745)

SCSL-04-14-T
(20316 - 20457)

20316

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, SC

Date: 27 November 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOINANA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

NORMAN FINAL TRIAL BRIEF

For the Office of the Prosecutor:
Mr Christopher Staker
Mr James C. Johnson
Mr Joseph Kamara

For Samuel Hinga Norman:
Dr Bu-Buakei Jabbi
Mr Alusine Sani Sesay

For Moinina Fofana:
Mr Victor Koppe
Mr Michiel Pestman
Mr Arrow Bockarie
Mr Steven Powles

For Allieu Kondewa:
Mr Charles Margai
Mr Ansu Lansana
Mr Yada Williams
Ms Susan Wright

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
27 NOV 2006
NAME Advea Neima K.
SIGN NeimaA.
TIME 09:26

Norman Final Trial Brief

Index

Introduction	1
Brief Procedural Background	1
Overview of the Charges	4
Brief Historical Background	4
Defects in the Indictment	14
General Considerations Regarding the Evaluation of Evidence	32
Evaluation of the Evidence	34
Corroborative Evidence	36
Hearsay Evidence	38
Witness Credibility	40
Inability to Recall Dates	42
Leading Questions	43
Applicable Law	45
Prosecution has Failed to show Crimes against Humanity	49
Command Responsibility under Article 6(3)	56
Criminal Liability under Article 6(1)	94
Joint Criminal Enterprise	108
Counts 1-2	113
Counts 3-4	123
Counts 5	124
Counts 6 -7	130
Count 8	131
Conclusion	135

20318

Introduction

1. Pursuant to Rule 86(b) of the Rules of Procedure and Evidence (the "Rules"), Court Appointed Counsel for the First Accused (the "Defence") hereby submits its final trial brief in accordance with the "Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments".[1] The Defence adopts and incorporates by reference those factual and legal assertions raised by the co-Accused to the extent that they have application.

Brief Procedural Background

2. Samuel Hinga Norman (the "First Accused") was indicted on 7 March 2003[2]. Moinina Fofana (the "Second Accused") and Allieu Kondewa (the "Third Accused") were indicted on 26 June 2003.

3. On the 15th, 17th and 21st March 2003, the First Accused was arraigned before the Trial Chamber and pleaded not guilty to the eight counts listed in the Indictment against him.

4. On the 9 October 2003 the Prosecution sought a Motion for Joinder of the First Accused with the Second and Third Accused.

5. On 27th January 2004 the Trial Chamber ordered the joint trial of Mr Norman, Mr Fofana and Mr Kondewa[3], and ordered that a single Indictment be prepared as the Indictment on which the joint trial would proceed. It further ordered that the Indictment should be served on each Accused in accordance with Rule 52 of the Rules of Procedure ad Evidence (the "Rules"). The Indictment was filed on the 5 February 2004.[4]

---

[1] *Prosecutor v. Norman et al.*, SCSL-04-14-T-722, "Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments", 18 October 2006.
[2] *Prosecutor v. Norman et al.*, SCSL-03-08-PT-002, Trial Chamber I, "Norman – Indictment", 7 March 2003.Hinga Norman was subsequently arrested on 10 March 2003.
[3] *Prosecutor v. Norman et al.*, SCSL-2003-12-PT-057, "Kondewa – Decision and Order on Prosecution Motions for Joinder", 28 January 2004; *Prosecutor v. Norman et al.*, SCSL-2003-08-PT-131, "Norman – Decision and order on prosecution motions for joinder", 28 January 2004; *Prosecutor v. Norman et al.*, SCSL-03-11-PT-093, "Fofana- Decision and order on prosecution motions for joinder", 28 January 2004 [and corrigendums].
[4] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-003, "Norman, Fofana, Kondewa – Indictment", 5 February 2004 ("Indictment").

6. Contrary to the order of the Trial Chamber, the Indictment was not served on the Accused personally but only to his Defence Counsel on 5 February 2004. Even though the Indictment charged the First Accused with the same crimes as contained in the Initial Indictment, the factual allegations against the First Accused varied from those contained in the Initial Indictment.

7. As a result of these procedural errors and omissions on the part of the Prosecution[5], Mr Norman repeatedly stated his position that in the absence of personal service of the Indictment, he was not properly within the jurisdiction of the Court.[6] He further held that there was an ongoing violation of his fundamental right to be personally presented with the charges against him as soon as possible after his arrest, a fundamental defence right guaranteed by the Special Court Statute and all international human rights instruments. Pending resolution of this issue, the First Accused did not attend the proceedings from approximately September 2004 until May 2005.[7]

8. The CDF trial began on 3 June 2004. The prosecution called 75 witnesses, including three expert witnesses. On 14 July 2005, the Prosecution concluded its case.

---

[5] The Appeals Chamber notes a number of these errors and omissions by the Prosecution in its "*Decision on Amendment of the Indictment*", Prosecutor v. Norman et al., SCSL-2004-14-AP-73, 16 May 2005: "It appears to us that some of the difficulties in this case originated with the Prosecutor's failure to appreciate the clear distinction between what should go in the indictment and what should be left to the case summary" (para. 53); "It was from this unnecessary and unexplained request [the Motion for Joinder] that a great deal of confusion was later to arise (para. 56); "It [Rule 48(A)] does not provide for consolidation of individual Indictments, a step which is unnecessary and can make no sensible difference that we can see to the proceeding or outcome. The Prosecution in its appeal submission still cannot explain why it sought consolidation, other than that this is the "normal practice in other criminal tribunals:. So it may be, but in this court it still requires to be justified" (para. 58); "We do not understand how the Prosecution could have thought that these additions to the first two counts of the Indictment could have been added to the Indictment without making a specific application to amend (para. 86); See also, *Prosecutor v Norman et al.*, "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", SCSL-2004-14-T-403, 24 May 2005: "The Prosecution, with the leave or knowledge of the Court, had taken advantage of the leave that was granted...to introduce to this Indictment, changes...characterized as being material and substantial...(para. 6); In a bid to circumvent its obligations to promptly inform the Accused of the offences he is alleged to have committed, the Prosecution alleges...that he has not suffered any prejudice in his ability to prepare this defence" (para. 26).

[6] For example, Transcript Hinga Norman, 15 June 2004, pg 2 line 27 – pg 5 line 24.

[7] The Trial Chamber reached its decision on 29 November 2004, *Prosecution v Norman et al*, "Decision on the First Accused's Motion for Service and Arraignment on the Indictment" SCSL-2004-14-T-282. This decision was appealed and the Appeal Chamber ruled on 16 May 2005, *Prosecutor v. Norman et al.*, "Decision on Amendment of the Indictment", SCSL-2004-14-AR73. The Prosecution presented its evidence over 5 trial sessions. The Accused effectively was absent from 3 of those trial sessions.

9. On 20 September 2005, the Trial Chamber heard oral arguments on Defence Motions for Acquittal.

10. On 21 October 2005 the Trial Chamber issued its judgment on the Defence Motions for Acquittal.[8] The Trial Chamber held that there was no evidence capable of supporting a conviction against the Accused Persons in respect of a number of geographical locations set out in paragraphs 25, 26 and 27 of the Indictment.[9]

11. After a motion requesting clarification[10], the Trial Chamber held that as a result of its Decision on the Defence Motions for Acquittal, sub-paragraph 25(g) of the Indictment are no longer operative as well as other paragraphs where the Indictment refers to the acts outlined in sub-paragraph 25(g) of the Indictment.[11] This effectively withdrew any alleged crimes relating to "Operation Black December".

12. The defence case of the First Accused began on 24 January 2006. The First Accused called 27 witnesses. The Second and Third Accused presented their defence cases from September – October 2006. The defence was closed on October 18 2006.

13. The combination of the denial of personal service, the length of time with which it took to reach final resolution on the issue of amendment of the Indictment, the perception of a breach of his fundamental fair trial rights by the First Accused, and his subsequent absence from a significant portion of the prosecution's evidence created a prejudicial atmosphere that pervaded throughout the trial proceedings. It is in this context that the Defence invites the Trial Chamber to review the evidence.

[8] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005.
[9] Ibid "VII Disposition", pgs. 27-28.
[10] Prosecutor v Norman et al., SCSL-2004-14-T-477, Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", 31 October 2005.
[11] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-550, 'Decision on Joint Motion of the First and Second Accused to clarify the decision on Motion for Judgment of Acquittal pursuant to Rule 98", 3 February 2006.

Overview of the Charges

20321

14. The accused Samuel Hinga Norman is jointly charged with Moinana Fofana and Allieu Kondewa on the an eight-count Indictment with war crimes, crimes against humanity and other violations of international humanitarian law committed within the territory of Sierra Leone from 31 November 1996. The Prosecution based its indictment on various acts and omissions alleged to have been committed by each of the accused either severally or jointly with co-perpetrators or both. Specifically the counts are:

    a. Paragraph 25 of the Indictment - Counts 1-2 Unlawful Killings;
    b. Paragraph 26 of the Indictment – Counts 3-4 Physical Violence and Mental Suffering;
    c. Paragraph 27 of the Indictment – Counts 4-5 Looting and burning;
    d. Paragraph 28 of the Indictment – Counts 6-7 Terrorising the Civilian population and collective punishments;
    e. Paragraph 29 of the Indictment – Count 8 Use of Child Soldiers.

15. Paragraphs 4-24 of the Indictment set out "General Allegations", "Individual Criminal Responsibility", and "Charges". The Defence submits that the Indictment is defective, is too vague and does not set out sufficient material facts to substantiate the Counts. This is discussed further at paragraph 53.

Brief Historical Background

16. Sierra Leone became independent in 1961 with Sir Milton Margai as the first Prime Minister. In 1968 Siaka Stevens became the head of state. In 1985 Major General Joseph Momoh was elected in a one party election under the All Peoples Congress (APC).[12]

[12] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73 bis) of 13 February 2004, 2 March 2004, paragraph 2. For further detailed background see also generally Defence Pre-Trial Brief paragraphs 2-14, Prosecutor v Norman, SCSL-2004-14-PT-111, 31 May 2004.

20322

17. The organized armed group that became known as the Revolutionary United Front (RUF), led by Foday Sabayana Sankoh, was founded about 1988 or 1989 in Libya with support and direction from the government of Muammar Al-Qadhafi.[13]

18. On March 23 1991 a group of about a hundred fighters including Sierra Leonean dissidents and Liberian fighters loyal to Charles Taylor, and a small number of mercenaries from Burkina Faso invaded eastern Sierra Leone at Bomaru, Kailahun District.

19. From early in the conflict, the RUF perpetrated widespread violence across southern and eastern Sierra Leone.[14] Within the first 18 months of RUF attacks in Sierra Leone, over 400,000 people were internally displaced while hundreds of thousands became refugees.[15] RUF attacks continued, marked by brutality against civilians, and children being kidnapped and inducted into the RUF.

20. In April 1992, unpaid soldiers staged a mutiny that quickly escalated into a coup. The soldiers announced that that they had formed a junta, the National Provisional Ruling Council (NPRC) under the power of Captain Valentine Strasser, to replace Momoh's APC regime.

21. By the time the NPRC took over State House in 1992 the war had been going on for just over one year. The destruction was already immense.

> Whole towns in the Southern and Eastern Provinces had been razed to the ground, and the number of refugees fleeing from Sierra Leone to Guinea alone had reached 120,000. As the war-affected areas were the most productive in agriculture (the Eastern Province is traditionally Sierra Leone's breadbasket), the food situation in much of the country was becoming desperate. The brutalities associated with the war – hacking off hands and limbs, rape, all forms of torture, and the destruction of schools and the violent recruitment of schoolchildren into the rebel fighting force, all frequently reported in the country's lively tabloids—were causing deep demoralisation in the nation's population.[16]

---

[13] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73 *bis*) of 13 February 2004, 2 March 2004, paragraph 3.
[14] Ibid paragraph 3.
[15] Ibid paragraph 2.
[16] Lansana Gberie. "*A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone*", 2005, pg 71.

The Role of the Sierra Leonean Army

22. The role of the Sierra Leonean Army ("SLA") has been described as one of the most important elements in the war.[17] The Defence submits that an appreciation of the role of the Sierra Leone Army in the conflict is critical to understanding the dynamics that played themselves out during the war, the relationship between civilians and members of the Army, and the importance of particular geographic locations as military bases. Further, the role of the Kamajors in the conflict can only be understand within the framework of other factions who played the most significant part in the conflict – the Army and the RUF.

23. Due to the grave abandonment of the basic needs of the military forces under the APC government, Sierra Leone was essentially devoid of an operational army when in needed one most in 1991[18]. The army lacked the skills needed to counter the attacks that followed 23rd March 1991. The army at that time has been described as a "purely ceremonial army and was ill prepared for a war...It lacked logistics, and personnel, intense political interference suppressed most training initiatives and the military had less training in field exercise since 1980.[19]

24. The TRC succinctly summarised the role of the SLA during the conflict as follows:

> "The Army was not worthy of being called a military force when the war broke out and it was never going to be possible to make it worthy of that name during the war."[20]

25. As early as 1991, observers began to suspect a form of collaboration between the two apparently opposing forces, the RUF and the SLA.[21]

[17] See for example, Keen, *Conflict and Collusion in Sierra Leone*, James Currey Ltd, 2005.
[18] Final Report, Truth and Reconciliation Commission of Sierra Leone ("TRC Report"), Volume 3a: Chapter 3, para. 243.
[19] TRC Report Volume 3a: Chapter 3, para. 265.
[20] TRC Volume 3a: Chapter 3 para. 270, see also para. 243: "The country was devoid of an operational Army when it needed one most in 1991", para 251 "In place of pride and professionalism, the soldiers – particularly senior officers – had indulged in vices such as embezzlement of public funds and favoritism along nepotistic and tribal lines".
[21] Supra note 15, pg 64, see also generally Keene, supra note 16.

26. The SLA was as interested in taking a piece of the diamond wealth as the RUF. There are numerous examples of the both the ineffectiveness and possible collusion on the part of the army.

27. Despite these factors, the SLA did manage to successfully dislodge the RUF from a number of locations from February 1993 through to the end of 1993.

28. However, as the TRC describes "in the space of little over one year, the whole context of the conflict in Sierra Leone changed for its civilian population".[22] In November 1993 every civilian settlement in the country had been purged of an RUF presence. By late January 1995 there was not a single District in the Provinces where the RUF was not present.[23]

29. The relationship between the SLA and civilians increasingly become one based on distrust and suspicion. As the TRC stated:

> "In times of crisis, according to the Constitution, the Sierra Leone Army has the duty to preserve the lives and property of the citizens of the state. The inescapable impression reached by the majority of civilians was that the Army was failing in its task. By any standards, the sheer breadth of geographic coverage achieved by the RUF represented a fundamental collapse in the state security apparatus. Naturally the civilians developed certain misgivings about the capacities of the soldiers on the ground to protect them."[24]

30. RUF guerrilla attacks were characterised by killings, abductions, and systematic destruction of property. After such attacks, the Army would claim that it could not prevent such attacks due to "institutional incapabilities", that they were forced to withdraw in the face of overwhelming pressure to an ambush or assault that was impossible to withstand. Civilians however refused to accept that such far-reaching and regulars spates of violations and abuse could continue to occur. Civilians pointed to highly suspicious circumstances surrounding guerrilla attacks on their

---

[22] TRC Report, Volume 3a, para. 489.
[23] Ibid para. 490.
[24] Ibid para. 491.

communities and suggested that soldiers had connived in these attacks. Civilians felt that the Army had abandoned civilians to suffer violations at the hands of the RUF or that the Army itself had carried out the attack themselves. The notion that SLA soldiers were working with the rebels, providing arms and logistics and even carrying out joint operations became commonplace. "In fact, according to conventional wisdom, many SLA men were 'soldiers by day, rebels by night'" which became encapsulated in the term "sobel".[25]

31. By the end of end of 1996, the RUF had wrecked destruction and violence throughout Sierra Leone. More than 15,000 people had been killed and almost two-thirds of the country's population of 4.5 million displaced. The economy had collapsed. By March 1996 an estimated 75 percent of school-aged children were out of school, and 70 per cent of the country's educational facilities were destroyed. Only 16 per cent of the country's health facilities were functioning by March 1996 and almost all of these were in the capital, Freetown, as yet untouched by the war.[26]

Kamajors

32. It is against this background that the Kamajors[27] and the eventual formation of the CDF must be understood. Communities were regularly being attacked by the RUF in brutal and violent ways. The Sierra Leonean army was to a large extent either doing nothing or complicit in the attacks, targeting civilians and attempting to reap as many profits from the diamond areas of Sierra Leone. "The failure of the army to protect the populace gave rise to an overwhelming desire among the people to institutionalise the existing civil militia as the only force that could protect the communities against attacks by the RUF."[28] The resort to traditional defence mechanisms is an entirely understandable, even logical progression from wanting to repel an enemy but not having the means to do so"[29]

[25] Ibid para. 492-496.
[26] Ian Smillie, Lansana Gberie and Ralph Hazelton, *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*, Ottawa, Partnership Africa Canada 2000, page 8.
[27] The term "kamajor" appears in many forms including kamajo, kamajoh, kamajoi, kamasoi, kamajesia, kamajoisia or kamasesia. See Dr Hoffman, "Expert Report on Kamajors in Sierra Leone", para C.1.a, EXHIBIT 165 ("Hoffman Report").
[28] TRC Final Report, para. 487.
[29] TRC Final Report, para. 563.

33. "Prior to the start of the war in 1991 and in its initial years, a Kamajor was "a Mende male who possessed specialised knowledge of the forest and was an expert in the use of medicines associated with the bush. At least since the introduction of shotguns to the rural areas, a Kamajor was also permitted the use of firearms, which were carefully regulated by local communities."[30]

34. A Kamajor was distinguished from ordinary hunters. A Kamajor was responsible "not simply for procuring meat but for protecting communities from both natural and supernatural threats said to reside beyond the village boundaries: elephant, leopard, witches and sometimes other human beings. In other words, the Kamajor provided a security function that was as important as his hunting role."[31] In short, "the Kamajors' very identity is predicated on the protection of villages.[32]

35. Historically there is a strong connection between the Kamajors and the community chiefs.[33] The work of the kamajor – both hunting and security services – were under the authorisation of the chief. Permission to hunt came from the chiefs and a part of the kills was owed to the chief. "Requests for the special services of the kamajor frequently came through the chiefs".[34] This historically strong connection between the Kamajors and the chiefs that had been in place for years prior continued throughout the war.

36. As the war progressed, various local defence activities began to appear towards the end of 1992. These activities were on the part of groups made up of these traditional hunters, including Kamajors, Tamaboros, Donsos, Kapras, Gbethis.

37. As noted in paragraph 32 above, the Sierra Leone army was unwilling and / or unable to protect rural villages in the early beginnings of the war. As a result, the

---

[30] Hoffman Report, para C.1.b
[31] Ibid para. C.1.c.
[32] Ibid para. D.2.c.
[33] "Local chiefs historically maintained a close relationship to the Kamajors in their communities", Hoffman Report, para C.1.d.
[34] Hoffman Report, para C.1.d.

NPRC government initially provided arms and used local hunters as guides and scouts to assist in fighting the RUF.[35]

38. As the war progressed, and the relationship with the Sierra Leone army either deteriorated or proved ineffectual in protecting communities from the RUF, increasingly "the Kamajors were a logical focal point around which rural communities could organize their own defense."[36] It is not surprising that the mobilization of communities increased in areas such as Kenema, Kailahun, and Pujehun grew around those who had knowledge of the bush and the use of firearms – the Kamajors[37]. It is also not surprising that this created disgruntlement amongst the soldiers.[38]

39. As Dr Hoffman noted, during the conflict and in particular during the time frames as set out in the Indictment, the majority of Kamajors who made up a part of the Civil Defense Forces had not been Kamajors prior to the start of the war. However the significance attached to the term "kamajor" remained. As Dr Hoffman explains:

> "It carried with it the same connotations of community defense, entitlement to carry firearms, and the possession of secret "medicines" (hale) that was embodied in the pre-war use of the term. This continuity of terms also signifies the continued importance to local chiefs to the Kamajors understanding of themselves. In other words, they retained the sense that the chiefs were the ultimate authorities to which a true kamajor was beholden, and that community defense was the Kamajors' principle responsibility."[39]

---

[35] This continued through the conflict. See Transcript, Hinga Norman, January 25 2006, pg 9, lines 14-21 Q: So, effectively what you have said is that even before the civilian government of Tejan Kabbah, His Excellency the President Ahmad Tejan Kabbah, came to office, government had been supplying weapons to local hunters for the protection of their respective communities? A. Yes, My Lord. I was in this country, I saw it and I knew it. And this same trend continued even when there was a civilian government and I was a deputy minister of that government.

[36] Hoffman Report, para. D.2.c.

[37] Transcript, Dr Demby, February 10 2006, pg 7, lines 8-19.

[38] Transcript, Hinga Norman, January 24 2006, pg 72 lines 14-22: But you and myself would be very difficult – it would be very difficult for you and myself to say which was really true, whether the soldiers had really transformed their loyalty into becoming rebels or it was the rebel that was trying to cause confusion among the population. And eventually, if that was the situation, they succeeded in putting us against our soldiers. So when chiefs, including myself, decided to arm young men in our chiefdoms to protect our land, homeland, property and life, soldiers <u>viewed this as a disservice to their loyalty</u>…"

[39] Hoffman Report, para. D.2.e.

40. Samuel Hinga Norman was born on 1 January 1940 in Ngolala Village, Mongeri, Valunia Chiefdom, Bo District in the Southern Province of Sierra Leone.[40]

41. In 1989, prior to the start of the war in Sierra Leone, Mr Norman returned from having lived in Liberia for 11 years.[41] From 1989 – 1994 he served as the spokesman for Valunia Chiefdom. In 1994 Mr Norman was appointed the regent chief for Jaiama Bongor Chiefdom – a position he held until 2003.[42]

42. After his installation ceremony as Chief in October 1994, chiefs from around his chiefdom including Boama, Wunde, Gboyama, and Tikonko, came together to discuss ways to protect their chiefdoms from the war.[43]

43. In 1994 it was decided that the NRPC government would be approached to assist in the protection of the various chiefdoms. A chief's committee recommended the selection of 75 able-bodied young men from each chiefdom and for the NPRC government to provide training and weapons. The men would be chosen by the chiefs of each chiefdom.[44] The men were chosen and received some training and were then sent back to their respective chiefdoms.[45] This system continued throughout the NRPC government.

44. In 1996, after general elections saw the installation of the SLPP government, Mr Norman was appointed the Deputy Minister of Defence under the Minister of Defence President Kabbah.[46]

45. In April 1997 in his position as the Deputy Minister of Defence, Mr Norman approached the President with the concern that the security situation in the country was not stable – in particular that there was considerable disgruntlement within the

---

[40] Indictment, para 1.
[41] Transcript, Hinga Norman, January 24 2006 pg 54 line 6 to pg 55 line 9.
[42] Transcript, Hinga Norman, January 24 2006, pg 55, line 12-17.
[43] Transcript, Hinga Norman, January24 2006, pg 56 line 15-20.
[44] Transcript, Hinga Norman, January 24 2006, pg 57.
[45] Transcript, Hinga Norman, January 24 2006, pg 59 lines 10-15.
[46] Transcript, Hinga Norman, January 24 2006, pg 68 lines 3-10.

20329

army. He requested that Parliament to legitimise the use of firearms by the Kamajors and other traditional hunters to protect their homes, properties and lives.[47] Parliament approved this measure, adding further to the rift between the SLA and the government, who was increasingly being seen as relying on Kamajors and hunters for security.[48]

AFRC Junta Period

46. On May 25 1997 a coup took place. The AFRC formed a junta government with the RUF under the leadership of Johnny Paul Koroma. This action confirmed the longstanding belief of many that the army was indeed in connivance with the rebels.

47. The coup was greeted with world wide condemnation. Within the Economic Community of West African States (ECOWAS) the Heads of Government adopted a three-pronged progressive policy for the restoration of President Kabbah. The Commonwealth Conference, the OAU Summit and the United Nations General Assembly all gave their outright support for the policy of restoration.

48. The immediate impact of the coup was to force all of the key office-holders into exile. Kabbah and the core of his cabinet went to Conakry, Guinea. Conakry became the operational centre for the Government. President Kabbah established a structure known as the "War Council in Exile" – with the function to deliberate on operational and political elements of the efforts to restore the Government. It was clear that at this point the Government has lost all control of the SLA and therefore had to disown its conventional military force. The Government therefore concentrated its endeavours on the civil defence forces ("CDF").[49]

---

[47] Transcript, Hinga Norman, January 24 2006, pg. 76 lines 9-18: "I took leave of His Excellency and went to Parliament and had talks with the Speaker of Parliament. I told the Speaker that the situation in the country was unsafe and that I had asked permission of His Excellency to proceed to Parliament to inform them of this situation so that I could request of them to do something. And that request was since the paramount chiefs in the entire Sierra Leone had put together an arrangement for hunter protection, local hunter protection, I was then requesting Parliament to legitimise their use of firearms for protection of their homes, land, life and property."

[48] See Transcript, Hinga Norman, January 24 2006 pg 76- 84 for a description of events leading to the AFRC coup.

[49] Transcript, Peter Penfold 09-02-2006, pg 8 lines 5-12 A. As I said, with the army having rebelled and the police force in disarray, other than the ECOMOG forces, the only indigenous Sierra Leone forces prepared to resist the illegal junta were the civil militia, notably at that time, the Kamajors. Q. Thank you. What period are

49. The evidence demonstrates that the CDF was acting with the support and approval of the Government and that one of its central goals was its restoration. The CDF motto was: "We Fight for Democracy". CDF military operations, including the attacks on Tongo, Bo, Kenema, and Koribundo were all legitimate armed attacks against the junta in furtherance of restoration of the Government. In fact the main objective of the CDF was the restoration of democracy.[50]

SLPP Restoration in February 1998

50. Through the intervention of ECOMOG with the support of the Kamajors, the AFRC government was ousted out of power on 12 February 1998. The SLPP government was restored on 10 March 1998.

51. Immediately after the restoration of the Kabbah government, steps were taken to formalise the CDF into the security apparatus of the State. All matters relating to security became the responsibility of ECOMOG. The Chief of Defence Staff was an ECOMOG Colonel, Colonel Khobe.[51] The evidence shows that ECOMOG planned

we talking about, Mr Witness? A. We are talking of the period from the May 1997 coup - 25 May - until, certainly in the first instance, the restoration of President Kabbah in February or February/March 1998.

[50] Transcript, Defence Witness Lumeh May 8 2006 pg 2 – line 19 – pg 4 line 8: "A ... Can I begin by saying to you that the Prosecution do not dispute, nor does the Prosecution challenge much of the evidence you have given. Do you understand? A. Very well. Q. And I am going to specify for the avoidance of doubt. There is no dispute or challenge by the Prosecution that the CDF and the Kamajors fought for the restoration of democracy. No dispute. Do you understand? A. Yes. Q. Insofar as any further evidence on this subject is concerned, I say that, what the Prosecution position is. Secondly, there is no dispute that His Excellency, President Kabbah, was very grateful to the CDF and the Kamajors for what they did for the restoration of democracy. Do you understand? A. Yes, sir. Q. That is what you were telling us on Friday, how President Kabbah thanked you all at Lungi? A. Yes. Q. So there is no dispute? PRESIDING JUDGE: For restoration of democracy and his reinstatement? MR De SILVA: Yes, yes. Q. Thirdly, there is no dispute, nor is there any challenge, that the Kamajor fighters received aid from ECOMOG. Again that is something you were telling us about. A. Exactly. Q. What may be in dispute is the period, but in general terms there is no dispute about the fact that indeed the Kamajors in the CDF received aid from a number of sources. because PRESIDING JUDGE: When you say no dispute, may I ask you, Mr Prosecutor, to specify, if you can, what you mean by "aid," there has been evidence talking of ammunitions, weapons, food, medication? You know what I mean. MR De SILVA: My Lord, I encompass all the items that Your Lordship has mentioned. PRESIDING JUDGE: I thank you. I am just trying to make sure that there is no loose end in this respect. I didn't understand your comments to be to that effect, but -- MR De SILVA: All things that are necessary for a fighting force, whether it be blankets or bullets. MR MARGAI: My Lords, just for the sake of clarity, do I understand my learned friend to be using the word "aid" to connote providing logistical support? PRESIDING JUDGE: That is what I just classified with the prosecutor. It means anything that was supplied to the CDF and Kamajors from blankets to bullets. That is basically what the Prosecution is saying."

[51] Transcript, Dr Demby 10 February 2006, pg 52 line 20 – pg 53 line 4: "When the government returned, a request was made by the President -- Q. Please watch the pace. A. Yes -- asking for the secondment of Colonel Khobe from the Nigerian Army to help the Sierra Leone Army, which was granted. Colonel Khobe then became

jointly with, fought alongside, provide logistics to, and shared the same objectives as the CDF.

20331

52. In early 1999 the President set up a committee (the National Coordinating Committee - "NCC") to handle all policy matters relating to the National Militia/CDF. The committee was to determine an organisational structure for the CDF and to set up ways of reviewing the means of financial logistical support to the CDF.[52] This structure continued until the signing of the Lomé Peace Accord.

Defects in the Indictment

General submissions

53. The Defence submits that the Indictment is vague and does not provide adequate notice of the charges. This has prejudiced the defence's ability to organise its defence and the Accused's right to a fair trial. The Defence further submits that the defects in the Indictment are not cured through particulars set out in the Prosecution Pre-Trial Briefs as the Pre-Trial Briefs themselves are of such a contradictory, confusing and vague nature. The Defence accepts that particulars can also be accepted through the opening statement but that the vagueness of the Indictment is not remedied through the limited additional information provided in the statement.

54. The Defence submits that in order to ensure the integrity of the proceedings and to safeguard the rights of the Accused, the Trial Chamber should take full consideration of the concerns raised by the Defence pertaining to the Indictment.[53]

Chief of Defence Staff - CDS - of the Sierra Leonean Army, who was charged with the responsibility of all military matters in the country. So he had control of the army, Sierra Leone Army, and the civil defence. He was responsible for all deployments, logistical support, arms, ammunition, food, et cetera, et cetera. And when ECOMOG came, together with the ECOMOG commander -- I think, if my memory serves me well, General Shelpidi, I think, was the first man, came and there was the ECOMOG commander, General Shelpidi."

[52] See Exhibit 120.

[53] Prosecutor v. Kupreskic, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 79 ("Kupreskic Appeal"); *The Prosecutor v. Laurent Semanza* Case No. ICTR-97-20-T, Judgement, 15 May 2003, para 42 ("Semanza Judgement"); *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, 25 February 2004, para 28 ("Ntagerura Judgement"): "The Chamber will review the indictments in light of applicable pleading principles because of the paramount importance of fair notice to the integrity of the proceedings and because of the Chamber's duty to ensure the fundamental fairness of the trial."

Role of the Indictment

20332

55. "The Indictment is the foundation on which every prosecution stands, in fact, the agenda on which criminal proceedings are based"[54] As such, the Indictment is meant to provide the Accused with sufficient information on the nature of the charges against them, as required by the Statute of the Special Court for Sierra Leone ("Statute") and the Rules of Procedure and Evidence (the "Rules") of the Tribunal.[55] As the primary accusatory instrument, an indictment must contain a concise statement of the facts detailing the crime or crimes with which an accused is charged[56]. As this Trial Chamber has stated, as the foundational instrument of criminal adjudication, the requirements of due process demand adherence...to the regime of rules governing the framing of indictments.[57] It is clear that the primary weight with respect to determining the scope of the counts and the material facts the Prosecution relies on to support those counts must be given to the Indictment.

56. The primacy of the Indictment has also been further reinforced by this Trial Chamber when it stated that even where there might be some indication that the Prosecution disclosed evidentiary material to the Defence (through other means such as the witness statements, the pre-trial briefs, the opening statement), there <u>still</u> must be some indication of such material in the Indictment, the principal accusatory instrument.[58]

57. Bearing these due process requirements in mind, the Defence submits the Indictment is the foundation for the review of all evidence in this case and serves as the guide as to the prosecutorial limits of the Prosecution's case against the Accused.

---

[54] *Prosecutor v Norman et al.,* Separate Concurring Opinion of Hon. Justice Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, SCSL-14-T-434, 24 May 2005, pg 25.
[55] *Prosecutor v Ntakirutimana,*ICTR-96-10-A and ICTR-96-17-A, Appeals Judgement , 13 December 2004, paras. 21-29 ("Ntakirutimana Appeal")
[56] *Semanza Judgement*, para. 42.
[57] *Prosecutor v Sesay,* SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 5.
[58] *Prosecutor v. Norman et al.*, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, SCCL-04-14-T-434, 24 May 2005, para. 19 (v).

Pleading principles

20333

58. As this Trial Chamber has stated, specific pleading in the Indictment "strikes at the very root of the procedural due process rights of the accused persons."[59] The Trial Chamber has also stated:

> "It is trite law that an indictment ... must be framed in such a manner as not offend the rule against multiplicity, duplicity, uncertainty or vagueness, and that were 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."[60]

59. The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Article 17(4)(a)[61] of the Statute and Rule 47(c). These provisions state that in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. This translates into an obligation on the part of the Prosecution to state clearly and fully the material facts underpinning the charges in the indictment.

60. Hence, the question whether an indictment is pleaded with sufficient particularity[62] is dependent upon whether it sets out the material facts of the

---

[59] Ibid para. 17.
[60] Ibid para. 18.
[61] The Trial Chamber has stated: "The only way the Prosecution can be seen to have fully complied with its obligations under Article 17(4)(a) of the Statute to promptly inform the Accused Person of the offences for which he is charged is through an Indictment that has been preferred against him": *Prosecutor v Norman et al.*, SCSL-14-T-434, "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para. 27.
[62] This Trial Chamber has deduced seven principles for the degree of specificity required in pleading of the indictment. The degree of specificity required must necessarily depend upon such variable as (i) the nature of the allegations; (ii) the nature of the specific crimes charged; (iii) the scale or magnitude on which the acts or events allegedly took place; (iv) the circumstances under which the crimes were allegedly committed; (v) the duration of time over which the said acts or events constituting the crimes occurred; (vi) the time span between the occurrence of the events and the filing of the indictment; (vii) the totality of the circumstances surrounding the commission of the alleged crimes, *Prosecutor v Sesay*, SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 8.

Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence.[63]

20334

61. A failure to plead in the Indictment material facts and elements of offences which the Prosecution intends to rely on to prove it renders it vague, unspecific and therefore defective.[64] As a result, the First Accused cannot be convicted on any counts based on material facts not specifically pleaded in the Indictment, nor set out in the Pre-Trial Briefs or opening statement.

62. The Defence submits that the scarcity of material facts, the failure to plead mode and extent of the Accused's participation under Article 6(1), and the vagueness of the Counts in the Indictment renders it defective. In order to ensure the fundamental fairness of the proceedings, the Chamber should take these deficiencies into account in making its factual and legal findings.

The Prosecution should know its case before going to trial

63. The Prosecution is expected to know its case before it proceeds to trial.[65] 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.[66] Such a situation may require the indictment to be amended or certain evidence to be excluded as not being with in the scope of the Indictment.

64. This Trial Chamber has stated that "[I]t would gravely undermine the procedural due process rights of accused persons and thereby bring the administration into disrepute if, at every stage, during the conduct of the trial, they are confronted with

---

[63] *Kupreskic Appeal*, para. 88; See also *Prosecutor v Sesay*, SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 7.
[64] *Prosecutor v Norman et al.*, SCSL-14-T-434 "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para 36; *Semanza*, Judgement, para. 42; *Kupreskic Appeal* paras. 114, 122.
[65] *Ntakirutimana Appeal*, para. 92.
[66] Ibid.

20335

new pieces of evidence designed to prove factual allegations not specifically pleaded in the Indictment ..."[67]

65. In addition to knowing its case before proceeding to trial, the Prosecutor must also make up its mind as to which of the several offences revealed in the witness statements and the exhibits he will prefer against the Accused.[68] It is not open to the Prosecution to rely on everything contained in each piece of disclosure as sufficiently meeting its Article 17(4)(a) obligations. Trial briefs as well do not assist the Prosecution in meeting its statutory obligations.[69]

66. This Trial Chamber has referred frequently to the "principal of orality". However there are limits to the application of this principle. The admission of evidence, whether documented or orally admitted must still fall within parameters set by the Indictment. Where such evidence is beyond the scope of the Indictment it must be excluded.

Review of the evidence must be limited to what was pleaded

67. The review of the evidence is limited to that was specifically pleaded by the Prosecution. "Indeed one of the fundamental principles on which International Criminal Justice is based is that an Accused Person should neither be tried nor convicted on the strength of evidence relating to an offence for which he has not been indicted, nor should such evidence be adduced or admitted if this would not only be contrary to the provisions of Article 17(4)(a) of the Statute, but will also amount to a flagrant violation of the principle of fundamental fairness."[70]

---

[67] *Prosecutor v Norman et al.*, SCSL-14-T-434, Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para 19 iv.
[68] *Prosecutor v Norman et al.*, SCSL-14-T-434, Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 27 (i).
[69] Ibid, para. 27 (ii).
[70] Ibid para. 34.

68. Therefore one of the key principles relating to the adduction of evidence on the part of the Prosecution is that it must be directly or ex facie relevant to facts in issues, that is, to counts in the Indictment.[71]

69. This Trial Chamber has used the analogy of pleaded factual allegations as the "building blocks" of an indictment.[72] There must be some nexus between the pleaded factual allegations in the indictment and the evidence that is elicited to prove the allegation.[73] Clearly where the allegation is never made the evidence cannot be introduced or is to be disregarded in the final analysis.

70. The Defence would submit that the Trial Chamber take note that the Indictment and the Pre Trial briefs are silent on many alleged events on which the Prosecution led evidence. The Defence submits that in conformity with principals of fundamental fairness this testimony must be excluded.

Defects in this Indictment

Failure to plead mode and extent of Accused's participation under Article 6(1)

71. The Indictment charges the Accused with criminal liability under Sections 6(1) and 6(3) of the Statute. Each count charges each Accused as criminally responsible for Counts 1-8 "pursuant to Article 6.1 and, or alternatively Article 6.3 of the Statute". Paragraph 20 further alleges that the three accused are criminally responsible "for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this indictment, which crimes each of them planned, instigated, ordered, committed, or in whose planning, preparation or execution each Accused otherwise aided and abetted, or 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."

---

[71] Ibid para.54.
[72] *Prosecutor v. Norman et al.*, SCSL-04-14-T-434 "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para. 9 (i).
[73] Ibid para.19 (ii).

2O337

72. This is the full extent of the detail provided in the Indictment pertaining to the Accused's alleged criminally responsibility under Article 6(1) relating to planning, instigating, ordering, committing or aiding and abetting for Counts 1-8.[74] The sophistication of the Prosecution's theory of its case as set out in the Indictment appears to be almost exclusively set out in Paragraph 13 which alleges that Mr Norman was the National Coordinator of the CDF, he was leader and commander of the Kamajors and had *de jure* and *de facto* command and control over their activities. On this basis the Accused is alleged to have criminal responsibility for planning, instigating, ordering, committing, aiding and abetting every action of the CDF or Kamajors as set out in the subsequent and equally vague paragraphs of the Indictment.

73. The Defence submits that the mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set forth in the indictment.[75] 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.[76]

74. The Prosecution has wholly failed to do this. It is impossible to know what the Accused is exactly said to have planned, instigated, ordered, committed or aided and abetted because the Indictment provides no such information. Rather the Indictment uses such vague language throughout Paragraphs 22-29 such as "Kamajors unlawfully killed or inflicted serious bodily harm" (para 24 a), "Kamajors continued

---

[74] The Accused is also alleged to have participated in a joint criminal enterprise under Article 6(1) and paragraph 19 of the Indictment sets out the Prosecution's material facts relating to that. This is discussed in more detail in this final submission at paragraph 344.
[75] *Ntagerura Judgement*, para 31 "The Chamber recognises that the Prosecutor may allege more than one form of participation for each crime, but emphasises that it is vague for the Prosecutor to simply refer broadly to Article 6(1) without further particularising the alleged acts of the accused that give rise to each form of participation charged; See also, *Semanza*, Judgement para. 59 and *Prosecutor v Krnojelac*, IT- 97-25-A, 17 September 2003, para 138("Krnojelac Judgement (AC)"):"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."; *Prosecutor v Delalic et al.*, IT-96-21-A, Judgement, 8 April 2003 ("*Celebici* Judgement (AC)") para. 350."
[76] *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, "Decision on Objections by Momir Talic to the Form of Amended Indictment", 20 February 2001, para. 20; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para 33.

to identify suspected 'collaborators' (para 24b); "Kamajors attacked" (para 24c - e). There is not one instance of specification as to a particular crime that the Accused is accused of having planned, instigated, ordered, committed or aided and abetted. Further, there are no specifications as to time, date, location, victims or other material details concerning any single attack. This renders the Indictment ambiguous and therefore defective.

75. It is not the job of the Defence and certainly not the responsibility of the Trial Chamber to attempt to decipher the allegations of the Prosecution. The Prosecution must identify precisely the form or forms of liability alleged for each count. This should be clear in the Indictment. However, in this case, it is anything but clear. The Prosecution has broadly alleged criminal liability under Article 6(1), and or alternatively Article 6(3), and nothing more. The Defence submits that the Prosecution Pre-Trial Briefs also provide no further assistance in pleading the specific acts of the Accused falling under the rubric of Article 6(1). This is discussed in more detail at Paragraph 101.

Allegations of "Committing" under Article 6(1) must be very specific

76. In cases where the Prosecutor alleges that an accused personally "committed" criminal acts within the meaning of Article 6(1), an indictment generally must plead with particularity the identity of the victims, the time and place of the events, and the means by which the acts were committed. If a precise date cannot be specified, then a reasonable range of dates should be provided. If victims cannot be individually identified, then the indictment should refer to their category or position as a group.[77] Where the Prosecution cannot provide greater detail, then the indictment must clearly indicate that it provides the best information available to the Prosecutor.[78]

---

[77] *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe,* Case No. ICTR-99-46-T, "Judgement and Sentence", 25 February 2004, para 32.
[78] *See, e.g., Prosecutor v. Brdjanin,* Case No. IT-99-36-PT, "Decision on Objections by Momir Talic to the Form of Amended Indictment", 20 February 2001, para. 22; *Prosecutor v. Krnojelac,* Case No. 97-25-PT, "Decision on Preliminary Motion on Form of Amended Indictment", 11 February 2000 paras. 33-34, 43.

77. The Indictment is completely devoid of any particulars with respect to any crimes that the Prosecution alleges that the Accused committed. Given the higher requirement for specificity when alleging the committing of a crime, the Defence submits that it is entitled to assume that, in the absence of such allegations in the Indictment, that the Prosecution is not alleging that the Accused "committed" any crimes within 6(1) of the Statute.

Defects in pleading joint criminal enterprise

78. If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the Accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify which form of joint criminal enterprise the Prosecutor will rely.[79] In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the Accused's participation in the enterprise.

79. Paragraph 19 of the Indictment is where the Prosecution sets out its theory of criminal liability relating to joint criminal enterprise under Article 6(1) of the Statute. It states:

> "The plan, purpose or design of Samuel Hinga Norman, Moinana 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".

[79] *Krnojelac* Judgement (AC), para. 138; *Prosecutor v. Mejakic,* Case No. IT-02-65-PT, "Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment" 14 November 2003, p. 3. *Prosecutor v. Tadic*, IT-94-1-AC, "Judgement and Sentence", July 15 1999, ("Tadic (AC)") paras. 185-226 (discussing the forms of joint criminal enterprise); *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, "Judgement and Sentence", 25 February 2004 para. 34.

80. Given the unclear wording of this paragraph, it appears that the Prosecution's theory relating to joint criminal enterprise is that the three Accused and everyone in the CDF ("subordinate members") were participants in the joint criminal enterprise – effectively making the CDF a criminal organisation and the entirety of its actions as perpetuating one joint criminal enterprise. The only indication the Defence is given as to the nature of the Accused's participation is that he "acted individually and in concert with subordinates (all unidentified) to carry out the said plan, purpose or design." Again on the basis of this paragraph the Prosecution alleges criminal responsibility for Counts 1-8. Pleading in this manner not only obfuscates the well documented role of the CDF in restoring democracy in Sierra Leone but it is so wide and all encompassing to make it impossible for the Defence to respond in any specific way.

Defects in Pleading Superior Responsibility under Article 6(3)

81. Where superior responsibility is alleged as it is in the Indictment, the relationship of the accused to his subordinates is the most material fact to be pleaded, as is his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.[80]

82. It is acknowledged that the specificity required to plead the identity of the victims, the time and place of the events, and the means by which the acts were committed is not as high where criminal responsibility is predicated on superior responsibility.[81] However, that the Accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes

---

[80] *Prosecutor v. Mejakic,* ICTY Case No. IT-02-65-PT, "Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment (TC)", 14 November 2003, p. 3; *Prosecutor v. Deronjic*, Case No. IT-02-61-PT, "Decision on Form of the Indictment (TC)", 25 October 2002, para. 7; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T "Judgement and Sentence", 25 February 2004, para 33; *Prosecutor v. Blaskic*, IT-95-14 "Judgement", 29 July 2004, para 19 ("Blaskic Judgment (AC)"), cited in *Prosecutor v Norman et al.* SCSL-04-14-T-434, "Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence" 24 May 2005, para. 8.

[81] *Semanza* Judgement (TC) , para. 45; *Prosecutor v. Galic,* Case No. IT-98-29-AR72, "Decision on Application by Defence for Leave to Appeal (AC)", 30 November 2002, para 15 ("As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.").

of his alleged subordinates or accomplices.[82] Thus, pleading superior responsibility does not obviate the Prosecution's obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible, particularly where the accused was allegedly in close proximity to the events.[83]

83. While it is accepted that the level of precision required for allegations under Article 6(3) is less, the Defence submits that the pleading as set out in Paragraph 21 is not acceptable. While Paragraphs 23-24 set out details as to geographic areas and time frames as to when Kamajors are alleged to have targeted "collaborators", the Indictment fails to plead any factual connection between those charges and the First Accused. No subordinates are named, no commanders identified, nor is there an identification of the relationship between the Accused and his alleged subordinates. Most importantly there are no material facts which allege 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.

84. In this respect the Defence submits that the Indictment is defective.

Lack of Specificity with respect to the particular counts

85. There is no rule specifying what must be included in the content of each "count" set out in the Indictment. However as tribunal jurisprudence has pointed out, it is evident from the context of Rule 47 that this term refers to the legal characterisation or qualification of the crime alleged in the concise statement of facts of the crime.[84] This legal qualification must include both the crime alleged and

[82] *Prosecutor v. Strugar*, Case No. IT-01-42-PT, "Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC)", 28 June 2002, para 22: "The Prosecution is directed to clarify if reference to "others" relates only to the four co-accused and their subordinates or others in that chain of command."
[83] *Prosecutor v. Strugar*, Case No. IT-01-42-PT, "Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC)", 28 June 2002, para. 24. *See also Brdjanin and Talic*, Case No. IT-99-36, "Decision on Objections by Momir Talic to the Form of the Amended Indictment (TC)", 20 February 2001, paras. 19-20.
[84] Rule 47(I).

the mode of the accused alleged participation. Thus a "count" defines the nature of the charge referred to in Article 17(4)(a) of the Statute.

86. Accordingly, each count in the indictment should indicate the precise legal qualification of the crime charged which should be based on the material facts alleged in the indictment. The count must also clearly identify the mode of the Accused's alleged participation in the crime; for example, as stated above, mere reference to Article 6(1) of the Statute, which lists multiple forms of individual criminal responsibility, is insufficient.[85]

87. Jurisprudence also indicates that each count in the indictment must indicate which paragraphs of the statement of the facts of the crime support the charge. For example, where a count charges the accused with accomplice liability, then it must refer to the paragraphs describing the relevant conduct of the accused and of the principal perpetrator. When a count charges superior responsibility pursuant to Article 6(3), then it is essential for the count to refer to the paragraphs describing the relationship between the accused and the alleged subordinates, the basis for the alleged knowledge of the accused, and the alleged failure to prevent the crime or to punish the subordinate. [86]

88. In this regard, each count in the Indictment is pleaded without adhering to these basic principles.

89. With respect to Count 3, "inhumane acts" are charged, punishable under Article 2.i. of the Statute. It is impossible to decipher, based on the facts pleaded in paragraph 26 (a) and (b) what the Prosecution is charging as "inhumane acts". For example, the paragraph begins by stating "acts of physical violence and infliction of mental harm or suffering included..." The charge of physical violence and mental harm falls under Article 3(a) of the Statute. Therefore, presumably, the Prosecution is setting out material facts relevant to Count 4. If this is the case what are the

---

[85] *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Sentence and Judgement, 25 February 2004, para 37; *Semanza*, Judgement (TC), para. 59; *Krnojelac* Judgement (AC), para. 138; *Celebici* Judgement (AC) para. 350.
[86] *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgment and Sentence, 25 February 2004, para 38.

"inhumane acts" then that the Prosecution charges under Count 3? Is it the "screening for collaborators" that is the inhumane act? Is it the "unlawful[ly] killing of suspected 'collaborators'", though this would be included in Counts 1 and 2? Is it the unlawful killings "often in plain view of friends and relatives" – that fact that alleged unlawful fillings were in front of friends and relatives – are those the inhumane acts? Illegal arrest and unlawful imprisonment of collaborators cannot be considered a crime against humanity. Are the "inhumane acts" referring to the destruction of homes and other buildings – though this is alleged in Count 5, as is looting? Perhaps the "inhumane acts" are the "threats to unlawfully kill, destroy or loot"? It is impossible to tell.

90. In the ICTY *Simic* case, the Accused was charged with the crime of cruel and inhumane treatment as acts of persecution. In its judgement, the Trial Chamber declined to consider any cruel and inhumane treatment falling outside the categories of beatings, forced labour assignments and confinement under inhumane conditions which were specifically pleaded in the Indictment. The wording "cruel and inhumane treatment including" was considered too vague and unspecific to have "provided notice to the Defence of the incidents not explicitly set out in the Amended Indictment".[87]

91. In the *Kayishema* case, the Prosecution failed to particularise the portions of evidence that supported the "Other Inhumane Acts" charges and the Trial Chamber was of the opinion that "this method of using a crime as a "catch-all" specifying which acts support the count almost as a postscript – does not enable the counts of the "Other Inhumane Acts" to transcend from vagueness to reasonable precision."[88]

92. This Trial Chamber has already ruled that the Prosecution's failure to plead "gender offences" more specifically in the Indictment and attempting to include it as "inhumane acts" as offences against humanity was too vague, and not as specific as

[87] *Prosecutor v. Simic et al.*, IT-95-9, Judgment, 17 October 2003, para 73. ("Simic (TC)").
[88] *Prosecutor v Kayishema* , ICTR-95-1-T, Judgement, 21 May 1999

required within the context of Rule 47(c). This proved fatal to the admissibility of all related evidence.[89]

93. In this case, the Prosecution charges "inhumane acts" but fails to enumerate and specifically plead what incidents the Prosecution believes constitutes those acts. The Defence submits that Count 3 is so vague to have provided the Defence with notice as to what incidents that the Prosecution were alleging and should therefore be dropped from the Indictment.

Count 5 does not include burning of property

94. Count 5 charges the Accused with "pillage" punishable under Article 3.f. of the Statue. In paragraph 27 the Prosecution pleads the "destruction and burning of civilian owned property" in various geographic locations as constituting the crime of pillage.

95. This Trial Chamber has set out the elements of pillage as follows:

- The perpetrator appropriated private or public property;
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
- and such appropriation was without the consent of the owner[90].

96. It is clear that "destruction by burning of civilian owned property" does not fall within the crime of "pillage".

97. The Defence submits that all evidence pertaining got the burning of civilian property must be disregarded by the Trial Chamber as it does not fall within the ambit of any of the Counts in the Indictment. This is also discussed in further detail at paragraph 413.

---

[89] *Prosecutor v Norman et al.* SCSL-04-14-T-434, "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para. 78 (i).

[90] *Prosecutor v Norman et al.*, SCSL-04-14-T-473, "Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005", para. 102 ("Rule 98 Decision").

Failure to Specify Precise Dates of Criminal Acts

98. The paragraphs in the Indictment allege in a very general way instances of specific conduct, which, if proven, are either criminal or could be used to infer *mens rea* in support of a criminal conviction. The Indictment's use of these exceedingly broad date ranges provides grossly inadequate notice of particular conduct or events, making it difficult for the Accused to prepare his defence.

99. Though the Prosecutor is allowed a degree of latitude where the exact dates of events are not known, the nearly two and a half year ranges cited in paragraphs 24d)[91], 24e),[92] 25e)[93], 25f)[94] 26b)[95] in reference to the Bonthe and Moyamba geographic areas are not acceptable. This is particularly so where the allegations are also devoid of any other detail that might assist the Accused in identifying the events alluded to in the Indictment. It is also noted that the Pre-Trial Brief provides no further detailed dated information other than providing information relating to one alleged incident on January 26 1998 and a meeting on 15 February 1998.[96]

100. The Defence would submit that the broad allegations made in these paragraphs leaves the impression that the Prosecutor had not obtained any particular and specific information or evidence regarding these allegations. Under such circumstances, the Accused cannot possibly be expected to effectively prepare his defence.

Indictment defects not cured through Pre-Trial Brief and Opening Statement

101. Tribunals have stated that a defective indictment can in some instances be cured if the Prosecution provides timely clear and consistent information detailing

---

[91] "Between about October 1997 and December 1999, Kamajors attacked or conducted arms operations in the Moyamba District..."
[92] "Between about October 1997 and December 1999..."
[93] "Between about October 1997 and December 1999 in locations in Moyamba District..."
[94] "Between about October 1997 and December 1999 in locations in Bonthe District..."
[95] "Between November 1997 and December 1999 in the towns of Tongo Field..."
[96] Pre Trial Brief ("PTB") see footnote 99, paras. 299d and 307d [It should also be noted that no evidence was led pertaining to either of these two allegation]

20346

the factual basis underpinning the charges against the accused. However, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of the tribunal, it has been stated there can only be a limited number of cases that would fall with that category.[97]

102. The Prosecution filed its first Pre-Trial Brief ("PTB") on 2 March 2004[98] and filed a subsequent PTB on 22 April 2004.[99] The Defence submits that the initial Pre-Trial Brief contains little in the way of material facts that substantiate the Indictment but is largely a review of the law the Prosecution believes is applicable.

103. The PTB is not meant to be an opportunity for the Prosecution to "cover all the bases" as it were, through repetitious and vague pleading of material facts. Rather it is meant to clarify and elucidate the material facts that the Prosecution intends to rely on as set out in the Indictment. However the Prosecution has failed to do this.

104. The PTB presents conflicting and inconsistent material facts from one Accused against the other, pleads materials facts inconsistently and contains a near complete absence of specific details such as the names of alleged subordinates of the Accused, or the names of any alleged perpetrators of crimes.

The position of the First Accused is unclear and contradicted throughout the Pre Trial briefs

105. Of particular relevance is the fact that the Prosecution is never clear in the PTB what position and role it alleges that the Accused held. In fact the Prosecution changes the role and position of the First Accused throughout the PTB. Absolute clarity on his position is of fundamental important in light of the fact that the Accused, with the co-accused are said to have held "positions of superior

---

[97] *Nkatirutima* (TC) para 114, *Kupreskic* (AC) para 114.

[98] *Prosecutor v Norman et al*, SCSL-2004-14-PT-24, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing of Pre-Trial Briefs (Under Rules 54 and 73 bis) of 13 February 2004" 2 March 2004.

[99] *Prosecutor v Norman et al*, SCSL-2004-14-PT-63, "Prosecution's Supplementary Pre-Trial Brief Pursuant to An Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", 22 April 2004. All subsequent references to Pre Trial Brief ("PTB") in this submission are to this Supplementary Pre Trial Brief.

responsibility and exercising command and control over their subordinates"[100] What exactly is this "position" that the Prosecution alleges? The Prosecution states at various points that:

- "Samuel Hinga Norman was the head of the War Council and as such reviewed and approved or disapproved all decisions made by that body"[101]
- "Samuel Hinga Norman was "a member of the War Council"[102]
- Samuel Hinga Norman was one of the commanders "who ordered that checkpoints be constructed"[103] or "who visited Moyamba Town to oversee the operations"[104]
- Samuel Hinga Norman was "the commander of the CDF"[105]
- Samuel Hinga Norman was the National Coordinator of CDF[106].

106. According to the Prosecution the Accused appears to have been all things at all times. If for a particular Count the Prosecution is alleging that Mr Norman was a member of the War Council, then clearly the analysis pertaining to command responsibility would be different that alleging that he was a commander with respect to another Count. It is difficult for the Defence to confront such imprecise allegations.

107. Further the PTB is contradictory in its material fact allegations and this further reinforces the difficulty of the Defence to know what allegations it must confront. For example, at paragraph 301(e) of the PTB the Prosecution is alleging that liability under Article 6(1) for the Moyamba area can be inferred from the fact that Hinga Norman "was in Moyamba when members of the CDF opened fire on a group of civilians in order to clear traffic from Mbang Bridge injuring several persons." However, further in the PTB at paragraph 346 (f), the Prosecution alleges that Article 6(1) responsibility can be inferred from the fact that Hinga Norman was

[100] Indictment, para. 21.
[101] PTB, para 276 b, para. 285 (b).
[102] PTB para 293 b., 301 (b), 317 (b).
[103] for example, at PTB para. 339 (c)
[104] for example, at PTB para. 346 (e)
[105] for example at PTB para. 332 (g)
[106] for example, at PTB para. 276 (a)

"at the Mbang Bridge where he instructed his bodyguards and entourage to clear the bridge where a commercial vehicle had wrecked with its civilian passengers…". It is unclear where exactly the Accused is said to have been at the time of this alleged incident and as such it is impossible to refute such ambiguous allegations.

General nature of the information set out in the PTB

108. With respect to the modes of criminal liability, under Article 6(1) the Prosecution merely reiterates over and over that their theory of the case is that the First Accused was involved in "planning, ordering or committing, or aiding and abetting" of the various alleged crimes in furtherance of the "common plan to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone".[107]

109. Generality is even more pronounced in the material facts that the Prosecution relies on to prove their theory of liability of the First Accused under Article 6(3). For example, the Prosecution merely repeatedly states that liability under Article 6(3) for the alleged unlawful killings in Tongo can be inferred from: the accused's position in the CDF, his leadership role in Kamajor structure, that he was in regular communication with other commanders at the various battle fronts, that he provided logistical support to the CDF, received status reports of war operations and frequently visited Kamajor bases. Notwithstanding the fact that the Prosecution's evidence has wholly failed to demonstrate these facts, these allegations are so vague as to not provide the Defence with more specific details as to the Prosecution's case.

Complete absence of any specific names

110. The Prosecution fails to mentions the names of any of the commanders in either the Indictment or the Pre-Trial Brief that the First Accused allegedly was in communication with, had as subordinates, held meetings with, or supplied with logistics etc. The Prosecution provides no dates as the visits to the Kamajor bases

---

[107] PTB paras. 275, 284, 292, 300, 308, 316, 324, 331, 338, 345, 352, 360, 367, 374, 381, 394.

that allegedly took place, and no specifics beyond stating "logistical support" is provided. TF2-014, arguably the witness the Prosecution considered to have the most significant and relevant evidence against the Accused, is not mentioned once either in the Pre-Trial Briefs or in the Indictment, nor are any other "commanders".

111. As stated above, if the Prosecution is in position to provide details it should do so. In this case, witness statements containing specific allegations were available to the Prosecution well before the trial. The Prosecution had met on numerous occasions with a number of their key witnesses and would have been in a position to provide more specific details in the PTB and the attached witness testimony summaries. However, as in the case of TF2-014, the extent of information provided is as follows:

> "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."[108]

112. On the basis of the above, the Defence would submit that the defects in the Indictment had not been cured, because timely, clear and consistent information has not been provided to the Accused.

GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

BASIC PRINCIPLES

113. As a preliminary general statement, the Trial Chamber is to assess the evidence in this case in accordance with the Tribunal's Statute and the Rules, and where no such guidance is provided by those sources, in such a way as will best favour a fair determination of the case against the Accused and is consonant with the spirit of the Statute and the general principles of law.[109]

---

[108] PTB Annex A, Testimonial Evidence, pg 3438.
[109] Simic (TC) , para 17.

Joint trials – basic principles when trying more than one accused at the same time.

114. In cases where more than one Accused stands trial, the Trial Chamber is to be diligent to evaluate the charges against each of the Accused. In joint trials each Accused shall be accorded the same rights as if he or she were being tried separately.[110] 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."[111]

115. The Defence submits that in light of this principle, where one of the other Accused presents evidence which discredits Prosecution witnesses this applies to each of the three Accused in this trial.

Rights of the Accused

Burden of Proof

116. Pursuant to Article 17(3) of the Statute an Accused is entitled to a presumption of innocence. This presumption places the burden on the Prosecution 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.[112] This is also in accordance with Rule 87 (a) of the Rules, 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." "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" (emphasis in the original quote).[113]

---

[110] See Rule 82(A) of the Rules. See also, *Prosecutor v Norman et al.* SCSL-04-14-T-282, Decision on the First Accused's Motion for Service and Arraignment on the Indictment, , 29 November 2004, para.30.
[111] *Simic* (TC), para. 18.
[112] *Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 September 2004, para. 22; *Prosecutor v. Kunarac*, Appeals Judgment, IT-96-23-A, IT-96-23/1-A, 12 June 2002, paras. 63 and 65.
[113] *Celibici* (AC) para. 458.

20351

117. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.[114] The Trial Chamber must acquit the accused if another conclusion can reasonably be drawn from that evidence pointing to the lack of guilt of an accused.[115]

118. Although pursuant to Article 17(g) of the Statute, an accused in not compelled to testify, the Accused in this case chose to testify before the Trial Chamber. His election to give evidence does not connote that the First Accused accepted any onus to prove his innocence.[116] Nor this it mean that a choice must be made between his evidence and that of the Prosecution witnesses. It is submitted that the approach to be taken by the Trial Chamber is to determine whether the evidence of the Prosecution witnesses should be accepted as establishing the facts alleged beyond reasonable doubt, notwithstanding the evidence which the Accused and other defence witnesses gave. The Trial Chamber should also take note that the Accused chose to give evidence prior to calling other Defence witnesses, and thus did so without the benefit of knowing what those other witnesses would say in their evidence. The Trial Chamber should take this factor into account in considering the weight to be accorded to the evidence he gave.[117]

EVALUATION OF THE EVIDENCE:

Relevance and Probative Value of the Evidence

119. Pursuant to Rule 89 (c), the Trial Chamber may admit relevant evidence that is deemed to be relevant, probative, and reliable. This broad approach is limited by Rule 89(B) which provides that the Chamber shall apply "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

[114] *Delalic et al.*, IT-26-21-T, Judgment, November 16 1998 para 599.
[115] *Brdjanin* (TC) para. 20
[116] *Simic* (TC), para. 20
[117] *Prosecutor v. Vasiljevic*, IT-98-32, Judgment, 29 November 2002, para 13 ("Vasiljevic (TC)")

120. The overriding principle concerning the admissibility of evidence is to ensure that it promotes a fair and expeditious trial.[118] As stated numerous times throughout the proceedings, the Trial Chamber stated that it would adopt a flexible approach admitting any relevant evidence, with the determination of the weight to be given to the evidence left to the Trial Chamber in the context of all the evidence admitted.[119] Therefore the threshold of admissibility is low; the weight of the evidence to be determined at a later stage.

121. However one limitation on the doctrine of relevance and the admissibility of evidence is that evidence should only be admitted if the evidence is related to facts in issue, that is, "to the offences charged in the Indictment, rather than throw open the gates for the admission of evidence which may either be irrelevant to the facts in issue or prejudicial to the interests of the Accused."[120]

122. In making the determination of weight, the evidence must, at a minimum, be relevant and probative. While not explicitly set out in the Rules, it follows that where the probative value of evidence is substantially outweighed by the need to ensure a fair trial, that evidence should be excluded.[121]

123. Reliability of evidence is to be assessed in the context of the facts of each particular case. To determine whether evidence is reliable the Trial Chamber should consider the circumstances under which the evidence arose, the content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntaries and trustworthiness of the evidence.[122]

---

[118] *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, February 16 1999, para 19.
[119] See also Rule 89 of the Rules of Procedure and Evidence.
[120] *Prosecutor v Norman et al.*, SCSL-04-14-434, Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, pg 42.
[121] *Prosecutor v Tadic*, IT-94-1, Decision on Defence Motion on Hearsay, August 5 1996, para 18 and Rule 95 generally: "Exclusion of Evidence - No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."
[122] See *Archibald International Criminal Courts, Practice and Procedure*, 2002, pg 253, §9-12b.

Corroborative Evidence

124. Other tribunals have determined that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.[123] However, this Trial Chamber has stated that it is not prepared to go as far as accepting that it is a general principle of international law, calling it a "contentious proposition".[124]

125. Witness testimony is strengthened when it has been corroborated, and conversely, testimony is weakened in the absence of corroboration.[125] It is submitted that where evidence is not corroborated, the Trial Chamber must scrutinise the evidence against the accused "with great care before accepting it as sufficient to make a finding of guilt against the Accused".[126] The Trial Chamber may in such situations decide not to rely on the evidence at all.[127]

126. In the instant case, the Defence highlights the need for the Trial Chamber to carefully scrutinise non-collaborated evidence. In particular the Defence draws the attention of the Trial Chamber to the testimony of the following witnesses:

i. **TF2-165** testified that 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. Mr. 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.[128]

ii. The evidence of **TF2-035** who testified that at Telama, 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

---

[123] *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgment 24 March 2000, para 62; *Krnojelac* TC para 71.
[124] Transcript, September 27 2006, pg 59 lines 5-16: MR KAMARA: -- but the principles of international law, that there is no need for collaboration. JUDGE ITOE: Oh, well, I'm not saying -- I don't accept -- I don't think I'm prepared to go that far, that there is no need for corroboration, no. MR KAMARA: Yes, My Lord. JUDGE ITOE: I contest that. MR KAMARA: My Lord -- PRESIDING JUDGE: I think it is a very, very -- MR KAMARA: My Lord -- PRESIDING JUDGE: -- contentious proposition. JUDGE ITOE: It is a very contentious, legal proposal.
[125] *Prosecutor v Tadic*, IT-94-1-T, Judgment on Allegation on Contempt Against Prior Counsel Milan Vujin, 31 January 2000 para.92.
[126] *Krnojelac (TC)*, para. 8.
[127] *Krnojelac*, (TC), para. 71; *Prosecutor v. Brdjanin* IT-99-36-T, Judgment, 1 September 2004, para. 27.
[128] Transcript, TF2-165, 7 March 2005 pg 9, lines 13-25, pg10 lines 22–12:17, pg12 line 25 – pg 13 line22. The need for corroborated is heightened by the fact that the date of the alleged killing is never made clear in the testimony.

civilians were taken a short distance away and systematically hacked to death by a group of 30 unidentified Kamajors.[129]

iii. **TF2-022** gave evidence of a number of alleged killings, none of which were corroborated, including[130]: at a field near the NDMC headquarters, unidentified Kamajors chopped three unnamed people with cutlasses[131]; on the day following the attack, unidentified Kamajors armed with guns and machetes captured 20 captured soldiers and 4 soldier's wives and hacked them to death;[132] 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;[133] an unnamed civilian was hacked to death by an unidentified Kamajor at a checkpoint because he had a picture of a soldier in his bag;[134] another unnamed civilian was hacked by an unidentified Kamajor at the next checkpoint because he was accused of being a soldier.[135]

iv. **TF2-071** gave evidence of extensive alleged killings, looting and burning in the Bonthe District including: Unidentified Kamajors capturing 34 civilians and took them to Mosandi where three of them—Bockarie Kpaka, Junisa, and Pa Samuel Kamara—were killed and eaten;[136] 5 civilians were captured by unidentified Kamajors in an ambush near the bridge linking Gbongboma and Molakaika; 3 escaped and reported that the other two had been killed by the Kamajors; Kamara's body was later found and buried;[137] Unidentified Kamajors burnt a number of houses in Baimbay;[138] Unidentified Kamajors looted and burnt houses at Mobayei and an old woman;[139] Unidentified Kamajors stabbed to death a pregnant woman called Jebbeh[140]; At Bolloh village, Kong Sam was killed by Adu Kai Ne Challey, and Ndogbei was killed.[141]

127. Lastly, the defence would submit that even where evidence is corroborated it does not necessarily follow that it is credible or reliable. In particular, in the circumstances of the Special Court, where the trial was held in the country the

[129] Transcript, TF2-035, 14 February 2005 pg 12, lines 21-25, pg 13 lines 11-16, pg 15 lines 13-17, pg 16 lines 10-11, pg 17, lines 11-15, pg 18, lines 23-24, pg 20 lines 1-20. This evidence was also not set out in the PTB or the Indictment and such not be considered for that reason as well. Further, evidence of such a highly incriminating nature must be corroborated.
[130] It should also be noted that the evidence of TF2-022 does not correspond to the description given in the witness summary attached to the PTB (at Pg 3440) nor does it correspond to any information provided in the Pre-Trial brief itself. NDMC headquarters is not mentioned in the Indictment.
[131] Transcript, TF2-022, 11 February 2005 pg 46, lines 14-29.
[132] Transcript, TF2-022, 11 February 2005 pg 50 lines 19–53:3
[133] Transcript, TF2-022, 11 February 2005 pg 56, lines 9-28, pg 5, lines 1-10, pg 57 lines 13-26
[134] Transcript, TF2-022, 11 February 2005 pg 59, lines 15-29
[135] Transcript, TF2-022, 11 February 2005 pg 61, lines :8-20
[136] Transcript, TF2-071, 11 November 2004 pg 57 lines 23–59:19, pg 109 lines 14-19
[137] Transcript, TF2-071, 11 November 2004 pg 59, lines 23–61:16, pg 62 line 20– pg 63 lines 7, pg 64 lines :8-27, pg 65, lines 8-26.
[138] Transcript, TF2-071, 11 November 2004 pg 68 lines 18– pg 69 line 15
[139] Transcript, TF2-071, 11 November 2004 pg 71 lines 1-12
[140] Transcript, TF2-071, 11 November 2004 pg 71 lines 13-21
[141] Transcript, TF2-071, 11 November 2004 pg 73 lines 10-18, pg 74 line 24– pg 75 line 18

crimes were alleged to have taken place, that communities are small, that the dissemination of information either through the Special Court outreach department or through the local media, testimony of other witnesses was relatively accessible to witnesses, the need to test the reliability and credibility of the evidence is even greater.

Hearsay Evidence

128. The Defence submits that any hearsay evidence presented in this case should not be relied on before the Chamber has satisfied itself as to its reliability given the context and character of that evidence.[142]

129. Where the hearsay evidence is especially incriminating, it should not be relied on at all. In this instant case, the Trial Chamber has highlighted the caution that should be attached to such hearsay evidence. For example, where Prosecution witness TF2-198 recounted being told that Kamajors had burnt houses in Koribundo, the Trial Chamber made the following caution:

> "In support of what the learned Presiding Judge is saying that I am sure that my own understanding of all relevant evidence does not really mean all relevant evidence, admissible or inadmissible. At least we operate a system which, of course, is probably a crystallisation of the common law and the civil law systems, and I think we need to avoid in any way, leading evidence of an incriminating nature, even though that is legitimate. That may well violate fundamental principles of fairness. And we do not want you to say that because you have the latitude to lead all relevant evidence, therefore, basic principles of fundamental fairness should not -- I think it is fair to say that we have some doubts as to whether this witness should continue to give evidence of such dimension and of incriminating nature when he did not witness any of these particular alleged incidents."[143]

130. Further, while the Rules favour a flexible approach to the issue of admissibility of evidence, this flexibility should not lead the Chamber to admit

[142] See *Prosecutor v Tadic*, IT-94-1-T, "Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", 10 August 1995, pp 2-3: "that the weight or probative value to be afforded to that 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, even this will depend upon the infinitely variable circumstances which surround hearsay evidence".
[143] Transcript, TF2-198 pg 34, lines 12-20.

"evidence where its probative value is manifestly outweighed by its prejudicial effect".[144]

131. The Defence would submit the following examples to demonstrate the extent to which hearsay evidence prevails throughout the proceedings and submit that this evidence is of such an incriminating nature it cannot be relied on:

- TF2-198, in testifying to the burning of houses stated that he returned to Koribundo from Bo. On describing seeing 106 houses burnt in Koribundo he stated that he was told that it was the Kamajors who burnt the houses.[145]

- TF2-042 gave evidence that 36 police officers were killed in Kenema, a number he says he received from ECOMOG.[146]

- TF2-144 testified that he had heard that a Mr 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.[147]

---

[144] See e.g. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr Koker", 23 May 2005, paras 7 and 8. See also, *Prosecutor v Norman et al.*, SCSL-04-14-T-434 "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para 75.

[145] Transcript, TF2-198, 15 June 2004 pg 32 lines 26– pg 33 line 10: Q. And when you returned to Koribundu, what did you see? A. When I returned to Koribundu some people who went to Bo were not able to stay there because they had problems of food, so they had to come back. When they had returned I found out that in fact almost all the houses are burnt. In fact, all the people that came, they started asking, "Who -- who burnt this place?" And they said it was the Kamajors that burnt and they said they had killed a lot of people here, and they started working with us and they started showing us graves, and they said, "You are here, you have Limba men that were buried." And they said in fact, "We are the ones who buried them." So we started working with them and they showed us where they buried different people and they returned to search with them. Q. Were you told who burnt the houses? A. Yes, they told us that it was the Kamajors and it was only they that were there. You know, in fact, almost everybody had left the place; it was only they that were there. In fact, there are some civilians who are trying to put out the houses which were burnt and in fact they gave testimony that it was the Kamajors who had burnt these houses.

[146] Transcript, TF2-042, 17 September 2004 pg 109 lines 2-7 A. Okay, the whole exercise. Well, I later came to know that there were 36 officers dead in Kenema. Q. Who told you that 36 officers were killed? A. Well, when we surrendered to the ECOMOG at the NIC building in Kenema, a report was given that 36 officers were killed.

[147] Transcript, TF2-144, 24 February 2004 pg 77 line 3– page 79 line 8: Q. Coming back to the question whether or not you could see what happened at the back of the house of Mr Ojuku, your answer you went into your parlour, could you see anything from your parlour? A. Well, when I entered my parlour I was not able to see what happened when they took him at the back of the house. Q. Did you learn at any time what happened to Mr Ojuku? A. When I came out I heard people say that they cut off his head and processed with him up to where his wife was doing business in the market. Q. To your knowledge, did they ask anything from Mr Ojuku's wife? A. He asked his wife to give them money so they could buy pepper, salt, and Maggi cubes. Q.

- TF2-147 testified to the killing of a Mr Abu Samuka Kamara by unidentified Kamajors which he told about.[148]

- TF2-056 gave evidence of hearing about unidentified Kamajors killed eight unnamed policemen at the barracks on the day the Kamajors entered Bo.[149] The witness was also told that unidentified Kamajors burnt four houses at the barracks.[150]

Witness Credibility

132. As one of the Judges remarked that the witness was "a very good story-teller"[151], the Defence also would submit that a number of Prosecution witnesses were also very good story tellers, to such an extent that their evidence is not credible and should be disregarded by the Trial Chamber in its assessment of the evidence.

133. TF2-006 appeared unable to maintain a consistent position on a question as straightforward as his profession. The witness agreed at various times that he was a welder, and then claimed that he was not. He also stated that he never told the OTP investigators that he was a welder and denied that the reason he lost his fingers was in a welding accident, quite contrary to the evidence he gave which alleged that Kamajors cut his fingers.[152]

Did you learn at any time for what purpose they were asking for Maggi, pepper and so on? A. Well, I don't know. I was not there.

[148] Transcript, TF2-147, 10 November 2004 pg 40 line 2– page 41 line 9) Did you notice anything about that corpse? A. Well, it was lifeless. That is what I could remember. Q. Were there any marks, bullets or anything on the body that you noticed? A. No, I couldn't. Q. And, Father Garrick, were you told how he was killed? A. I was only told that he was killed by the Kamajors. Q. Did you notice anything? A. Well, not really. I can't remember now.

[149] Transcript, TF2-056, 6 December 2004 pg 68 lines 15-24.

[150] Transcript, TF2-056, 6 December 2004, pg 68 line 29– page 70 line 8 Q. Did the Kamajors do anything else within the police barracks, apart from killing? A. They destroyed four houses. Q. Did you see them destroying four houses? A. I was not there, but when I came, I saw four burnt houses and the eight corpses I talked about. Q. And how did you learn that these four houses were destroyed by Kamajors? A. All those leaving the barracks told me about it, even the men in the barracks they said "These houses were burnt by Kamajors."

[151] Transcript. TF2-162 Pg 29, lines 14-16.

[152] Transcript, TF2-006, 9 February 2005 pg 39 lines 19-21, pg. 40 lines 1-2, page 40, lines 7-10, pg. 40, lines 23-26.

134. The Prosecution should call only those witnesses they believe will tell the truth. However, when a witness admits to telling lies it becomes impossible for the Trial Chamber to know what parts of the evidence can be relied on and what should be disregarded. The entire evidence becomes tainted. This is the position of two Prosecution witnesses who admitted to not telling the truth. Witness TF2-017 admitted to giving false information to the OTP and admitted that he felt that it was acceptable to invent facts about which one is unsure.[153] Also, witness TF2-190 admitted outrightly that he did not tell the truth to OTP investigators because he was scared.[154] Such evidence, the extent of its veracity being unknown, is unsafe to be relied upon to render a verdict.

135. It is submitted that the Trial Chamber must take into account the extent of the consistency between the oral evidence of the witnesses at trial and statements given prior to trial. While the defence accepts that minor discrepancies do not discredit the evidence of a witness as a whole,[155] where the discrepancy goes to the essence of their testimony the evidence should be treated with caution, and in some instances completely disregarded.

136. In this respect the Trial Chamber should regard the reliability and credibility of a number of the Prosecution witnesses with caution.

137. For example, TF2-021 refuted significant portions of his statement, to such an extent that the Presiding Judge stated it was becoming a pattern[156] and it was noted that the probative value to be attached to this testimony would be reviewed.[157] The witness refuted such a large portion of his various statements that the Defence

---

[153] Transcript, TF2-017, 22 November 2004 pg 38 lines 25-27. Q. Now you admit that you gave them false information; is that correct? A. Yes.; TF2-017, 22 November 2004 (44:9-12) Q Let me rephrase the question to you then. In your mind, it is okay to make up facts if you are hesitant about the facts; is that correct? A. Yes, you are correct.

[154] Transcript, TF2-190, 10 February 2005 pg 7 lines 18-21: Q. So you admit to lying to the investigators then to protect yourself? A. I was not telling lies. I was really afraid and when you are scared you do not know how to position yourself. And see Exhibit 56.

[155] *Vasiljevic*, (TC) para 21.

[156] Transcript, TF2-021, 4 November 2004 pg 7 lines 17-20: PRESIDING JUDGE: His consistent refusal of the contents of statements which are alleged to have been made by him is degenerating into a pattern, because yesterday, when Mr Williams was cross-examining, it was the same thing. We, of course, have it on record that he is an illiterate, but it is getting into what we would like to feel is a pattern.

[157] Transcript, TF2-021, 4 November 2004 pg 8 lines 6-12: Judge Thompson:...this witness has responded the way he thinks he should respond. The judges will, at the end of the day, in the light of testimony that may be forthcoming, determine what probative value to attach..."

requested that the investigators who took the statement be called as witnesses to verify the process of statement-taking by the Prosecution.[158] It is clear that this witness through the consistent refuting of his statement thoroughly impeached himself and his evidence should be disregarded in its entirety.

138. Another example is the testimony of TF2-012 which contained a number of significant inconsistencies between the statements given to the Prosecution investigators and his oral testimony. In particular the witness was adamant on the point of the number of houses he testified that Hinga Norman said should remain in Koribundo – three, not four as in his statement.[159] Further the Defence submits that the demeanour of the witness throughout his cross examination should also be noted in assessing his credibility as a witness[160].

Inability to recall dates

139. A number of Prosecution witnesses were unable to provide an accurate date in their testimony as to when events are alleged to have occurred. For example, TF2-152 could not recall when the time period when the junta government was in power.[161] TF2-096's testimony refers only the period "between the rainy and the dry season."[162] TF2-004 provides no dates as to his involvement in any of the

---

[158] Transcript, Virginia Chatanda, OTP Investigator, 2 March 2005.
[159] Transcript, TF2-012, 22 June 2004 Pg 16 lines 21-25, Q. Now, Mr. Witness, referring to your first statement made on the 19th of January 2003, did you say, and I quote: "I was the section commander of the *Kamajors* for Wunde Chiefdom"? ... THE WITNESS: I didn't say that. I only said that I was sent by the section chief, and it is he who sent me. Pg 17 lines 34-36 Q: And did you say that when Hinga Norman addressed the meeting at Koribundu in early March of 1998, that he said he expected only four houses to be spared? A. I only spoke about three houses. I talked about three houses: Pg 18 lines 16-31 Q. Now, you said, and I quote: "Hinga Norman commended Joe Tamidey and admitted he sent him to capture Koribundu. He went further to say that he was responsible for the destruction of Koribundu and not the *Kamajors*. He said he was annoyed at seeing a lot of houses standing since he was only expecting to see four houses." ... Q. How -- having heard that, Mr. Witness, again, I'm putting to you, did you say Hinga Norman expected to see four houses? I said three houses. I said three houses. Q. Thank you. On the next page, you also said, and I quote: "He then said that the four houses at the junction by Sumbuya-Bo Road belonged to *Kamajors*." Did you refer to four houses as having been so said by Hinga Norman? A. Only one house should be standing there and that was the storey building. That was where the *Kamajors* should stay. I only talked about one house. Maybe that's the house because it's a storey building. Maybe that's the house they understood as two."
[160] Transcript, TF2-012, 22 June 2004, Pg 24 lines 31-37: MR. MARGAI: My Lord, this is a court of fact and a court of credibility. This is why Your Lordships need to watch the demeanour of the witness. MR. PRESIDENT: We are watching him. MR. MARGAI: I know that, very keenly too.
[161] Transcript, TF2-152, 27 September 2004, pg 97 lines 11-15 Q. Mr Witness, do you recall a time called the junta time? A. Yes. Q. When was this? A. I can't remember the time nor recall the day, but I can remember the time they were in power.
[162] Transcript, TF2-096, 8 November 2004, pg 1-2.

attacks he testified to, nor was he able to confirm his age with any clarity though his testimony relates to his participation as a child soldier.[163] TF2-048 spoke only of the "dry season" in 1997.[164]

140. The Defence submits that the Trial Chamber can only review evidence that falls within the relevant timeframe of the Indictment. Where it has not been made clear by the witness when the events they are testifying to took place, the Trial Chamber should not infer or speculate as to when exactly the witness was referring.

141. Further, testimony often focused on events which do not fall within the timeframes of the Indictment and the Defence also submits that the Trial Chamber maintain a cautious stance in reviewing such evidence. For example, a significant portion of the testimony of Father Garrick, TF2-147 related to attacks on Bonthe in September 1997 which is clearly outside the timeframe of the Indictment.[165]

Leading questions

142. The overall conduct of the prosecution's examination and the propensity towards asking leading questions sets the context in which the evidence must be evaluated. While the Trial Chamber stated that "leading questions are permissible on not contentious issues"[166] examples pervade throughout the proceedings of the Prosecution leading its witnesses through key areas of evidence.[167] Information

---

[163] Transcript, TF2-004, 9 November 2004, pg 86 lines 4-18 Q. What age did you think you were before your father told you that? PRESIDING JUDGE: What a question. THE WITNESS: Could you please go over that again. PRESIDING JUDGE: Ms Whitaker, what a question. MS WHITAKER: Well, Your Honour, he's given an age to the investigators. He must have got his information from somewhere. Prior to this 20, Your Honour, he gave a different age on his statement. PRESIDING JUDGE: Well, proceed. MS WHITAKER: So he had an idea of an age prior. PRESIDING JUDGE: If he had one, he wouldn't be going to his father. MS WHITAKER: Well, Your Honour, he's asserted an age on this statement.

[164] Transcript, TF2-048, 23 February 2005, pg 8, lines 13-17 Madam Witness, I'd also like to take you back to the time when this happened, when you had to go to the headquarters. Was this during the dry season or the rainy season? Do you remember? A. It was during the dry season.

[165] See for example, Transcript TF2-147, 10 November 2004 page10 lines 2-17.

[166] Transcript. Judge Thompson November 11 2004, pg 52 lines 7-8.

[167] For example, transcript, Novemeber 11 2004, pg 52 line 29 PRESIDING JUDGE: But it doesn't mean that Mr Sauter will persist on asking leading questions. <u>He should avoid asking leading questions</u>; Transcript, TF2-198, June 15 2—4 pg 17 lines 4-7: Q. Do you know who the CDF was, or the Civil Defence Forces? A. Yes, they are the Kamajors? Q And Sam Hinga Norman was their leader? A. Yes, certainly he was the leader of the Kamajors.; Transcript. November 23 2004, pg 107, lines 11-14: Mr Sauter: Q. So, Mr Witness, would I be right to say that most of your belongings were taken away? Presiding Judge: <u>That is a leading</u>

obtained from a leading question should not be relied on as evidence supporting the allegations against the Accused in the present trial, as the evidentiary weight to be given to testimony that is elicited from leading questions is significantly decreased.

143. In instances, the Trial Chamber admonished the Prosecution for asking leading questions during the examination. Judge Thompson asked the Prosecution to desist from asking leading questions on a number of occasions.[168]

144. The example of TF2-157 provides a good example of the extent to which leading questions formed the examination style of the Prosecution:

> TF2-157 Transcript June 16 2004, Pg 16 Lines 3-18 Q. Do you know a person by the name of Chief Kafala -- Kafala? MR. JABBI: Objection, My Lord. My Lord, the Prosecutor has asked a question which was in the process of being answered and he is already suggesting a name in answer to that question which is of course hidden. JUDGE BOUTET: Objection sustained. MR. PRESIDENT: You can reframe your question, you know, employ your prosecutorial strategies and reframe your question, you know. BY MR CARUSO: Q. Yes. So did you ever witness anyone else in Koribundu being killed? A. Yes. Q. Did you know that person by name, sir? A. Yes. Q. And who was that person, sir? A. His name was Chief Kafala.
> ...
>
> pg 18, lines 2-7: Q. Now, did you see anyone else in your -- in Koribundu mistreated or beaten by the *Kamajors*? A. Yes. Q. Who was this, sir? A. I know of a man, an elderly man that is called Lahai Bassie, he is an old man, or he was an old man. At the time that we were about to leave the town, he didn't leave the town. He was there, he stayed.
> ...
>
> Pg 20 lines 11-12 Q. Whilst you were in Koribundu, did you ever see Hinga Norman? Yes, when I went back to Koribundu, after it had taken some time, I saw him
> ...
>
> Pg 20, lines 21 – 34. Q. And did you attend the meeting? A. Yes. Q. And it was at the town b*array*? A. Yes, at the court *barray*. Q. Who else attended the meeting, sir? A. There were a lot of people there. If there was an edict from the *Kamajors*, everybody would have to abide by that, so a lot of people went -- a lot of people attended the meeting. Q. Were there only civilians there? A. There were a lot of civilians and a lot of *Kamajors*. At that time then a lot of civilians had returned to the town. Q. Did Mr. Norman appear at the meeting? A. Yes. Q. As you recall now, sir, did Mr. Norman speak at the meeting? A. Yes.

---

question. You cannot ask this question; TF2-157, Transcript, pg 14 lines 33-35: Q. Did you ever observe after that any one being -- did you ever observe anyone being killed after that in Koribundu? A. Yes, on that Sunday.;

[168] Transcript, 11-11-04, pg 52 line 29 PRESIDING JUDGE: But it doesn't mean that Mr Sauter will persist on asking leading questions. He should avoid asking leading questions;

145. The Defence submits that the evidence is replete with evidence on substantive issues being elicited through leading questions.[169]

Applicable Law

146. The Indictment charges the Accused with unlawful killings (murder), physical violence and mental suffering, looting and burning, terrorizing the civilian population and collective punishments, and use of child soldiers[170].

147. Counts 1 and 3 charge the Accused with murder and inhumane acts as a crime against humanity. Counts 2, 4, 5, 6, 7 charges the Accused with murder, cruel treatment, pillaging, acts of terrorism, and collective punishments as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Count 8, enlisting and or using children under 15 years as an "other serious violation of international humanitarian law."

148. The Defence would note that acts of pillage, terrorism and collective punishments do not form part of the enumerated offences under Common Article 3 of the Geneva Conventions and therefore the Accused cannot be charged as being in violation of the Article 3 of the Convention on Counts 5-7.

149. The following are the elements of the crimes as set out by Trial Chamber I in its "Decision on Motions for Acquittal Pursuant to Rule 98".[171]

Elements for Crimes against Humanity

[169] See also for example, Transcript. TF2-151, 23 September 2004 pg 7 lines 1-5: A. Well, I didn't know. I didn't know [Arthur Koroma's] position, but all I knew was that he was a big man in his office. Q. But do you agree with me that he was one of the leaders of the Kamajors in Kenema? A. Yes, sir; Transcript TF2-159 9 September 2004 Pg 14 lines 12-13 Q. Now, Mr Witness, I want to take your mind far back to the 13 year of 1998. Do you recall the 13th February 1998?; Pg 49 lines 21-28 Now, Mr Witness, let me take you to some time in March of 1998. Do you recall the month of March 1998? A. Yes. Q. Where were you? A. I was in Koribundu. Q. You were in Koribundu? A. Yes. Q. Did anything happen in Koribundu that you want this Court to know? Transcript, TF2-082 16 September 2004 Pg 40 lines 5-6 Thank you. Mr Witness, after the attack on Koribundu did you have cause to see the second accused, Moinina Fofana at any other point in time?

[170] Indictment, paragraphs 25-29.

[171] Rule 98 Decision.

150. The general elements that the Prosecution must prove for a crime against humanity are:[172]

(a) There must be an attack;
(b) the acts of the accused must be part of the attack;
(c) the attack must be directed against any civilian population;
(d) the attack must be widespread or systematic;
(e) the accused must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population.

Murder as a crime against humanity (Count 1)

151. To prove murder as a crime against humanity, the Prosecution must prove the death of the victim—a person taking no active part in hostilities—resulting from an act or omission of the accused committed with the intent to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death[173].

Inhumane Acts as a crime against humanity (Count 3)

152. To prove the *actus reus* the following elements must be demonstrated beyond a reasonable doubt:

(a) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article;
(b) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
(c) the act or omission was performed deliberately by the accused or a person or persons for acts and omissions he bears criminal responsibility[174].

153. The m*ens rea* which must be proven is:

(d) At the time of the act or omission, the principal offender had the intention to inflict serious physical or mental suffering or where he knew that his act or omission was likely to cause serious physical or mental suffering and was

[172] Rule 98 Decision paras. 54–59.
[173] Rule 98 Decision para. 72.
[174] Ibid para. 93.

reckless as to whether such suffering or attack would result from his act or omission[175].

War Crimes (Article 3 Common)

154. The general elements that the Prosecution must demonstrate for an alleged crime to violate Common Article 3 or Protocol II are:[176]

(a) The alleged acts of the Accused should have been committed in the course of an armed conflict;

(b) The alleged acts must be against persons taking no active part in the hostilities.

Murder (Count 2)

155. The Prosecution must prove the death of the victim—a person taking no active part in hostilities—resulting from an act or omission of the accused committed with the intent to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death[177].

Cruel Treatment (Count 4)

156. The Prosecution must prove that there was an intentional act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity against a person taking no active part in hostilities. Such act or omission may include treatment that does not meet the purposive requirement for the offence of torture[178].

Pillage (Count 5)

157. The elements of pillage are to be proven are:

---

[175] Ibid para. 94.

[176] Ibid paras. 67–70. N.B. Judicial notice has been taken of the fact that an armed conflict occurred in Sierra Leone from 1991-2002.

[177] Ibid para. 73.

[178] Ibid para. 95.

(a) The perpetrator appropriated private or public property;

(b) intended to deprive the owner of the property and to appropriate it for private or personal use; and

(c) such appropriation was without the consent of the owner[179].

Acts of Terrorism (Count 6)

158. The elements of terrorism are:

(a) Acts or threats of violence wilfully directed against protected persons or their property;

(b) The acts or threats are committed with the primary purpose of spreading terror among protected persons[180].

Collective Punishments (Count 7)

159. In aggregation, the elements are:

(a) the elements constitutive of Common Article 3 crimes;

(b) a punishment imposed upon protected persons for acts that they have not committed; and

(c) the intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishment[181].

Child soldiers (Count 8)

160. The Prosecution alleges that the First Accused, as National Coordinator of the CDF and Commander of the Kamajors knew and approved the recruiting, enlisting, conscription, initiation and training of Kamajors, including children below the age of 15 years. It is also alleged that the First Accused, along with the co-accused, knew and approved the use of children to participate actively

---

[179] Ibid para. 102.

[180] Ibid para 109–112. N.B. The Chamber here relied on the *Galic* decision, ICTY-IT-98-29, Judgement, 5 December 2003 ("Galic (TC)"), a Trial Chamber decision with a strong dissenting opinion supporting the position that this "offence" has not yet attained the status of an international crime.

[181] Ibid para 118.

in hostilities.[182] Count 8 charges the Accused with enlisting or using children under 15 in hostilities.

The Prosecution has failed to show Crimes against Humanity

161.The main thrust of the Prosecution's argument that the alleged evidence reaches the level of crimes against humanity appears to be to repeatedly state in its Pre-Trial Brief in the statement that crimes of humanity are evident from "the overall conduct of the CDF, not limited to one district, which engaged in the widespread killing of civilians as part of a campaign of terror and collective punishment".[183] The Defence submits that the Prosecution's evidence fails to demonstrate that the alleged crimes in Counts 1 and 3 are crimes against humanity.

162. As stated above the general elements for the applicability of Article 2 of the Statue are that:

- there must be an attack;
- the acts of the accused must be part of the attack;
- the attack must be directed against any civilian population;
- the attack must be widespread or systematic;
- the accused must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population.[184]

163. The *mens rea* element is satisfied if the perpetrator has knowledge of the general context is which his acts occur and of the nexus between his action and that context, in addition to the requisite *mens rea* for the underlying offence or offences with which he is charged.[185]

---

[182] Indictment para. 17
[183] PTB paras. 275 (e), 284 (a), 308 (a), 324 (a), 331 (a), 338 (a), 345 (a), 352 (a), 360 (a), 367 (a), 372 (a), 381 (a),
[184] Rule 98 Decision, paras. 54–59.
[185] *Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 133-134

20367

164.There must be an attack. An attack has been defined as "a course of conduct involving the commission of acts of violence,"[186] which need not constitute a military attack.[187]

165.The acts of the accused must constitute part of the attack.[188] The required nexus between the acts of the accused and the attack consists of two elements:

> - the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
> - knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof."[189]

166. The attack must be directed against a civilian population. For an attack to qualify as "d*irected against any civilian population",* it must be shown that the civilian population was "the primary rather than an incidental target of the attack".[190] As the ICTY Appeals Chamber has stated:

> "The expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity the civilian population is the primary object of the attack'. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."[191]

167. The "targeted population must be predominantly civilian in nature, although the presence of a number of non-civilians in their midst does not change the character of that population as civilian".[192] It is established that the targeting of a select group

---

[186] *Prosecutor v Limaj et al.* IT-03-66, Judgement , November 30, 2005 ("Limaj (TC)"), para. 182; *Brdjanin,* (TC), para. 131 (similar); *Galic*, (TC),para. 141 (similar); *Prosecutor v. Naletilic and Martinovic,IT-98-34, Judgement,* (Trial Chamber), March 31, 2003, para. 233 ("*Naletilic* (TC)"), para 233.
[187] *Naletilic TC*, para 233.
[188] *Prosecutor v. Kunarac, Kovac, and Vokovic*, IT-96-2- A, Judgement ("Kunarac (AC)"), June 12, 2002, para. 99.
[189] See also *Limaj (TC)*, para. 188; *Prosecutor v. Blagojevic and Jokic*, IT-02-60, Judgement, (Trial Chamber), January 17, 2005, para. 547.
[190] Rule 98 Decision.
[191] *Kunarac (AC)* para 91, referred to in Rule 98 Decision.
[192] *Prosecutor v. Jelisic*, IT-95-10, 14 December 1999, para 54; *Kupreskic* (TC) paras 547-549; *Natetilic* (TC) para 235; *Blaskic* (TC) para 214.

of civilians – for example, the targeted killing of a number of political opponents – cannot satisfy the requirements of Article 5. It is insufficient to demonstrate that there was and attack was in fact directed against a civilian "population" where there are a randomly selected number of individuals.[193] As the ICTY has stated, it must shown that most of the population was directly affected, not a limited and selected group of individuals.[194]

168. To qualify as a crime against humanity, the acts of the accused must be "part of widespread or systematic attack against any civilian population".[195]

169. As the ICTY has noted, for reasons related to structural factors and organisational and military capabilities, and "attack against a civilian population" will often be found to have been at the behest of a State.[196] Further existence of an attack is often most evident when a course of conduct is launched on the basis of massive state action.[197]

170. The attack must be either widespread or systematic. The "widespread" characteristic refers to the large scale of the attack and to the number of victims"[198] and the "adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence.

Prosecution theory of Crimes against Humanity

[193] *Limaj* (TC), para 187, *Kunarac* (AC), para 90.
[194] *Prosecutor v Stakic*, IT-97-24, Judgement (Trial Chamber), July 31, 2003, para. 627: "The Trial Chamber is satisfied that the events which took place in [the] Prijedor municipality between 30 April and 30 September 1992 constitute an attack directed against a civilian population. The scale of the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals. Rather, most of the non-Serb population in the Municipality of Prijedor was directly affected. Moreover, it is clear from the combat reports that the Serb military forces had the overwhelming power as compared to the modest resistance forces of the non-Serbs."
[195] Article 2 Statute of the Special Court.
[196] *Limaj* (TC) para 191.
[197] *Limaj* (TC), para 194 citing *Prosecutor v Nikolic* where the Trial Chamber noted the "authoritarian take over" as evidence of an attack and *Prosecutor v Mrksic* et al, where the Trial Chamber looked to the massive land, naval, and air offensive by the forces of the JNA, intensive shelling of Vukovar for 3 months and the en masse deportation of women and children as amounting to an "attack".
[198] *Limaj* (TC) para. 183.

171. It is unclear what exactly is the prosecution's theory relating to crimes against humanity other than the Prosecution repeatedly stating that crimes against humanity can be inferred from the "overall conduct of the CDF, not limited to one district, which engaged in the widespread killing of civilians as part of a campaign of terror and collective punishment."[199]

172. The Defence is presuming that on the basis of this reiteration by the Prosecution that it does not seek to demonstrate that crimes against humanity occurred in a systematic way – only on a widespread basis. Regardless, the Defence submits that there is no evidence to suggest a systematic nature to the alleged crimes.

173. The Prosecution has suggested that "there is evidence that CDF campaigns spread throughout Sierra Leone in identified geographic locations." Further the Prosecution contends that these CDF campaigns were "massive, frequent, large scale actions, directed against multiple victims" and that "the attacks followed a clear pattern, spreading from Bonthe District throughout the country."[200]

174. The Defence submits that the means and methods used by the CDF in the period relevant in the Indictment do not evince characteristics of an attack directed against a civilian population. Even taken at its highest, the bulk of the evidence of alleged killings is in relation to individuals who were singled out as individuals because of their suspected or known connection with, or acts of collaboration with, RUF / AFRC forces – and not because they were members of a general population against which an "attack" was directed by the CDF. This sort of evidence does not meet the required level of an "attack against a civilian population" and therefore cannot fall with the ambit of crimes against humanity.[201] Other evidence on alleged killings can best be described as random killings by unidentified Kamajors that can hardly said to fall within the ambit of an "attack".[202] There is no evidence that could lead to the conclusion that there was ever an "attack" against the civilian population.

---

[199] PTB para 275 (e), paras. 284 (a), 292 (a), 300 (a); 308 (a), 316(c), 324 (a), 331 (a), 338(a), 345(a), 352(a), 360 (a), 367(a), 374(a), 381 (a).

[200] *Prosecutor v Norman et al*, SCSL-04-14-T-468, Public Version of the Prosecution Response to Motion for Judgement of Acquittal of the First Accused, Samuel Hinga Norman, 27 September 2005, para 16.

[201]. See *Limaj,* Judgment Para 227.

[202] *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 194: "It has been emphasised, repeatedly, that the contextual element required for the application of Article 5 serves to exclude single, random or limited acts from

175. In contrast to other tribunal jurisprudence where the attacking force possessed overwhelming military superiority, the situation with the CDF is different. The CDF was, for the majority of the timeframe in the indictment, a community defense organisation, engaged in combat with a junta government made up of a conventional military force and a rebel organisation. The battles were, even as set out in the Indictment, localised battles between the AFRC/RUF forces and the CDF in discreet limited number of geographic areas. Often a town would be taken over by the CDF in a matter of hours or days and then a few days the AFRC/RUF junta would re-enter the town[203] or as in the case of Koribundo, the AFRC junta soldiers just left Koribundo and there was no combat, and certainly nothing that could be said to have been an "attack". This is the same for Bonthe where TF2-071 testified that the Kamajors entered Bonthe after the soldiers had fled.[204]

176. Describing the 'overall conduct' of the CDF as amounting to a crime against humanity is also counter to the bulk of the evidence which clearly demonstrates that the CDF played a significant role in returning the legitimately elected government of President Kabbah to power and to countering the attacks by the RUF[205] and the AFRC.

177. Witnesses gave testimony as to the pride of belonging to the Kamajors and that Kamajors played a significant role in liberating many communities across Sierra Leone.[206] There was also evidence that President Kabbah was immensely grateful to

---

the domain of crimes against humanity." *Limaj et al.*, (Trial Chamber); and para. 189: "[I]t must be established that the acts of the accused are not isolated, but rather, by their nature and consequence, are objectively part of the attack."

[203] For example TF2-021 testified that Kamajors had taken Tongo in 4 days (Transcript, TF2-201 4 November 2004, pg 110 line 25 – pg 111 line 1, pg 112 lines 8-17.

[204] Transcript TF2-071, 11 November 2004, page 76 line 24– page 77 line 8.

[205] For example Transcript Kenei Torma, June 2 2006, pg 16, lines 11-20 Q. Yes, the rebels drove the civilians out of town and took over Moyamba? A. They dislodged the Kamajors and the civilians and they settled there. Q. Yes? A. And the chiefs, all of them assembled in Sembehun and they were guests to the other chiefs there and they said, "What is happening? Our district is being destroyed. Let's provide Kamajors by chiefdoms so that they can go and dislodge the rebels from our districts." And they arranged that –

[206] See for example TF2-012 Transcript. June 21 2004 , pg 57, line 26-27 Why did you join the *Kamajors*' society, to burn houses? A. No. Pg 58 lines 3-4 Q. As a *Kamajor,* did you fight for your country or did you fight against your country? A. I didn't fight. Pg 58, lines 8-9 Q. At the time when you went to the bush who were you afraid of, *Kamajor* or soldier? I was afraid of the soldiers and the rebels. Pg 62 lines 2-12 Q. You will agree with me that the chiefdom organised these *Kamajors* to go and liberate Wunde from the RUF; isn't it? A. Yes. Q. Now tell me, were you happy when Wunde was eventually -- Wunde, was it eventually liberated? A. Yes.Q. Did you go back to Wunde after its liberation? A. Yes, we went back there. Q. So the Kamajors drove the rebels? A.

the Kamajors and the CDF and the role they played in assisting to return the government to power. The Kamajors were to receive recognition for their role with certificates[207] and the President distributed bags of rice and money to those Kamajors who did not benefit from demobilisation programs.[208] It is difficult to conceive of a government wanting to recognise the role of a group and reward them with rice and money f they had committed crimes against humanity against the population of Sierra Leone.

Identification of particular individuals not an "attack"

178. As previously stated, taken at its highest the evidence presented by the Prosecution does not demonstrate that there was an "attack". The bulk of the evidence shows that persons allegedly killed by Kamajors were targeted as being collaborators or of belonging to particular ethnic groups. This evidence does not amount to an "attack against a civilian population".

179. Such evidence of allegedly killings of targeted individuals includes, but is not limited to, the following witness testimony:

- TF2-198 gave evidence his brother's killing by unidentified Kamajors saying he had been accused of being a Junta member.[209] This witness also testified that he returned to Koribundo and was told that Kamajors had killed Limba men;[210]

Drove the rebels, yes. Q. At this time it was very fashionable to be a *Kamajor*, wasn't it? A. Yes, it was really nice to be a *Kamajor*. Pg 62 lines 21-29 Q. Now, tell this Court, is it not a common practice for initiates of the Kamo -- of the *Kamajor* society to take an oath to, one, not to kill innocent civilians? A. Yes. Q. Two, not to loot civilians' property? A. The time when I joined the *Kamajor*, yes, they told us that. Q. And three, not to rape? A. Yes, they said that. Q. And the most important to respect the dignity of civilians? A. Yes.

[207] See Exhibit 146

[208] Transcript, Arthur Koroma, May 4, pg 10 line 56.

[209] Transcript, TF2-198, June 15 2004, pg 22 lines 7-11 "A. At that time when he identified me as somebody from Koribundu, they held me, they threw me to the ground, they beat me and when I was shouting, my younger brother woke up and he came and he peeped, they saw him and they said, "Oh, look at one Junta peeping." And they held him. They brought him out and they threw him to the ground, and they tied him, and they said we should be killed by Sikissi."

[210] Transcript TF2-198, June 15 2004, pg 32 lines 27-34, pg 33, lines 4-7.

20372

- TF2-157 gave evidence as to some of the same deaths as TF2-198 saying that they had been killed because were Limbas;[211]

- TF2-176's testimony was that a kamajor said he should be killed because he was a soldier;[212]

- TF2-159 evidence was to the same alleged killings as described by TF2-198 and TF2-157, stating that the people killed were Limba men;[213]

- TF2-030 testified that her husband was killed because he was Temne;[214]

- TF2-156 gave evidence that while he was in the hospital, a group of unidentified Kamajors came, announced that all policemen were with the junta and should be killed;[215]

- TF2-067's evidence was that n unidentified Kamajor shot to death an unnamed Temne man in a park;[216]

- TF2-058 said her husband was killed by unidentified Kamajors because he was accused of being a soldier;[217]

180. The evidence of alleged killings continues in this same vein, where the alleged killing specifically targeted an individual or is a random act of violence, in some instances as acts of retaliation from past vendettas.[218] Therefore the Defence would

---

[211] Transcript, TF2-157 pg 15, June 16 2004, line 27.
[212] Transcript, TF2-176 June 17 2004, pg 82, lines 36.
[213] Transcript, TF2-159, September 9 2004, pg 29 lines 1-28 pg 30 lines 1-5.
[214] Transcript, TF2-030, 25 November 2004 pg 5 lines 19 – page 7 line 26, pg 8 line 9 page 9, line 8, page 10 lines 1-2, page 10 lines 15-23, page 11 lines 3-5, page 11 lines 6-19
[215] Transcript, TF2-156, 25 November 2004 pg 51 lines 6-22, page 53 lines 3-7, page53 lines 13-21.
[216] Transcript, TF2-067, 1 December 2004 pg 4 line 19– page 5 line 15
[217] Transcript, TF2-058, 3 December 2004 page 50 lines 10-22, page 51 lines 14-25, page 51 line 26–page 52 line 6, page52 lines 7-9), page 53 lines 23– page 54 line 11, page 54 line16– page 55 line 13, page 55 line 14– page 57 line 12, page 60, lines 2-10.
[218] For example, TF2-166 stated that each of the five people involved in the killing of witness's father owed him money: Transcript, TF2-166, 8 March 2005 pg 80 lines 13-19, pg 81 lines 12-16.

submit that there is no evidence of an "attack", let alone an attack against a civilian population.

Attacks not widespread nor systematic

181. Even if the Trial Chamber were to find that there was an attack, it is clear that the weight of the prosecution's evidence even taken at its highest fails to demonstrate that such an attack was widespread or systematic.

182. As referred to above, widespread refers to the large scale of the attack and to the number of victims.

183. As the ICTY has stated, "History confirms, regrettably, that wartime conduct will often adversely affect civilians."[219] However, the Defence submits that even if it is be accepted that civilians were killed by renegade Kamajors in and around the relevant period, then, nevertheless, in the context of the population of Sierra Leone as a whole these were relatively few in number and could hardly be said to amount to a "widespread" occurrence for the purposes of Article 2 of the Statute.

184. The Defence has already stated that it presumes that the Prosecution is not alleging systematic attacks. However, even if the Trial Chamber finds that the evidence discloses that there was some lose form of a "systematic" attempt by the CDF or random elements within the CDF, or rogue Kamajors to target individuals believed to be, or suspected of, collaborating with the AFRC junta, there is still no evidence to demonstrate that there was an attempt to target a civilian population as such.

Command Responsibility under Article 6(3)

185. The Accused is charged with responsibility for the crimes in the Indictment under Article 6(3). For criminal responsibility to attach by virtue of Article 6(3), the Prosecution must prove each of the elements of each of the crimes beyond a

[219] *Limaj Trial Judgment*, para. 210.

reasonable doubt. If it succeeds in doing so for any crime, then the Prosecution must prove each of the following elements of command responsibility in relation to that crime, again beyond a reasonable doubt.

Command Responsibility – The Law

186. Article 6(3) of the Statute of SCSL incorporates the customary law doctrine of command responsibility. This doctrine is predicated upon the power of the superior to control or influence the acts of the subordinates. Failure by the superior to prevent, suppress, or punish crimes committed by subordinates is a dereliction of duty that may invoke individual criminal responsibility.[220]

187. The Trial Chamber in *Celebici* formulated the three elements of command responsibility:

1) the existence of a superior-subordinate relationship (functional);
2) the superior knew or had reason to know that the criminal act was about to be or had been committed (cognitive aspect), and
3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof (operational aspect).[221]

188. These criteria reflect the three aspects of the concept of superior responsibility established in post-second World War case law. The Trial Chamber in the case of *Akayesu*, held that in the case of civilian superiors, the principle of command responsibility as laid down in Article 6(3) of the ICTR Statute remains 'contentious'.[222] The *Kayishema* and *Ruzindama* judgment, in which a prefect and a businessman stood trial, which was delivered a year after *Akayesu*, incorporated the *Celebici* decision. The ICTR Trial Chamber was of the view that 'superior' encompasses political leaders and other civilian superiors, as long as civilian/non-military superior holds a position of authority.[223] Unlike the Trial Chamber in

---

[220] *Prosecutor v Delalic et al.*, IT-26-21-T, "Judgment" November 16 1998 (*Celebici* Judgment, 346), confirmed in Appeal;, Prosecutor v. Delalic et al, case No. IT-96-21-A, 8 April 2003 (Celebici AC) paras. 333-343.
[221] *Celebici* AC, paras. 189-198.
[222] *Akayesu* Judgment, para. 490.
[223] *Kayishema and Ruzindana* Judgment, para. 16.

Akayesu, it held that 'the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one'.[224] It further emphasized that the crucial question was not the civilian status of the accused, but the degree of authority exercised by the accused over his subordinates.[225] In *Musema*, the Trial Chamber subscribed to this position, but asserted that authority should be assessed on a case-by-case basis.[226] This case law demonstrates that the concept of a superior is far from a settled proposition.

189. Command is 'the authority vested in an individual of the armed forces for the direction, co-ordination, and control of military forces.[227] In the *Celebici* case, the Trial Chamber held:

> "[a] position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's de facto, as well de jure, position as a commander.[228]

190. It is important at this stage to realise that different types of command do not incur different types of superior responsibility. Whether it is direct or indirect subordination that characterises the relationship between subordinates and superior,

---

[224] Ibid.

[225] van Sliedregt E. The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (2003) T.M.C Asser Press, p. 145

[226] *Prosecutor v. Musema*, ICTR- 96-13-A, "Judgment", 16 November 2001 (*Musema* Judgment), para. 135, See also Prosecutor v Akayesu, ICTR-96-4-T, Judgment and Sentence, 2 September 1998 (Akayesu Judgment) para. 491: '[i]t is appropriate to assess on a case by case basis the power of authority actually devolved upon the accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof '

[227] van Sliedregt, supra note 226, p. 146.

[228] Celebici Judgement paras. 205-206.

occupation or operational level of command, there is only one type of criminal superior responsibility, i.e. control.

191. Having control means having *effective* authority over subordinates.[229] Control 'requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders'.[230] In *Celebici,* the Trial Chamber ruled that in order for the principle of superior responsibility to be applicable to non-military superiors, an element of control is vital:

> " [t]he doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."[231]

192. Furthermore, the exercise of *de facto* authority must be accompanied by "the trappings of the exercise of *de jure* authority."[232] In *Bagilishema,* the Trial Chamber concurred but held the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere "rabble-rousers" or other persons of influence.[233]

193. Having examined customary law on superior responsibility, the Appeals Chamber in *Celebici* ruled that '*sufficient influence*' is not an element of command responsibility, and that where influence plays a role in prompting subordinates to commit crimes, for instance, influencing criminal policies by writing them into orders, direct liability for aiding and abetting is more appropriate[234].

194. The Defence submits that the nature of the concept of superior responsibility concerns the relationship between superiors and their subordinates. This relationship should be marked by a hierarchy built on elements such as command and control, not by influence.

---

[229] *Celebici Judgement*, paras. 256 and 256-266.
[230] van Sliedregt, supra note 226, p. 149.
[231] Celebici Judgment, para. 378.
[232] Ibid
[233] *Prosecutor v Bagilishema*, ICTR-95-1A-T, "Judgment," June 7, 2001 (Bagilishema Judgment), para. 43.
[234] *Celibici (AC)*, paras 258-264.

195. In *Celebici*, the ICTY determined that control is the key element in establishing superior responsibility. It gave the element of control the place it deserves in the law on superior responsibility:

> "The doctrine of command responsibility is ultimately predicated upon the power of a superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers over the actual perpetrators of offences and accordingly, cannot properly be considered their 'superiors' within the meaning of Article 7(3) of the Statute."[235]

196. Command and control are inseparable. To hold a person liable on the basis of superior responsibility there needs to be proof of both command and control. This applies to both *de facto* and *de jure* superiors.[236] Being called a 'commander' in and of itself is not sufficient: there must be exercise of superior authority over the institution and its personnel.[237] As to the capacity to issue orders, a person's signature can indicate authority and can, therefore, be considered as evidence of *de facto* command. However, the signature in itself is not enough. To establish the command status of a signatory, the authority and executive capacity of the latter need be put forward as supporting evidence.[238]

197. When defining control, command needs to be *exercised* through control.[239] This is illustrated in the case of *Delalic*. Delalic was a 'co-ordinator of operations' and as such liaised between the war Presidency and the military forces. The ICTY Trial Chamber found that there was no evidence of a superior-subordinate relationship and, therefore found him not responsible under Article 7(3) of the ICTY Statute. The Trial Chamber found that providing logistic support, being in weapons delivery,

---

[235] *Celebici* Judgment, para. 377.
[236] van Sliedregt, supra note 226, p. 152.
[237] *Celebici* Judgment, para.765.
[238] van Sliedregt, supra note 226, p. 155.
[239] Ibid. p.152.

exercising administrative functions, and signing orders were not sufficient evidence of authority pertaining to a superior status.[240]

198. It follows that the essential element is not whether a superior had authority over a certain geographical area, but whether he or she had *effective control* over the individuals who committed the crimes, and whether he or she knew or had reason to know that the subordinates were committing or had committed a crime under the Statutes. Although an individual's command position may be a significant indicator that he or she knew about the crimes, such knowledge may not be presumed on the basis of his or her position alone.[241] Thus, control has to be *effective*. According to Fenwick, this word 'is intended to encompass both *de [j]ure* and *de facto* command and to ensure that, when multiple chains of command appear to exist, responsibility is assigned to the chain of command wherein resides the power to give orders...'[242]

199. Article 6(3) of the Statute of the SCSL states that a superior is expected to take "necessary and reasonable measures" to prevent or punish crimes under the Statute. In *Bagilishema,* the Trial Chamber held "necessary" to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and "reasonable" to be those measures which the commander was in a position to take in the circumstances.[243] In *Celebici*[244], the Trial Chamber held that a superior may be held responsible for failing to take only such measures that were within his or her powers to take. In *Bagilishema,* the Chamber held that it is the commander's degree of effective control which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop, or punish the subordinate's crime. Such a material ability must not be considered abstractly, but must be considered on a case-by-case basis, considering all the circumstances.[245]

200. There seems to be general agreement amongst the Trial Chambers that '*knew*' can be proved through direct and circumstantial evidence.[246] The Prosecutor's

[240] *Celebici Judgement,* para. 668.
[241] Ibid, para. 45.
[242] Cassese et al: The Rome Statute of the International Criminal Court: A Commentary Vol. 1, p.858
[243] Blaskic Judgment, para. 333.
[244] Celebici Judgement, para. 395.
[245] *Bagilishema* Judgment, para 48.
[246] van Sliedregt supra note 226, page 158.

contention in *Celebici* that knowledge may be presumed when the crimes are a matter of public notoriety, are numerous, and occurred over a prolonged period, or over a wide geographical area was not accepted. The Trial Chamber was of the view that no such general presumption could be made. The Trial Chamber adopted from the Commission of Experts the list of indicia that serves to establish by way of circumstantial evidence if a superior knew offences were committed by his subordinates.[247]

201. In *Aleksovski*, the Trial Chamber expressed the view that a superior's position may be an indication of knowledge. It needs, however, to be coupled with other indicia such as the geographical and temporal circumstances:

> "This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them."[248]

202. The second part of the knowledge element of Article 6(3) of the Statute of SCSL contains the clause 'had reason to know'. In *Celebici,* the Trial Chamber interpreted '*had reason to know*', as follows:

> "[t]hat a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional

[247] *Celebici*, Judgement, para 386: Commission of Experts in its Final Report:

I. The number of illegal acts;
II. The type of illegal acts;
III. The scope of illegal acts;
IV. The time during which the illegal acts occurred
V. The number and type of troops involved, if any;
VI. The logistics involved, if any;
VII. The geographical location of the acts;
VIII. The widespread occurrence of the acts
IX. The tactical tempo of operations;
X. The modus operandi of similar illegal acts;
XI. The officers and staff involved;
XII. The location of the commander at the time.

[248] Aleksovski Judgment, para. 80.

investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.[249]

203. Therefore a superior can only be required to take such measures as are within his powers. International law cannot oblige a superior to perform the impossible.[250]

Prosecution's Theory on Command Responsibility of the First Accused

204. The Prosecution alleges that the co-accused were seen and known as the top leaders of the CDF and that Moinina Fofana and Allieu Kondewa took directions from and were directly answerable to Hinga Norman. They took part in planning and operational decisions of the CDF.[251] Individually or in concert the three accused are alleged to have exercised authority, command and control over all subordinate members of the CDF.[252]

205. In its Pre-Trial brief the Prosecution states that criminal liability of the First Accused under Article 6(3) can be inferred from:

- His position of authority within the CDF and his leadership role within the Kamajor structure;
- The fact that during the relevant times in the indictment, Samuel Hinga Norman was in regular communication with other commanders at the various battle fronts where the CDF and Kamajor combatants were deployed;
- The fact that during the relevant times in the indictment he provided logistical support to the CDF in the field;
- The fact he received regular status reports of war operations and frequently visited Kamajor bases in and around Tongo [and other

[249] *Celebici* Judgment, para. 393.
[250] Ibid, para. 395.
[251] Indictment para 14.
[252] Indictment para 18.

geographic locations] as well as the other areas in Sierra Leone where the war was being prosecuted.[253]

206. The Defence submits that the Prosecution has failed to prove that the Accused bears criminal responsibility for any of the crimes charged in the indictment under Article 6(3).

The Position of the Accused and Establishment of the CDF:

207. The Accused was appointed Deputy Minister of Defence by President Kabbah in 1996. As stated above, this government was ousted by a coup of the AFRC on the 25th of May 1997. Following near universal condemnation of the coup, ECOWAS took steps to assist in reinstalling the democratically elected government of Kabbah. In his evidence, Hinga Norman said the Chairman of ECOWAS was prepared to ask ECOWAS members to assist Sierra Leone if he was convinced it was the wishes of the people not to accept a military government. Hinga Norman stated that President Kabbah said "Chief, that is where we need the support of the hunters of Sierra Leone to support their people in rejecting the military government."[254]

208. That is the purport of Exhibit 158, a letter from President Kabbah to CSO Mustapha of Nigeria about his discussion with General Abacha whereby he stressed the need to enhance the capacity of the Kamajors and the necessity of ECOMOG commanders to work with the Deputy Minister of Defence. Exhibit 158 shows that the government had a strategy in place to remove the junta through a carefully planned and executed action in collaboration with ECOMOG. This shows that at all times material to this conflict, the government and ECOMOG were in command and control of the Kamajors and the CDF. The first accused was not in a position of control and therefore never had a duty to act.

209. The Accused further testified that the President told him that there was an arrangement that he should "move from Guinea to join the officers of the Nigerian

[253] PTB para 279 para (a) – (d), para 288 (a) – (d), para 296 (a) – (d), para 304 (a) – (d), para 312 (a) – (d), para 328 (a) – (d), para 335 (a) – (d), para 342 (a) – (d), para 349 (a) – (d), 356 (a), (g), (h), (i), para 362 (a) – (d), para 371 (a) – (d), 378 (a) – (d), para 386 (a) – (d), para (a)- (b).
[254] Transcript, Hinga Norman, p. 25, Jan. 25. 2006.

army in Liberia." The Accused also testified that the President said he was going to announce to the people of Sierra Leone (over BBC) that he had been appointed National Coordinator. This was the first time the words "Civil Defence Force" were used by the President, to embrace all defences by civilians to support the military effort.[255]

210. As stated by Defence witness Peter Penfold, there were various civil militias actively working for the restoration of democracy and there was need to coordinate these activities both within these various groups and with ECOMOG. There was also a need for President Kabbah in Conakry to have control over efforts to re-establish his government.[256] There is unchallenged evidence that President Kabbah while in Conakry told Peter Penfold that the CDF will be the organisation to coordinate and the Chairman of the CDF Committee would be Vice President Demby answerable directly to the President with various other patronage to be appointed.[257]

211. The Accused testified that while in Monrovia he was picked up by General One Mohammed of ECOMOG who briefed him that it was for a mission that was of military importance to the situation in Sierra Leone and flew him to Monrovia. He was taken to his boss General Victor Malu who arranged for a meeting the following day and gave him a place to lodge and a vehicle.[258] Hinga Norman was told that some Kamajors were already at Bo Waterside, on the Liberian side of the border across from Sierra Leone. Hinga Norman said he requested a group of Kamajors to be conveyed to attend the meeting amongst including Eddie Massalay who had earlier denounced the military takeover over BBC.[259]

212. The Accused testified that at the meeting held on 17 June 1997 senior Nigerian officers with ECOMOG Liberia stated that they had been instructed by the Head of State of Nigeria to assist all civilian efforts to reinstate the democratic government of Sierra Leone. They further stated that the hunters who knew their terrain and their communities were being told by ECOMOG to assist in anyway they

[255] Transcript, Hinga Norman, pp.27,31, Jan. 25, 2006.
[256] Transcript, Peter Penfold, pp. 26-27, Feb. 8 2006.
[257] Ibid, pg. 27.
[258] Transcript, Hinga Norman, pp. 31-33, 25 Jan 2006
[259] Ibid, pp.33-34

could to make the work of ECOMOG less burdensome.[260] The Accused also said their discussion at the meeting covered logistical supplies including arms and ammunition, food, medicine, transportation by land and air by ECOMOG Liberia and for hunters to facilitate civilian support to ECOMOG Liberia while they were operating inside Sierra Leone.[261]

213. The Accused testified that the official designation of the CDF came about in May 1998 and that a request was made through the Chief of Defence Staff to the government-in-exile to provide financial resources so that the hunters could adequately be taken care of in the 149 chiefdoms.[262] Although Chief Norman was designated the coordinator, there was no one head, each unit, each chiefdom had their own respective civil defence which was headed by the chiefs and sub-chiefs.[263] In answer to a question about there being no centre from which pronouncements came from the CDF, defence expert witness Dr Hoffman said logistically, there was nobody who could occupy that position and there was nothing logistically that could facilitate it.[264]

214. The Accused testified that the information provided by Exhibit 112 (CDF Calendar) under his picture stating that he is the founder of the Kamajors is not true, but there was no way to correct it and that the information on every individual was provided by the Director of Personnel.[265] The Director of Logistics Mustapha Lumeh testified that the information on Exhibit 112 is misleading and that is why the calendars were not distributed.[266]

215. An assessment of the effectiveness or otherwise of Chief Norman's role by Lt. Gen David Richards was that 'he was very determined, kept talking about this was for everybody, not just ECOMOG. And did have a view of some of the detail'. But General Richards supposed he had 'already formed the opinion on his first visit that he was a very effective Minister. He was dynamic. He took decisions and had the

[260] Ibid, p. 36,
[261] Ibid, p.37.
[262] Transcript, Hinga Norman, p. 76, Jan.26, 2006.
[263] Transcript, Dr. Demby, p. 6. Feb. 16 2006.
[264] Transcript, Dr Hoffman, p.100, Oct. 9 2006.
[265] Transcript, Hinga Norman, p.57, Feb. 6 2006.
[266] Transcript, Mustapha Lumeh, pp 90-91 May 5, 2006.

20384

courage of his convictions. He was a Minister who understood not to get into the tactical issues, but to keep at the right level for him, let the military get on and run their own affairs in line with the policy that had been agreed by the government.'[267]

The Prosecution's Allegations of Effective Control over the CDF

216. The Prosecution alleges that the Accused, in his position as the National Coordinator of the CDF, "was the principal force in establishing, organising, supporting, providing logistical support, and promoting the CDF. He was also the leader and Commander of the Kamajors and as such had de jure and de facto command and control over the activities and operations of the Kamajors."[268]

217. The Defence submits that this is erroneous. In suggesting that Hinga Norman was the principal force, the Prosecution is alleging that the First Accused was the primary or the main force in establishing, organising, supporting, providing logistical support and promoting the CDF. The evidence suggests otherwise. In fact there were a number of other individuals and organisations who played an active role in supporting the CDF and specifically in supplying key logistical support to the CDF.

218. The Prosecution itself conceded that the CDF received logistical support from ECOMOG[269] and a number of other sources. It is ludicrous to suggest the Hinga Norman was the principal force in providing logistical support when it is clear from the evidence that in fact ECOMOG, a body formed out of a regional organisation with the support of sixteen West African countries, played a significant role in supporting the CDF in its objective of reinstalling the democratically elected government of President Kabbah[270]. It is also clear that the CDF was receiving support from the American and the British Governments, through ECOMOG[271]. President Kabbah was

[267] Transcript Lt. Gen. David Richards, pp.24-25, Feb. 21 2006.
[268] PTB para. 269, paragraph 13 Indictment.
[269] Transcript, May 8 2005 pg 2 – line 19 – pg 4 line 8: Q. Thirdly, there is no dispute, nor is there any challenge, that the Kamajor fighters received aid from ECOMOG. Again that is something you were telling us about. A. Exactly. Q. What may be in dispute is the period, but in general terms there is no dispute about the fact that indeed the Kamajors in the CDF received aid from a number of sources.
[270] Transcript, Kenneth Koker 20 February 2006, page 57 lines 1-3: "[Daramy Rogers] was mainly with the ECOMOG. Food that was coming through the ECOMOG, it was he and the ECOMOG who had been distributing this food to us, rice."
[271] "The bulk of arms came from ECOMOG" Transcript, Arthur Koroma May 3 2006 pg 43, lines 6-7.

also playing a significant role on diplomatic fronts to ensure that there were logistical supplies coming through to the CDF.[272] It can hardly be suggested that Hinga Norman was the principle supporter of logistics to the CDF.

219. There is also significant evidence which demonstrates that the Accused was not the principal force in establishing, organising, or supporting the CDF in the relevant time frame. In this regard, there is evidence which demonstrates that in fact it was ECOMOG who was playing this principle role.

220. Arthur Koroma, a former CDF administrator, testified that from December 1997 to February 1998 while he was based at Lungi, he had significant interaction with ECOMOG and with General Khobe.[273] In 1998 he received a letter from ECOMOG informing him that the Kenema District CDF was under the 15th ECOMOG brigade and that all operational matters were to be dealt with through them.[274] This witness further testified to requests for ammunition being processed through ECOMOG.[275]

221. The role of the CDF in the attack on Kenema in February 1998 was that the CDF was an auxiliary force to ECOMOG. While the CDF went in front, ECOMOG was clearly in command.[276] Prosecution witnesses confirmed that ECOMOG came into Kenema just after the CDF.[277] The central role of ECOMOG became much stronger after the 10th March 1998 when the government was restored.[278]

222. Another Prosecution witness testified that Hinga Norman seen in Bonthe with ECOMOG officers, but that ECOMOG was continually in Bonthe at that time.[279]

---

[272] There is evidence that the Kamajors in the northeastern corner of Kenema district and the northern part of Kailahun district had direct contact with the government in exile and received supplies directly from there. There is further evidence that the weapons used in the attack on Tongo in January 1998 came directly from the President in Conakry at the time (Transcript, Arthur Koroma, May 3rd, pg 43, lines 6-7).
[273] Transcript, Arthur Koroma, May 3 2006 , pg 26, lines 20-28.
[274] Transcript, Arthur Koroma, May 3 2006 pg 46, lines 13-16. See also Exhibits 135 and 136
[275] See Exhibits 137, 138, 140.
[276] Transcript, Arthur Koroma, May 3 2006 pg 32 lines 21-29.
[277] Transcript, TF2-042, 17 September 2004 pg 97 lines 22-27, Transcript TF2-033, 20 September 2004 pg 27 lines 24-28, Transcript TF2-040, 21 September 2004 pg 33 lines 23-25, Transcript TF2-223, 28 September 2004 pg 102 lines 25-29.
[278] Transcript, Arthur Koroma, May 3 2006 pg 43 lines 1-8.
[279] Transcript, TF2-116, 9 November 2004 pg 31 lines 19-29: A. I saw once Chief Hinga Norman. That was in fact at the Bonthe airfield. He was accompanied by, I think, two ECOMOG officers at that time. I cannot tell

Former British High Commissioner, Peter Penfold, testified to being in Bo and going to the CDF office where he was introduced to Mr Daramy Rogers who briefed him on how the Kamajors, in conjunction with ECOMOG, had mounted a resistance against the junta in Bo.[280] Defence witness Ishmael Koroma stated that after the takeover of Kenema the entire Kenema District, including SS Camp, was under the control of ECOMOG under a Lieutenant Uma.[281]

223. This evidence and others demonstrates that clearly Hinga Norman was not a principal force in establishing, organising, or supporting the CDF. Further details as to the logistical support and promotion of CDF are set out below.

Provision of Logistical Support and Promotion of CDF

224. The Accused said he was told by the ECOMOG Chief of Staff to Gen. Malu, that he was always disposed to requests being made if and when they were needed in the areas of arms, ammunition, food, medicine, transport and the sustaining requirements for transports.[282] As far back as August 1997[283], ECOMOG started supplying the CDF with arms and ammunition and funds for rations, condiments and miscellaneous expenses. At various phases in the conflict ECOMOG supplied arms and ammunition to the CDF as shown in Exhibits 137, 139, 140 and 158. In his evidence, Arthur Koroma testified that from the 10th March 1998, all the arms they used came from two sources, the bulk of which came from ECOMOG in the form of rifles and ammunition while in Gendema they received their arms and ammunition

precisely whether he travelled by plane or helicopter, but it was by air. At that time we are in a situation of receiving ECOMOG, so any time we hear the sound of a plane or helicopter, almost half of Bonthe would run to the airstrip to see whether ECOMOG had arrived, but this time when we went -- I went there personally, because we were all eager to receive ECOMOG -- we only saw Chief Hinga Norman and the two ECOMOG officers.; Transcript, TF2-071, 11 November 2004 pg 93 line 25– pg 94 line 14): Q. Okay. Did you ever see any other of the Kamajor leaders at the highest level in Bonthe? A. Yes. Eight days after the incident occurred the soldiers fled and the Kamajors took over Bonthe, Chief Sam Hinga Norman came by helicopter with two ECOMOG officials on board.

[280] Transcript, Peter Penfold, 8 February 2006 pg 44 lines 14-20 , See also Transcript Kenneth Koker, 20 February 2006,pg 50 lines 9-16 "Was anything done by ECOMOG in relation to the organisation of the Kamajors in Bo? A. Yes, sir. Q. What was done? A. Because during that time we were in chiefdom orders. So the ECOMOG, they decided to form us into battalions. Q. Who was the head of your own battalion? A. Augustine Sule Ngaoujia."

[281] Transcript, Ishmael Koroma, 23 February 2006 pg 26, lines 6-11.

[282] Transcript, Hinga Norman, p.37-38, Jan 25 2006.

[283] Exhibit 157 "Periodic Report, Civil Defence Force, Kamajors, dated August 1997".

from the other main source - the government in exile.[284] Mustapha Lumeh also testified that he got logistics from two places, from Lungi where he received arms and ammunition from Gen Khobe and from Monrovia.[285]

225. The Accused described his interaction with ECOMOG as coordination which primarily meant he was to receive the support, whether in the form of arms, ammunition, food, and transport from ECOMOG and then have it delivered to the men on the ground through their commanders. This was done by himself and a MS Kallon as Administrator who received and delivered supplies to Kamajors to assist ECOMOG commanders.[286] The Accused said his duty in addition to that of being a government minister, was to encourage the various chiefdom hunters and other civilian organisations in the effort of restoring the elected government of the people of Sierra Leone.[287]

226. As defence expert witness Dr Hoffman puts it, there were lots of different sources of weapons. In some cases, individuals are using single-barrel shotguns that were the historic firearms of the Kamajors. People are getting weapons from ECOMOG at various points and often they were capturing them.[288]

227. The Accused testified that General Khobe visited Base Zero to discuss the provision of conventional weapons and the Accused also made a corresponding visit in October 1997 to Lungi. At that time he was told that there had been an arrangement by the government to procure arms and ammunition to be used by hunters and that the request was made for the preparation of trainers.[289] The Accused further stated that around November 1997, he was shown a huge quantity of weapons, in a store at Lungi by Gen. Khobe, amongst which were explosives, rocket propelled mortars, general purpose guns and AKs and these were all to be used by the hunters.[290] This piece of evidence was corroborated by Dr. Albert Joe Demby.[291]

---

[284] Transcript, Arthur Koroma, pp. 43-44, May 3 2006, See also footnote 276.
[285] Transcript, Mustapha Lumeh, pp75-76, May 5 2006.
[286] Transcript, Hinga Norman, p. 41 & 45, Jan. 25 2006, p.75, Feb. 6 2006.
[287] Transcript, Hinga Norman, p.3, Jan. 26, 2006.
[288] Transcript, Dr Hoffman, p.120, Oct.9 2006.
[289] Transcript, Hinga Norman, p 38, Jan 26, 2006,see Transcript Mustapha Lumeh, p.76, May 5 2006.
[290] Ibid, p.96. Feb.6 2006.
[291] Transcript, Dr Demby, p.32, Feb.10.

228. In his evidence TF2-008 alleged that in a meeting at Talia Hinga Norman told them that he got arms and ammunition from his friend General Abdu One Mohammed, an ECOMOG General[292]. The Accused said the request for the supply of conventional weapons by the government came from the hunters and that is what he conveyed to Gen. Khobe and that he travelled to the ECOMOG Chief of Staff in Liberia to make him understand that hunters will be carrying such weapons under the command of ECOMOG.[293]

229. TF2-014 in his evidence alleged that the First Accused told them that President Kabbah had failed to give them arms and ammunition and that President Kabbah didn't believe in the Kamajor movement and that he believes only in the international community for them to fight the war. TF2-014 further alleged that the First Accused told them that all food, arms and ammunition that the national coordinator brought, came from one of his friends, General Abdu One Mohammed of ECOMOG. The Accused rebutted this evidence as false and misleading as he could not have told TF2-014 that those arms and ammunition came from a friend since the arrangement had been put in place by the President of Sierra Leone.[294]

230. The Accused testified that welfare logistics, specifically rice and money went to hunters after the formation of National Coordinating Committee (NCC) every month from July 1998 to 2002.[295]Exhibit 128 details how the government supplied rice to CDF in November 1999.

231. This is corroborated by the former Vice President Dr. Albert Joe Demby and the Director of Logistics Mustapha Lumeh who testified that the NCC saw to it that support in terms of rice was increased[296]and that supplies to the District Administrators in respect of arms and ammunition went straight to General Khobe.[297]

---

[292] Transcript, TF2-008, p.41& 48, Nov. 16, 2004.
[293] Transcript, Hinga Norman p.45 January 26 2006.
[294] Transcript, Hinga Norman pp 35-36, Jan. 31 2006.
[295] Transcript, Hinga Norman, pp 24, 26, 28, Jan. 27 2006 & p. 96, Feb. 6 2006.
[296] Transcript, Mustapha Lumeh, pp 82-83, May 5.2006.
[297] Ibid p.84.

232. The Accused testified that he was informed by Hon. Pujeh Momoh that the amount of $10,000 (US Dollars) had been given to him by Lady Patricia Kabbah to be conveyed to him on behalf of the hunters. The Accused said he was helicopter-lifted from Base Zero to Monrovia where he received this amount which he used to purchase a few needs and return to Base Zero. There he informed the Chairman and Members of the War Council of the transaction and handed over the supplies and balance to the Chairman.[298] The Accused said he was told that the money had been sent by "Tegloma" a group in the United States, to President Kabbah as support for all those who were assisting in the restoration of democracy including hunters.[299]

233. Defence witness Peter Penfold testified that before he was about to go on leave in December 1997, he visited the President who showed him a copy of draft contract which had been sent to him by a mining firm. The contract, in essence, was saying in return for certain mining concessions, equipment and training would be provided by a firm called Sandline for use by President Kabbah's forces.[300] Mr Penfold said the Sandline contract allowed for a small amount of arms and ammunition, and that those arms and ammunition arrived at Lungi at the end of February or March 1998 and they were held by ECOMOG.[301] Vice President Demby corroborated this, stating that Gen. Khobe showed him this cache of arms stored at a secret location in Lungi.[302]

234. There is unchallenged evidence from the Director of Logistics Mustapha Lumeh that while in Liberia ECOMOG donated to the CDF logistics.[303] He further testified that the CDF directly requisitioned for arms and ammunition from ECOMOG in pursuit of the war as an allied fighting force and General Khobe was the Chief of Defence Staff and in charge of military matters.[304] The Districts were under various ECOMOG operational commands as indicated in Exhibits 135 and 136 (detailing Kenema under 15 ECOMOG Brigade). Under cross examination, the Accused

[298] Transcript, Hinga Norman p. 12, Jan. 30, 2006.
[299] Ibid p.15 Jan. 30, 2006.
[300] Transcript, Peter Penfold, pp. 40-41, Feb. 8, 2006.
[301] Ibid p. 42.
[302] Transcript Dr. Demby, p.32. Feb. 10 2006.
[303] Transcript of Mustapha Lumeh, p.24, May 8 2006.
[304] Ibid p. 68.

confirmed that the Kamajors got their weapons from ECOMOG (Exhibits 137, 138, 139, 140) or from General Khobe who was in charge of ECOMOG Freetown.[305]

The Prosecution's allegations regarding the Accused's Effective Control Over all Units

235. The Prosecution alleges that the CDF was "an organised armed force comprising various tribally based traditional hunters"[306] and that the first accused was the National Coordinator of the CDF. The Prosecution is essentially charging that the CDF was a highly organised and structured military organisation with the first Accused as the apex.

236. To establish this, the Prosecution has to prove beyond a reasonable doubt that all the Kamajors, and less dominant groups including the Gbethis, the Kapras, the Tamaboros, and the Donsos were integrated into an organised military structure, over which the Accused was the commander. The Prosecution has failed to do this.

The Accused Was Not the Overall Commander – He Had No Control Over Self Organized Groups Of Kamajors

237. The Prosecution alleges that the First Accused was "also the leader and commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of that group within the CDF. In the pursuit of accomplishing these tasks he both issued orders and received reports operation operations from subordinate commanders.[307]

238. The Prosecution's case is premised on the position that every single kamajor and traditional hunter in Sierra Leone was a subordinate of Mr Norman. This is an extreme premise which is false. The evidence has shown that the groupings of Kamajors were under the control of the chiefs. And often there were Kamajors who appeared to be under the control of no one.

The conditions for command and control did not exist

[305] Transcript, Hinga Norman, p.96, Feb. 6 2006
[306] Indictment, paragraph 6
[307] PTB para 269 and para 13 of the Indictment.

239. The Prosecution alleges that the "CDF was an organised armed force comprising various tribally-based traditional hunters".[308] Overwhelming evidence by both the Prosecution and the Defence is that the Kamajors emerged from the chiefdoms in response to the violent attacks by the RUF and the AFRC. These were self organised groups that were essentially autonomous and poorly organized[309]. The following paragraphs provide further detail on the command and control of the Kamajors.

Command and Control of the Kamajors and CDF up to May 1997

240. In his evidence, the former vice President testified that the "kamajor movement" started at the village level then the entire chiefdom. At the village level a leader/commander was appointed, usually from among ex-service men in that area. At the chiefdom level, the paramount chiefs and their sub-chiefs brought all of Kamajors together under one umbrella called 'Chiefdom Kamajors'. They were then under the chiefdom's command and control, and supplied food and logistics under chiefdom authorities led by their Paramount Chiefs. This was the case up to 1994.[310]

241. All the fighting by the Kamajors was improvised and on a voluntary basis. As Dr Demby stated:

> "... The Kamajor movement was a voluntary mass mobilisation of men, women and children from all walks of life who took up defensive weapons: Shotguns, knife, axe, spear, stick, et cetera, to beat back their enemies -- Q. By "their enemies", what do you refer to? A. Rebels, sobels, juntas, which I will, as time goes on, tell you that. But those that came to attack them in their localities. So to beat back their enemies in the defence of their lives, their families, their properties and their community. That is the group that we

[308] Indictment, paragraph 6.
[309] If there was any organization of the Kamajors it was done through ECOMOG. See for example Transcript, Kenneth Koker, February 20 2006 pg 50 lines 9-16: "Was anything done by ECOMOG in relation to the organisation of the Kamajors in Bo? A. Yes, sir. Q. What was done? A. Because during that time we were in chiefdom orders. So the ECOMOG, they decided to form us into battalions. Q. Who was the head of your own battalion? A. Augustine Sule Ngaoujia."
[310] Transcript, Dr Demby, p.7, Feb. 10 2006.

called Kamajor movement. And it became a pride of every man, woman and grown-up child to contribute in the defence of his community -- of the community."[311]

242. The Kamajors have always worked directly under and for the interest of their chiefs as illustrated in Exhibit 144. This conduct is best described in humanitarian law as a *'levee en masse'*, i.e. the rule that civilians spontaneously taking arms on the approach of the enemy and in the absence of regular forces have combat status and a right to participate directly in hostilities.[312] This provision makes it clear that a State is responsible for the conduct, for example violations of international humanitarian law, of such civilians.

243. Contrary to the evidence of some prosecution witnesses that Hinga Norman was the founder of the Kamajors, there is unchallenged evidence from Hinga Norman himself[313] and various witnesses like Peter Penfold who disagreed with Exhibit 112 that Hinga Norman was the founder of the Kamajors. Mr Penfold said his understanding of Kamajors was that they had been called together by their paramount chiefs within the chiefdoms and each chiefdom would have a group who were known as Kamajors.[314] Vice President Demby gave a very detailed analysis of the origins and role of the Kamajors, corroborating the evidence of the First Accused.[315] Likewise Defence Expert witness Dr Hoffman[316] testified that the people leading this effort were community elders, particularly men, who participated collectively in decision making and who came together to discuss ways to protect themselves. This is indicative of the fact that the Kamajors were under the local chiefs.

244. It is equally important to note that after initiation most Kamajors never had weapons. Ishmael Koroma testified that the section chiefs were called by paramount chiefs, that those who had single barrel guns would give them to the Kamajors so that they could prosecute the war and they also gave money to buy single barrel

[311] Transcript. Dr Demby, 10 February 2006 pg 6 lines 6-17.
[312] Art. 4(A)(6) of Convention and Art. 2. of the Hague Regulations, see also Article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001.
[313] Transcript, Hinga Norman, p. Jan. 25 2006.
[314] Transcript, Peter Penfold, p. 44, Feb. 9 2006
[315] Transcript, Dr. Demby, p.7, Feb. 10 2006
[316] Transcript, Dr Hoffman, p.65 Oct 10 2006.

cartridges.[317] It was a collective community effort making the best of what resources were available.

Command and control from May 1997 to February 1998

245. From May 1997 to February 1998, command and control of the Kamajors lay with the chiefdom authorities and ECOMOG.[318] The First Accused had no active role to play in the fighting. However he was kept informed because he was the coordinator and needed to know how the hunters were assisting ECOMOG in the field.[319] Various witnesses testified that at all material times, together with ECOMOG soldiers, they would go out to fight and they fought along side ECOMOG under its command.[320] Under cross examination, the Accused testified that as coordinator, his role was not to initiate attacks on towns or villages in Sierra Leone[321] and that while in Talia he gave no orders that Kamajors should attack towns or villages.[322] This piece of evidence was corroborated by Arthur Koroma who testified that he never saw Chief Norman in combat activities and he never came close to the frontlines.[323] Arthur Koroma testified that by November 1997, there was a significant amount of involvement with ECOMOG in the sense that all the food, the arms and ammunition they used were provided by ECOMOG and even the wounded in hospital were taken to Monrovia and treated in ECOMOG hospitals.[324] Mr Koroma further testified when the Kamajors were together with ECOMOG, they were always an auxiliary to ECOMOG, and ECOMOG was in command. But they, the Kamajors, led the way because they knew the terrain, the people and the language.[325]

246. In his evidence, TF2-201 alleged that the War Council did not function properly. TF2-011 also testified that most of the decisions of the War Council were not implemented because whenever a decision was taken, Norman would confer with

[317] Transcript, Ishmael Senesie Koroma, p.38, Feb. 22 2006.
[318] Transcript, Hinga Norman, p.19, Feb. 6 2006: Under cross examination, witness said after training in Talia, the First Accused addressed the Kamajors and told them 'go into the land. Operate under the advice and direction of ECOMOG troops. They are the ones that will give you the needs for your services'.
[319] Ibid p. 44,
[320] Transcript, Osman Vandi, p. 88 Feb. 17 2006; Transcript Arthur Koroma, p. 16, May 3 2006.
[321] Transcript, Hinga Norman, p.83. Feb.6 2006.
[322] Ibid p.86-87.
[323] Transcript, Arthur Koroma, pp 41-42, May 3 2006.
[324] Ibid p. 16.
[325] Ibid p.31-33.

Mr Moinina and Mr Kondewa and whatever those three decided was implemented. This witness further alleged that the War Council could not force Norman to implement its decisions and that it did not have control over the Disciplinary Committee, headed by Dr. Jibao. TF2-201 also stated that the Kamajors in Base Zero were more loyal to Norman and the initiators than to the Chiefs.[326]

247. The Accused rebutted these allegations when he testified that as far as operational decisions were concerned, it was a matter of advice between the War Council and himself. In the areas before ECOMOG commanders became involved with the activities of the various hunters groups, and eventually the CDF, it was a matter for discussion either at Base Zero with all War Council members or in Guinea with the War Council members in Conakry. Whenever it was decided that a particular action was to be taken by commanders in the field against enemy forces, the directives were given at meetings of the War Council.[327]

248. Contrary to allegation by TF2-011 that Kamajors were more loyal to Norman and initiators, Mustapha Lumeh testified under cross-examination that there was no central command in Base Zero other than the War Council. The War Council were the policy makers for the execution of the war itself, the planning of the war or the implementation of policy was done by the commanders in the field.[328] Mr Lumeh further testified that at Base Zero the undisputed leader was the Chairman of the War Council and Hinga Norman was seen as the government representative and coordinator of the Civil Defence Forces.[329] He emphasised the control of the War Council, stating that it was such a powerful organisation at Base Zero and nobody could have interfered with their work.[330]

249. In his evidence TF2-014 alleged that the First Accused had absolute power at Base Zero, even over the War Council. He also said that when the War Council took decisions, the Accused reversed them. The Accused denied these allegations and

---

[326] Transcript TF2-011.
[327] Transcript, Hinga Norman, p.18, Feb. 2 2006
[328] Transcript, Mustapha Lumeh, pp.7-8, May 8 2006
[329] Ibid p.13.
[330] Ibid p. 22.

stated that the War Council was set up with powers and authority to advise him especially as he was far away from the Minister of Defence under whom he served[331].

250. Under cross examination, Ishmael Senesie Koroma, testified that the attack on Kenema in January/February 1998 was ordered by ECOMOG under Lt. Uma[332]. Under cross examination, Dr. Joe Demby, testified that General Khobe was in charge of the CDF before ECOMOG arrived because he had been appointed Chief of Defence staff and that made him in charge of the CDF and all the allied forces.[333]

251. In his evidence the former Vice President, testified that when General Khobe was appointed Chief of Defence Staff, he had responsibility for all military matters in the country. He was responsible for all deployments, logistical support, arms, ammunition, and food.[334] He further testified that the main purpose of the document shown as Exhibit 134 was that after the return of the democratically elected government, the government wanted to have full control over the way in which the war was being fought. The forces available to government were ECOMOG and CDF, so a delegation was composed to assess the military situation in the East of the country and make recommendations as to how the Government should proceed.[335] In his evidence, the Accused testified that when Gen. Khobe was appointed Chief of Defence Staff, he was introduced to him on the 17th of March 1998 as Deputy Minister of Defence and he had direct interaction with him in that capacity. He further testified that the custody, control and distribution of weapons were the responsibility of General Khobe.[336] As Arthur Koroma put it, when the government returned on the 10th March 1998, all matters relating to combat, fighting, logistics and everything was actually done in conjunction with ECOMOG, and it was the ECOMOG Brigade commander or his subordinates who showed them targets, what to do and what not to do.[337]

---

[331] Transcript, Hinga Norman, pp 44-45 Jan. 30 2006.
[332] Transcript, Ishmael Senesie Koroma, pp.23-24, Feb. 23 2006.
[333] Transcript, Dr. Demby, p.31, Feb. 15 2006.
[334] Transcript, Dr. Demby, p.52, Feb. 10 2006.
[335] Ibid, pg 55, Feb.13 2006.
[336] Transcript, Hinga Norman, p.27 January 27 2006.
[337] Transcript Arthur Koroma, p.42, May 3 2006.

252. Exhibits 135 and 136 also demonstrate that the CDF was under the command and control of ECOMOG and all communications and logistics due were delivered through the chain of command. Exhibit 105, a Report of UN Secretary General[338] corroborates the fact that CDF was under the command and control of ECOMOG. This document confirmed that there was already a functioning government in Sierra Leone and the powers to give orders resided with the government and ECOMOG, certainly not the First Accused.

253. Defence witness Kenneth Koker testified that when ECOMOG captured Bo Town, they called a general meeting, One General Buhari Musa of ECOMOG told the Kamajors that from that moment no kamajor should do anything by himself, that they had to take orders from ECOMOG.[339]

254. As stated in Exhibit 159[340] by Major-General Abdu One Mohammed who was the Chief of Staff ECOMOG and Commander of the Nigerian Contingent in both Liberia and Sierra Leone, ECOMOG collaborated with the CDF operationally especially in the Bo-Kenema axis, supplying arms and ammunition, fuel, food and cash.

255. Under cross examination, Hinga Norman testified that while in Liberia, ECOMOG exercised control over the Kamajors who were on Liberian side of the border. It was from there that arrangement for the coordinated operation was put in place.[341]

256. In his evidence, Mohammed Turay Collier testified that Hinga Norman did not have control of any Kamajors in Talia. Every Kamajor had his own master.[342]

257. At the Chiefdom level, defence witness Paramount Chief Joseph Ali-Kavura Kongomoh II testified that the functions of the command structure of the chiefs in Moyamba was to guide and then give command to the Kamajors or mobilise them

---

338 Report of the UN Secretary General, dated 14th August 1998, p. 4.
339 Transcript, Kenneth Koker, pp. 50-51, Feb 20 2006.
340 Exhibit 159, statement of Major-Gen. Abdu One Mohammed, dated 2nd March, 2006.
341 Transcript, Hinga Norman, p. 76 Feb. 6. 2006.
342 Transcript, Muhammed Turay Collier, p. 91, Feb.16 2006.

whenever there was an attack elsewhere within the district.[343] Every Chiefdom where there were Kamajors had their leaders called chiefdom commanders and district commanders. Under cross examination Mustapha Lumeh described the CDF as a loose organisation of various command posts, that any attack on any particular area was planned and directed by that particular area.[344]

258. Under cross examination, Dr. Joe Demby testified that from May 1997 to March 1998, the CDF was under the command of their paramount chiefs and sub chiefs.[345] Kamajors remained loyal and respectful to the chiefs until the time the war ended[346] but that between 1998 and 1999, the bodies that ensured that laws were obeyed and law and order maintained were the police and ECOMOG.[347]

259. Various witnesses testified that ECOMOG had control wherever Kamajors operated and Kamajors would do nothing that ECOMOG did not approve of.[348]

260. In their evidence TF2-222 and TF2-005 alleged that there were specific instructions for the Tongo operation from Chief Norman who allegedly said that "whosoever takes Tongo and keeps it wins the war."[349] This was rebutted by Chiefdom commander Brima Sei who testified that he didn't know anything about the Tongo attack being planned in Base Zero and that the planning was done in his own chiefdom.[350] Brima Sei further testified that the Kamajors had organised themselves to came together to protect and fight for their lives. Siaka Lahai testified that at the time of the attack on Tongo they were working with the War Council.[351]

---

[343] Transcript PC. Joseph Ali-Kavura Kongomoh II, p. 51, June 1 2006 and Transcript Kenei Torma, p. 88 & 98, June 2 2006.
[344] Transcript, Mustapha Lumeh, p.89, May 5 2006.
[345] Transcript, Dr. Demby, p.32, Feb. 15 2006
[346] Transcript, PC Joseph Ali-Kavura Kongomoh II, P.60, June 1 2006
[347] Ibid, p.73.
[348] Transcript, Mohammed Kineh Swaray, pp. 52-53, May 26 2006; Transcript Ishmael Senesie Koroma, pp.23-24, Feb. 23 2006.
[349] Transcript, TF2-222, p. 10, Feb17 2005 and Transcript TF2-005, p 105, Feb. 15 2005
[350] Transcript, BJK Sei, p.14, May 16 2006.
[351] Transcript, Siaka Lahai, pp.39-40, May 17 2006.

Command and Control from March 1998 to December 1999

261. The Accused said the Kamajors were directly under the control of the Chief of Defence Staff of the Sierra Leone Army after the reinstatement of the government of President Kabbah - beginning from the 10th of March 1998 right up to when 'di war don don' statement was made. The Chief of Defence Staff was working in liaison with ECOMOG forces and the hunters operated directly under the military orders of whichever forces were in the area.[352] The Accused stated that he received a letter signed by President Kabbah establishing the formation of a body called National Coordinating Committee (NCC) chaired by the President's appointee, the then Vice President, Dr. Albert Joe Demby (see Exhibit 120) to handle all policy matters relating to the National Militia/CDF.

262. As a follow up, Exhibit 123[353] the organogram of the CDF was prepared in fulfilment of the terms of reference of Exhibit 120. Exhibit 129 explains how the War Council was abolished by the National Coordinating Committee by March 1999. Exhibit 130 explains how the NCC increased logistics supply of rice/cash to support CDF operations. In Exhibit 131, the NCC took a decision that the CDF War Front food would go to ECOMOG commanders for distribution to the CDF fighters and the CDF food allocation were being handled by District officers and chiefs in the Northern Province.[354]

263. The Accused testified that from that time the Chief of Defence Staff was the direct coordinator between the government of Sierra Leone and ECOMOG and all logistical support to CDF was channelled through the National Coordinating Committee.[355] This evidence was corroborated by Joe Demby and Lt. General David Richards.

---

[352] Transcript, Hinga Norman, p. 83, Jan. 26, 2006.
[353] Exhibit 123 sets out the hierarchical structure of the CDF.
[354] Exhibit 131, p.2. para. B.
[355] Transcript, Hinga Norman, pp 24-25, Jan 27 2006.

264. Defence witness Peter Penfold testified that the British government did not directly supply logistics to CDF but provided assistance to ECOMOG in the form of vehicles, communication equipment, paid for helicopter, training and ammunition.[356]

265. Defence witness Lt. Gen David Richards stated that when he visited Sierra Leone in January 1999 he worked with ECOMOG Brigadier Gen. Khobe who had tactical control of the government forces (CDF and remnants of the loyal SLA), and also Chief Hinga Norman who was the Deputy Minister of Defence.[357] He further said 'Chief Norman might establish policy, but how it was spent in detail, how the forces were organised, that was all Gen. Khobe's job.'[358]

266. As Gen. David Richards rightly said under cross examination, Chief Norman was an inspirational figure head and that had an effect on the people's morale but, the hour-to-hour control of the CDF was exercised by Gen. Khobe, under what the government had established as a coherent defence strategy.[359]

Appointments to Positions within the CDF

267. During the time the War Council was in operation an Appointment Committee existed that interviewed people and took decisions on promotions and appointments of individuals. The Chairman of the Appointment Committee was Alhaji Daramy Rogers. A recommendation was forwarded to First Accused and the War Council's advice would be sought and the appointment would be either approved or rejected. These appointments did not happen below the battalion level.[360]

268. This fact was corroborated by Dr. Albert Joe Demby who testified that on the 19 September 1997, while he was at Lungi, Eddie Massalay told Hinga Norman that he had not been appointed commander of the Kamajors Southern Region, but Daramy Rogers had been appointed. Dr Demby said Chief Norman responded in his presence that the appointments to positions at Base Zero are by the Appointment Committee of

[356] Transcript, Peter Penfold p. 13, Feb, 9, 2006.
[357] Transcript, Lt. Gen. David Richards, p. 14, Feb. 21 2006,
[358] Ibid p. 21.
[359] Ibid p. 67.
[360] Transcript, Hinga Norman, p.42, Feb. 6 2006. See also Exhibits 10 and 59.

the War Council and that incidentally Daramy Rogers was the Chairman of the Appointment Committee.[361]

269. Various witnesses testified how they were appointed by the chiefdom commanders or by the War Council.[362] Under cross examination, Hinga Norman testified that the Chairman of Promotions and Appointment designated or appointed the commander responsible for the attack on Koribundo.[363] This is contrary to the evidence of TF2-014 that he was appointed National Deputy Director of Operations by Hinga Norman, and that he took general and specific instructions from the First Accused and passed it on to the war front. This piece of evidence has been rebutted by various witnesses including the First Accused.[364] Under cross examination, the Accused denied having control over who became a commander.[365]

270. In his evidence, Mohamed Kaineh testified that the War Council appointed him to the position of Director of War, Kailahun District and also appointed the Vandi Songo III, Director of Intelligence, Easter Region, Jambawai Regional Coordinator, Easter Region[366] In his evidence, Kenneth Koker testified that they initially operated under chiefdom orders, and ECOMOG subsequently organised them into battalions. Augustine Ngaoujia was appointed the head of his battalion and Mr Koker became the deputy.[367]

271. Arthur Koroma testified that in May 1998 Vice President Demby decided that the CDF should be administered on the basis of Districts whereupon he was elected as District Administrator for Kenema.[368]

Giving and Receiving Reports and Orders about Operations from Commanders

---

[361] Transcript, Dr. Demby, p. 30, Feb. 10 2006.
[362] Transcript, Ishmael Senesie Koroma, p. 23, Feb. 21 2006, Transcript Hinga Norman, pp.106-107. Feb, 6 2006; Transcript Kenei Torma, p.55, June 2 2006.
[363] Transcript, Hinga Norman, p. 100, Feb. 6 2006.
[364] Transcript, Hinga Norman, pp 37-38, Jan 31 2006.
[365] Ibid, p. Feb. 6 2006.
[366] Transcript, Mohamed Kaineh, p. May 19 2006.
[367] Transcript, Kenneth Koker, pp.52-53, Feb. 20 2006
[368] Transcript, Arthur Koroma, pp. 40-41, May 3 2006.

272. The Prosecution alleges that Hinga Norman was in regular communication with other commanders at the various battle fronts where the CDF and kamajor combatants were deployed. The Defence submits that this is entirely not the case.

273. Exhibit 157 is indicative of the fact that Kamajors started sending their periodic reports to ECOMOG as far back as August 1997. Also, in his evidence, TF2-079 testified that he left Tongo with a group of Kamajors to Talia to hand over a situation report of Tongo and that upon arrival they met Fofana who told them that Norman had gone to Liberia. As a result the report was given to Siaka Lahai. Siaka Lahai testified that he never gave any report for onward transmission to Base Zero. This was corroborated by Keikula Amara who testified that he sent his reports to his superior BJK Sei and that he was aware that BJK Sei's superior was Chief Amara Gado.[369]

274. TF2-190's testimony was that he used to receive orders from Hinga Norman and that when they were ordered by Norman to reinforce the Kamajors in Moyamba, Norman asked the logistical officer to supply them with fuel, arms, and a vehicle and ammunition.[370] This testimony is not consistent with his statement where he said "we got orders from the War Council. Mr Lumeh would bring orders to us…whatever the War Council would say we would do it."[371] This inconsistency should be noted and less weight given to such unreliable evidence.

275. Various witnesses have testified that Hinga Norman never gave orders to commanders in the field but instead they received orders from the War Council.[372] Defence witness Haroun Collier testified that the Death Squad took orders from the War Council and that no reports were ever made specifically to Hinga Norman. He further said that Exhibit 153 was false because as he himself was Secretary he should have written it.[373] In his evidence TF2-011 alleged that the War Council did not receive reports at Base Zero from commanders but reports went to straight to the Coordinator. This evidence has been rebutted by Lansana Bockarie who said they

369 Transcript, Keikula Amara, pp 63-64, May 18 2006.
370 Transcript, TF2-190.
371 Ibid, p. Feb. 10, 2005
372 Transcript, Haroun Collier, pp 5-6, May 15 2006.
373 Transcript, Haroun Collier p.6 May 15 2006.

heard of the position of National Coordinator but and CDF Administrator but there was a War Council so they reported to it.[374]

276. The Accused testified that President Kabbah did not give him orders on how to conduct the war and that his appointment was solely to coordinate -- not to command and control the war.[375]

277. Under cross examination, Haroun Collier as deputy commander of the Death Squad[376], refuted the evidence of TF2-008[377] and that of TF2-014, that the Death Squad was answerable to Hinga Norman and Allieu Kondewa. The witness equally disagreed with TF2-068[378] that the Death Squad was under the control of Hinga Norman, Fofana and Kondewa and finally refuted the evidence of TF2-190 that he was only finally answerable to Hinga Norman.

Investigation and Disciplining of the Kamajors and CDF

278. The Kamajors and the CDF were investigated and disciplined by the government and ECOMOG for any violations as CDF members were under their command and control. Cases of investigation range from Exhibits 132A and 132B concerning an alleged attack on Marima village was subsequently investigated by the government.

279. Where harassment was alleged against the Kamajors as in the case of Exhibit 133 concerning Fogbo village, the allegation was investigated. Under cross examination, Dr. Albert Joe Demby testified that he conducted investigations and he kept records of such investigations.[379]

280. In his evidence, Arthur Koroma agreed that some CDF members fell short of proper behaviour on several occasions. He cited, as an example one commander James Kallon in Joru who had problems with the chiefs in the township and a

[374] Transcript,Lansana Bockarie, p.15, June 1 2006.
[375] Transcript, Hinga Norman, pp. 25-26, Feb. 6 2006.
[376] Ibid, pp 16, 42.
[377] Transcript, TF2-008, pp. 60-61, 16 Nov. 04 2006.
[378] Transcript, TF2-068, pp.90-91, 17 Nov. 04 2006.
[379] Transcript, Dr. Demby, p 47, Feb. 16 2006

complaint was forwarded to the Senior District Officer in Kenema for disrupting a dance and misbehaving to the chiefs. Mr Kallon was investigated and sent to the state prison.[380]

281. According to Dr. Joe Demby, the government investigated the killing of civilians at the checkpoint, allegedly committed by Kamajors, but that their investigation came to a different conclusion.[381] Also investigated was information that the CDF killed their captives but the investigation showed that there were detention centres at the Islamic College, Magburaka.[382] The witness further testified that reports were made to President Kabbah that Kamajors had seized houses belonging to other people. The President asked that the Minister of Local government and himself to go to Bo and Kenema to investigate and to see that the people got their houses. This was after the return of the government.[383] Also investigated was the allegation that the Kamajors locked up people and burnt them in their houses.[384]

282. Various witnesses also testified how the War Council at Talia investigated and disciplined Osman Vandi for alleged misconduct.[385] TF2-011's testimony that the War Council took decisions to punish Kamajors but they were never followed or carried must be viewed in light of other testimony which suggested that there were instances were the War Council investigated and disciplined the Kamajors.[386]

283. ECOMOG also investigated and disciplined Kamajors who allegedly committed crimes. In the case of Exhibit 89[387], the ECOMOG Commander for Kenema under whom the CDF operated investigated a CDF member.

284. There is equally the case of Exhibit 145 whereby a police officer was investigated by ECOMOG in September 1998, for alleged atrocities committed during

[380] Transcript, Arthur Koroma
[381] Transcript, Dr Demby p.33, Feb. 13 2006
[382] Ibid.
[383] Ibid pp.33-34.
[384] Ibid p.31.
[385] Transcript, Hinga Norman, p.34, Jan 30 2006; Transcript Brima Tarawally, p.53, October 5.
[386] Transcript, Brima Tarawally, pp. 53-54, October 5 2006.
[387] 20/26 Dec. 1998, entitled 'Handing over of Mr KBK Magona National Task Force Commander Civil Defence Force and the Report of Investigation carried out on his Activities in Kenema"

the junta era. In the above cases the ECOMOG commander put the Vice President on notice by providing some specific information.

285. From the above analysis one can conclude that the Kamajors and the CDF were under the '*overall control*' of the government of Sierra Leone and ECOMOG forces. In *Tadic,* the Appeal Camber ruled that:

> "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct by the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to the members of the group, instructions for the commission of specific acts contrary to international law".[388]

Communication with Commanders in the field:

286. The Accused moved to Talia, Base Zero in October 1997 and stayed there until the end of 1998 with intermittent shuttle between Talia, Monrovia and Conakry. The Accused had no satellite communication facility between him and the Kamajor commanders in the field who were working with ECOMOG Commanders.[389] The Accused testified that it "took one to know what was going on as long as it took somebody to walk" -- anything between five to seven days.[390]

287. In his evidence defence expert witness Dr Hoffman, testified that communication capacity did not exist.[391] Dr. Hoffman further testified that as a general rule, communication was extremely difficult, and it was generally done by individual couriers as there was no functioning phone system in rural communities.[392] Communication was extremely difficult to the extent that while at Talia, the First Accused was only made aware that ECOMOG was in Sierra Leone beyond being

[388] Tadic Appeal Judgment, July 15, 1999, para 131.
[389] Transcript, Hinga Norman, p.2, Jan. 30 2006
[390] Transcript, Hinga Norman, p. 107, Feb. 6 2006
[391] Transcript, Daniel Hoffman, p. 99, October 9 2006
[392] Ibid, p.107

based at Lungi through the BBC. There was no radio link between ECOMOG and the First Accused. The First Accused also received information from runners who came from Kenema and Tongo and told him the extent to which ECOMOG had advanced.[393].

288. In his evidence, the Prosecution's Military Expert testified that there were very few, if any radios being used, so the communications had to be run by hand. This could either be by motor bike or moped in the areas controlled by the CDF, or on foot through the jungle in other areas.[394] However, the expert also testified that communications throughout this period and throughout this region were good and that the high command in Talia understood what was happening on the ground.[395] This is inconsistent and implausible. As defence expert witness Dr Hoffman puts it "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 a large number of the Kamajors had simultaneous access".[396]

289. The Accused testified that a satellite phone was provided for him at Base Zero by President Kabbah to facilitate communication between the Accused and the President and the ECOMOG Chief of Staff in Liberia. Hinga Norman arrived in Talia in September 1997 and the phone arrived in around November 1997[397]. Hinga Norman said that he communicated with President Kabbah regularly to communicate operations that were going on to reinstate his government and democracy in Sierra Leone. The President stated that his concern was whenever a need arose for logistical support he should be immediately informed.[398] There was no satellite communication facility between the Accused and the commanders in the field who were working with ECOMOG commanders and were out of his reach.

290. The Defence is calling upon the Trial Chamber to look at the logistics involved if any, the location of the accused in Talia, the officers and the staff, the tactical tempo of operations and the geographical location of the alleged acts which

---

[393] Transcript, Hinga Norman, p.98, Feb 6 2006.
[394] Transcript, Col Richard Iron, p. 33, June 14, 2005.
[395] Ibid, p.35.
[396] Transcript, Daniel Hoffman, p.99, Oct.9 2006.
[397] Transcript, Hinga Norman, pp. 25-26, Feb. 6 2006.
[398] Transcript, Hinga Norman, p.5, Jan.30 2006.

are all indicia pointing to one conclusion: the accused had no knowledge of the crimes allegedly committed by the Kamajors and the CDF. To decide otherwise will be obliging the accused to perform the impossible. When illegal acts are committed in a location "physically distant," the presumption of knowledge becomes far weaker in the "absence of other indicia".[399] Knowledge of the nature of the "general situation that prevailed," however, does not amount to knowledge that one's subordinates are likely to commit crimes.[400]

The Prosecution Military Expert Col. Richard Iron

291. The first issue to be discussed is whether an expert may be permitted to give an opinion on the '*ultimate issue*', in the case, i.e., to give an opinion on the very issue that the court has to determine.[401] As pointed out by *May & Wierda* it is not for the expert to give an opinion on the ultimate issue that the Court has to determine.[402] The ultimate issue in this case is the alleged command responsibility of the first accused. This question has arisen in the ICTY in relation to military experts who have sought to comment on the command responsibility of the accused. In *Kordic* the Trial Chamber excluded the evidence on the basis that the witness indeed was drawing conclusions on the very matters upon which the Trial Chamber was required to decide, thus invading its province.[403]

292. The Military Expert Col. Richard Iron testified that he was to determine the extent to which command was effective and whether there was a clear connection between strategic, operational and tactical levels[404] within the CDF.[405] Colonel Iron said the CDF was a territorial force dispersed in chiefdoms controlled by CDF.[406] He further testified that there was a large number of CDF units based in Talia on a hierarchical structure and that the commander was Hinga Norman.[407] This piece of evidence was challenged by Dr Hoffman who testified that there simply was nobody

[399] *Alesksovski, Judgment*, para. 80.
[400] *Bagilishema, Judgment*, para. 42.
[401] May & Wierda, International Criminal Evidence (2002), p. 200.
[402] May & Wierda, p. 200.
[403] Ibid, p. 200.
[404] Transcript, Col. Richard Iron, p.23, June 14 2005.
[405] Ibid p. 24.
[406] Ibid p. 29.
[407] Ibid p.30.

20407

in a position to make declarations that would be considered the word for the movement as a whole and there was no communication capacity.[408]

293. According to the military expert, at the tactical level command tended to be less effective because of their inexperience and lack of training.[409]

294. Col Richard Iron also testified that the CDF had a recognisable military hierarchy and structure[410] and that the CDF had effective command and the person who welded the ultimate power in a military sense within the CDF was Hinga Norman.[411] Under cross examination, this witness testified that there was evidence to demonstrate difficulties over command and the relationship between ECOMOG and the CDF.[412] The witness agreed that ECOMOG and CDF operated together after ECOMOG intervention.[413] Defence Expert witness Dr Hoffman who testified as to whether the CDF constituted a military organisation and what kind of structure it had, described the CDF as a militarised social network, or militarised social movement.[414]

295. The Military expert merely interviewed seven people, and read witness statements and testimonies – all provided for him by the Prosecution. The witness said he interviewed two members of the War Council who were high ranking officials while writing his report (their names were written in Exhibits 98 and 99). The witness agreed that the names of those seven people interviewed were provided by the Prosecutor[415] and that he did not independently verify the source of his information.[416] This in itself is a problem and as defence expert witness Dr Hoffman said methodologically, he is concerned with the very limited number of people spoken to and their location and position within the CDF, and concerned about the very limited amount of time that was spent in preparation of the report. As Dr Hoffman stated "there are a lot of social nuances that are incredibly important for understanding the

[408] Transcript, Daniel Hoffman Ph.D, p.99, October 9 2006.
[409] Transcripts of Col. Richard Iron, p.30, June 14, 2005.
[410] Ibid p.39.
[411] Ibid p.40.
[412] Ibid p.47.
[413] Ibid p. 49.
[414] Transcript, Daniel Hoffman, p.112, October 9 2006.
[415] Ibid p.59.
[416] Ibid p.60.

dynamics of the CDF...nobody could possibly pick up talking to seven people within a period of 14 days".[417]

296. Col Richard Iron testified that he would classify the CDF as an unconventional army.[418] In his evidence, Lt. General David Richards testified that the CDF is at best a militia and that a militia is best characterized as a citizen army but it does not exhibit in his mind many of the traits of a conventional army, for the training is far less thorough, their chain of command is much looser, their discipline is less good.[419]

The Complete Absence of any features of an organised military

297. Kamajors were often identified in the evidence by the "ronko" that they were wearing. These outfits were based on traditional hunting clothes and were variously described. The traditional attire could hardly qualify as a "uniform"[420], did not have insignias identifying Kamajors to any particular unit or rank, there was no standing kamajor force,[421] there were no barracks[422], Kamajors received no salaries – there were no features of an organised structure. For particular attacks, commanders would converge with their Kamajors and there would be no one person who had overall command.[423]

298. People could come and go from groups of fighters as they pleased. Although military terminology was sometimes used to describe groupings of Kamajors and there were an overwhelming number of people with the designation of "commander",

---

[417] Ibid p.111.
[418] Ibid p. 79.
[419] Transcript, Lt. General David Richards, p.56, Feb. 21 2006.
[420] Transcript, TF2-162 8 September2004 pg 22 lines 7-17: Q. Can you describe how they were dressed? 7 A. Yes. Q. What were they wearing? Were they wearing uniforms or any other kind of clothes? A. They had no uniform on. In fact, the clothes that they had on was torn and tattered. They didn't have any proper dress on - no uniform. They never had a uniform on; no, it was not a uniform that they had on.
[421] Transcript, Arthur Koroma, 4 May 2006 pg 18 line 28 – page 20 line 15.
[422] Transcript, Arthur Koroma, 4 May 2006, pg 20 lines 13-15: So it was very difficult to actually put a stop to Kamajor activities because of that decentralised nature of the organisation.
[423] For example, the attack on Korbibundo: Transcript, TF2-082 pg 34 lines 14-28: Q. So you met other Kamajors in Koribundu? A. Yes. When we entered there we met Kamajors there. Q. Were there any other Kamajor commanders in Koribundu that you met? A. Yes. Q. And who are these commanders that you met on the ground when you entered Koribundu? A. I first saw Siro (phonetic) Lamina when I entered. Q. You saw Siro (phonetic) Lamina and who else? A. And Bobo Toka, and Lahai George. Q. So did you have command over these other commanders? A. At times they would listen to me, but you know in that Kamajor not everybody could listen to me, except those that I actually brought, because they were much more than us in number.

this usage was so arbitrary and widespread and did not correspond to any military reality.

The role of the First Accused as the Deputy Minister of Defense did not enhance the capability or effectiveness of the CDF as a fighting force

299. The Prosecution further alleges that the Accused, "as Deputy Minister of Defense…was able to enhance the capability and effectiveness of the CDF as a fighting force".[424]

300. No witness confirmed the alleged enhanced capability and effectiveness of the CDF by virtue of Mr Norman's position as the deputy minister of defence. In fact, the evidence shows that if the effectiveness and capability of the CDF was enhanced by anyone it was by the Minister of Defence, President Kabbah. While there was certainly a dimension of personal politics at play in the relationship between the President and Mr Norman it does not detract from the fact that it was the Minister of Defence who ultimately had the ability to ensure that the CDF played a legitimate and significant role in his government's reinstatement.

Ability to Implement International Humanitarian Law

301. The Prosecution submits that the Accused and all members of the CDF were required to abide by International Humanitarian Law (IHL) and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.[425] However the Prosecution has failed to demonstrate that the CDF had the ability to implement international humanitarian law as required for the application of Additional Protocol II.

302. There was a significant amount of evidence as to the rules of being a kamajor but these rules certainly never included rules pertaining to IHL. Certainly within the

[424] PTB, para 269.
[425] Indictment, para 8

rules that did exist, there was no system of ensuring implementation of those rules, let alone any capacity for implementation of IHL.[426]

303. The evidence demonstrates that there was no dissemination of principles of IHL at during the period relevant in the indictment or thereafter.[427] One witness testified to having a ICRC booklets on "how to treat war victims"[428] but this evidence is hardly indicative of an ability of CDF to implement IHL.

Allegations under Article 6(3) have not been proven

304. Having examined customary law on superior responsibility the Appeals Chamber in *Celebici* ruled that '*sufficient influence*' is not an element of superior responsibility.[429] In *Semanza*, the Trial Chamber ruled that effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.[430] This requirement is not satisfied by a showing of general influence on the part of the accused[431]. Should the first accused be held responsible because he was a well known personality as a Deputy Minister of Defence and National Coordinator? The Norman Defence submits that the Trial Chamber should answer this question in the negative.

305. From the legal evaluation of the facts, the accused cannot be held for superior responsibility under Article 6(3) of the Statute, for superior responsibility must not be seen as responsibility for the act of another person. Superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation.[432] In A*leksovski*, the Trial Chamber ruled that:

---

[426] For example, TF2-013 testified that Kamajors were instructed not to kill innocent civilians or to loot property; but certain unmanageable Kamajors ignored such rules. Transcript, TF2-013, 24 February 2005 page 30 line 28–page 31 line 1.

[427] Transcript, General David Richards, 21 February 2006 page 63 lines 11-23 "Now, General, in the British Army I take it that there are rules of engagement, no doubt? A. Yes. Q. And are these rules made known to every military personnel? A. Yes, very strictly. Q. Very strictly. And naturally you would expect strict adherence? A. It's a disciplinary offence not to adhere to them. Q. Thank you very much. In your strategising with General Khobe, General Shelpidi, were you at any time told about rules of engagement for the CDF? A. Not to my knowledge. I can't remember any discussion of them

[428] Transcript, TF2-223, 28 September 2004 page 35 lines 2-16.

[429] *Celebici Appeals Judgment*, paras 258-264.

[430] *Semanza, Judgment* (TC), para. 402, cited in *Ntagerura et al*, (TC), para. 628.

[431] *Semanza, Judgment* (TC), para. 402, para. 402.

[432] *Aleksovski Judgment*, para. 72

"Within the meaning of Article 7(3), a person is obliged to act only if it has been established that he was a superior of the perpetrators of the offence and also knew or had reasons to know that a crime was about to be committed or had been committed. Should such be the case, the person against whom the claim is directed is obliged to take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof."[433]

306. The Prosecutor has not established sufficient reliable or credible evidence to determine that Hinga Norman was in command and control of the Kamajors and the CDF. Therefore the accused cannot be held criminally responsible as a superior under Article 6(3) of the Statute for the alleged acts of the Kamajors and the CDF because the Prosecutor has not established the existence of a superior-subordinate relationship. There is also lack of sufficient reliable evidence to determine whether the accused knew or should have known that the Kamajors and the CDF were allegedly committing offences. In *Blaskic*, the Appeals Chamber concluded that:

"[Blaskic] "lacked effective control over the military units responsible for the commission of crimes in the Ahmici area on April16, 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility [were] not satisfied".[434] On the basis of the above the defence submits that the Prosecution has failed to demonstrate that the Accused is liable for any of the Counts in the indictment pursuant to Article 6(3) superior responsibility liability.

Responsibility of the First Accused pursuant to Article 6(1)

Elements of Individual Responsibility under Article 6(1)

307. The Prosecution has stated that it imputes guilt to Mr Norman in relation to each count of the indictment pursuant to Article 6.1 of the Statute. The Prosecution alleges that Mr Norman bears individual responsibility for those crimes the Prosecution alleges that he planned, instigated, ordered, committed or in whose planning, preparation or execution he otherwise added and abetted. It is further

[433] Ibid para 72.
[434] *Blaskic, Appeals Chamber*, para 421.

alleged that the Accused with his co-Accused participated in a joint criminal enterprise.

308. For criminal responsibility to attach by virtue of Article 6(1) the Prosecution must first prove each of the elements of the crimes for counts 1-8 as set out above beyond a reasonable doubt. If it succeeds in doing so for any crime, then the Prosecution must prove each of the following elements of individual responsibility in relation to that crime, again beyond a reasonable doubt. The Defence would also note here that while Article 6(1) covers various stages of the commission of a crime, with respect to making a finding of criminal participation pursuant to Article 6(1), the Accused can only incur criminal responsibility if the offence is completed[435].

Planning

309. Planning implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phase.[436] 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.[437] The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.[438] An accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed."[439]

Instigating

310. In the jurisprudence of the Tribunals, "instigating" is defined to mean "prompting another to commit an offence".[440] It must be shown that there is a causal relationship between the instigation and the fulfilment of the *actus reus* of the

---

[435] *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment and Sentence, 2 September 1998, para 473.
[436] *Brdanin Trial Judgment*, para 268; *Krstic Trial Judgment* para 601; *Stakic Trial Judgment*, para 443, *Limaj, Trial Judgment*, para 513, *Blaskic Trial Judgment*, para 279; *Rutaganda, (Trial Chamber)*, December 6, 1999, para. 37; *Musema*, (Trial Chamber), January 27, 2000, para. 119; *Akayesu*, (Trial Chamber), September 2, 1998, para. 480:
[437] *Kordic Appeal Judgment*, para 26 citing Kordic Trial Judgment para 386.
[438] *Bagilishema, (Trial Chamber*), June 7, 2001, para. 30; Semanza, (Trial Chamber), May 15, 2003, para. 380.
[439] *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 386.
[440] *Krstic*, (Trial Chamber), August 2, 2001, para. 601; *Blaskic*, (Trial Chamber), March 3, 2000, para. 280; *Akaseyu Trial Judgment* para 482; *Blaskic Trial Judgment* para 280.

crime.[441] Further, the *actus reus* requires a clear contribution to the act of the other person.[442] To establish the *mens rea* for instigating it must be proved that the accused directly intended to provoke the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.[443]

Ordering

311. Ordering' entails a person in a position of authority using that position to convince another to commit an offence.[444] No formal superior-subordinate relationship is required for a finding of 'ordering' so long as it is demonstrated that the accused possessed the authority to order.[445] 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.[446]

312. With respect to planning, instigating or ordering, the Prosecution has attempted to argue that to find guilt of the Accused, it is not necessary to prove that the Accused planned, instigated or ordered the specific crime, or each of the specific crimes, alleged in the indictment.[447] In making this argument [with respect to the Second Accused], the Prosecution states that "it would be open to a reasonable trier of fact to conclude on the basis of all of the evidence that all of the crimes alleged in the Indictment were committed pursuant to a single campaign of which the Second Accused was one of the planners and instigators, and which the Second Accused gave orders to implement. On that basis, the Prosecution submits that it would be open to a reasonable trier to fact of conclude that the Second Accused is guilty of planning, instigating and ordering all of the crimes alleged in the Indictment."[448] The Defence submits that this proposition is legally incorrect, and that the Prosecution must

---

[441] *Blaskic*, (Trial Chamber), March 3, 2000, paras. 278, 280.
[442] *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 60.
[443] *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 387: *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 60: *Kvocka et al.*, (Trial Chamber), November 2, 2001, para. 252
[444] *Krstic*, (Trial Chamber), August 2, 2001, para. 601.
[445] *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 388:
[446] Blaskic Appeals Judgment, para 42, Kordic Appeals Judgment para 30, Brdanin Trial Judgment para. 270.
[447] *Prosecutor v Norman et al.*, SCSL-04-14-T-469, Public Version of the Prosecution Response to Fofana Motion for Judgment of Acquittal, 27 September 2005, SCSL-14-T-469, para. 79.
[448] Ibid.

20414

demonstrate the elements for each specific alleged crime before there can be a finding of criminal responsibility pursuant to Article 6(1).

Committing

313. Committing a crime "covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law."[449] "'Committing' refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute.[450] Any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the International Tribunal's Statute with the requisite knowledge.[451] The requisite *mens rea* for committing a crime is that, as in other forms of criminal participation under Article 6(1), the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.[452]

Aiding and Abetting

314. "Aiding and abetting" has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[453] Strictly, "aiding" and "abetting" are not synonymous. The term 'aiding' means assisting or helping another to commit a crime, and the term 'abetting' means encouraging, advising, or instigating the commission of a crime.[454] However, these forms of liability have consistently been considered together in the jurisprudence of the Tribunals.[455]

315. The *actus reus* of aiding and abetting is that the support, encouragement or assistance of the aider and abettor has a substantial effect upon the perpetration of the crime.[456] The acts of the accused must be direct and substantial.[457] Mere presence

---

449 *Krstic Trial Judgment* para 601, *Tadic Appeals Judgment* para 188, *Kunarac Trial Judgment* para 390.
450 *Semanza,* (Trial Chamber), May 15, 2003, para. 383.
451 *Kordic and Cerkez,* (Trial Chamber), February 26, 2001, para. 376: *Kvocka et al.*, (Trial Chamber), November 2, 2001, para. 251; *Vasiljevic,* (Trial Chamber), November 29, 2002, para. 62.
452 *Kvocka et al.*, (Trial Chamber), November 2, 2001, para. 251.
453 *Kordic Appeals Chamber* para 28 citing Kordic Trial Judgment para 388.
454 *Semanza,* (Trial Chamber), May 15, 2003, para. 384; *Akayesu,* (Trial Chamber), September 2, 1998, para. 484
455 Limaj, Trial Judgment, para 516
456 *Blaskic Appeals Judgement* para 48; *Furundzija Trial Judgment*, para 249,

constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*.[458] However, an individual's position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime.[459]

316. To establish the *mens rea*, an accomplice must *knowingly* provide assistance to the perpetrator of the crime, that is, he or she must know that it will contribute to the criminal act of the principal. Additionally, the accomplice must have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.[460]

***Allegations of planning*:**

317. The Indictment does not provide any information as to material facts that allege that the First Accused planned any of the alleged crimes in Counts 1-8. The Pre-Trial Briefs also do not provide the Defence with any more specific material facts relating to particular crimes the Accused is alleged to have planned. While it is not for the Defence nor the Trial Chamber to have to guess what the Prosecution's allegations are, given the nature of the pleading in the Indictment and the sparseness of detail in Pre-Trial briefs the Defence has no other option than to attempt to decipher the material facts as set out in the PTB.

318. With respect to "planning", the Prosecution states that criminal responsibility of the Accused for Counts 1-8 can be inferred on the basis that:

- The CDF high command, repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo; Bo; Moyamba,, Kenema, Bonthe[461];

---

[457] *Tadic*, (Trial Chamber), May 7, 1997, para. 691, *Bagilishema*, (Trial Chamber), June 7, 2001, para. 33; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 70.
[458] *Aleksovski*, (Trial Chamber), June 25, 1999, para. 64 .
[459] *Aleksovski*, (Trial Chamber), June 25, 1999, para. 65.
[460] *Bagilishema*, (Trial Chamber), June 7, 2001, para. 32; *Blaskic*, (Trial Chamber), March 3, 2000, para. 286; *Furundzija*, (Trial Chamber), December 10, 1998, para. 245, 249.
[461] PTB para 275 (a), para 292 (b), para 300 (b), para 331 (b), para 374 (b).

- Samuel Hinga Norman was physically present in war planning meetings at the issuing of directives and commands to the CDF for the capture of Tongo; Kenema; Bo, Bonthe, Moyamba[462];
- It was at Base Zero that Samuel Hinga Norman, Moinana Fofana, and Allieu Kondewa, forming a tripartite CDF leadership, together with other persons, planned, coordinated, directed, trained and commanded the attacks on Bo, Kenema, Moyamba, Bonthe, Koribundo and Tongo as well as the other locations specified in the indictment;[463]

The evidence

319. The Defence would firstly note that no dates are provided in the PTB as to when any meetings were held and the only indication of where these meetings were held is "Base Zero". The Defence would also note that there are inconsistencies between the Counts with respect to planning for attacks in particular geographic areas. For example, the Prosecution alleges that for Counts 1 and 2, the Accused can be found criminally responsible for planning because "the CDF high command, repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo,[464] Bo,[465] Moyamba[466]." However, for Counts 3 and 4, the Prosecution only alleges criminal responsibility for planning on the basis that " the CDF high command, led by Samuel Hinga Norman repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo Field,[467] for Kenema,[468] Moyamba,[469]". While the Prosecution has failed to specifically cite their material facts towards proof of planning, it is also unclear whether the Prosecution is alleging planning only occurred for specific counts in specific geographic locations. The Defence submits that the Trial Chamber should bear in mind this pervading vagueness in examining the evidence.

320. The Defence would submit that these allegations as set out in the Pre-Trial Brief do not assist the Defence in knowing the case against the Accused. There is no information provided as to when these meetings were, and the fact that "discussions were held together and with each other" is illogical and unhelpful. There is also a

---

[462] PTB para 276 d, para 285 (c) para 293 (d), para 309 (d), para 382 (d) para 395 (d).
[463] PTB para 307 (b), para 351 (d), para 373 (c).
[464] PTB para 275 (a).
[465] PTB para 292 (b).
[466] PTB para 300 (b).
[467] PTB para 324 (b.
[468] PTB para 331 (b).
[469] PTB para 345 (b).

conspicuous lack of mention of the War Council anywhere in the Prosecution's material facts.

321. Regardless, with respect to the evidence that was presented, the Prosecution relies extensively on its allegations that it was at meetings predominately at Base Zero (Talia) where "battle plans" were discussed. As set out above, to be criminally responsible for planning, there must be evidence of planning to commit one of the crimes which is in the Indictment and the plan must have been carried out. Further it must be demonstrated that the Accused directly or indirectly intended that the crime be committed."

322. There is a paucity of evidence relating to specific planning for any of the crimes that the Accused has been charged. The evidence that does exist is very general, and provides no indication of specific plans, beyond generally discussing "attacks". Further within this general planning evidence, there are indications of planning by the War Council and Mr Norman being the one carrying the results of the planning through to the commanders.

323. With respect to planning for the attack on Tongo, TF2-201 stated that the meeting took place at Talia and that Mr Norman directed that the "hydro" at Dodo should be destroyed.[470] This same witness also testified that the planning for the planning for the Bo and Kenema attacks was done in February 1998 at Talia. He further testified that Norman stated that it would be an "all-round attack" on Bo and Kenema together and that the Kamajors would join ECOMOG who would "lead the attack.[471]

324. TF2-008 testified that the planning for the taking of Koribundo and Sembehun was done by the War Council and made the recommendation to Norman. Norman accepted this recommendation and passed on the instructions of the War Council to the commanders.[472] TF2-008 further testified that in 1998 the War Council met and

---

[470] Transcript, TF2-201, November 4 2004 pg 106 lines 4-29.
[471] TF2-201, 5 November 2004 page 41 lines 12-19, page 42 lines 4-12, page 42 line 15, page 43 lines 7-11, page 43 lines 13-25, page 44 lines15-18, page 44 lines 23-24, page 46 lines 22-24, page51 lines 2-8, page 53 lines 24-28; page 54 lines 1-8, page 83 lines 3 -7.
[472] TF2-008, 16 November 2004 page 78 line 12– page 79 line 24.

recommended to Norman that Bo should be the next target and that the attack should be done in consultation with Maxwell Khobe.[473]

325. TF2-190 said that he attended a meeting at Talia in 1998 to "arrange strategies to launch an all-out offensive on the juntas."[474] TF2-005 merely stated that the responsibility for planning how the war was to be fought was with Norman, Fofana and his deputy, Director of Operations and his deputy, and Kondewa[475] though he also states that it was the War Council who chose where to attack.[476] TF2-014 stated that he was the one who did all the planning for the Koribundo attack.[477] Finally, there is absolutely no evidence that demonstrates that there was ever any "planning" with respect to the use of child soldiers.

326. Therefore the Defence submits that on the basis of the lack of evidence with respect to planning of any specific crimes, the Accused cannot be held criminal liability under Article 6(1) for planning any alleged crimes under Counts 1-8.

Allegations of Instigating

327. Again the Defence submits that it is impossible to know what the allegations relating to "instigating" specifically are as the PTB and the Indictment never make this clear. Regardless, from what the Defence can piece together from the PTB, the Prosecution appears to allege that criminal responsibility through instigating for Counts 1-8 can be inferred on the basis that:

- In December 1997 at a Base Zero meeting attended by all Commanders in the Tongo axis, Samuel Hinga Norman said that all people in Tongo should be regarded as the enemy and should be treated as such; that civilians living in Tongo were Kamajor enemies because they were mining diamonds which were used by the rebels to buy weapons and that therefore all Tongo residents remaining in the town after its capture by the CDF should be regarded as enemies and should be killed;[478]
- Addressed a meeting of the CDF at Base Zero and supported directives for the attack on Bonthe Town during which collaborators were to be killed;[479]

[473] F2-008, 16 November 2004 page 80 line 8-28, page 81 lines 1-6, page 81 lines 20-27, page 82 lines 1-11.
[474] TF2-190, 10 February 2005 page 43 line 28– page 48 line 4.
[475] TF2-005, 15 February 2005 page 93 line 29– page 94 line 5.
[476] TF2-005, 16 February 2005 page 10 lines 3-7.
[477] Transcript, TF2-014, 10 March 2005 page 64 lines 16-18.
[478] PTB para 276 (e).
[479] PTB para 309 (e).

- in February of 1998 addressed a meeting of the CDF at Base Zero where he supported directives for the attack on Bonthe Town; that those orders included instructions that collaborators should be killed; that many civilians were seriously injured in the attack;[480]
- at a meeting in Base Zero, while addressing the CDF before the attack on Bo, said that the CDF should feed themselves; that this statement was understood as giving a free hand to CDF to loot property and that in effect, widespread looting followed the attack on Bo and was pervasive in Bonthe District as well.[481]

The Evidence

328. The Defence submits firstly that it is unable to find any testimony relating to a meeting at Base Zero in February 1998 where Bonthe District was discussed. Further the defence submits that the Prosecution has failed to demonstrate a casual relationship in any of the evidence between any alleged instigation and the fulfilment of the *actus reus* of the crime. For example there is no evidence which shows a nexus between alleged looting that occurred in Bo by Kamajors and any meeting with the Accused is alleged to have "instigated" such activity. Further one witness gave testimony about a meeting where Tongo was discussed [482] but when this meeting is alleged to have occurred is never made clear. On this basis liability pertaining to instigating under Article 6(1) fails.

Allegations of Ordering

329. The Prosecution has not specifically made clear what exactly the Accused is said to have "ordered", alleging all actions pertaining to the First Accused fall within the rubric of Article 6(1) responsibility. However, and again, through a process of attempting to decipher the Prosecution's case, it appears that the Prosecution makes a number of allegations in its Pre-Trial Brief as the evidence of the Accused's alleged ordering. No evidence was presented for the bulk of these allegations or the allegations pertain to geographic areas that were no longer a part of the Indictment.[483]

---

[480] PTB para 353 (g).
[481] PTB para 375 (d).
[482] Transcript, TF2-005 15 February 2005 pg 105 lines 20-25, page 106 line 10– page 107 line 3.
[483] This includes allegations at PTB 293 (e), PTB para 339 (b), PTB para 339 (c), PTB para 339 (d), PTB para 346 (f), PTB para 368 (g), PTB para 368 (h), PTB para 373 (d), PTB para 382 (f), PTB para 293 (g), PTB para 309 (h), PTB para 325 (f).

Tongo PTB Allegations

- In January 1998 after the CDF had taken Tongo, Samuel Hinga Norman gave instructions that all those found remaining in Tongo following the capture of the area were to be killed, that no one was to be spared[484];
- In January 1998 CDF combatants fighting in Tongo spoke of a CDF order that all houses were to be searched and that anyone who had a gun or ammunition in their house were to be killed; that anyone in a uniform or who was an occupant in a house where a gun or uniform was found, was to die;[485]
- [Hinga Norman was] the commander who, in December 1997, said in a meeting at Base Zero, attended by all Commanders in the Tongo axis, that all people in Tongo should be regarded as the enemy, that he further said that civilians living in Tongo were Kamajor enemies because they were mining for diamonds which were used by the rebels to buy weapons and that therefore they should be killed;[486]

Evidence

330. TF2-005 is that only witness who gave testimony that Norman had said that Tongo should be taken "at all costs" and anybody found "walking with the juntas or mining for them should not be spared".[487] This is the only witness who gave testimony relating to the allegations as set out in the PTB related to Tongo. This testimony was not corroborated by any other witness.

331. Also as stated above, the ICTR has stated that the Accused can only incur criminal responsibility if the offence is completed.[488] The Defence submits that there is no evidence which shows a nexus between what TF2-005 alleges that Hinga Norman ordered and what unidentified kamajor perpetrators are alleged to have done in Tongo.

Kenema PTB Allegations

- The CDF launched an attack on Kenema town on February 1998 upon the directives and instructions of the CDF high command, of which Samuel Hinga Norman was the National Coordinator and that during this attack an unknown number of civilians were killed;[489]

---

[484] There was no evidence presented to support this allegation.
[485] There was no evidence presented to support this allegation.
[486] PTB para 325(e), There was no evidence presented of such a meeting at Base Zero in December 1997 to support this allegation.
[487] TF2-005, 15 February 2005 pg 105 lines 20-25, pg 106 line10 - page 107 line 3.
[488] *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment and Sentence, 2 September 1998, para 473.
[489] PTB 283 (a).

- Ordered the CDF to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses;[490]
- Following reports received at Base Zero that police were involved in the fighting on the side of the Junta, ordered CDF to treat the police as their enemies and thereafter police officers were specifically targeted and killed at the Police Barracks in Kenema in February 1998.[491]
- The commander who ordered the CDF to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses;[492]

Evidence

332. TF2-201 testified to a meeting at Talia where he alleged that the planning for the capture of Bo and Kenema took place. According to the witness, Norman announced that it would be an "all-round attack" on Bo and Kenema together and that the Kamajors would join ECOMOG who would be moving from Liberia and would "lead the attack".[493] There was no evidence that Hinga Norman ordered the CDF to "kill all captured rebels and collaborators and seize or burn their houses".

333. TF2-041 testified that an unidentified kamajor said to him "He said -- Hinga Norman said, "When you come, that we should kill the police, their wives and their children, so we're taking you straight to the ground commander in Blama."[494] However there is no evidence of Hinga Norman actually ever giving such an order to specifically target police and such an order cannot be implied based on this testimony alone.

Koribundo PTB Allegations

- At a meeting in which Samuel Hinga Norman participated, commands and orders were given for the attack on Koribundo in the Bo District; that those commands included orders not to "spare any living thing" during the attack;[495]
- In January/February 1998 after various failed attempts to capture Koribundo, while addressing the CDF before an attack on the town, ordered them to capture Koribundo "at all costs"; that he specifically ordered the CDF to destroy Koribundo;[496]

---

490 PTB 285 (d).
491 PTB 285 (f).
492 PTB para 323 (b), para 361 (e).
493 Transcript TF2-201, 5 November 2004 pg 41 lines 12-19, page 42 lines 4-12, page 42 line 15, page 43 lines 7-11, page 43 lines 13-25, page 44 lines 15-18, page 44 lines 23-24, page 46 lines 22-24, lines 51 lines 2-8, page 53 lines 24-28.
494 Transcript, TF2-041 24 September 2004 page20 line 10– page 31 line 2.
495 PTB 291 (a)
496 PTB para 293 (j), para 337 (a), para 339 (e), para 368 (e)

- Ordered that all the houses – except 4 were to be destroyed because every house had given sheltered (sic) rebels and soldiers;[497]

Evidence

334. Tf2-014 was the only "commander" who gave evidence of having received any orders prior to the attack on Koribundo from Hinga Norman. The remainder of the evidence relates to witness testimony of attending either one or both meetings held at the court barri in Koribundo where Hinga Norman allegedly said that he had ordered that all the houses in Koribundo were to be burnt.[498] There cannot be liability under Article 6(1) for ordering when it is the Accused who self-incriminates himself in stating that he did the ordering. Further these statements were made after the fact, without any further evidence to demonstrate that he gave the order and that the order subsequently was carried out. Further the Defence would submit that the credibility of the testimony of TF2-014 must be closely examined. This is explained in greater detail in the paragraph below.

335. Further TF2-008 testified that it was the War Council who gave the orders for Koribundo and that Hinga Norman accepted the recommendation and passed on the instructions to the commanders.[499] Hinga Norman was merely a conduit for passing on information from the War Council to the commanders and cannot be held liable for "ordering".

Bo PTB Allegations

- In early February 1998 at Base Zero before the attack on Bo, ordered that prominent people, including the former District Officer, Provisional Secretary, and those who stayed in Bo Town during the rebel occupation were to be executed;[500]
- Gave specific instructions to commanders during the Bo attack to kill police officers because they did not support the Kamajor cause;[501]

[497] PTB para 368 (f)
[498] Transcript. TF2-198, 15 June 2004 pages 37-39, TF2-157, 16 June 2004 pages 19-22, TF2-012, 21 June 2004 pages 27-28, TF2-162, 8 September 2004 page 30, TF2-032, 10 September 2004 pages 55, 62, TF2-082, 15 September 2004 page 49.
[499] TF2-008, 16 November 2004 page 78 line 12– page 79 line 24
[500] PTB para 293 (f)
[501] PTB para 293 (h)

- In January 1998 at Base Zero where he instructed the CDF to kill captured rebels and rebel collaborators or anyone who worked for the rebels or who lived in an area occupied by rebels;[502]
- In a meeting at Base Zero, Samuel Hinga Norman ordered that all shops and pharmacies in Bo Town were to be looted and that all property in Bo Town "belonged" to the CDF;[503]

336. TT2-014 gave the bulk of the evidence that supports these allegations. The Defence would submit that the credibility of TF2-014 should be carefully inspected by the Trial Chamber. Though TF2-014 was adamant in wanting to speak the truth, after having been reassured that he himself would not be prosecuted for his participation in a number of atrocities[504], he quite deliberately misled the Trial Chamber with his evidence. TF2-014 provided the court with great detail of the targeting of a Joseph Lansana, stating that he participated in his torture and that he cut off his ear.[505] This was blatantly untrue as Joseph Lansana himself appeared as a Defence witness with both of his ears intact.[506] While the Trial Chamber felt it necessary to thank the witness for his role in "ensuring lasting peace" in Sierra Leone,[507] it is clear that the credibility of the witness was significantly impeached when it is clear on a significant allegation he clearly chose not to tell the truth.

Allegations of Committing

337. As stated above, given the requirement of increased specificity in the Indictment where the Prosecution alleges that the Accused "committed" a crime, the Defence has proceeded on the basis that no such allegations are made in this case as the Indictment contains no such allegations. Further through examination of the PTB the Defence can find no specific allegations of committing there either. With respect

---

[502] PTB para 309 (f)
[503] PTB para 366 (b)
[504] TF2-014, Transcript, March 11 2005, line 6-17, page 45: "Yes, Mr Witness, you said you had a clear understanding that those who received commands would not be apprehended, if I am correct. From whom did you get this understanding? A. It was from Radio Sierra Leone, then the people – the prosecutors -- that went around me. They said they wanted the truth. If you do not bear any of the greatest responsibility, you say the truth, nothing but the truth, nothing will be done to you. I thought for some time; I pondered over it, and I thought within myself that until we say the truth -- until we say the truth -- we get everlasting peace in this country. That is why I am here today, to say the truth so that we get everlasting peace in this country."
[505] TF2-014, Transcript, March 11 2005, page 48, lines 22-23
[506] Transcript, Joseph Lansana,
[507] TF2-014, Transcript, March 15 2005 pg 70 line 24 – page 71 line 1 page 45PRESIDING JUDGE: It has been long, but it has revealed many things which will assist the Chamber to determine the truth in this matter. THE WITNESS: Yes, My Lord. PRESIDING JUDGE: I think the Chamber would like to commend one thing, and that is that you came to testify in order to ensure that there is, you know, lasting peace in this country.

to Count 8 the Defence submits that there is no evidence which demonstrates that the Accused himself recruited or used child soldiers.

Allegations of Aiding and Abetting

338. The Prosecution appears to allege that the liability of the Accused with respect to aiding and abetting can be inferred predominately from evidence that:

- Samuel Hinga Norman was responsible for sending ammunition to the CDF in the field as well as providing other logistics to CDF commanders and combatants;[508]
- Samuel Hinga Norman was physically present in war planning meetings and at the issuing of directives and commands to the CDF;[509]
- Samuel Hinga Norman provided the commanders with arms and ammunition;[510]

Evidence

339. TF2-201 testified that Hinga Norman would write orders for distribution of ammunition on paper and pass them to the Second Accused.[511] TF2-201 also testified that at a meeting at Talia concerning the attack on Tongo, Norman announced that he would supply the commanders with ammunition and food.[512] This witness also stated that at a meeting at Talia regarding Koribundo TF2-082 asked for a certain amount of ammunition, food, and money, and Norman wrote out an order for supplies.[513] TF2-017 testified that it was the Second Accused who distributed arms and ammunition to attack Kebi Town.[514] This same witness testified that it was the Second Accused who also distributed the weapons for the Black December operation.[515] He further stated that around the second week of February 1998 the final order to attack Bo came from Norman and "they" gave arms and ammunition to all the commanders.[516]

---

[508] PTB para 276 (c).
[509] PTB Tongo, para 276 (d), Kenema para 285 (c), Bo para 293 (d), Moyamba para 301 (d), Bonthe para 309 (d).
[510] PTB Tongo para 276 (f), Bo para 293 (c), Moyamba para 301 (c), Bonthe para 309 (c).
[511] Transcript, TF2-201, 4 November 2004 page 97 lines 14-26.
[512] Transcript, TF2-201, 4 November 2004 page 106 lines 4-29.
[513] Transcript, TF2-201, 4 November 2004 page 113 line 1– page 114 line 20
[514] Transcript, TF2-017, 19 November 2004 page 92 line 26– page 94 line 29, page 95 – 97 line 18.
[515] Transcript, TF2-017, 19 November 2004 page 82 lines 17-22
[516] TF2-017, 19 November 2004 page 98 line 4– page 101 line 14

340. The Defence submits that the testimony of TF2-017 must not be given any weight as this witness himself stated that "it is acceptable to invent facts about which one is unsure" and also admitting to not telling the truth to OTP investigators.[517]

341. TF2-190 stated that he participated in the attack on Koribundo and that he organised his own men and supplied their ammunition as he had his own. He also stated that TF2-082 had been given ammunition by orders from Norman at Talia.[518] TF2-005 gave general evidence stating that Norman was in control of giving out ammunition and that the Second Accused also was responsible for distributing ammunition.[519]TF2-014 testified that part of his role was to distribute arms and ammunition.[520]

342. The *mens rea* for aiding and abetting is not the criminal intent of the perpetrator; rather it involves the accessory having the knowledge that his actions assist the perpetrator in the commission of the crime. However, the accessory must also be aware of the essential elements of the crime, including the *mens rea* of the principle.[521] The evidence fails to establish this.

343. The defence submits that Mr Norman was not aware of the essential elements of any of the crimes that were committed, especially the *mens rea* of the alleged perpetrators. While it may be unclear whether certain unidentified members of the CDF were conducting military operations with the intent to commit any of the crimes charged in the Indictment, Mr Norman, as a potential aider and abetter was certainly unaware of such hypothetical intentions. Accordingly he cannot be held indirectly responsible for any of the acts alleged in the Indictment.

Joint Criminal Enterprise

344. The Prosecution alleges a theory of criminal liability that inculpates Norman for those criminal acts which were perpetrated as a part of a joint criminal enterprise

---

[517] TF2-017, 22 November 2004 page 38 lines 25-27, page 44 lines 9-12
[518] TF2-190, 10 February 2005 page 47 lines 21 - 29
[519] TF2-005, 15 February 2005 page 91 lines 12-19, page 101 lines 15-16
[520] TF2-014 10 March 2005 page 33 lines 15-18
[521] Prosecutor v Tadic, (AC), para 229, Prosecutor v Blaskic (AC), para 50.

in which he participated.[522] The Prosecution alleges that this joint criminal enterprise was "to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone." At the outset the Defence submits that this simply does not amount to criminal behaviour. It is a legitimate goal of any party to an armed conflict and certainly in this instance, where the objective was the reinstatement of the democratically elected government of President Kabbah.

345. Joint criminal enterprise liability is a form of criminal responsibility. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.[523]It can exist whenever two or more people participate in a common criminal endeavour.[524] This form of criminal liability does not exist in the Statute of the Special Court but rather it is a concept that exists as customary international law.[525]

Categories of Common Purpose Doctrine

346. The notion of common purpose encompasses three distinct categories of collective criminality. The first such category is represented by cases where all co-defendants, acting pursuant to common design, posses the same criminal intention, for instance the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design.[526]

347. The second distinct category of cases embraces the so-called "concentration camps" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps i.e. by groups of persons acting pursuant to a concerted plan.[527]

---

[522] Indictment para 20.
[523] Tadic (AC) 1999 para. 190.
[524] Kvocka et al (Trial Chamber) ICTY November 2 2001 para. 307.
[525] Tadic (AC): "the notion of common design as a form of ... liability is firmly established in customary international law."
[526] Tadic (Appeals Chamber) para. 195-196
[527] Tadic (Appeals Chamber) para. 202-204

348. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.

Elements required for a Joint Criminal Enterprise

349. The following elements must be demonstrated beyond a reasonable doubt for criminal liability to arise:

a) Plurality of persons;

b) The existence of a common plan design or purpose which amounts to or involves the commission of a crime;

c) Participation of the accused in the common design involving the perpetration of one of the crimes as alleged in the indictment.

350. The participation need not involve the commission of a specific crime but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. A person participates in a joint criminal enterprise by: personally committing the agreed crime as principal offender; by assisting the principal offender in committing the agreed crime as a co-perpetrator (by undertaking acts that facilitate the commission of the offence by the principal offender); or by acting in furtherance of a particular system in which the crime is committed.[528]

351. For joint criminal liability an accused must have carried out acts that substantially assisted or significantly affected the furtherance of the goals of the enterprise with knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to criminally liable as a participant in a joint criminal enterprise.[529]

352. The Prosecution must establish the existence of an arrangement or understanding amounting to an agreement between two or more persons that a

[528] Vasiljevic (Trial Chamber) November 29 2002 para 67.
[529] Kvocka et al (Trial Chamber) November 2001 para 312.

particular crime is committed. The arrangement or understanding need not be express and it may be inferred from all the circumstances.[530]

353. The level of participation in joint criminal enterprise must be significant. The Trial Chamber in *Kvocka* [531] defined "significant" as an act or omission that makes an enterprise efficient or effective, e.g. participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. The level of participation attributed to the accused and whether the participation is deemed significant will depend on variety of factors including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness gratuitous cruelty exhibited in performing the actors function.

354. The responsibility for crimes outside the common purpose occurs if it was foreseeable that such a crime might be perpetrated and the accused willingly took the risk.[532]

355. The *mens rea* required for joint criminal enterprise is dependent upon which of the three forms is alleged. The basic form requires that the accused had the intent to perpetrate a specific crime that was within the common purpose, an intent that was only shared by the co-perpetrators. The accused must have voluntarily participated and intended the criminal result. The extended form requires that the accused intended to participate in and further the common purpose of the joint criminal enterprise, and that the crime that was beyond the common purpose was a natural and foreseeable consequence and the accused willingly took the risk that it would occur.[533]

---

[530] Vasiljevic (Trial Chamber) ICTY November 29 2002 para. 66
[531] Kvocka et al (Trial Chamber) ICTY November 2 2001 para 309
[532] Tadic (AC), para. 77.
[533] Kvocka et al (Trial Chamber) ICTY November 2 2001 para 86

356. It is however important to consider the joint criminal enterprise as alleged in this Indictment. While the Prosecution has not explicitly stated it, it appears that the prosecution is alleging criminal liability pursuant to the third category of joint criminal enterprise -- covering a situation where a group of persons act according to a common purpose, and in the course of this, someone in the group commits a crime that was not part of the common purpose.

357. The common plan alleged by the Prosecution "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 giving 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 is alleged to have acted individually and in concert with subordinates to carry out the said plan, purpose or design.[534]

358. The common plan "to gain and exercise control over the territory of Sierra Leone" is not criminal itself. Nor does this enterprise amount to a crime provided for in the Statute.[535] As the Prosecution alleges, the CDF was a criminal organisation and the three Accused and their subordinates were all part of this joint criminal enterprise – effectively making every action of the CDF criminal. This flies in the face of the accepted evidence that the purpose of the CDF was to defend communities and to liberate the country from the RUF and AFRC.

359. The Defence would also submit that it is important to note that the Prosecution has broadened the scope of an already exceedingly broad form of criminal liability. In citing the three forms of joint criminal enterprise, the ICTY stated that for the third form (where a crime occurs that was not a part of the common purpose), the standard of proof is that crime was a "*natural and foreseeable consequence*" of the common purpose.[536] The Prosecution in this instance attempts to broaden this even further by stating that the crime was "*reasonably foreseeable*"[537]. The Defence submits that

[534] Paragraph 19 Indictment
[535] A joint criminal enterprise requires the existence of a common plan, design or purpose which amounts to or involves the *commission of a crime provided for in the Statute.*
[536] Tadic 15 July 1999 Appeals Chamber, Kvocka et al 2 November 2001 (Trial Chamber)
[537] Indictment, para. 20.

there is no basis for the Prosecution reformulating the law and further that it is an unacceptable further broadening of the potential culpability of criminal defendants – very little would appear to fall outside the scope of a joint criminal enterprise.[538]

360. The Defence submits that Hinga Norman did not act individually and in concert with subordinates within a common purpose, plan or design In addition to the CDF lacking the requisite criminal purpose, the violations as alleged in the Indictment to the extent that they did occur are attributable to individual Kamajors and commanders who did not follow stated rules. These were isolated events and not the result of a general policy or plan on the part of the Accused and "subordinates".

The Counts

Counts 1 and 2
The majority of the alleged perpetrators are unknown

370. The Defence would first submit that respect to Counts 1 and 2, the bulk of the evidence does not establish the identity of any of the alleged perpetrators of murder.

371. The PTB only states that the "CDF attacks and unlawfully killed an unknown number of captured enemy combatants as well as civilians"[539] for each of the geographic locations set out in the Indictment. At the start of its case, it appears that the Prosecution was unable to provide the Defence with the name of one single alleged perpetrator of murder. The PTB is also unable to provide the name of a single "commander."

372. The evidence shows that the prosecution does not in fact know who committed the majority alleged murders nor does the evidence demonstrate that any of these persons were the subordinates of Mr Norman. In the case of criminal liability under Article 6(3), an essential element to be pleaded and proved is that there was a superior-subordinate relationship. Mr Norman can only be found guilty of those

[538] "What is the limit to intended or foreseeable wrongdoing in a country wracked by ethnic cleansing and armed conflict?" Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 Calif. L. Rev. 75. at 135.
[539] PTB Paragraphs 273, 281,290,298, 306.

crimes if the perpetrators are under his effective control. As the Prosecution has failed to identify who the perpetrators are, the counts of murder should be dismissed. Also the evidence wholly fails to establish any link between the Accused to any alleged command he gave to any commander to any discreet piece of evidence that this command was implemented. On that basis no liability under Article 6(3) has been established.

373. There is no evidence of any link between these unidentified Kamajors and the Accused. Where this is possibly a link it is too remote. As the ICTY has stated "great care must be taken 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."[540]

Tongo

374. The Prosecution alleges in Paragraph 25 a) of the Indictment that "Between about 1 November 1997 and about 30 April 1998 at or near Tongo Field, and at or near the towns of Lalehun, Kamboma, Konia, Talama, Paguma and Sembehun,[541] the CDF attacked and unlawfully killed an unknown number of captured enemy combatants as well as civilians,[542] Further details provided in the Prosecution Pre-Trial Brief allege that these unlawful killing including Chief Aruna Konuwa, Chief Brima Conteh, and one Mohammed Mansarray alias "Joskie".[543]

375. The Prosecution further alleges that within this same time frame and geographic regions, Kamajors screened the civilians and those identified as "Collaborators", along with any captured enemy combatants and unlawfully killed them.[544]

376. The Defence would first submit that this is no evidence presented for the geographic location of Konia.

[540] Celebici Trial judgment, 16 November 1998 para 377-378.
[541] Note that two geographic locations, Panguma and Sembehun, were dropped from the indictment in the Decision on the Motions for Acquittal pursuant to Rule 98", 21 October 2005 Doc 473
[542] Indictment 25a
[543] PTB para 273.
[544] Paragraph 24a Indictment.

377. The Prosecution states that the attacks on Tongo took place between 1 November 1997 and about 30 April 1998. With respect to the Prosecution's witnesses ability to put their testimony with this relevant timeframe, TF2-015 could not remember when the attack was[545], TF2-048 only being able to recall that it was on a Wednesday[546], TF2-035 stated it was in the dry season of 1997[547], TF2-144[548] and TF2-053[549] recalling that it was the "fasting month". Even though the Prosecution's PTB alleges that it was on or about 14 January 1998 that the CDF attacked Tongo Field, five of the Prosecution witnesses testified that it was sometime either in November or December 1997.[550]

378. A number of witnesses testified that civilians gathered at the NDMC Headquarters and it here where the Prosecution alleged that a number of unlawful killings took place.

379. TF2-015 testified to a number of alleged killings, all perpetuated by unidentified Kamajors.[551] TF2-022 also testified to a number of killings, again by unidentified Kamajors.[552] TF2-022 testified to one instance of an unidentified commander ordering a kamajor to open fire on a group of civilians and another unidentified commander ordering them to stop.[553] In nearly every instance the witness testified that the civilians allegedly killed were targeted for a particular reason[554]. As previously stated identification and killing of specific individuals does not amount to a crime against humanity and therefore none of the alleged killings can be considered as such under Count 1.

[545] Transcript, TF2-015, 11 February 2005 5:1-6 Do you remember when the Kamajors came to Tongo? A. Yes. Q. Do you know what month or year the Kamajors came to Tongo? A. I cannot remember. I cannot remember the day they came to Tongo.
[546] 23 February 2005 pg 6 lines 15-17.
[547] 14 February 2005 pg 8 lines 10-20.
[548] Transcript, TF2-144, 24 February 2004 pg 56 lines 26-28, page 59 lines 6-12, page 60 line 23– page 61 line 4.
[549] Transcript, TF2-053, 1 March 2004 pg 74 lines 4-13.
[550] Transcript, TF2-022, 11 February 2005 pg 44 line 27– page 45 line 4,TF2-035, 14 February 2005 page 8 lines 10-20, page10 lines 24-28, TF2-027, 18 February 2005 page 79 lines 14-25, page 85 lines 4-15, page 85 liens 27-29, TF2-047, 22 February 2005 page 44 lines 4-11,TF2-016, 1 March 2004 page32 lines 20-26.
[551] Transcript, TF2-015, 11 February 2005 page7 lines23– page 8 line 17, page8 line 25– page 9 line 28, Transcript, TF2-015, 11 February 2005 page 11 line 23 – page 13 line 15.
[552] Transcript, 11 February 2005 page 46 lines 14-29, 11 February 2005 page 50 line 19– page 53 line 3 , 11 February 2005 page 59 lines 15-29, 11 February 2005 page 61 lines 8-20.
[553] Transcript, TF2-022, 11 February 2005 page 56 lines 19-28, page 57 lines 1-10, page 57 lines 13-26.
[554] This also hold true for the evidence of TF2-048 who stated that another unidentified Kamajor, after consulting a list containing names of Limbas, killed the witness's elder brother.

380. TF2-035 testified to Kamajor commander called Keikula Kamagboty ("Kamabote") 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.[555] This testimony is not corroborated anywhere else. Also, as defence counsel noted in its cross examination, this evidence is suspicious in that an alleged massacre of this scale should have been noted somewhere, in newspapers, through memorial / remembrance services in Tongo, or through third party documented sources such as NGOs or UN monitors. There is no evidence that these alleged killings were reported by any other source than this witness. Further, the Prosecution chose to engage the services of a forensic expert who gave evidence pertaining to two graves containing a relatively small number of bodies[556]. If, as according to this witness, the victims of the alleged killings were still buried behind the NMDC building, then why did the Prosecution not provide a forensic report for this site?

381. The evidence demonstrates that "Kamabote" is alleged to have been responsible for the majority of the alleged deaths in Tongo. In addition to the evidence of TF2-035, this "Kamabote" is also alleged to have chopped a "Fatmata Kamara" to death.[557] TF2-053 also testified that 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.[558] She also said that Kamabote had killed her son at a checkpoint.[559] There is no evidence that Kamabote belonged to any particular group of Kamajors, or that he was taking instructions from any commander let alone that such a commander was acting pursuant to any directives of the Accused.

382. TF2-027 and TF2-047 each testified that BJK Sei was the commander in charge in Tongo and that Saika Laihi was his deputy.[560] However to say that there was

[555] Transcript, TF2-035, 14 February 2005 page12 lines 21-25, page 13 lines 11-16, page 15 lines 3-17, page 16 lines 10-11, page 17 lines 11-15, page 18 lines 23-24, page 20 lines 1-20.
[556] Exhibit 101.
[557] Transcript, TF2-047, 22 February 2005 page59 lines 11-27.
[558] Transcript, TF2-053 t, 1 March 2004 page 82 line 8– page 84 line 27.
[559] Transcript, TF2-053, 1 March 2004 page 88 line 22– page 89 line 10.
[560] Transcript, TF2-027, 18 February 2005 page 92 lines 22-23, page 92 line 26.

one commander in charge of Tongo is false as other witnesses testified that there were groups of Kamajors following various often contradictory orders from commanders, none of whom are identified.[561]

383. Witnesses also testified to seeing corpses of people that they recognised. But there is no evidence that they saw who killed them or how they were killed. Tf2-027 testified to recognizing two corpses, Joski Mbona and one Fullah bread seller.[562] TF2-144 testified to seeing two corpses, one a man she knew called Joski and an unnamed woman.[563] This evidence cannot constitute evidence towards unlawful killings should be disregarded.

384. TF2-013 testified to the alleged killing of Chief Brima Conteh in Lalehun, the only one of three people specifically identified in the pre-trial brief as having been unlawfully killed. However, no time is given for when this death is alleged to have taken place.

385. According to TF2-016, a commander named Bimba Aruna ordered the killing of a "Aruna Konowa" who was arrested, brought to Lalehun, and killed.[564]

386. The bulk of these alleged killings were by unidentified Kamajors. The perpetrators are unknown. No evidence has been brought about the *mens rea* of these unidentified perpetrators. Accordingly there is no evidence regarding this requisite element for the crime of murder.

387. Where a kamajor is named (i.e. Kamabote) the evidence is that he was not acting in accordance with any instructions or under any command. Again, however, there is no evidence about the *mens rea* of this alleged perpetrator and again then the requisite element for murder is missing. Further there is no evidence that reports on Kamabote were ever taken to the Accused.

---

[561] Transcript, TF2-022, 11 February 2005 page 71 lines 20-28, page 72 lines 17-20, page 73 lines 5-15.
[562] Transcript, TF2-027, 18 February 2005 page 108 lines 8-20, page 109 lines 2-7.
[563] Transcript, TF2-144, 24 February 2004 page 62 line 20– page 63 line 24.
[564] Transcript, TF2-016 1 March 2004 page 36 line 13– page 37 line 18, page 38 line 7-13, page 38 line 22– page 39 line 10.

KENEMA

388. The Indictment alleges that "on or about 15 February 1998, at or near the District Headquarters town of Kenema and at nearby locations of SS Camp, and Blama, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants.[565] The Prosecution Pre-Trial Brief further alleges that one "Kosia of Sumalia Street" was unlawfully killed by the CDF.[566]

389. It is further alleged that "on or about 15 February 1998, at or near Kenema Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers[567]. Included in these alleged deaths, the Prosecution alleges that the CDF unlawfully killed Sgt Fosonah, Momoh Samura and Cpl. Fandai.[568]

390. 9 prosecution witnesses testified to events alleged to have occurred in Kenema.

391. Again the majority of the evidence relates to unidentified Kamajors as the perpetrators with no evidence as to the *mens rea* of these perpetrators, hence a critical element for murder has not being demonstrated. TF2-033 testified that unidentified Kamajors killed an unarmed soldier.[569] TF2-151 testified to unidentified Kamajors killing an unnamed boy accusing him of being a junta.[570] TF2-154 states that unidentified Kamajors decapitated a Temne boy and killed a Mende man accused of being a former soldier.[571] TF2-152 testified to unidentified Kamajors killing 5 people.[572] TF2-040 testified that unidentified Kamajors killed unnamed police officers.[573] 4 witnesses testified that unidentified Kamajors killed seven named police

[565] Indictment para 25 b.
[566] PTB para 281.
[567] Indictment para 25c.
[568] PTB para 282.
[569] Transcript, TF2-033, 20 September 2004 page 10 lines 2-23.
[570] Transcript, TF2-151, 22 September 2004 page 12 line 16– page 16 line 23.
[571] Transcript, TF2-154, 27 September 2004 page 48 line 4– page 50 line 3.
[572] Transcript, TF2-152, 27 September 2004 page 121 line 10– page 123 line 3.
[573] Transcript, TF2-040, 21 September 2004 page 26 line 23 – page 27 line 2

officers.[574] One kamajor is identified by name by TF2-041[575] however, there is no evidence to demonstrate the *mens rea* of this perpetrator.

392. There is no evidence which connects any of the unidentified Kamajors to a commander. There is also no evidence which then connects a commander to the Accused or any of the unidentified Kamajors directly to the Accused.

BO

393. The Prosecution alleges that "in or about January and February 1998 in locations in Bo District including the District Headquarters Town of Bo, Koribundo, Fengehun Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants.[576] The Prosecution also alleges in its Pre-Trial Brief that the CDF unlawfully killed both captured enemy combatants and an unknown number of civilians including one Kafala[577], Ambrose Kortu[578] and, one Abema[579], a CDF combatant, who was killed for refusing to operate as ordered by CDF superior commanders.[580]

394. 10 Prosecution witnesses gave evidence relating to Bo.

395. The evidence of TF2-088 relates to Gumahun, Mandu, and Kpetewoma - all geographic locations not mentioned in the Indictment and therefore this evidence should be excluded. TF2-030 testified that unidentified Kamajors killed her husband because he was a Temne.[581] TF2-156 also testified to unidentified Kamajors capturing his brother, some others and himself and "chopping them".[582] TF2-57 gave evidence to seeing Kamajors arrest a woman and then later seeing her severed head wrapped in

[574] Transcript TF2-042, 17 September 2004 page 102 lines 18-23; Transcript TF2-033, 20 September 2004 page 11 line 18–page 12 line 12; Transcript TF2-040, 21 September 2004 page 28 line 6– page 29 line 2; Transcript, TF2-039, 23 September 2004 page 107 line 6–page 112 line 21.
[575] Transcript, TF2-041, 24 September 2004 page 52 lines 15-23.
[576] The geographic locations of Kebi Town, Kpayama, Mongere were dropped from the Indictment in the Rule 98 Decision.
[577] No evidence was presented with respect to this allegation.
[578] No evidence was presented with respect to this allegation.
[579] No evidence was presented in support of this allegation.
[580] PTB para 290.
[581] Transcript, TF2-030, 25 November 2004 page 11 lines 6-19.
[582] Transcript, TF2-156, 25 November 2004 page 41 lines 8-15, page 41 lines 21-27, page 42 line 1– page 43 line 26, page 45 lines 19-21, page 46 line 14– page 47 line 5, page 48 line 13– page 49 line 21.

a scarf. This evidence should not be considered as it is too circumstantial to prove a murder allegation. TF2-067 said that an unidentified kamajor shot to death an unnamed Temne man in a park [583] as well as an unidentified kamajor killing a solider at a checkpoint. [584] Tf2-058 said unidentified Kamajors killed her husband.[585] Through hearsay and uncorroborated evidence TF2-056 said he saw the corpses of police officers.[586] This evidence should be completely disregarded as there is no indication as to who is alleged to have killed these police officers. This same witness also gave evidence that four Limbas from Tongo Field were killed by unidentified Kamajors.[587] TF2-001 also gave evidence of unidentified Kamajors shooting a man named "Freeman"[588] This same witness stated that on 6 February 1998, a group of unidentified Kamajors hacked to death "James Vandy".[589]

396. The Defence submits that with respect to Count 1 the evidence does not show that there was an "attack" of any kind. Further the evidence on its face demonstrates that the alleged killings were of particular individuals who were identified by profession or ethnic group. Again this is insufficient to demonstrate an attack. Therefore there is no crime against humanity and Count 1 should be dismissed.

397. Further, the only Kamajors who are identified are with respect to the testimony of TF2-007 who stated that certain Kamajors participated in the death of his father.[590] All other evidence alleges that it is unidentified Kamajors who were the perpetrators. Again there is no evidence of the *mens rea* of these perpetrators and therefore an essential element of the crime of murder has not been demonstrated.

---

[583] Transcript, TF2-067, 1 December 2004 page 4 line 19– page 5 line 15.
[584] Transcript, TF2-067, 1 December 2004 page 18 lines 12-27.
[585] Transcript, TF2-058, 3 December 2004 page 50 lines 10-22, page 51 lines14-25, page 51 line 26– page 52 line 6, page 52 lines 7-9, page 53 line 23– page 54 line 11, page 54 line 16– page 55 line13, page 55 line 14 – page 57 line 12, page 60 lines 2-1.
[586] Transcript, TF2 -056, 6 December 2004 page 68 lines 15-24, page 68 line 29– page 70 line 8.
[587] Transcript, TF2-056, 7 December 2004 page 75 line 16– page 76 line 8.
[588] Transcript, TF2-001, 14 February 2005 page 82 line 16– page 83 line 5.
[589] Transcript, TF2-001, 14 February 2005 page 85 line 17– page 87 line 4.
[590] Transcript, TF2-007, 2 December 2004 page 48 lines 6-8, page 49 lines 6-20, page 50 line 10– page 51 line 4.

MOYAMBA

398. The Prosecution alleges that "between about October 1997 and December 1999 in locations in Moyamba district including Taiama, Ribbi, Kamajors killed an unknown number of civilians."[591] The PTB also alleged that the CDF unlawfully killed an unknown number of civilians, including one Mr Thomas, former Treasury Clerk and Abubakkar "Waka" Bangura,[592] a businessman as well as captured enemy combatants.[593]

399. 7 Prosecution witnesses gave evidence relating to the Moyamba crime base.

400. TF2-168 testified that unidentified Kamajors entered his farm in the bush and that a Kamajor named "Kakpata" ordered an unidentified Kamajor to shoot his wife.[594] TF2-165 testified that a group of unidentified Kamajors, under the command of one Mr Ngobeh, arrested and killed a suspected collaborator called Mr Thomas.[595] He also testified that unidentified Kamajors brought three men to Shenge Park and burnt one of them to death.[596] TF2-167 testified that on 23 March 1998, a group of four unidentified armed Kamajors came to witness's house and shot his grandson.[597] TF2-170 testified that a Kamajor named Kakpata shot a Alusine Kabbah dead.[598]

401. The Prosecution led evidence on 5 alleged unlawful killings in Moyamba. Against this evidence hardly reaches the scale of an attack to be a crime against humanity. Further again the evidence is that unidentified Kamajors were the perpetrators and only one instance is a kamajor named ("Kakpata"). In all cases no evidence as to the *mens rea* of these perpetrators has been led. With respect to Kakpata there is no evidence to establish his mens rea, and no evidence that he was in any particular grouping of Kamajors or that he had a command, or that there was any

[591] The geographic locations of Sembehun, Bylago, and Gbangbatoke were dropped from the indictment in the Rule 98 Decision.
[592] No evidence was presented in support of this allegation.
[593] PTB para 298.
[594] Transcript, TF2-168, 3 March 2005 page59 line 28– page 65 line 29, page 67 line 8– page 68 line 6.
[595] Transcript, TF2-165, 7 March 2005 page 9 lines 13-25, page 10 line 22– page 12 line 17.
[596] Transcript, TF2-165, 7 March 2005 page 14 line 13– page 15 line 15, page16 lines 9-24.
[597] Transcript, TF2-167, 8 March 2005 page 28 line 9– page 30 line 24, page 31 lines 2-17, page 32 lines 22-27.
[598] Transcript TF2-170, 7 March 2005 page 51 line 16– page 52 line 16, page 53 lines 1-12, page 54 line 14– page 57 line 6, page 57 line 24– page 58 line 25, page 59 lines 1-27.

nexus at all to the Accused. The same hold true with respect to Mr Ngobeh, identified as a commander by TF2-165. There is no evidence that this commander received any orders or directions or logistics etc from the Accused or that he was in attendance at any meetings alleged to have occurred at Base Zero.

BONTHE

402. The Prosecution allegations that "between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, and Bonthe Town Kamajors unlawfully killed an unknown number of civilians."[599] The Prosecution further alleges in its PTB, that the CDF unlawfully killed a number of civilians including Jusu Sally, Lahai Lebbie, and Pa Bargie[600] as well as captured enemy combatants.[601]

403. 12 Prosecution witnesses testified to events in Bonthe.

404. 3 Prosecution witnesses gave evidence of a fisherman being shot by a kamajor commander named "Baigeh".[602] TF2-147 testified that a fisherman called Kondor Bantiamor was killed by unidentified Kamajors.[603] This same witness also testified that "Samuka Kamara" was killed by unidentified Kamajors.[604] TF2-071 testified to the allegedly killing of a "Musu Fai" by unidentified Kamajors.[605] TF2-071 testified that unidentified Kamajors stabbed to death a pregnant woman called Jebbeh[606]. TF2-071 testified to a killing in Bolloh village[607], but the Defence submits that this evidence should be disregarded as this location is not cited in the Indictment.

405. TF2-096 said a captured soldier was killed by unidentified Kamajors but the witness didn't know when it was (the "rainy season")[608]. Three individuals identified as Jusu Shalley, Baggie Vaiey, and Lahai Lebbie were killed, according to TF2-108

---

[599] Indictment para 25 f.
[600] No evidence was presented in support of this allegation.
[601] PTB para 306.
[602] Transcript TF2-116, 9 November 2004 page 12 lines 10-24, Transcript TF2-147, 10 November 2004 page 36 line 12 – page 37 line 2; Transcript TF2-071, 11 November 2004 page 77 lines 13-17.
[603] Transcript, TF2-147, 10 November 2004 page 43 lines 10-28.
[604] Transcript. TF2-147, 10 November 2004 page 40 line 2– page 41 line 10.
[605] TF2-071, 11 November 2004 page 71 lines 1-12.
[606] Transcript, TF2-071, 11 November 2004 page 71 lines 13-21.
[607] Transcript, TF2-071, 11 November 2004 page 73 lines 10-18.
[608] Transcript, TF2-096 8 November 2004 page21 line 2– page 22 line 3.

by unidentified Kamajors in Talia.[609] TF2-187 testified that three pregnant women were killed by "Kondewa's boys."[610] TF2-189 testified that a kamajor named Nulele killed her husband.[611]

406. When witness's husband attempted to retried her from Talia, he was captured by Nulele, taken to Kondewa, then lead by a group of singing Kamajors to a tree where Nulele asked him to say goodbye and to chose death by the gun or the knife; the husband did not chose, and Nulele cut his throat and removed his head; his corpse was taken to the bush:

407. Against the Defence submits that the level of alleged killings is clearly not an "attack" within the meaning of crimes against humanity and therefore Count 1 should be dismissed. Also, again the majority of crimes are perpetrated by unidentified Kamajors with no evidence as to their *mens rea*, nor any connection to the Accused, or any of his actions. Where the alleged perpetrator is identified there is still no evidence of the perpetrator's *mens rea.*

Counts 3 and 4

408. Paragraph 26 of the Indictment charges the Accused with "Acts of Physical violence and infliction of mental harm and suffering". Counts 3 charges inhumane acts as a crime against humanity, and Count 4 charges "Violence to life, health and physical or mental well-being of persons, in particular cruel treatment," a Violation Of Article 3 Common to the Geneva Conventions and of Additional Protocol II punishable under Article 3 (a) of the Statute.

Physical violence and mental suffering

409. A number of Prosecution witnesses gave testimony alleging physical violence and mental suffering with respect to the various crime pages: Tongo (TF2-015), Kenema (TF2-151, TF2-152, TF2-079), Blama (TF2-041) , Koribundo (TF2-157, TF2-014), Bo (TF2-198, TF2-056, TF2-001, TF2-067, TF2-110), Bonthe District

[609] Transcript, TF2-108, 30 May 2005 page5 line 6– page 6 line 14
[610] Transcript, TF2-187, 1 June 2005 page 17 lines 1- page 19 line 12.
[611] TF2-189, 3 June 2005 page7 line 15– page 8 line 24

(TF2-086, TF2-147, TF2-017, TF2-134, TF2-173) and Moyamba (TF2-170, TF2-166).

410. The Defence submits that the majority of these alleged crimes were perpetrated by unidentified Kamajors. As the prosecution must establish a sufficient nexus between the accused and the attack, this is impossible to do when the identity of the perpetrator is unknown.

411. As with Count 1 the Defence submits that the Prosecution has failed to demonstrate that there was an "attack" against a civilian population and therefore has failed to meet one of the necessary elements for a crime against humanity. The prosecution must prove under count 3 of the Indictment that there was a widespread or systematic attack on civilian population by the Kamajors.

412. The Defence submits that there were no "attacks" against civilians, certainly not on the level that is large enough or targeting a whole population to suffice to the level of an attack as set out in the jurisprudence.

Count 5: Looting and Burning

413. Count 5 of the indictment alleges that the Accused of his alleged position as a superior for looting and burning.

414. The elements of the crime of pillage are:

- The perpetrator appropriated certain property
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use. (As indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging.)
- The appropriation was without the consent of the owner
- The conduct took place in the context of and was associated with an armed conflict not of international character.

- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.[612]

415. In the traditional sense the concept of pillage implies an element of violence.[613]

416. The Defence submits that the crime of 'burning' does not fulfil the elements of pillage, since pillage requires appropriation, whereas burning does not. This argument is strengthened when Article 5.b. of the Statute of Special Court is considered. In the Defence view 'burning' has been inappropriately pleaded as pillaging and all evidence relating to burning should be not considered with respect to Count 5. Regardless the Defence will review the evidence presented in relation to burning as well under Count 5.

417. In order to establish the facts in relation to the allegations set forth in paragraph 27 of the Indictment the Prosecution relied on the testimony provided by various prosecution witnesses concerning alleged looting and burning in Kenema District and Town, Tongo Field and Surrounding areas, Bo District and Town, Koribondo, Moyamba District, Bonthe District and Town and Talia (Base Zero). The Defence would analyzed the evidence of both the prosecution and defence witnesses to demonstrate that the first accused was neither a direct participant nor was he in any alleged position as a superior.

Kenema Town and District:

418. Various Prosecution witnesses testified that unidentified Kamajors burnt down and looted their houses and other houses in Kenema. TF2-223 described a number of houses burnt in Blama road including the house of a lieutenant who was alleged to be a friend of the junta and the house of one "Kutayeh". TF2-188 also alleged that Kamajors took away her and her mother's property.

---

[612] Dixon & Khan: Archbold International Criminal Courts, Practice, Procedure & Evidence (2002), p.327
[613] Celebici Judgment, para.591, p.209

419. In his evidence, Mohammed Kineh Swaray, testified that when they attacked Kenema, he observed that civilians were burning the houses were juntas stayed when they burnt down the houses of the relatives of the Kamajors and civilians.[614] The witness further testified that when they observed that the civilians were burning houses, they called all of them and stopped them from burning houses. They told them they have not come to destroy Kenema so nobody should burn a house there.[615] Mohammed Bonie Koroma also testified that civilians burnt houses of rebel supporters in retaliation and he denied seeing Kamajors burning houses as alleged by TF2-154.[616]

420. In his evidence Ishmael Senesie Koroma, testified that while the juntas were pulling out of Kenema led by Mosquito, they caused a lot of destruction and looted shops completely and took all the vehicles to Kailahun.[617] This witness further testified that he operated with a vehicle belonging to ICRC which was given to him by ECOMOG and the vehicle was with witness until the Lome Peace Accord was signed when ICRC returned and Major Tony of ECOMOG requested the witness to hand over the vehicle. A document was prepared to that effect and the vehicle handed back to ICRC.[618] The witness denied under cross examination of being aware of Kamajors committing acts of looting and stated that it was a rule for them not to loot.[619] Arthur Koroma corroborated this evidence when he testified that when the AFRC junta forces were pulling out around mid February 1998, they launched "operation pay yourself" where they broke into all the major shops along the main street and looted vehicles and items in the shops.[620]

Tongo Field and Surroundings:

421. In his evidence, TF2-144 testified that when they left Tongo and escorted by the Kamajors to Dodo to Kenema, he was later escorted by one commander to Tongo and upon arrival in his compound, witness discovered that all his zincs had been

[614] Transcripts of Mohammed Kineh Swaray, p.109, May 25 2006
[615] Ibid, p.110
[616] Transcripts of Mohammed Bonie Koroma, p. May 22 2006
[617] Transcripts of Ishmael Koroma, pp.12-13, Feb. 23 2006
[618] Ibid, pp.16-17, Feb. 23 2006
[619] Ibid, p.63, Feb. 23 2006
[620] Transcripts of Arthur Koroma, pp.34-35, May 3 2006.

removed and his three houses destroyed. This piece of evidence is unreliable because the witness was not there when the alleged looting took place and cannot identify the alleged perpetrators. The witness further said that in his house on Kailahun Street was invaded by Kamajors who took away his mattress where he hid $10,000 (US).[621] This piece of evidence is equally not convincing as it is far fetched to believe that amount of money was in a mattress to begin with. TF2-053 also testified how his house was burnt down in Tongo including other houses. Again this evidence should be viewed with circumspection as there is evidence that Tongo was occupied by the juntas who carried out acts of looting and burning.

422. In his evidence, Siaka Lahai testified that when they entered Tongo, they met a lot of destruction, houses on fire and the juntas were breaking into houses.[622] This piece of evidence was corroborated by Keikula Amara who testified that in the evening while outside Panguma Town, they were seeing fire burning in all of Tongo and that the soldiers were putting people in their houses and setting their houses ablaze.[623]

Bo Town and District:

423. The allegations of looting and burning from TF2-008 which he alleged took place after the attack on Bo cannot be subscribed as acts of Kamajors as according to the witness he saw evidence of looting and burning but didn't know if was AFRC or Kamajors who were the perpetrators.[624] In his evidence TF2-017 alleged that at a meeting in Base Zero in Jan. 1998 Hinga Norman told them when attacking Bo to loot and burn houses and specifically loot pharmacies and get the medicines.[625] This witness further alleged that during the attack on Bo, his group went to a hotel whose owner allegedly hid rebels, broke in, looted then set it on fire. He also stated that he broke into a pharmacy on Tinkoko road and took medicines from the pharmacy on Bojon road. The accused while testifying refuted ever instructing anybody to loot or

[621] Transcripts of TF2-144, 25 February 2005, pg 11.
[622] Transcripts of Siaka Lahai, p.10, May 17 2006.
[623] Transcripts of Keikula Amara, pp. 31-33, May 18, 2006.
[624] Transcripts of TF2-008, p.108, Nov. 16, 2004.
[625] Transcripts of TF2-017, Closed Session, p. 94, 19 November 2004.

burn down houses.[626] TF2-110 alleged that the Kamajors came to his house and took his family belongings and TF2-030 alleged that when Kamajors entered Bo they started looting and his landlady's shop was looted. TF2-156 also alleged that when Kamajors entered Bo they looted his things and looted his brother's house. This piece of evidence was contradicted by Defence witness Morris Ngobeh who testified that when the Kamajors entered Bo on Friday and Saturday the town was in the hands of the youths. On Sunday morning the Kamajors came to Bo and the burning stopped and everybody received the Kamajors joyously. The people were dancing for the rest of the day and continued till Monday.[627]

424. There is evidence before the Court that there was looting and burning by the civilians when the Kamajors entered Bo but this cannot be attributed to the Kamajors.[628] There is evidence that the juntas disguised as Kamajors and committed atrocities as Kamajors.[629]

425. Defence witness Morris Ngobeh testified that on the night of May 25 coup in 1997, the AFRC soldiers looted all the main shops in Bo Town[630] and that civilians reacted, particularly the youths, the following morning by demonstrating in the street saying that they did not approve of what happened and that during the demonstration they looted properties.[631] This witness further testified that youths burnt the house of Victor Foh, a very senior AFRC at Maria Street and MB Sesay's house situated along Fenton road and Kawusu street were burnt as well as the house of Joe Amara Bangali who was Finance Minister. [632]

426. In his evidence TF2-057 testified that he was in Bo when Kamajors came to his house in March 1998 and took away valuables but ECOMOG soldiers came and stopped them from taking it.[633] TF2-056 also alleged seeing four burnt houses in Bo at the police barracks the day the Kamajors came in March 1998[634]. This piece of

[626] Transcripts of Hinga Norman. Pp 28, 38, 39, Jan 31 2006.
[627] Transcripts of Morris Ngobeh, p.9, Sept. 27 2006
[628] Ibid, p.9
[629] Transcripts of Dr. Joe Demby, p.29, Feb. 13 2006, Transcripts of Ishmael Koroma, pp. 14-15, Feb. 22 2006
[630] Transcripts of Morris Ngobeh, p.5, Sept. 27 2006
[631] Ibid, p. 5.
[632] Ibid, p.7
[633] Transcripts of TF2-057, p.116 29 November 2004.
[634] Transcripts of TF2-056, p.73, Dec. 6 2004

evidence lacks specificity because merely seeing burnt houses the day the Kamajors entered does not mean that the houses were burnt by Kamajors. The same witness further alleged that Kamajors came to his house and took his refrigerator, water filter and television set.[635]

Koribondo:

427. Several prosecution witnesses testified about alleged looting and burning in Koribondo. TF2-157 testified that when he went to Koribondo in February 1998, he saw three houses burning and his own house was burnt down.[636] There is no evidence to suggest that this was done by Kamajors. Under cross examination, TF2-056 testified that when they were entering Koribondo, he observed burning of houses, while the enemy AFRC/RUF were pulling out.[637]

428. In his evidence, TF2-159 alleged seeing Kamajors destroying houses and taking property on the 14th February 1998 and in the evening the Kamajors started burning the town. On Blama road to the junction, the witness said he saw about 25 houses burnt including Daniel Habid's house.[638] This piece of evidence was challenged by the Accused, when he testified it is impossible that 25 houses were burnt because from the junction to the last house moving on to Blama direction, the houses on their left or right are no more than 15. The Accused further agreed that part of Mr Habib's house was damaged was that part of it was burnt as a result of the soldiers who were occupying the house and had stored some inflammables in it.[639] In her testimony, Wuiyatta Sheriff corroborated the evidence that soldiers set fire on her mother's house and others and denied that Kamajors burnt houses on Blama road.[640] Dauda Sheriff equally described meeting soldiers burning down houses[641] and Bobor Brima also testified how he arrived back to Koribondo to see many houses burnt.[642]

---

[635] Ibid, p.73
[636] Transcript, TF2-157, p.14, 16 June 2004.
[637] Transcript, TF2-056, p.83, Oct. 6 2005.
[638] Transcript, TF2-159, pg 26, 9 Sept 2004.
[639] Transcript, Hinga Norman, p.73-74, Jan. 30 2006.
[640] Transcript, Wuiyatta Sheriff, pg 22, May 9 2006.
[641] Transcript, Dauda Sheriff, pg 96, May 8 2006.
[642] Transcript, Bobor Brima, pg 69, May 9 2006.

From the totality of the evidence it is impossible to state that it was Kamajors who were involved in looting and burning.

429. In his evidence, the Accused refuted the allegation of TF2-032 that he counted 161 burnt houses stating it is not possible because there were no more than 100 houses in Koribundo at that time.

430. The accused further refuted TF2-190's allegation that he did not specifically confess acts of looting to him during the Koribondo attack of 13 Feb. 1998 where he allegedly looted 56 bundles of zincs from a store including fuel from a petrol station[643].

Moyamba District

431. Prosecution witness TF2-170 alleged that around March 1998 they were harassed by Kamajors who looted their property including that of his brother and looted property from traders. TF2-168 also alleged that on the 19th of March 1998 one Obai and his group went to Bradford and raided all houses and that all his property including rice was cleared. TF2-167 alleged that the Kamajors looted their clothing, groundnut, rice and palm oil which they put in the vehicle and took to Moyamba and that the entire Bradford was looted. TF2-166 also alleged how the CDF how all her father's property was take away and they lodged a complaint to the Resident Minister in the Chiefdom who called a meeting that the effect. It worthy to note that there was also a functioning government that was already in place and that is why a complaint was lodged to the Resident Minister, indicative of the fact that there was constitutive authority in place.

Counts 6 and 7

432. In count 6, the Prosecution alleges that, at all times relevant to the Indictment, the CDF, largely Kamajors, committed the crimes alleged in Counts One through Five as part of a campaign to terrorise the civilian population of the specified geographic

[643] Transcript Hinga Norman, pp 28-29, Jan 31 2006.

20448

locations.[644] The Prosecution further alleges that Mr Norman by his acts or omissions in relation to the allegations contained in Counts One through Five is individually criminally responsible for committing Acts of Terrorism, a War Crime.[645]

433. Count 7 alleges that all times relevant to the Indictment, the CDF, largely Kamajors committed the crimes alleged in Counts One through Five to punish the civilian population living in the specified geographic locations for their support of, or failure to resist, the combined RUF/AFRC forces.[646] The Prosecution alleges that Mr Norman by his acts or omissions in relation to the allegations contained in Counts One through Five, is individually criminally responsible for administering Collective Punishment, a War Crime.[647]

434. Counts Six and Seven have novel Counts as they have never been charged by a Prosecutor nor tried before an international tribunal before. There is no jurisprudence to guide the defence as to what exactly these counts entail. The elements of these crimes have also not been defined anymore. Of note is that fact that the Addendum of the Rome Statute establishing the International Criminal Court, which is regarded as the most up to date and comprehensive digest of international crimes.

435. The Defence submits that Counts 6 and 7 are not discernable crimes, there are no identified constituent elements that exist and their inclusion in the indictment violates the fundamental principle of *nullum crimen sine lege*.[648] On this basis Counts 6 and 7 should be dismissed.

Count 8: Use of Child Soldiers

442. Count 8 of the Indictment charges the Accused with:

[644] Indictment, para 28
[645] Ibid
[646] Ibid
[647] Ibid
[648] "No crime without law" – See Article 15 of the International Covenant on Civil and Political Rights: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed."

Enlisting children under the age of 15 years into armed forces or using them to participate actively in hostilities, an OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW, punishable under Article 4.c. of the Statute.

443. The definition of the criminal act of count 8 contains two elements, first 'enlistment', second 'using them to participate'.

444. It is first of all important to determine the intent and knowledge of the accused. There is no evidence before the court that shows that the accused had the requisite intent to enlist children or that he had knowledge that children were being enlisted to participate actively in hostilities. The accused testified that he was not connected with the enlistment of children in the conflict whether with the hunters as a national coordinator or with the army as the Deputy Minister of Defence in Sierra Leone and that he did not participate in any enlistment of children.[649] The accused denied the allegation of TF2-014 who alleged that one Junior Spain at Base Zero who was aged around 12-15 years and who with others of similar age or even lower age at Base Zero, were sent to war to take part in combat, so long as they had been initiated into the Kamajor society.[650]

445. Various defence witnesses including Ishmael Senesie Koroma, Muhamed Turay Collier, Lansana Bockarie denied that children under the age of 15 were fighting along side the Kamajors and that as commanders they didn't take children to war because it was not a fight for children.[651] Under cross examination Mustapha Lumeh was shown Exhibit 117B but he testified that the children who were with them were sent to the Catholic Organisation for Children and that they were not child soldiers.[652]

446. There are witnesses who testified why they were initiated. P.C Joseph Ali-Kavura Kongomoh II testified that during the January 6 1999 invasion until the end of the war, initiation went on and even he was initiated for protective reasons. The witness

[649] Transcript, Hinga Norman, p. 47 Feb 1 2006
[650] Transcript, Hinga Norman, pp 54-56, Jan 31 2006 and p 32 Feb 1 2006.
[651] Transcript Ishamael Senesie Koroma, pp. 59-60, Feb.23 2006, Transcripts of M.T. Collier, pp.66 & 91 Feb. 16 2006 Lansana Bockarie, p.18, June 1 2006.
[652] Transcript Mustapha Lumeh, pp.43-44, May 8 2006

said he joined two of his children, one eight years and the other seven into the Kamajor society.[653] Witness further testified that he did that so they were immunized for fear of stray bullets.[654]

447. In his evidence, the accused testified that he knew children were involved in the war in Sierra Leone. But he said this was a situation where the chiefs and elders of the chiefdom sent their people for initiation and sometimes immunization for the defence of their various chiefdoms. Further President Kabbah made a request for all Sierra Leoneans to defend their democracy, and pleaded with them for their assistance in returning him to power.[655] As Justice Robertson puts it 'there may be a defence of necessity, which could justify desperate measures when a family or community is under murderous and unlawful attack'.[656]

448. The Accused further testified under cross examination that he watched the training at Base Zero but did not notice children under 15 being trained, but that later after the government had been reinstated he noticed that Kamajors were using children under 15 but that he advised the President.[657] The Accused said he first met TF2-140 in Bo and he was not aware that TF2-140 fought in Kenema.[658]

449. In his evidence, TF2-218, was merely speculating when he testified that he observed a significant number of Kamajors in Daru appeared to be in their early teens armed with cutlasses and knives, long barrel guns.. Under cross examination, Vice President Demby testified that it is difficult to say the precise age of a child in his ethnic culture.[659]

450. The second element in Count 8 talks of using children to participate actively in hostilities. In his evidence, the accused testified that as coordinator of the Civil Defence Forces, he did not play any role in getting children to actively participating in

[653] Transcript, P.C. Joseph Ali-Kavura Kongomoh II, p. 56, June 1 2006.
[654] Ibid, pp.56-57
[655] Transcript, Hinga Norman, pp 54-58 Jan 31 2006
[656] *Prosecutor v. Norman et al.*, SCSL-04-14-AR72(E), Decision on Preliminary Motion based on lack of Jurisdiction (Child Recruitment), Dissenting Opinion Justice Robertson, 31 May 2004, pg 35
[657] Transcript, Hinga Norman, p.46, Feb. 7 2006
[658] Ibid, p.49
[659] Transcripts of Dr. Albert Joe Demby, pp. 78-79, Feb 13 2006

hostilities. He further testified that as he did not receive any specific instructions and gave no specific instructions to use children under the age of 15 and as Deputy Minister of Defence and National Coordinator, he never enlisted, recruited or conscripted before, during or after the conflict.[660] Under cross defence witness Keikula Amara denied that he had three child soldiers within his Kamajors. He also denied that at Talama he gave a weapon to the child soldier to execute one of the civilians he had as a captive.[661]

451. The Accused further testified that he did not have control over the participation of children under the age of 15 in hunter's activities between the hostilities from 25 May 1997 to 10 March 1998.[662] Under cross examination Lansana Bockarie denied that children assisted them to carry luggage like loads, foodstuff, weapons, and ammunition boxes. He also denied that children were used as spies and report back.[663] This was corroborated by Brima Tarawally who denied being aware of children manning check points or of children under 15 being use for spying missions.[664] Prosecution witness TF2-082 equally testified that he never saw Kamajors use child soldiers.[665]

452. The accused testified that he informed the CDF not to encourage the involvement of children. The accused further testified that he also informed President Kabbah to assist with the issue of children being involved in the war. The Prosecution submitted a number of documents pursuant to Rule 92 *bis* to supplement the allegations under Count 8. The majority of these documents make it clear that the pronouncements by the Government of Sierra Leone to stop the recruitment of children was in relation to both the national army and the CDF. Further these documents demonstrate that when policy announces concerning ending the recruitment of children with CDF these came from the government of Sierra Leone[666]. Any indication as to the use of child soldiers can hardly be said to be individually attributable to the conduct of the First Accused.

---

[660] Transcript, Hinga Norman, pp 52-53, Jan 31 2006
[661] Transcript, Keikula Amara, pp 17,20, May 18 2006
[662] Transcript, Hinga Norman, p.17, Feb. 2 2006.
[663] Transcript, Lansana Bockarie, pp.18-19, June 1 2006
[664] Transcript, Brima Tarawally, pp. 104-105, Oct. 6 2006.
[665] Transcript, TF2-082. Closed session, pg 41 16 September 2004.
[666] See for example "Sixth Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone", 04/06/99, paragraph 36 "My Special Representative in Freetown continues to monitor the situation closely and raises the relevant issues with the Government. Government officials in the Southern Province have reportedly acted to halt underage recruitment by CDF elements". Submitted by the Prosecution

Conclusion

453. Based on the foregoing discussion of the evidence presented against the Accused Hinga Norman, the Prosecution has failed to prove beyond a reasonable doubt that he is guilty of any of the crimes charged under any theory of liability asserted by the Prosecution as applicable to the Accused and the facts presented therein.

Filed 22 November 2006

Dr Bu-Buakei Jabbi
Senior Court Appointed Counsel

under Rule 92 bis: Prosecutor v Norman, SCSL-10-14-T-447, "*Decision on Prosecution's Request to Admit into Evidence Certain Document pursuant to Rule 92 bis and 89(c)*", 14 July 2005.

INDEX OF AUTHORITIES

SCSL

1. *Prosecutor v. Norman et al.*, SCSL-04-14-T-722, "Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments", 18 October 2006

2. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-550, 'Decision on Joint Motion of the First and Second Accused to clarify the decision on Motion for Judgment of Acquittal pursuant to Rule 98", 3 February 2006

3. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005

4. *Prosecutor v Norman et al.*, SCSL-04-14-T-469, "Public Version of the Prosecution Response to Fofana Motion for Judgment of Acquittal", 27 September 2005

5. *Prosecutor v. Norman et al.*, SCSL-04-14-T-434 "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005

6. *Prosecutor v Norman et al.*, SCSL-2004-14-T-403 "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005

7. *Prosecutor v Norman et al.* SCSL-04-14-T-434, "Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence" 24 May 2005

8. *Prosecutor v. Norman et al.*, SCSL-2004-14-AR-73 "Decision on Amendment of the Consolidated Indictment", 16 May 2005

9. *Prosecutor v Norman et al.*, SCSL-04-14-T-282 "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment" 29 November 2004

10. *Prosecutor v. Norman et al.*, SCSL-04-14-AR72(E), Decision on Preliminary Motion based on lack of Jurisdiction (Child Recruitment), 31 May 2004

11. *Prosecutor v Norman*, SCSL-2004-14-PT-111 "Defence Pre-Trial Brief" 31 May 2004.

12. *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73 bis) of 13 February 2004, 2 March 2004

13. *Prosecutor v Norman et al,* SCSL-2004-14-PT-63, "Prosecution's Supplementary Pre-Trial Brief Pursuant to An Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", 22 April 2004

14. *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-003, "Norman, Fofana, Kondewa – Indictment", 5 February 2004

15. *Prosecutor v. Norman et al.,* SCSL-2003-12-PT-057, "Kondewa – Decision and Order on Prosecution Motions for Joinder", 28 January 2004

16. *Prosecutor v. Norman et al.*, SCSL-2003-08-PT-131, "Norman – Decision and order on prosecution motions for joinder", 28 January 2004

17. *Prosecutor v. Norman et al.*, SCSL-03-11-PT-093, "Fofana- Decision and order on prosecution motions for joinder", 28 January 2004

18. *Prosecutor v. Norman et al.*, SCSL-03-08-PT-002, Trial Chamber I, "Norman – Indictment", 7 March 2003

OTHER SCSL

19. *Prosecutor v Sesay,* SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003

20. Statute of the Special Court

21. Rules of Procedure and Evidence

ICTY

22. *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005

23. *Prosecutor v. Blagojevic and Jokic*, IT-02-60, "Judgement", January 17, 2005

24. *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, "Judgement" 17 December 2004

25. *Prosecutor v. Brdjanin*, IT-99-36-T, "Judgment" 1 September 2004

26. *Prosecutor v. Blaskic*, IT-95-14 "Judgement", 29 July 2004

27. *Prosecutor v. Mejakic,* Case No. IT-02-65-PT, "Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment" 14 November 2003

28. *Prosecutor v. Simic et al.,* IT-95-9, Judgment, 17 October 2003

29. *Prosecutor v Krnojelac*, IT- 97-25-A, "Judgement" 17 September 2003

30. *Prosecutor v Stakic*, IT-97-24, "Judgement" July 31, 2003

31. *Prosecutor v Delalic et al.*, IT-96-21-A, "Judgement" 8 April 2003

32. *Prosecutor v. Naletilic and Martinovic*, IT-98-34, Judgement, March 31, 2003

33. *Prosecutor v. Galic*, Case No. IT-98-29-AR72, "Decision on Application by Defence for Leave to Appeal", 30 November 2002

34. *Prosecutor v. Vasiljevic*, IT-98-32, Judgment, 29 November 2002

35. *Prosecutor v. Deronjic*, IT-02-61-PT, "Decision on Form of the Indictment", 25 October 2002

36. *Prosecutor v. Strugar*, IT-01-42-PT, "Decision on Defence Preliminary Motion Concerning the Form of the Indictment", 28 June 2002

37. *Prosecutor v. Kunarac, Kovac, and Vokovic*, IT-96-23-A, "Judgement" June 12, 2002

38. *Prosecutor v Kvocka et al.*, IT-98-30/1 "Judgement" November 2 2001

39. *Prosecutor v. Kupreskic*, IT-95-16-A, "Appeal Judgement", 23 October 2001

40. *Prosecutor v. Kordic and Cerkez*, IT- 95-14/2, "Judgement", February 26, 2001

41. *Prosecutor v. Brdjanin*, IT-99-36-PT, "Decision on Objections by Momir Talic to the Form of Amended Indictment", 20 February 2001

42. *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgment 24 March 2000

43. *Prosecutor v. Krnojelac*, IT- 97-25-PT, "Decision on Preliminary Motion on Form of Amended Indictment", 11 February 2000

44. *Prosecutor v Tadic*, IT-94-1-T, Judgement on Allegation on Contempt Against Prior Counsel Milan Vujin, 31 January 2000

45. *Prosecutor v. Jelisic*, IT-95-10, Judgement, 14 December 1999

46. *Prosecutor v. Tadic*, IT-94-1-AC, Judgement and Sentence, July 15 1999

47. *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, February 16 1999

48. *Prosecutor v. Furundzija*, IT-95-17/1 Judgement, December 10, 1998

49. *Prosecutor v Delalic et al.*, IT-26-21-T, "Judgment" November 16 1998

50. Prosecutor v Tadic, IT-94-1, Decision on Defence Motion on Hearsay, August 5 1996

51. *Prosecutor v Tadic*, IT-94-1-T, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995

ICTR

52. Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, ICTR-99-46-T, "Judgement" 25 February 2004

53. *Prosecutor v Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Appeals Judgement" 13 December 2004

54. *Prosecutor v. Musema*, ICTR- 96-13-A, "Judgment", 16 November 2001

55. *Prosecutor v Bagilishema*, ICTR-95-1A-T, "Judgment," June 7, 2001

56. *Prosecutor v. Laurent Semanza,* ICTR-97-20-T, "Judgement", 15 May 2003

57. *Prosecutor v Kayishema* ICTR-95-1-T, "Judgement", 21 May 1999

58. Prosecutor v Akayesu, ICTR-96-4-T, Judgment and Sentence, 2 September 1998

Other

59. Lansana Gberie. "A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone", 2005

60. Keen, Conflict and Collusion in Sierra Leone, James Currey Ltd, 2005

61. Truth and Reconciliation Commission of Sierra Leone, Final Report, 2004

62. Ian Smillie Lansana Gberie and Ralph Hazelton, The Heart of the Matter: Sierra Leone, Diamonds and Human Security, Ottawa, Partnership Africa Canada, 2000

63. Archibald International Criminal Courts, Practice and Procedure, 2002

20457

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

65. van Sliedregt E. The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (2003) T.M.C Asser Press