morale boosters.<sup>268</sup>

169. On the above-cited evidence, Fofana's potential acts of practical assistance, encouragement, or support with regard to the attack on Tongo amount to his (i) strong words of encouragement to those in attendance at the meeting; (ii) distribution of an unknown quantity of ammunition to an unidentified number of individuals before the attack; and (iii) provision of certain morale boosters to an unknown number of individuals after the attack.

170. However, because the Prosecution has failed to establish a nexus between Fofana's alleged acts at Base Zero and any of the underlying crimes said to have been committed

<sup>265</sup> Trial Transcript, TF2-005, 15 February 2005 (105:20-25) and (106:10-107:3).

<sup>266</sup> Trial Transcript, TF2-222, 17 February 2005 (110:5-28), (111:8-19), (111:23-112:2), (112:25-113:7), (113:19-114:4), and (119:1-120:11).

<sup>267</sup> Trial Transcript, TF2-201, 4 November 2004 (110:25-111:1), (112:8-17), (113:1-2) and TF2-079, 26 May 2005 (66:2-14).

<sup>268</sup> Trial Transcript, TF2-079, 26 May 2005 (66:2-14).

in and around Tongo, it is impossible to assess whether these acts had any impact, let alone a substantial one, on the commission of any crimes there. A detailed review of the evidence with respect to the Tongo crime base<sup>269</sup> reveals that all alleged criminal activity was perpetrated by unidentified “Kamajors”, with the exception of the following individuals mentioned by name: Keikula Kamabote, BJK Sei, and Chief Baimba Aruna.<sup>270</sup> As there is no evidence that any one of these individuals was present at the above-mentioned meeting, it cannot be said that Fofana provided them with practical assistance, encouragement, or support with regard to their activity at Tongo.

171. In fact, witness BJK Sei testified that the planning for the various Kamajor operations at and around Tongo was done in the bush by Kamajors from several chiefdoms without any reference to Base Zero, and that he never once coordinated or liaised with Fofana.<sup>271</sup> According to other Defence witnesses, there were at least three discrete Kamajor attacks on Tongo<sup>272</sup> for which some arms had been provided from locations other than Base Zero.<sup>273</sup> Furthermore, the evidence above with regard to the above-referenced situation report indicates that five to six thousand Kamajors from several chiefdoms participated in that particular attack on Tongo.

172. Because the evidence with regard to the above-mentioned meeting indicates that only certain commanders were present, it is reasonable to conclude that much if not all of the criminal activity said to have taken place at Tongo and surrounding areas was committed by individuals who did not hear Fofana speak or who received their weapons and/or encouragement from other sources. It is equally likely, on this evidence, that any Kamajors who did receive ammunition or encouragement from Fofana at Base Zero ultimately never made it to Tongo, or that they did but committed no crimes there.

173. A single witness does claim that his group encountered Musa Junisa’s troops at a checkpoint near Panguma where a woman was “chopped” by an unidentified

<sup>269</sup> The crime base evidence for Tongo and environs comprised the testimony of witnesses TF2-015, TF2-022, TF2-035, TF2-027, TF2-047, TF2-048, TF2-013, TF2-144, TF2-016, and TF2-053. See Crime Base Annex.

<sup>270</sup> See Crime Base Annex.

<sup>271</sup> Trial Transcript, BJK Sei, 16 May 2006 (11–13, 29–33).

<sup>272</sup> Trial Transcript, Siaka Lahai, 17 May 2006 (7).

<sup>273</sup> Trial Transcript, Arthur Koroma, 4 May 2006 (73); BJK Sei, 16 May 2006 (27–28); Siaka Lahai, 17 May 2006 (19).

Kamajor.<sup>274</sup> However, in its Rule 98 Decision, the Chamber struck the location of Panguma from the Indictment with respect to Counts 1 and 2. In any event, it is not clear that Junisa—who is said to have been present at the above-mentioned meeting where Fofana “dished out” ammunition—had anything to do with the alleged chopping. Assuming, *ex arguendo*, that he did, it is equally unclear whether anything Fofana had done or said at Base Zero had an impact, substantial or otherwise, on Junisa’s decision to engage in criminal activity at Panguma. To the extent that any link has been established between Fofana and Junisa, it is far too remote both physically and temporally to establish liability beyond reasonable doubt.<sup>275</sup>

174. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 1–4 at Tongo Field.

*12. Fofana did not aid and abet unlawful killings or detentions at SS Camp*

175. The Prosecution has claimed that Fofana frequently visited “SS Camp, a location in Kenema used by the CDF for the killing of captured rebels, collaborators and as a detention facility”.<sup>276</sup> Although this statement fails to articulate any coherent allegations with respect to Fofana’s alleged visits to SS Camp, the Defence presumes the Prosecution intended to allege that Fofana somehow aided and abetted Counts 1–4<sup>277</sup> at that location.

176. The Evidence with regard to this allegation comes exclusively from witness TF2-223 who stated that he received orders from one CO Ngaoujia to capture Special Security (“SS”)<sup>278</sup> Camp and await further orders. According to the witness, Ngaoujia received his orders from Norman through Fofana.<sup>279</sup> SS Camp—located along the Gendema-Kenema axis approximately five miles south of Kenema near the Moa River Bridge—

<sup>274</sup> Trial Transcript, TF2-144, 24 February 2004 (67:9–68:12).

<sup>275</sup> See Kunarac Trial Judgement, ¶ 741 (where the Chamber held that the nexus created by the Prosecution’s evidence with regard to the acts of the accused and the alleged crimes was “so loose” that it would stretch the concept of aiding and abetting beyond its limits).

<sup>276</sup> Supplemental Pre-Trial Brief, ¶ 25(h), under “Counts 1–2: Unlawful Killings” for “Kenema District” and ¶ 72(g), under “Counts 3–4: Physical Violence and Mental Suffering” for “Kenema District”.

<sup>277</sup> The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Counts 5 or 8 for SS Camp. Because Counts 6 and 7 are pleaded as “umbrella” offences, they are dealt with separately in this Brief.

<sup>278</sup> The name “SS Camp” pre-dates the Kamajor occupation. As was mentioned several times during the trial, the location was initially established by the SLA, no doubt due to its strategic location on the Moa River.

<sup>279</sup> Trial Transcript, TF2-223, 28 September 2004 (57:1-27).

was considered a strategic position from which to launch attacks on Kenema.<sup>280</sup> Sometime in early January 1998, SS Camp was captured and occupied by the Kamajors. Some civilians died in the operation, but it is not clear whether they were killed in cross-fire or specifically targeted by junta or Kamajor fighting forces.<sup>281</sup>

177. Approximately one month after the Kamajors had taken control of Kenema (in April or May 1998, according to the witness), Ngaoujia's unit was assigned to mount a checkpoint at SS Camp by Fofana and Kondewa in order to secure the Moa River Bridge. Fofana personally escorted the witness to SS Camp to explain his responsibility there, which was to secure the river.<sup>282</sup>

178. At this point the evidence becomes rather confusing, and the witness was subsequently led a great deal by counsel for the Prosecution. The witness states that, at some point, a team known as Yamorto headed by Murrie Vaughn (alias Steve Biko) took over operations at SS Camp.<sup>283</sup> He then states that, approximately two weeks into his posting at SS Camp and after the Yamorto group had left, Norman arrived with the head of intelligence Mr Magona. Norman told the witness that the "mandate" of SS Camp had changed and that it would subsequently be used as a place for executions under the command of Magona. At some point, Vaughn returned, indicating that he had been sent by Kondewa to remain at SS Camp as part of a "special mission". Norman announced that all killings should be coordinated with Magona and gave the witness a "daily occurrence book" in which to record the killings. According to the witness, Vaughn's Yamorto Group was tasked with extracting human body parts at SS Camp for initiation purposes on orders from Kondewa. When asked how often Norman visited SS Camp, the witness's answer seemed indicated that Fofana may have been present on certain occasions and that he may have seen the daily occurrence book. However, this evidence is far from clear.<sup>284</sup>

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<sup>280</sup> Trial Transcript, TF2-223, 28 September 2004 (59:6-60:15).

<sup>281</sup> Trial Transcript, TF2-223, 28 September 2004 (61:1-62:18).

<sup>282</sup> Trial Transcript, TF2-223, 28 September 2004 (104:11-106:8).

<sup>283</sup> Trial Transcript, TF2-223, 28 September 2004 (106:19-26).

<sup>284</sup> Trial Transcript, TF2-223, 28 September 2004 (108:15-110:12), (111:11-25), (112:23-113:10), (114:16-115:9), (117:7-12), (118:13-119:26), (119:29-120:9), (120:24-122:3), (123:4-19), (125:11-17), (125:20-126:5) and 30 September 2004 (72:5-15).

179. On the above-cited evidence, Fofana's acts of assistance with regard to alleged activity at SS Camp are limited to (i) transmitting orders from Norman to Ngaujia with regard to the initial operation to take the camp sometime in January 1998; (ii) escorting witness TF2-223 to the camp to explain his duties there sometime in April or May 1998; and (iii) being present for unspecified periods of time on unspecified dates at unspecified locations within the camp when certain ritualistic killings may have been taking place there.
180. Because the first two acts deal strictly with the provision of assistance to legitimate objectives—the taking and later manning of a strategic position—and there is no further evidence that either one may have had a substantial effect on the commission of any crimes, Fofana's activity in this regard cannot be said to be culpable.
181. With regard to the third incident, the Defence re-emphasizes the fact that “acts of cannibalism and human sacrifices are not included in the indictment against the three Accused”.<sup>285</sup> Taking the Prosecution at its word, the Defence draws particular attention to the fact that there is simply no evidence of any criminal activity other than that which unequivocally qualifies as “human sacrifice” alleged to have occurred at SS Camp.<sup>286</sup> In any event, the evidence of witness TF2-223—confusing in the extreme—is the product of a series of leading questions by counsel for the Prosecution<sup>287</sup> and is uncorroborated by any other witness. Further, it fails to establish that Fofana was present at the time that any of the alleged human sacrifices were being committed. Even assuming, *ex arguendo*, Fofana's presence during such acts, the Prosecution has failed to show what effect, if any, such presence alone would have had on the commission of the crimes. As noted above, mere presence at the scene of a crime is insufficient to incur criminal liability as an aider and abettor.
182. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 1–4 at SS Camp.

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<sup>285</sup> *Norman*, SCSL-2004-14-T-728, ‘Confidential Prosecution Response to Confidential Defence Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure’, 30 October 2006, ¶ 16.

<sup>286</sup> Trial Transcript, TF2-223, 28 September 2004 (112:23–113:10), (117:7-12), (118:13–119:26), (124:19–125:10), (125:11-17). This was the only Prosecution witness who testified to the commission of any specific crimes at SS Camp.

<sup>287</sup> *Ibid.*

*13. Fofana did not aid and abet any crimes which might have resulted from any attack on Koribondo*

183. The Prosecution has alleged that Fofana was present at a meeting at Base Zero, along with Kondewa, with respect to an attack on Koribondo where certain “commands and orders” were given by Norman, including that no “living thing” should be spared in the attack;<sup>288</sup> “soldiers, rebels and collaborators in Koribondo [should] be killed”;<sup>289</sup> Koribondo should be taken “at all costs”;<sup>290</sup> and that “all the houses except four were to be destroyed because every house had given shelter to rebels and soldiers”.<sup>291</sup> It is further alleged that Fofana “was responsible for sending ammunition to the CDF in the field”.<sup>292</sup> Arguably, the Prosecution has alleged that Fofana aided and abetted Counts 1–5<sup>293</sup> in Koribondo through his distribution of ammunition following the alleged meeting. The evidence with regard to this allegation is as follows:
184. According to witness TF2-008, the war council recommended the taking of Koribondo to Norman in advance of moving on Bo and Freetown at a meeting attended by Fofana and Kondewa. Norman accepted the recommendation and told to the commanders to execute the attack and not to “leave any house or any living thing there, except mosque, church, the barrie and the school”.<sup>294</sup>
185. According to witness TF2-201, Norman called a meeting at Base Zero at which he announced that he had given his “last words” to Joe Tamidey to take Koribondo “under all cost”. Fofana added that it was a disgrace that the Kamajors had failed to dislodge the junta and that they should finally take Koribondo. Kondewa gave his blessing to the attack. Tamidey then requested a certain amount of ammunition, food, and money, and Norman wrote out an order. The following morning, Norman himself distributed the materiel.<sup>295</sup>

<sup>288</sup> Supplemental Pre-Trial Brief, ¶ 31(a), under “Counts 1–2: Unlawful Killings” for “Bo District” and ¶ 77(a), under “Counts 3–4: Physical Violence and Mental Suffering” for “Bo District”.

<sup>289</sup> Supplemental Pre-Trial Brief, ¶ 79(f), under “Counts 3–4: Physical Violence and Mental Suffering” for “Bo District”.

<sup>290</sup> Supplemental Pre-Trial Brief, ¶ 108(a), under “Count 5: Looting and Burning” for “Bo District”.

<sup>291</sup> Supplemental Pre-Trial Brief, ¶ 108(b), under “Count 5: Looting and Burning” for “Bo District”.

<sup>292</sup> Supplemental Pre-Trial Brief, ¶ 33(d), under “Counts 1–2: Unlawful Killings” for “Bo District”; ¶ 79(d), under “Counts 3–4: Physical Violence and Mental Suffering” for “Bo District”; and ¶ 108(g), under “Count 5: Looting and Burning” for “Bo District”.

<sup>293</sup> The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Count 8 for Koribondo. Because Counts 6 and 7 are pleaded as “umbrella” offences, they are dealt with separately in this Brief.

<sup>294</sup> Trial Transcript, TF2-008, 16 November 2004 (78:12–79:24).

<sup>295</sup> Trial Transcript, TF2-201, 4 November 2004 (113:1–114:20).



186. According to witness TF2-190, Norman chaired a meeting at Base Zero in 1998 to “arrange strategies to launch an all-out offensive on the juntas”. He said it was time to capture junta positions “once and for all, and at the same time”. Fofana addressed the meeting and told the Kamajors it was time to implement the training they had received and that any commander who failed in his mission should not return to Base Zero. However, Fofana did not tell the fighters to loot property, burn houses, or kill civilians or captured soldiers. Kondewa ensured the fighters that his powers would be with them. Norman ordered Joe Tamidey to lead the attack on Koribondo. The witness and Tamidey moved together with their men to Kpetewoma where, along with commander Lahai George, they organized their men and distributed ammunition to the fighters. The witness had his own ammunition, and Tamidey had been given his at Base Zero by Lumeh on orders from Norman.<sup>296</sup>
187. According to witness TF2-190, the attack on Koribondo took place on Friday, 13 February 1998. Kamajors including the witness looted certain items, and the witness saw unidentified Kamajors burning houses during the attack.<sup>297</sup>
188. According to witness TF2-201, the commanders who participated in the attack were Joe Tamidey, Bob Tucker, and Lamin Ngobeh. Many Kamajors from the chiefdom joined the attack which was finally successful.<sup>298</sup>
189. According to witness TF2-014, commanders from Pujehun, Bonthe, and Bo Districts were involved in the successful attack on Koribondo in February/March 1998. After taking the town, the witness “burnt the place”. He then received orders from Norman to move to Bo.<sup>299</sup>
190. On the above-cited evidence, Fofana may have provided assistance with regard to the Koribondo attack by way of his rather forceful words of encouragement to the fighters in support of certain illegal orders allegedly given by Norman.

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<sup>296</sup> Trial Transcript, TF2-190, 10 February 2005 (43:28–48:4), (83:3-15).

<sup>297</sup> Trial Transcript, TF2-190, 10 February 2005 (49:7-11), (50:9-14), (51:12-15).

<sup>298</sup> Trial Transcript, TF2-201, 4 November 2004 (115:20-28).

<sup>299</sup> Trial Transcript, TF2-014, 10 March 2005 (74:21–76:7).

191. However, because the Prosecution has failed to establish a nexus between Fofana's alleged acts at Base Zero and any of the underlying crimes said to have been committed in Koribondo, it is impossible to assess whether his words of encouragement had any impact, let alone a substantial one, on any of the individuals who allegedly committed crimes there. A detailed review of the evidence with respect to the Koribondo crime base reveals that all alleged criminal activity was perpetrated by unidentified "Kamajors".<sup>300</sup> As there is no evidence that these individual were present at the above-mentioned meeting, it cannot be said that Fofana provided them with practical assistance, encouragement, or support with regard to their activity.
192. Moreover, the evidence of Albert Nallo indicates that various commanders from Pujehun, Bonthe, and Bo Districts were involved in the attack; and witness TF2-201 noted that "many Kamajors" from the chiefdom joined the attack. Yet it is impossible to discern, on the Prosecution's evidence, whether all of these commanders and Kamajors were present at the above-mentioned meeting, let alone whether they heard the comments attributed to Fofana. Further, Mustapha Lumeh and Dauda Sheriff both testified that the final planning for the attack on Koribondo was done at Kpetewoma.<sup>301</sup> But it is not clear from the evidence whether those Kamajors in attendance at Kpetewoma had also been at the previous meeting at Base Zero.
193. Accordingly, it is reasonable to conclude that much if not all of the criminal activity said to have taken place at Koribondo was committed by commanders and fighters who had little or no awareness of what had transpired at the meeting at Base Zero. It is equally likely, on this evidence, that any of the Kamajors who were in fact substantially emboldened by Fofana's putative utterances at Base Zero ultimately never made it to Koribondo, or if they did, that they committed no crimes there. Furthermore, witness Joe Nunie testified that houses were burnt and civilians were killed by junta forces as they pulled out of Koribondo.<sup>302</sup>
194. A single individual, Bob Tucker, who claims to have been present at the above-mentioned meeting, also admits to having looted a quantity of zinc from various

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<sup>300</sup> The crime base evidence for Koribondo comprised the testimony of witnesses TF2-198, TF2-157, TF2-176, TF2-012, TF2-162, TF2-159, and TF2-032. *See* Crime Base Annex.

<sup>301</sup> Trial Transcript, Mustapha Lumeh, 8 May 2006 (52-58) and Dauda Sheriff, 8 May 2006 (95-96).

<sup>302</sup> Trial Transcript, Joe Nunie, 11 May 2006 (34:13-25).

locations during the attack on Koribondo.<sup>303</sup> Yet it is not at all clear from Tucker’s evidence—or from any other evidence—whether anything Fofana said at Base Zero had an impact, substantial or otherwise, on Tucker’s decision to engage in criminal activity at Koribondo. The evidence is that Fofana urged the fighters to implement the training they had received in order to finally dislodge the junta. There is no further evidence that the Kamajors had been trained how to loot. Indeed, in his evidence, Tucker clearly indicated that Fofana had not told the fighters at the meeting to loot property.<sup>304</sup> Tucker’s decision to do so, it seems, was entirely his own. Additionally, the Defence notes that Tucker admitted to having lied to prosecution investigators<sup>305</sup> and accordingly urges the Chamber to bear such fact in mind when evaluating his testimony.

195. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 1–5 at Koribondo.

*14. Fofana did not aid and abet any crimes which may have resulted from any attack on Bo*

196. The Prosecution has alleged that Fofana was present at a meeting at Base Zero “when orders were given that all shops and pharmacies in Bo Town were to be looted and that all property in Bo Town ‘belonged’ to the CDF”;<sup>306</sup> “that the CDF should feed themselves”; and that such statements were “understood as giving a free hand to the CDF to loot property and that as a consequent effect widespread looting following the attacks on Bo”.<sup>307</sup> It is further alleged that Fofana “was responsible for sending ammunition to the CDF in the field”.<sup>308</sup> Arguably, the Prosecution has alleged that Fofana aided and abetted Count 5<sup>309</sup> in Bo through his presence at the above-mentioned meeting and his further distribution of ammunition. The evidence with regard to this allegation is as follows:

<sup>303</sup> Trial Transcript, TF2-190, 10 February 2005 (50:11–27).

<sup>304</sup> Trial Transcript, TF2-190, 10 February 2005 (43:28–48:4), (83:3-15).

<sup>305</sup> Trial Transcript, TF2-190, 10 February 2005 (79:18-21).

<sup>306</sup> Supplemental Pre-Trial Brief, ¶ 106(b), under “Count 5: Looting and Burning” for “Bo District”.

<sup>307</sup> Supplemental Pre-Trial Brief, ¶ 114(a), under “Count 5: Looting and Burning” for “Bonthe District” but referring specifically to the attack on Bo.

<sup>308</sup> Supplemental Pre-Trial Brief, ¶ 108(g), under “Count 5: Looting and Burning” for “Bo District”.

<sup>309</sup> The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Counts 1–4 or Count 8 for Bo Town. Because Counts 6 and 7 are pleaded as “umbrella” offences, they are dealt with separately in this Brief.

197. According to witness TF2-201, Norman convened a meeting at Base Zero sometime in February 1998. Fofana and Kondewa were present as well as members of the war council and unnamed commanders. Norman instructed the “operation commanders” that there would be an “all-round attack” on Bo and Kenema and that the Kamajors should join ECOMOG forces moving into those areas from Liberia. According to Norman, ECOMOG would “lead the attack”.<sup>310</sup>
198. According to witness TF2-008, at a meeting behind Norman’s house at Base Zero sometime in 1998 after the fall of Koribondo, the war council recommended to Norman that Bo should be the next target and that the attack should be executed in consultation with Maxwell Khobe. Fofana and Kondewa as well as some commanders were present at this meeting, after which the three accused sat down “together with their commanders to plan” the attack.<sup>311</sup>
199. According to witness TF2-068, at a meeting at the school field at Base Zero, Norman told the fighters to “go and clear Bo from the enemies”.<sup>312</sup>
200. According to witness TF2-017, a meeting was convened by Norman at the training field at Base Zero on an afternoon in January 1998. Present were Fofana and Kondewa, members of the war council, and various Kamajors. Children were also present at the meeting, and Norman announced that they were doing better than the adult fighters. In response to a question, Norman told those present that they should “hope to meet everything there when we attack and we succeeded. Whatever we find there belongs to us”. He added that, in addition to attacking the “enemy combatant who are the RUF or the AFRC”, the Kamajors should also attack collaborators who were “in support of the enemy combatants against us and [...] worse than the enemy combatant.”<sup>313</sup>
201. According to witness TF2-017, a second meeting was held on the evening of the same day at the back of the field. Present were Fofana and Kondewa, members of the war

<sup>310</sup> Trial Transcript, TF2-201, 5 November 2004 (41:12-19), (42:4-12), (42:15), (43:7-11), (43:13-25), (44:15-18), (44:23-24).

<sup>311</sup> Trial Transcript, TF2-008, 16 November 2004 (80:8-28), (81:1-6), (81:20-27), (82:1-11), (84:2-10), (94:23-28).

<sup>312</sup> Trial Transcript, TF2-068, 17 November 2004 (93:15-94:1).

<sup>313</sup> Trial Transcript, TF2-017, 19 November 2004 (87:3-88:16), (89:21-90:29), (91:13-92:2).

council, and commanders including James Kaillie and Joseph Lappia. Norman announced that the commanders should attack the Kebi Town section of Bo, kill enemy combatants and collaborators, burn houses, and loot big shops especially pharmacies. Fofana distributed the arms and ammunition later that night. Witness and his group of Kapras along with Kamajors from the other commanders carried out the attack and killed combatants in the process.<sup>314</sup>

202. According to witness TF2-017, sometime around the second week of February, the final order to attack Bo came from Norman, and “they” distributed arms and ammunition to all the commanders, who attacked Bo in four flanks under the command of Albert Nallo.<sup>315</sup>
203. On the above-cited evidence, Fofana’s single act of assistance with regard to the alleged attack on Bo amounts to his distribution of an unknown quantity of ammunition to an unidentified number of individuals sometime before the attack.
204. However, because the Prosecution has failed to establish any nexus between Fofana’s alleged distribution of ammunition at Base Zero and any of the underlying crimes said to have been committed in Bo, it is impossible to assess whether his act had any impact, let alone a substantial one, on the commission of any crimes committed there. A detailed review of the evidence with respect to the Bo crime base<sup>316</sup> reveals that all alleged criminal activity was perpetrated by unidentified “Kamajors”, with the exception of the following individuals mentioned by name: James Bundu, Alhaji Hassan Sheriff, Sundifu Samuka, Joseph Kulagbanda, Gibril Mansarray, Ernest Blango, Phillip Mboma, Borbor Aruna, Chief Mulai, David Joseph, Munda Goima, Abu Gina, Gbessay Abu, Alieu Gina, Munda Gina, Moses Sandy, Abu Tawa, Agba Murray, and one Harowan. However, there is no evidence that any one of these individuals—or any one of their commanders for that matter—was present at the above-mentioned meetings. Therefore, it cannot be said that Fofana provided them with any practical assistance, encouragement, or support with regard to their alleged criminal activity in Bo.

<sup>314</sup> Trial Transcript, TF2-017, 19 November 2004 (92:26–94:29), (95:5-9), (95:23-29), (96:19-27), (97:5-10), (97:15-18).

<sup>315</sup> Trial Transcript, TF2-017, 19 November 2004 (100:11–101:14) and 22 November 2004 (2:4–3:10).

<sup>316</sup> The crime base evidence for Bo comprised the testimony of witnesses TF2-119, TF2-030, TF2-156, TF2-088, TF2-057, TF2-067, TF2-007, TF2-058, TF2-056, TF2-006, and TF2-001. See Crime Base Annex.

205. Additionally, the evidence of witness TF2-017 indicates that Bo was attacked “in four flanks”. Because it is not clear from the Prosecution’s evidence whether Fofana distributed ammunition to the commanders in each flank, it is possible that all of the alleged crimes committed during the attack on Bo were carried out by commanders and fighters who did not receive ammunition from Fofana. It is equally possible, on this evidence, that those unnamed commanders and/or fighters who did receive ammunition from Fofana at Base Zero never in fact made it to Bo; or if they did, that they committed no crimes there.
206. Witness TF2-017 himself admits to having engaged in certain acts of looting during the Bo operation. Specifically, he claims that he and his men looted two pharmacies, one on Tikonko Road and one on Bojon Street,<sup>317</sup> and that they looted and burnt a hotel on Sewa Road belonging to Dr MB Sesay.<sup>318</sup>
207. The Defence does not dispute that one could, in theory, lend substantial assistance to the crime of looting by providing the physical perpetrators with the means by which to accomplish their illegal task. However, it is not at all clear from the Prosecution’s evidence whether the arms and ammunition allegedly distributed by Fofana at the second meeting in January 1998<sup>319</sup> were the same arms and ammunition used by witness TF2-017 and his men during the Bo operation, which took place sometime during the second week of February and for which additional arms and ammunition were provided by unidentified individuals at Bumpé.<sup>320</sup> Further, it is equally unclear which particular arms and ammunition, if any, witness TF2-017 and his men used to facilitate the above-mentioned acts. The crime of looting, obviously, does not necessarily require the use of arms.
208. In cases where Chambers of the International Tribunals have found liability for aiding and abetting the commission of crimes through the distribution of weapons, the accused was physically present at the crime scene where both the distribution and use of the

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<sup>317</sup> Trial Transcript, TF2-017, 19 November 2004 (11:17-19, 12:6-24).

<sup>318</sup> Trial Transcript, TF2-017, 19 November 2004 (6:2-8:10).

<sup>319</sup> Trial Transcript, TF2-017, 19 November 2004 (87-89).

<sup>320</sup> Trial Transcript, TF2-017, 19 November 2004 (100-101).

weapons clearly took place.<sup>321</sup> In other words, the nexus between the accused's act of assistance, encouragement, or support and the crime was clear. In the instant case, the Prosecution has clearly failed to make such a showing. Accordingly, it is open on this evidence that Fofana's alleged distribution of unspecified arms and ammunition in January 1998 had no effect, let alone a substantial one, on the alleged looting said to have taken place in Bo in February of the same year. Furthermore, Morries Ngobeh testified that the Southern Motel, owned by MB Sesay, was looted and burnt by the youths of Bo on a Friday or Saturday in February 1998 before the Kamajors entered town.<sup>322</sup>

209. Finally, the Defence submits that the entire testimony of witness TF2-017 should be viewed with extreme circumspection. The witness openly admitted to lying to the Prosecution and, when asked, agreed that it was acceptable to "make up facts if you are hesitant" about them.<sup>323</sup> Additionally, the witness and his family spent at least twenty-two months in the care and custody of the Special Court's Witness and Victim Support unit (the "WVS"), during which time his children's school fees were paid and \$1000 was given to the witness, ostensibly for the care of his father.<sup>324</sup> While the Defence does not suggest that the receipt of financial support from the WVS is improper as a general matter, the fact that the witness openly admitted to lying reasonably calls into question his motives for participating in the CDF proceedings.

210. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 5 at Bo.

211. Accordingly, Fofana should be found 'Not Guilty' of aiding and abetting any of the crimes alleged in Counts 1-5 and Count 8 of the Indictment.

<sup>321</sup> See *Ndindabahizi* Trial Judgement, ¶¶ 462, 464, 472-473, 485 (Liability for genocide and extermination where, in conjunction with his words of encouragement, the accused distributed weapons and money to the attackers and facilitated their transportation to the crime scene.); *Rutaganda* Trial Judgement, ¶¶ 385, 386, 439 (Liability for unlawful killings and infliction of serious bodily/mental harm where the accused, carrying a rifle and machete, arrived at the crime scene with a truck full of firearms and machetes, personally distributed the weapons to the Interahamwe (over whom he was in a position of authority), and urged them to "go to work".); *Semanza* Trial Judgement, ¶¶ 426, 430, 432 (Liability for genocide where the accused provided substantial assistance to the principal perpetrators of the genocide by gathering Interahamwe and their weapons for the attack on a church and by directing the attackers to kill the Tutsi refugees at the church.)

<sup>322</sup> According to Ngobeh, the Eastern Motel—also owned by Dr Sesay—was looted by youths around the same time but not burnt. Trial Transcript, Morries Ngobeh, 27 September 2006 (6-13).

<sup>323</sup> Trial Transcript, TF2-017, 22 November 2004 (38:25-27, 44:9-12).

<sup>324</sup> Trial Transcript, TF2-017, 22 November 2004 (53-55).

**F. Fofana did not commit any crimes through his participation in a joint criminal enterprise**

*1. The Prosecution has failed to plead a coherent theory of JCE liability*

212. As noted above, a properly pleaded allegation of an accused's commission of crimes through his participation in a joint criminal enterprise must unambiguously specify (i) the form or forms of JCE upon which the Prosecution intends to rely;<sup>325</sup> (ii) the alleged criminal purpose of the enterprise;<sup>326</sup> (iii) the identity of the co-participants, particularly the "person who physically carried out the crime";<sup>327</sup> and (iv) the nature of the accused's participation in the enterprise.<sup>328</sup> Such precision in pleading is required for the simple reason that it "would contravene the rights of the defence" if the Trial Chamber "chose a theory not expressly pleaded".<sup>329</sup>
213. For example, in the *Gacumbitsi* Trial Chamber held that, where the Prosecutor charged the accused with "participating in the planning, preparation or implementation of a common plan, strategy or scheme aimed at exterminating the Tutsi, through his own acts, or through people whom he helped, or through his subordinates, whose acts he knew and approved of", the Chamber could not make any finding as to the putative JCE because it had not been "pleaded clearly enough to allow the Accused to defend himself adequately".<sup>330</sup>
214. With respect to the alleged JCE in the CDF case, the Indictment states that:

<sup>325</sup> *Stakic* Appeal Judgement, ¶¶ 66, 68, 71, and 74 (With regard to the form of the JCE, while it is preferable for the Prosecution to specifically identify its theory by one or more of the now well-known categories—basic, systemic, extended—an indictment that otherwise makes it clear on which category the Prosecution intends to rely is sufficient.)

<sup>326</sup> *Brdjanin* Decision on Form of the Indictment, ¶¶ 42, 43 (The scope of the common purpose must be to carry out a particular crime or crimes, and it is not sufficient for the Prosecution merely to allege that the enterprise did not have a lawful purpose; it must identify a specific crime.)

<sup>327</sup> *Krnjelac* Appeal Judgement, ¶ 116; *Brdjanin* Decision on Form of the Indictment, ¶ 45 ("Without such proof, it cannot be held that the accused was a member of a joint criminal enterprise together with the person who committed that further crime charged".)

<sup>328</sup> *Ntagerura* Trial Judgement, ¶ 34.

<sup>329</sup> *Krnjelac* Appeal Judgement, ¶ 117. No surprisingly, the second through fourth pleading requirements mirror the general *actus reus* elements of the offence of JCE.

<sup>330</sup> *Gacumbitsi* Trial Judgement, ¶ 289 (Where the Prosecutor had merely charged the accused "with conspiring with others, participating in the planning, preparation or implementation of a common plan, strategy or scheme aimed at exterminating the Tutsi, through his own acts, or through people whom he helped, or through his subordinates, whose acts he knew and approved of".).



Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, by their acts or omissions are individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in [...] the Statute as alleged in this indictment, [...] which crimes were within a common purpose, plan or design in which each Accused participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which each Accused participated”.<sup>331</sup>

The plan, purpose or design of Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa 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. This 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. Each Accused acted individually and in concert with subordinates, to carry out the said plan, purpose or design<sup>332</sup>.

215. The language of the first paragraph arguably put Fofana on notice that the Prosecution was charging his participation in both basic<sup>333</sup> and extended<sup>334</sup> categories of JCE. The second paragraph, purporting to describe the common plan, arguably states two distinct criminal purposes: (i) conducting warfare by illegal “means” and (ii) the “elimination” of a protected class of persons.<sup>335</sup>
216. The Defence concedes that, for purposes of pleading, the first two prongs of the above-referenced test—namely, the category of JCE and the criminal purpose of the enterprise—have arguably been met, despite the rather vast scope of the alleged enterprise itself and the general nature of its alleged criminal purpose.
217. However, with respect to the third prong of the pleading test, the Indictment is problematic. Rather than clearly stating the identities of the alleged co-perpetrators as required, it refers vaguely to the three accused “and subordinate members of the CDF”.<sup>336</sup> This amounts to a material defect, as the accused is entitled to know the

<sup>331</sup> Indictment, ¶ 20; *see also* Pre-Trial Brief, ¶ 86, Supplemental Pre-Trial Brief, ¶ 11, and Prosecution’s Opening Statement, Trial Transcript, 3 June 2004 at 10:4-17.

<sup>332</sup> Indictment, ¶ 19; *see also* Pre-Trial Brief, ¶ 83; Supplemental Pre-Trial Brief, ¶ 6; and Opening Statement, Trial Transcript, 3 June 2004 at 10:4-17.

<sup>333</sup> For crimes which “were within a common purpose”.

<sup>334</sup> For crimes which crimes “were a reasonably foreseeable consequence of the common purpose”.

<sup>335</sup> The Defence concedes that both conducting warfare by illegal means and seeking to eliminate a category of protected persons, in theory, amount to criminal activity. However, it is the better practice in pleading to refer to specific crimes (as enumerated in the Statute) rather than to broad descriptive categories of illegal activity.

<sup>336</sup> Indictment, ¶ 19.

identities of those individuals with whom he is said to have agreed upon the alleged common plan. Further, and perhaps more problematic, is the Prosecution's failure to specifically outline the nature of Fofana's alleged participation in the alleged enterprise as required by the fourth prong of the pleading test. This too amounts to a material defect.

218. Accordingly, as of 5 February 2004, the Prosecution's JCE charges were very similar to those rejected by the Trial Chamber in the *Gacumbitsi* case cited above. The material defects were not cured by the Pre-Trial brief, which merely repeated, verbatim, the allegations at paragraphs 19 and 20 of the Indictment. The Supplemental Pre-Trial Brief, which also largely repeated the same allegations, did make one noticeable alteration: Where the Indictment and the Pre-Trial Brief had described the plurality of alleged perpetrators as including an indeterminate number of "subordinate members of the CDF", such language was conspicuously absent from the Supplemental Pre-Trial Brief.<sup>337</sup> As no additional co-perpetrators were named, it seemed that as of 22 April 2004 the plurality included only the three accused.

219. With regard to the fourth prong of the pleading test, the Supplemental Pre-Trial Brief finally provided the required factual information regarding the manner in which Fofana is said to have participated in the alleged JCE. Specifically, the nature of Fofana's participation in the alleged enterprise was said to encompass seven discrete activities, namely (i) the use of radio communications to coordinate troop and supply movements, and offer status reports; (ii) attendance and participation in CDF leadership and War Council meetings; (iii) the coordination or direction of various CDF troop movements; (iv) the coordination or direction of various weapons and supply distribution; (v) the organization of CDF recruitment, initiation and training; (vi) the organization of financial and resource support; and (vii) the organization and/or participation in the initiation processes employed.<sup>338</sup>

220. Further, the Supplemental Pre-Trial Brief indicated that "the prosecution theory of the case is that each accused is criminally responsible for the acts and omissions of each of

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<sup>337</sup> Supplemental Pre-Trial Brief, ¶ 6.

<sup>338</sup> Supplemental Pre-Trial Brief, ¶ 7. An eighth residual category of activity was included: "any action of an accused which furthered the joint criminal enterprise". However, the Defence submits that such a patently vague assertion has no place in a properly formulated criminal pleading.

their participating counterparts”.<sup>339</sup> Yet none of these so-called counterparts were named, again with the exception of the three accused. The JCE was subsequently mentioned in the Prosecution’s opening statement, where Mr Crane repeated the alleged criminal purpose of the plan.<sup>340</sup> Surprisingly, the language that was dropped from the Supplemental Pre-Trial Brief had re-emerged, with unidentified “subordinates” once again appearing to form part of the alleged plurality. Accordingly, at the time of going to trial, the Prosecution’s JCE theory suffered from a material defect which had not been cured by the further Pleadings.

221. Because the matter had not been sufficiently pleaded, was the Defence to have assumed that the enterprise included only the three accused? All “subordinate members of the CDF”? Or only some of them? Albert Nallo? Bob Tucker? All fighters? All initiators? SLPP administrators in Freetown? President Kabbah and his cabinet in Conakry? Such confusion as to which particular individuals are alleged to have formed the plurality is not a trivial matter, but rather a crucial pleading requirement, and the Defence submits that the confusion in the Pleadings is indicative of the Prosecution’s own uncertainty as to its putative theory of liability.

222. The Defence emphasises that JCE is not a residual form of culpability through which the Prosecution can seek to criminalize the activity of an entire organization if it fails to prove individual criminality by way of the more traditional modes of liability. Rather, it is simply a discrete mode of “commission” by which an accused person can be said to incur liability for a particular offence through his joint activity with a set of particular co-perpetrators, at least one of whom has physically committed particular acts constituting a particular crime. However, unmoored by such particulars, the Prosecution’s theory has failed to descend from the realm of academic abstraction to the *terra firma* of legal allegation.

223. By failing to coherently articulate its theory, the Prosecution has left the Defence (and the Chamber) to guess at its allegations. Without knowing precisely who is included in

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<sup>339</sup> *Ibid.*, ¶ 8.

<sup>340</sup> Opening Statement, Trial Transcript, 3 June 2004 at 10:4–8 (“Their plan and purpose, and that of their subordinates, was to defeat by any means necessary the [RUF] to include the complete elimination of the RUF and members of the [AFRC], their supporters, sympathizers and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone”)

the alleged enterprise, let alone which individuals within that group are said to have physically carried out any particular crime, the Defence cannot fairly answer the charges, nor can the Chamber properly evaluate them. Accordingly, the Chamber should dismiss the supposed allegations without further analysis. As noted above, for the Chamber to attempt to analyze a theory not expressly pleaded “would contravene the rights of the defence”.<sup>341</sup>

*2. The Prosecution has failed to substantiate any theory of JCE liability*

224. Nevertheless, *ex abundante cautela*, the Defence will attempt to analyze the JCE “charges” as further particularized in the Supplemental Pre-Trial Brief.<sup>342</sup>

*a. The substantive law of JCE*

225. Like the Appeals Chamber of International Tribunals, this Chamber has acknowledged that individual criminal responsibility arises under the Article 6(1) of the Statute not only in respect of persons who perform a criminal act, but also, in certain circumstances, in respect of those who in some way make it possible for the perpetrator physically to carry out that act.<sup>343</sup> When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a JCE in relation to that crime. Where the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for all the crimes committed in furtherance of that common purpose as a co-perpetrator.<sup>344</sup>

226. Three categories of joint criminal enterprise have been identified in the jurisprudence of the International Tribunals. They all require, as to the *actus reus*, (i) a plurality of

<sup>341</sup> *Krnjelac* Appeal Judgement, ¶ 117.

<sup>342</sup> *N.B.* In cases where the Defence is left with “some uncertainty as to the Prosecution’s argument” even where it reasonably took all three forms into consideration in its final trial brief a Trial Chamber has “good grounds for refusing, in all fairness, to consider” the form of liability. *Krnjelac* Appeal Judgement, ¶ 144 (where the Appeals Chamber held that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good cause not to consider the proposed JCE theory).

<sup>343</sup> Rule 98 Decision, ¶ 130; *Tadic* Appeals Judgement, ¶ 192.

<sup>344</sup> *Kvočka* Appeals Judgement, ¶ 90. *N.B.* Co-perpetration in the context of a joint criminal enterprise differs from aiding and abetting. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes.

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) participation of the accused in the common design. However, only two of the three categories are relevant to the instant case: the first and the third. In the first type of joint criminal enterprise, so-called basic JCE, the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators. The third type, extended JCE, concerns cases in which one of the participants commits a crime outside the common design. The *mens rea* in such cases is twofold. First, the accused must have the intention to take part in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly takes the risk that the crime might occur by joining or continuing to participate in the enterprise.<sup>345</sup>

227. The presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required.<sup>346</sup> However, in all cases it must be shown that the accused as well as the physical perpetrator of the criminal act were both parties to the agreement to commit criminal activity.<sup>347</sup>

*b. The "allegations"*

228. As explained in greater detail above, the Prosecution has failed to plead a coherent theory of JCE against Fofana. However, in abundance of caution, the Defence will briefly dispense with the partial allegations contained in the Supplemental Pre-Trial Brief where the nature of Fofana's participation in the alleged enterprise was said to encompass seven discrete activities.<sup>348</sup>

229. With respect to five of the seven alleged activities, absolutely no evidence was presented. No witness or document indicated that Fofana, in furtherance of any common plan or otherwise, (i) used radio communications to do anything, let alone

<sup>345</sup> *Tadic* Appeals Judgement, ¶¶ 204; 227-228; *Kvočka* Appeals Judgement, ¶ 83.

<sup>346</sup> *Krnojelac* Appeals Judgement, ¶ 81.

<sup>347</sup> *Brdjanin* Trial Judgement, ¶ 344.

<sup>348</sup> Supplemental Pre-Trial Brief, ¶ 7.

coordinate troop and supply movements or offer status reports; (ii) coordinated or directed any particular CDF troop movements; (iii) organized CDF recruitment, initiation, or training; (iv) organized financial and resource support; or (v) organized and/or participated in the initiation process.<sup>349</sup>

230. However, as to the remaining two alleged activities—“attendance and participation in CDF leadership and War Council meetings” and “coordination or direction of various weapons and supply distribution”—the Defence has identified only three distinct instances where it could perhaps be said that Fofana, through one of these two categories of activity, participated in something approximating a common plan. Yet, as the Prosecution did not plead the first *actus reus* element of the alleged JCE—a plurality of persons—with sufficient particularity, analyzing Fofana’s alleged culpability is impossible. This is because the relevant jurisprudence requires a showing that the accused person as well as the physical perpetrator of the criminal act were both parties to the agreement to commit criminal activity.<sup>350</sup>

231. According to the evidence outlined above, Fofana appears to have participated in a “leadership meeting” sometime prior to the Tongo operation by giving strong words of encouragement to those in attendance at the meeting. At this meeting, he is said to have distributed an unknown quantity of ammunition to an unidentified number of individuals sometime before the operation and subsequently ordered by Norman to distribute certain “morale boosters” to an unknown number of individuals sometime after the operation.<sup>351</sup> Further, he appears to have participated in a similar meeting prior to the Kamajor operation at Koribondo, again through his forceful words of encouragement to the fighters in attendance.<sup>352</sup> Finally, it was said that he distributed an unknown quantity of ammunition to an unidentified number of individuals at a third meeting prior to the Bo operation.<sup>353</sup>

<sup>349</sup> Supplemental Pre-Trial Brief, ¶ 7.

<sup>350</sup> See *Brdjanin* Trial Judgement.

<sup>351</sup> See ¶¶ *supra*, on aiding and abetting. Trial Transcript, TF2-201, 4 November 2004 (106:4-29); TF2-005, 15 February 2005 (105:20-25) and (106:10–107:3); TF2-222, 17 February 2005 (110:5-28), (111:8-19), (111:23–112:2), (112:25–113:7), (113:19–114:4), and (119:1–120:11); TF2-201, 4 November 2004 (110:25–111:1), (112:8-17), (113:1-2) and TF2-079, 26 May 2005 (66:2-14); TF2-079, 26 May 2005 (66:2-14).

<sup>352</sup> See ¶¶ *supra*, on aiding and abetting. Trial Transcript, TF2-008, 16 November 2004 (78:12–79:24); TF2-201, 4 November 2004 (113:1–114:20); TF2-190, 10 February 2005 (43:28–48:4), (83:3-15).

<sup>353</sup> See ¶¶ *supra*, on aiding and abetting. Trial Transcript, TF2-201, 5 November 2004 (41:12-19), (42:4-12), (42:15), (43:7-11), (43:13-25), (44:15-18), (44:23-24); TF2-008, 16 November 2004 (80:8-28), (81:1-6), (81:20-

232. Of course, this is not how the Prosecution pleaded its JCE case. Leaving this aside as well as the equally important question of whether any plans to commit crimes materialized at any one of the three alleged meetings, the fact that no specific co-perpetrators have been identified makes it impossible to determine whether Fofana's alleged contribution can be said to have furthered either the contemplated<sup>354</sup> or reasonably foreseeable<sup>355</sup> crimes resulting from the supposed enterprise. In other words, no nexus has been established between the activity attributed to Fofana at Base Zero and the commission of criminal activity at any of the crime bases.<sup>356</sup>
233. Equally problematic is the fact that this lacuna in the Pleadings (and in the evidence) renders the crucial shared-intent analysis an exercise in futility. A review of the evidence with respect to the Tongo, Koribondo, and Bo crime bases reveals that the physical perpetrators of alleged criminal activity at those locations were either unidentified Kamajors or individuals not present at the above-referenced meetings. It is simply not possible on such evidence to determine—as must be done—whether Fofana shared the intent to commit crimes with these hypothetical co-perpetrators.
234. For these reasons the Defence submits that the Chamber would have to accept far too many assumptions and unreasonable inferences to arrive at the conclusion that the Prosecution has substantiated any JCE charges against Fofana.

**G. Fofana did not commit any of the crimes referenced in the testimony of Albert Nallo**

235. Consistent with the principles outlined above, the Prosecution has failed to plead the bulk of the offences referenced in the testimony of Albert Nallo. This Chamber has held “that it is a legal misconception that once a determination is made that evidence sought to be adduced is relevant and of probative value, such a finding automatically triggers off its reception in evidence, even though the Indictment may not contain any

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27). (82:1-11), (84:2-10), (94:23-28); TF2-017, 19 November 2004 (87:3-88:16), (89:21-90:29), (91:13-92:2); TF2-017, 19 November 2004 (92:26-94:29), (95:5-9), (95:23-29), (96:19-27), (97:5-10), (97:15-18).

<sup>354</sup> In relation to a Category I JCE.

<sup>355</sup> In relation to a Category III JCE.

<sup>356</sup> As noted above, the Prosecutions allegations of aiding and abetting suffer from similar evidentiary problems.

specific factual allegations underlying that evidence”.<sup>357</sup> By the same reasoning, simply because a witness was permitted to testify as to certain incidents during trial does not mean that such testimony is necessarily relevant to any of the charges against the accused. For example, the Chamber has indicated that any testimony related to crimes of a sexual nature—some of it technically “on the record” in the sense that it has been recorded in the transcripts—will be considered to have no evidentiary value because it does not go to any of the charges in the case. By force of logic, the Defence submits that the testimony of Albert Nallo (or any other witness for that matter), which does support any factual allegations in the Pleadings, is legally null and void and must be disregarded by the Chamber.

236. The Defence submits that the following portions of Albert Nallo’s testimony relating to Fofana’s alleged involvement in criminal activity do not go to any charges contained in the Prosecution’s case: (i) the operations at Dodo, Sorgia, Pipor, and Baoma; (ii) the human sacrifices of one Kamajor and one Kapra in the bush near Base Zero; and (iii) the orders to execute a number of specifically-named collaborators and destroy their property in Bo and Koribondo.
237. The Pleadings do not contain a single specific factual allegation with respect to the first and second incidents. And although the summary of Nallo’s testimony set forth at Annex A of the Supplemental Pre-Trial Brief provides certain general information with respect to the third incident—“Witness was instructed at Base Zero to kill all captured rebels and collaborators as a result of which there were many such killings. Witness saw looting at several locations and heard HINGA NORMAN give direct orders that certain targets were to be looted”.<sup>358</sup>—Fofana is nowhere alleged to have been involved. As explained above in greater detail, in order to successfully plead allegations of any mode of Article 6(1) liability, at a minimum, the accused’s “particular acts” must be clearly set forth somewhere in the Pleadings.
238. In its Rule 98 Response, the Prosecution emphasized Fofana’s “direct involvement” in the human sacrifices said to have taken place in the bush near Base Zero.<sup>359</sup> As noted

<sup>357</sup> Admissibility Decision, ¶ 19(vii).

<sup>358</sup> Supplemental Pre-Trial Brief, Annex A, at p 2.

<sup>359</sup> Rule 98 Response, ¶¶ 87–88.



above, under the jurisprudence of the International Tribunals, such allegations of direct involvement (i.e. commission) must be pleaded with “the greatest precision”.<sup>360</sup> Yet the Prosecution did not mention the time, location, participants, victims or any other material fact concerning these alleged killings anywhere in its Pleadings when all of this information was presumably in its possession at the time of going to trial. In any event, the Prosecution has already conceded that “acts of cannibalism and human sacrifice” do not form part of the charges against the three accused.

239. Accordingly, the Defence submits that the Prosecution has not charged Fofana with any of the alleged crimes discussed by Nallo. However, *ex abundante cautela*, the Defence nevertheless briefly addresses each incident in the event the Chamber departs from its Admissibility Decision.

*1. Fofana is not liable for any crimes committed during the alleged operations around Talia*

240. According to Nallo, “one morning” Norman ordered him to engage in certain killings of people around Base Zero in the presence of Fofana.<sup>361</sup> Specifically, Nallo discussed four incidents, not one of which was mentioned anywhere in the Pleadings.

*a. The alleged killing of fifteen people at Dodo*

241. According to Nallo, Norman gave him “command that I should go on an operation to get rid of all the collaborators, rebels and sympathisers around our base,” and that on these orders Nallo went to Dodo village “with two other people given to me by Moinina Fofana to give me an idea what the terrain is in the area.” These men were called Momoh Pemba and Billo Conteh. Upon reaching Dodo, Nallo and the others summoned the villagers to the court barrie, announced their mission to “weed out” rebels, and “opened fire on them”. Fifteen people were killed and an unspecified number of houses were burnt down.<sup>362</sup>

<sup>360</sup> See ¶¶, *supra*, on pleading requirements.

<sup>361</sup> Trial Transcript, TF2-014, 10 March 2005 (42:12), (42:15-16), (44:22-23), (44:28).

<sup>362</sup> Trial Transcript, TF2-014, 10 March 2005 (45:1–46:23).

242. Assuming the material facts of Fofana's involvement in this incident had been pleaded, the Prosecution has arguably alleged that he aided and abetted murder (Counts 1 and 2) in Dodo by providing Nallo with the men for his unlawful mission. However, Billoh Conteh himself disabused Nallo's testimony in this regard<sup>363</sup> and testified that he never went on any mission with Nallo and Pemba, nor was he ever involved in any fighting in Dodo.<sup>364</sup> Further assuming that the Chamber finds Conteh less credible than Nallo, the evidence does not satisfy the *mens rea* requirement for aiding and abetting, namely that Fofana knew that he was assisting a criminal offence. The evidence is that Norman ordered Nallo to "get rid of all the collaborators, rebels and sympathisers around our base". On its face, such an order does not suggest the commission of criminal activity, and it is open on this evidence that Fofana may have reasonably believed he was assisting a legitimate Kamajor operation.

*b. The alleged torture of Joseph Lansana and killing of his mother at Sorgia*

243. According to Nallo, following the original instructions from Norman, he went to Sorgia with Kamoh Lahai Bangura and identified Joseph Lansana as someone who had been working as a secretary for the rebels and was therefore a "dangerous man around our base". Nallo and his companion then tied Lansana, cut off his ear, dripped melted plastic onto his body, and beat him "well, well, well". After this, Bangura informed Nallo that Lansana's mother had been "cooking for the juntas" and "the old woman was chopped" by an unidentified member of Nallo's group. After chopping the woman, the group "set ablaze their compound" and threw her into the fire. "That's where she died".<sup>365</sup>

244. Assuming the fact of Fofana's alleged presence at the meeting between Nallo and Norman had been pleaded, there is no evidence that Fofana lent his assistance—substantial or otherwise—to the alleged incident. As noted throughout this Brief, the mere presence of an accused person is insufficient to incur criminal liability. In any event, the Defence took up Nallo's suggestion<sup>366</sup> and invited Lansana to give his version of events. He testified that Sorgia was attacked by Kamajors only once, in 1995 during the presidency of Maada Bio, and that during the attack his mother was burnt to

<sup>363</sup> Trial Transcript, Billoh Conteh, 28 September 2006 (41:27–42:17), (45:6–10).

<sup>364</sup> Trial Transcript, Billoh Conteh, 28 September 2006 (38:2–39:25).

<sup>365</sup> Trial Transcript, TF2-014, 10 March 2005 (46:24–28) and (47:7–49:29).

<sup>366</sup> Trial Transcript, TF2-014, 10 March 2005 (48:11–12).

death by a Kamajor called Conteh but that he was unharmed in the attack.<sup>367</sup> Further, the Chamber was able to confirm that Lansana, the only person by that name living in Sorgia, was in possession of both of his ears.<sup>368</sup>

*c. The alleged looting at Pipor*

245. On further instructions from Norman, Nallo claimed he went to Pipor village and “unroofed” the house of Mamuna Cleveland and carried away the zinc because Norman had received information that it had been supplied to certain villagers by the RUF.<sup>369</sup> Again, there is no indication in the evidence that Fofana lent any assistance to this incident. For the same reasons as outlined above, he therefore does not incur liability.

*d. The alleged killing at Baoma*

246. According to Nallo, he went to Baoma Kpenge village on “the order of Chief Norman and Moinina Fofana” because the two had been informed by a Kamajor from that area, “Junisa Korneh [phon]”,<sup>370</sup> that rebels and collaborators had been infiltrating the trade fair in Baoma “which was very dangerous for our base”. Nallo took five Kamajors and joined Conneh at Baoma on the day of the trade fair. Conneh identified a Fullah man on a bicycle as a rebel. Nallo and the others “apprehended him” and “took him behind a school building” where he was shot to death by an unidentified member of the group”.<sup>371</sup>

247. Assuming the material facts of Fofana’s involvement in this incident had been pleaded, the Prosecution has arguably alleged that he, in conjunction with Norman, ordered unlawful killing in Baoma. However, the evidence indicates only that Fofana and Norman instructed Nallo to go to Baoma. Such evidence, which attributes a single act to two individuals without further explication as to what each individual actually did, is difficult to analyze and typical of Nallo. It is simply not clear on this evidence that Fofana actually instructed Nallo to commit a criminal offence as per the *actus reus* for

<sup>367</sup> Trial Transcript, Joseph Lansana, 28 September 2006 (61:16–63:29), (79:16-22).

<sup>368</sup> Trial Transcript, Joseph Lansana, 28 September 2006 (64:18-20).

<sup>369</sup> Trial Transcript, TF2-014, 10 March 2005 (51:26–53:17).

<sup>370</sup> The correct spelling of the surname is “Conneh”.

<sup>371</sup> Trial Transcript, TF2-014, 10 March 2005 (53:18–54:17).

the crime of ordering. Further, it is equally unclear whether Fofana intended to bring about the killing of the Fullah man or whether he was aware of a substantial likelihood of Nallo engaging in killing at Baoma.

248. In any event, Conneh himself—a lifetime resident of Baoma Kpengeh and its only resident with that name—testified that he had never seen a trade fair in his village nor had he ever gone on any mission with Nallo.<sup>372</sup> Conneh additionally disabused Nallo’s testimony regarding the alleged killing of the Fullah man at Baoma.<sup>373</sup>

*2. Fofana is not liable for the alleged human sacrifices in the bush near Talia*

249. Additionally, Nallo gave evidence regarding two human sacrifices which allegedly took place in the vicinity of Base Zero in the presence of the three accused and others.

*a. The alleged killing of Mustapha Fallon*

250. According to Nallo, a Kamajor from Kati called Mustapha Fallon<sup>374</sup> was killed at some point in time in “the Poro bush when we were at Talia”.<sup>375</sup> When specifically asked who committed the actual killing, Nallo responded, somewhat equivocally: “Dr Allieu Kondewa and Chief Hinga Norman and Moinina Fofana; all were there”.<sup>376</sup> When asked how Fallon was killed, Nallo was equally unclear: “They laid him and they cut off his throat. There was one guard whose mouth was cut. [...] We laid him and we cut off his throat. [...] I was there; I was standing there”.<sup>377</sup> However, when asked why Fallon was killed, Nallo was explicit: “Allieu Kondewa said that we needed human sacrifice”.<sup>378</sup> Nallo further added that Fallon’s corpse was “burnt to ash. The liver was cooked with some medicine, some herbs, which Chief Allieu Kondewa brought out and mixed with it. All of us ate that and we took an oath”.<sup>379</sup>

<sup>372</sup> Trial Transcript, Junisa Conneh, 28 September 2006 (8–15).

<sup>373</sup> Trial Transcript, Junisa Conneh, 28 September 2006 (17:2-3).

<sup>374</sup> Trial Transcript, TF2-014, 10 March 2005 (56:15).

<sup>375</sup> Trial Transcript, TF2-014, 10 March 2005 (55:16).

<sup>376</sup> Trial Transcript, TF2-014, 10 March 2005 (55:5-6).

<sup>377</sup> Trial Transcript, TF2-014, 10 March 2005 (55:8–56:2) (emphasis added).

<sup>378</sup> Trial Transcript, TF2-014, 10 March 2005 (56:6).

<sup>379</sup> Trial Transcript, TF2-014, 10 March 2005 (57:19-24).

251. As the Defence has already mentioned several times, the Prosecution has formally announced that its charges against the three accused do not include acts of cannibalism or human sacrifice. Nevertheless, Fallon's brother Mohammed gave a completely different account of the death of his brother, specifically that he was killed by junta forces in Koribondo sometime in October of 1997. Fallon the witness, who stood to gain nothing by coming to court, claims to have been present during the killing and to have clearly recognized his brother.<sup>380</sup>
252. Should the Chamber find Fallon less credible than Nallo, the Defence submits that the little evidence regarding Fofana's alleged involvement in the killing—simply that he was “there”—is legally insignificant. In order for an accused to incur liability under international criminal law, it must be shown that he either participated in some way, either by committing, planning, instigating, ordering, aiding and abetting, or contributing to a JCE, or that he is liable for the criminal act of his subordinate. Not a single one of these discrete and nuanced modes of liability is substantiated by simply being “there” when a crime is committed.
253. Finally, the Defence notes that Fallon was said to have been a Kamajor. As it is legally impossible to commit a war crime against a member of one's own faction,<sup>381</sup> Fofana could not be held liable for the alleged death of Fallon pursuant to Count 2 even if the Prosecution had pleaded and proved the killing.

*b. The alleged killing of Alpha Dauda Kanu*

254. Further, Nallo testified that Alpha Dauda Kanu, a Kapra, was killed in an oil palm plantation near Mokusi.<sup>382</sup> Again, when asked who killed him, Nallo ambiguously answered: “Dr Allieu Kondewa, Hinga Norman, Moinina Fofana”.<sup>383</sup> However, as with the alleged incident relating to Fallon, the alleged killing of Kanu was clearly described

<sup>380</sup> Trial Transcript, Mohammed Fallon, 27 September 2006 (25:9–32:24), (36:17-28), (37:4-8), (43:10-18).

<sup>381</sup> See Antonio Casese, *INTERNATIONAL CRIMINAL LAW*, (Oxford 2003), §3.1 at 48. (“[C]rimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.”) (citing the decisions in *Pilz*, Dutch Special Court of Cassation and *Motosuke*, Temporary Court Martial of the Netherlands East Indies at Amboina).

<sup>382</sup> Trial Transcript, TF2-014, 10 March 2005 (59:19-25).

<sup>383</sup> Trial Transcript, TF2-014, 10 March 2005 (59:26-27).

as some kind of human sacrifice.<sup>384</sup> Furthermore, it contradicts the evidence of another prosecution witness who testified in much greater detail about the alleged sacrifice and who clearly suggested that Kanu had been killed by “two herbalists”.<sup>385</sup>

255. According to witness TF2-017, Fofana was only made aware of the incident sometime after the fact, and there is no evidence on the record that the unidentified herbalists were his subordinates.<sup>386</sup> Witness TF2-017 also testified that he brought Nallo to the scene of the alleged crime the following morning and that Kondewa alone was still there.<sup>387</sup> Again this contradicts the testimony of Nallo who claimed to have been present while Kanu was allegedly killed.<sup>388</sup>
256. Finally, the Defence notes that Kanu was allegedly a Kapra which would have made him a member of the CDF along with Fofana. For the same reason given above,<sup>389</sup> Fofana could not then be held liable for Kanu’s alleged killing pursuant to Count 2 even if the Prosecution had produced credible evidence that it had taken place.

### *3. Fofana is not liable for the alleged killing and burning in Bo and Koribondo*

257. Additionally, Nallo testified that, before the Kamajor operations in Bo and Koribondo, he was given “specific orders” by Norman at Base Zero in the presence of Fofana to kill several collaborators at both locations and to further burn and loot their property.<sup>390</sup> However, as noted several times in this brief, mere presence at the issuance of illegal orders does not amount to culpable behavior under any of the modes of liability recognized by international criminal law. Assuming, *ex arugendo*, the relevance and veracity of Nallo’s testimony, it has not been shown that Fofana was under any legal obligation, vis-à-vis Nallo, to prevent the alleged activity from occurring.

<sup>384</sup> Trial Transcript, TF2-014, 10 March 2005 (59:28–60:14).

<sup>385</sup> Trial Transcript, TF2-017, 19 November 2004 (65:28–66:18).

<sup>386</sup> Trial Transcript, TF2-017, 19 November 2004 (67:26–68:7).

<sup>387</sup> Trial Transcript, TF2-017, 19 November 2004 (80:24–81:8).

<sup>388</sup> Trial Transcript, TF2-014, 10 March 2005 (60:2).

<sup>389</sup> See Antonio Casese, *INTERNATIONAL CRIMINAL LAW*, (Oxford 2003), §3.1 at 48. (“[C]rimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.”) (*citing* the decisions in *Pilz*, Dutch Special Court of Cassation and *Motosuke*, Temporary Court Martial of the Netherlands East Indies at Amboina).

<sup>390</sup> Trial Transcript, TF2-014, 10 March 2005 (70:14–79:19).

## H. Acts of Terrorism and Collective Punishments

258. As charged in the Indictment, Fofana is said to have incurred liability under both Counts 6 and 7, by his “acts or omissions in relation to” the allegations contained in Counts 1 through 5.<sup>391</sup> Further, the Supplemental Pre-Trial Brief explains that “[t]he matters set out above in relation to counts 1 to 5 inclusive are relied upon as establishing the nexus between Moinina Fofana and” Counts 6 and 7.<sup>392</sup>
259. With regard to Count 6, the Defence submits that the Prosecution has failed to demonstrate that Fofana himself directly engaged in any “acts or threats of violence directed against protected persons or their property” for any purpose, let alone “with the primary purpose of spreading terror among protected persons.”<sup>393</sup> Additionally, with regard to Count 7, the Defence submits that the Prosecution has equally failed to prove that Fofana himself directly imposed any “punishment” on anyone, let alone “protected persons for acts that they have not committed”.<sup>394</sup>
260. Further, it has not been established that Fofana ordered, planned, instigated, or aided and abetted such “acts or threats of violence” or “punishment” or that he entered into a common plan with others with a view to accomplishing such illegal aims. Nor has it been shown that any identifiable subordinate of Fofana committed such offences.
261. Simply put, because the Prosecution has failed to substantiate the charges contained in Counts 1–5, the critical nexus between Fofana and Counts 6 and 7 does not exist.
262. The Defence reserves its right to make further legal and factual submissions with respect to Counts 6 and 7 during its closing arguments.

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<sup>391</sup> Indictment, ¶ 28.

<sup>392</sup> Supplemental Pre-Trial Brief, ¶¶ 129, 131 (emphasis added).

<sup>393</sup> Rule 98 Decision, ¶ 112, where the Chamber outlined the elements of Count 6.

<sup>394</sup> Rule 98 Decision, ¶ 118, where the Chamber outlined the elements of Count 7.

## VII. Article 6(3) Liability

### A. Relevant Law

263. The law in relation to Command Responsibility under international law is well settled. Most of the relevant principles are fully set out in the Prosecution's Pre-Trial Brief<sup>395</sup> and are accordingly not repeated here.
264. In essence, to establish guilt pursuant to Article 6(3) of the SCSL Statute the Prosecution must prove to the requisite standard, i.e., beyond reasonable doubt:
- (i) A superior subordinate relationship between the perpetrator and the Moinina Fofana;
  - (ii) Fofana's knowledge that his subordinate was about to commit or had committed a crime;
  - (iii) Fofana's failure to prevent or punish the commission of the crime.
265. In addition to the jurisprudence highlighted in the Prosecution's Pre-Trial Brief, the following important principles should also be set out and borne in mind when considering an accused's liability pursuant to Article 6(3):
- (i) The ICTY Appeals Chamber in *Blaskic* held that in determining whether 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."<sup>396</sup>
  - (ii) The accused's subordinates must be clearly identified and the link between them obvious. In *Blaskic* it was further stated: [T]he law does not know a universal superior without a corresponding subordinate."<sup>397</sup> An accused

<sup>395</sup> Pre-Trial Brief, ¶¶ 156–174.

<sup>396</sup> *Blaskic* Appeal Judgment, ¶ 197.

<sup>397</sup> *Blaskic* Appeal Judgment, ¶ 197.



cannot have command responsibility over an “unspecified assortment of attackers”. The Prosecution must establish a “link of control”.<sup>398</sup>

(iii) In *Hadzihasanovic et al* the ICTY Appeals Chamber held that:

‘an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate.’<sup>399</sup>

(iv) It is submitted therefore that a Trial Chamber may only ascribe criminal responsibility to an accused pursuant to Article 6(3) of the Statute for crimes committed by the accused’s subordinates at the time that he was either their *de jure* or *de facto* commander.

(v) Effective control of an alleged superior must be operative at the time the alleged subordinates committed the criminal acts.<sup>400</sup> Temporarily delegated authority is an insufficient bases from which to extrapolate command responsibility unless crimes occurred during the period of delegation.<sup>401</sup> This point is illustrated in *Kunarac*, 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 pursuant to the concept of command responsibility.<sup>402</sup>

(vi) The mere giving of instructions by an accused to somebody else (even where those instructions are complied with by that person) does not necessarily denote a position of command for the accused over that person.<sup>403</sup>

<sup>398</sup> *Blaskic* Appeal Judgment, ¶ 197.

<sup>399</sup> *Hadzihasanovic et al* ‘Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility’ 16 July 2003. ¶ 51 (emphasis added).

<sup>400</sup> *Delalic* Appeal Judgment, ¶ 254.

<sup>401</sup> *Delalic* Trial Judgment, ¶¶ 695-696 and 700.

<sup>402</sup> *Kunarac* Trial Judgment, ¶¶ 628-629.

<sup>403</sup> *Kupreskic* Appeal Judgment, ¶¶ 354–357 (where the Appeals Chamber held that it had been “unreasonable for the Trial Chamber to conclude [that the accused] played a command role in the attack” by virtue of his instructions to a soldier to “leave [a woman] alone”).

(vii) Even where it is established that persons subordinate to an accused operated in a given area where crimes were committed, if there is a possibility that other units or persons operated in the same area it is inappropriate to hold the accused responsible pursuant to Article 6(3) unless the Prosecution can demonstrate that those persons were also subordinates of the accused.<sup>404</sup>

(viii) Even where an accused possess a degree of influence as a high-ranking member of an organisation, no responsibility will entail pursuant to Article 6(3) unless the Prosecution can prove that such influence was capable of establishing effective control. In *Halilovic* the Trial Chamber held:

‘The Trial Chamber recalls its finding that Sefer Halilovic possessed a degree of influence as a high ranking member of the AbiH and as one of its founders. However, the Trial Chamber considers that Sefer Halilovic’s influence falls short of the standard required to establish effective control. It is a principle of international criminal law that a commander cannot be held responsible for the crimes of persons who were not under his command at the time the crimes were committed.’<sup>405</sup>

(ix) In establishing whether an accused has the power to prevent or punish crimes, it is important to distinguish between the exercise of “true powers of discipline” by an individual from “mere personal influence” in a given situation.<sup>406</sup>

(x) In determining whether an accused exercised command, either *de facto* or *de jure*, or effective control, the Trial Chamber must be satisfied to the required degree, namely beyond reasonable doubt. Even where “there is a strong possibility apparent on the evidence that [an accused] was active as a commander ... at the times relevant to the Indictment”, this is not enough to sustain a conviction pursuant to Article 6(3).<sup>407</sup>

<sup>404</sup> *Limaj* Trial Judgement, ¶¶ 697–702.

<sup>405</sup> *Halilovic* Trial Judgement, ¶ 752 (emphasis added).

<sup>406</sup> *Limaj* Trial Judgement, ¶ 590.

<sup>407</sup> *Limaj* Trial Judgement, ¶ 601.

## B. Prosecution's Allegations of Command Responsibility

266. In the Indictment the Prosecution allege that:

- (i) At all times relevant to the Indictment, Moinina Fofana was the National Director of War of the CDF. As such, together with Samuel Hinga Norman, Moinina Fofana was seen and known as one of the top leaders of the CDF. Moinina Fofana took directions from and was directly answerable to Samuel Hinga Norman. He took part in policy, planning and operational decisions of the CDF.<sup>408</sup>
- (ii) Moinina Fofana acted as leader of the CDF in the absence of Samuel Hinga Norman and was regarded as the second in command. As National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war. He liaised with field commanders, supervised and monitored operations. He gave orders to and received reports about operations from subordinate commanders, and he provided them with logistics including supply of arms and ammunition. In addition to the duties listed above at the national CDF level, Moinina Fofana commanded one battalion of Kamajors.<sup>409</sup>
- (iii) As such, Moinina Fofana, individually or in concert, exercised authority, command and control over subordinate members of the CDF.<sup>410</sup>
- (iv) Pursuant to Article 6(3) of the Statute, Moinina Fofana, while holding a position of superior responsibility and exercising command and control over subordinates, is individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute. He is responsible for the criminal acts of his subordinates that he knew or had reason to know that the subordinate was about to commit such acts or had done so and he

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<sup>408</sup> Indictment, ¶ 14.

<sup>409</sup> Indictment, ¶ 15.

<sup>410</sup> Indictment, ¶ 18.

failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>411</sup>

- (v) Moinina Fofana is charged pursuant to Article 6(3) for counts 1-8 of the Indictment.

267. The Pre-Trial Brief adds no more, in terms of substance, with regards to command responsibility and alleged liability pursuant to Article 6(3) than the Indictment.<sup>412</sup>

268. The Prosecution expand and set out in more detail Fofana's alleged Article 6(3) liability in the Supplemental Pre-Trial Brief, where the specific allegations for Fofana's alleged liability pursuant to Article 6(3) are set out for each of the crime bases: (i) Tongo; (ii) Kenema; (iii) Bo; (iv) Moyamba; and (v) Bonthe. This is set out and considered below for each crime base.

269. Before considering Fofana's Article 6(3) liability for each crime base area, it is first instructive to consider, on a general level, Fofana's superior position against the backdrop of the Article 6(3) requirements.

### **C. Fofana's Superior Position**

270. There is evidence that Fofana was a superior, of sorts, within the Kamajor/CDF movement. The issue is firstly what role and responsibilities he had as a superior and secondly whether he was the superior of the specific perpetrators of any crime (this second question is considered in more detail below in relation to each crime base and Fofana's relationship to the alleged perpetrators of the crimes therein).

#### *1. Command in the Kamajor/CDF Movement*

271. When considering any position of command within the CDF, it is important to see it against the backdrop of how the Kamajor/CDF movement functioned, or rather did not function, as a unit.

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<sup>411</sup> Indictment, ¶ 21.

<sup>412</sup> Pre-Trial Brief.

*a. The number of Kamajors and the issue of recruitment*

272. There are varying estimates as to how many people were actually in the Kamajor/CDF movement. The most conservative estimates put the figure at 5,000, while the most generous at 99,000 plus.<sup>413</sup> One of the reasons it is so hard to accurately estimate how many people were in the movement was because some people took the name “Kamajor” for “no purpose other than to defend their own community and may not have done anything more than patrol the perimeter of the village on a handful of occasions.”<sup>414</sup> Obviously, it is very difficult to ascertain the numbers of such individuals and simultaneously very difficult for any one to direct or control what they were doing at any given time.
273. In terms of who was mobilising people to join the Kamajor society, it is apparent that “the people leading this effort are community elders, town chiefs, paramount chiefs, and then the elderly, particularly men, in these given communities who participate collectively in decision-making and are coming together to talk about this obviously pressing need.”<sup>415</sup> This was confirmed by Albert Joe Edward Demby who stated that the Kamajor movement was a “voluntary mass mobilisation” organised at the Chiefdom level.<sup>416</sup>
274. That the driving force behind many men joining the Kamajors was the Chiefdom authorities inevitably meant that many still held some allegiance and responsibility towards those authorities. This similarly no doubt diluted the command and control that any individual or entity could exert over the Kamajors as a whole.
275. Indeed, as confirmed by Arthur Koroma, Kamajor combat activities and discussions regarding tactics and strategy were sorted out “locally”.<sup>417</sup> This chiefdom-based command system had tactical advantages in that a decentralised system made it difficult to “put a stop to Kamajor activities”.<sup>418</sup> Thus, Kamajors often fought without the knowledge and consent of the likes of Fofana. Decisions as to which and how many

<sup>413</sup> Trial Transcript, 9 October 2006, at 63:3.

<sup>414</sup> Trial Transcript, 9 October 2006, at 63:7.

<sup>415</sup> Trial Transcript, 9 October 2006, at 65:3.

<sup>416</sup> Trial Transcript, 10 February 2006, at 6:6-17 and 7:8-19.

<sup>417</sup> Trial Transcript, 3 May 2005, at 42:7-12.

<sup>418</sup> Trial Transcript, 4 May 2005, at 20:3-15.

Kamajors went to the front were made locally by local commanders.<sup>419</sup> Accordingly, in any given attack, Kamajors could have come from a number of different sources. To ascribe Article 6(3) responsibility to Fofana it must be proved beyond reasonable doubt that the perpetrators of any alleged crimes were under his command and control.

*b. Base Zero vs Base One*

276. It is also important to consider the relationship between Base Zero and Base One. To the extent that individuals were directing Kamajor/CDF activity, it is clear that Base Zero, and the individuals there, did not have any sort of monopoly on the organisation of the Kamajors. Indeed, in the initial mass mobilisation of the Kamajors it was Eddie Massallay at Gendema (to become Base One) who made the public announcement over the BBC for Kamajors to congregate at Gendema after the coup.<sup>420</sup> In terms of who gave Massallay the authority to make such a call, Dr Hoffman stated:

To some degree, what gives him that authority is the fact that he has access to somebody who will broadcast this call over the BBC. He took the initiative to do this, and he is obviously an important person in the region and so it is not surprising that a person of importance is going to end up playing this kind of role, but it's really he becomes the name associated with this summoning. That, in a sense, conveys on him the authority to do so, if that makes any sense.<sup>421</sup>

Thus, it was open to many people, at any given time, to exert and claim authority over the Kamajors/CDF and certainly various factions within it.

277. Mohammed Bonnie Koroma states that he was appointed a Battalion Commander at Base One by Eddie Massallay.<sup>422</sup> Accordingly, not all commanders and people involved in operations were directed by individuals at Base Zero and certainly not by Fofana.

278. That said, in terms of what was "going on at Gendema" (Base One), Dr Hoffman concluded that it was "a more fluid and chaotic situation [...]. There may have been efforts on the parts of various people to establish some kind of authority. But it's not clear that that was ever – in fact, it's quite certain that it didn't quite pan out that

<sup>419</sup> Trial Transcript, 5 May 2005, at 48–50.

<sup>420</sup> Trial Transcript, 9 October 2006, at 67:26.

<sup>421</sup> Trial Transcript, 9 October 2006, at 68:5.

<sup>422</sup> Trial Transcript, 22 May 2006, at 24, 32 and 33.

way.”<sup>423</sup> Thus, it was difficult to say that either Eddie Massallay or Chief Norman was directing things at Base One.<sup>424</sup>

279. It is also apparent that there were tensions between Base Zero and Base One. Individuals in one location could not necessarily exert influence and control over what happened in their own base, let alone the other. In terms of the relationship between Base Zero and Base One, Dr Hoffman stated:

When Base Zero becomes what we think of as being Base Zero, there are Kamajors that go from Gendema to Base Zero. The relationship is not – it’s not a fixed one and it’s, to some degree, tenuous. There are tensions between personalities at these various locations. There is not a lot of – in fact, probably very, very little co-ordination of efforts, partly because of these personality tensions, but also because of the difficulty of moving from one to another. It is not possible to do it over land. It’s dangerous, it takes a very long time. And it meant co-ordinating any kinds of activities between the two was certainly not easy.<sup>425</sup>

280. Thus, it is very difficult to assert that anyone in Base Zero could exert any kind of control and influence over persons in Base One. There was no hierarchy between the two bases with Base Zero coming out on top, as Dr Hoffman stated: “in terms of a kind of relationship of one having precedence over the other, I wouldn’t characterise it in that way.”<sup>426</sup> In all likelihood this could also be true of Kamajors based in other areas other than the two bases where there were local figures directing Kamajor/CDF matters. Ultimately, it is impossible to determine whether any of the alleged perpetrators of alleged crimes were committed by persons from Base Zero or where ever Fofana may have been.

*c. Communication with Kamajors in the field*

281. Moreover, it is important to consider the difficulty the Kamajors/CDF had with to communicating with each other during the conflict.

Communication was very difficult and it was generally done by individual couriers. It was—there was not a—at that point there wasn’t a functioning

<sup>423</sup> Trial Transcript, 9 October 2006, at 71:1.

<sup>424</sup> Trial Transcript, 9 October 2006, at 70:23.

<sup>425</sup> Trial Transcript, 9 October 2006, at 71–72.

<sup>426</sup> Trial Transcript, 9 October 2006, at 73:10.

phone system to the rural communities. We're talking about messages that are passed orally. In some cases written down. There were modes of tape recording, in some cases, voices, and sending those. So, as anybody who has travelled up country in Sierra Leone knows, especially during the rainy season, this can be a time-consuming process.<sup>427</sup>

As witness TF2-079 put it in evidence:

Q: Mr Witness, would I also be correct to suggest that because of this absence of communication system between Base Zero and the various points some of the incidents do not come to the knowledge of the Kamajor commanders at Base Zero?

A: Which of the commanders?

Q: To the War Council members, the national co-ordinator, those who were at Base Zero?

A: Yes I agree some of the incident did not come to the notice of the War Council and the national co-ordinator –

Justice Thompson: Because of the lack of communication?

A: Yes.<sup>428</sup>

Thus, it would be difficult to exert control and influence over those in remote areas.

*d. Inexperience of the Kamajors and general lack of discipline*

282. Coupled with the logistical difficulties go the relative inexperience of the Kamajors/CDF. It is important to recall that the vast majority had no formal military experience or training. Accordingly, Colonel Iron described how, at the “tactical level” “command tended to be less effective because of the inexperience and lack of training of many of the junior commanders.”<sup>429</sup> The CDF had no fall back: when things started to go wrong the CDF units tended to disintegrate. If one of the people was killed the rest of the unit would run away and they were less robust than the other two organisations involved in the conflict (especially in 1997 and 1998).<sup>430</sup> On the battlefield there was a real “lack of discipline”.<sup>431</sup>

<sup>427</sup> Trial Transcript, 9 October 2006, at 107:13

<sup>428</sup> Trial Transcript, 27 May 2005, at 35:5.

<sup>429</sup> Trial Transcript, 14 June 2005, at 30:23.

<sup>430</sup> Trial Transcript, 14 June 2005, at 36:12.

<sup>431</sup> Trial Transcript, 14 June 2005, at 37:23.



283. This was confirmed by CDF members: Witness TF2-222 stated “from the outset ... the Kamajors were not disciplined”; there was a “chain” but lack of discipline was responsible for the “uncontrollable nature of the activities”.<sup>432</sup> Indeed some fighters acted on their own without the knowledge of central command.<sup>433</sup>
284. Crucially “no on individual” was in control of deployment, the individual commanders told their men where to go, any one who could command up to ten or fifteen men could mobilise them to a particular area.<sup>434</sup> Even at Base Zero itself, it was said that there was a “lack of an effective command and control” – “everyone was commander”.<sup>435</sup>
285. Indeed, witness TF2-005 confirms that many people considered themselves to be commanders at Base Zero. He said: “But there were so many commanders in the place there, everybody – many people called themselves CO, CO. That name was all around the place.”<sup>436</sup> Thus, it is not right for the Prosecution to assert that Fofana was in charge of all commanders as it was not his role or within his power to control them.

*e. The War Council at Base Zero*

286. At Base Zero, it is also important to factor in and consider the role of the War Council. The War Council, based in Base Zero, “was a collection of important people who either lived in Talia, that was considered their home, or they had been displaced or visited from, came in from other parts of the country.”<sup>437</sup> Dr Hoffman describes the War Council as a “socio-political institution” whereby elders in the community “come together and they are—they deliberate in local parlance stuff and refer to as hanging heads. People—people of consequence in a community coming together to inform one another about their understandings of what matters of importance to a community. Seeking counsel together, offering advice to the collective.”<sup>438</sup>

<sup>432</sup> Trial Transcript, 23 November 2004, at 32:23.

<sup>433</sup> Trial Transcript, 16 February 2005, at 70:23.

<sup>434</sup> Trial Transcript, 17 February 2005, at 92:16.

<sup>435</sup> Trial Transcript, 17 February 2005, at 87–90.

<sup>436</sup> Trial Transcript, 16 February 2005, at 16:24.

<sup>437</sup> Trial Transcript, 9 October 2006, at 77:9.

<sup>438</sup> Trial Transcript, 9 October 2006, at 77:24.

287. Dr Hoffman agreed with the analysis of the Presiding Judge that the War Council acted as “a kind of continuum of some indigenous institution within the community. That would be your own independent finding, as distinct from an ad hoc body, set up to address a particular phenomenon at a particular junction of time.”<sup>439</sup> Thus, the War Council was an important and respected institution within Base Zero and exerted influence on the way things functioned. Persons at Base Zero of “sufficient status” would sit in on War Council meetings.<sup>440</sup> Their level of participation and influence would of course be a matter for them.
288. The important role of the War Council can be seen as a result of the purported appointment of Fofana as Director of War.<sup>441</sup> There is also evidence that the War Council was involved in tactical decision making with regards to the conflict. For example, it was said that it was the War Council that recommended the taking of Koribondo<sup>442</sup> and Bo.<sup>443</sup>
289. It is not clear, from the evidence, whether Fofana was actually on the War Council or definitively what the role of the War Council was and its place in the hierarchy, such that there was one, at Base Zero especially with regards the direction and control of commanders. It is open on this evidence that much of what the Prosecution allege against Fofana was actually within the province of the War Council.

## *2. The Importance of Patronage to issues of Command*

290. The concept of patronage was central to the Kamajor/CDF structures. Patronage is central to everyday life in Mende communities and was therefore foundational to the Kamajors/CDF.<sup>444</sup> Patrons are generally thought of as being people who are going to be on the lookout for their clients.<sup>445</sup> As a result the client has a certain sense of obligation to the patron in relation to matters such as security and labour.<sup>446</sup>

<sup>439</sup> Trial Transcript, 9 October 2006, at 78:8.

<sup>440</sup> Trial Transcript, 9 October 2006, at 79:14.

<sup>441</sup> See Exhibit 59 and *infra*.

<sup>442</sup> Trial Transcript, 16 November 2004, at 78:12–79:24.

<sup>443</sup> Trial Transcript, 16 November 2004, at 80–84.

<sup>444</sup> Trial Transcript, 9 October 2006, at 102:19.

<sup>445</sup> Trial Transcript, 9 October 2006, at 102:24.

<sup>446</sup> Trial Transcript, 9 October 2006, at 103:1.

291. It is important to stress, however, that such relationships are not stable. As Dr Hoffman stated:

In practice, these client/patron relationships can be quite fluid. And what we find is that in periods, particularly of economic or social stress, they in fact become quite fluid. For the only reason, this is how you get by, this is how you survive, is your positioning within the patron/client frameworks, and a lot of the anthropological literature, especially on West Africa, not just within Sierra Leone and the war, but generally in the wake of the kind of post-structural adjustment economic crises is that these relationships can be highly mobile and highly fluid.<sup>447</sup>

292. In times of conflict, such relationships are put under greater strain and pressure: “clients who are constantly have to seek out new patrons and constantly having to find people who can help them make the basic necessities when they’re not themselves in a position to do so.”<sup>448</sup>

293. Dr Hoffman makes the point that in times of conflict, “the term ‘commander’ essentially became a synonym, if you will, of the term ‘patron’. That was—the implication in the term ‘commander’ was that this was the kind of relationship that was being pointed to”.<sup>449</sup> It is apparent that it was relatively easy to become a “commander” in that all one needed to do was assert oneself with a degree of conviction and authority. As Dr Hoffman stated: “what you were doing was you were saying, okay, I am a commander and all you had to do was say it. You know, if you said it with enough conviction, the hope was that people would then sort of be willing to treat you as such.”<sup>450</sup>

294. It is important to stress that during times of conflict the patronage system may be modified. As Dr Hoffman stated in cross-examination:

Militarisation offered, for some young people, an alternative way to work around what they considered to be the injustices of the way patronage operated. It doesn’t suggest that it offered them a way to opt out of patronage. It suggests it offered them a way to opt out of the way the patronage system had worked prior to the war, which many of them felt excluded them, because, as I mentioned, this gerontocratic, what they perceived as being the

<sup>447</sup> Trial Transcript, 9 October 2006, at 103:19.

<sup>448</sup> Trial Transcript, 9 October 2006, at 104:6.

<sup>449</sup> Trial Transcript, 9 October 2006, at 104:14.

<sup>450</sup> Trial Transcript, 9 October 2006, at 105:7.

greed of elders, in not passing down to their clients material wealth. Many of them perceived that as an injustice. This offered them a way to erect their own alternative patronage networks.<sup>451</sup>

Due to the fluid and loose nature of patronage relationships, especially during time of conflict, it is obviously hard for an individual, big man or not, to exert significant command and control.

### 3. Moinina Fofana's Title – Director of War

295. At some point during the conflict Moinina Fofana acquired the title “Director of War”. In terms of the *de jure* responsibilities attaching to this position, there was no evidence called during the trial to explain exactly what the responsibilities and duties of someone with such a title were. The title is objectively meaningless with no corresponding or analogous position in any other military organisation. The title is apparently a CDF invention. This certainly concurs with Colonel Iron's observation that there was no established rank system with the CDF.<sup>452</sup> He went on to confirm that in the absence of a formal rank system there was no written job description associated with the different offices within the CDF.<sup>453</sup>

296. It is accordingly important to consider Fofana's *de facto* responsibility.

#### a. Receipt of the title

297. The Trial Chamber was presented with different accounts of how Fofana received the title “Director of War”.

- (i) On one account Fofana was appointed Director of War by “all the Kamajors” at Talia sometime in September or October 1997.<sup>454</sup>
- (ii) Similarly it was stated that Fofana was appointed at a meeting of elders at Talia shortly after Chief Normans arrival there.<sup>455</sup>

<sup>451</sup> Trial Transcript, 10 October 2006, at 7:7.

<sup>452</sup> Trial Transcript, 14 June 2005, at 69:19-22.

<sup>453</sup> Trial Transcript, 14 June 2005, at 69:23.

<sup>454</sup> Trial Transcript, 4 November 2004, at 88:25–89:5.

(iii) Two other witnesses stated that it was Norman who appointed Fofana “Director of War”, one said in November 1997<sup>456</sup> and the other stated before the Kamajors moved to Talia.<sup>457</sup>

298. Fofana’s “Letter of Appointment – Director of War and Operations”<sup>458</sup> is dated 18 January 1999. It appears that Chief Norman accepted and approved the recommendation of the War Council to appoint Fofana ‘Director of War’.

299. Crucially, the Letter of Appointment does not set out or specify Fofana’s duties and responsibilities as Director of War. It is interesting to note that it appears that it was actually the War Council that had the power to appoint Fofana to the position as opposed to Chief Norman. The letter does, however, highlight the lofty aims of the CDF and the primary motivation of the organisation. The letter tells Fofana:

You have earned this position as a result of your hardwork and dedication to the course of our people and the restoration of DEMOCRACY in Sierra Leone.

Fofana is further told:

I wish to urge you to take this appointment as a challenge for you to strive further and redouble your efforts for the restoration of constitutional order and the reinstatement of Alhaji Dr Ahmed Tejan Kabba as president of Sierra Leone.

The aims of the CDF were noble and Fofana’s appointment and instruction part of those noble aims.

*b. Actual role behind title*

300. Notwithstanding Fofana’s title, it appears that, in many ways it was nothing more than just that – a title. In the words of Justice Thompson, summarising the apparent position of one of the witnesses:

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<sup>455</sup> Trial Transcript, TF2-190, 10 February 2005, at 29:17-29, 30:17-25.

<sup>456</sup> Trial Transcript, TF2-005, 16 February 2005, at 54:19.

<sup>457</sup> Trial Transcript, TF2-014, 10 March 2005, at 16:12.

<sup>458</sup> Exhibit 59.

Justice Thompson: That's what he was saying. He was saying "I know for sure that this man was not even one of those commanders who planned or devised or conceptualised strategies to prosecute the war". The impression I got, rightly or wrongly, is that this person called the Director of War was, as it were, someone dressed in borrowed robes.<sup>459</sup>

*c. The CDF Calendar*

301. This position is exemplified by various witnesses responses to the CDF Calendar which has Fofana as a rather fetching "Mr February" with pen in hand (notwithstanding his illiteracy) under the title "National Director of War" and the inscription:

As far as the Sierra Leone Civil Defence Forces are concerned, they don't say war unless he says they say war. Moinina Fofana, popularly known within the CDF as Director, is the man who oversees [*sic*] the mobilization and deployment of the volunteer fighters of the CDF.<sup>460</sup>

302. The calendar, like Fofana's title, was perceived as somewhat of a joke:

- (i) Mustapha Lumeh described the quote under the photo in the calendar as a "farce".<sup>461</sup>
- (ii) BJK Sei described the photo of Fofana with pen in hand as "empty bluff".<sup>462</sup>
- (iii) Keikula Amara stated that the information and inscription in relation to Fofana in the calendar was "incorrect".<sup>463</sup>

303. In any event, as confirmed by Alfred Samforay in the 92*bis* email,<sup>464</sup> he set out the caption below Fofana's photo and confirms that "there was no formal verification of the information in the calendar." The calendar was published by the CDF support group in the USA who were not on the ground in Sierra Leone.

<sup>459</sup> Trial Transcript, 5 May 2006, at 36:6-11.

<sup>460</sup> Exhibit 112.

<sup>461</sup> Trial Transcript, 5 May 2006, at 89:24-27, 90:11-16.

<sup>462</sup> Trial Transcript, 16 May 2006, at 15:15-20.

<sup>463</sup> Trial Transcript, 18 May 2006, at 67:18-22.

<sup>464</sup> Exhibit 167.

*d. The Importance of English titles*

304. English titles, such as “Director of War”, were of limited importance within the CDF. Firstly English was not “that widely spoken” by the “majority” of people.<sup>465</sup> Accordingly, Kamajors would probably understand someone with an English title to be of importance but not necessarily know what the title itself denoted and meant.<sup>466</sup> Dr Hoffman confirmed that the title “Director of War” or “Director” was employed and expressed to him in relation to Moinina Fofana with a “certain amount of irony and ridicule”.<sup>467</sup> Dr Hoffman later expanded and explained this “irony and ridicule” by saying:

[I]n conversations with individuals about this definition of, or this term ‘director of war’, that it was very often sort of something that people, combatants acknowledged that they had used in a somewhat ironic fashion. That it was actually quite – that it was quite humorous to them that this individual, who was carrying that title could be called that. Some people pointed to his illiteracy as part of the explanation for this. Some people pointed to the fact of his relative marginality. Again, this is complex, because I do not mean to suggest that this is not somebody who was accorded a degree of respect. But, when I inquired with people about sort of how they were deploying that title, very often they sort of pointed to it as being a sort of ironic terminology which, incidentally in Mende is not uncommon. Nicknames quite frequently take on that role. I believe I mentioned that in the report that nicknames can be deployed humorously or ironically on a fairly regular basis. And this has been documented in ways that I’ve cited here.<sup>468</sup>

Of significant importance is perhaps the fact that such information and conversations by Dr Hoffman with interviewees was something “that predates the writing of [his] report”.<sup>469</sup>

*4. Education in Mende Culture*

305. Dr Hoffman further emphasised the extent to which education “is a highly prized trait” among Mendes with the consequence that “within the movement, there was always a sense that those who were educated were the ones who were able to rise, those who weren’t educated always risked being marginalized.”<sup>470</sup> He gave the example of how

<sup>465</sup> Trial Transcript, 9 October 2006, at 106:4.

<sup>466</sup> Trial Transcript, 9 October 2006, at 106:17.

<sup>467</sup> Trial Transcript, 10 October 2006, at 26:22-24.

<sup>468</sup> Trial Transcript, 10 October 2006, at 81:12-28.

<sup>469</sup> Trial Transcript, 10 October 2006, at 81:10-11.

<sup>470</sup> Trial Transcript, 9 October 2006, at 107:1-5.

Kondewa, who was not educated and illiterate, was marginalized and out manoeuvred.<sup>471</sup> It is worth noting that at the time Dr Hoffman briefly met Fofana, Fofana was based in Bo while the principal CDF figures tended to be people that were based in Freetown.<sup>472</sup>

##### 5. Prosecution Assertions about Fofana's Role as Director of War

306. In his expert report Colonel Iron asserts that Fofana, as Director of War, had *inter alia* the following responsibilities:

- (i) Looking after ammunition until distributed according to Norman's orders;<sup>473</sup>
- (ii) Being in charge of logistics;<sup>474</sup>
- (iii) Being Norman's second in command;<sup>475</sup>
- (iv) Being present at Briefings and Meetings;<sup>476</sup> and
- (v) Planning the Bo-Koribondo campaign.<sup>477</sup>

Firstly, it should be noted that all of Iron's "expert" conclusions were based upon his discussions with a small number of Prosecution witnesses. He did not seek to verify the information he was provided from any independent source.<sup>478</sup>

Secondly, the Iron's Report suffers from the three highlighted flaws succinctly identified by Dr Hoffman: (i) the methodological, (ii) the empirical, and (iii) the theoretical or conceptual.<sup>479</sup>

Thirdly, it should be noted that Colonel Iron did not mention either Moinina Fofana or the role of the Director of War once in his oral testimony.

<sup>471</sup> Trial Transcript, 9 October 2006, at 141:10–142:11.

<sup>472</sup> Trial Transcript, 9 October 2006, at 25:7–29.

<sup>473</sup> Exhibit 97, Iron Expert Report, at 12840 E-4.

<sup>474</sup> Exhibit 97, Iron Expert Report, at 12850 C-4.

<sup>475</sup> Exhibit 97, Iron Expert Report, at 12851 C4.2.

<sup>476</sup> Exhibit 97, Iron Expert Report, at 12853 C4.6.

<sup>477</sup> Exhibit 97, Iron Expert Report, at 12856 D2.

<sup>478</sup> Trial Transcript, 14 June 2005, at 59:27–60:15.

<sup>479</sup> Trial Transcript, 9 October 2006, at 110:23–112:1.



307. Not surprisingly, Iron's conclusions are mirrored in the testimony of a number of Prosecution witnesses – not surprisingly because these are the self same witnesses that he spoke to and based his report upon.

308. These witness stated *inter alia* that Fofana was:

- (i) In charge of “the administration”.<sup>480</sup>
- (ii) In charge of “all fighters, all fighting groups”.<sup>481</sup>
- (iii) To plan and execute the war and to supply arms and ammunition to commanders.<sup>482</sup>
- (iv) To deploy Kamajors in areas of command.<sup>483</sup>
- (v) To select commanders to go to battle and “dish out ammunitions if and when directed by Norman”.<sup>484</sup>
- (vi) To plan a war and to receive frontline reports from commanders.<sup>485</sup>
- (vii) To deputise for Norman.<sup>486</sup>
- (viii) To make arrangements for food at Base Zero.<sup>487</sup>
- (ix) To be present at meetings for commanders.<sup>488</sup>
- (x) To hold the key to the store at Base Zero.<sup>489</sup>
- (xi) To receive situation reports in the absence of Norman.<sup>490</sup>

309. The first thing to note is that, on the whole, these are predominantly general allegations. They do not link Fofana, in any command position, to any actual crimes being committed by specific and known perpetrators.

310. Secondly, it should be noted that there is some evidence to suggest that the above was not necessarily the case. Some Prosecution witnesses intimated that Fofana was not in a position of “effective command and control” at Base Zero. Witness TF2-222 stated:

<sup>480</sup> Trial Transcript, TF2-223, 28 September 2004, at 52:6-25.

<sup>481</sup> Trial Transcript, TF2-008, 16 November 2004, at 46:26.

<sup>482</sup> Trial Transcript, TF2-008, 16 November 2004, at 47:20.

<sup>483</sup> Trial Transcript, TF2-068, 17 November 2004, at 18:18.

<sup>484</sup> Trial Transcript, TF2-005, 15 February 2005, at 92:25.

<sup>485</sup> Trial Transcript, TF2-079, 26 May 2005, at 40–42.

<sup>486</sup> Trial Transcript, TF2-079, 26 May 2005, at 40–42.

<sup>487</sup> Trial Transcript, TF2-079, 27 May 2005, at 56:3.

<sup>488</sup> Trial Transcript, TF2-222, 17 February 2005, at 102:24.

<sup>489</sup> Trial Transcript, TF2-201, 4 November 2004, at 96:5.

<sup>490</sup> Trial Transcript, TF2-201, 4 November 2004, at 98:16.

Also I saw – here was a man called the Director of War who was effective – he was more concerned with the receiving of the logistics and distributing 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. I could not see that also.<sup>491</sup>

311. Another Prosecution witness, stated that other people had the exact same duties that Fofana was alleged to have had. He stated that at Base Zero, CO Jayah was in charge of the food store and MO Moosa was in charge of the arms and ammo store.<sup>492</sup>
312. Similarly, it was suggested by Prosecution witnesses that Base Zero was effectively run and managed by one man, to the exclusion of all others, namely Chief Norman. Witness TF2-011 stated that the CDF was Chief Norman’s “one man show” at Base Zero.<sup>493</sup> Colonel Iron stated that 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.” He concluded: “the person who exercised all three of these for the CDF was Hinga Norman.”<sup>494</sup>
313. That TF2-079 stated that Fofana may have deputised<sup>495</sup> for Norman does not confer command responsibility on Fofana. As demonstrated by ICTY jurisprudence, the effective control of the superior must be operative at the time the alleged subordinates are said to have committed criminal acts. Temporarily delegated authority is an insufficient bases from which to extrapolate command responsibility unless crimes occurred during the period of delegation. There is no evidence of this in the present case.

#### *6. Defence case regarding Fofana’s position as Director of War*

314. In addition to the Prosecution witnesses who undermine the Prosecution’s position vis-à-vis Fofana’s command position, there were a whole plethora of Defence witnesses who cast substantial doubt on Fofana’s alleged command role:

<sup>491</sup> Trial Transcript, 17 February 2005, at 92:2-9.

<sup>492</sup> Trial Transcript, TF2-008, 16 November 2004, at 65:19-25.

<sup>493</sup> Trial Transcript, 8 June 2005, at 19:7-9.

<sup>494</sup> Trial Transcript, 14 June 2005, at 50:16-20.

<sup>495</sup> Trial Transcript, TF2-079 26 May 2005, at 25–26.

- (i) Norman himself, for what it is worth, stated that he had “no deputy”.<sup>496</sup>
- (ii) Norman stated that the Director of Operations decided how many Kamajors would go to the war front.<sup>497</sup>
- (iii) Mohammed Kaineh also stated that Fofana was not regarded as second in command to Norman.<sup>498</sup>
- (iv) Kaineh also stated that as a commander he never discussed matters related to the war with Fofana, he did not liase with him, Fofana did not give him orders and nor did he ever report to Fofana. Fofana was not responsible for deciding or planning the fighting in which Kaineh was involved and he did not consider Fofana to be in charge of his group.<sup>499</sup>
- (v) MT Collier stated that: At Base Zero, Jajah Kamara was in charge of the food store (the storekeeper). Fofana was responsible for distributing food amongst the Kamajors. Mustapha Lumeh was the logistics officer. The three worked closely together, but apart from his involvement in food distribution, Collier did not see Fofana do any other work at Talia.<sup>500</sup>
- (vi) Haroun Collier also stated that Jajah Kamara was the storekeeper at Talia.<sup>501</sup>
- (vii) Osman Vandy stated that Fofana never directed or prepared him for war.<sup>502</sup>
- (viii) Kenneth Koker stated that Augustine Ngaoujia headed the battalion in Bo.<sup>503</sup>
- (ix) Koker further stated that although Fofana was Director of War, he never received any orders from him and never saw Fofana playing any role in relation to his title.<sup>504</sup>
- (x) Ishmael Koroma stated that Fofana was a director but that he never received any orders from him.<sup>505</sup>
- (xi) Arthur Koroma stated that he never received any orders from Fofana.<sup>506</sup> Koroma, who was highly connected to the fighting, stated that Fofana did not do anything to make him “personally feel he was director of war”.<sup>507</sup>

<sup>496</sup> Trial Transcript, 3 February 2006, at 32:4.

<sup>497</sup> Trial Transcript, 7 February 2006, at 39:4.

<sup>498</sup> Trial Transcript, 19 May 2005, at 37:19-21.

<sup>499</sup> Trial Transcript, 19 May 2005, at 38-41.

<sup>500</sup> Trial Transcript, 17 February 2006, at 3, 6, 7, and 10.

<sup>501</sup> Trial Transcript, 12 May 2006, at 36:25-37:3.

<sup>502</sup> Trial Transcript, 20 February 2006, at 21:6-23.

<sup>503</sup> Trial Transcript, 20 February 2006, at 50.

<sup>504</sup> Trial Transcript, 20 February 2006, at 65-66.

<sup>505</sup> Trial Transcript, 23 February 2006, at 25:1-10.

- (xii) Arthur Koroma also confirmed that Norman did not have a second in command,<sup>508</sup> and he did not consider Fofana to be his superior.<sup>509</sup>
- (xiii) Mustafa Lumeh stated that Fofana was a “congenial fellow, very affable, and mostly the initiators liked him very much. So his role was to mediate between petty quarrels and therefore was nicknamed the ‘director’.”<sup>510</sup>
- (xiv) Mustafa Lumeh also stated that Fofana was not involved in matters of central strategy, tactics, operations.<sup>511</sup> Fofana did not command troops and nor did he make strategy or policy decisions; they were made by commanders.<sup>512</sup>
- (xv) BJK Sei stated that Fofana was not in charge or involved in his combat activity.<sup>513</sup>
- (xvi) Keikula Amara stated that Fofana never gave him orders and nor did he ever report to Fofana. He heard Fofana’s name but Fofana was of “no importance” to him in relation to “Kamajor business”. Amara did not consider Fofana to be in charge of fighting groups and nor did he play a role in deciding and planning how the war was to be fought.<sup>514</sup>
- (xvii) Mohammed Bonnie Koroma stated that Fofana was not doing the job of a “head man” within the CDF. He never received orders from Fofana and nor did he report to him. Commanders did their own planning and Fofana did not command them.<sup>515</sup>
- (xviii) Kenei Torma was a battalion commander and never received orders from Fofana in respect of any attack and nor was Fofana involved in the planning. Torma was eventually made overall chiefdom commander by his “chiefdom people”.<sup>516</sup>
- (xix) Junisa Conneh stated that he took instructions from Fofana at Base Zero regarding the distribution of salt.<sup>517</sup>

<sup>506</sup> Trial Transcript, 4 May 2005, at 34:10-12.

<sup>507</sup> Trial Transcript, 4 May 2005, at 35-37.

<sup>508</sup> Trial Transcript, 4 May 2005, at 39:3-5.

<sup>509</sup> Trial Transcript, 4 May 2005, at 45-46.

<sup>510</sup> Trial Transcript, 5 May 2006, at 87:23-88:4.

<sup>511</sup> Trial Transcript, 5 May 2006, at 89:1-17.

<sup>512</sup> Trial Transcript, 5 May 2006, at 91:18-29.

<sup>513</sup> Trial Transcript, 16 May 2006, at 16-17.

<sup>514</sup> Trial Transcript, 18 May 2006, at 64-65.

<sup>515</sup> Trial Transcript, 22 May 2006, at 34-38.

<sup>516</sup> Trial Transcript, 2 June 2006, at 37-38 and 49.

<sup>517</sup> Trial Transcript, 28 September 2006, at 17-19.

315. After conducting extensive research with over 200 witnesses, Dr Hoffman concluded in his report that:

For the matters under consideration by the Special Court in the case of Moinina Fofana, this calls into question the use of the term “Director of War” in two ways. First, unlike a professional European army, titles such as this do not come with a specific and codified set of responsibilities, duties or privileges. They refer more to a person’s social standing and patronage position than they do to that person’s military rank. The title came into use at Base Zero when Fofana was tasked with food distribution, clearly a critical administrative job given the chronic shortages of provisions at Talia. Second, the use of the English term further suggests a lack of fixed comprehensible meaning for most combatants. The term “Director of War” clearly signifies a person of some importance, but does not specify why. Fofana was referred to most often by combatants simply as “Director”, a nickname that would imply respect but would mean nothing to most combatants. What’s more, that generic term was used for a number of other individuals, including the various regional Directors of Operation.<sup>518</sup>

316. That Fofana provided food, and the importance of this, was confirmed by Dr Hoffman during cross-examination.<sup>519</sup> Dr Hoffman stated that during the course of his extensive research he did not have “any commanders say to me that they received weapons from Moinina Fofana, commanders or rank and file individuals I’ve spoken to.”<sup>520</sup> This was notwithstanding his enquiries into the role of this “Director of War”.<sup>521</sup>

317. Dr Hoffman confirmed:

Nobody that I have spoken to said they received direct orders for combat from Moinina Fofana.<sup>522</sup>

## 7. Conclusion

318. To conclude:

- (i) Moinina Fofana was Director of War but in title only.

<sup>518</sup> Exhibit 165, Hoffman Expert Report, § D.4.u.

<sup>519</sup> Trial Transcript, 10 October 2006, at 51:11–53:17.

<sup>520</sup> Trial Transcript, 10 October 2006, at 54:2-4.

<sup>521</sup> Trial Transcript, 10 October 2006, at 54:12-29.

<sup>522</sup> Trial Transcript, 10 October 2006, at 27:3-4.

- (ii) At most Fofana was someone who held, as in *Halilovic*, a degree of influence insufficient to give rise to Article 6(3) liability.
- (iii) The Prosecution have failed to establish beyond reasonable doubt that he had *de jure* or *de facto* power over any subordinates – at best the overall picture is confused and blurred.
- (iv) For the reasons set out below—to the extent that any *de facto* responsibility can be attributable to Moinina Fofana—the Prosecution cannot prove that any of the alleged crimes were committed by his direct subordinates.
- (v) There was a distinct possibility that other Kamajors from other areas were operating in areas where Kamajors associated with Fofana, such that there were any, were operating.
- (vi) There is no evidence to suggest that, at the time Fofana held any superior position as deputy or otherwise (such that there is any evidence of this), that discernable crimes were committed by his identifiable subordinates.
- (vii) Fofana had no knowledge that crimes were about to be or had been committed by his subordinates.
- (viii) Fofana had no power to either prevent or punish any such alleged crimes.

#### **D. Crime Base Analysis**

319. This section will consider whether there is any evidence of Moinina Fofana's Article 6(3) liability for each crime base area.

320. The extent to which any crimes may have been committed in each crime base, and the alleged perpetrators thereof is considered and set out in Annex A.

##### 1. Tongo Field

321. The Prosecution allege Fofana's Article 6(3) responsibility for Tongo Field in the following terms:

It is the prosecution theory of the case that Moinina Fofana held, individually or in concert with other CDF superiors, a position superior to the CDF

subordinates engaged in the unlawful killings and had effective control over those subordinates.<sup>523</sup>

It is the prosecution theory of the case that the fact that Moinina Fofana knew or should have known that the unlawful killings were about to be committed can be reasonably inferred from, *inter alia*:

- (a) his position of authority within the CDF;
- (b) the fact that he was a member of the War Council;
- (c) the fact that he was physically present and participated in the planning of attacks and was in receipt of reports about these attacks;
- (d) the announced position of the CDF with respect to civilians, in particular those civilians in Tongo;
- (e) the fact that during the relevant times in the indictment, Moinina Fofana was in regular communication with Samuel Hinga Norman;
- (f) the fact that during the relevant times in the indictment he provided logistical support to the CDF in the field;
- (g) the fact that he received regular status reports of war operations and frequently visited the CDF bases in and around Tongo.<sup>524</sup>

It is the prosecution theory of the case that given all of these matters it can be reasonably inferred that Moinina Fofana failed to take necessary and reasonable measures to prevent the unlawful killings or to punish the perpetrators thereof.<sup>525</sup>

322. Annex A sets out the evidence which, if believed, describes what allegedly occurred at the Tongo Field crime base.

323. The first thing to note is that the vast majority of crimes were allegedly committed by "unidentified" Kamajors. Fofana cannot be held to be a superior to such individuals. They could have been under the command and control of any number of individuals. Fofana cannot be held to be their superior with the power to prevent or punish their actions.

324. Witness TF2-027 stated that BJK Sei was in charge of the Kamajors and Siaka Lahai his deputy.<sup>526</sup> CO Kamabote is also alleged to have been involved in the attack and to have committed crimes.<sup>527</sup>

325. Chief Baimba and Bimba Aruna are alleged to have committed crimes in Lalehun.<sup>528</sup>

<sup>523</sup> Supplemental Pre-Trial Brief, ¶ 18.

<sup>524</sup> Supplemental Pre-Trial Brief, ¶ 19.

<sup>525</sup> Supplemental Pre-Trial Brief, ¶ 20.

<sup>526</sup> Trial Transcript, 18 February 2005, p. 92 and 22 February 2005 p. 50 – 51; 22 February 2005 p. 59; 22 February 2005 p. 71 – 73.

<sup>527</sup> Trial Transcript, 1 March 2004, p. 82-84.

326. Keikula Kamagboty<sup>529</sup> and Kamabote<sup>530</sup> are alleged to have committed crimes in Talama.

327 There is no evidence at all that Fofana had any sort of relationship, superior or otherwise with Baimba, Aruna, Kamagboty, or Kamabote. Accordingly there can be no Article 6(3) liability.

328. The Prosecution’s position in relation to Fofana’s connection to BJK Sei, Siaka Lahai and CO Kambote for alleged crimes in Tongo Field is even weaker. Witness TF2-022 stated that the Kamajor Commanders operating at NDMC headquarters had their own groups of Kamajos and seemed to give their own, at times contradictory, orders.<sup>531</sup> It was stated that different “types” of Kamajors had different commanders.<sup>532</sup> Some Kamajors guided civilians, others chopped them: a ‘good number’ of Kamajors did not appear to follow orders.<sup>533</sup>

329. Again. from this it cannot be discerned that Fofana was in command or had any responsibility for any Kamajors responsible for committing alleged crimes. The situation is, at best, confusing.

330. Specifically, BJK Sei gave evidence that during the time of the Tongo attacks: He did not discuss matters of policy or strategy with Fofana. He did not receive orders from Fofana or report to him.<sup>534</sup> He stated Fofana was not in charge or involved in his combat activity.<sup>535</sup>

331. There is some confusion as to who planned the Tongo attack. Keikula Amara stated that it was done at Panguma by Chief Kamajor BJK Sei.<sup>536</sup> Conversely, TF2-201 stated that

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<sup>528</sup> Trial Transcript, 24 February 2005, and 1 March 2004 p. 36-38.  
<sup>529</sup> Trial Transcript, 14 February 2005, p. 12 – 20.  
<sup>530</sup> Trial Transcript, 1 March 2004, p. 88-89.  
<sup>531</sup> Trial Transcript, 11 February 2005, p. 71 – 73.  
<sup>532</sup> Trial Transcript, 22 February 2005, p. 104-105.  
<sup>533</sup> Trial Transcript, 22 February 2005, p. 81-82.  
<sup>534</sup> Trial Transcript, 16 May 2006, p. 11-13 and p. 33.  
<sup>535</sup> Trial Transcript, 16 May 2006, p. 27 line 28 – p. 28 line 3.  
<sup>536</sup> Trial Transcript, 18 May 2006, p. 24-25 .



Chief Norman gave the order, in the presence of amongst others, Fofana.<sup>537</sup> He also alleged that Norman order Fofana to “dish out the ammunitions”.<sup>538</sup>

332. Witness TF2-005 stated that Norman told the Kamajors to take Tongo “at all costs” and that Fofana was present at this meeting. Norman ordered Fofana to distribute ammo for the operation.<sup>539</sup>
333. Witness TF2-222 said Norman ordered the attack and stated that at the meeting Fofana said “any commander failing to perform accordingly and loosing you own ground, just decide to kill yourself there and don’t come to report to us”.<sup>540</sup>
334. Witness TF2-079 stated that he gave a written situation report from Tongo to Fofana.<sup>541</sup> (Obviously Fofana himself could not read the report). The witness later met with Norman and Fofana “brought the situation report”.<sup>542</sup> The witness prepared the report himself.<sup>543</sup> The Report, Exhibit 86, is addressed directly to Chief Norman and discloses no information about alleged crimes or wrongdoing.
335. Even if Norman did order the carrying out of crimes in Tongo, there is no evidence that anyone present at any such meeting did, in fact, commit any crimes. Even if Fofana advised men to kill themselves if they lost ground this does not demonstrate either (a) an order to commit crimes, or (b) Fofana’s superiority over anyone who may have committed crimes. Such instructions could have been limited to the taking of legitimate targets. There is no evidence that persons present at this alleged meeting ultimately committed any crimes.
336. Thus, in relation to the Tongo crime base there is either no evidence or no credible evidence that Moinina Fofana was the superior to any subordinate who actually committed crimes in Tongo. There is no evidence that he knew of the commission of such crimes and there is no evidence that he had the power to prevent or punish such crimes. Norman was clearly the driving force who could not be subverted.

<sup>537</sup> Trial Transcript, 4 November 2004, p. 106.

<sup>538</sup> Trial Transcript, 15 February 2005, p. 105 lines 20 – 25 and p. 106 – 107.

<sup>539</sup> Trial Transcript, 16 February 2005, p. 106.

<sup>540</sup> Trial Transcript, 17 February 2005, p. 119.

<sup>541</sup> Trial Transcript, 25 May 2005, p. 25.

<sup>542</sup> Trial Transcript, 25 May 2005, p. 27.

<sup>543</sup> Exhibit 86.

Kenema District*Kenema*

337. The Prosecution allege Fofana's Article 6(3) Responsibility for the Kenema District in almost identical terms as those alleged for the Tongo Field. The only addition is that it is alleged that Fofana knew or should have known that the unlawful killings were about to be committed by inference from "the fact that he regularly received reports of police officers being targeted and took no action in relation to such reports".<sup>544</sup>
338. Annex A sets out the evidence which, if believed, describes what allegedly occurred in the Kenema crime base.
339. The first thing to note is that the vast majority of crimes were allegedly committed by "unidentified" Kamajors. Fofana cannot be held to be a superior to such individuals. They could have been under the command and control of any number of individuals. Fofana cannot be held to be their superior with the power to prevent or punish their actions.
340. The only named individuals alleged to have committed crimes in Kenema are Brima Massaquoi (who spoke with a Liberian accent),<sup>545</sup> "Magona",<sup>546</sup> and Mualemu Sheriff.<sup>547</sup> There is no evidence that Fofana had any sort of relationship, let alone a superior one, to any of these individuals and there can accordingly be no Article 6(3) liability.
341. It was Norman who gave the instructions to the operation commanders for the Kenema attack.<sup>548</sup>
342. Witness TF2-201 claims that Fofana was present at a planning meeting for the attack on Kenema.<sup>549</sup> This alone does not demonstrate that Fofana had a superior position over anyone involved in the Kenema attack.

<sup>544</sup> Supplemental Pre-Trial Brief, ¶ 28.

<sup>545</sup> Trial Transcript, 23 September 2004, p. 102-105.

<sup>546</sup> Trial Transcript, 22 September 2004, p. 43 and 23 September 2004 p. 6-9.

<sup>547</sup> Trial Transcript, 24 September 2004, p. 52.

<sup>548</sup> Trial Transcript, 5 November 2004, p. 41.

343. The only witness to give evidence about Fofana's alleged command role in the Kenema attack was TF2-223. According to him Fofana and Kondewa were "in charge of the Kamajors" in Kenema.<sup>550</sup> He based this assessment on an announcement made by Fofana and Kondewa the day following the attacking that the NIC building on Dama Road would be the CDF HQ.<sup>551</sup> The witness was unable to say whether the two arrived on that day (ie the Monday) or previously.<sup>552</sup>

344. The only two examples of the "exercise of authority" by Fofana and Kondewa that TF2-223 could only point to were:

- (i) That "even though [TF2-223] had been told by Chief Norman that whatever we get at the war front belongs to us, but this time now when we came down to Kenema we caught a huge quantity of tonnage in this cocoa produce at FD Saad's place ... we are now instructed [by Fofana and Kondewa] not even to go around there again."<sup>553</sup>

If anything this seems to be implying that the witness was told not to loot contrary to his previous instructions by Norman.

- (ii) There were orders for one corpse to be burnt.<sup>554</sup> TF2-223 never enquired why the corpse was burnt.<sup>555</sup>

There could have been a whole plethora of reasons why a corpse should be burnt – not least hygienic.

These examples do not come close to establishing proper command authority.

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<sup>549</sup> Trial Transcript, 5 November 2004, p. 42.

<sup>550</sup> Trial Transcript, 28 September 2004, p. 98 line 18.

<sup>551</sup> Trial Transcript, 28 September 2004, p. 98 lines 23-29.

<sup>552</sup> Trial Transcript, 28 September 2004, p. 99 line 17-22.

<sup>553</sup> Trial Transcript, 28 September 2004, p. 100 lines 14-27.

<sup>554</sup> Trial Transcript, 28 September 2004, p. 101 line 14-19.

<sup>555</sup> Trial Transcript, 28 September 2004, p. 102 line 4.

345. There is some evidence to suggest that ECOMOG exerted a degree, if not significant control, over matters in Kenema.<sup>556</sup> This was confirmed by Brima Moriba who stated that it was announced that ECOMOG would be incharge of security in Kenema.<sup>557</sup> Moreover, Arthur Koroma was emphatic that Fofana was not involved in the attack on Kenema.<sup>558</sup>
346. The crucial matter to note from TF2-223's evidence set out above is that it does not clearly establish that Fofana was in a position of authority with the power to prevent or punish crimes of any subordinates. To the extent that TF2-223 can be established as a subordinate it is not clear, from the evidence, that Fofana knew of his activities and alleged crimes and not clear that Fofana would have had the authority and power to either prevent or punish them. Moreover, as in *Limaj*, it is clear that other units could have been operating in the area over who Fofana had no responsibility or control.

#### *SS Camp*

347. The only witness to allege Fofana's involvement in anyway to SS Camp was TF2-223. It is not possible to discern from his testimony that Fofana had any command role in relation to the camp.
348. TF2-223 claims that his unit was assigned to take SS Camp. The witness gave hearsay evidence that CO Ngaoujia had told him that the the orders came from Norman but were "dished out" by Fofana.<sup>559</sup> The bulk of casualties at SS Camp were civilian.<sup>560</sup>
349. After the Kenema operation, TF2-223 states that he transferred to SS Camp on the orders of Fofana and Kondewa.<sup>561</sup> Fofana is said to have handed SS Camp over to the witness's unit.<sup>562</sup>

<sup>556</sup> Trial Transcript, 23 February 2006, p. 26, 29, 39 and 42.

<sup>557</sup> Trial Transcript, 23 May 2006, p. 15 lines 11-24.

<sup>558</sup> Trial Transcript, 4 May 2005, p. 51, 52, and 54.

<sup>559</sup> Trial Transcript, 28 September 2004, p. 57.

<sup>560</sup> Trial Transcript, 28 September 2004, p. 61-62.

<sup>561</sup> Trial Transcript, 28 September 2004, p. 104.

<sup>562</sup> Trial Transcript, 28 September 2004, p. 105-106.

350. Norman is said to have announced that SS Camp would be a place for executions and that Magona be in charge.<sup>563</sup> Norman gave TF2-223 a daily occurrence book to record the activity at SS Camp.<sup>564</sup> Norman visited the camp on many occasions.<sup>565</sup> It is alleged that Fofana may have sometimes been with him and may have seen the daily occurrence book.<sup>566</sup>

351. A few short points should be made:

- (i) It was only hearsay evidence that Fofana “dished out” Norman’s orders to take SS Camp. Crucially there is no evidence that the orders were unlawful or gave instructions to target civilians.
- (ii) To the extent that there were civilian casualties in the taking of SS Camp, it is not clear from the evidence whether they were deliberate targets or collateral casualties.
- (iii) Fofana was not involved giving orders regarding the running of SS Camp ie as a place for executions.
- (iv) It is not clear what was actually in the Daily Occurrence Book that, at most, Fofana may have seen. It is not clear that it contained details of alleged crimes. In any event – unless the book was in pictorial form – as Fofana is illiterate he would not have been able to understand it.

352. It is submitted that from the above it is impossible to be sure, beyond reasonable doubt, that Fofana occupied a sufficient position of superiority over any of the alleged perpetrators of crimes in either Kenema or SS Camp.

Bo District

353. The Prosecution allege Fofana’s liability pursuant to Article 6(3) in similar terms to the allegations pertaining to Tongo Field.<sup>567</sup>

<sup>563</sup> Trial Transcript, 28 September 2004, p. 110.

<sup>564</sup> Trial Transcript, 28 September 2004, p. 120.

<sup>565</sup> Trial Transcript, 28 September 2004, p. 121.

<sup>566</sup> Trial Transcript, 28 September 2004, p. 125.

<sup>567</sup> Supplemental Pre-Trial Brief, ¶ 35.

354. It is alleged that the fact that Moinina Fofana knew or should have known that the unlawful killings were about to be committed can be inferred from the following factors in addition to those set out for Tongo Field above:

- (i) the fact that he was in charge of CDF activity in the Bo District;
- (ii) the fact that the commanders put in place at the checkpoints around Bo were appointed by Fofana;
- (iii) the fact that the killings at these checkpoints were reported to Moinina Fofana;
- (iv) the fact that he received regular status reports of war operations;
- (v) the fact that reports of CDF atrocities were brought to his knowledge with no action taken.

Unlike for Tongo Field it is not alleged that Fofana was physically present and participated in the planning of attacks and was in receipt of reports about these attacks.<sup>568</sup>

The Prosecution allege that from all these matters it can be inferred that Moinina Fofana failed to take necessary and reasonable measures to prevent the unlawful killings or to punish the perpetrators thereof given that:

- (a) after the CDF captured Bo (on or about 15 March 1998) checkpoints were set up by the CDF to screen the collaborators from the civilians as the fled the town;
- (b) Fofana knew killings took place at these checkpoints but no preventative action was taken;
- (c) At the time, Fofana had an office on Mahei Boima Road in Bo;
- (d) Many meetings were over the fact of CDF atrocities in which Fofana was present and informed of such conduct;
- (e) All atrocities occurring in Bo were reported to Fofana.<sup>569</sup>

<sup>568</sup> Supplemental Pre-Trial Brief, 36.

<sup>569</sup> Supplemental Pre-Trial Brief, 37.

355. There are two aspects to Fofana's alleged command role in Bo: (i) the attack of Bo, and (ii) the management of Bo after its capture.

*The Attack of Bo*

356. With regards the attack on Bo two witnesses claim to have been involved in the attack and commission of crimes in Bo and assert Fofana's involvement in the attack: Albert Nallo and TF2-017. Annex A sets out the alleged crimes that these two men claim to have committed. It is apparent from the Annex that, apart from these two men, all other alleged crimes in Bo were committed by "unidentified Kamajors" over whom it cannot be said that Fofana exercised Article 6(3) responsibility.
357. There are two points to make about Nallo and TF2-017: Firstly, both Nallo and TF2-017 are reprehensible, dishonest and unreliable witnesses. The Trial Chamber should not place significant, if any, weight on the testimony of self-confessed murderers who have themselves by doing so been granted complete amnesty. Secondly, there is no clear and reliable evidence that Fofana was in a position of command of either of these two men for the purpose of Article 6(3) liability.
358. Albert Nallo asserts that Fofana was present when Norman gave orders regarding the Koribondo and Bo attacks,<sup>570</sup> for example with regards looting the killing of policemen, and collaborators.<sup>571</sup> Even if believed, Fofana's presence when such orders were given does not give rise to any Article 6(3) liability unless it is proved that the alleged crimes were eventually committed by persons who he had Article 6(3) control over. It is worth noting that Nallo stated that about a week after the fall of Bo, Norman is alleged to have addressed a large meeting of Kamajors and civilians and said, effectively, they should not grumble about Kamajors who did things. Rather than blame the Kamajors Norman is said to have stated that they should blame him for it was he who "gave them directions".<sup>572</sup> Moreover, witness TF2-011 stated that it was Norman who appointed the

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<sup>570</sup> Trial Transcript, 10 March 2005, p. 64-65.

<sup>571</sup> Trial Transcript, 10 March 2005, p. 65-71.

<sup>572</sup> Trial Transcript, 10 March 2005, p. 81-82.

commanders for Koribondo and Bo.<sup>573</sup> This casts substantial doubt over whether Fofana had any responsibility over the actions of Kamajors in Bo.

359. TF2-017 stated that it was Albert Nallo who commanded the attack on Bo.<sup>574</sup> This is confirmed by TF2-001.<sup>575</sup> It should be noted that in cross-examination Nallo confirmed that he had been told by the Prosecution that he would be prosecuted only if he bore the greatest responsibility—if he gave commands.<sup>576</sup> There is more evidence of Nallo’s command role with regards the attack than Fofana’s, but Nallo has escaped Prosecution ostensibly by implicating others.

360. Witnesses gave evidence that Fofana was present when Norman gave instructions for the attack on Bo.<sup>577</sup> Fofana’s mere presence at such a meeting does not connote that he possessed any command position vis-à-vis the attack. TF2-017 further alleges that Fofana distributed arms and ammunition prior to the attack.<sup>578</sup> It was not established that these arms and ammunition were used in the perpetration of specific crimes by forces in Bo and certainly does not indicate that Fofana had any command position over persons who may have used them.

361. TF2-001 stated that in April 1998 he saw Kamajor leaders at a parade at the new police barracks.<sup>579</sup> Norman purportedly stated at this meeting that Fofana had reported that the police barracks had been burned down when they had in fact not been burned down.<sup>580</sup> So it appears that according to the witness, Norman was displeased for having been given information about an event that had not in fact taken place. This clearly does not indicate that Fofana was responsible for the action or had authority over those who carried it out.

362. Bob Tucker asserted that crimes had been committed as part of the Bo attack.<sup>581</sup> He asserts that he made a report of the Bo mission to MT Collier.<sup>582</sup> There is no evidence

<sup>573</sup> Trial Transcript, 8 June 2005, p. 29 lines 6-8.

<sup>574</sup> Trial Transcript, 22 November 2004, p. 2.

<sup>575</sup> Trial Transcript, 14 February 2005, p. 75.

<sup>576</sup> Trial Transcript, 11 March 2005, p. 41.

<sup>577</sup> Trial Transcript, 5 November 2004, p. 42 and Trial Transcript 19 November 2004 p. 92-93.

<sup>578</sup> Trial Transcript, 19 November 2004, p. 96.

<sup>579</sup> Trial Transcript, 14 February 2005, p. 98.

<sup>580</sup> Trial Transcript, 14 February 2005, p. 99.

<sup>581</sup> Trial Transcript, 10 February 2005, p. 56.



that this report was ever passed on the Fofana or that he possessed any Article 6(3) responsibility over anyone or anything contained within it.

*BO after its capture by CDF*

- 363. There is little credible, if any evidence, that Fofana exercised a command position in Bo after its capture so as to give rise to any Article 6(3) liability.
- 364. Firstly, it should be noted that ECOMOG arrived in Bo approximately five days after the Kamajors.<sup>583</sup> By the time ECOMOG entered Bo the Kamajors had already left for the villages.<sup>584</sup> By March 1998, ECOMOG was in control of security in Bo.<sup>585</sup> ECOMOG officer Buhari Musa announced that Kamajors should take orders from them going forward; Fofana was not present at the announcement.<sup>586</sup> He also stated that Augustine Ngaoujia headed the Kamajor Battalion in Bo.<sup>587</sup>
- 365. After the arrival of ECOMOG, the commander of the Kamajors in Bo was Kosseh Hindowa.<sup>588</sup> Peter Penfold stated that shortly after the restoration of the President in March 1998, it was Daramy Rogers who was the head of the Kamajors in Bo.<sup>589</sup> Kenneth Koker confirmed that Daramy Rogers was eventually replaced by Hindowa in Bo.<sup>590</sup> Even though he was Director of War, Fofana played no role in relation to his title.<sup>591</sup> Thus, there is doubt over whether Fofana was in control of Bo as alleged by the Prosecution.
- 366. The incident described by witness TF2-057 is dealt with in detail above. There are obviously serious question marks over Fofana's involvement in this incident, particularly the alleged decision to kill the prisoners. At the point where TF2-057 purportedly "recognises" Fofana, i.e., when he arrives at Kamajor Headquarters at 88 Mahei Boima

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<sup>582</sup> Trial Transcript, 10 February 2005, p. 56.  
<sup>583</sup> Trial Transcript, 6 December 2004, p. 72.  
<sup>584</sup> Trial Transcript, 25 November 2004, p. 12.  
<sup>585</sup> Trial Transcript, 30 November 2004, p. 79.  
<sup>586</sup> Trial Transcript, 20 February 2006, pp 50 and 66.  
<sup>587</sup> Trial Transcript, 20 February 2006.  
<sup>588</sup> Trial Transcript, 6 December 2004, p. 73.  
<sup>589</sup> Trial Transcript, 8 February 2006, p. 44.  
<sup>590</sup> Trial Transcript, 20 February 2006, p. 58.  
<sup>591</sup> Trial Transcript, 20 February 2006, p. 65-66.

Road. Fofana is not alleged to have said or done anything that can be said to give rise to any Article 6(3) liability. Fofana is not said to have given any commands or asserted any command authority over the other persons involved in the initial incident.<sup>592</sup> Moreover it should be noted that 88 Mahei Boima Road was confirmed as the office of Kosseh Hindowa by Foday Sesay, and Fofana was at a different location.<sup>593</sup> Kenneth Koker confirmed that Fofana and Hindowa had offices at different addresses in Bo.<sup>594</sup>

### *Koribondo*

367. Annex A does not identify any individual who was responsible for having committed crimes in Koribondo. All the alleged crimes are said to have been committed by “unidentified Kamajors”. Fofana can have no Article 6(3) liability over such persons.
368. Bob Tucker stated that Fofana purportedly addressed a meeting regarding the attack on Koribondo and stated that it was time to implement their training and any commander who failed in his mission should not return to Base Zero.<sup>595</sup> This does not suggest that he endorsed or was aware of the commission of crimes. As Norman himself stated: Koribondo was an important “military” target.<sup>596</sup> Although it should be stressed that TF2-201 stated that Norman was the one who gave the orders for the attack.<sup>597</sup> Norman also is alleged to have ordered TF2-082 to lead the attack on Koribondo.<sup>598</sup>
369. Albert Nallo claimed that he led the Koribondo operation.<sup>599</sup> He stated that he transcribed strategies dictated to him by Fofana.<sup>600</sup> It is important to stress that the killing of innocent civilians, looting of property and the raping of women was not something discussed by Nallo as part of the planning with Fofana.<sup>601</sup> In any event it was Norman who was allegedly directing the operation.<sup>602</sup> This was confirmed by TF2-

<sup>592</sup> Trial Transcript, 29 November 2004, p. 114-117.

<sup>593</sup> See Exhibit 168, The Foday Seisay Email.

<sup>594</sup> Trial Transcript, 20 February 2006, p. 84.

<sup>595</sup> Trial Transcript, 10 February 2005, p. 43-48.

<sup>596</sup> Trial Transcript, 30 January 2006, p. 49.

<sup>597</sup> Trial Transcript, 4 November 2004, p. 113-114.

<sup>598</sup> Trial Transcript, 10 February 2004, p. 43-48.

<sup>599</sup> Trial Transcript, 14 March 2005, p. 39.

<sup>600</sup> Trial Transcript, 14 March 2005, p. 51.

<sup>601</sup> Trial Transcript, 14 March 2005, p. 51-52.

<sup>602</sup> Trial Transcript, 14 March 2005, p. 49.

201 who stated that Koribondo should be taken “at all cost” with Fofana allegedly present.<sup>603</sup>

370. Joe Nunie stated that with regards the Koribondo attack he did not receive orders from Fofana and that Fofana was not involved in matters of strategy. Fofana was a man of no consequence and Nallo was much more powerful than him.<sup>604</sup>

371. It should be stressed that TF2-082 stated that Albert Nallo was a “director” and that Nallo would apprise Norman of developments from the war front.<sup>605</sup> This does not suggest that Fofana would have had any knowledge or control over what actually occurred at the front. TF2-082 stated he received a letter from Fofana instructing him to bring whatever and whomever he captured to him.<sup>606</sup> TF2-082 also produced a letter from Fofana instructing him to turn over captured vehicles to ECOMOG.<sup>607</sup> Crucially, TF2-082 stated that it was Norman who appointed him battalion commander of Koribondo.<sup>608</sup> This suggests quite clearly that Fofana did not have a command position over individuals involved in fighting in Koribondo.

#### Moyamba District

372. The Prosecution allege Fofana’s Article 6(3) liability in the following terms:

That Moinina Fofana held a position individually or in concert with other CDF superiors, superior to the CDF subordinates engaged in the unlawful killings and thus had effective control over those subordinates as witnessed by the fact that:

- (i) at a meeting that took place in Mobia Keffe, a village, Moinina Fofana declared that he had been sent by Samuel Hinga Norman in his capacity as Director of War to resolve a dispute between the CDF factions of the two chiefdoms;

<sup>603</sup> Trial Transcript, 4 November 2004, p. 113.

<sup>604</sup> Trial Transcript, 11 May 2006, p. 46-48.

<sup>605</sup> Trial Transcript, 15 September 2004, p. 18.

<sup>606</sup> Trial Transcript, 15 September 2004, p. 40.

<sup>607</sup> Exhibit 11.

<sup>608</sup> Trial Transcript, 15 September 2004, p. 51 and 57 and Exhibit 10.

(ii) after Moinina Fofana’s intervention there was a permanent cessation of hostilities between the two factions.<sup>609</sup>

The prosecution allege that Moinina Fofana knew of should have known that the unlawful killings were about to be committed in Moyamba in similar terms to those set out above for Tongo Field. The only difference being that it is not alleged that he was physically present and participated in the planning of attacks and was in receipt of reports about these attacks.<sup>610</sup>

373. From Annex A, it is clear that the following are alleged to have committed offences in Moyamba: Steven Sowa, Moses Mbalacolor, Mohamed Sankoh, Commander Kakpata, and Commander Obai. Fofana had no relationship with any of them and accordingly cannot be said to have had a superior/subordinate relationship with them.

374. From Annex A, it can be seen that the only other Kamajors said to have operated in Moyamba were “unidentified Kamajors”. Thus, Fofana has no clear relationship with them and cannot entail any Article 6(3) liability for their alleged actions.

375. Bob Tucker describes his version of the attack on Moyamba Town.<sup>611</sup> He describes how civilians were killed as enemy soldiers used them as “human shields”.<sup>612</sup> Tucker describes how he allegedly made a “situation report” about the attack to Norman.<sup>613</sup> Thus, there is no evidence of Fofana’s command role in the attack at all so as to give rise to Article 6(3) liability.

376. Albert Nallo alleged that Charles Caulker made a report to him about an incident in Moyamba. Nallo claims that under the order of Fofana he formed a brigade team and went to district officer who was Matthew Manna.<sup>614</sup> Nallo claims that he went to “cool down the situation” in Bumpe and Shenge Chiefdoms. Nallo did not state that he reported back on his mission to anyone. It seems that some arrests were made of potential perpetrators. However, according to Nallo Norman “flew in by helicopter and

<sup>609</sup> Supplemental Pre-Trial Brief, ¶43.

<sup>610</sup> Supplemental Pre-Trial Brief, ¶ 44.

<sup>611</sup> Trial Transcript, 10 February 2005, p. 38.

<sup>612</sup> Trial Transcript, 10 February 2005, p. 39 line 23.

<sup>613</sup> Trial Transcript, 10 February 2005, p. 40 line 27.

<sup>614</sup> Trial Transcript, 10 March 2005, p. 58.

released all those people”.<sup>615</sup> If true, given Norman’s control, it is crystal clear that Fofana was not in a position to prevent or punish crimes in Moyamba, even assuming they were committed by his subordinates and assuming that he had knowledge of them.

Bonthe District

377. The Prosecution allege Fofana’s Article 6(3) liability for the Bonthe District in similar terms to that set out for Tongo Field above.<sup>616</sup>

The Prosecution allege that the fact that Fofana knew or should have known that unlawful killings were about to be committed in Bonthe District can be inferred from similar factors to those for Tongo Field, with the following additions:

- (i) the fact that Fofana was in charge of all CDF activity in Bonthe District for a period of time prior to Samuel Hinga Norman’s arrival;
- (ii) the fact that Commanders put in place for the checkpoints around Bonthe District and in particular Base Zero, were appointed by Moinina Fofana;
- (iii) the fact that the killings at these checkpoints were reported directly to Moinina Fofana.
- (iv) The fact that reports of CDF atrocities were brought to his knowledge with no action taken.

Unlike for Tongo Field it is not alleged that Fofana was physically present and participated in the planning of attacks and was in receipt of reports about these attacks.<sup>617</sup>

*Bonthe*

378. Annex A indicates that Morie Jusu Kamara was the “overall commander of operations in Bonthe”.<sup>618</sup> Junisa Conneh gave evidence that Morie Jusu reported to Fofana.<sup>619</sup> It is

<sup>615</sup> Trial Transcript, 10 March 2005, p. 59 line 18.

<sup>616</sup> Supplemental Pre-Trial Brief, ¶ 51.

<sup>617</sup> Supplemental Pre-Trial Brief, ¶ 52.

important to note that Conneh did not state when Morie Jusu reported to Fofana or what he reported to Fofana about. This was not explored by the Prosecution in cross-examination. Thus, there is no evidence that Fofana was aware, through Jusu, of all activities in Bonthe.

379. It is also important to stress that there is no evidence that Morie Jusu Kamara perpetrated any crimes in Bonthe. On the contrary, there is evidence to suggest he did his best to subvert such activity. For example, Rambo called for the death of TF2-116. Morie Jusu Kamara announced that there would be no more civilian deaths.<sup>620</sup> Despite Jusu's order Rambo and his men killed Bendeh Battiana.<sup>621</sup>
380. Annex A indicates that some crimes were allegedly committed in Bonthe. Witness TF2-147 stated that there was no identifiable authority to whom to make a report. A report was eventually made to Morie Jusu Kamara who stated that he was unable to control many of the Kamajors because of their relationship with Kondewa, but that he would try.<sup>622</sup> Kamara had mixed results with controlling Kamajors.<sup>623</sup> No individual was in effective control of the Kamajors operating in Bonthe.<sup>624</sup>
381. That Junisa Conneh said that Morie Jusu Kamara may have reported to Fofana does not prove that Fofana was aware of any alleged crimes in Bonthe. To the extent that Fofana was Kamara's superior, credit should be given to Fofana for the fact that it appears that Kamara did his best to be a humane commander and minimise civilian casualties in Bonthe. There appears to have been an uncontrollable group of rogue Kamajors in Bonthe and there is no evidence to suggest that they were in anyway connected to Fofana or that he had or could have been expected to have control over them. Accordingly, Fofana cannot incur any Article 6(3) liability for any of the alleged crimes in Bonthe.

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<sup>618</sup> Trial Transcript, 10 November 2004, p. 37-38.

<sup>619</sup> Trial Transcript, 28 September 2006, p. 19-20.

<sup>620</sup> Trial Transcript, 9 November 2004, p. 37-38.

<sup>621</sup> Trial Transcript, 9 November 2004, p. 37-38.

<sup>622</sup> Trial Transcript, 10 November 2004, p. 42, 49 and 52.

<sup>623</sup> Trial Transcript, 10 November 2004, p. 52 and 65.

<sup>624</sup> Trial Transcript, 11 November 2004, p. 18 – 19.

*Talia*

382. Witness TF2-008 stated that Fofana was in charge of “all fighting groups” and that his role was to plan and execute the war and to supply arms/ammo to the commanders.<sup>625</sup> Witness TF2-005 stated Fofana was the overall boss of all commanders at Base Zero.<sup>626</sup> By contrast TF2-222 stated that Fofana was “more concerned with the receiving of logistics and distributing 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”.<sup>627</sup> This is to some extent confirmed by TF2-201 who stated that Norman would give orders to distribute arms and ammo to Fofana who would then pass on the order to the witness who was in charge of the arms store at Talia.<sup>628</sup>
383. Thus, the overall picture one gets of Fofana at Talia was someone in charge of logistics passing out the instructions of Norman rather than someone really at the heart of all central issues and matters. To the extent that Fofana was in charge of any commanders at Base Zero, which is not accepted, there is no evidence to suggest that those subordinates were involved in the commission of any crimes. No Article 6(3) liability can therefore ensue.
384. There is of course, some evidence that Fofana received reports when Norman was not at Base Zero.<sup>629</sup> However, there is no evidence of him carrying out or supervising crimes during any such periods.
385. Albert Nallo did give evidence that he was charged by Norman to carry out certain activities in and around Talia. He also alleged various acts of human sacrifice. Nallo’s credibility and these incidents are considered above. Even if admissible and believed, none of the incidents described by Nallo indicate Fofana exercising any kind of command role. At most he appears to have been “present” when instructions were given.

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<sup>625</sup> Trial Transcript, 16 November 2004, p. 47.

<sup>626</sup> Trial Transcript, 15 February 2005, p. 101.

<sup>627</sup> Trial Transcript, 17 February 2005, p. 92.

<sup>628</sup> Trial Transcript, 4 November 2004, p. 96-97.

<sup>629</sup> Trial Transcript, 26 May 2005, p. 25.

*The Death Squad*

386. Witness TF2-008 alleged that the Albert Nallo once made a report that the Death Squad was killing innocent civilians and looting civilian property. Fofana is said to have referred the matter to the War Council.<sup>630</sup> However, TF2-008 also said that Jegbeyama was leader of the Death Squad and that the Death Squad reported to Kondewa.<sup>631</sup>
387. By contrast, Bob Tucker, who claimed to be the leader of the Death Squad stated that it was responsible for security in and around Talia. Tucker stated that he received orders from “Pa Norman and not any other person.”<sup>632</sup> This is confirmed by Nallo who stated that the Death Squad was answerable only to Norman.<sup>633</sup> Thus, witnesses who stated that the Death Squad reported to all three accused should be viewed with a degree of circumspection.<sup>634</sup>
388. From the totality of the evidence it is not possible to be sure beyond reasonable doubt that the Death Squad were answerable to Fofana or that he had any Article 6(3) responsibility over them. The picture is, at best, confused.

**E. Conclusion**

389. Mindful of the ICTY Appeals Chamber’s ruling in *Blaskic*:

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.<sup>635</sup>

390. While Fofana may have had a title, while he may have had a very limited “degree of influence”,<sup>636</sup> the link of control between him and any alleged perpetrators was either

<sup>630</sup> Trial Transcript, 16 November 2004, p. 62-63.

<sup>631</sup> Trial Transcript, 16 November 2004, p. 60-61.

<sup>632</sup> Trial Transcript, 10 February 2005, p. 32-34.

<sup>633</sup> Trial Transcript, 10 March 2005, p. 35.

<sup>634</sup> Trial Transcript, 17 November 2004, p. 90; 15 February 2005, p. 95; 16 November 2004, p. 61.

<sup>635</sup> See *Blaskic*, *supra*.

<sup>636</sup> See *Halilovic*, *supra*.



totally absent or too remote. Accordingly, it would be an injustice to hold him responsible pursuant to Article 6(3) for any of the alleged crimes in the Indictment.

391. For every crime base area – there is no definitive evidence, no credible evidence or evidence capable of belief, that Fofana was responsible for Kamajors acting in those areas. It has not been proved beyond reasonable doubt, as required by *Limaj*,<sup>637</sup> that Kamajors subordinate to others were not those who actually perpetrated the alleged crimes.

392. Thus, the Prosecution has not proved to the required standard:

- (i) A superior subordinate relationship between the alleged perpetrators and the Moinina Fofana;
- (ii) Fofana's knowledge that his subordinates were about to commit or had committed any crime;
- (iii) Fofana's failure to prevent or punish the commission of such crimes.

393. Accordingly, Fofana must be acquitted of all allegations pursuant to Article 6(3) in the Indictment

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<sup>637</sup> See *Limaj* Trial Judgement, *supra*.

### VIII. Greatest Responsibility

394. Pursuant to Article 1(1) of the Statute, the Special Court has personal jurisdiction over only those “persons who bear the greatest responsibility for serious violations of international humanitarian law”. The legal significance of this language—namely the deliberate and conspicuous decision by the drafters to include the words “greatest responsibility” in the Statute’s jurisdictional provision—has been both the subject of litigation and a topic of much debate.<sup>638</sup> Since the inception of this case, the Defence has taken the categorical position that Moinina Fofana cannot credibly be said to belong to such a category of persons.<sup>639</sup>

395. This Chamber long ago 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”.<sup>640</sup> Having reached the end of that stage, the Defence submits that based upon the Prosecution’s failure to substantiate a single count of its Indictment by way of a single mode of liability, as demonstrated by the foregoing analysis, it is now unmistakably clear as a matter of evidence that Moinina Fofana does not bear any, let alone the greatest, responsibility for violations of international humanitarian law committed in Sierra Leone.

<sup>638</sup> See, e.g., *Norman*, SCSL-2004-14-T-689, Appeals Chamber, ‘Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone’, 11 September 2006, ¶ 33 (“The Trial Chamber has already ruled that this issue ‘is an evidentiary matter to be determined at the trial stage’ although I would have thought that it is first and foremost a question of law as to whether (and if so, to what extent) it is a legitimate defence for a defendant to argue that he bears lesser rather than greater responsibility for a war crime. Is this actually a defence, or a jurisdictional bar that can avail a defendant, or does it merely limit prosecutorial selection to the class of persons to be tried in the Special Court?”)

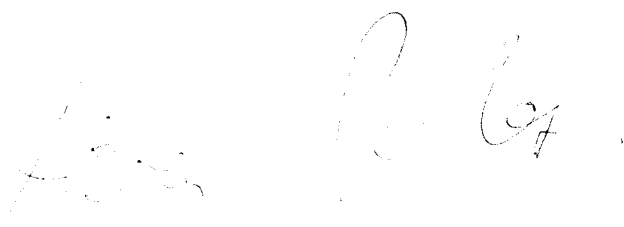
<sup>639</sup> This argument was first articulated by the Defence in a preliminary motion and subsequently reiterated in its pre-trial brief and motion for judgement of acquittal. See, e.g., *Prosecutor v. Moinina Fofana*, SCSL-2003-11-PT-058, ‘Preliminary Defence Motion on the Lack of Personal Jurisdiction’, 14 November 2003.

<sup>640</sup> *Norman*, 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, ¶ 44 (emphasis added).

**IX. Conclusion**

396. For the above-stated reasons, the Prosecution has failed to substantiate its case against Moinina Fofana. Accordingly, a verdict of 'Not Guilty' should be entered as to each and every count of the Indictment.

COUNSEL FOR MOININA FOFANA



Steven Powles

**ANNEX A**

**Crime Base Evidence**

- 1. Tongo Field: Tongo Field, Lalehun, Kamboma, Konia, Talama<sup>641</sup>
- 2. Kenema: Kenema Town, SS Camp, Blama<sup>642</sup>
- 3. Bo: Bo Town, Koribondo, Fengehun<sup>643</sup>
- 4. Moyamba: Moyamba Town, Sembehun, Bradford, Mabang<sup>644</sup>
- 5. Bonthe: Bonthe Town, Bembay, Mobayei, Bolloh, Talia<sup>645</sup>

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<sup>641</sup> There is evidence regarding alleged criminal activity at Bumie, Dodo, Ngiehun, Panguma, and Saama. However, these locations were either not pleaded by the Prosecution or were stricken by the Chamber. Accordingly, that evidence has not been included here or considered in the Defence’s analysis.

<sup>642</sup> There is evidence regarding alleged criminal activity at Yandiana. However, this location was not pleaded by the Prosecution. Accordingly, that evidence has not been included here or considered in the Defence’s analysis.

<sup>643</sup> There is evidence regarding alleged criminal activity at Gumahun, Sembehun, Kpetewoma, Kendeyama, Fobu, and Gbetema. However, these locations were either not pleaded by the Prosecution or were stricken by the Chamber. Accordingly, that evidence has not been included here or considered in the Defence’s analysis.

<sup>644</sup> There is evidence regarding alleged criminal activity at Shenge, Moyamba Town, Makabi Loko, Waterloo, and Rokonta. However, these locations or incidents were not pleaded by the Prosecution. Accordingly, that evidence has not been included here or considered in the Defence’s analysis.

<sup>645</sup> There is evidence regarding alleged criminal activity at Sebongie, Momaya, Mosandi, Gbongboma, and Molakaika. However, these location were not pleaded by the Prosecution. Accordingly, that evidence has not been included here or considered in the Defence’s analysis.

## 1. Tongo Field:

Tongo Field, Lalehun, Kamboma, Konia, Talama

### *Tongo Field*

An unidentified number of armed Kamajors attacked the town of Tongo sometime in November or December 1997, possibly on a Wednesday.<sup>646</sup> As they entered, they “fired everywhere”, and at least four women were shot. One survived but it is unclear what happened to the others.<sup>647</sup>

After the Kamajor attack, civilians assembled at the National Diamond Mining Company (“NDMC”) headquarters, where the junta forces had been based but over which the Kamajors had taken control.<sup>648</sup>

On her way to NDMC headquarters, witness saw two corpses, one a man she knew called Joski and the second an unnamed woman; the man’s body appeared to have been hacked.<sup>649</sup> Another witness recognized two corpses, one Joski Mbona who appeared to have been hacked at the back of his neck and one Fullah bread seller.<sup>650</sup>

BJK Sei was in charge of the Kamajors and Siaka Lahai was his deputy.<sup>651</sup>

A number of crimes were said to have been committed at or near the NDMC headquarters on the day of the attack:

- Unidentified Kamajors “fired from different directions” and killed an unidentified number of “people”.<sup>652</sup>
- Unidentified Kamajors dressed in ronko chopped three unnamed “people” with cutlasses.<sup>653</sup>
- Upon orders from an unidentified commander, unidentified Kamajors opened fire on a group of civilians; another unidentified commander then ordered the Kamajors to stop; some civilians were hit by bullets; one civilian who was hit was further chopped to death by an unidentified Kamajor.<sup>654</sup>
- An unidentified Kamajor said that those assembled there (mostly civilians) should be killed; BJK Sei intervened and announced that that no one should be killed, that care should be taken with the civilians.<sup>655</sup>

<sup>646</sup> TF2-022, 11 February 2005 (44:27–45:4); TF2-035, 14 February 2005 (8:10-20), (10:24-28); TF2-027, 18 February 2005 (79:14-25), (85:4-15), (85:27-29); TF2-047, 22 February 2005 (44:4-11); TF2-016, 1 March 2004 (32:20-26); TF2-144, 24 February 2004 (56:26-28), (59:6-12), (60:23–61:4); TF2-053, 1 March 2004 (79:4-13).

<sup>647</sup> TF2-015, 11 February 2005 (4:24-29), (5:1-6), (5:27-28), (6:4-18).

<sup>648</sup> TF2-015, 11 February 2005 (7:2-5), (7:14-22); TF2-022, 11 February 2005 (45:6-13); TF2-027, 18 February 2005 (87:1-3), (91:17-20); TF2-047, 22 February 2005 (47:10-13); TF2-048, 23 February 2005 (7:15-16); TF2-144, 24 February 2004 (61:15-20); TF2-053, 1 March 2004 (79:14-16).

<sup>649</sup> TF2-144, 24 February 2004 (62:20–63:24).

<sup>650</sup> TF2-027, 18 February 2005 (108:8-20), (109:2-7).

<sup>651</sup> TF2-027, 18 February 2005 (92:22-23), (92:26); TF2-047, 22 February 2005 (50:26–51:1).

<sup>652</sup> TF2-015, 11 February 2005 (7:8-13).

<sup>653</sup> TF2-022, 11 February 2005 (46:14-29).

<sup>654</sup> TF2-022, 11 February 2005 (56:19-28), (57:1-10), (57:13-26).

<sup>655</sup> TF2-027, 18 February 2005 (93:2–94:22); TF2-047, 22 February 2005 (50:3-11), (50:21-23).

- CO Kamabote ordered two women to denounce rebels among the group assembled there; two women did so and, Kamabote shot dead the two men the women had identified; Kamabote ordered the women to repeat the exercise, and those identified were taken away.<sup>656</sup>
- An unidentified Kamajor then asked the civilians to denounce the rebels among them; they did so, and they were put aside and taken away to a place formerly used as a slaughtering ground for cattle (but witness doesn't know what happened after that).<sup>657</sup>
- Fatmata Kamara denounced one Dr Blood as a rebel to Kamabote who chopped him to death.<sup>658</sup>
- Kamabote chopped Fatmata Kamara to death.<sup>659</sup>
- Unidentified Kamajors took a man, a child, and a woman away, and returned with bloody machetes; but witness doesn't know what actually happened to the three.<sup>660</sup>
- Civilians were grouped according to their tribe and some were taken away.<sup>661</sup>
- Unidentified Kamajros separated the civilians by tribe and announced that the Temnes, Limbas, and Lokos would be killed; a group of fighters speaking a Liberian language intervened and prevented any killings.<sup>662</sup>
- Some groups were speaking Mende and others a Liberian language; each group was "doing what that group wanted to do without any control".<sup>663</sup>
- On the day following the attack (Thursday), unidentified Kamajors armed with guns and machetes captured 20 soldiers (one called Cobra) and 4 soldier's wives and hacked them to death.<sup>664</sup>
- BJK Sei ordered Siaka Lahai to order unnamed civilians to bury unidentified corpses; twenty were chosen and made to do so.<sup>665</sup> Kamabote and BJK Sei ordered witness to bury unidentified corpses at Tongo; witness did so.<sup>666</sup>

The Kamajor commanders operating at NDMC headquarters—the so-called "COs"—had their own groups of Kamajors and seemed to give their own, at times contradictory, orders.<sup>667</sup> Different "types" of Kamajors had different commanders.<sup>668</sup> Some Kamajors guided civilians, others chopped them: a "good number" of Kamajors did not appear to follow orders.<sup>669</sup>

On the way out of Tongo, an unnamed civilian was hacked to death by an unidentified Kamajor at a checkpoint; the man had a picture of a soldier in his bag.<sup>670</sup> Another unnamed civilian was

<sup>656</sup> TF2-053, 1 March 2004 (82:8–84:27).

<sup>657</sup> TF2-027, 18 February 2005 (94:1–95:26), (96:22-23), (100:26-28), (102:4-7), (102:11-13), (104:19-21).

<sup>658</sup> TF2-047, 22 February 2005 (51:19–52:3), (52:23-29); c.f. Exhibits 63A or 64A.

<sup>659</sup> TF2-047, 22 February 2005 (59:11-27).

<sup>660</sup> TF2-048, 23 February 2005 (10:20–11:2), (11:5-12), (11:15-19).

<sup>661</sup> TF2-144, 24 February 2004 (64:27–65:3).

<sup>662</sup> TF2-048, 23 February 2005 (13:5-13), (14:8-18), (14:25–15:14).

<sup>663</sup> TF2-048, 23 February 2005 (32:13-26).

<sup>664</sup> TF2-022, 11 February 2005 (50:19–53:3).

<sup>665</sup> TF2-027, 18 February 2005 (104:16-27), (106:3-10).

<sup>666</sup> TF2-047, 22 February 2005 (53:22-26), (54:5-8), (59:4-10), (60:21-29), (65:11-17).

<sup>667</sup> TF2-022, 11 February 2005 (71:20-28), (72:17-20), (73:5-15).

<sup>668</sup> TF2-047, 22 February 2005 (104:21–105:6).

<sup>669</sup> TF2-047, 22 February 2005 (81:13-23), (82:2-3).

<sup>670</sup> TF2-022, 11 February 2005 (59:15-29).

hacked by an unidentified Kamajor at the next checkpoint; the man was accused of being a soldier.<sup>671</sup>

At a checkpoint outside Tongo, an unidentified Kamajor took the bag of one of witness's companions containing their belongings; another unidentified Kamajor struck witness with a stick on her waist; three other unidentified Kamajors took money from witness's brother.<sup>672</sup> An unidentified Kamajor then consulted a list containing names of Limbas and announced that he would kill witness's elder brother; the brother begged for his life, but the Kamajor cut his throat and further mutilated his body; he died.<sup>673</sup>

*Lalehun*

At an unspecified time, Chief Brima of Nyawa was arrested by Chief Baimba, brought to Lalehun, accused of being "chief of rebels", and paraded through town with a cement block on his head; Baimba Aruna, chief Kamajor there, ordered that he be killed; he was taken into the bush and decapitated; witness was then made to walk through town from house to house with Brima's head and a containing holding other "human parts" on top of the head; the head was ultimately left with the chief Kamajor.<sup>674</sup>

Aruna Konowa was arrested, brought to Lalehun, taken to the court barrie, and accused of being a collaborator by unidentified Kamajors; Bimba Aruna, a Kamajor commander, ordered his boys to kill Konowa; he was taken away, killed with a knife, and disemboweled.<sup>675</sup>

Unidentified Kamajors looted the village of Lalehun and burnt nine houses there, sometime in early 1998.<sup>676</sup>

Civilians in Lalehun were forced to carry loads by unidentified Kamajors.<sup>677</sup>

*Kamboma*

A group of unidentified Kamajors shot and killed seven unnamed civilians behind a house near Kamboma; an additional seven civilians including the witness were struck with knives.<sup>678</sup>

*Konia*

[No evidence]

<sup>671</sup> TF2-022, 11 February 2005 (61:8-20).

<sup>672</sup> TF2-048, 23 February 2005 (21:14-23), (22:8-18), (23:16-20).

<sup>673</sup> TF2-048, 23 February 2005 (24:19-26:7).

<sup>674</sup> TF2-013, 24 February 2005 (16:12-23), (18:11-12), (19:28-21:24), (22:9-23:8), (23:17-24:25), (25:5-17), (Exhibit 65), (28:16-29:8); TF2-016, 1 March 2004 (39:11-41:23), (43:9-17).

<sup>675</sup> TF2-016, 1 March 2004 (36:13-37:18), (38:7-13), (38:22-39:10).

<sup>676</sup> TF2-016, 1 March 2004 (33:6-15), (33:24-34:5).

<sup>677</sup> TF2-016, 1 March 2004 (44:28-45:9).

<sup>678</sup> TF2-015, 11 February 2005 (11:23-13:15), (14:9-23), (17:4-5).

*Talama*

At Talama, a Kamajor commander called Keikula Kamagboty ordered that the belongings and persons of a group of civilians be searched; also upon his orders, a group of 150 Limba, Temne, and Loko civilians were taken a short distance away and systematically hacked to death by a group of 30 unidentified Kamajors.<sup>679</sup>

At Kenema, witness learned that her son had been killed by Kamabote at a checkpoint at Talama because the boy admitted to being a relative of one Akim, an AFRC soldier.<sup>680</sup>

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<sup>679</sup> TF2-035, 14 February 2005 (12:21-25), (13:11-16), (15:3-17), (16:10-11), (17:11-15), (18:23-24), (20:1-20).

<sup>680</sup> TF2-053, 1 March 2004 (88:22-89:10), (89:12-26).



**Kenema Crime Base:**

Kenema, SS Camp, Blama

*Kenema*

Unidentified Kamajors entered Kenema on 15 February 1998<sup>681</sup> armed and dressed in ronko<sup>682</sup> in advance of ECOMOG forces.<sup>683</sup> The attack on Kenema was executed by various units from different chiefdoms.<sup>684</sup> During and shortly after the attack a number of unlawful incidents were said to have occurred:

- Unidentified Kamajors forcibly searched the police barracks for soldiers and SSD officers.<sup>685</sup>
- Unidentified Kamajors shot an unnamed soldier in the street (unclear if he died).<sup>686</sup>
- About forty unidentified Kamajors chased, chopped, and burned an unnamed boy accused of being a junta (unclear if he died).<sup>687</sup>
- Unidentified Kamajors killed unnamed police officers.<sup>688</sup>
- Unidentified Kamajors killed seven named police officers: (1) Sergeant Mason, (2) Corporal Fandai, (3) Sergeant Samura, Momoh Samura, Momoh Tawol, (4) Sergeant Turay, (5) OC Kanu, OC Bull, OC Brima, (6) Desmond Pratt, and (7) Sub-Inspector Mimor.<sup>689</sup>
- A Kamajor called Brima Massaquoi (who spoke with a Liberian accent) ordered the killing of a police officer called OC Turay.<sup>690</sup>
- It was reported that 36 police officers were killed in Kenema.<sup>691</sup> The police officers were suspected of collaborating with the junta.<sup>692</sup>
- The Kamajors continued to threaten police officers after ECOMOG was in control of Kenema.<sup>693</sup>
- Five unidentified civilian corpses were seen on the streets.<sup>694</sup>

<sup>681</sup> TF2-042, 17 September 2004 (96:19-26), (98:25-26); TF2-033, 20 September 2004 (3:24-27); TF2-040, 21 September 2004 (22:10-17); TF2-154, 27 September 2004 (41:1); TF2-152, 27 September 2004 (102:13-15).

<sup>682</sup> TF2-042, 17 September 2004 (98:1-5), (100:1-8); TF2-039, 23 September 2004 (98:2-19); TF2-041, 24 September 2004 (18:5-12); TF2-154, 27 September 2004 (41:8-17).

<sup>683</sup> TF2-042, 17 September 2004 (97:22-27); TF2-033, 20 September 2004 (27:24-28); TF2-040, 21 September 2004 (33:23-25); TF2-223, 28 September 2004 (102:25-29).

<sup>684</sup> TF2-223, 28 September 2004 (68:26-69:1).

<sup>685</sup> TF2-042, 17 September 2004 (101:16-21), (103:3-15); TF2-033, 20 September 2004 (23:22-26:1); TF2-039, 23 September 2004 (100:3-102:3); TF2-041, 24 September 2004 (19:10-22).

<sup>686</sup> TF2-033, 20 September 2004 (10:2-23).

<sup>687</sup> TF2-151, 22 September 2004 (12:16-16:23).

<sup>688</sup> TF2-040, 21 September 2004 (26:23-27:2), (27:14-21).

<sup>689</sup> TF2-042, 17 September 2004 (102:18-23), (103:20-28), (104:22-106:3), (106:21-107:13); TF2-033, 20 September 2004 (11:18-12:12), (13:7-15:1), (15:18-17:6), (20:5-23), (26:14-27:9), (27:11-23), (28:4-11), (125:13-22); TF2-040, 21 September 2004 (28:6-29:2), (29:16-30:7), (31:22-32:15); TF2-039, 23 September 2004 (107:6-112:21).

<sup>690</sup> TF2-039, 23 September 2004 (102:9-105:16).

<sup>691</sup> TF2-042, 17 September 2004 (109:2-7).

<sup>692</sup> TF2-042, 17 September 2004 (109:15-23).

<sup>693</sup> TF2-042, 17 September 2004 (112:2-17), (115:21-29).

<sup>694</sup> TF2-040, 21 September 2004 (36:3-5), (59:23-26), (67:27-28), (68:1-4).

- Unidentified Kamajors from witness's unit shot and burnt to death an unnamed soldier on Massaquoi Street.<sup>695</sup> Another unidentified Kamajor from witness's unit shot and killed Mohammed Tarawallie after he was denounced as a collaborator at the same location.<sup>696</sup>
- Unidentified Kamajors from witness's group looted the house of Borbor Pain and "mercilessly" beat, shot, and killed his brother Alusine; Alusine's father was also killed; both bodies were burnt as well as the house.<sup>697</sup>
- Unnamed "corpses" were burnt by unidentified individuals from witness's unit near the National Bank and FT Saad's shop.<sup>698</sup>
- Houses at 8 and 12 Dama Road were burnt down by unidentified individuals from witness's unit.<sup>699</sup>
- About a week after the attack, the house of Kuyateh was burnt by unidentified individuals.<sup>700</sup>
- The day after the attack, relatives of the police were killed during searches of the barracks by witness's unit.<sup>701</sup>
- Witness heard that six policemen were killed in the fighting.<sup>702</sup>
- Captured soldiers were killed by witness's unit at Reservation Road.<sup>703</sup>

Further unlawful incidents in Kenema include the following, but most if not all are unrelated to the attack and it's unclear when most of them occurred:

- Sometime in November or December 1998, witness was detained, beaten, taken to the CDF office, stripped, accused of collaborating with the junta and sewing for the rebels, further beaten, and then released by an unidentified "Pa".<sup>704</sup> Witness again detained, taken to a shop where he was denounced as a junta collaborator, taken to the CDF office, beaten, stripped, placed in a cell overnight on orders of "Mr Fefegula", interrogated, threatened with death, accused of collaborating, further beaten, tied with FM rope, untied, doused with cold water, publicly humiliated, returned to the cell for four days, then taken to his house where his father was made to pay for his release.<sup>705</sup> Witness again detained, taken to the CDF office by "Magona", relieved of his radio and cash, asked to sign his death warrant, beaten, placed in a cell, and released by an ECOMOG officer.<sup>706</sup>
- Sometime in November or December 1998, unidentified Kamajors shot, chopped, and burnt to death a young man accused of being with the junta.<sup>707</sup>
- Sometime in November or December 1998, unidentified Kamajors were seen near the KEDC field with human body parts and a mutilated corpse.<sup>708</sup>

<sup>695</sup> TF2-223, 28 September 2004 (70:5-71:8), (73:18-23).

<sup>696</sup> TF2-223, 28 September 2004 (70:24-73:4), (73:18-23).

<sup>697</sup> TF2-223, 28 September 2004 (75:13-75:15).

<sup>698</sup> TF2-223, 28 September 2004 (79:15-24).

<sup>699</sup> TF2-223, 28 September 2004 (80:2-10).

<sup>700</sup> TF2-223, 28 September 2004 (88:13-18).

<sup>701</sup> TF2-223, 28 September 2004 (89:5-27).

<sup>702</sup> TF2-223, 28 September 2004 (91:10-14), (96:15-21).

<sup>703</sup> TF2-223, 28 September 2004 (97:5-12).

<sup>704</sup> TF2-151, 22 September 2004 (16:24-21:10).

<sup>705</sup> TF2-151, 22 September 2004 (26:2-40:4).

<sup>706</sup> TF2-151, 22 September 2004 (43:1-3), 23 September 2004 (6:28-9:19).

<sup>707</sup> TF2-151, 23 September 2004 (14:1-13).

- At some point, witness was pursued, captured, interrogated, beaten, threatened, stabbed, left for dead by unidentified Kamajors, but he admits it may have been a personal matter regarding an investigation.<sup>709</sup> The same unidentified Kamajors killed two of witness's colleagues, one unnamed and one called Sergeant Fosana.<sup>710</sup> One of the Kamajors involved was Mualemu Sherrif.<sup>711</sup>
- At some point, unidentified Kamajors burned a house and killed two young civilian men who were residing there as tenants, Mohammed and Alpha Aruna.<sup>712</sup>
- At some point, witness was arrested by two unidentified Kamajors and taken to Magona at CDF headquarters where he was forced to sign his "death warrant" then placed in a cell.<sup>713</sup>
- At some point, unidentified Kamajors killed two unnamed individuals on Blama Road near the NP station and three unnamed individuals opposite the Capitol Restaurant near the police barracks.<sup>714</sup>
- At some point, unidentified armed Kamajors dressed in ronko came to witness's house, told him that they intended to occupy it, and ordered him and his family to move out; witness took the matter to one Kamoh Brima and the Kamajors left; however, some days later a group of unidentified Kamajors came to witness's house and looted his mattress in which he had stashed 10,000 US dollars.<sup>715</sup>
- At some point, a group of unidentified Kamajors led by one M.O. Foday attacked one Mr Ojuku, beat him, and dragged him to the back of his house; witness later heard that Ojuku had been decapitated and that Kamajors processed through the streets with his head; witness also heard that Kamajors asked Ojuku's wife for money so they could buy certain condiments.<sup>716</sup>
- At some point, at a checkpoint in Kenema, an unidentified Kamajor hit a man with a gun, knocked him down, tied him with FM rope, called for Yamorto who arrived and "pierced him on his chest".<sup>717</sup>

### SS Camp

The only witness to give evidence with respect to SS Camp was TF2-223 who stated that he received orders from one CO Ngaoujia to capture Special Security ("SS") Camp and await further orders. According to the witness, Mr Ngaoujia received his orders from Mr Norman through Mr Fofana.<sup>718</sup> SS Camp—located along the Gendema-Kenema axis approximately five miles south of Kenema near the Moa River Bridge—was considered a strategic position from

<sup>708</sup> TF2-151, 23 September 2004 (15:2–16:5), (17:20–22).

<sup>709</sup> TF2-041, 24 September 2004 (20:10–31:2); (92:5–9).

<sup>710</sup> TF2-041, 24 September 2004 (33:18–27), (53:16–21).

<sup>711</sup> TF2-041, 24 September 2004 (52:15–23).

<sup>712</sup> TF2-154, 27 September 2004 (42:14–46:8) (see Exhibits Nos. 15(A), (B) and (C) for possible inconsistencies).

TF2-152, 27 September 2004 (103:3–105:28).

<sup>713</sup> TF2-152, 27 September 2004 (106:15–113:1).

<sup>714</sup> TF2-152, 27 September 2004 (121:10–123:3); see Exhibit 16 for possible inconsistency.

<sup>715</sup> TF2-144, 24 February 2004 (73:3–75:23).

<sup>716</sup> TF2-144, 24 February 2004 (77:3–79:8); but see Exhibit 69 for a different version.

<sup>717</sup> TF2-144, 24 February 2004 (79:19–80:14), (80:27–81:16).

<sup>718</sup> TF2-223, 28 September 2004 (57:1–27).

which to launch attacks on Kenema.<sup>719</sup> Sometime in early January 1998, SS Camp was captured and occupied by the Kamajors. Some civilians died in the operation, but it is not clear whether they were killed in cross-fire or specifically targeted by junta or Kamajor fighting forces.<sup>720</sup>

Approximately one month after the Kamajors had taken control of Kenema (in April or May 1998, according to the witness), CO Ngaoujia's unit was assigned to mount a checkpoint at SS Camp by Messrs Fofana and Kondewa in order to secure the Moa River Bridge. Mr Fofana personally escorted the witness to SS Camp to explain his responsibility there, which was to secure the river.<sup>721</sup>

At this point the evidence becomes rather confusing, and the witness was subsequently led a great deal by counsel for the Prosecution. The witness states that, at some point, a team known as Yamorto headed by Murrie Vaughn (alias Steve Biko) took over operations at SS Camp.<sup>722</sup> He then states that, approximately two weeks into his posting at SS Camp and after the Yamorto group had left, Mr Norman arrived with the head of intelligence Mr Magona. Mr Norman told the witness that the "mandate" of SS Camp had changed and that it would subsequently be used as a place for executions under the command of Mr Magona. At some point, Mr Vaughn returned, indicating that he had been sent by Mr Kondewa to remain at SS Camp as part of a "special mission". Mr Norman announced that all killings should be coordinated with Mr Magona and gave the witness a "daily occurrence book" in which to record the killings. According to the witness, Mr Vaughn's Yamorto Group was tasked with extracting human body parts at SS Camp for initiation purposes on orders from Mr Kondewa. When asked how often Mr Norman visited SS Camp, the witness's answers indicated that Mr Fofana may have been present on certain occasions and that he may have seen the daily occurrence book. However, the evidence is far from clear.<sup>723</sup>

According to the witness, at least fifteen, and at most "many, many, many, many" human sacrifices took place at SS Camp.<sup>724</sup> Arthur Koroma, a witness for Mr Fofana, stated that SS Camp was a checkpoint and not a CDF detention facility.<sup>725</sup>

### *Blama*

Unidentified Kamajors entered Blama on 15 February 1998<sup>726</sup> armed and dressed in ronko.<sup>727</sup> Unidentified Kamajors captured a group of civilians, forced them to march to Blama, separated

<sup>719</sup> TF2-223, 28 September 2004 (59:6-60:15).

<sup>720</sup> TF2-223, 28 September 2004 (61:1-62:18).

<sup>721</sup> TF2-223, 28 September 2004 (104:11-106:8).

<sup>722</sup> TF2-223, 28 September 2004 (106:19-26).

<sup>723</sup> TF2-223, 28 September 2004 (108:15-110:12), (111:11-25), (112:23-113:10), (114:16-115:9), (117:7-12), (118:13-119:26), (119:29-120:9), (120:24-122:3), (123:4-19), (125:11-17), (125:20-126:5) and 30 September 2004 (72:5-15).

<sup>724</sup> TF2-223, 28 September 2004 (118:13-119:26), (124:19-125:10), (125:11-17).

<sup>725</sup> 4 May 2005 (115:20-22).

<sup>726</sup> TF2-041, 24 September 2004 (13:3-16).

<sup>727</sup> TF2-041, 24 September 2004 (19:1-9).

them by tribe, decapitated a Temne boy and danced with his head; a Mende man was accused of being a former soldier and killed.<sup>728</sup>

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<sup>728</sup> TF2-154, 27 September 2004 (48:4-50:3); (50:8-51:5).

**Bo Crime Base:**

Bo, Koribondo, Fengehun

*Bo*

The junta forces pulled out of Bo on 15 February 1998.<sup>729</sup> On 15 February 1998, a group of approximately 2000 armed Kamajors dressed in ronko entered Bo from the Kenema direction led by Albert Nallo, Agba Murray, John Ngombeh, and Kamoh Lahai.<sup>730</sup> About two days later, Kamajors dressed in ronko entered Bo peacefully.<sup>731</sup> During the “fight” (?) for Bo, junta forces disguised themselves as Kamajors.<sup>732</sup>

However, shortly afterwards, Kamajors began to engage in unlawful activity:

- Witness and his men attacked Bo sometime in the second week of February and killed soldiers (unclear if the soldiers were armed or hor de combat): “Anywhere we saw combats on the door, we would break the door and enter there and if there was any soldier there, we killed him”.<sup>733</sup>
- Witness and his men “spoil” the Southern Motel—removed items and then burnt it.<sup>734</sup>
- Unidentified Kamajors shot and killed a woman, on witness’s orders, found at the hotel who admitted to having cooked for the rebels.<sup>735</sup>
- Joseph Lappia—a member of witness’s group—shot and killed John Musa who was accused of having sold palm wine, etc to rebels.<sup>736</sup>
- Witness and his men looted two pharmacies in Bo, one on Tikonko Road and the other on Bojon Street.<sup>737</sup>
- Witness killed unidentified police in Bo and looted and burnt unidentified property.<sup>738</sup>
- On 16 February 1998, unidentified Kamajors dressed in ronko entered the Bo police barracks and came to witness’s house; they searched his house and looted his personal items; witness was despondent and left his house; outside he was threatened with death by Kamajors and returned home as ordered.<sup>739</sup>
- Later the same night, another group of unidentified Kamajors entered witness’s house, asked for his particulars, and informed him that they had been specifically ordered by Norman to take the such details s well as uniforms from police officers before killing them; witness complied and produced his particulars and then plead for mercy; however, the Kamajors indicated that they would not defy their boss’s order; after asking him for

<sup>729</sup> TF2-119, 23 November 2004 (104:21-25).

<sup>730</sup> TF2-001, 14 February 2005 (70-76).

<sup>731</sup> TF2-030, 25 November 2004 (3:3-16), (4:1-5).

<sup>732</sup> TF2-001, 15 February 2005 (5:2-4).

<sup>733</sup> TF2-017, 19 November 2004 (97:15-180).

<sup>734</sup> TF2-017, 22 November 2004 (6:2-8:10).

<sup>735</sup> TF2-017, 22 November 2004 (8:26-9:19).

<sup>736</sup> TF2-017, 22 November 2004 (9:23-10:26).

<sup>737</sup> TF2-017, 22 November 2004 (11:17-19, 12:6-24).

<sup>738</sup> TF2-014, 10 March 2005 (64-71).

<sup>739</sup> TF2-119, 23 November 2004 (105:3-17), (105:18-106:25), (107:17-27).

reasons why he should be spared, the Kamajors seriously wounded witness with their machetes.<sup>740</sup>

- Witness was left for dead but managed to crawl to a well into which he fell; a friend attempted to retrieve him but, two unidentified Kamajors prevented the friend and the witness fell back into the well; finally he was rescued and taken to the hospital by two Red Cross workers on 17 February 1998.<sup>741</sup>
- While the witness was in the hospital, unidentified groups of Kamajors forcibly removed patients who were accused of being junta forces.<sup>742</sup> Later, after a nurse locked the door to the ward, two unidentified Kamajors attempted to stab and then shoot the witness; before they could do so, there was a commotion and they fled.<sup>743</sup> While in the hospital, Norman paid a visit sometime during the second half of February 1998 and announced to the patients that his troops had captured Tongo and Kenema and now Bo and would be proceeding to Freetown to “wipe out all the bad elements from this country”.<sup>744</sup>
- Witness was later discharged from the hospital and referred to Freetown for further treatment; on 28 March 1998 on his way out of Bo, witness was interrogated and roughly treated by unidentified Kamajors at a checkpoint at the brigade junction; he was taken from his vehicle and accused of possessing false documents and collaborating with the junta: witness, on crutches and in plasters, fell and was dragged by one Kamajor to a pit behind the guard booth in which two corpses had been dumped; the Kamajor called for his weapon; witness shouted and was rescued by ECOMOG officers.<sup>745</sup>
- About two days after they arrived, unidentified Kamajors looted witness’s landlady’s shop.<sup>746</sup>
- On 22 February 1998, witness, her husband, her children, and some others were at home when a group of more than fifteen unidentified Kamajors entered the house, surrounded the husband, and chopped him to death with their machetes; the body was buried the following day, the same day that ECOMOG entered Bo; witness suspects her husband was killed because he was Temne.<sup>747</sup>
- At the same time that her husband was attacked, witness saw the same group of unidentified Kamajors hacking about six other people in the same swamp behind her house, but she doesn’t now what happened to them.<sup>748</sup>
- Sometime in 1998, a group of unidentified Kamajors entered Bo and looted witness and his brother’s property.<sup>749</sup>
- A few weeks later, after having spent some time in the bush, witness returned to Bo to his aunt’s house where he was washing when a group of unidentified armed Kamajors captured witness, his two brothers, a local called Sorie, and a fifth unidentified person;

<sup>740</sup> TF2-119, 23 November 2004 (107:28–109:29), (110:11-20), (110:25–111:9), (111:12-15), (111:18–112:12), (112:26–113:23), (115:22-28), (116:4-6).

<sup>741</sup> TF2-119, 23 November 2004 (116:9–117:24), 24 November 2004 (4:23-24).

<sup>742</sup> TF2-119, 23 November 2004 (118:6-12), (118:16-22), (118:25-29), (119:17-23).

<sup>743</sup> TF2-119, 23 November 2004 (120:3-28).

<sup>744</sup> TF2-119, 23 November 2004 (126:25–127:13), (5:23-27).

<sup>745</sup> TF2-119, 23 November 2004 (123:2–126:11).

<sup>746</sup> TF2-030, 25 November 2004 (4:23-29).

<sup>747</sup> TF2-030, 25 November 2004 (5:19–7:26), (8:9–9:8), (10:1-2), (10:15-23), (11:3-5), (11:6-19).

<sup>748</sup> TF2-030, 25 November 2004 (11:20–12:8).

<sup>749</sup> TF2-156, 25 November 2004 (36:22–37:3), (37:14-23), (38:2-9), (38:10-13).

witness and the others were severely chopped by the Kamajors; the others died as a result of the attack.<sup>750</sup>

- While witness was in the hospital, a group of unidentified Kamajors came, announced that all policemen were with the junta and should be killed, and opened fire on the ward, but there were no deaths; eventually ECOMOG arrived and repulsed the Kamajors.<sup>751</sup>
- Unidentified Kamajors killed eight unnamed policemen at the barracks on the day the Kamajors entered Bo; witness heard about the killing but saw the corpses; witness was also told that unidentified Kamajors burnt four houses at the barracks.<sup>752</sup>
- An unnamed Limba man accused of being with the junta was hacked to death and further mutilated by unidentified Kamajors in witness's presence prior to the arrival of ECOMOG.<sup>753</sup>
- During the time the Kamajors entered town, witness was chased out of Bo by a group of unidentified armed Kamajors in ronko; they chopped five people; they caught witness and amputated the fingers on his left hand, and accused him of working with the soldiers.<sup>754</sup>
- On 15 February 1998, witness returned to his house and found an unidentified group of armed Avondo Kamajors looting his property; he protested and one struck him with a gun; he protested further and they threatened to kill him; he left the scene, unharmed further.<sup>755</sup>
- On 15 February 1998, a different group of unidentified Kamajors forcibly detained OC Bundu, OC Katta, and OC Danema and beat them in the street.<sup>756</sup>
- On 15 February 1998, unidentified Kamajors looted the house of one Freeman; Freeman was later shot and hacked to death by a different group of unidentified Kamajors.<sup>757</sup>
- On 16 February 1998, a group of unidentified Kamajors hacked to death SI James Vandy.<sup>758</sup>
- On 16 February 1998, witness was pursued by a group of unidentified Kamajors, who were forced to retreat before capturing him.<sup>759</sup>

ECOMOG arrived in Bo approximately five days after the Kamajors.<sup>760</sup> By the time ECOMOG entered Bo—around 23 February 1998—the Kamajors had already left for the villages.<sup>761</sup> By March 1998, ECOMOG was in control of security in Bo.<sup>762</sup> The Kamajors returned to Bo in

<sup>750</sup> TF2-156, 25 November 2004 (41:8-15), (41:21-27), (42:1-43:26), (45:19-21), (46:14-47:5), (48:13-49:21).

<sup>751</sup> TF2-156, 25 November 2004 (51:16-22), (53:3-7), (53:13-21).

<sup>752</sup> TF2-056, 6 December 2004 (68-70).

<sup>753</sup> TF2-056, 6 December 2004 (70-72).

<sup>754</sup> TF2-006, 9 February 2005 (7-13).

<sup>755</sup> TF2-001, 14 February 2005 (77-79).

<sup>756</sup> TF2-001, 14 February 2005 (79:13-80:5).

<sup>757</sup> TF2-001, 14 February 2005 (80-83).

<sup>758</sup> TF2-001, 14 February 2005 (85:17-87:4).

<sup>759</sup> TF2-001, 14 February 2005 (88:9-89:8).

<sup>760</sup> TF2-056, 6 December 2004 (72:11-18).

<sup>761</sup> TF2-030, 25 November 2004 (12:14-20).

<sup>762</sup> TF2-057, 30 November 2004 (79:17-29).



March 1998.<sup>763</sup> After the arrival of ECOMOG, the commander of the Kamajors in Bo was Kosseh Hindowa.<sup>764</sup>

- Sometime thereafter [no date given], a group of unidentified Kamajors entered witness's house, conducted a search for weapons, and looted witness's personal belongings; however, they were stopped by ECOMOG soldiers before they could complete their task.<sup>765</sup>
- A few hours later, a group of unidentified Kamajors returned to witness's house and told him he was wanted at Kamajor headquarters at 88 Mahei Boima Road; he and his brother were taken forcibly to the office where they were made to sit on the ground; Fofana entered the room from the verandah and stood by them; witness claims to have recognized Fofana from previous meetings held at Coronation Field in Bo with Norman in 1993 and 1994 where Fofana was introduced as Director of War; Fofana asked "What type of people are this?" and a junior Kamajor responded that they were Temne people; Fofana responded that he "did not have any business with the Temne people, because ... they're [sic] brother, Foday Sankoh, brought a war in this country"; Fofana then went into his office, and the junior Kamajor locked the witness and his brother in a cell with four strangers; witness remained in the cell for 25 days and his brother for 15; at one point, witness heard Fofana's voice calling for "one person among the two people in the cell"; unidentified Kamajors opened the door and asked witness's brother to come out; witness heard his brother saying "they are taking me away", and he has not seen him since; witness again heard the voice of Fofana calling for two of the four who were already in the cell; they were taken and witness heard them crying; he "peeped" through a hole in the door and saw a group of unidentified Kamajors armed with cutlasses and sticks surround them and hack them to death; witness saw Aruna Massaquoi killed in a similar manner by unidentified Kamajors; witness was eventually released by ECOMOG officers.<sup>766</sup> Witness understood Fofana's comment regarding Temnes to mean that they would be killed.<sup>767</sup> Witness claims the incident occurred in March 1998.<sup>768</sup>
- About three days after his release, witness saw a woman with a small child arrested by unidentified Kamajors; the woman was forced to leave her child behind, and witness returned it to the father; witness and the father went to the Kamajor office but were forcibly turned away by an unidentified Kamajor; they subsequently made a report at the ECOMOG office where they were given three ECOMOG soldiers to accompany them back to the Kamajor office; on the way, they discovered the woman's severed head wrapped in a scarf; the ECOMOG soldiers left and returned with trucks and arrested all the Kamajors on the scene; at the time, Augustine Ngaujia was commanding the 29th Battalion; the Kamajors were eventually released.<sup>769</sup>
- At some point "during the time when the war was raging", a group of unidentified armed Kamajors dressed in ronko entered witness's house and detained him while they searched

<sup>763</sup> TF2-057, 29 November 2004 (112:7-12) and TF2-056, 6 December 2004 (67:27-28).

<sup>764</sup> TF2-056, 6 December 2004 (73:24-28).

<sup>765</sup> TF2-057, 29 November 2004 (114:5-115:10), (116:17-20), 30 November 2004 (69:3-8).

<sup>766</sup> TF2-057, 29 November 2004 (117-123); 30 November 2004 (1-12).

<sup>767</sup> TF2-057, 30 November 2004 (20:24-21:12).

<sup>768</sup> TF2-057, 30 November 2004 (70:26-71:9).

<sup>769</sup> TF2-057, 30 November 2004 (13-20).

for his father, a Temne; when the father did not materialize, the boy was released and the Kamajors left.<sup>770</sup> Sometime later, another group of unidentified Kamajors entered witness's house and looted some of the property; the matter was reported to ECOMOG and they arrived on the scene.<sup>771</sup> Immediately after ECOMOG left, the same group of Kamajors returned to the house, reclaimed their weapons, and beat a pastor who was staying in the house.<sup>772</sup>

- At some time, an unidentified Kamajor shot to death an unnamed Temne man in a park.<sup>773</sup>
- At some time, unidentified Kamajors burnt something in a part adjacent to the witness's house; by the smell, witness assumed it was a human being.<sup>774</sup>
- Unidentified Kamajors forcibly arrested witness's father, his uncle, and witness himself from his house and took them to their base, where they placed his father and uncle "under the sun" while witness was placed separately with other boys; because his father spoke Mende he was able to plead for his and witness's release; however, the uncle was left behind and witness has not seen the uncle to date (inconsistent with father's testimony above).<sup>775</sup>
- On 27 April 1998, witness's husband was killed by unidentified armed Kamajors in ronko in the Duwebu section of Bo; he was accused of being a soldier.<sup>776</sup>
- On the same day, witness saw unidentified Kamajors hacking an unnamed man in a swamp near Shenge market; she saw a similar occurrence at a swamp in Njai Town.<sup>777</sup>
- After the arrival of ECOMOG, unidentified Kamajors dressed in ronko entered witness's house, accused him of being with the junta, and looted his personal property.<sup>778</sup>
- After the arrival of ECOMOG, a Limba man whose daughter was accused of being in love with a junta soldier, was arrested by unidentified Kamajors, taken to 88 Mahei Boima Road—the Kamajor "head office", and placed in the custody of Kosseh Hindowa; the man was beaten by unidentified Kamajors in Hindowa's presence; Hindowa demanded 100,000 Leones for the man's release; witness paid the money, and the man was released to him with welts on his body; he died one month later.<sup>779</sup>
- Witness paid a Kamajor called Moses Sandy for the release of two other Limba men, who were detained for two days and tied with FM rope at an unnamed location (possibly same as above).<sup>780</sup>
- Witness paid a Kamajor called Abu Tawa for the release of another Limba man, who had been accused of being with the junta, detained, stripped, made to roll on the ground, and beaten at an unnamed location (possibly same as above).<sup>781</sup>

<sup>770</sup> TF2-067, 30 November 2004 (86:24–87:29), (89:21–90:5).

<sup>771</sup> TF2-067, 30 November 2004 (90:7–91:14), (95:20–27).

<sup>772</sup> TF2-067, 30 November 2004 (95:28–97:16), (98:3–14).

<sup>773</sup> TF2-067, 1 December 2004 (4:19–5:15).

<sup>774</sup> TF2-067, 1 December 2004 (7:1–12).

<sup>775</sup> TF2-067, 1 December 2004 (7–12, 47).

<sup>776</sup> TF2-058, 3 December 2004 (50–60).

<sup>777</sup> TF2-058, 3 December 2004 (61–63).

<sup>778</sup> TF2-056, 6 December 2004 (72:21–73:23).

<sup>779</sup> TF2-056, 6 December 2004 (74–77).

<sup>780</sup> TF2-056, 6 December 2004 (77–79).

<sup>781</sup> TF2-056, 6 December 2004 (79–82).

- Witness heard that four Limbas from Tongo Field were killed by unidentified Kamajors.<sup>782</sup>
- In April 1998, after the arrival of ECOMOG, Norman addressed a parade at the new police barracks in Bo; with him were Kondewa, Fofana, Kamoh Lahai, Mammy Munda, and other Kamajor leaders; Norman announced that the Kamajor chiefs had deceived him by reporting to him and Fofana, the “war director”, that they had burnt down the barracks and killed all the policemen when in fact they hadn’t.<sup>783</sup>
- A group of Kamajors entered the house where witness was staying; a Kamajor called Harowan accused witness and his brother of being with the junta; they were tied and forcibly taken to Y-Junction along Sikissi; they removed witness’s clothes and dripped hot plastic on his body; witness’s brother was decapitated in his presence, and the Kamajors told witness that they intended to eat the brother; the Kamajors told witness that he was released so that he could tell his people what happened to his brother.<sup>784</sup>

### *Koribondo*

Unidentified Kamajors, dressed in ronko<sup>785</sup>, attacked Koribondo on Friday, 13 February 1998.<sup>786</sup> Certain civilians fled the town in fear.<sup>787</sup> Several incidents of unlawful activity were said to have occurred on the day of the attack:

- Witness looted zinc from shops in town.<sup>788</sup>
- Witness saw unidentified Kamajors burn houses.<sup>789</sup>
- Unidentified Kamajors in witness’s group burnt the houses of Sheku Gbao.<sup>790</sup>
- Witness and his men “burnt the place”.<sup>791</sup>
- Unidentified Kamajors killed civilians Sarah Binkolo, Sarah Lamina, Chief Kafala, one Gombu, and one Brima.<sup>792</sup>
- Unidentified Kamajors serious beat, detained, interrogated, and tied civilian Lahai Bassie.<sup>793</sup> However, Joe Tamide ordered his release.<sup>794</sup> Shortly thereafter, Bassie died.<sup>795</sup>
- A crowd of unidentified Kamajors beat and killed two unidentified civilians.<sup>796</sup>

<sup>782</sup> TF2-056, 7 December 2004 (75:16–76:8).

<sup>783</sup> TF2-001, 14 February 2005 (97–100).

<sup>784</sup> TF2-198, 15 June 2004 (21–32), (44:26-27).

<sup>785</sup> TF2-198, 15 June 2004 (18:2-12); TF2-157, 16 June 2004 (7:22-29); TF2-176, 17 June 2004 (80:27-31); TF2-012, 21 June 2004 (24:17-21); TF2-162, 8 September 2004 (15:18–15:29); TF2-159, 9 September 2004 (17:11-22); TF2-032, 10 September 2004 (49:14-18)<sup>785</sup>, (52:15-24).

<sup>786</sup> TF2-198, 15 June 2004 (18:26–19:2); TF2-157, 16 June 2004 (9:26-37); TF2-176, 17 June 2004 (75:27-34, 76:9-10); TF2-162, 8 September 2004 (12); TF2-082, 15 September 2004 (25:25-28).

<sup>787</sup> TF2-198, 15 June 2004 (19:35–20:1-4); TF2-176, 17 June 2004 (77:2-9); TF2-157, 16 June 2004 (11:31-36).

<sup>788</sup> TF2-190, 10 February 2005 (50:9-14).

<sup>789</sup> TF2-190, 10 February 2005 (51:12-15).

<sup>790</sup> TF2-014, 10 March 2005 (71–72).

<sup>791</sup> TF2-014, 10 March 2005 (74–76).

<sup>792</sup> TF2-198, 15 June 2004 (32:26–33:10); TF2-157, 16 June 2004 (14:31–15:27)<sup>792</sup>, (18:1-2); TF2-157, 16 June 2004 (16:13–17:37).

<sup>793</sup> TF2-157, 16 June 2004 (18:13–19:35).

<sup>794</sup> TF2-157, 17 June 2004 (12:4-11).

<sup>795</sup> TF2-157, 17 June 2004 (43:18-27)<sup>795</sup>.

<sup>796</sup> TF2-162, 8 September 2004 (19:23–20:15), (57:8-13).

- Five Limba men—Sofiana, Sarrah, Momoh, Kamara, Koroma—were caught by unidentified Kamajors; two were shot to death, the others were killed with cutlasses. The bodies of Sarrah and Momoh were then decapitated.<sup>797</sup>
- Three women—Amie, Jeneba, and Esther—and five unidentified men were caught by unidentified Kamajors, beaten, mutilated, killed (some shot, some hacked), and further mutilated and eaten.<sup>798</sup>
- Witness's grandparents were burnt to death, but he didn't know who did it.<sup>799</sup>
- Witness heard that two individuals—Kafala and Abema—had been killed in “ritual ceremonies”.<sup>800</sup>
- Some witness found burnt houses in town upon returning and heard that the Kamajors had done it but did not see it themselves.<sup>801</sup>
- Some witnesses saw Kamajors burning houses.<sup>802</sup>
- The soldiers did not burn houses.<sup>803</sup>
- Unidentified Kamajors looted civilian property.<sup>804</sup>
- Civilians also looted and burned houses.<sup>805</sup>
- Unidentified Kamajors forcibly bound and interrogated by unidentified civilians.<sup>806</sup>
- Small boys worked as security in Koribondo.<sup>807</sup>

However, at least one witness testified that houses had been destroyed in fighting previous to the Kamajor attack in question.<sup>808</sup>

### *Fengehun*

In 1998, during the dry seasons, a group of mostly unidentified Kamajors (the group included Munda Goina, Abu Gina, Gbessay Abu, Alieu Gina, and Munda Gina) arrested witness in the bush, brought him to Fengehun where they had captured his father; witness's father was bound at the waist with a rope and one of his ears had been chopped off; the Kamajors took witness and his father to a school compound where they tied the father in a hut and set fire to it; they decapitated the corpse and told witness to go home; later they came to witness's home with his father's head demanding money and asking the witness to dance with them; witness later learned that his father was killed because he had protected people from the Kamajors.<sup>809</sup>

<sup>797</sup> TF2-159, 9 September 2004 (27:24–32:27).

<sup>798</sup> TF2-159, 9 September 2004 (35:1–40:20), (128:7-22).

<sup>799</sup> TF2-159, 9 September 2004 (40:23–49:2).

<sup>800</sup> TF2-032, 10 September 2004 (25:1–26:1).

<sup>801</sup> TF2-198, 15 June 2004 (32:26–33:10), (35:34-37); TF2-157, 16 June 2004 (14:13-26); TF2-176, 17 June 2004 (79:11-18, 79:35, 80:2); TF2-012, 21 June 2004 (24:3-7).

<sup>802</sup> TF2-162, 8 September 2004 (14:18–15:10), (17:10-14), (18:15-28), (19:4-16); TF2-159, 9 September 2004 (21:12–27:10), (124:8-18); TF2-032, 10 September 2004 (29:15–35:21).

<sup>803</sup> TF2-198, 15 June 2004 (35:38–36:2).

<sup>804</sup> TF2-162, 8 September 2004 (20:23-29); TF2-159, 9 September 2004 (24:21-26); TF2-140, 14 September 2004 (82:1-16); TF2-082, 15 September 2004 (33:13-25); TF2-082, 17 September 2004 (37:11-16); TF2-162, 8 September 2004 (21:2-12).

<sup>805</sup> TF2-159, 9 September 2004 (123:11-14).

<sup>806</sup> TF2-140, 14 September 2004 (83:2–86:4).

<sup>807</sup> TF2-140, 14 September 2004 (86:10-15).

<sup>808</sup> TF2-198, 15 June 2004 (48:37–49:8).

<sup>809</sup> TF2-007, 2 December 2004 (48–64) and Exhibits 37 and 40.

**Moyamba Crime Base:**

Moyamba, Sembehun, Bradford, Mabang

*Moyamba Town*

Sometime in 1997 or later, a group of unidentified Kamajors, under the command of one Mr Ngobeh, arrested a suspected collaborator called Mr Thomas in Moyamba; Thomas was shot dead and decapitated in Shenge Park; some of the Kamajors drank Thomas's blood, some rubbed it on their bodies, and one paraded through town with Thomas's head.<sup>810</sup>

*Sembehun*

Sometime in November 1997, an unidentified group of armed Kamajors arrived at Sembehun, dislodged the local Kamajors, and took control of the town; the Kamajors came from Gbangbatoke, Tihun, and Talia and based with the local ground commander, Edward Challe.<sup>811</sup> Unidentified Kamajors of this contingent looted residents of Sembehun and surrounding villages.<sup>812</sup> On the day of their arrival, unidentified Kamajors of this contingent commandeered the vehicles of Nbaba Fofana and Mrs Gorvie.<sup>813</sup>

On the evening of the second day, Kamajors Steven Sowa, Moses Mbalacolor, Mohamed Sankoh, and three unidentified Kamajors forcibly entered witness's house and announced that they had been sent by Kondewa to collect resources for the war and they wanted to inspect witness's garage for arms and ammunition; Mohamed Sankoh said he was deputy director of war under Sam Hinga Norman; when they saw that witness had a vehicle in his garage, they sent for six more unidentified Kamajors and announced that they wanted to use witness's car; they woke witness's children, beat them, ransacked his house, found the keys to the garage, and made off with the car and some other items.<sup>814</sup>

On the evening of the third day, unidentified Kamajors of this contingent beat witness's brother-in-law and commandeered his van.<sup>815</sup>

On the fourth day, the contingent left town with two of the vehicles (including witness's) and the looted property.<sup>816</sup>

*Bradford*

On 19 March 1998, Obai and his Kamajors raided Bradford and forcibly entered witness's house and stole his rice.<sup>817</sup>

<sup>810</sup> TF2-165, 7 March 2005 (9-13).

<sup>811</sup> TF2-073, 2 March 2005 (28-31).

<sup>812</sup> TF2-073, 2 March 2005 (30:2-12), (30:17-27), (31:1-2).

<sup>813</sup> TF2-073, 2 March 2005 (31:20-32:4), (32:10-27).

<sup>814</sup> TF2-073, 2 March 2005 (34-37).

<sup>815</sup> TF2-073, 2 March 2005 (39:2-25).

<sup>816</sup> TF2-073, 2 March 2005 (40:1-13).

<sup>817</sup> TF2-168, 3 March 2005 (57:16-58:3).

On 23 March 1998, unidentified Kamajors entered Bradford and chased and shot at people; witness and his family fled to the bush.<sup>818</sup>

On 25 March 1998, unidentified Kamajors entered witness's farm in the bush; witness and his family fled and he was separated from his wife and granddaughter; the Kamajors captured the wife and girl; Kakpata, the head of the group, took the wife's money and ordered another unidentified Kamajor to shoot her; he did so and she died; the Kamajors left the girl; witness collected her and buried his wife; witness did not report the matter.<sup>819</sup>

At some point in 1998 at Bradford, a Kamajor commander from Ribbi called Obai sent a message to a Kamajor called Kenie Spencer with orders from Norman to attack Mbang; a group of armed Kamajors dressed in ronko led by one Sanawi arrested witness and two others and took them under gunpoint to see Obai; along the way one of the Kamajors spotted Marie Sankoh and ordered her to stop; she approached the group and one of the Kamajors attempted to chop her; she jumped and was shot twice and fell down; witness was then shot in the arm; some of the Kamajors "had gone wild", so witness ran for the bush; he was chased and shot at but managed to escape.<sup>820</sup>

Upon returning to Bradford some two months later, witness found his house had been occupied by a Kamajor commander called Kakpata.<sup>821</sup>

On 19 March 1998, unidentified Kamajors entered witness's house in Bradford; witness and his family fled to the bush; the following morning, witness returned to his house and found it had been looted.<sup>822</sup>

On 23 March 1998, another group of four unidentified armed Kamajors came to witness's house and shot his grandson and son and took his remaining seven children to the Bradford Park where they said they would kill them; witness went to his grandson, but he was dead; his son survived and together they buried the grandson; the remaining seven children were released; the Kamajor who killed witness's grandson was called Patrick John.<sup>823</sup>

### *Mabang*

On 23 December 1997, unidentified Kamajors under the command of Obai attacked Mabang and Rokonta; they attacked and looted witness's father's house.<sup>824</sup>

<sup>818</sup> TF2-168, 3 March 2005 (59:8-26).

<sup>819</sup> TF2-168, 3 March 2005 (40:1-17), (59:28-65:29), (67:8-68:6).

<sup>820</sup> TF2-173, 4 March 2005 (55-64).

<sup>821</sup> TF2-173, 4 March 2005 (66:1-15).

<sup>822</sup> TF2-167, 8 March 2005 (23:18-27:21).

<sup>823</sup> TF2-167, 8 March 2005 (28-34).

<sup>824</sup> TF2-166, 8 March 2005 (51-54).

**Bonthe Crime Base:**

Bonthe, Bembay, Mobayei, Bolloh, Talia

*Bonthe*

The Kamajors, dressed in ronko<sup>825</sup>, entered Bonthe Town on a Friday morning after the soldiers had left the previous day.<sup>826</sup> Kamajors entered Bonthe Town on 15 February 1998 after the soldiers left.<sup>827</sup> The “overall commander of operations in Bonthe” was Morie Jusu Kamara.<sup>828</sup>

Evidence of criminal activity is as follows:

- On 15 February 1998, a fisherman Kpana Manso was shot dead by a Kamajor commander called Baigeh outside the military base because he was believed to have been the father of a soldier.<sup>829</sup>
- Around 16 February 1998, witness was targeted by a group of Kamajors and called by Julius Squire to a meeting held by district commander Morie Jusu to answer allegations that he had supported the junta; the meeting was held at Father John Garrick’s Roman Catholic parish and continued the following day at the home of one Isaac Williams; the civilians were eventually found to be “innocent” of the charges.<sup>830</sup>
- At the first meeting, one Kamajor called Rambo called for witness’s death but Jusu announced that there would be no more civilians deaths; despite Jusu’s order to the contrary, Rambo and his men killed a boy, Bendeh Battiana, accused of collaborating with the junta.<sup>831</sup>
- Jusu announced that no one else would be killed but that the civilians in attendance would have to pay the Kamajors 100,000 Leones a piece; Father Garrick made the payments.<sup>832</sup>
- On his way to the first meeting, the witness saw the corpse of one Abu Samukah Mampeh.<sup>833</sup>
- Upon leaving the second meeting held at Isaac William’s house, unidentified Kamajors killed a tailor called Conteh.<sup>834</sup>
- Upon returning to his home, the witness found it had been thoroughly looted (including several million Leones) by Julius Squire, according to his sons. Witness agrees that Squire did it for his own personal benefit.<sup>835</sup>

<sup>825</sup> TF2-086, 8 November 2004 (88:1-4).

<sup>826</sup> TF2-086, 8 November 2004 (87:15-20).

<sup>827</sup> TF2-116, 9 November 2004 (8:11-18); TF2-147, 10 November 2004 (32:10-18); TF2-071, 11 November 2004 (76:24-77:8).

<sup>828</sup> TF2-147, 10 November 2004 (37:16-25), (38:4-6).

<sup>829</sup> TF2-116, 9 November 2004 (12-14); TF2-147, 10 November 2004 (36:12-37:1); TF2-071, 11 November 2004 (77:13-17), (77:23-27).

<sup>830</sup> TF2-116, 9 November 2004 (10-39).

<sup>831</sup> TF2-116, 9 November 2004 (21-23), (37:21-38:9).

<sup>832</sup> TF2-116, 9 November 2004 (23:5-16), (23:20-23).

<sup>833</sup> TF2-116, 9 November 2004 (18:1-18).

<sup>834</sup> TF2-116, 9 November 2004 (25:16-22).

<sup>835</sup> TF2-116, 9 November 2004 (26:4-28:7), (38:10-15).

- Unidentified Kamajors looted the Bonthe Technical College, the Bonthe Holiday Complex, and various government buildings including the hospital.<sup>836</sup>
- Further looting was done by Kamajors Gbokambama and Rambo.<sup>837</sup>
- A fisherman called Kondor Bantiamor was killed by unidentified Kamajors.<sup>838</sup>
- Abu Samuka Kamara was killed by unidentified Kamajors.<sup>839</sup>
- Three days after the Kamajors arrived, unidentified Kamajors from Sittia killed Abu Conteh who was accused of preparing talismans for the soldiers.<sup>840</sup>
- Many people chose to stay on Father Garrick's compound because of the "continuous harassment" by the Kamajors.<sup>841</sup>
- The Kamajors were administering a form of extortion in Bonthe whereby they would accuse civilians of certain acts, forcibly detain them, and then require payment for their release.<sup>842</sup>
- On 29 February 1998, Kondewa himself came to deal with the situation, particularly with Chief Lahai Ndokoi Koroma.<sup>843</sup>

At first, there was no identifiable authority to whom one could make a report; a report was eventually made to commander Morie Jusu Kamara, who stated that he was unable to control many of the Kamajors because of their relationship with Kondewa, but that he would try.<sup>844</sup> With some difficulty, Kamara was able to control Gbokambama on one occasion.<sup>845</sup> However, on another occasion, he was not able to control the Kamajors.<sup>846</sup> No individual was in effective control of the Kamajors operating in Bonthe.<sup>847</sup>

#### *Bembay*

On a Monday, Maire Yayen was captured near Baimbay and force to cook for unidentified Kamajors for two days.<sup>848</sup> On the same day, unidentified Kamajors burnt a number of houses in Baimbay.<sup>849</sup>

#### *Mobayei*

Unidentified Kamajors looted and burnt houses at Mobayei and killed Musu Fai, an old woman.<sup>850</sup> Unidentified Kamajors stabbed to death a pregnant woman called Jebbeh.<sup>851</sup>

<sup>836</sup> TF2-147, 10 November 2004 (35-43).

<sup>837</sup> TF2-147, 10 November 2004 (50:1-51:24).

<sup>838</sup> TF2-147, 10 November 2004 (43:10-28).

<sup>839</sup> TF2-147, 10 November 2004 (40:2-41:9).

<sup>840</sup> TF2-147, 10 November 2004 (46:21-26).

<sup>841</sup> TF2-147, 10 November 2004 (48:19-49:3).

<sup>842</sup> TF2-147, 10 November 2004 (53:18-55:2), (62:10-63:5); TF2-071, 11 November 2004 (78:16-26).

<sup>843</sup> TF2-147, 10 November 2004 (57-61).

<sup>844</sup> TF2-147, 10 November 2004 (42:13-23), (49:9-21), (52:7-18).

<sup>845</sup> TF2-147, 10 November 2004 (52:19-53:12).

<sup>846</sup> TF2-147, 10 November 2004 (65:18-25).

<sup>847</sup> TF2-147, 11 November 2004, (18:22-19:1), (19:19-28).

<sup>848</sup> TF2-071, 11 November 2004 (66:6-28).

<sup>849</sup> TF2-071, 11 November 2004 (68:18-69:15).

<sup>850</sup> TF2-071, 11 November 2004 (71:1-12).

<sup>851</sup> TF2-071, 11 November 2004 (71:13-21).



*Bolloh*

Witness was told that Kong Sam was killed by Adu Kai Ne Challey and Ndogbei was killed at Bolloh village. However, it is not clear if the perpetrators were Kamajors.<sup>852</sup>

*Talia*

Evidence of criminal activity is as follows:

- Upon instructions from Norman “one morning” (Fofana present), witness went to Dodo with Momoh Pemba and Billoh Conteh—given to him by Fofana—and killed 15 unarmed civilians there and burnt their houses.<sup>853</sup>
- Upon same instructions, witness went to Sorgia and tortured Joseph Lansana and killed his mother (chopped her and threw her into a fire).<sup>854</sup>
- Upon same instructions, witness went to Baoma Kpenge with Juinisa Conneh and other unidentified Kamajors and shot and killed a Fullah trader.<sup>855</sup>
- “We” killed Mustapha Fallon near Talia as a “human sacrifice”.<sup>856</sup>
- “We” killed Alpha Dauda Kanu near Mokosi as a human sacrifice.<sup>857</sup>
- A captured soldier was killed by unidentified Kamajors.<sup>858</sup>
- In 1997, Kondewa and Kamoh Boni killed two “town commanders”.<sup>859</sup>
- A woman and business associate of the witness who had been abducted by the rebels refused to give additional food to a group of Kamajors who reported the incident to Kondewa who called for the woman to be brought to him; the woman was held in a cage and released upon a ransom being paid to Kondewa by the witness’s husband.<sup>860</sup>
- Witness captured by a group of armed Kamajors including Allieu Vandi at Gerehun Sogbewe and taken to Talia.<sup>861</sup>
- Witness captured by a group of armed Kamajors led by Joe Tamidey and Kamoh Bonnie at Sogbini and taken to Talia.<sup>862</sup> Apart from human captives, property was taken as well.<sup>863</sup>
- Three civilians—Jusu Shalley, Baggie Vaiey, and Lahai Lebbie—were killed by unidentified Kamajors at an unknown time at night in Talia.<sup>864</sup>
- Kamajors Mohammed, Moriba, and others came to Blama at an unspecified time and demolished witness’s house; witness was then captured and, along with her mother, made to carry loads to Talia.<sup>865</sup>

<sup>852</sup> TF2-071, 11 November 2004 (73:10-18), (74:24–75:18).

<sup>853</sup> TF2-014, 10 March 2005 (38–42).

<sup>854</sup> TF2-014, 10 March 2005 (42–46).

<sup>855</sup> TF2-014, 10 March 2005 (49–50).

<sup>856</sup> TF2-014, 10 March 2005 (50–54).

<sup>857</sup> TF2-014, 10 March 2005 (54–545).

<sup>858</sup> TF2-096, 8 November 2004 (2–24).

<sup>859</sup> TF2-096, 8 November 2004 (24–27).

<sup>860</sup> TF2-096, 8 November 2004 (28–36).

<sup>861</sup> TF2-108, 30 May 2005 (4–5).

<sup>862</sup> TF2-109, 30 May 2005 (31–33).

<sup>863</sup> TF2-109, 30 May 2005 (33:1-13).

<sup>864</sup> TF2-108, 30 May 2005 (5–14); TF2-109, 30 May 2005 (34–35, 41–43).

- Kondewa ordered witness's mother to be killed at an unspecified time at Talia; her hands were tied at the back, she was hit with a stick, and hacked with a machete.<sup>866</sup>
- Late in 1998, Kondewa's "boys" were stealing cassava from witness's uncle's farm; when he complained a third time, he was arrested by the boys, taken to the entrance of the society bush, tied, tortured to death with melted plastic, and hastily buried; one Bombowai, a deputy to Kondewa, was present.<sup>867</sup>
- In preparation for Norman's visit, three pregnant women were captured by Kondewa's boys, taken to the barrie, tied to some pillars, and gutted as the helicopter was arriving; the women died; the heads were removed from the fetuses and placed on arm-length sticks; each stick was tied to a larger stick which was pinned, "like a flag", at the junction; Bombowai and other unidentified Kamajors were present; the "flag" was positioned for Norman to see; the Kamajors smeared the dead women's blood on their faces and bodies and buried the corpses; finally, the Kamajors sang a song indicating that they had drawn strength from the experience.<sup>868</sup>
- Witness and other civilians were forcibly taken, during an unspecified "rainy season", from Malima to Talia by a Kamajor called Nulele and his armed colleague Kamajors.<sup>869</sup> When witness's husband attempted to retrieve her from Talia, he was captured by Nulele, taken to Kondewa, then led by a group of singing Kamajors to a tree where Nulele asked him to say goodbye and to choose death by the gun or the knife; the husband did not choose, and Nulele cut his throat and removed his head; his corpse was taken to the bush.<sup>870</sup> Witness remained in Talia for four months where she saw a helicopter arriving; her "husband" Nulele told her it brought Norman with supplies for Kondewa, but she did not see Norman.<sup>871</sup>
- Witness captured from her village in Bonthé by armed Kamajors on an unspecified day and taken to Talia for an unknown period of time.<sup>872</sup> Witness tried to escape from Talia twice but was caught by Kamajors each time; after the second occasion she was tied, beaten, and placed in a coop for some hours (less than a day).<sup>873</sup>
- Witness captured by unidentified Kamajors at an unspecified time and taken to Yawbeko; witness's mother killed by a Kamajor called Moina Jusu in the bush of Yawbeko; at Yawbeko witness heard that the leader there was Kondewa, though she did not see him.<sup>874</sup>

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<sup>865</sup> TF2-188, 31 May 2005 (12–14).

<sup>866</sup> TF2-188, 31 May 2005 (15–18).

<sup>867</sup> TF2-187, 1 June 2005 (11–15).

<sup>868</sup> TF2-187, 1 June 2005 (17–37).

<sup>869</sup> TF2-189, 3 June 2005 (4–7, 20).

<sup>870</sup> TF2-189, 3 June 2005 (7–13).

<sup>871</sup> TF2-189, 3 June 2005 (13:18–14:15).

<sup>872</sup> TF2-134, 3 June 2005 (23–25).

<sup>873</sup> TF2-134, 3 June 2005 (31–34).

<sup>874</sup> TF2-133, 6 June 2005 (5:1–6:22).